

Providing an Alternative to Silence:

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

COUNTRY REPORT: NETHERLANDS

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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The project has been funded with support from the European Commission. The sole responsibility lies with the author and the Commission cannot be held responsible for any use that may be made of the information contained therein.

With financial support from the Prevention of and Fight against Crime Programme of the European Union.
European Commission – Directorate-General Home Affairs



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Country Report

The Kingdom of the Netherlands

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1. Introduction

The Kingdom of the Netherlands has been one of the first countries world-wide to introduce explicit whistleblowing legislation. Ever since 2001, the Netherlands have witnessed an ongoing stakeholder debate and a comparatively quick sequence of further legislative steps.

From the perspective of some of these stakeholders, the landscape for whistleblowers may still look rather bleak, lacking (comprehensive) protection for whistleblowers, provisions for external or anonymous whistleblowing, as well as an independent centre for advice and protection. However, in a consensus oriented culture, progress there is should be attributed to this faithful wrestling between stakeholders, politics and administration. Introduction and implementation of whistleblowing provisions were the result of a complex stakeholder dialogue, marking a remarkable step forward in societal consensus.

For whatever the legislation does, it will by necessity need continuous monitoring and questioning of its effectiveness. In the Netherlands, the home of some internationally renowned whistleblowers¹ and an active academic community, this seen as a work in progress, engaged in a public dialog with politics and administrations about the scope and the effectiveness of the existing regulations.

In a certain formal sense, the Netherlands have a complete set of regulations, rules, and institutions. From another perspective, these rules are limited in their applicability to the public service, and initially, in 2001, just in laid out in an abstract, procedural manner and for yet limited sections of the Dutch public service. In 2001, Art 125 quinquies 1.f. of the Ambtenarenwet (Public Service Officials Statute) introduced a new legal basis. The new law requires the employers of the national public service to give themselves procedures for the reporting of presumed deficiencies. In the same year a model procedure was published (Voorbeeldregeling Klokkenluiders), and soon after emulated for the different administrative branches beyond the national administration, such as the self-regulating political entities (towns, cities, provinces), more recently even to the Police and the Military.

From 2006 a decree had opened ways for public officials to find advice and receive information at the Bureau Integriteitsbevordering Openbare Sector (BIOS).² Soon after an Integrity Commission at the Interior Ministry had been tasked to investigate reports on presumed deficiencies. From 2011 the Office of the National Ombudsman, who had from time to time acted upon request from whistleblowers, became involved as a general advice and information centre. Since 01 October 2012, an independent Whistleblower Advice Centre (Adviespunt Klokkenluiders) has been activated within the office of the National Ombudsmann, with the former CEO of Siemens

¹ Bekende Klokkenluiders listed at

http://nl.wikipedia.org/wiki/Klokkenluiders_melder_van_misstanden

² The Bureau Integriteitsbevordering Openbare Sector, or BIOS (Dutch National Office for Promoting Ethics and Integrity in the Public Sector) is a section of CAOP, the Labour Management Consultancy Service of the Dutch Ministry of the Interior and Kingdom Relations (BZK), and was itself created in 2006.

Netherlands at its helm.³ This Advice Centre has been set up to serve both the public and the private sector. From its conception it had been comprehensively discussed and legislative alternatives had been probed.⁴ While the Advice Centre will be given a fair chance to live up to its promise, it seems safe to assume that the search for further improvements will not stop after the general elections of September 2012.

The private sector relies on an inter-industrial accord published as recommendations by the Stichting van de Arbeid (Labour Foundation consisting of Employer Federations and Employee Unions), which is customarily honoured by Labour Courts.⁵ According to the model rules which came with these recommendations, under certain conditions, reporting to an external organisation (regulator, investigator), should be permitted. While these regulations are not legally binding in a strict sense, they set a certain standard. Currently these recommendations may therefore be regarded like an expert opinion, or good labour practice. Wherever enterprise-wide whistleblowing regulations (codes of conduct or the like) have been introduced, the opinion will serve as their measure in Court. If a private enterprise has not even implemented its own rules on whistleblowing, in theory the recommendations ought to provide equal protection against the harassment of whistleblowers, because laws and labour practice make it clear enough that good employers should not let whistleblowers suffer a detriment.

The public follows the continuing debate which is normally left to experts and academics. There seems to be a general notion that both the reporting procedures and the protection mechanisms still merit considerable thoughts for improvement, whereas these improvements should be reached by small steps, regular monitoring and without discarding whatever has been reached so far.

Overall criticism focuses on the effectiveness of protections (or lack thereof), the independence of reporting recipients and investigators, as well as the quality of advice. Both government and critical experts use the UK PIDA legislation plus the PCaW advice centre as bench marks – yet, without fully agreeing to consequences or conclusions. In 2011 the Socialist Party (SP) introduced a legislative proposal providing for a “House of Whistleblowers,” as an option for making neutral legal advice more readily available. At the time of writing of this overview neither SP participation in a coalition government nor a success of this proposal from the passed legislative period seemed likely. However, the expert group of Whistleblowers unequivocally supports this proposal in its 2012 Black Book.⁶

³ According to a release of 24 May 2012 by the Minister for BZK

⁴ Proposed legislation van Raak

⁵ according to a statement by the STAR

⁶ Zwartboek Klokkenluiders, 2012

2. Whistleblower protection laws

A) Typical laws with explicit reference to whistleblowing

While the Netherlands don't have a standalone act for the protection of whistleblowers, they do have a specific law – since 2001 integrated into the Civil Servants Act⁷, and they do have legal precedents relevant to whistleblowing.⁸

The referenced law, covering most of that part of the working population which is in the Civil Service, consists on the one hand of a formal prescription to implement codes of conduct in the administration,⁹ and therein to include stipulations for whistleblowing.¹⁰ These codes of conduct have been implemented and occasionally been updated, generally following a central template.¹¹ – The model rules explicitly state what whistleblowing is, who whistleblowers are, and that they should not suffer detriments for their whistleblowing.¹² In addition to that official legal comments from the Government further define and explain these regulations.¹³

In order to merit reporting under the Dutch rules, the object of whistleblowing, the presumed irregularities (misstanden) have to concern

- a criminal act;
- an infraction of the rules of public service and government;
- misleading of justice;
- a risk to public health, environmental safety; or
- wilful withholding information on the above facts.

Since 2007 the existing official model rules for the branches of the public administration have been updated and identical ones for the Police and the Armed Forces introduced. Suspicions can now be reported not only regarding ones own employing institution but also in regard to other branches of the public service.

⁷ Ambtenarenwet

⁸ The most recent one of importance arguably from the Amsterdam Superior Court: LJN: BR2582, Gerechtshof Amsterdam, 200.070.341/01 of 14 June 2011; The Supreme Court of the Netherlands (Hoge Raad) has explicitly been referring to whistleblowing (klokkenluiden) since 2003. Ever since that year the Hoge Raad has published at least one decision regarding this subject. The year 2011 even saw eight such instances.; www.rechtspraak.nl

⁹ art 125 quater 3rd paragraph “draagt zorg voor de totstandkoming van een gedragscode voor goed ambtelijk handelen;”

¹⁰ art 125 quinquies 1st paragraph f.) “een procedure voor het omgaan met bij een ambtenaar levende vermoedens van misstanden binnen de organisatie waar hij werkzaam is.”

¹¹ The Province, Communities and Water Regulation Bodies each had their (largely identical) models published in Statsblad

¹² Art 125 quinquies 3rd paragraph: De ambtenaar die te goeder trouw de bij hem levende vermoedens van misstanden meldt volgens de procedure, bedoeld in het eerste lid onder f, zal als gevolg van het melden van die vermoedens geen nadelige gevolgen voor zijn rechtspositie ondervinden tijdens en na het volgen van die procedure.

¹³ Lately incorporated in the Decree: „Besluit van 15 december 2009, houdende een regeling voor het melden van een vermoeden van een misstand bij de sectoren Rijk en Politie (Besluit melden vermoeden van misstand bij Rijk en Politie), Statsblad 2009, 572

Eligible reporters of irregularities are „ambtenaren“ (public officials), only. This is a rather restricted definition oriented toward a formal status – and not e.g. toward the factual proximity to relevant sources of information.

The Dutch rules permit the internal reporting of a mere suspicion, if made in good faith. According to these rules, the reporting persons should not be prejudiced in their legal positions, or according to the newer model rules, “not in any way”.¹⁴ This level of protection (?) is accorded independent of material accuracy or veracity of the reported suspicion.

The exact meaning of “prejudice to legal positions” (nadelige gevolgen voor zijn rechtspositie) does not seem to have been tested in higher Courts. While it should be arguable that health and physical as well as psychological well-being are also protected legal positions, it may seem desirable to qualify protections. Currently the civil servant would have to prove

- a) a damage to his/her legal positions;
- b) the causation by the act of reporting a suspected irregularity;
- c) the unwarrantedness of these damages.

He or she would have a true day in Court. There are no particular stipulations under Dutch law granting potential whistleblowers extra rights, but reinstatement and provisional injunctions are potentially available – as for anyone else.

The model procedures do not provide for confidentiality let alone anonymous disclosures. However, there is a public hotline which accepts anonymous reports – obviously from anyone. The focus of this hotline seems to be more on violence, drugs and possibly organised crime – not so much the public service.¹⁵ Its slogan is “Bel M” (Ring M.), with “M” standing for “Meld Misdaad anoniem.” Its service number 0800 7000 has become popular,¹⁶ and in 2009 an off-shoot was started as “De Vertrouwenslijn.”¹⁷ The purpose of this “Trust line” is to help politically exposed persons such as mayors and councillors resist unwarranted pressure or attempted extortion by offering advice, coaching and an experienced network. While “Bel M.” is a “crime-stoppers” type of citizens’ hotline for the reporting of misdeeds (misdaaden) rather than irregularities (misstanden), the latter may be intended as a backstop against denunciation (bad faith reporting). While anonymous calls are encouraged, the staffing of these services (at the Ministry for BZK or the Police) also remains anonymous. Both services do not provide extra reporting channels in the typical whistleblowing situations.

The most recent model procedures for the public service explicitly provide for “external disclosures.” External, in this case, means contacting the National

¹⁴ e.g. Art 11.1. of the model procedures for the Provinces “De ambtenaar die met inachtneming van de bepalingen van deze regeling een vermoeden van een misstand heeft gemeld, wordt op geen enkele wijze in zijn positie benadeeld als gevolg van het melden.”

¹⁵ Stichting M, financed by National Police and Government, started in 2002, (www.meldmisdaadanoniem.nl).

¹⁶ In 2008 it had received a total of 76.000 calls, which eventually led to 710 cases resolved and goods and moneys in the total value of 1,7 Mio. EUR confiscated, http://nl.wikipedia.org/wiki/Meld_Misdaad_Anoniem

¹⁷ <http://www.devertrouwenslijn.nl>

Ombudsman, or a Commission for Help and Advice to Whistleblowers¹⁸ at the office of the National Ombudsman. The purpose of this latter institution is to provide advice and support upon request

- to public officials who contemplate making an internal report on possible irregularities, and
- to the administrations and their managements.

The Commission may be approached before using the customary line of reporting – if there are good reasons. Eventually it is the “most external” potential recipient of whistleblowing information under Dutch Law. It has no duties or rights to make investigations or to provide specific protection.

The Office of the National Ombudsman, now host to this Commission, was introduced in 1982. Since 1999 it has been recognised as an independent body at the constitutional level. The first paragraph of Article 78a of the Dutch Constitution, reads as follows:

*The **National Ombudsman** shall **investigate**, on request or of his own account, actions taken by central government and other administrative authorities designated by or pursuant to Act of Parliament.*

The Office of the National Ombudsman has indeed established three departments for the purpose of investigating those parts of the administration within its remit.¹⁹ Undoubtedly the person of the incumbent National Ombudsman is respected across all sectors of society, and across the political spectrum. Both the above mentioned proposed legislation by the SP and the whistleblowing experts group, while intending to change procedures to some extent, would want to keep their whistleblowing counsel and protection institutions attached to the National Ombudsman’s office.

While the Dutch laws provide for public officials not to suffer disadvantages in their legal positions, if they make such a report in correctly following the procedures, there are no explicit provision to sanction anyone who should legally or factually inflict damage or suffering to these persons. While the general rules would apply (e.g. provisions in criminal law and in the Civil Service Act), there do not seem to be any reports on sanctions against anyone who may have retaliated against a whistleblower.

There have been two major evaluations addressing the situation of whistleblowing in the Netherlands. One commissioned by the Ministry for BZK²⁰ and one self-commissioned by the Expert Group of Whistleblowers²¹ these complement each other but come to similar conclusions. The existing regulations do not effectively promote internal communication about presumed irregularities; they do not protect whistleblowers, they should be developed – arguably radically – towards the UK model of whistleblowing in the public interest.

¹⁸ Commissie advies- en verwijspunt klokkenluiden, active from 01 Oct 2012, introduced by Decree of 27 Sept. 2011, Statsblad 2011, 427

¹⁹ The first round GRECO Evaluation Report NL, 2003, p. 18, ciph. 60, noted 115 staff at the office and a total of four investigation departments;

²⁰ Bovens et.al. Evaluatie klokkenluidersregelingen publieke sector 2008

²¹ Zwartboek Klokkenluiden, 2012

B) Laws with indirect effect on whistleblowing

For some time, it had been propagated that imposing a duty to report could protect whistleblowers, because the activity of reporting would then be more readily accepted. While this assumption seems worth debating in virtually all accounts, a strictly limited duty to report certain serious crimes can be visited in most legal cultures. Thus nor reporting preparations for a war of aggression, for murder, or more recently money laundering, may in itself be a crime.

In addition to that, in the Code of Criminal Procedure the Netherlands have set up a duty to support criminal proceedings and investigations through the provision of information – essentially by anyone. Article 160 of the Code of Criminal Procedure imposes a duty to report to a criminal investigator any knowledge of specific serious crimes.

If the crime is below this threshold of seriousness, according to Art. 161, anyone who has knowledge of an offence (such as corruption) that has been committed, may report it to said bodies. However, Art. 162 imposes a duty to report *any committed crime* on civil servants and on public bodies as such – if they are not charged with the investigations in the first place.

It would not surprise if reporting statistics under Art 162 were found to be rather low, because a mere suspicion is not sufficient for a duty to report. Usually, it would be too puzzling to know whether a crime has actually been committed, if the person is not even charge with the investigations. And, while failure to comply with this duty will not be sanctioned, a breach of confidence, or a report in bad faith is quite likely to be sanctioned. However, these rules were not entirely synchronised with the newer regulations and rules from and under Art 125 quinquies Ambtenarenwet.

Overall, it seems sufficient to note that the rules in the Criminal Procedure are unlikely to send a signal to support whistleblowing either way. The First Round GRECO Evaluation Report comes to a positive conclusion. Its recommendation to extend the original rules and clarify any possible tensions²² had later been picked up by the improved model regulations by the Dutch Government.

Most Dutch Ministries seem to have their own complaints procedures. These may reflect on whistleblowing practice depending on their openness and communication culture. However as secondary legal materials, they cannot be analysed in this short report.

C.) Self-Regulation (Private Sector)

The Dutch Private Sector has a successful instrument concerned with internal and external lobbying for self-regulation in labour relations. Founded in 1945 the Stichting van de Arbeid (Labour Foundation, StvdA, or recently most commonly STAR) brings together the larger part of employer foundations and trade unions. Arguably as

²² GRECO First evaluation report 2003 at N. 83

reaction to reaction to the Dutch construction fraud scandal in the late 90s, early 2000s, the Ministry of Labour and Social Affairs had asked STAR to develop a (model) code of conduct, which could provide guidance when confronted with an integrity violation. In a 2006 evaluation of whistleblowing procedures, again performed upon request by the Ministry, STAR advised its members to include whistleblowing procedures in all tariffs / collective bargaining agreements.²³

The current version of the STAR recommendations²⁴ has a number of distinct advantages over the model rules for the public sector. Most importantly, while the private sector parties are candid about their primordial interest of keeping the reporting internal, they have understood the UK model to the extent that this interest will be served best, if they explicitly permit responsible outside reporting.²⁵ The STAR explains this approach in words deserving a direct quotation:

“If reporting malpractice externally, the employee should approach the most relevant external party. He or she should consider how effectively that party can intervene and rectify or help to rectify the malpractice. The employee should also attempt to limit the loss or damage suffered by his or her employer as a result of such intervention. In other words, when an employee decides to report malpractice outside the company, he or she should first approach the competent authorities and not the media.

The more serious the malpractice is, the more certain population groups are at risk and/or the more the malpractice persists despite repeated reports, the more justified the employee is in contacting the media. It will clearly not be easy for the whistleblower to argue plausibly that he or she was forced to call in the media to rectify the malpractice or prevent its recurrence.”²⁶

3. Perceptions and political will

It seems remarkable how the country had early on introduced a proprietary term for whistleblowing: *klokkenluiden* (bell ringing), which since then has regularly been used even in legislative materials. It seems that the metaphor of *klokkenluiden* refers to an external process: Bell ringing is meant to facilitate crossing thresholds. Accordingly, the Dutch *klokkenluiden* is a narrower or differing concept compared to what is often called whistleblowing internationally. *Klokkenluiden* does not customarily include internal communication. By contrast and surprisingly, the existing Dutch legislation concerns merely the internal processes, regulates external whistleblowing only by way of omission – and therefore not be expected to make life much easier for whistleblowers: “Melden” is OK, even if it’s only a suspicion; “*klokkenluiden*” is what should be avoided.

The term *klokkenluiden* sounds to outsiders, as though one is talking about an accepted and certainly not tabooed or negatively connotated activity. However, whistleblowing expert Evita Sips believes: “*Klokkenluiden*’ is too much contained with the negative connotations part of the conventional whistleblower framework. We should consider using also ‘whistleblowing’.”²⁷ Language doesn’t necessarily change

²³ Zoon Nauta, Donker van Heel, Evaluatie zelfregulering klokkenluidersprocedures, rapport in opdracht van het ministerie van Social zaken en Werkgelegenheid, 2006

²⁴ Annex 3 to this report

²⁵ Art 5 of the model (Annex 3)

²⁶ re. g), p. 11 in the English version

²⁷ Eva Sips at footnote 364

attitudes, but it is often valuable to pay close attention exactly how words are being used.

Dutch laws, regulations and model rules usually refer to “vermoedens van misstanden” as object of such communication processes. This means a presumption or suspicion (“vermoeden”) is enough to start the process. “Misstand” is a condition in which things are not as they should be, regardless of their underlying cause. This should be stressed, because the legal phrase itself may actually be more sensible than its everyday usage, even in the Netherlands. Beware: the common English translation of “misstand” as “abuse” seems potentially misleading, because “misstand” neither implies an actor or an act, nor a will behind it. Misstand is therefore a comparatively unemotional word, much less judgemental than e.g. “abuse.” Any misstand is an object of (risk) identification and calls for further assessment, possibly a management decision and remediation; whereas an “abuse” is the result of assessments, may call to rally against the presumed responsables, and to sanction them, be it for their inability, or their bad intentions. The label “abuse” raises defences, whereas a label “deficiencies” might call for solidarity and co-operation. However, since deficiency also sounds a bit defective or even ideological, whereas the actual subject matter may even offer more than expected, for the purposes of this country report “misstand” will be translated as “irregularity.” This is also supported by the parallel use of the Dutch word “onregelmatigheden” in the (private sector governance) code Tabaksblad. “Onregelmatigheden” are literally irregularities.

However, what needs to be done about whistleblowing or risk communication has not always been clear. The Raad van State, the ancient organ through which every law has to pass before it may be presented to Parliament did not assume legal whistleblower protection to be necessary.²⁸ This body assumed the Dutch Civil Service to be managed in such a manner that it would react sensitively to any criticism and certainly not treat anyone unfairly, let alone loyal civil servants who in good faith gave internal reports according to the procedures. However, the reality was different, even in the Netherlands, and certainly in the years before the first model rules had come into force.

The first TI NIS Report mentioned how there was limited protection of whistleblowers²⁹. Since then, there have been vast improvements to the counsel potential whistleblowers may request and receive, recently through the Help and Advice Centre. In its 2012 report, Transparency NL remarks that whistleblower regulations are still considered to be ineffective by many, because too many issues are not reported or addressed, and whistleblowing in the private sector remained basically non-existent; because existing procedures only apply to exchange-listed companies.³⁰ However, since apart from the public sector, it is just these exchange listed corporations which have the most employees. Therefore it is probably a majority of Dutch employees which have whistleblowing regulations and processes installed.

It is interesting that only one in ten of those corporations, which have installed a whistleblowing regime, equally encourages their usage and internal criticism. In the last five years, only one company in twenty received at least one report on an

²⁸ Lissenberg, p. 12

²⁹ NIS NL (2001), p. 33

³⁰ National Integrity System, Report Netherlands 2012, p.31

irregularity from one of its employees.³¹ And only about 1.6 – 3.5 % of the employees are (potential) whistleblowers.³² About ten times as many (25%) know the whistleblowing regulations.³³ Thousands of interviewed Dutch employees were overwhelmingly under the impression that reporting or not reporting is largely inconsequential for the resolution of irregularities.³⁴

About half of this small number of employees who have reported an irregularity continue outside because their internal reporting could not resolve the issue. Two thirds of the respondents named as most important reason for external reporting the idea that their internal reporting had not been taken seriously. Others expect more protection after external reporting. On the other hand, the reasons not to carry on outside are diverse: they don't expect benefits from third party activities, they fear a deterioration of work relations with colleagues, received discouraging advice, etc.³⁵

In 2010, the Commission Integriteit Overheid³⁶ received 43 reports. Just two of these were taken up for further investigation. Three persons withdrew their report. 38 reports had been referred back because they were not covered by the rules of the procedure.³⁷

Cases

The pivotal whistleblowing case is arguably what is known as the construction fraud scandal of the late 90s, early 2000s. The fate of that whistleblower (unfortunately coined a “slachtoffer”) made it clear that regulation of the position of whistleblowers was more than just desirable.³⁸ Indeed introduction of the current legislation probably always had this victim or casualty in mind.

The case about the EU Commission and Paul van Buitenen certainly also preoccupied the Dutch public, though it is not exactly a Dutch case.

Recently the Court of Amsterdam was of the opinion that an employee had infringed upon the contractual confidentiality clause in giving confidential information of his employer to a third party (in this case a private banking client). The potential damage to this client was not accepted as a sufficient justification. According to the Court, the employer had to inform his superior or other managers within the company – or else (even indirect) shareholders of the company – about the abuse of his employer before letting go the loyalty and discretion in relation to his employer. Only in case the employer did not react adequately, would it have been acceptable to make public the potentially serious abuse. However, in the latter case, this should have been carried out in a proportional way. Moreover this should be warranted by an important

³¹ De weg van de klokkenluider p.12

³² De weg van de klokkenluider p.12

³³ Zwartboek p. 13

³⁴ De weg van de klokkenluider p.14

³⁵ De weg van de klokkenluider p.14

³⁶ until Oct 2010 the only accessible semi-external body other than the so far non-specific National Ombudsman

³⁷ De weg van de klokkenluider p.14

³⁸ NIS NL, 2012, p.283

public interest. In this case the conflict between the employee and his employer did not meet these criteria.³⁹

A comprehensive study with the largest number of Dutch whistleblowers interviewed came to the conclusion, that most proceedings in Court focussed on the troubled working relationship rather than the irregularities.⁴⁰

4. Strengths, weaknesses and recommendations

The Dutch society arguably has the best informed experts and specialists outside the Anglo-American or Common Law world. Its consensus oriented political system has managed to come up with a stream of continuous steps toward improved whistleblowing procedures.

The debate featured some core values, such as justice for the victims, loyalty, being a good employer/employee, and the protection of corporate confidentiality.

The model rules of the Labour Fund (incorporating Employer Trusts and Trade Unions) are praise worthy for their reasoning as well as their clarity about opening an external communication channel.

The Dutch system seems to take pride in its Labour Fund. So, it should be hoped that external whistleblowing as proposed by the Labour Fund, will soon become law for everybody.

Also, a dedicated, truly independent advisory body for whistleblowers might be desirable. However, realistically no artificial body can be expected to emulate what has grown to be Public Concern at Work in the UK.

It needs to be recognised that Public Concern at Work in the UK is a civil society entity, grown strong by the idealism of a few individuals, and riding on the wave of support by a large coalition across all spheres of society.

While the employers in UK may seem less supportive, their support, as visible in the Labour Fund positions, could be a major asset in the Netherlands.

The Netherlands will benefit, if a desperate attitude of “nothing matters” and “whistleblowers become victims” (slachtoffers) can be betrayed by a more positive reality.

Some stakeholders explicitly realise the value, benefit and necessity of systematically

- assuring that everyone will get heard (a matter of justice and of responsibility in risk identification);
- assuring that all risk information will flow where it is needed and where it will be processed responsibly, preferably internally, but better externally than not at all.

³⁹ LJN: BR2582, Gerechtshof Amsterdam, 200.070.341/01, uitspraak van 14 Juni 2011) and mentioned in NIS NL, 2012, p.276

⁴⁰ De weg van de klokkenluider p.86

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- <https://zoek.officielebekendmakingen.nl>
- www.rechtspraak.nl
- http://nl.wikipedia.org/wiki/Klokkenluider_%28melder_van_misstanden%29
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- <http://www.devertrouwenslijn.nl>

Annex 1

Chart 1

Civil Service Act and Public Service Model Rules

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	Internal only
Broad definition of whistleblower		X		Voluntary regime, only, in private sector. Only public servants in public service
Broad definition of retribution protection			X	No disadvantage of any sort – to legal positions
Internal reporting mechanism	X			
External reporting mechanism			X	To National Ombudsman and Integrity Commission at the office of the National Ombudsman
Whistleblower participation			X	Only in the sense of a time-line in the procedures
Rewards System		X		
Protection of confidentiality			X	Only in the sense that the procedure is designed to have all information stay internal
Anonymous reports accepted		X		Not under the official procedures
No sanctions for misguided reporting	X			As long as done in good faith
Whistleblower complaints authority			X	National Ombudsman
Genuine day in court			X	As for anyone
Full range of remedies			X	As for anyone
Penalties for retaliation			X	Only if generally prohibited
Involvement of multiple actors		X		

Annex 1

Chart 2

STAR Recommendations and Model Rules

	Yes	No	Partial	Notes
Broad definition of whistleblowing	X			
Broad definition of whistleblower			X	Employee, (...) whether or not under working contract
Broad definition of retribution protection			X	No disadvantage of any sort – to legal positions
Internal reporting mechanism	X			
External reporting mechanism	X			
Whistleblower participation			X	
Rewards System		X		
Protection of confidentiality			X	“ not inform others in the company unnecessarily”
Anonymous reports accepted		X		
No sanctions for misguided reporting	X			
Whistleblower complaints authority			X	Now, also the Commission with the National Ombudsman
Genuine day in court			X	As for anyone
Full range of remedies			X	As for anyone, however, since 2009 costs of proceedings can be reimbursed..
Penalties for retaliation			X	As for anyone
Involvement of multiple actors		X		

Annex 2

Legal Material

1.) Ambtenarenwet

Artikel 125 quinquies

1.

Voor zover deze onderwerpen niet bij of krachtens de wet zijn geregeld, **worden voor de ambtenaren**, door of vanwege het rijk aangesteld, bij of krachtens **algemene maatregel van bestuur voorschriften vastgesteld betreffende:**

a.- e. (...) [conflicts of interest, outside employment; insider information;]

f. een procedure voor het **omgaan met bij een ambtenaar levende vermoedens van misstanden binnen de organisatie waar hij werkzaam is.**

2.

(...)

3.

De ambtenaar die te goeder trouw de bij hem levende **vermoedens van misstanden meldt volgens de procedure**, bedoeld in het eerste lid onder f, zal als gevolg van het melden van die vermoedens **geen nadelige gevolgen voor zijn rechtspositie** ondervinden tijdens en na het volgen van die procedure.

2.) Model Procedures

The three tiered procedure provided under Dutch Law has little resemblance of its UK role model:

- (i) [only?] if the relevant hierarchical superior is involved, the whistleblower may address the immediate superior authority;
- (ii) if the whistleblower has some doubts on whether and how to report, he/she may consult a confidential integrity counsellor; and
- (iii) if the whistleblower disagrees with the decision of the hierarchical superior, or no information is provided in a reasonable period of time concerning the outcome of the relevant investigations of the reported suspicions, the whistleblower has the possibility to report to the Central Government Integrity Committee (as a second instance).

(Only] under special conditions - if significant risks are preventing the use of the normal internal channels from reporting suspicions (e.g., one or more senior officials are involved in the suspected misconduct) - he/she may directly report to the Central Government Integrity Committee.

Annex 3

STAR Sample procedure (2010)

Procedural rules for dealing with suspected malpractice

The Labour Foundation believes it is important for employees to be able to report suspected malpractice within their companies by the most suitable means without putting themselves at risk. That requires a proper procedure to be put in place. The methods companies use to do this will depend in part on their size and the nature of their activities.

This annex presents a possible set of rules for dealing with suspected malpractice, based on the basic components of the "Statement on dealing with suspected malpractice in companies".

It is up to local parties to decide which of the following articles should be included – either as is or in amended form – in any procedural rules, given the size and nature of the company or companies concerned.

Section 1. Definitions

Article 1.

In these rules, the following terms shall be understood to have the meanings assigned to them below:

- *employee*: person working for the employer, whether or not under an employment contract;
- *external third party*: an external third party as referred to in Article 6.1;
- *advisor*: the person referred to in Article 4;
- *senior corporate officer*: the person who, either alone or in consultation with others, represents the highest level of authority in the employer's organisation;
- *accountable party*: manager who is accountable, either directly or indirectly, for the unit of the organisation in which the employee works and/or in which suspected malpractice is taking place;
- *superior*: the employee's direct superior;
- *counsellor*: person appointed to act in that capacity for the employer's organisation;
- *suspected malpractice*: a reasonable suspicion regarding facts or circumstances within the organisation in which the employee works that affect the public interest and involve:
 - a. a criminal offence (or the threat of a criminal offence being committed);
 - b. an infringement of rules (or the threat of an infringement taking place);
 - c. a hazard to public health, public safety or the environment (or the threat of such a hazard arising);
 - d. the deliberate misleading of public bodies (or the threat of such occurring);
 - e. a waste of public monies (or the threat of such waste); or
 - f. the deliberate concealment, destruction or manipulation of information concerning these facts (or the threat of such taking place).

Section 2. Internal procedure

Article 2. Internal report made to a superior, accountable party and/or counsellor

1. Save in the exceptions referred to in Article 5.2, employees shall report suspected malpractice to their superiors or, if doing so is not considered desirable, to an accountable party or, if doing so is not considered desirable, to the counsellor. Employees may also report suspected malpractice to the counsellor in addition to their superior or an accountable party.
2. On request, the superior or the accountable party shall document the report in writing, recording the date on which it was received, and shall submit the document to the employee for him/her to sign. The employee shall receive a true copy of the document. The superior or the accountable party shall ensure that the senior corporate officer is notified immediately of the suspected malpractice and the date on which the report was received and ensure that the senior corporate officer receives a copy of the document. If the employee has reported his/her suspicions to the counsellor, the counsellor will also notify the senior corporate officer of the report and the date on which it was received, but doing so only at a time and in a manner agreed with the employee.
3. An investigation into the suspected malpractice shall commence without delay.
4. The senior corporate officer shall send confirmation to the employee who has reported suspected malpractice, referring to the original report made. Confirmation shall be sent even if the employee has told a counsellor of his/her suspicions rather than the superior or an accountable party.
5. The senior corporate officer shall decide whether an external third party as referred to in Article 6.1 should be notified of the internal report of suspected malpractice.

Article 3. Conclusions

1. The employee shall be notified in writing by or on behalf of the senior corporate officer of the latter's conclusions regarding the suspected malpractice, such notification being received within a period of eight weeks of the internal report being made. The notification shall also indicate the steps taken following the employee's report.
2. If the senior corporate officer is unable to report his/her conclusions within eight weeks, he/she or his/her representative will so notify the employee and indicate when the latter can expect to be informed about the conclusions.

Article 4. Advisor

1. The employee may report suspected malpractice to an advisor and request his/her advice in confidence.
2. An advisor may be any person whom the employee trusts and who is bound by professional or official secrecy.

Section 3. Reporting suspected malpractice to an external third party

Article 5.

1. Subject to the provisions of Article 6, the employee may report suspected malpractice to an external third party as referred to in Article 6.1 in the event that:
 - a. he/she does not agree with the conclusions referred to in Article 3;
 - b. he/she has not received such conclusions within the required period of time referred to in Articles 3.1 and 3.2;
 - c. the period referred to in Article 3.2 is unreasonably long given the circumstances involved and the employee has voiced his/her objections to the senior corporate officer; or
 - d. an exception applies as referred to in the following paragraph.
2. An exception as referred to in Article 5.1.d. shall apply in the event that

- a. an acute threat involving a serious and urgent public interest requires an immediate external report to be made;
- b. the employee has good reason to fear reprisals if he/she reports the matter internally;
- c. there is a clear risk that evidence will be concealed or destroyed;
- d. a prior internal report of, essentially, the same malpractice made in accordance with the procedure has not led to the desired effect; or
- e. the employee is obliged or empowered by law to immediately report the matter externally.

Article 6.

1. Within the meaning of these rules, an external third party shall be any organisation or organisational representative, not including the counsellor or an advisor, to which the employee reports suspected malpractice because, in his/her considered opinion and given the circumstances of the case, the public interest being served by reporting the malpractice takes precedence over the employer's interest in maintaining confidentiality, and which, in the employee's considered opinion, can be regarded as capable of rectifying the malpractice or having it rectified, either directly or indirectly.
2. Subject to the provisions of Article 6.3, the employee may report suspected malpractice to an external third party as referred to in the preceding paragraph in one of the cases described in Article 5.
3. The employee shall report the suspected malpractice to the external third party that he/she deems most appropriate given the circumstances of the case, while duly considering how effectively that party can intervene as well as the employer's interest in minimising the loss or damage suffered as a result of such intervention, insofar as such loss or damage is not necessarily the result of measures taken to oppose the malpractice.
4. The greater the risk that reporting suspected malpractice to an external party will cause serious loss or damage to the employer, the stronger the employee's suspicions must be before doing so.

Section 4. Legal protection

Article 7.

1. An employee who has reported suspected malpractice in accordance with the provisions set out in these rules shall not suffer any detrimental effects in his/her job as a result.
2. An advisor as referred to in Article 4 or a counsellor as referred to in Article 1 who works under contract to the employer shall not suffer any detrimental effects in his/her job as a result of acting in such a capacity in accordance with these rules.

Section 5. Effective date

Article 8.

These rules shall take effect on 1 (month) (year).

Annex 4

Legal System Background

The decisions published by the Courts explicitly refer to whistleblowing only in a limited number of cases⁴¹ and may have effectively failed to set up any material standards for the conduct of employers or employees in this respect. However, such a statement would not further the purpose to describe the legal system regarding whistleblowing in the Netherlands. Labour Court Judges would be tending to search for norms with specific rights or obligations and in the lack thereof take recourse to general principles, such as the duty to be a good employer/employee. This approach may or may not render “sufficient” whistleblower protection. Before definitively assessing the situation,⁴² it seems advisable to fully appreciate the Dutch Legal System, at least in regard to whistleblowing.

The legal tradition in the Netherlands is that of Roman Law country with a strong bottom layer, which may be termed “Saxo-Germanic.” This means its legal ecosystem is not easily comparable with that of country in the Common Law tradition. On the Roman Law side, it is arguably a bit closer to France than to Germany. Looking at the legal valves and locks pertaining to “whistleblowing” communication, it is important to understand, especially from a Common Law perspective, that inherent regulation could be effective even without an explicit law and without reference to legal precedents. This is because in the absence of explicit regulations, the legal subjects as well as the Courts have to take recourse either to higher principles (“upward”) or make up their own rules, usually by way of contracts or covenants (downward) which may not conflict with the higher principles. In our case, the latter is encouraged e.g. by offering templates for codes of conduct with whistleblowing procedures.

Courts have not been discovered to have referenced these codes of conduct in whistleblowing cases. Since many of these codes have been in force for more than five years, this observation might point out a lack of legal effectiveness and/or specific protection in these codes. On the other hand, this might show that very few whistleblowers see reasons to go to Court – or else, get a chance to do so. Another less speculative explanation: in the absence of a specific law spelling out rights, or exceptions to duties, the Courts could be hesitant to accept arguments regarding “whistleblowing” – unless “whistleblowing” is accepted as part of a higher principle, e.g. as an aspect of good employership/employeeeship. Whistleblowing is necessary communication about risks.⁴³ Therefore this type of communication could or even should be an accepted obligation of employees. For the same reasons it should also be facilitated by employers, and it should be an established element of good employership/employeeeship.

Dutch Courts do make reference to good employership/employeeeship, a legal institute codified in Civil Law.⁴⁴ In a case involving a whistleblowing situation, however, the Court let the privacy rights of the employer prevail, even though the facts that were to be kept private, qualified as illegal behaviour. The employee did not

⁴¹ according to the official database at www.rechtspraak.nl

⁴² as will be attempted in section 4 of this country report

⁴³ see e.g. Björn Rohde-Liebenau (2006)

⁴⁴ Art 7:611 Burgerlijk Wetboek

convince the Court that he had taken the necessary steps to stop the fraud internally. Therefore, the Court was not tasked to discuss whistleblowing.⁴⁵ At least the Court clarified that only then, only in the public interest, and only in a “proportional” manner would the employee have been permitted to notify an outside party, e.g. indirect shareholders. This case reminds the reader of a large print testimonial by the Government Centre for Information and Training in Labour Management issues:

Een goede meldingsprocedure is onontbeerlijk!⁴⁶
(“A good reporting procedure is indispensable!”)

This slogan is literally the bottom line of a core information brochure from the Government to the benefit of Dutch public administrations. The leaflet has the title “Misstanden bespreekbaar maken is pure noodzaak” (a bit ambivalent and awkward to translate: It’s pure necessity - to lift the taboo of talking about deficiencies; or

- to put discussing deficiencies on the agenda; or
- to bring us in a position to speak about deficiencies; or
- to make deficiencies discussable.”)

The Court could not test this leaflet, because it is not a legal source. However, the leaflet might express generally held values of what is expected of a good employer and a good employee. It seems that the Court saw no reason to ask the employer to prove a good reporting procedure or that there was no inhibition on venting deficiencies, let alone abuses at the workplace. The employer in this case was a private bank, not a public administration. But private banks should arguably be particularly sensitive to deficiencies or abuses to the detriment of their customers. And the Labour Fund (Stichting van de Arbeid) makes exactly the same recommendations to its members. This suggests that as yet a good reporting procedure and an open risk communication culture are not being perceived part of good employership by Dutch Courts.

If one then takes into account the low aggregate numbers of registered internal or external whistleblower reports, the general scarcity of legal precedents, the missing recourse to basic and constitutional rights (e.g. freedom of expression) in balancing juridical arguments in the absence of explicit legislation, as well as the exclusion of effective internal reporting systems from the legal construct of “good employership,” a suspicion that the Dutch legal system around whistleblowing may be ineffective and lacking important elements finds confirmation.

⁴⁵ LJN: BR2582, Gerechtshof Amsterdam, 200.070.341/01

⁴⁶ Information leaflet “Misstanden bespreekbaar maken is pure noodzaak” available for download from the CAOP at www.caop.nl (last access Sept 19)

Annex 5

A Dutch whistleblowing time line

Paul van Buitenen, Dutch National at the EU Commission becomes most visible European Whistle-blower; PIDA is voted on in UK Parliament, the Dutch Construction Fraud Affair becomes public. (Ad Bos)	Van Buitenen publishes his first book "Strijd voor Europa;" first committee of experts confirms van Buitenen's reports; OLAF is installed at the EU Commission	Art. 125 quin-ques Amb-tenaren-wet passed in TK, Decree of 7 Dec 2000; European Parliament officially makes itself available for whistleblowing	Dutch Whistle-blowing rules activated, van Buitenen's reports fully confirmed by group of experts for EU Parliament (EP)	Independent, anonymous reporting hotline "Meld Misdaad Anonoem" starts; EU Commission introduces new set of "whistle-blower" rules in its standards for EU officials	Hoge Raad first concerned with klokkenluiden; rising peer pressure on the private sector through the US Sarbanes Oxley Act of 2002; STAR publishes an official declaration on how to deal with a suspected deficiencies.	Model rules for public administration branches ; van Buitenen founds Party "Europa Transparant" and is elected as Dutch Rep. to EP	Rules implemented in many Dutch administrations	BIOS takes up work; first STAR recommendations for private sector . First expert report for European Parliament declares EU Commission rules on whistleblowing low on standards and detrimental	Review of wb. Rules commissioned by Min. for BZK	Report on effectiveness of rules in public sector (Bovens et.al.) published – Dutch rules miss their goal: few reports and NO protection	Decree on reporting suspicion of abuses in the Government and the Police published	WB rules in Central Gov. and Police activated	Similar rules for Armed Forces; National Ombudsman becomes involved , SP offers alternative " House for Whistleblowers concept ;" second expert report for European Parliament declares EU Commission rules on whistleblowing missing standard.	Whistle-blowing Advice Centre at the Office of the Nat. Ombudsman ; Dutch Expert Group of Whistle-blowers presents Zwartboek Klokkenluiden (Black Book Whistle-blowing)
1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012