

THE STATE OF THE WHISTLEBLOWER PROTECTION ACT IN THE NETHERLANDS

Compliance with the Whistleblower Protection Directive

As a result of the Whistleblower Protection Directive, the Whistleblower Protection Act came into force in the Netherlands on February 18, 2023. While the implementation of the Directive should improve the protection of whistleblowers if implemented correctly, there are significant concerns about the way it is being implemented in the Netherlands. In the transposition process, the Netherlands has opted for a minimalist approach, unnecessary complexity and does still not meet all EU requirements.

In this response to the public consultation of the European Commission on the Whistleblower Protection Directive, Transparency International Nederland (TI-NL) outlines the main issues and shortcomings in the Dutch Whistleblower Protection Act.

Enforcement and sanctions

The Dutch Whistleblower Protection Act does not provide sanctions for violations of whistleblower protection, i.e., retaliation, breach of confidentiality regarding whistleblower's identity, legal proceedings against a whistleblower, obstruction of reporting, and violation of the obligation to have a whistleblowing policy. A commitment to impose administrative sanctions exists, but the sanctions regime still needs to be developed.

In line with the EU Whistleblower Directive (in art. 23) which calls on Member States to take effective sanctions, competent authorities should be given the power to impose sanctions. This is also in line with the OECD recommendations¹ which recommend “providing effective, proportionate and dissuasive sanctions for those who retaliate against whistleblowers”. The Dutch government should comply with all requirements of the Whistleblower Protection Directive and give the Dutch Whistleblowers Authority without further delay, the sanctioning power to impose administrative sanctions on those who break or fail to comply with the Whistleblower Protection Act.² After all, without sanctions, supervision and enforcement are impossible and the law is toothless.

Conditions and thresholds for protection

Under the Dutch Whistleblower Protection Act, a report that does not concern a breach of EU law (which in itself is unclear on the basis of the provisions of the Act) is only considered a whistleblower report if the public interest is at stake. Many whistleblowers run the risk of not receiving protection against retaliation or decide not to report at all as it is very often impossible to determine with certainty whether their report actually contains elements of the 'public interest'.

TI-NL considers that the 'public interest' criterion is often applied too rigidly, and as a result many reports of wrongdoing were not classified as whistleblowing reports, meaning the whistleblower

¹ OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0378, section XXII, sub viii

² Transparency International Nederland: *How well does the Netherlands protect its whistleblowers in comparison to other EU countries? (Hoe goed beschermt Nederland haar klokkenluiders tegenover andere EU-landen?)*, 8 November 2023, <https://www.transparency.nl/nieuws/2023/11/hoe-goed-beschermt-nederland-haar-klokkenluiders-tegenover-andere-eu-landen/>

received no protection. In an attempt to clarify the public interest requirement in the Whistleblower Protection Act, the government has added additional wording that the suspicion of wrongdoing should be either part of a pattern, structural in nature or serious/broad in scope. When explaining these ambiguous conditions, the former Minister of Interior explicitly stated that transgressive behaviour and corruption do not necessarily fall under this definition.

The unnecessary requirement in the Dutch Whistleblower Protection Act that there must be a "public interest" at stake before someone has the right to receive whistleblower protection creates uncertainty and undermines the law in various ways. For example: how does a whistleblower know in advance whether something will be labelled as a 'wrongdoing with public interest'. Isn't every case of corruption or abuse wrongdoing?

In March last year, the Whistleblower Protection Act has been evaluated and the implementation assessment by SEO in collaboration with Leiden University has been published.³ This assessment confirms that the definition of wrongdoing involving the public interest is complex and therefore difficult to understand for all parties involved: the whistleblower, employer and competent authorities. As a result of this complex definition, it is less clear whether the whistleblower enjoys protection.

It is precisely on this point that the court also seems to be siding with us. In October 2024, the court of appeal in Den Bosch ruled that a whistleblower in a nursing home had been wrongfully dismissed. Previously, the subdistrict court judge had found this to be correct, because there was no 'patron', ergo, no 'public interest', so no whistleblower case and protection. The court of appeal in Den Bosch found that the whistleblower was indeed wrongfully dismissed. The whistleblower suspected a homicidal offence, and the court of appeal finds that this is by definition a public interest, even if it is not structural.⁴

While the purpose of the Whistleblower Protection Act is to give whistleblowers certainty, the public interest requirement does exactly the opposite and creates uncertainty for (potential) whistleblowers. In order to provide much-needed certainty to potential whistleblowers and to not miss out on any opportunity to prevent or solve issues at an early stage, TI-NL recommends broadening the legal definition of wrongdoing by removing the restrictive requirement that the public interest must be at stake.

³ SEO, Veilig voor de melder? Invoeringstoets Wet Bescherming klokkenluiders, december 2024: <https://www.universiteitleiden.nl/nieuws/2025/03/rapport-over-bescherming-klokkenluiders-verstuurd-naar-tweede-kamer>

⁴ Court of Appeal 's-Hertogenbosch (Gerechtshof 's-Hertogenbosch): *Whistleblowers nursing hom unfairly fired (Klokkenluider verpleegtehuis onterecht ontslagen)*, 10 October 2024, <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-s-Hertogenbosch/Nieuws/Paginas/Klokkenluider-verpleegtehuis-onterecht-ontslagen.aspx>

Anonymous reporting

Following an adopted amendment by Dutch Parliamentarian Pieter Omtzigt to enable internal anonymous reporting of suspicions of wrongdoing, the government published a proposal in Spring 2024. While many parties responded positively, pressure from employers' associations with the argument of the administrative burden led to the withdrawal of the proposal. However, a recent study by TI-NL into internal reporting mechanisms within the Dutch business community shows that 90% of the 70 companies assessed already offer their employees the opportunity to report wrongdoing anonymously. According to the former Minister, the proposal to require organisations in receiving and handling anonymous reports presents too many practical and legal obstacles. A promise has been made that its implementation will be included in a subsequent amendment of the law, with the submission of a new Bill scheduled for 2026.

There are ample reasons to implement the amendment regarding anonymous reporting as soon as possible. Research shows that the option of anonymous reporting can persuade potential whistleblowers to report suspected misconduct. That applies in particular if there are suspicions that organised crime is involved. Moreover, it can prevent people from feeling compelled to report externally or to go public through the press. Anonymous reporting is an essential aspect of any successful whistleblowing program because it is crucial in promoting the reporting of wrongdoing and provides ultimate protection against retaliation.