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New Dutch Rules on Whistleblower Policy and the Creation of an Institute for Whistleblowers

It took the Dutch legislature several years to approve new legislation concerning internal whistleblower policies for companies, but the Dutch parliament finally approved a new bill on March 1, 2016 that makes provisions for internal whistleblower policies. One of the main provisions is the creation of an independent administrative body called the Institute for Whistleblowers.¹ Furthermore, the bill will establish new rules for internal whistleblower policies as part of corporate governance. The bill still has to enter into force but the Dutch government already agreed that it needs to further incorporate a provision of additional legal protection to whistleblowers who are independent contractors or otherwise not classified as an employee. In this *GT Alert*, we review the newly adopted bill and emphasize the most important changes to current Dutch corporate governance rules that operate on a “comply or explain” basis.²

1. Internal Whistleblower Policy and Legal Protection to Non-Employees

The aim of the new legislation is to give employees the opportunity to report suspected misconduct, but to require them to do so internally, first. To that end, companies must have internal policies in place that must be known to the

¹ Explanatory Note II, 2014-2015, nr. 6, p. 3, Article 3(1), (2), (4).

² Please also note article 61 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC: “(2) The mechanisms referred to in paragraph 1 shall include at least: specific procedures for the receipt of reports on breaches and their follow-up; appropriate protection for employees or persons in a comparable position, of obliged entities who report breaches committed within the obliged entity [...]; clear rules that ensure that confidentiality is guaranteed in all cases in relation to the person who reports the breaches committed within the obliged entity, unless disclosure is required by national law in the context of further investigations or subsequent judicial proceedings. (3) Member States shall require obliged entities to have in place appropriate procedures for their employees, or persons in a comparable position, to report breaches internally through a specific, independent and anonymous channel, proportionate to the nature and size of the obliged entity concerned.”

employees. Therefore, the new legislation is part of corporate governance. As employees remain under a civil law obligation to act as a good employee, they should report suspected misconduct in good faith, when there are reasonable grounds to suspect misconduct.³

In line with the general characteristics of Dutch corporate governance of “comply or explain,” internal corporate policies should be drafted by the companies and can be adapted to the companies’ needs and context, but the bill sets certain basic rules that must be included in the policies of the individual companies. For instance, companies should provide a definition of the term “suspected misconduct” to their employees, and the legislative proposal suggests the following definition to include in company policies: the suspicion of a misconduct where: (i) the suspicion is either based on reasonable grounds and based on the employee’s personal knowledge he or she acquired with his employer, or the suspicion is based on knowledge the employee obtained with another company or another organization, and (ii) the public interest is at stake (*e.g.*, there exists a risk to general health, a risk for the safety of persons, a risk for the environment, or mismanagement).⁴

Additionally, the new legislation provides that the internal policy must state to which officers an employee should report the alleged misconduct, and it must provide a description of the reporting process and procedure. If the employee so wishes, the report will be treated as confidential. The employee should also be given the possibility to consult an adviser, be it a lawyer or designated officer in the company. The internal policy should be made available in hard copy or electronically.⁵ If a corporation has a works council, the works council must consent to the internal policy before it is published internally.⁶

One of the key hallmarks of the new legislation is that companies may not retaliate against employees that report potential suspected misconduct, and this prohibition applies both internally and externally.⁷ As stated, the new whistleblower legislation does not only apply to employees, but to the entire workforce, which includes trainees as well as independent contractors. Furthermore, the Dutch Senate voted in favor of a motion to amend the current bill to extend the legal protection afforded to employee-whistleblowers to whistleblowers who have worked for the company in the past, whether or not on the basis of an employment contract.⁸

2. Institute for Whistleblowers

One Independent Administrative Body, Two Divisions: Advisory and Investigation

Under the new legislation, the Institute for Whistleblowers (the “Institute”) will be established as an independent administrative body and it will have two tasks: (i) to advise, and (ii) to investigate.⁹ The Institute will be divided into two divisions, so as to separate these two different tasks and prevent any conflict of interest. The advisory division of the Institute will inform, advise, and support the whistleblowers, and refer the case to governmental bodies or services that have investigative or supervisory powers¹⁰, while the investigation division will decide whether to investigate a reported issue and will conduct the investigation itself.¹¹

³ A) Materially and B) procedurally carefully: A) report internally first, if necessary at the highest level, unless that can reasonably not be expected or whether it would go against public interest; and B) suspicion should be based on reasonable grounds, report if it is in the public interest / if it concerns a public interest, and if the external publication of the alleged misconduct prevails in relation to the interest of the employer by keeping it confidential.

⁴ Paraphrasing and summarizing the definition provided in Explanatory Note II, 2014-2015, 34 105, nr. 6, Article 1(d).

⁵ Explanatory Note II, 2014-2015, 34 105, nr. 6, p. 2, Article 2(2) and (3).

⁶ Explanatory Note II, 2014-2015, nr. 6, p. 12, Article 18d on a new addition to Article 27 Act on Works Councils (“WOR”): Article 27m WOR.

⁷ A new article for such a general prohibition of retaliation of whistleblowing is being incorporated in the Dutch Civil Code: Article 7:658c BW. See Explanatory note II, 2014-2015, nr. 6, p. 11, Part E, Article 18.

⁸ Motion Bikker c.s. approved on March 1, 2016, see Explanatory note I, 2015-2016, 33 258 / 34 105, p. 1-2.

⁹ Explanatory Note II, 2014-2015, nr. 6, p. 3, Article 3a(1); and Explanatory Note II, 2014-2015, 24 105, nr. 7, p. 2-4.

¹⁰ Explanatory Note II, 2014-2015, nr. 6, p. 3, Article 3a(2).

¹¹ Explanatory Note II, 2014-2015, nr. 6, p. 3, Article 3a(3).

The Institute has a board that consists of a chairperson and a maximum of four board members. The members of the board and the chairperson are appointed by Parliament, which also has the power to suspend and dismiss members. The board will be supported by a team that consists of advisors for the advisory division, and investigators for the investigation division. As the divisions are completely separate, no one person can serve as both an adviser and an investigator.

Employees Must Report to the Company First

Under the new bill, employees can only initiate an investigation with the Institute if they have reported internally first. A general exemption to report internally is provided in cases where it would be unreasonable to expect an employee to report to the company. After a report has been filed, only the whistleblower can decide whether to enter into the investigation phase and determines which documents can be included in the investigation.¹²

Institute Will Report Findings Which Will Be the Basis of Any Criminal Enforcement

With regard to the investigation of alleged corporate misconduct, the investigators of the Institute have limited powers, compared to an investigation in the public sector. However, corporations are still under the obligation to provide requested information and to provide and disclose documentation.¹³ After an investigation, the Institute will produce a report and decide whether to make any recommendations to the company concerned. However, the recommendations are not legally binding and do not constitute any civil liability or suspicion of criminal conduct. The reported findings can, however, lead to criminal enforcement. Any information not included in the report remains confidential¹⁴ and the published report will not include the name of the whistleblower.¹⁵

With this new legislation, the Netherlands has made a shift in how it treats whistleblowers, by elevating their status and strengthening their legal protection. Companies doing business in the Netherlands should review their internal policies to see if they meet the threshold criteria outlined above and should consult with counsel regarding next steps to ensure compliance. Although the new Institute seems a powerful tool, it remains to be seen whether it will deal with many reports filed by whistleblowers. Much will depend on how the Institute will take on its new roles of advisor and investigator.

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¹² Explanatory Note II, 2014-2015, nr. 6, p. 6, Article 3l(3) and (4). The investigation is initiated with an application that should satisfy the basic requirements in Article 5 (signed by the applicant or his/her attorney, name and address of the applicant, date of submission, description of the misconduct, including the name of the employer and basis of suspicion; and a Dutch translation if application is in a foreign language (by application of Article 9:28 Awb (general administrative law)).

¹³ Explanatory Note II, 2014-2015, nr. 7, p. 4 (Onderzoeksbevoegdheden).

¹⁴ Explanatory Note II, 2014-2015, nr. 6, p. 5, Article 3j.

¹⁵ Explanatory Note II, 2014-2015, nr. 6, p. 5, Article 3k.

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