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FRANCE

French Supreme Court applies strict scrutiny to whistleblowing schemes

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The French Supreme Court, in its ruling of December 8th, 2009, invalidated the whistleblowing scheme contained in Dassault Systèmes' code of business conduct. For the first time since Sarbanes-Oxley Act ("SOX") in 2002, the scope of which extends to any foreign subsidiary of a company listed in the U.S.A., the French Supreme Court considered the validity of a whistleblowing scheme. Foreign subsidiaries of companies listed in the U.S.A. find themselves hemmed in by SOX provisions and local regulations, with the obligation to comply with both.

The French Supreme Court found that Dassault Systèmes'[1] code of business conduct is not in compliance because:

1. pursuant to the code, an employee wishing to use outside of the company any "internal" information, such as notes sent to the workforce, org. charts, objectives, formulas or patterns, must seek prior approval from the author of the information. This constitutes an excessive limitation on freedom of speech which is not justified by a legitimate purpose. Moreover, the code does not define "internal information", making it impossible for a judge to check whether the limitation is proportional to the goal sought.

2. the scope of whistleblowing is not limited to corporate fraud but also includes any serious shortcoming putting at stake the interests of the company or the physical or moral integrity of an employee, such as breach of an intellectual property right, disclosure of privileged information, insider trading, discrimination, moral or sexual harassment. The scheme is therefore prone to encourage invasions of privacy.

[1] Dassault Systèmes is listed a the NYSE as well as at the Paris Stock Exchange

3. the code fails to provide that any employee involved in a whistleblowing process has a right to access his/her personal data and demand that such information be amended or deleted if inaccurate or outdated.

In 2005, the French Data Privacy Protection Commission (*Commission Nationale Informatique et Libertés, CNIL*) set forth the conditions under which a whistleblowing scheme could be implemented without prior approval from the *CNIL*:

- the scope shall be limited to corporate fraud;
- whistleblowing shall never be mandatory (even when it is mandatory for the company to implement a whistleblowing scheme);
- whistleblowing shall be the last recourse after the employee has tried to report to his superior, to the auditor or to anyone entrusted to deal with the matter;
- the whistleblower must disclose his/her identity to the investigators but can ask to remain otherwise anonymous.

Any diverging scheme can only be implemented after the company has sought and obtained prior approval from the *CNIL,* which decides on a case-by-case basis.

The only other decision issued by a French court is that of a lower court, before which a claim was brought by unions of the subsidiary of a U.S. company, Stryker. In this case, the whistleblowing scheme was invalidated because it made it possible to report on co-workers suspected of abusing medication or drugs.

In France, whistleblowing schemes are under a strict scrutiny from the *CNIL* and now from the French Supreme Court because they are considered as a potential threat to individual freedom. A Code of conduct may be perfectly legal in the U.S.A. but invalidated in France.