

SQUARE TABLE

**The EU Whistleblowing Directive:
“the interplay with the GDPR and
implementing appropriate
organizational and technical measures”**

Speaker: Geert Vermeulen

December 8, 2021 - Online Webinar

19:00 - 20:00

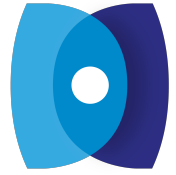
CPE: 1 point



ISACA
Netherlands Chapter

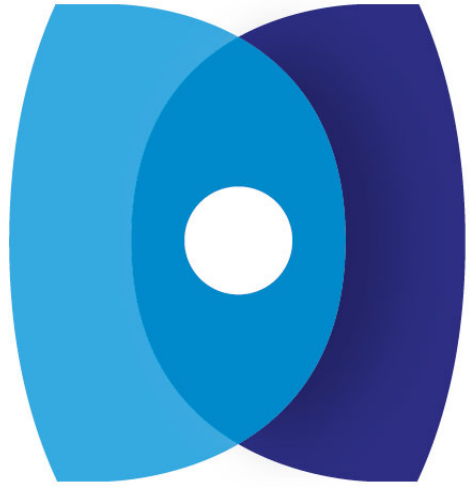
NOREA
DE BEREPSORGANISATIE VAN IT-AUDITORS

Disclaimer: This presentation is for information purposes only, it is not legal advice, especially now that the proposed Dutch law is still a draft



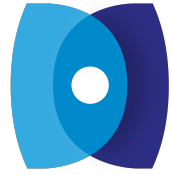
EU Whistleblower Protection Directive & GDPR

1. Introduction
2. Why the new EU Directive? – a short history
3. The benefits of a solid whistleblowing system
4. EU Whistleblower Protection Directive
5. Implementation into Dutch law
6. Data privacy / protection requirements
7. Good practices
8. What is new? What to do now?



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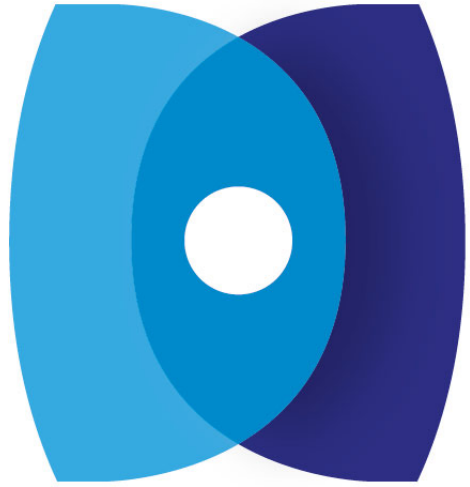
1. Introduction



Introduction: Geert Vermeulen

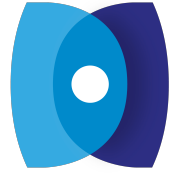
- I help organizations to act in an ethical & compliant way
- Chief Compliance Officer Aon EMEA
- Global Head of Compliance DAMCO
- Director Netherlands Compliance Institute
- Founder/CEO of ECMC
 - Teacher, trainer, speaker
 - Consultant
 - Interim Ethics & Compliance Officer
- Founder/CEO The Integrity Coordinator
- Former President Dutch Compliance Officers Association
- Founder/Chair Expert Group on Financial Economic Crime
- Member Expert Group on Culture & Behaviour
- Prof. Advisory Committee Compliance Minor Hague University
- 2020 Winner of the National Compliance Award





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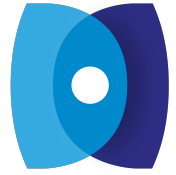
2. Why the new EU Directive?
Short History



2006 - 2009



- Compliance with Sarbanes Oxley legislation
- Rolling out whistleblowing procedures in 60 countries in Europe/Middle East/Africa
- EU countries specifically challenging, each country different, e.g.
 - Data Privacy legislation different in each country / data privacy tier
 - Reports limited to certain categories / or not
 - Reports only about management / or not
 - Anonymous reports sometimes not allowed
 - Approval from the Works Council in some countries

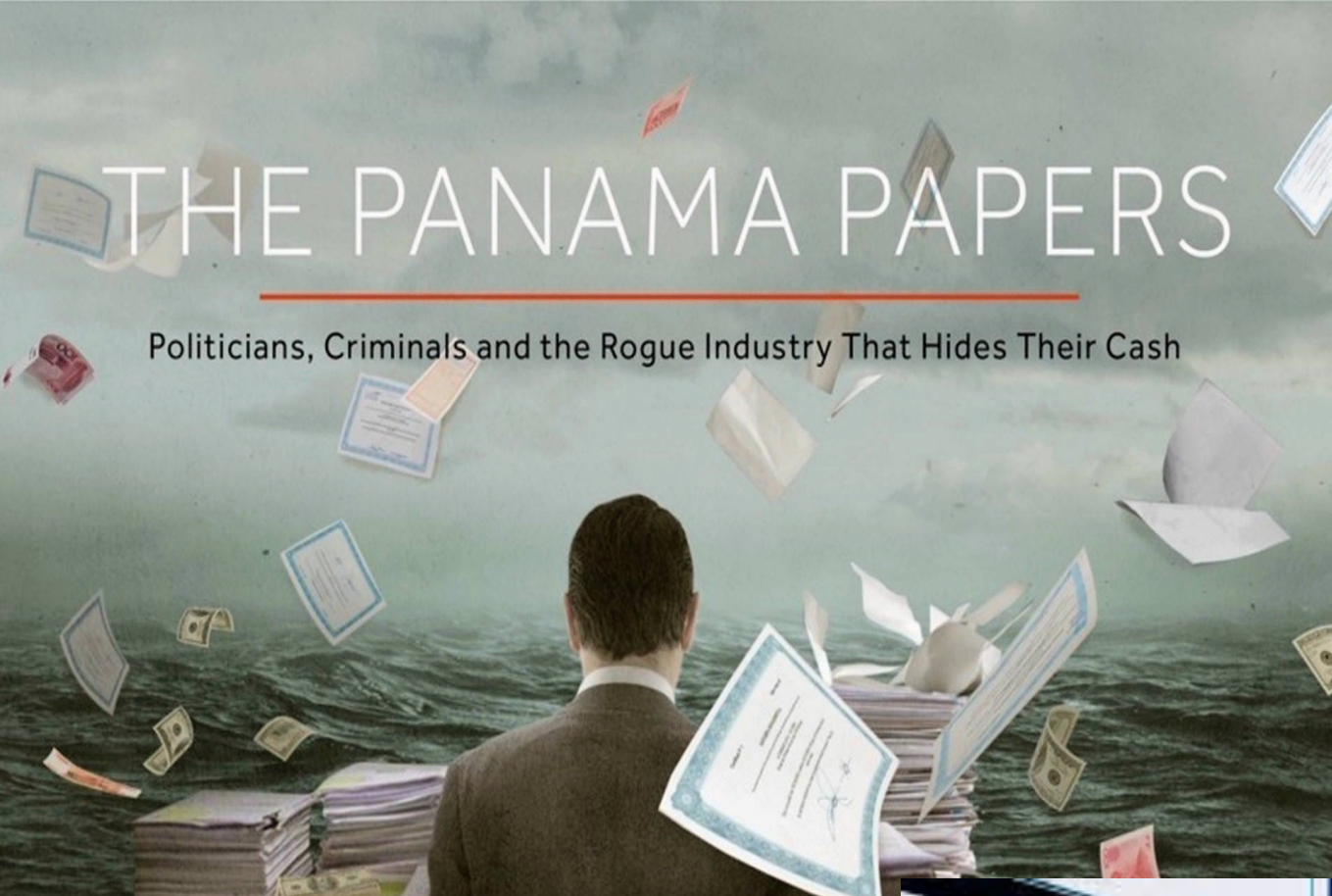


2015-2020

- Public opinion started shifting in the EU countries
- National legislation as well
- Netherlands: Introduced WB legislation > 50 employees in 2016
- Lithuania: Law on Protection of WB, including rewards in 2017
- France: Loi Sapin II=> WB procedure if > 50 employees per 2018
- Ireland: introduced a hotline to report bribery & corruption in 2018
- Italy: Protection whistleblowers end of 2018
- Slovak Rep.: Act on the Protection of WB, incl. rewards 2019
- Germany and Spain allowed anonymous reporting

THE PANAMA PAPERS

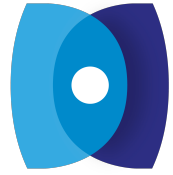
Politicians, Criminals and the Rogue Industry That Hides Their Cash



SWISS LEAKS

THE SECRET FILES OF HSBC





LuxLeaks

- Antoine Deltour and Raphaël Halet (PwC) leaked confidential information about tax deals of large corporations in Luxemburg to journalists in 2014
- Lots of commotion in the press
- Deltour and Halet prosecuted
 - At first instance: 12/9 months jail + € 1500 fine
 - Public commotion, appeal, suspended jail sentence
 - In the end acquitted
- Public opinion shifted / judges as well
- European Commission/OECD: BEPS
- 130 countries have now agreed on a minimum tax%

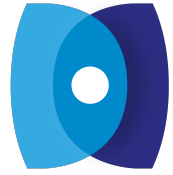




April 23 2018: Proposal European Commission EU Whistleblower Protection Directive

Referring to **LuxLeaks**, **Panama Papers**, **Cambridge Analytica**, first Vice-President Frans Timmermans said:

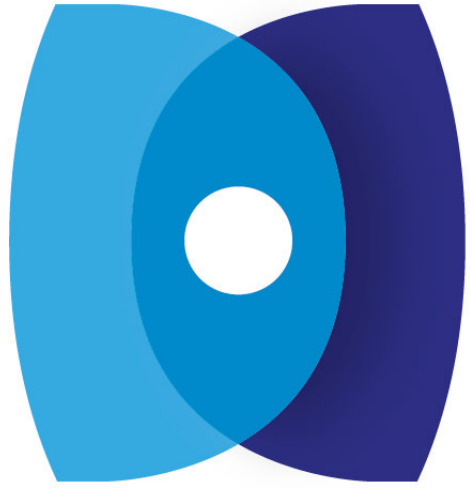
"Many recent scandals may never have come to light if insiders hadn't had the courage to speak out. But those who did took enormous risks. So if we better protect whistleblowers, we can better detect and prevent harm to the public interest such as fraud, corruption, corporate tax avoidance or damage to people's health and the environment. There should be no punishment for doing the right thing. In addition, today's proposals also protect those who act as sources for investigative journalists, helping to ensure that freedom of expression and freedom of the media are defended in Europe."



April 23 2018: Proposal European Commission

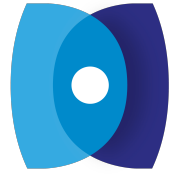
Věra **Jourová**, Commissioner for Justice, Consumers and Gender Equality added: *"In the globalised world where the temptation to maximise profit sometimes at the expense of the law is real **we need to support people who are ready to take the risk to uncover serious violations of EU law. We owe it to the honest people of Europe.***





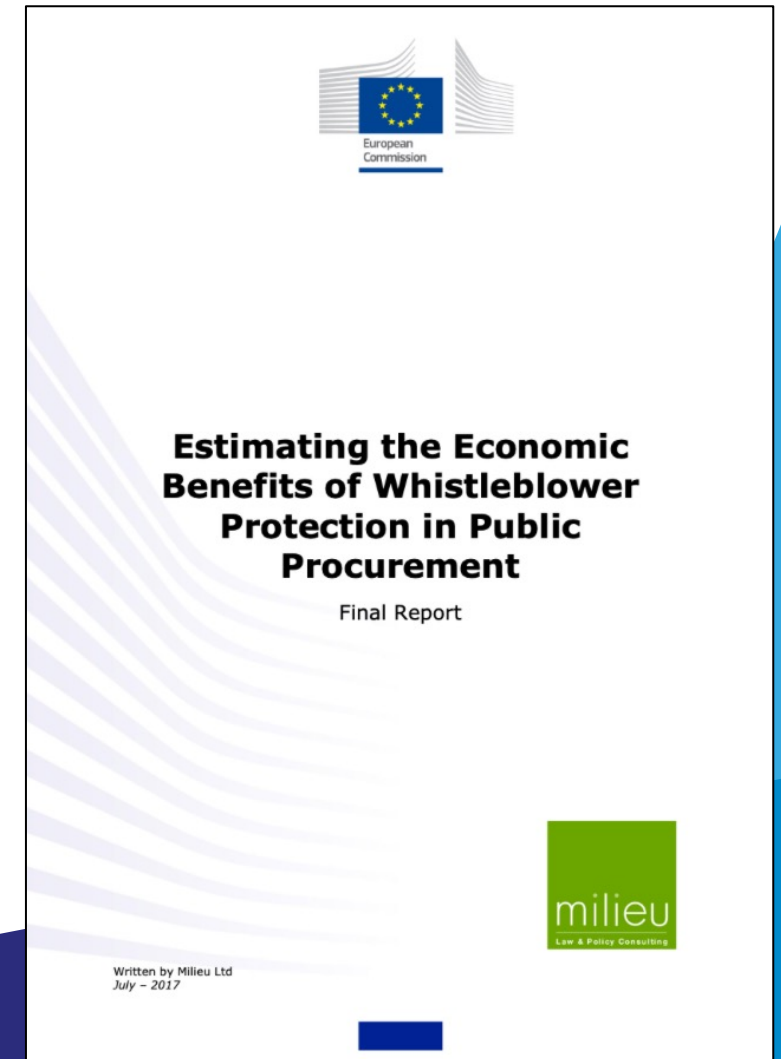
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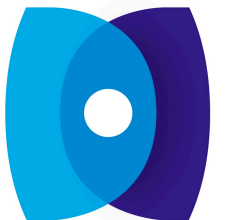
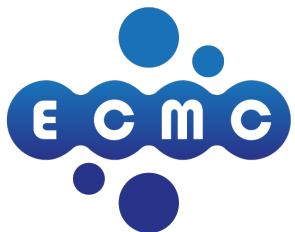
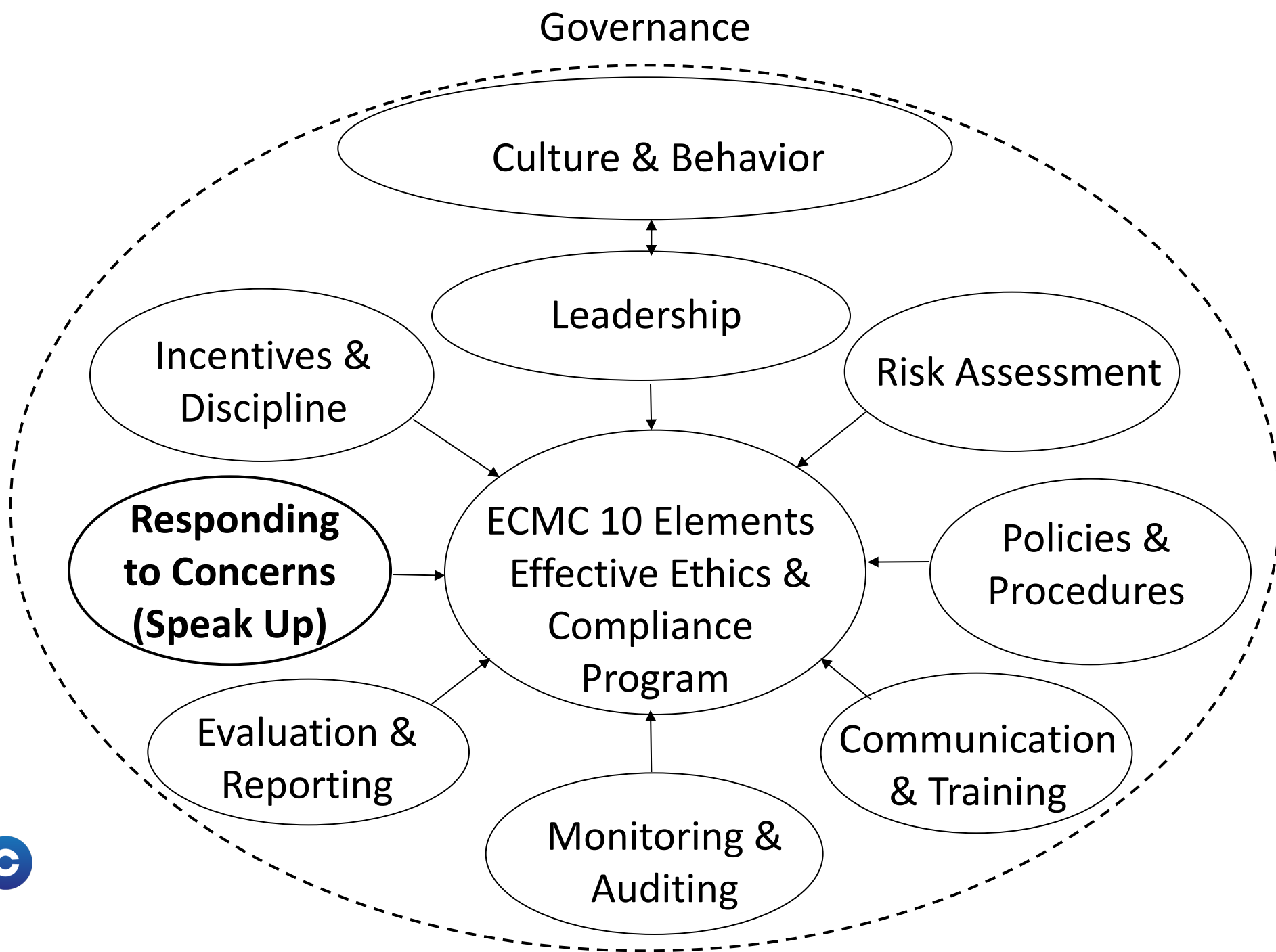
3. A solid whistleblowing system
The benefits

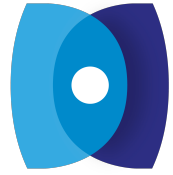


Estimating the Economic Benefits of Whistleblower Protection in Public Procurement

- 2017 study ordered by European Commission
- Solely focusing on public procurement
- Estimates economic benefits of whistleblowing protection in the EU
- Between € 5.6 and 9.6 billion annually

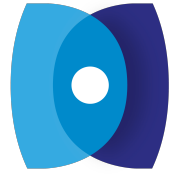






Association of Certified Fraud Examiners

- Average loss due to fraud: 5% of the revenue of a company
- > 50% of frauds are discovered through reporters
- Most of the reporters are
 - 1) Employees (50%)
 - 2) Clients (22%)
 - 3) Anonymous - we don't know who they are (15%)
 - 4) Suppliers (11%)
- You do the math!



George Washington University / Kyle Welch

Companies with more internal whistleblowing reports have:

- Fewer external whistleblower reports
- Fewer litigation costs (20,4 %)
- Fewer material lawsuits (6,9 %)
- Increased return on assets (2,8 %)



Higher ROA

Companies with higher hotline usage have ROA up to 2.8% higher than similar companies with lower hotline usage.

TOTAL SOCIETAL IMPACT

A NEW LENS FOR STRATEGY



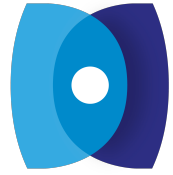
BCG

THE BOSTON CONSULTING GROUP

Boston Consulting Group

Ethical companies
perform better financially in
the long term

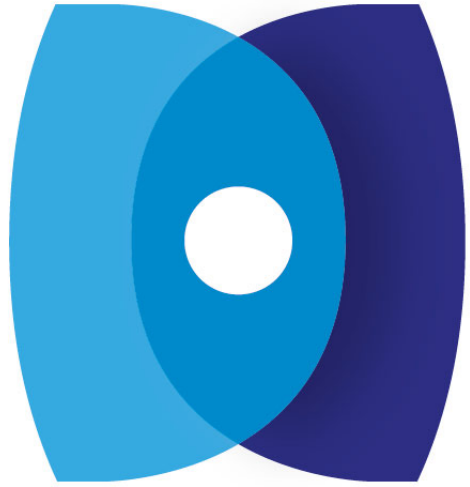
=> ESG investments



Benefits of a good speak-up system

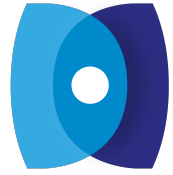
- Identify and address problems early
- Fewer investigation & litigation costs
- Fewer fines
- Fewer management time spent on problems
- Better reputation, attract employees, suppliers, clients
- Transparency/organizational justice will increase the trust
- Stimulates the sharing of knowledge and ideas
- Better, more creative work environment

#Fraud
#Corona
#MeToo
#BlackLivesMatter
#ModernSlavery
#Health&Safety
#Corruption
#Environment
#MoneyLaundering
#Treating Customers Fairly
#Greatplacetowork
#Culture
#Trust
#Compliance
#Creativity
#Ethics



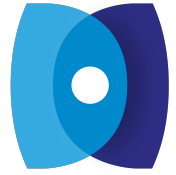
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4. EU Whistleblower Protection Directive
What is new?



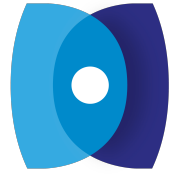
EU Whistleblower Protection Directive

- Adopted by European Parliament & Council on 23 October 2019
- Has entered into force on 17 December 2019
- Has to be implemented on 17 December 2021
- Prohibits retaliation against whistleblowers = primary goal
- Individuals who report wrongdoing encountered in a work-related context
- Protected against dismissal, suspension, demotion, poor evaluation, etc.
- Reversal burden of proof
- Scope = violation of EU law (but Member States can extend the scope)
- Scope includes amongst others 'protection of privacy and personal data (GDPR), and security of network and information systems'



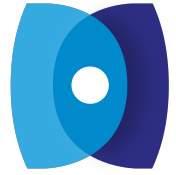
EU Whistleblower Protection Directive

- Reporting internally first = encouraged, but not obliged
- Organizations to set up a confidential & secured whistleblowing procedure
- Reports submitted in writing, orally or both
- In-person meeting upon request of the reporter



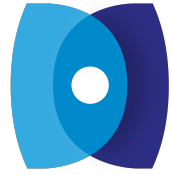
EU Whistleblower Protection Directive

- Separate procedure for each legal entity
 - Is this the end of the global whistleblowing procedure?
 - European Commission: You can have a local and global procedure
 - Report can be sent to HQ if the reporter agrees with that
 - But it should normally be received and investigated locally/per legal entity
- Impartial coordinator (for each legal entity):
 - Somebody or a department who receives the report and somebody or a department who coordinates the follow-up on the report
- And an adviser to the whistleblower
- Entities in the same group with 50-249 employees can share resources
- Organization needs to keep a register of the reports



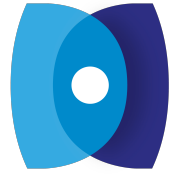
EU Whistleblower Protection Directive

- Confirmation receipt of the report within 7 days, feedback within 3 months
- No fine if you don't have a reporting procedure, but.....
- If the reporter has sufficient reason to believe that no action is taken, or in case of an emergency, reporter can go directly to the authorities/the media
- And is no longer bound by confidentiality clauses
- Reporter can always go directly to the authorities
=> encourage them to report internally first



EU Regulation vs Directive

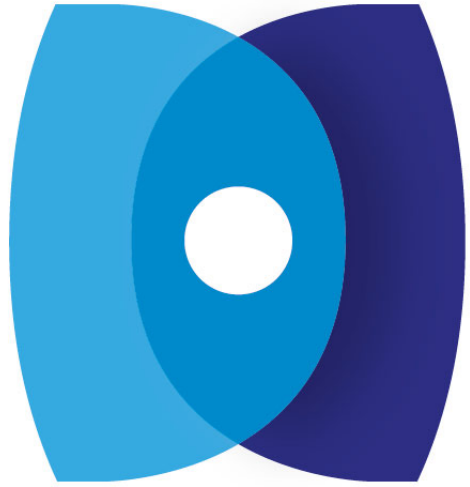
- Regulation:
 - Applies directly in each of the EU Member States
 - For example: General Data Protection Regulation (GDPR)
 - Same in all of the EU
 - Practice: some small differences in interpretation/additional local legislation
- Directive:
 - Sets the minimum requirements
 - Has to be implemented in the national law of each of the Member States
 - For example: 4th/5th/6th EU Anti Money Laundering Directive
 - Practice: notable differences between the EU Member State



Progress

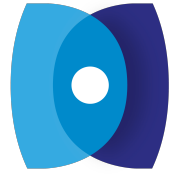
- December 8 2021: Only Denmark and Sweden have fully transposed the Directive
- Brexit: UK not included
- Netherlands:
 - Draft law sent to parliament in May 2021
 - Discussed by parliamentary Committee of the Ministry of the Interior end of September
 - Feedback by parliament submitted October 4
 - Reaction and adapted law expected this week





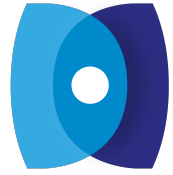
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5. Implementation into Dutch law
Whistleblower Protection Act
Wet bescherming klokkenluiders



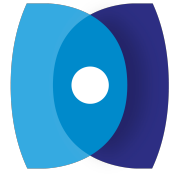
Netherlands: scope

- Existing House for Whistleblowers Law: covers wrongdoing whereby the public interest is at stake (Dutch: maatschappelijke misstand)
- European Directive adds: Violations of EU law
- Whistleblower Protection Act replaces previous law (Wet Bescherming Klokkenluiders)
- Estonia, Latvia, Czech Republic, Denmark, Sweden, Germany relatively broad scope, covering e.g. also breaches of national law and/or serious misconduct
- Does this matter?
- If you want to receive as many reports as possible:
- Allow reports of any violation of the Code of Conduct or other policy or procedure, violations of applicable law, anything that bothers the reporter or if they just have a question



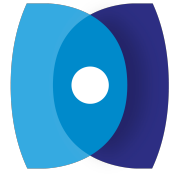
Entry into force in The Netherlands

- As of December 17 2021:
 - All public entities (direct effect of the Directive)
- Start date of the Dutch Law on the Protection of Whistleblowers
 - All private organizations > 249 employees
 - All organizations in financial services, regardless of their size
 - All organizations subject to AML/TF legislation, regardless of their size
 - (e.g. casinos, notaries, law firms, accountants, etc.)
- As of December 17 2023: all organizations > 49 employees
 - However, House for Whistleblowers law already applies now



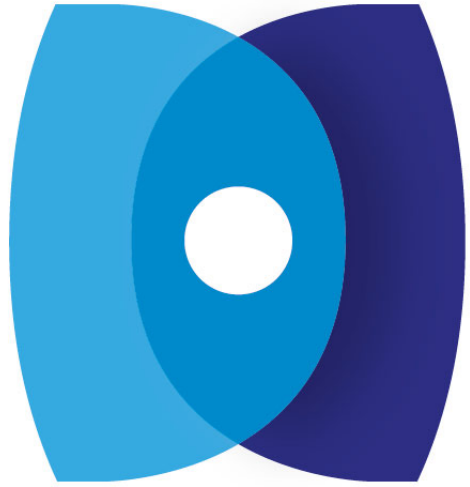
Who can file a report?

- Current Dutch law: Employees (broadly defined)
- EU Directive extends this to everybody in a work related context:
 - Employees, interns, contractors, trainees, volunteers, NEDs
 - But also: shareholders, suppliers, vendors, (agents), employees of suppliers, people who assist the reporter, (companies of) relatives, etc.
- What to do?
 - My suggestion: open it up to anyone on your external website



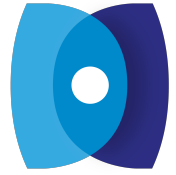
Anonimity

- No obligation to enable anonymous reports in the EU Directive
- However, it is offered as a suggestion to national governments
- Draft Dutch law: No obligation to enable anonymous reporting
- However, identity of the reporter must be kept confidential, unless the reporter agrees that his/her identity is disclosed
- What to do?
 - My suggestion: enable anonymous reports
 - This is a best practice anyway, especially when people are not inclined to report due to fear of retaliation



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6. Data Privacy/Protection Requirements



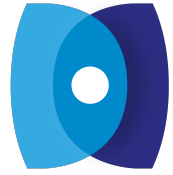
EU WB Protection Directive versus GDPR

Processing of personal data: GDPR applies

- Legal basis: processing is necessary for complying with a legal obligation
- Legal basis: legitimate interest of the organization
- Consent by the reporter when submitting a report

Special category data (health, race, criminal convictions, etc.)

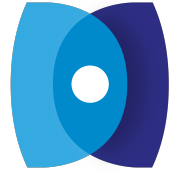
- If there is a substantial public interest or employment law reasons
- Notice to other persons can be delayed if disclosure would impair the case



EU WB Protection Directive versus GDPR

Privacy by design and by default

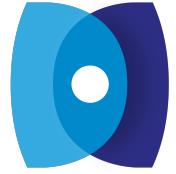
- Requirement: Confidential and secure reporting channel
- Requirement: Keep the report and the identity of the reporter confidential
- So: you should not be able to trace IP addresses, IT may not have access to the reports
- Suggestion: Not via your website; outsource whistleblowing platform to reliable 3rd party
- With appropriate security measures
- International data transfers: Where is the platform hosted? Who has access?
- Limit the number of people who have access, minimize personal data, anonymization?
- E.g. disable or limit the possibility to download, copy or print reports



EU WB Protection Directive versus GDPR

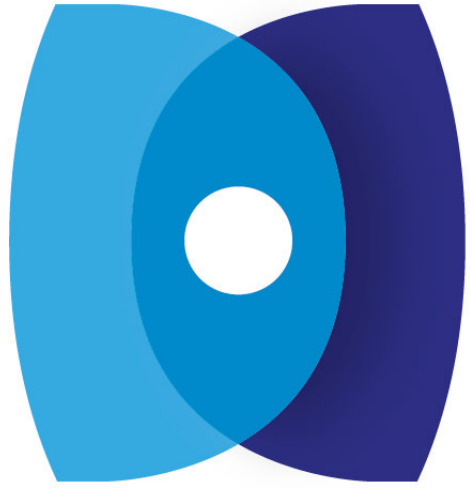
Delete personal data in time

- E.g. if investigated and no action required: delete within 2 months (CNIL)
- But will generally depend on a case by case basis, weighing the various interests



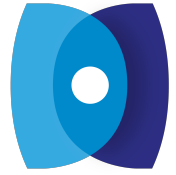
Don't forget

- To enable managers who receive a report to enter it themselves into the register
- To put in place an investigation procedure
- In The Netherlands, the reporting and the investigation procedure have to be approved by the Works Council
- In The Netherlands, the Works Council is obliged to receive an annual report on the whistleblowing procedure



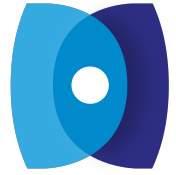
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7. What is new? What to do now?



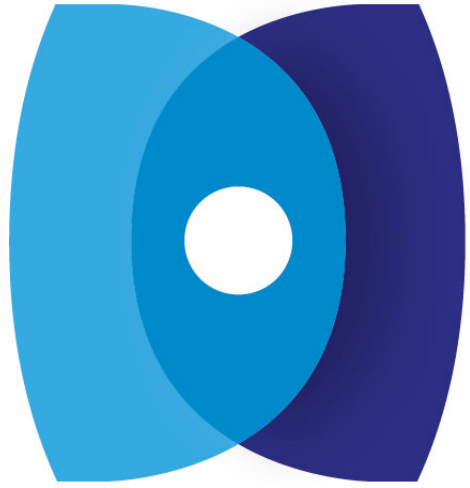
What is new/different?

- Broader definition of protected reporters; covers more organizations
- Reversal burden of proof
- Organizations to put in place a reporting procedure per legal entity
- Reporter no longer obliged to first report internally
- Include reference to public authorities in the reporting procedure
- Confirmation within 7 days, substantive feedback within 3 months
- Confidentiality clauses become invalid if procedure not trustworthy
- Appointment of an impartial coordinator
 - A Compliance/Audit Charter that guarantees independence?
 - External coordinator? Training?



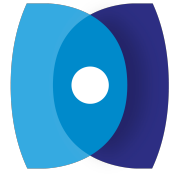
What to do now?

- Identify the coordinator of the whistleblowing procedure
- Make sure the person(s) is/are independent (and competent)
- Start (re)drafting the whistleblowing and investigation procedure
- If necessary: start selecting external whistleblowing platform
- Start the discussion with the Works Council



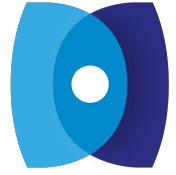
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8. Good Practices



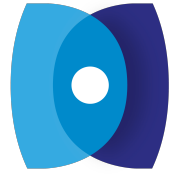
Good Practices

- Encourage people to report internally instead of to authorities/media
- More reports mean better business results
- How to accomplish this?



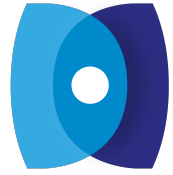
Why do people not report internally?

- They are afraid of the consequences (retaliation, reputational damage)
- They think nothing will happen/change
- They don't know how to report



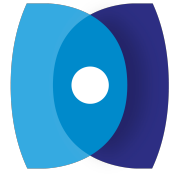
Good practices 1/2

- Short, easy to understand, reporting procedure
 - Think of a good name, e.g. Ethics Helpline, Speak-up procedure
 - Avoiding legal jargon might be challenging, e.g. draft Dutch law:
 - Define breach of EU law and wrongdoing where public interest is at stake
 - Reporter needs to be informed about 8 external reporting channels in The Netherlands and probably more to come, including Data Privacy Authority (AP)
- Make it possible to report anonymously
 - You can't retaliate against somebody who you don't know
- Make the procedure accessible to anyone
 - Include a link on your external website



Good practices 2/2

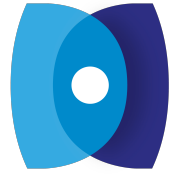
- Create trust; show what happens with the reports
 - Provide regular feedback to the reporter
 - Report statistics (mandatory in NL anyway)
 - Describe an anonymized case once in a while
 - Celebrate reporters / promote an open culture in respect of mistakes
 - Continue to repeat the message / make it personal / who is behind the channel
- Protect (the identity of) reporters, conduct solid investigations
 - Really protect reporters, not just because the law says so
 - Ensure that investigations are conducted fairly, independently, solidly
 - Invite employees to report as soon as possible / at an early stage
 - “Organizational fairness”: treat similar cases equally



The Integrity Coordinator

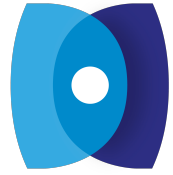
Wat we do:

1. External coordinator of whistleblowing procedures:
 - a. Communicate confidentially with the reporter, discuss the issue with management and coordinate the investigation if needed
 - b. Provide easy to use whistleblowing & investigation procedure, help you communicate it and train relevant employees
 - c. Prepare the mandatory annual report for the Works Council
2. We train your internal integrity coordinator



Draft law + draft guidance

- <https://www.deintegriteitscoordinator.nl/wet-bescherming-klokkenluiders/>
- Contains a link to the draft guidance
- Note: it is expected that the Ministry will submit a revised proposal for the law any moment now
- Sign up for our newsletter: send email to info@deintegriteitscoordinator.nl



Contact

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Your safety net when something goes wrong