



Mutual Learning Programme

DG Employment, Social Affairs and Inclusion

Peer Country Comments Paper – The Netherlands

Trust arrives on foot, but leaves on horseback

Establishing reporting channels in such a way that they meet the aims and expectations of both the reporter and the recipient

Peer Review on “Enhancing whistleblower protection through better collaboration between responsible authorities – a tool to prevent and tackle work-related crime”

Norway, 14-15 February 2019



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1 Introduction

This paper has been prepared for the Peer Review on "Enhancing whistleblower protection through better collaboration between responsible authorities – a tool to prevent and tackle work-related crime" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country (Norway) and the situation in The Netherlands.

2 Overview of key trends

Key trends in work-related crime

During the past years, the Inspectorate of the Ministry of Social Affairs and Employment (hereinafter Labour Inspectorate) has observed an increase in cases and forms of dishonest work, such as underpayment, exploitation, too long working hours, bogus constructions as well as an increase of industrial accidents, work stress and burn-out (Inspectorate SZW, 2018).

Key trends in whistleblower protection

Whistleblowing is an issue that has been taken very seriously in the Netherlands and much debated over the last 18 years. The Dutch term for whistleblower is *klokkenluider*, meaning bell-ringer.

In the definition of the Recommendation CM/Rec(2014)7 and explanatory memorandum of the Council of Europe "whistleblower" means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector. This definition corresponds with the meaning of *klokkenluider*.

In the Netherlands the whistleblowers legislation, that passed in 2016, combines two emerging trends in national whistleblowing arrangements: 1) stand-alone whistleblowing legislation covering both public and private sector and 2) the installation of a government funded whistleblowers authority: *Huis voor Klokkenluiders* (Loyens & Vandekerckhove, 2018).

3 National policy / measures

Stakeholders have diverse approaches to whistleblowing. The aim of whistleblowers themselves is first of all to stop wrongdoing. When reporting wrongdoing they expect praise instead of retaliation. Trade unions want to support whistleblowers in raising their concern and to protect them against retaliation. A corporate culture typified by transparency, due care and integrity may make it possible to avoid and counteract practices that can bring a company into discredit; therefore, business has an interest in clearly defined guidelines about when and how to report wrongdoing internally and externally. National authorities, e.g. in the field of health and safety, environment or fair competition benefit from reports of wrongdoing in the area of their competence; people who work for an organisation or are in contact with it in their work-related activities are often the first to know about such occurrences and are therefore in a privileged position to inform those who can address the problem. The public expects from the government protection from wrongdoing that affects its health, safety, welfare and well-being; the government therefore has an interest in stimulating people with knowledge about threats to the common good to report these.

In the Netherlands there are several channels for workers to report wrongdoing (van Steenberghe, 2017). Already mentioned is the stand-alone whistleblowing legislation, *Wet Huis voor klokkenluiders* (House for Whistleblowers Act). The Dutch Whistleblowers Authority, *Huis voor Klokkenluiders*, is an independent governing body that advises

whistleblowers and investigates both wrongdoing that may harm public interest as well as retaliation against those who have reported it. In addition to the advisory and investigation department, it has also a research and prevention department and it offers whistleblowers psychosocial support (Loyens & Vandekerckhove, 2018). There are coordination protocols between the Whistleblowers Authority and other authorities and regulators such as the National Ombudsman and the Public Prosecutor.

The social partners in the Dutch Labour Foundation, *Stichting van de Arbeid*, agreed on a *Statement on dealing with suspected malpractices in companies*, including a sample procedure for reporting wrongdoing (2003, updated in 2010). This statement declares how a good employer and a good employee should behave in case of reports of wrongdoing. An appeal to this Statement can be a way out when an appeal to the House for Whistleblowers Act is not possible, for instance when the wrongdoing is beyond the scope of the definition of wrongdoing in the Act.

Article 10 of the European Convention on Human Rights providing the right to freedom of expression and information, including the right to impart information, can also give protection when reporting wrongdoing (van Uden, 2013).

Besides national and European legislation, there is sectoral legislation, obliging or empowering the worker to report the matter to the regulator concerned. This legislation also protects the reporting workers against retaliation. More in general, according to the Dutch Civil Code, the employer may not treat an employee unfairly for having properly reported a suspected abuse to the employer or the competent authority either during or after the period in which this report is dealt with.

M. (*Meld misdaad anoniem*) is meant for people who have information about crime, but do not want to talk to the police. By calling M. you can pass on information about crime, anonymously. The *Team Criminele Inlichtingen* (Team Criminal Information) of the *Rijksrecherche* (Criminal Investigation Department) provides the opportunity to share information about crimes in confidence.

PubLeaks.nl is a website for people to leak documents to the media securely and anonymously. The initiative is designed to protect whistleblowers, shed light on wrongdoing and encourage and support investigative journalism.

The *Stichting Expertgroep Klokkenluiders* (Expert Group for Whistleblowers Foundation) has been drawing attention to the fate of reporters of abuses in both the public and private sectors for years. The Expert Group makes a contribution in various ways to improve both the legal and the actual position of the reporters and relatives. All members of the Expert Group have been recognized as whistleblowers and have experienced the consequences in their personal lives.

4 Assessment of public policy implications and success factors

4.1 A comparison

Definitions

In the Netherlands the term *klokkenluider*, thus whistleblower, is usually just used for external reporting about wrongdoing that concerns society or at least persons outside of the organisation of the whistleblower. In the *Statement on dealing with suspected malpractices in companies* a worker who reports wrongdoing internally is called a potential whistleblower. Reporting about work-related crime that only affects the workers in the company normally is not called whistleblowing, no matter if the reporting is internal or external. So, a worker reporting about insufficient protective or safety equipment or bullying and harassment of workers is not considered to be a (potential) whistleblower. This is an issue of appreciation and semantics; it does not mean that a

worker reporting work-related crime does not have the same protection. This also can be a protected disclosure.

Different perspectives

Looking at the three whistleblowing perspectives in the Host Country Discussion Paper, the welfare perspective can be well compared with the public interest perspective of the House for Whistleblowers Act, the efficiency perspective can be linked to the *Statement on dealing with suspected malpractices in companies* of the Dutch Labour Foundation and the democratic perspective shows similarity with the perspective of freedom of expression and information.

Voice through trade unions and HSE representatives

As in Norway collective industrial relations and collective agreements fulfil a key function in the regulation of wages and working conditions. In the Netherlands co-determination at the workplace occurs through the elected works councils. There is no single-channel representation. All enterprises with 50 employees or more are obliged to set up a works council. Since the House for Whistleblowers Act came into force these enterprises also have to draw up a procedure for dealing with reports of suspected wrongdoing within the organisation. This procedure must in any event set out how an internal report is to be handled; describe when a suspected wrongdoing is deemed to exist, subject to the definition in the House for Whistleblowers Act; identify the designated officer(s) to whom a suspected wrongdoing can be reported; set out the employer's obligation to treat such a report confidentially at the employee's request; state that an employee may consult an adviser confidentially about a suspected abuse. Furthermore, the employer is obliged to provide all employees with a written or electronic statement of the procedure and inform them about the circumstances in which a suspected wrongdoing can be reported outside the organisation and about the legal protection for an employee who reports a suspected wrongdoing. The Works Councils Act requires that the works council's prior consent be obtained for decisions to adopt, amend or withdraw a procedure for dealing with reports of suspected wrongdoing within the organisation. There are several models for such a procedure available.

Reporting wrongdoing to trade union representatives is not regarded as whistleblowing, but as an appropriate way to raise a matter of work-related crime. In doing so the reporter avoids retaliation. In cases of reporting wrongdoing that are not work-related, workers can ask trade union representatives for advice and support.

There is no substantive difference between Norway and the Netherlands in the way the right to free expression is relevant and protected in cases of public notification (whistleblowing).

In the Netherlands all officials that receive whistleblowing reports have a duty of confidentiality. It is essential that the whistleblower or reporter stays in charge. He has to be informed about the risks of losing confidentiality and retaliation in order to be able to abandon reporting. Others than the receiver may only be informed if the reporter gives his consent.

The three-tiered system and the role of the supervisory authorities

In the Netherlands employees can report on all three levels. It depends on the circumstances which level or channel is appropriate to report to. Unless this could not reasonably be expected, one has to make an internal report first. The idea is that the employer must have the opportunity to correct the wrongdoing and in this way prevent unnecessary reputational damage. A direct external report is for instance allowed when an acute threat involving a serious and urgent public interest requires an immediate external report to be made; when the employee has a good reason to fear reprisals if he reports the matter internally; when there is a clear risk that evidence will be concealed or destroyed; when a prior internal report of, essentially, the same

malpractice made in accordance with the procedure has not led to the desired effect; or when the employee is obliged or empowered by law to immediately report the matter externally. Also when the employer does not stop the wrongdoing, an external report can be made. The employee will report the suspected wrongdoing to the external third party that she/he deems most appropriate given the circumstances of the case. In this context, consideration should be given to the degree of effectiveness of an intervention by that party and the potential loss or damage suffered by the employer as a result of such intervention. Unlike the Host Country Discussion Paper suggests, this external third party will usually be a regulator or the Whistleblowers Authority. The more serious the wrongdoing is, the more certain population groups are at risk and the more the wrongdoing 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 was forced to call in the media to rectify the wrongdoing or prevent its recurrence. Within this framework the freedom of expression comes in.

4.2 Success factors

The debate in Norway about new provisions as well as the remarks on the inflow of labour trigger a comparison with what already exists in the Netherlands. In both countries the rules for submitting a notification can be hard to interpret. For a clear understanding of the content and the meaning of the House for Whistleblowers Act, the explanatory memorandum and the parliamentary proceedings are important. In many other countries with schemes for whistleblowers protection, the legislation is much more detailed. That is on the one hand an advantage, because it gives clarity and legal certainty. On the other hand, it can force one into a too tight straitjacket and distract from the main principles. In general, workers need assistance to know what could be an effective and safe way to report. Depending on the characteristics and the stage of the case, the worker can be advised to report the wrongdoing within the company first or to the Labour Inspectorate or the investigation department of the Whistleblowers Authority. If for instance the safety culture in an organisation is the main subject of concern instead of a violation of a single safety rule, then the investigation department would be the most obvious option.

It depends on what the aims and expectations of the whistleblower are which channel is the most appropriate one to use for reporting. If these aims and expectations are defeated once, it is unlikely that the whistleblower will report to the same recipient again (Vandekerckhove, 2013). A warning related to this: to prevent potential reporters from giving up, it is important that the receiving regulators and authorities have enough capacity and knowledge to deal properly with these reports. This fits in with the research, mentioned in the Host Country Discussion Paper, indicating a correlation between the choice to notify and the belief that this will make a (positive) difference. Considering this, the advisory department of the Dutch Whistleblowers Authority has a crucial task. It advises and informs individuals who want to report wrongdoing in their organisation and provides free legal advice in every step of the reporting procedure. Its task includes providing information about the reporting procedure, informing whistleblowers about the possible consequences and risks of reporting, giving them advice regarding the decision whether or not to report and referring them to the proper reporting channel(s).

Introducing a "good faith" test should be rejected, if this test puts the whistleblower's motives on trial and puts up a barrier for whistleblowing. In terms of public policy, that is an irrelevant distraction. Prosecutors and other competent authorities do not care about a witness' motives, except for credibility concerns. Whistleblowers should not have to explain their thoughts, justify their reasons and demonstrate their moral purity to escape liability. What counts is the accuracy of their disclosures.

For authorities, regulators and supervisors it is important to put themselves in the position of potential whistleblowers in order to be able to take measures to break down

existing barriers to report. The Labour Inspectorate, for example, makes use of a procedure for foreign victims of human trafficking that makes it possible for them to report this crime without the threat of immediate deportation. Linked to the report is the right of a temporary asylum status, during and for the purpose of the criminal procedure. Linked to this status is the right to relief and (medical) care. The Labour Inspectorate has produced a leaflet *Arbeid en uitbuiting* (Labour and exploitation) as well in several languages. There is also a brochure for European labour migrants, titled *New in the Netherlands*, in several languages. Another page teaches labour migrants how to submit complaints, tips and reports (<https://www.inspectorateszw.nl/contact/complaints-tips-notifications-and-reports>).

Work-related crime and other wrongdoings in the workplace are often reported to trade unions in companies and sectors in which trade unions have a strong position. In various cases these reports concern violations of work-related legislation and/or collective agreements. Therefore it is interesting for both trade unions and the Labour Inspectorate to work together.

The Labour Inspectorate supports the social partners with their monitoring of compliance of collective agreements. If they suspect evasion of a collective agreement, they can ask the Labour Inspectorate to investigate this. The results of this investigation can be used to force compliance in a civil action. Most requests are from the trade union FNV. The *Stichting Vervoersbond Naleving CAO Beroepsgoederenvervoer* (VNB; Transport Alliance Compliance Collective Agreement Road Transport Foundation) has been set up to further compliance of the collective agreements in the sector Transport and Logistics. It has its own digital report channel. At the request of the VNB the Labour Inspectorate investigated a Dutch transport company. Polish workers were working there through a Polish establishment for Polish salaries. With the conclusions of the Labour Inspectorate the requester approached the transport company. By mutual agreement the company ended this construction. Polish drivers now have a Dutch employment contract with Dutch working conditions. In another case the FNV received reports from workers in an employment agency that this agency did not observe the collective agreement. Polish and Hungarian construction workers were deliberately underpaid. This also resulted in unfair competition. The FNV requested the Labour Inspectorate to investigate this. With the conclusions of the Inspectorate the FNV took the matter into court. The court agreed to all the requirements of the FNV. The employment agency had to make additional payments and went bankrupt. The construction company that hired these workers took over the payments (Inspectie SZW, June 2018).

5 Questions

There are some aspects of the debated new provisions of the Norwegian commission that call for further information or clarification:

- What are the aims and expectations of the public interest test? Does this test mean that a complaint that concerns the conditions for a single employee will no longer be protected or only that it will no longer be considered to be a ground for whistleblowing?
- What are the aims and expectations of establishing a separate ombudsman for whistleblowing? Will this ombudsman also advice and support posted and self-employed workers?
- Should the initial notification always be submitted internally in the enterprise concerned, without exceptions? What is the purpose of this proposal?

- How and with what aim should the relationship between whistleblowing and a favourable workplace climate be reflected in the objects clause of the Working Environment Act?
- What would be the nature of the conflicts the separate tribunal should resolve? Will this tribunal deal with violation of provisions? If so, which provisions?

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Annex 1 Summary table

The main points covered by the paper are summarised below.

Overview of key trends

- An increase in cases and forms of dishonest work as well as an increase of industrial accidents.
- Trend to stand-alone whistleblowing legislation covering both public and private sector and the installation of a government funded whistleblowing authority.

National policy / measures

- Several channels for workers to report wrongdoing.
- House for Whistleblowers and House for Whistleblowers Act.
- Sectoral legislation, protecting whistleblowers in a particular field.

Assessment of public policy implications and success factors

- Different channels for different perspectives.
- Voice through trade unions and Works Councils.
- Department giving workers free (legal) advice in every step of the reporting procedure.
- Low barriers to report wrongdoing.
- Cooperation between Labour Inspectorate and trade unions.

Questions

- What are the aims and expectations of the public interest test? Does this test mean that a complaint that concerns the conditions for a single employee will no longer be protected or only that it will no longer be considered to be a ground for whistleblowing?
- What are the aims and expectations of establishing a separate ombudsman for whistleblowing? Will this ombudsman also advice and support posted and self-employed workers?
- Should the initial notification always be submitted internally in the enterprise concerned, without exceptions? What is the purpose of this proposal?
- How and with what aim should the relationship between whistleblowing and a favourable workplace climate be reflected in the objects clause of the Working Environment Act?
- What would be the nature of the conflicts the separate tribunal should resolve? Will this tribunal deal with violation of provisions? If so, which provisions?

Annex 2 Example of relevant practice

Name of the practice:	Aanpak schijnconstructies & cao-naleving
Year of implementation:	2014
Coordinating authority:	Labour Inspectorate
Objectives:	Tackling sham constructions and further compliance with collective agreements provisions
Main activities:	Detect sham constructions and deal with companies deliberately evading rules to reduce labour costs. Supporting social partners with monitoring compliance of collective provisions.
Results so far:	<p>Considering the results and effects, the investigations by the Labour Inspectorate and the follow-up actions by social partners make an important contribution to create a fair labour market, prevent unfair competition and provide good conditions of employment for all workers. To give a few examples: The <i>Stichting Vervoersbond Naleving CAO Beroepsgoederenvervoer</i> (VNB; Transport Alliance Compliance Collective Agreement Road Transport Foundation) has been set up to further compliance of the collective agreements in the sector Transport and Logistics. It has its own digital report channel. At the request of the VNB the Labour Inspectorate investigated a Dutch transport company. Polish workers were working there through a Polish establishment for Polish salaries. With the conclusions of the Labour Inspectorate the requester approached the transport company. By mutual agreement the company ended this construction. Polish drivers now have a Dutch employment contract with Dutch working conditions.</p> <p>In another case the trade union FNV received reports from workers in an employment agency that this agency did not observe the collective agreement. Polish and Hungarian construction workers were deliberately underpaid. This also resulted in unfair competition. The FNV requested the Labour Inspectorate to investigate this. With the conclusions of the Inspectorate the FNV took the matter into court. The court agreed to all the requirements of the FNV. The employment agency had to make additional payments and went bankrupt. The construction company that hired these workers took over the payments [Inspectie SZW (June 2018)].</p>

