

OPEN LETTER SENT BY EMAIL

Mr. Ferdinand Grapperhaus,
Minister of Justice and Security,
Netherlands
- and -
Ministers of Justice of EU Member States

7th March 2019

Dear Minister Grapperhaus and Esteemed Colleagues,

I am writing to you and to the other 27 Ministers of Justice of the European Union on behalf of myself and the WIN Board of Trustees to urge you to support the European Parliament's position on flexible reporting channels for whistleblower in Europe as a matter of urgency.

Briefly, I am Executive Director of the Whistleblowing International Network (WIN), an international network of civil society organisations in 35+ countries around the world that advise, support and work with whistleblowers. I am a lawyer with 19 years' experience in the field; I was Deputy Director of Protect (formerly Public Concern at Work) the non-profit legal advice organisation set up in the UK in 1993 and on which the Netherlands government modelled the Adviespunt Klokkenluiders, the predecessor to the House for Whistleblowers. I was adviser to the Council of Europe's Committee on Legal Co-operation in the preparation of [CM/Rec\(2014\)7 on the protection of whistleblowers](#) and drafted the Explanatory Memorandum. I was also consultant to the UNODC and drafted the [Resource Guide on Good Practices in the Protection of Reporting Persons \(2015\)](#).

The WIN Board of Trustees is composed of experts as knowledgeable as I am in whistleblowing law and practice, if not more so.

Over the years, we have had the honour of working with jurists across Europe and around the world. We have debated how best to transpose international and regional legal principles on the protection of whistleblowers into different national laws and how to reap the benefits of good national practices. It is for this very reason that we are writing to you with such urgency today.

Adopting a directive that imposes mandatory internal reporting as a minimum standard, rather than allowing for flexible protected disclosure channels, will undermine existing laws and legal principles in different Member States, including in the Netherlands. The EU has

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already had to concede a provision to ensure that the directive does not undermine the Swedish Constitution with respect to protecting public servants who have the right to speak directly to the media without interference.

The fundamental purpose of any law to protect whistleblowers is to ensure the free flow of information to exercise responsible institutional authority in the public interest. This must be borne in mind when implementing minimum standards of whistleblower protection across Europe.

Institutions that have the legal powers and mandate to regulate sectoral and individual conduct, including criminal conduct, rely on information from a range of sources. This includes information from individuals and the media. In fact, the House for Whistleblowers in the Netherlands accepts information from any employee reporting to them directly¹ and then rightly determines – based on the information and circumstances of the individual - whether it is more appropriate for that information to be reported internally to the organisation.² There is nothing in the Dutch law or any sectoral laws in the Netherlands that make it an obligation to report concerns internally first, and in fact and quite rightly, the Dutch law removes the legal uncertainty for the individual and puts the onus on the “external” body – the House - to work with the individual to determine the best route. This means that in the Netherlands there is always the capacity for external oversight.

In Austria, for example, the Prosecutors Office³ runs an anonymous hotline that accepts reports from anyone about suspicions of economic wrongdoing or corruption. While there are certainly a number of reports not worth following-up, the Prosecutor’s Office has found it to be a valuable source of information leading to investigations of wrongdoing. Again, while the hotline does not link one’s identity to the report, it would be difficult to understand how a worker whose identity becomes known for whatever reason and who reported a genuine suspicion to a government-sanctioned hotline would fail to be protected because they did not raise the issue internally first.

The Irish Protected Disclosures Act, 2014 is one of the strongest whistleblowing statutes in the EU, cited by the European Commission as providing comprehensive safeguards. Ireland

¹ Wet Huis voor Klokkeluiders (2014) See Article 4 (1) An employee can contact the research department to: (a) report a suspicion of misconduct for an investigation, or (b) to request an investigation into the way in which the employer has behaved towards him in response to a report of a suspicion of misconduct.

² Ibid, see Article 6 The (1) The research department will initiate an investigation within 6 weeks of the date of the petition, unless the research department decides that: (e) the applicant has not reported the suspicion of misconduct to a supervisor, a confidant or another person of the organization in which the alleged misconduct is designated in an internal procedure as referred to in Article 2, unless this cannot reasonably be requested from him / her to do.

³ Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption (WKStA)

enacted the law in response to the collapse of its banking sector and a succession of scandals in government, the police and politics. The Irish law, like the UK's Public Interest Disclosure Act, 1998, allows any worker to directly report to 'prescribed persons' (i.e. regulators) if they believe that the information they are sharing is 'substantially true'.⁴ This means that Irish and UK whistleblowers do not have to first report to their employer.

Like in many other EU Member States where there is no legal obstacle to employees reporting directly outside their employment first, or it is specifically allowed by national law to report to competent authorities, there has no rush by employees to do so. Nor has any regulator or law enforcement body collapsed under the weight of information flowing to it. While only one source of the information that allows regulatory and law enforcement bodies to fulfil their mandates effectively, information from employees is potentially very valuable. It is therefore highly likely that regulatory bodies and government agencies across Europe will continue to set up systems to encourage people to report any suspicions on risks or wrongdoing. This is also a very cost-effective way to get the information they need.

Despite these initiatives, the evidence⁵ shows that the vast majority of individuals will always report to their employers first – the organisations for whom they work and depend. They do so because it makes sense to them. Employees want their organisations to succeed. Even when they can report externally, they very rarely do so, preferring to try to resolve any problems within their workplace.

Mandatory internal reporting is a hugely counter-productive measure and predating legal protection on employees' use of employer-prescribed systems is also highly problematic for the good governance of responsible organisations.

⁴ Ireland, Protected Disclosures Act (2014) Article 7 (1) A disclosure is made in the manner specified in this section if the worker— (a) makes the disclosure to a person prescribed under subsection (2) (a), and (b) reasonably believes—

(i) that the relevant wrongdoing falls within the description of matters in respect of which the person is prescribed under subsection (2) (b), and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

⁵ A 2016 study for the French Ministry of Labour and representative of employees in France found that 57% of workers who reported information disclosed it first to a colleague and 48% to a direct manager. See Technologia (2015) Fraudes, malversations, lanceurs d'alerte... Comment réagissent les salariés français? <http://www.technologia.fr/blog/wp-content/uploads/2015/12/LanceursdAlerteDef.pdf>

Research conducted in 2013 into 1000 British whistleblowing cases, found that in 82 per cent of the cases individuals raised their concern to their employers first. [See Whistleblowing: The Inside Story. A study of the experiences of 1,000 whistleblowers.](#) PCaW (now Protect) & Greenwich University : London, U.K.

The largest business survey in the US has consistently found the range of worker reporting internally first is between 90-97%. See Ethics Resource Center, "Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey," p. 13 (2012)

<http://www.corporatecomplianceinsights.com/wp-content/uploads/2012/05/inside-the-mind-of-a-whistleblower-NBES.pdf>

By focussing on the need to ensure the free flow of information to allow for the responsible exercise of institutional authority, it becomes very clear that mandatory internal reporting creates very real and unnecessary barriers to communication. Exceptions to the mandatory rule do not create objective boundaries for the legal protection of public interest whistleblowing. They do the opposite. It means that individuals who are uncertain about speaking up internally – even when faced with potentially very serious wrongdoing - must guess whether they will be protected for going to the government and will not know if they chose correctly until after a judicial hearing is over. This kind of uncertainty has a chilling effect on those considering whether or how to report a concern. Uncertainty leads to more people choosing to remain silent or resorting to anonymous leaks.

Further, by predicating legal protection on reporting only through specific employer-prescribed systems, the flow of protected information within organisations will shrink dramatically. Most people raise their concerns in the normal course of their work, to managers and supervisors; very few initially consider it necessary or wise to make official reports of wrongdoing. However, under the EU proposals, in order to preserve their rights employees would have to withhold risky whistleblowing information from their normal management hierarchy and instead flood the employer-prescribed designated channel. This institutionalises mismanagement and undermines good governance by blocking the flow of information for the operation of the normal management checks and balances while simultaneously creating a dysfunctional log-jam at an internally designated office.

Finally, mandatory internal reports in any form enable obstruction of justice at bad faith organisations and the EU proposals lock in a three-month grace period to perfect a cover-up as well as provide ample opportunity to discredit and punish the whistleblower before there is any chance for independent external oversight. These unnecessary barriers will impede responsible external whistleblowing in the 3-10% of cases when needed the most. Experience shows that scandals or tragedies in any sector, even when committed by one corrupt or negligent organisation, negatively impacts on all the organisations operating in that sector no matter how well-governed and responsible they are.

It is deeply concerning that the EU proposals – as currently drafted with respect to imposing a strict reporting hierarchy – will make it more dangerous, and therefore more unlikely, that people like Antoine Deltour will speak up in future about serious public interest matters like corporate tax avoidance on a massive scale. If Antoine were to have disclosed the same information under new proposed EU rules, not only would he have faced the same criminal prosecution, he would have been more likely to lose his case. It is also alarming that the proposed rules will do little to increase the early detection and prevention of food safety and health risks, like the contaminated egg scandal that broke publicly in early August 2017. It turned out that the problem originated from a company operating in Belgium and the Netherlands. By mid-August 2017, the European Commission announced that a total of 15

EU states, plus Switzerland and Hong Kong were affected by the spread of contaminated egg products. The Dutch authorities were initially alerted by a tipoff (a “whistleblower”) that fibronil – a banned toxic substance - was being sold and used illegally in farms in the Netherlands as far back as November 2016. The Dutch authorities did not pass this information to authorities in other EU Member States, and there is no evidence to show that anyone else felt able to alert the authorities in Belgium or in any of the other affected countries. Rather than addressing this dynamic of silence in a positive and legally sound manner, the proposed EU whistleblower rules make it even less likely that anyone working in the food industry will feel able to contact the authorities unless they are certain they can prove there is a serious health risk. By that time, it may be too late to prevent harm.

It is because we are so alarmed at this prospect and have had such long experience in the field working with governments, businesses, professional bodies and legislators on whistleblower protection that we write to you now to set out our concerns.

We trust you will accept our submissions in the spirit in which they are offered – to assist you and your colleagues in adopting a progressive and sensible law to protect public interest whistleblowers and strengthen democratic accountability across the European Union.

Please do not hesitate to contact us if you have any questions or wish to discuss any matter set out in this letter.

We remain at your disposal.

Yours truly,

Anna Myers, Executive Director

John Devitt (Chair of WIN), Chief Executive of [Transparency International Ireland](#)

Tom Devine, Legal Director, [Government Accountability Project](#), USA

Annegret Falter, Chair, [Whistleblowers-Netzwerk](#), Germany

David Hutton, Senior Fellow, [Centre for Free Expression Whistleblowing Initiative](#), Canada

Cathy James, Lawyer and Independent Expert on Whistleblowing Law and Practice, UK

Venkatesh Nayak, Coordinator, Access to Information Programme, [Commonwealth Human Rights Initiative](#), India

Vladimir Radomirović, Editor-in-Chief, [Pištaljka](#), Serbia

Francesca West, Chief Executive, [Protect](#), UK