

Prof. Dr Wim Vandekerckhove  
University of Greenwich  
London  
w.vandekerckhove@greenwich.ac.uk



**Panel contribution – international lessons for the transposition of the EU Whistleblowing Directive  
Tweede Kamer, the Netherlands, 30 September 2021**

I would like to bring your attention to one of the crucial aspects of the Whistleblowing Directive (2019/1937), namely the reversal or shifting of burden of proof, which not only needs to be adequately transposed, but also effectively implemented. With reference to international developments, I make four recommendations, two related to transposition, and the other two to implementation.

*Recommendations with regard to transposition of Art 21 par 5 (EU Dir 2019/1937):*

1. In reference to recital 28 (EU Dir 2019-1937), the default assumption in proceedings needs to be that there has been a protected disclosure (i.e. in the public interest). A whistleblower does not need to argue that their disclosure was a protected disclosure. The defendant needs to provide convincing ground to establish that the disclosure was not protected. This was already the provisions in the 2014 Irish legislation.
2. In reference to recital 93 (EU Dir 2019-1937), the default assumption in proceedings needs to be that any detriment suffered was in relation to a protected disclosure. It is important to note that the relation that needs to be disproved is not necessarily a causal relation. Rather, it must be clear that the detriment is 'in no way related to' the protected disclosure.

*Recommendations with regard to the implementation of this reversal of burden of proof (recitals 28, 90 and 93, are to expand the legal mandate of the Dutch Whistleblowing Authority to:*

3. Develop and update standards for adjudication on what is not a protected disclosure, and what appropriate processes are for handling whistleblower reports. A key question in adjudication will be whether an employer has done all that can reasonably be expected with regard to due process and protection. International guidance is available. In August 2021, the first international standard on whistleblowing management systems was published (ISO37002:2021). This standard was developed by multi-stakeholder experts from 40 countries and liaison bodies. An example of what a regulator regards as due process in proactive protection of reporting persons can be found in Australia (ASIC RG 270 from 2019). Examples of companies operating trustworthy whistleblowing management systems can be found in Kenny, Vandekerckhove & Fotaki (2019).
4. Support adjudicators in whistleblowing proceedings to take a process view. Whistleblowing is not a one-off decision, but gradually emerges from critical voice to formal reporting. Detrimental action often starts before the formal reporting but is nevertheless related to it. The French whistleblowing authority (Défenseur des droits) has a proper policy on this: In its Annual Report 2020, we can read: 'Indeed, protection against retaliation, if it arises from the "formal" report issued by the employee in writing, must extend to the employer's decisions taken previously, as long as they are the consequence of the informal reporting that preceded the report.' (p 88).

Although the Netherlands is taking leadership together with France, in developing a network of national whistleblowing authorities – potentially an emerging European model – I have noted elsewhere that the Dutch agency advocates a process view but fails to use a process epistemology (see Vandekerckhove 2021).

I have every trust that the Dutch Whistleblowing Authority will be able to develop appropriate standards and benchmark protocols in its service to whistleblowers, employers,

and adjudicators. What I recommend legislators to do in this transposition of the EU Directive, is to give the Dutch Whistleblowing Authority the mandate to enforce these standards, in binding rather than advising ways. France has shown that the advisory power of an ombudsman is not enough – its advice was not followed by policy makers and adjudicators (see its annual report 2020). On the other hand, the requirement in Serbian whistleblowing legislation (2014) that judges adjudicating a whistleblowing case need to have had training provided by its national whistleblowing authority, has had an impact. (see IBA-GAP 2021).

Appendix – relevant parts of the EU Directive 2019/1937.

Recital 28

(28) While this Directive should provide, under certain conditions, for a limited exemption from liability, including criminal liability, in the event of a breach of confidentiality, it should not affect national rules on criminal procedure, particularly those aiming at safeguarding the integrity of the investigations and proceedings or the rights of defence of persons concerned. This should be without prejudice to the introduction of measures of protection into other types of national procedural law, in particular, the reversal of the burden of proof in national administrative, civil or labour proceedings.

Recital 93

(93) Retaliation is likely to be presented as being justified on grounds other than the reporting and it can be very difficult for reporting persons to prove the link between the reporting and the retaliation, whilst the perpetrators of retaliation may have greater power and resources to document the action taken and the reasoning. Therefore, once the reporting person demonstrates prima facie that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure

Art 21 para 5

In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds.

Recital 90

(90) Competent authorities should provide reporting persons with the support necessary for them to access protection effectively. In particular, they should provide proof or other documentation required to confirm to other authorities or courts that external reporting has taken place. Under certain national frameworks and in certain cases, reporting persons may benefit from forms of certification of the fact that they meet the conditions of the applicable rules. Notwithstanding such possibilities, they should have effective access to judicial review, whereby it is for the courts to decide, based on all the individual circumstances of the case, whether they meet the conditions of the applicable rules.

## Appendix – other references

ASIC RG 270, November 2019: Whistleblower policies: <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-270-whistleblower-policies/>

Défenseur des droits (2020). Annual Activity Report 2020: [https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/defenseurdesdroits-annualactivityreport2020-en\\_01.pdf](https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/defenseurdesdroits-annualactivityreport2020-en_01.pdf)

IBA-GAP (2021). Are whistleblowing laws working? <https://www.ibanet.org/article/ee76121d-1282-4a2e-946c-e2e059dd63da> (International Bar Association - Government Accountability Project)

ISO37002:2021. Whistleblowing Management Systems Guidelines: <https://www.iso.org/standard/65035.html>

Kenny K., Vandekerckhove W., Fotaki M. (2019). The whistleblowing guide: speak-up arrangements, challenges and best practices. Wiley Finance: <https://onlinelibrary.wiley.com/doi/book/10.1002/9781119360742>

Vandekerckhove, W. (2021). De Nederlandse autoriteit klokkenluiden: de nieuwe visie en de oude koek: <https://wimvdk.wordpress.com/author/wimvandekerckhove/>