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Freedom of association of trade unions in Denmark

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CONTENT

I. GENEREL OUTLINE

The general freedom of association is documented in the Danish Constitution from 1849, revised in 1953. Nevertheless, in practice, the freedom of association of trade unions was first secured through the conclusion of the so-called September Compromise in 1899, also referred to as the Danish Labour Market Constitution, by the employees and employers main organisations. This 'constitution' determines the rules of the regulation of the labour market by the labour market organisations and is still in force. It was revised in 1960 under the name of the Basic Agreement. The freedom of trade union association was settled together with the managerial prerogative; the employers' right to manage and divide the work including the right to hire the at any time necessary labour force (hire at will).

It is thus important to understand that the Danish model of labour market regulation, including the right to form associations, is based on these voluntaristic principles and that legislation or interference of the state is kept on a minimum. The right of association and the recognition of labour market associations are based on the mutual recognition of conflicting interests.

The freedom of assembly is separated from the freedom of association in the Constitution, as is the freedom of speech. (Ch. 8, §77-79).

II. THE LEGAL FRAMEWORK

1. Freedom of association with regard to trade unions, as a constitutional right

The general freedom of association in relation to the state is recognised in general in the Constitution §78. It states that all able citizens have the constitutional right to form organisations as desired. Only a revision of the constitution can change this basic right.

The central administration is not allowed, unless stated in specific legislation, to discriminate between different types of labour market organisations.

2. The norms of regulation of freedom of trade union association

In Denmark questions about freedom af association of trade unions are primarily regulated by collective agreements. The freedom of associations and the prohibition of anti-union behaviour, or acts of hostility towards other organisations, is recognised in the Basic Agreement (§1) between the main organisations behind the September Compromise (see above), the Danish Confederation of Trade Unions (Landsorganisationen i Danmark, LO) and the Danish Employers

Confederation (Dansk Arbejdsgiverforening, DA) – hereafter referred to by their abbreviations LO and DA. The Basic Agreement §5 contains a reservation. Salaried employees, which in relation to the other wage earners/employees are considered as spokesmen of the employer, can be held outside same union membership as of his colleagues at shop floor, if the employer so wish and after having consulted the salaried employee in question. Employment as salaried employee alone does not fall under this provision.

It is possible, though, for the employee in question to join a union outside LO, for instance the association of executive and managerial staff, LH (Ledernes Hovedorganisation).

The prohibition of dismissal because of union membership is laid down in The Dismissal on Grounds of Union Membership Act (Foreningsfrihedsloven) and the Act on the Legal Relationship between Employers and Salaried Employees (Funktionærloven) states the right to form unions for salaried employees (white-collar workers).

Denmark has ratified the ILO conventions 87 and 98 concerning freedom of trade union association and the right to conduct free negotiations, as well as the European Social Charter and the European Human Rights Convention. ILO's organisation committee has criticised Denmark for breaking the rules. The Act on Danish International Ships Register is contrary to the rules in convention 98 about the right to conduct free negotiations, ILO claims. Neither do closed shop clauses, as in Denmark, agree with the provisions of the Social Charter's provision about the freedom not to be a member of an association. However, in Article 12 of The EU Charter of Fundamental Rights this 'negative right' of association is absent, but the Charter is not (yet) binding in an EU-legal sense.

III. INDIVIDUAL FREEDOM OF ASSOCIATION WITH REGARD TO TRADE UNIONS

1. Individual right of trade union association

All Danish employees are eligible for membership of a trade union; including the police and armed forces, and other statutory civil servants. Also managers at higher level have their own union. In principle self-employed can be member if they wish. In practice only few have joined a union.

Foreign citizens, also outside EU, can obtain membership of a union, as well as part-time workers, freelancers, retired and high-ranking officials.

2. The content of Individual Union Association (the dispensations of IUA)

A. Positive rights

The right to join a collective organisation and to carry on normal collective activities is recognized in the Basic Agreement between the DA and LO and in

the case of white-collar workers it is given positive protection under §10 of the Act on the Legal Relationship between Employers and Salaried Employees (sometimes called the White-Collar Workers Act). It is, however, a legal presumption in so far as it already follows from general (unwritten) fundamental legal principles. Every collective agreement is also assumed to be based on the mutual recognition by the parties concerned of each other's existence and legal capacity to act, and taking action to undermine the other party's organisation therefore constitutes a breach of the agreement. The Dismissal on Grounds of Union Membership Act prohibits employers from dismissing employees because they have joined a union. Positive freedom of association is also given legal protection by §78 of the Danish Constitution, which states that citizens have the right to form associations without prior consent from the public authorities.

B. Negative rights

The right to abstain from joining an organisation, the 'negative' freedom of association, enjoys no protection on the general level, either in regard to coercion by state authorities or in regard to private attempts to compel membership. In contrast to the 'positive' rights, the non-organised lacks protective provisions. A certain degree of protection may, however, derive from collective agreements. For example, under the Basic Agreement between the DA and LO employers are free to employ non-organised employees (the employer's freedom to hire at will). On the other hand, where the employers and employees concerned are not covered by the DA/LO Basic Agreement, closed shop clauses (obliging employers to employ only union members, or to give them preference) are included in some collective agreements in the private sector. In the public sector, owing to the obligation on the state to treat all citizens equally there is a general legal principle that public employers may not discriminate on grounds of union membership. Negative freedom of association is also given some protection by the Dismissal on Grounds of Union Membership Act, which makes it unlawful to dismiss employees because they refuse to join a union.

C. Clauses for encouraging individual freedom of trade union association

There are no recognised clauses for encouraging individual freedom of trade union association such as agency shop, "reservation of advantages for membership" (quoting the questionnaire of this study), or anything of that nature.

IV. FREEDOM OF ASSOCIATION WITH REGARD TO TRADE UNIONS ON A COLLECTIVE BASIS

1. Freedom of organisation and regulation of trade unions

A trade union may be formed without any official authorization, and there is no general legislation on such organisations. Under a special law on the funding of certain associations it must, however, be registered if its assets exceed 250,000 DDK.

In order to understand the Danish system of collective labour law it is necessary to have knowledge of the system of rules that has been built up on the functioning of associations, including relations between associations and their existing and potential members and mutual relations between their members. For the most part, these rules are developed by the courts as supplementary rules. However, in the particular case of non-profit-making associations which in their capacity as collective organisations in the labour market, i.e. employers' associations and trade unions, exert a decisive influence on the welfare and employment opportunities of the individual, the courts establish certain mandatory legal principles. Apart from considerations concerning the mandatory principles dictated by respect for freedom to earn a living, social order and the rule of law, in ruling on concrete cases the courts base their decisions on what has been expressly agreed regarding relations within the association concerned (its constitution, often called the "rule-book" in the particular case of unions), internal practice (its implied rules and regulations) and generally accepted norms of good practice.

Joining an organisation usually involves written formalities in accordance with its rules on the procedure for admission. In the absence of any rules to that effect, however, it is perfectly possible under Danish law for admission to be by oral, or even implied, agreement.

2. Freedom of running

The sovereign body of an association is a general meeting open to all members or, if this is impossible in practice, a conference or congress attended by elected delegates. It is this body which decides the association's policy and fixes the membership subscription. As a rule, a smaller body is then elected from this (an executive committee) to run the association's affairs during the intervals between the meetings of the sovereign body. The regulation of the trade union is laid down in a set of rules.

In large associations it is customary for a full-time, paid leadership to be appointed in the form of a management committee or chief official. In the trade union movement, appointments to paid posts are often made by election.

The main sources of finance of the trade unions are the membership fee. Trade unions do not receive funds from the government or any other body.

3. Freedom of federation and confederation

All trade unions are free to establish and constitute federations and confederation or in principle to join a confederation. There are no limits. A new confederation would have to get influence in competition with existing confederations.

The system is based on the free market and recognition is parallel to the degree of success.

4. The freedom to carry out trade union action

A. General considerations

In accordance with collective labour law the holders of collective trade union freedom, trade union activities, are “only trade unions, but all of them” (citation from the questionnaire of this study). The right to strike is encompassed by collective law, which means that the unions and not the workers have the right to strike. Unlawful strikes in a Danish context are defined as breaches on the peace obligation according to the collective agreement. The right to strike is close connected to the periods of collective bargaining. In cases where the employer is not covered by an agreement the union can take industrial action in order to obtain collective bargaining.

Only the trade unions can conduct collective bargaining with the employers associations.

In the agreement between The Christian Union and The Christian Employers Association the right to strike is abolished.

Statutory civil servants (tjenestemænd) have had a de facto right to collective agreement since 1917. They have traditionally been regarded as bound by a special relationship of trust. This means, among other things, that the system covering breach of duty that is applicable to private-law employment relationships is in their case replaced by special provisions on disciplinary proceedings. It was also formerly deemed that they did not possess the right to strike. From 1960 onwards, however, when postal workers in Copenhagen possessing the status of statutory civil servants waged a (successful) strike for higher pay, there were a number of occasions when statutory civil servants were involved in industrial action. As a result, they were formally granted special rights on the settlement of such disputes and provision was made for the imposition of a fine for work stoppages in certain cases. Also, under a reform of the ‘statutory civil servants’ regime in the late 1960s the legislators sought to introduce a collective bargaining element into their terms and conditions of employment. Since then, under the Statutory Civil Servants Act a number of specially authorized statutory civil-servant unions have been granted the capacity to bargain on pay and conditions and the latter are laid down by the Danish Parliament (Folketinget) only if these negotiations break down (Statutory Civil Servants Act, Part 2). In addition, statutory civil servants are protected by special pension arrangements and wrongful dismissal occasions entitlement to a pension.

Thus, employment carrying the status of statutory civil servants implies a legal position which in essence differs from that applying to employment regulated by private law, including other public-sector employment carrying salaried employee/white-collar worker status.

Statutory civil servant status is applied to manual and salaried employee/white-collar worker posts, the teaching profession, regular members of the armed forces and senior officials in central and local government.

B. Trade union action and the level of union representation

Trade union representative lies within the system of collective bargaining. Unions involved in collective bargaining have all rights in relation to enforce and/or maintain the collective agreement. The legal regimen is the collective labour law.

5. Protection of trade union freedom

5.1. Prohibition of anti-union behaviour (anti-union discrimination)

A. On the part of the public powers

The general legal regime on the prohibition of anti-union behaviour, i.e. the discrimination against trade unions or on the grounds of union membership, is laid down in the fundamental principal of equal treatment within the public administration. Secondly the Dismissal on Grounds of Union Membership Act (Foreningsfrihedsloven) about unlawful dismissal on grounds on union membership also offers protection against anti-union behaviour.

As an employer, the public associations taking part in collective bargaining will also be sanctioned according to collective labour law in connection with breaches of the collective agreement.

B. On the part of employers

The main provisions are the Basic Agreement, first paragraph, which state that the parties agree that discriminations on grounds of association membership is prohibited; and secondly the Dismissal on Grounds of Union Membership Act. However, §2 of the Act states that the negative right, i.e. not to be member of a union, do not apply if the employee as a condition of employment is informed that he/she has to member of a certain trade union, i.e. in cases of closed shop agreements.

It could also be questioned if an employer, not covered by a collective agreement falls under the provisions of anti-union behaviour. However, the rub-off effect from the collective agreements and the Danish ratification of international rules must state the fact that the prohibition of anti-union behaviour is also binding for employers not covered by a collective agreement.

C. On the part of the trade union

The unions do not have particular statutory clauses of admission. The powers and the influence of the social partners' organisations in dealing with and solv-

ing tasks and problems within the Danish welfare state has made membership of a trade union a general legal claim, in so far as the wish to join a union is based on reasonable (e.g. occupational) grounds. A union can deny membership to a person with a different educational and occupational background than the existing members, and instead recommend membership of another more fitting union. It is also legal to deny unemployed membership, and a union can demand that membership of the union's unemployment fund is a condition for membership.

Former membership of an employers association is no hindrance to join a trade union.

The disciplinary power of the union: examples of behaviour leading to sanctions from the union would be serious violation of the provisions of collective law by an individual or a small group of members. Or violation of the organisation rules and regulations (it's constitution). Strike-breakers of legal conflicts can be excluded and denied future trade union membership. If payment of the membership fee is not maintained in a proper way, the union can expel the membership.

D. On the part of other trade union organisations

There is no special legal regulation regarding prohibition of anti-union behaviour from other trade union organisations, others than those directed at misconduct in general. The Danish trade union system is a one-string system and trade unions follow occupational lines and not political or religious lines. The division of trade unions in confederations is mainly historical. The four existing confederations roughly divide the occupations between: LO (blue-collar workers and white-collar workers); FTF (salaried employees/white-collar workers); AC (professionals, academics); LH (an organisation for executive and managerial staff) See also below. LO have co-operation agreements with FTF and AC, among other things in order to prevent demarcation disputes. The latter exists to a certain degree among the unions within the LO family. However, demarcation disputes are not settled by law, but solved in-house according to the rules and regulations settled by the general assembly of LO.

2. Legal guarantees in the face of anti-union behaviour

No provisions inside the legal system or the collective labour law system deal with legal guarantees in the face of anti-union behaviour.

When an employer or a company is bound by a collective agreement, the employer has committed himself to avoid organisation-hostile acts (i.e. anti-union behaviour); even if this is not mentioned in the collective agreement, which is not always the case. In case of anti-union behaviour it will be regarded as a breach of the agreement and will impose a fine at the industrial court system.

If an act is judged as anti-union behaviour by the civil or industrial court the sanctions will take the form of compensations for losses and damage. People

fired contrary to the act on freedom of association will not, in the private sector, automatically have their jobs restored, but will receive a compensation from the employer.

Anti-union behaviour can only constitute a criminal offence if the act in itself falls under the provisions of the Criminal Code.

The Official Work Inspection has no special competence in regard to take action against administrative misconduct; only in cases concerning the working environment, including the psycho-social working environment.

V. FREEDOM OF ASSOCIATION OF EMPLOYERS

As in the case of the trade unions the employers' organisations owe their existing legal status to the September Compromise 1889.

Membership of employers associations is not compulsory and employers associations are not recognised through legislation. Recognition as an employers' association with bargaining and representative rights mainly builds on the concept of mutual recognition of conflicting interest vis-à-vis the trade unions; or in other words on reciprocal recognition.

Employers associations exercise their freedom of association like the trade unions. Any person or groups of persons can create an association. The recognition (or representative) lies implicit in the success of obtaining influence within the collective bargaining system.

The competence of concluding collective agreements is more centralised on the employers' side than the side of the employees' organisations. §23 in the laws of the Danish Employers' Confederation, DA, contain rules and regulations concerning negotiations with the employees' organisations. DA has to accept a number of the negotiated issues between a DA member association and a trade union, e.g. wage increase, reduction of working hours, annual holiday entitlements outside the legally binding, closed shop agreements, etc. The member associations may not enter into collective agreements without authorisation from DA, and it is the competent bodies within the DA, which decide whether member associations are to take industrial action, although this strong centralisation is beginning to break down. In addition, the confederation maintains substantial funds (supplementing the member associations' own fighting funds) to assist members both during lawful work stoppages and when strikes contravening an agreement are used to exert pressure on enterprises.

VI. ASSOCIATION

Level of membership

Membership of trade union is traditionally high in Denmark. At national level union density is around 80%. The main organisation LO covers around 66% of all membership. FTF covers 17%; AC 8%; LH 3.5% and others 5.5% (See full

names for abbreviations of the main organisations below, next paragraph). The trend the level of membership over the last decade has been that the workers unions in LO have lost a little terrain to the salaried employees in FTF and the academics in AC. Especially AC has experienced a growth in the period; from 3,5% of all union membership 1993 to around 8% in January 2004. This change is basically due to a change in the level of education of the population in favour of more mid-level and high-level educated. In this case the other Scandinavian countries and Finland experience the same development. In average union membership in Denmark has increased 1.7% (2003). The total Danish work force is approximately 2.65 million.

Trade union confederations:
There are four trade union confederations in Denmark:

The Danish Confederation of Trade Unions, LO.
LO is main organisation for 19 member trade unions, which cover skilled and unskilled workers in industry, construction, service, trade and transport. LO was founded 1898. The last of the former political bonds with the Social Democrats were formally cut in 2003. LO is member of ETUC.
Membership as of January 2004: 1,385,775 persons.

The Salaried Employees' and Civil Servants' Confederation, FTF
Member unions of FTF (Funktionærerne og Tjenestemændenes Fællesråd) mostly organise statutory civil servants, public sector salaried employees and white-collar workers: Army and police forces, nurses, teachers, bank employees, stewardesses. FTF was founded in 1952 in opposition to LO, among other things as a protest of the political bonds between LO and the Social democrats. FTF has a membership of 95 trade unions, which are characterised by a large number of small trade unions and a few of a substantial weight, like the nurses and teachers unions. FTF is member of ETUC.
Membership as of January 2004: 358,989

The Danish Confederation of Professional Associations, AC
AC (Akademikernes Centralorganisation) is a political independent umbrella organisation for 22 member organisations that has professionals, graduates and academics as members, and was founded in 1972. Unlike LO and FTF, AC takes part in collective bargaining to the extent authorised by the member organisations. AC is member of ETUC.
Membership as of January 2004: 252,097

The Danish Association of Managers and Executives, LH
LH (Ledernes Hovedorganisation) is an organisation for Danish managers and executives in the private and the public sector. LH is considered a main organi-

sation, in so far as LH represents all managerial staff, but is not a confederation in the sense of the three above mentioned. Membership of LH is direct membership, divided among local organisations. LH takes part in collective bargaining on behalf of the members, and also forms part of bargaining coalitions in the public sector together with unions from LO, FTF and AC. LH is member of The European Confederation of Executives and Managerial Staff (CEC). Membership as of January 2004: 85,000.

Main employers' organisations

There are three Danish main employers organisation. The oldest and most influential is the already mentioned Danish Employers Confederation, DA, which cover employers' associations within industry, building and construction, service, trade and transport. Largest among the DA members is the Confederation of Danish Industries (Dansk Industri, DI), which covers 50% of the total wage sum paid to employees of the DA member companies. The collective agreements concluded by the employers associations of DA cover 650,000 employees, or around 50% of the private labour market.

Employers associations in agriculture are members of the Danish Confederation of Employers' Associations in Agriculture (Sammenslutningen af Landbrugets Arbejdsgivere, SALA), and the financial sector employers belong to the Danish Employers' Association for the Financial Sector (Finanssektorens Arbejdsgiverforening, FA). The six member associations of SALA cover around 50,000 employees in farming, forestry, gardening and dairies. FA covers 60,000 employees in finance and insurance and negotiates one collective agreement for each of the sectors. Member companies of FA have direct membership.

SALA does not take part in collective bargaining, but has concluded a Basic Agreement and a Cooperation Agreement with the employees' confederation LO.

At European level DA is member of UNICE. SALA is member of Geopa; and FA is member the European Banking Federation's Banking Committee, and also of the Comité Européen des Assurances (CEA), the European Insurance Organisation, in their labour relations committee.

Features of social dialogue and conciliation

The social dialogue in Denmark takes place at three levels: at company level, at sectoral and at cross-sectoral level. Negotiations as well as consultations take place at all levels.

Collective bargaining takes place at sectoral and company level. The sectoral level, which is the most important concerning the conclusion of collective agreements in Denmark, provides a framework agreement, including a minimum wage increase, which outlines what can be expected to be further negotiated at company level. Traditional issues like wage and working conditions have been decentralised over the last decades, and the conclusive wage bargaining takes place at company level between the management and the shop steward

and the unions as a consulting party. In the so-called normal-wage area, which cover approximately 15% of the LO/DA area, the negotiations only take place at sectoral level, which means that wage and working time are agreed at the central level without further local negotiations.

The resolution of conflicts in the collective labour law builds upon the distinction between disputes of rights and disputes of interests.

A conflict of right arises where the matter in dispute is already covered by a collective agreement.

In the event of a conflict of right, there is virtually never a right to resort to industrial action or to lock-out. The only exception from this peace obligation that is relevant for employers is cases of lawful sympathetic industrial action or lock-out.

If the case concerns a breach of the collective agreement it must be referred to the Labour Court**.** If, on the other hand, there is disagreement concerning the interpretation of the agreement, the dispute must be settled by an industrial arbitration tribunal (faglig voldgift). The legal regimen of conflict resolution is the Standard Rules for Handling Industrial Disputes from 1910 (Danish abbreviation is "Normen").

Conflicts of interests occur in periods and areas, when and where there is no collective agreement in force, and industrial action, like strikes, lockout or blockade, can be taken provided there is a reasonable degree of proportionality between the goal to be obtained and the means used to obtain it. The freedom applies both to the workers and the employers. Conflicts of interests may occur in connection with the renewal of a collective agreement. In this case an attempt at mediation is made by the Public Conciliator (Forligsmanden) in order to avoid further conflict, i.e. a general strike.

Besides, conflicts of interests may arise between the trade unions and employers not covered by a collective agreement. During the period of a collective agreement in force, conflicts of interests would furthermore arise, if for instance new technology at the workplace creates new work not covered by the existing collective agreement. In both occasions the unions can take industrial action against the employer in order to obtain a collective agreement.

The collective labour law deals primarily with conflicts of rights. Conflicts of interests are mainly political-economical of nature.