

Providing an Alternative to Silence:

**Towards Greater Protection and Support for
Whistleblowers in the EU**

COUNTRY REPORT: DENMARK

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at www.transparency.org.

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Country report Denmark

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1. Introduction

There are no standalone WB laws or regulations in Denmark and no WB body is established for advising and protecting whistleblowers. WB regulations are few in Denmark and Denmark is the only Nordic country without well-defined WB regulations.¹

Laws regarding freedom of speech and employee's right and duty to inform the public on irregularities forms to a large degree the legal framework for whistleblowing. Freedom of speech is primarily regulated in the Danish Constitution §77 from 1953 and in the European Convention for the Protection of Human Rights and Fundamental Freedoms article 10, which was incorporated in Danish law the 29th of April in 1992 (law no. 285).² The Administration Act from 1987 defines the legal framework for confidentiality whereas the Penal Code from 1930 with later amendments' §152-152 f describes the sanctioning possible for breach of confidentiality.³

§ 152 e of the Penal Code is the closest Denmark gets to a WB regulation. The law states that public employees may lawfully disclose confidential information with obvious social interest. The law, however, depends on specific trade-offs that are difficult to predict. The rule has a criminal purpose and does not protect a whistleblower against getting fired.⁴ Employers' and Salaried Employees' Act from 2005 with later amendments and the general agreement defines the framework for compensation for getting arbitrary fired. However, the compensation is considered to be insufficient in a whistleblowing context where a potential case law can drag out for years.⁵

In 2003 a regulation regarding public employees' right to inform and a regulation regarding enhancement of public employees' participation in the public debates were proposed by two politicians in the opposition. The proposals led to the government decision to establish a commission to assess the legal framework of public employees' freedom of speech and right to inform.⁶ Based on the assessment, the commission was asked to evaluate whether there existed a need for reforming the present legal framework. The assessment was finalised in 2006 and the overall conclusion was that the regulations are adequate to protect public employees' freedom of speech and right to inform. However, it was found that there exists a need to raise awareness regarding public employees' freedom of speech and right to inform.

After the assessment from 2006 there have been a number of studies and cases pointing towards the need to enhance public employees' willingness to engage in the public debate. Studies conducted by two large trade unions in 2010 and 2012⁷ find that it has not been sufficient to distribute the pamphlet "Guidance on public employees' freedom of speech" which was based on the assessment from 2006 since public employees' willingness to participate in the public debate has not been improved.

¹ Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011

² Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, "Ytringsfrihed og meddelelser for offentligt ansatte", p. 52; Institut for Menneskerettigheder "Ytringsfrihed. Status 2012", May 2012, p. 10 ff.

³ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, "Ytringsfrihed og meddelelser for offentligt ansatte", p. 50 ff.

⁴ Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011

⁵ Transparency International Danmark: "Nationalt integritetssystemstudie", 2011.

⁶ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, "Ytringsfrihed og meddelelser for offentligt ansatte", p. 9-10.

⁷ 3F: "Sladrehanke frygter fyring", 3.8.2012.; FTF: "Behov for whistleblower-ordninger på danske arbejdspladser", 28.1.2011

According to the study from 3F the opposite has happened; the number of public employees that fear getting fired or exposed to other sanctions for voicing concerns has been doubled from 2008 to 2012, primarily due to the financial crisis.⁸

In the private sector there has been an increase in establishment of whistleblower bodies. 67 whistleblower bodies are now registered in the private sector and 50-60 applications for new mechanisms are awaiting approval from the Data Protection Agency.⁹ This development has mainly been driven by Danish companies operating in countries with clearly defined whistleblowing laws such as the United States but also due to recommendations from the Committee on Corporate Governance in Denmark.¹⁰

2. A compilation, description and assessment of WB protection laws

There are no standalone WB laws or regulations in Denmark and no WB body is established for advising and protecting whistleblowers. WB regulations are few in Denmark and Denmark is the only Nordic country without well-defined WB regulations.¹¹

Instead of laws and regulations the Danish labour market has to a large degree been regulated by voluntary agreements on pay and working conditions between workers and employers' organizations, where the state generally does not interfere. The so-called Danish Labour Market Model is based on the principle that the parties agree on conditions that they themselves have to fulfill. The Danish Model is still very relevant which is partly due to the fact that 80% of Danish wage earners are members of unions.¹² Many conflicts in relation to the workplace are solved in trade unions and the model offers solutions for reporting irregularities such as union representatives available for employees to turn to.¹³

Laws regarding freedom of speech and employee's right and duty to inform the public on irregularities forms to a large degree the legal framework for whistleblowing. However, these laws are scarce and case law is limited. In the public sector the parliamentary ombudsman has settled a large number of cases and therefore there is clarity of the law within this field.¹⁴ The parliamentary ombudsman did not to the same degree focus on freedom of speech within the private sector and this problem is therefore less studied and there is not the same degree of clarity as in the public sector. In general, public employee's freedom of speech is considered to be legally more sufficient protected than employees in the private sector.¹⁵

The most relevant laws will be assessed below.

⁸ 3F: "Sladrehanke frygter firing", 3.8.2012.

⁹ Ingeniørforeningen IDA: "Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder", March 2012.

¹⁰ The Committee on Corporate Governance in Denmark was created by the then Minister for Economic and Business Affairs Ole Starvad in 2001. In 2002 Copenhagen Stock Exchange continued the work on corporate governance and formed a committee for good corporate governance.

¹¹ Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011

¹² See Klaus Nielsen and Ove K. Pedersen (eds): *Negotiation Economy in Scandinavia*, 1989, and Ministry of Employment website: www.bm.dk

¹³ Jyllands Posten: "Fagforeninger afviser fløjten", 25.6.2012.

¹⁴ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 50 ff.; Personnel Agency, Local Government Denmark and Danish Regions: *Good behavior in the public sector*, June 2007.

¹⁵ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 53 ff. FTF – analyse: "Privatansatte frygter at få sparket", 20.10.2010, FTF Web page.

2.1 Formal and Material Freedom of Speech

Freedom of speech is primarily regulated in the Danish Constitution §77 from 1953 and in the European Convention for the Protection of Human Rights and Fundamental Freedoms article 10, which was incorporated in Danish law the 29th of April in 1992 (law no. 285).¹⁶

Researchers differentiate between the formal and the material freedom of speech. The formal freedom of speech protects against measures seeking to prevent publication/statements of concerns why the material freedom of speech prevents the possibilities of sanctioning after statements have been made public.

2.1.1 The Constitution

The formal freedom of speech is well covered in the Constitution's §77.¹⁷ The Constitution states:

*"Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures shall never again be introduced."*¹⁸

Freedom of speech includes "any person" without exception and authorities are unable to introduce any censoring measures on any person's ideas. "Any person" refers to all private people including public employees voicing concerns as private persons.¹⁹

There is more or less consensus in academics that § 77 of the Constitution do not protect the material freedom of speech.²⁰ It is argued that the material freedom of speech is covered elsewhere in the Constitution such as § 67 that protects against sanctioning utterances regarding religious believe but it is not believed to be a full protection of the material freedom of speech. But in general there is consensus about the material freedom of speech being less protected than the formal. The material freedom of speech is however covered by the European Convention on Human Rights article 10.²¹

2.1.2 The European Convention on Human Rights article 10

The European Convention on Human Rights article 10 states that:

"1: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

¹⁶ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 52; Institut for Menneskerettigheder "Ytringsfrihed. Status 2012", May 2012, p. 10 ff.

¹⁷ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 50 ff; Poul Andersen "Dansk Statsforfatningsret", 1954, p. 665; Alf Ross, "Dansk Statsforfatningsret" 3. edition, 1980, volume II, p. 716; Max Sørensen, "Statsforfatningsret" 2. edition, 1973, p. 376; Peter Germer, "Statsforfatningsret" 3. edition, 2001, p. 280 og Henrik Zahle, "Dansk forfatningsret 3", 3. edition, 2001, menneskerettigheder, p. 77.

¹⁸ <http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Constitution%20of%20Denmark.pdf>

¹⁹ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 50 ff.

²⁰ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 50 ff.

²¹ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 50 ff.

2: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

There is consensus in academics that the article protects both the formal and the material freedom of speech for *everyone* (including public employees). It does however not explicitly protect against censorship and other preventive measures.²² It supplements the Constitution § 77 by pointing to other expressions forms besides non-verbal communication such as symbolic dress codes, artistic expressions etc.²³ Contributions to the public debate are believed to be more protected by the Convention while private statements are less protected.²⁴

2.1.3 The Administration Act § 27 and the Penal Code §152-152 f

It should be mentioned that the protection of public employees' material freedom of speech is somewhat limited according to Danish law. § 27 of the Administration Act from 1987 which applies to all public authorities and the Penal Code's §152-§152 f regulates public employees' duty of confidentiality. The Administration Act defines the legal framework for confidentiality whereas the Penal Code's §152-152 f describes the sanctioning possible for breach of confidentiality.²⁵

Public employees are obliged to state when they speak as private persons and not on behalf of the authorities and there are limitations on what utterances they can state within their work field – also as private persons. Voicing obviously false information regarding their employment field is considered to be breach of loyalty and utterances of an unjustifiable rough character is not accepted.²⁶ Further, public employees are subject to limitations regarding disclosure of confidential information such as personal data, financial interest etc.²⁷ Breach of confidentiality will be punished with up to 6 months of prison and up to 2 years of imprisonment if it is judged to be aggravated circumstances.²⁸

2.1.4 The Penal Code §152 e

The §152 e - the closest Denmark gets to a WB regulation for public employees – states some exemptions from these rules of confidentiality:

“The provisions of §§ 152-152 d does not include cases where the person:

- 1. is required to disclose information or*
- 2. is acting in obvious public interest or for his own or others' best interests.”²⁹*

²² Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, ”Ytringsfrihed og meddelelser for offentligt ansatte”, p. 53 ff.

²³ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, ”Ytringsfrihed og meddelelser for offentligt ansatte”, p. 53 ff.

²⁴ Jens Elo Rytter, ”Den Europæiske Menneskerettighedskonvention – og dansk ret”, 2003, p. 196

²⁵ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, ”Ytringsfrihed og meddelelser for offentligt ansatte”, p. 50 ff.

²⁶ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, ”Ytringsfrihed og meddelelser for offentligt ansatte”, p. 15 ff.

²⁷ Administration Act from 1987 §27

²⁸ Penal Code §152 paragraph 2.

²⁹ The translation is carried out by the author and is not an official translation of the Penal Code's §152 e: “Bestemmelserne i §§ 152-152 d omfatter ikke tilfælde, hvor den pågældende:

1) er forpligtet til at videregive oplysningen eller

2) handler i berettiget varetægelse af åbenbar almeninteresse eller af eget eller andres tarv.”

The paragraph states that it is allowed to breach confidentiality and give information to the media or others if it is in the public's, others or in the person's own interest. However, as mentioned above, the law depends on specific trade-offs that are difficult to predict. The public employee is *required* to disclose information if he or she comes across actually observed illegalities.³⁰

Only once has the penal code § 152 e been tested in practice and it did not fall out in favour of the whistleblower. Frank Grevil was an intelligence officer who reported that the assessment of threats of mass weapons, which was the argument for Denmark to join the coalition against Iraq, was associated with much more insecurity than the official presentation expressed. He reported his concern to two journalists and was sentenced for breach of confidentiality by the Penal Code's § 152e.³¹ He was fired and sentenced to 4 months of prison. This case was widely exposed in the media and has probably enhanced the barrier of voicing concerns among public employees.³²

2.2. Compensation for getting arbitrary fired in the private and public sector

All employees in the private and public sector are covered by the Employers' and Salaried Employees' Act nr. 68 of 21.1.2005 with later amendments and the general agreement between the Confederation of Danish Employers (DA) and The Danish Confederation of Trade Unions (LO) in case they are getting arbitrary fired.³³ The regulations are to a large degree similar and if an employee is covered by both the law and agreement he or she can choose to claim the regulation preferred.³⁴

The act covers the majority of employees' in Denmark and only a minority is not covered by the regulation.³⁵ § 2b clarifies the regulations regarding compensation for arbitrary dismissals. According to the act³⁶ the maximum compensation for getting arbitrary fired is 4 to 6 months of salary if the employee has been in the same workplace for 10 to 15 years prior getting fired. According to the general agreement an employee getting fired can be compensated with up to 52 weeks of salary. However, the compensation is considered to be rather low compared to the potential consequences of whistleblowing.³⁷ Further, the burden of proof falls on the employee and not on the employer.

2.3 Formally proposed laws or regulations

In 2003 a regulation regarding public employees' right to inform and a regulation regarding enhancement of public employees' participation in the public debates led to the establishment of a commission to assess the legal framework of public employees' freedom of speech and right to inform.³⁸ The assessment was carried out and finalized in 2006 and the report of the Committee on public employees' freedom of speech and right to inform was published.³⁹ The conclusion of the report

³⁰ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 18 ff.

³¹ Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011

³² Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011

³³ The general agreement was first negotiated in 1899 by The Confederation of Danish Employers (DA) and The Danish Confederation of Trade Unions (LO). The general agreement has been amended various times since then and is an agreement which is also widely copied to areas outside of the original coverage. The agreement contains regulations regarding work conditions, employees' right to organize etc.

³⁴ <http://www.danskerhverv.dk/Raadgivning/Ansættelsesret/opsigelse/Sider/Godtgoerelseforusagligafskedigelse.aspx>

³⁵ Professor Steen Scheuer: "Funktionær eller ej? Funktionæransættelsens omfang og betydning i den danske aftalemodel", March 2009, p. 4.

³⁶ <http://www.danskerhverv.dk/Raadgivning/Ansættelsesret/opsigelse/Sider/Godtgoerelseforusagligafskedigelse.aspx>

³⁷ Transparency International Danmark: "Nationalt integritetssystemstudie", 2011.

³⁸ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 9-10.

³⁹ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte"

was that there was no need to reform the legal framework, even though awareness regarding the rules was lacking.

A minority of the committee assessing the legal framework of public employees' freedom of speech and right to inform found a need for more explicit regulation on public employees' freedom of speech. They argued that a legislative provision would signal political commitment and support which potentially could have a positive effect on public employees' willingness to participate in the public debate.⁴⁰ It was proposed to add the following paragraphs:

“§x: Employees in the public administration has freedom of speech as private persons.

Paragraph 2: The right according to paragraph 1 does not apply to the extent that other legislation prevails and in special cases where the particular interest of the public authorities' internal decision-making and functional capacity dictates otherwise.”⁴¹

The intention of the law was to formulate it broadly to keep the prevailing legal situation status quo and to ensure that practice continuously was defined by the practice of the Ombudsman and the court. However, since it was only the minority who expressed a need for further regulation, it was decided not to add the paragraphs.

A pamphlet done on the commissions' findings called “Guidance on public employees' freedom of speech” was distributed in 2006 to public authorities and employees with the intention of informing public employees of their freedom of speech to enhance public employees' participation in the public debate.⁴² Shortly after the publication of this guidance a study from the trade union FTF pointed to the fact that public employees' freedom of speech was in a bad condition.⁴³ Further, a number of cases were in the media in the aftermath of the commission's assessment and the publication of the guidance.⁴⁴

In 2008 the Red-Green Alliance proposed to establish a body for securing public employees' freedom of speech. The body should allow for anonymous advisory services regarding work related issues in the public sector.⁴⁵ The proposal also included a suggestion to implement reversed burden of proof. This means that the employer must prove that the employee has violated the rules and not the other way around.⁴⁶

⁴⁰ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, ”Ytringsfrihed og meddelelser for offentligt ansatte”, p. 39 ff.

⁴¹ The translation is carried out by the author and is not an official translation of:

”§ x. Ansatte inden for den offentlige forvaltning har som privatpersoner ret til ytringsfrihed.

Stk. 2. Retten efter stk. 1 gælder dog ikke i det omfang, det følger af anden lovgivning, samt hvis navnlig hensynet til offentlige myndigheders interne beslutningsproces og funktionsevne i særlige tilfælde tilsiger det.” Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddelelser, nr. 1472, marts. 2006, ”Ytringsfrihed og meddelelser for offentligt ansatte”, p. 204.

⁴² Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed”

⁴³ FTF: ”Er det farligt at stå frem? FTF-undersøgelse om offentlige ansattes ytringsfrihed”, May 2006.

⁴⁴ Formally proposed law, proposed the 25.11.2009: ”B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed”

⁴⁵ Formally proposed law, proposed 19.2.2008: ”B 59: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed.”

⁴⁶ 3F: ”Offentligt ansattes ytringsfrihed skal beskyttes”, 8.4.2008

The proposal was followed up by another proposal from the entire former opposition in 2009.⁴⁷ Here the requirements of establishing a whistleblowing body for public employees and the reversed burden of prove were repeated. The whistleblower body was proposed to have an advising role and not a sanctioning role. Its main function was to investigate potential wrongdoings and advise the potential whistleblower on the legal framework and consequences of speaking up.⁴⁸

The proposal was cancelled but was somehow renewed in the government's declaration from October 2011.⁴⁹

2.4 Regulations in the private sector and barriers

Whistleblowing in the private sector has to a large degree been defined by international companies working in countries such as the United States where whistleblowing mechanisms are required by companies listed on the stock market.⁵⁰ Further, the Committee on Corporate Governance in Denmark⁵¹ recommended companies listed on the Danish Stock Market to consider whether whistleblowing mechanisms could be implemented to secure appropriate reporting of serious misconduct. The recommendations from the Committee on Corporate Governance are considered to be a so-called soft law and companies are not obliged to comply with these recommendations. However, if they choose not to comply, the companies have to officially explain why.⁵² The companies are monitored and receive public reprimands on a regular basis by the stock exchange.

The recommendations from the Committee on Corporate Governance and the requirements from other countries legislation affecting Danish companies doing business in these markets have created an incitement for establishing whistleblowing mechanisms in the private sector.⁵³ This is reflected in practice since 67 WB bodies have been registered in the private sector and officially 50-60 applications for new mechanisms are awaiting approval from the Data Protection Agency.⁵⁴ However, the unofficial number of applications awaiting approval is estimated to be around 160 companies which are considered to be a rather large number compared to other European countries.⁵⁵

It is the "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data" that defines the framework for the European countries laws on protection on personal data. However, this directive has been interpreted very differently in the EU countries' national legislation which makes the legislation very untransparent across the European member states and very difficult for private companies to implement whistleblowing bodies in the countries they operate. It

⁴⁷ Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et navn til sikring af offentligt ansattes ytringsfrihed"

⁴⁸ Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et navn til sikring af offentligt ansattes ytringsfrihed"; DR, P1: "Oppositionen i kamp for ytringsfrihed", 3.5.2010.

⁴⁹ "Et Danmark der står sammen", Government Declaration, October 2011

⁵⁰ Plesner: "Arbejds- og ansættelsesret: Whistleblowing – en fremmed fugl i dansk ansættelsesret", July, 2008;

Ingeniørforeningen IDA: "Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder", March 2012.

⁵¹ The Committee on Corporate Governance in Denmark was created by the then Minister for Economic and Business Affairs Ole Starvad in 2001. In 2002 Copenhagen Stock Exchange continued the work on corporate governance and formed a committee for good corporate governance. The Committee for good corporate governance: Recommendations for good corporate governance, April 2010.

⁵² Nasdaq: "Regler for udstedere af aktier." NASDAQ OMX Copenhagen A/S, 1.7.2010

http://www.nasdaqomx.com/digitalAssets/68/68664_regler_for_ustedere_af_aktier_-_endelig.pdf

⁵³ Ingeniørforeningen IDA: "Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder", March 2012.

⁵⁴ Ingeniørforeningen IDA: "Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder", March 2012.

⁵⁵ Interview with Christine Jøker Lohmann, anti-corruption consultant in DI – Confederation of Danish Industries, conducted 16.8.2012

requires a legal assessment of each country the company operates in and such assessments are both expensive and time consuming. Therefore, there is a barrier towards having whistleblowing mechanisms implemented in private companies operating in various countries.

In Denmark it is the Data Protection Agency who is in charge of approving and supervising whistleblowing mechanisms in the private sector.⁵⁶ It is the Data Protection Agency who is in charge of the mechanisms since whistleblowing reporting often includes personal data and therefore it is very important to make sure that the Personal Data Protection Act is respected.

Before a company can get an approval they have to pay EUR 134 according to the law on Personal Data Protection Act § 63, paragraph 2, nr. 2. In Denmark it is allowed to have a whistleblowing mechanism covering both internal personnel and external personnel such as lawyers, suppliers, customers or others stakeholders. It is recommended by the Data Protection Agency to use anonymous reporting mechanisms in the mechanisms but it is not a requirement. In practice the vast majority of whistleblowing mechanisms offer anonymity and currently only one registered whistleblowing mechanism (out of 67) does not allow for anonymous reporting.⁵⁷

It is important to notice that only illegalities and severe cases can be reported to whistleblowing bodies in Danish companies. Less serious offenses cannot be reported to such mechanisms.⁵⁸ The guide from the Data Protection Agency states that:

“The Data Protection Agency’s opinion is that there can be reported in cases where there is - or suspected - serious wrongdoing that may affect the company as a whole or which may be crucial for the individual’s life or health. It may, for example, be in cases of suspicion of serious economic crime, including bribery, fraud, forgery and the kind.”⁵⁹

The guide therefore has some limits to what the whistleblowing mechanism should cover. However, the guide also expresses the possibility of including: *“cases of environmental pollution, serious breaches of work safety and serious conditions such as an employee being targeted with violence or sexual assault.”*

Overall, the definition of what a whistleblowing mechanism can contain is therefore rather broad as long as it is a severe case.⁶⁰

3. Perceptions and Political will

There has been a tendency in Denmark to view whistleblowers more as snitches than as heroes. The Danish language has no proper translation for whistleblowing and therefore newspaper headlines have often included words such as snitches, gossip, rumours etc. There has been a tendency in the media to view whistleblowers with hostility and the Frank Grevil case mentioned above was an example of this.⁶¹ However, the perception is changing and within the last decade many private companies have established whistleblower functions as means of preventing corrupt behaviour and financial crimes. Especially in the wake of the financial crisis it is recognized that large scandals such as bank cracks etc. could have been avoided with whistleblowing systems in place.⁶²

⁵⁶ And also partly in the public sector. However, public institutions are not obliged to get an approval if the WB mechanism is handled internally, only if it is out-sourced to an external actor. Ingeniørforeningen IDA: *”Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder”*, March 2012; Interview with Christine Jøker Lohmann, anti-corruption consultant in DI – Confederation of Danish Industries, conducted 16.8.2012

⁵⁷ Ingeniørforeningen IDA: *”Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder”*, March 2012

⁵⁸ Ingeniørforeningen IDA: *”Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder”*, March 2012

⁵⁹ <http://www.datatilsynet.dk/blanketter/vejledninger/whistleblower/>

⁶⁰ Ingeniørforeningen IDA: *”Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder”*, March 2012

⁶¹ JP: Mette Reisman & Anne-Louise Thon Schur: *“Kronik: Whistleblowing er ikke fejlt”*, 13.6.2012

⁶² Ingeniørforeningen IDA: *”Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder”*, March 2012.

Besides the Frank Grevil case there has only been few whistleblowing cases. The reason for this is most likely that work related conflicts are mainly handled internally and in the trade unions. Other cases worth mentioning is the case about Sergio Fox who was employed in the Danish Energy Agency. In 2002 he noticed that misleading data regarding windows' potential energy savings had been given to politicians for years. He talked to his leader several times during the years regarding the data but the leader refused to do anything about it. The Danish Energy Agency was contacted by the media and the journalist was referred to Sergio Fox who again contacted his leader regarding guidelines towards what he should say. He was told to tell the truth and when he did that the case escalated in the media. He was asked to resign due to cooperation problems. Two years later the National Audit Office criticises the Danish Energy Agency for their treatment of Sergio Fox. Politicians put pressure on the minister for Economic and Business Affairs to reconsider the sanctions against Sergio Fox. The minister replies that Sergio's freedom of speech has not been breached and since he decided himself to resign he cannot get any compensation.⁶³

Recently, the director of Dong Energy Anders Eldrup was fired due to a whistleblower who tipped the chairman of the board. Anders Eldrup had been allocating more staff members' specific payment deals without notifying the board.⁶⁴

In 2011 a whistleblower-tip regarding economic irregularities in the pharmaceutical company Lundbeck lead to the revelation of a large fraud against some of the largest companies in Denmark including Lundbeck, Novo Nordisk etc. and 20 persons are now charged for fraud.⁶⁵ The case is now being investigated by the police.

Whistleblowing is receiving more and more attention in the public debate. Further, many companies had established WB functions in 2012 and an estimated 160 companies are awaiting approval of such functions.⁶⁶ Three local governments had implemented WB bodies by 2012 and the tendencies in the private sector seem to affect the public sector. However, there is no doubt that the public sector is lacking behind the private sector.⁶⁷ A recent study conducted with all local governments in Denmark showed that three out of four were not interested in establishing whistleblowing mechanisms.⁶⁸ The local governments turning this opportunity down found that there already exist various possibilities of voicing concerns and therefore whistleblowing mechanisms are considered unnecessary.⁶⁹

The recent cases in Dong and Lundbeck have affected the attitude towards whistleblowing mechanisms and larger trade unions who used to be opponents towards the phenomenon are opening up. The Danish Association of Lawyers and Economists has published a number of whistleblowing articles showing that every second public employee who is member of the association supports implementing whistleblowing mechanisms.⁷⁰ The chairman of public employees in the organisation though is still an opponent but a more positive attitude towards the phenomenon is showing.

3.1. Barriers towards Whistleblowing in the Public Sector

⁶³ <http://www.whistleblower.dk/magisterblad%20sergio.html>

⁶⁴ Politiken.dk: "TIDSLINJE: Fyringen der skulle være udløst af en whistleblower", 27.3.2012.

⁶⁵ Dr.dk: "Whistleblower afslørede Lundbeck-bedrageri", 7.4.2011

⁶⁶ Ingeniørforeningen IDA: "*Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder*", March 2012; Interview with Christine Jøker Lohmann, anti-corruption consultant in DI – Confederation of Danish Industries, conducted 16.8.2012

⁶⁷ Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011

⁶⁸ Avisen.dk: "Kommuner afviser anonyme sladrehanke", Jacob Krarup Bjerregaard, 21.4.2012

⁶⁹ Avisen.dk: "Kommuner afviser anonyme sladrehanke", Jacob Krarup Bjerregaard, 21.4.2012

⁷⁰ Djøf-bladet: "Djøfere klar til whistleblower-ordning", 6.6.2012

The commission who was appointed to assess the legal framework of public employees' freedom of speech and right to inform found that there is no need to revise the legal framework for whistleblowing in the public sector. However, it also found that voicing concerns is often perceived as an expression of disloyalty. Even though the right to voice concerns is secured by law in practice it seems to have large consequences for the employee to do so. Thus there seem to be a cultural barrier preventing public employees to speak up in fear of sanctions.⁷¹

This finding is supported by an analysis carried out by the trade union FTF in 2010.⁷² The study was conducted among 3474 members of FTF from both the private and the public sector and showed that 22% of public employees who had publicly voiced concern about the workplace were faced with subsequent problems, such as being perceived as disloyal to their employers or being explicitly warned not to make future comments.⁷³ Further, in the public sector 38% of the surveyed who decided not to publicly voice concerns had done so in fear of negative consequences. This number is somewhat less in the private sector where 23% decided not to speak up due to similar fears.⁷⁴

A recent study published in June 2012 with 1048 representative members of the trade union 3F (including employees from both the private and public sector) shows that the financial crisis has worsened the fear of speaking up regarding irregularities in the workplace. Compared to an identical study conducted in 2008 the number of persons who are afraid of reporting misconduct has doubled.⁷⁵

Opposed to the two large trade unions mentioned above (FTF and 3F) a number of other large trade unions do not consider it necessary to implement whistleblowing bodies or improve whistleblower protection.⁷⁶ The organisations fear growing a snitch culture by implementing whistleblowing mechanisms⁷⁷ and believe that the Danish Labour Market Model already offers other solutions for reporting irregularities such as union representatives available for employees to turn to.⁷⁸

Besides the cultural barrier for not reporting misconduct 19% of public employees the FTF study points to the fact that employees do not know where to report such information.⁷⁹ Lack of awareness in the public sector on how to report is thus also a barrier to whistleblowing.

3.2 Large Political will to Protect Whistleblowers – yet to be shown in practice.

The political will to protect whistleblowers is somewhat large and it is one of the priorities mentioned in the government's declaration from October 2011.⁸⁰

A recent case has reconfirmed this will to protect whistleblowers but nothing has happened in practice yet. An employee of Denmark's largest company Maersk contacted the official authorities regarding questionable samples of oil spills which she had been asked to destroy by her employers. The authorities reacted on the inquiry but also let Maersk know that they had been contacted by a citizen.

⁷¹ The cultural barrier is also expressed in the chronicle: Berlingske: "Kronik: Ingen blæser i fløjten", Michael Gotze, Ph.D. Juridiske Fakultet, 9.5.2011

⁷² FTF: "Behov for whistleblower-ordninger på danske arbejdspladser", 28.1.2011

⁷³ FTF: "Behov for whistleblower-ordninger på danske arbejdspladser", 28.1.2011.

⁷⁴ FTF: "Behov for whistleblower-ordninger på danske arbejdspladser", 28.1.2011, p. 6.

⁷⁵ 3F: "Sladrehanke frygter firing", 3.8.2012.

⁷⁶ Plesner: "Arbejds- og ansættelsesret: Whistleblowing – en fremmed fugl i dansk ansættelsesret", July, 2008; Journalisten: "Professor: Whistleblower-splittelse hos fagforbund", 25.6.2012.

⁷⁷ Jyllands Posten: "Fagforeninger afviser fløjten", 25.6.2012.

⁷⁸ Jyllands Posten: "Fagforeninger afviser fløjten", 25.6.2012.

⁷⁹ FTF: "Behov for whistleblower-ordninger på danske arbejdspladser", 28.1.2011, p. 6.

⁸⁰ "Et Danmark der står sammen", Government Declaration, October 2011

Maersk requested to have access to the correspondence between the citizen and the authorities and in these files it was evident who had voiced the concern. She was registered with full name and contact details. The whistleblower was transferred from her job and did not receive her annual bonus or a salary raise.⁸¹ In the wake of this case more political parties and government representatives have promised to work with this issue. However, no concrete political initiatives have been taken in practice so far.

4. Strengths, weaknesses and recommendations

The legal framework for whistleblower protection in Denmark is weak in comparison to other comparable countries. As mentioned above it is the only Nordic country with no specific law on the area. A commission was appointed to assess the legal framework of public employees' freedom of speech and right to inform.⁸² The majority of this commission came to the agreement that the regulations on the field were sufficient and a judicial reform was unnecessary. However, a minority of the commission believed that evidence on how the regulations were working in practice indicated a need for signalling better protection towards public employees to have them participate in the public debate. This perception has also been expressed by the former opposition who is now the government. Further, more cases in the media, the financial crisis and the experiences with whistleblowing bodies in both the private and the public sector have been affecting the society's attitude towards whistleblowing.

4.1. Best practice

Norwegian laws and regulations are largely comparable to the Danish law system. Therefore, it is relevant to look closer into the Norwegian laws on the field. Also, Norway just did a comprehensive reform of the Norwegian Constitution's § 100 regarding protection of freedom of speech which potentially could be an inspiration to Denmark.⁸³

Norway has a much broader whistleblowing protection which includes a great deal of the elements suggested by the former opposition in the proposal from 2009.⁸⁴ In the Norwegian constitution the freedom of speech is expressed as the rule that prevail all other interests. The constitution explicitly states that an employee is allowed to voice concern about the public administration and any other subject. If the employer finds the concern unreasonable it is up to the employer to carry the burden of proof. Further, the Norwegian Law on Labour Environment from 2005 states that an employee is allowed to voice concerns on critical issues in her/his workplace. There are regulations to prevent retaliation against employees who voiced concerns and if an employee experiences retaliations from the employer he/she may require redress, regardless of the employer's fault.⁸⁵

The Swedish legal framework is deemed to be less protective towards whistleblowers than the Norwegian.⁸⁶ However, it does offer some improvements compared to the Danish legal framework in

⁸¹ Berlingske: "Myndigheder svigter whistleblowere", 19.7.2012; Dr.dk: "Hjælp på vej til whistleblowere fra Christiansborg"; Politiken: "Styrelse afslørede hemmelig kilde til Mærsk-fusk", 19.7.2012.

⁸² Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 9-10.

⁸³ Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 124 ff.

⁸⁴ Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed"

⁸⁵ Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed"; Betænkning fra Udvalget om offentligt ansattes ytringsfrihed og meddeleret, nr. 1472, marts. 2006, "Ytringsfrihed og meddeleret for offentligt ansatte", p. 124 ff.

⁸⁶ Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed"

the sense of improving the right to inform regarding irregularities as a public employee. It is allowed for public employees to contact the press directly to reveal misuse of power in the public sector and to achieve immediate protection and anonymity. It is illegal for public leaders to try to identify persons behind leaks of information.⁸⁷

In the United States of America whistleblowers are well protected by the law. Leaders discriminating whistleblowers can be punished with long prison sentences and very strict protecting measures apply to employees defined as whistleblowers by the authorities.⁸⁸

In Denmark the law proposal B 64 recommended to establish a whistleblowing body to advise and protect whistleblowers. Such a body has also been recommended by Transparency International Denmark. The idea is to give the body the mandate to define a whistleblower and protect the whistleblower from any sanctions from the employers. As in the United States a definition of a whistleblower should trigger a specific protection in the recognition of the difficulties the whistleblower might experience as a consequence of voicing concerns.⁸⁹

4.2. Recommendations:

- It is recommended to establish an independent WB body for advising and protecting whistleblowers in both the public and the private sector. The body is intended to advice potential whistleblowers on their rights and possibilities if they choose to go forward with their case. It is essential that potential whistleblowers can obtain impunity to break confidentiality and loyalty obligations to allow for investigation of the cases.
- Economic compensation for unfair dismissal should be raised since the current compensation is inadequate compared to the potential large consequences voicing concerns might have. Further, if a whistleblower is officially approved as a whistleblower by the body he or she should be required to be transferred to a similar position of his or hers own free choice.
- It should be considered a criminal offense to try to identify a whistleblower and pursue him/her just as it is in Sweden.⁹⁰

5. References and sources

- 3F: "Sladrehanke frygter firing", 3.8.2012
- Berlingske: "Kronik: Ingen blæser i fløjten", Michael Götze, Ph.D. Juridiske Fakultet, 9.5.2011
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- FTF: "Behov for whistleblower-ordninger på danske arbejdspladser", 28.1.2011

⁸⁷ Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes yringsfrihed"

⁸⁸ Plesner: "Arbejds- og ansættelsesret: Whistleblowing – en fremmed fugl i dansk ansættelsesret", July, 2008

⁸⁹ Transparency International Denmark, "Oplæg til arbejdsgruppen om whistleblower-initiativ fra TI-Danmark", 31. august 2008.

⁹⁰ Transparency International Denmark, "Oplæg til arbejdsgruppen om whistleblower-initiativ fra TI-Danmark", 31. august 2008.

- Formally proposed law, proposed the 25.11.2009: B 64: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed”
- Formally proposed law, proposed 19.2.2008: ”B 59: Forslag til folketingsbeslutning om oprettelse af et nævn til sikring af offentligt ansattes ytringsfrihed.”
- Government Declaration, ”Et Danmark der står sammen”, October 2011
- Ingeniørforeningen IDA: ”Whistleblowerordninger. Erfaringer fra ordninger i private danske virksomheder”, March 2012.
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- The Committee for Good Corporate Governance: Recommendations for good corporate governance, April 2010.
- Transparency International Denmark, ”Oplæg til arbejdsgruppen om whistleblower-initiativ fra TI-Danmark”, 31. august 2008.
- Transparency International Danmark: ”Nationalt integritetssystemstudie”, 2011

6. Chart(s)

Complete title of law or regulation: The Danish Legal Framework for Whistleblowing

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	<ul style="list-style-type: none"> § 77 in the Constitution defines the legal framework for freedom of speech as such but do not refer specific to whistleblowing. The paragraph protects the formal freedom of speech but is not considered to be sufficient for the material freedom of speech. Convention for the Protection of Human Rights and Fundamental Freedoms article 10, Danish law no. 285. The law protects all persons' formal and material freedom of speech, including employees' in the public and private sector. The Penal Code's §152 refers to public employees' duty of confidentiality. § 152 e refers specific to exemptions from this duty and this article is considered the closest Denmark gets to a specific WB legislation.
Broad definition of whistleblower			X	<ul style="list-style-type: none"> As mentioned above the articles do not refer specific to whistleblowers but to any person. As such it is a wide definition but whistleblowers are not mentioned explicitly.
Broad definition of retribution protection			X	<ul style="list-style-type: none"> Since there is no specific WB regulation in Denmark retribution protection falls under general protection from employers' sanctions. However, the rules are in practice not very protective since there is possible for the leader to refer to cooperation difficulties. A public employee who does not agree with a sanction can apply for legal aid or assistance from a trade union representative. Alternatively, he can take the case to the Parliamentary Ombudsman or the courts.
Internal reporting mechanism		X		<ul style="list-style-type: none"> Internal reporting is not incentivised since it depends very much of the culture of the specific workplace and the leaders. It is up to the leader to create space for voicing concerns but if this is not done in practice the employee has few options for raising critics. One option is to go to the trade union representative. However, this solution also depends on the power of the representative within the institution.
External reporting mechanism			X	<ul style="list-style-type: none"> The Parliamentary Ombudsman is considered to be a very strong institution and the public employee is able to take up cases with the institution. Public employees are allowed to report non-confidential information to the media and to other external parties in cases of illegal or feared illegal administration in the public sector or misuse of power. The Penal Code §152 e states that confidential information can be reported if it is in the public's, others or in the person's own interest. However, the law depends on specific trade-offs that are difficult to predict.
Whistleblower participation			X	<ul style="list-style-type: none"> The Administration Act defines the rules regarding hearing of parties in a case, duty of guidance and rules of impartiality. The public institution is required to hear all parties in a case and is required to inform the parties of access to disadvantageous information of to the party before making a decision. Parties in a case are allowed to be represented by a third party such as a trade union represent during the hearing.
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted		X		
No sanctions for misguided reporting				<ul style="list-style-type: none"> The penal codes § 152 e defines the possibilities for breaching confidentiality in the public sector. However, public employees'

				possibilities of reporting confidential information is subject to a specific trade-off that are difficult to predict. The paragraph has been tested once where the WB Frank Grevil (see country report) was sentenced 4 months of prison for breach of confidentiality.
Whistleblower complaints authority		X		
Genuine day in court	X			
Full range of remedies		X		<ul style="list-style-type: none"> The Employers' and Salaried Employees' Act and the general agreement protects against getting arbitrary fired. However, the compensation is calculated according to the persons' employment period and not with focus on recovery of losses and making the complainant whole.
Penalties for retaliation		X		
Involvement of multiple actors	X			<ul style="list-style-type: none"> There is a general tradition in Denmark to involve civil society in reviews of legislation. A large assessment was conducted in 2006 on the Danish regulation of freedom of speech and public employee's right to inform regarding irregularities and here multiple stakeholders were involved.

