

**PROVIDING AN ALTERNATIVE TO SILENCE:  
TOWARDS GREATER PROTECTION AND SUPPORT FOR  
WHISTLEBLOWERS IN BELGIUM**

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## **1. Introduction**

The federal state of Belgium is comprised of the Dutch speaking region of Flanders in the north and the French speaking southern region of Wallonia. The Brussels-Capital region, officially bilingual, is a mostly French speaking enclave within the Flemish region. There is a small German speaking community (1%) which administratively is part of the Walloon region.

Each region has its own parliament, government, public administration and civil service. There is also a federal parliament and government which has mandates over parts of foreign affairs, defense, justice, finance, social security, public health, and internal affairs.

Which political level (regional or federal) mandates which policy domain has been and remains an important political and economic debate in Belgium. Given this complexity, we have chosen to analyze perceptions and political will with regard to whistleblower protection separately for the public and the private sector.

We present summaries for both parts first, and explain the methodology used to prepare this report. Then we proceed with the analysis of whistleblower protection in the Belgian public sector, and after that with the analysis for the private sector. Finally, we summarize in SWOTs and conclude with a suggested action plan for both sectors.

## 2. Summary

In the federal state Belgium, whistleblowing legislation exists at the Flemish level. The policy covers wrongdoing in the Flemish public sector, and stipulates a two-tiered approach (Vandekerckhove 2010): line manager or internal audit at the first tier, and the Flemish Ombudsperson at the second tier. The Ombudsperson reports to parliament, and data on how the policy works is available through the annual reports.

At federal level, a number of Bills have been submitted over the past years. All but one of those mimic the Flemish whistleblowing legislation. The exception is the most recent Bill, indicating some political and institutional will at federal level. However, this current Bill seems to make procedures for whistleblowers too complex, and also lacks an identified body for investigating whistleblower concerns.

There seem to be two urgent challenges with regard to public sector whistleblowing in Belgium. The first is to ensure an agency is identified in the federal whistleblowing Bills that can realistically investigate whistleblowing concerns. The second challenge, at Flemish level, is to improve remedies for the whistleblower by including confidentiality and reinstatement options.

More long-term challenges include whistleblower protection at the level of the Brussels Capital community, at the level of the Walloon Region, and in the private sector.

There seems to be a critical mass (i.e. a minimum amount) of political and institutional will at Flemish level to further improve whistleblowing<sup>1</sup> practices and policies. At federal level, such a positive will seems to be growing at institutional level more than at political level. An important positive change in the Walloon press is the connotation of whistleblowing<sup>2</sup> with civic responsibility and hence as pro-social behaviour.

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<sup>1</sup> The Dutch word for whistleblower is 'klokkenluider' which translates as 'bell ringer'.

<sup>2</sup> The French word for whistleblower is 'lanceur d'alerte' which translates as 'alert launcher'.

Our research on the private sector finds that in Belgium, employees tend to raise their concerns about workplace malpractice in the wrong place, i.e. informally with people they trust but who may not be able to take the required action. There is no culture of silence, although whistleblowing hotlines are generally disliked and not used.

There are currently no legal protections for private sector whistleblowers in Belgium. The routes suggested by policy makers are not viable for whistleblowers. Some progress has been made in the area of corporate governance, and companies tend to divide between pioneers and laggards in terms of internal whistleblowing policies.

Strengthening the position of private sector whistleblowing cannot be a quick-fix. However, there is a demand with different stakeholders to exchange examples and good practices. That is the area where short-term progress can be made, whilst developing a long-term strategy for legally strengthening the position of the whistleblower.

### **3. Methodology**

The aims of this report are to provide some insight into how political perception and policy on public sector whistleblowing is developing at various political levels, and to identify the positions of stakeholders in the private sector relative to internal whistleblowing and to investigate under what conditions whistleblowing could be supported by the private sector.

For the analysis of the public sector, we have used document analysis. There is an abundance of reports and legislative Bills to sketch policy development at a suitable level for the purposes of this report.

For the private sector part, we have used a combination of document analysis and expert interviews as methodologies. We used law texts and minutes of Parliamentary Q&A sessions to describe the position of policy makers towards private sector whistleblowing. We also conducted a document analysis of 20 companies listed on Euronext Brussels. We used publicly available documents for this: corporate governance statements, annual reports, codes of conduct, and company websites.

We also conducted 12 telephone interviews with experts in the fields of sustainability, compliance, HR, safety advice, risk management, quality control, ethics training, and auditing. They were either employed in these functions, did consultancy work, were board member, or were active within a professional body in Belgium. They were asked for their opinion as professionals, not for an official standpoint of their organisations. In order to facilitate conversation and allow the use of examples during the interviews, our interviewees were promised complete anonymity. We have also abstained from using any examples mentioned during the interviews, unless the case had been covered by the media.

The methodologies used in this research have been approved by the Research Ethics Committee of the University of Greenwich (London). Both the public sector and private sector parts of the analysis have been reviewed by experts.

## **4. Compilation, description and assessment of whistleblower protection laws**

All civil servants and public officials have the duty to report crimes they come across during the fulfilment of their mandate, to the Crown Prosecutor (Article 29 Criminal Law). In reality, this old law remains irrelevant to the realities of concerns about malpractice people have at their workplace, regardless of whether the wrongdoing constitutes a crime or questionable behaviour. In fact, the history of Belgian whistleblowing policies starts in 1999, when a new coalition of liberal democrats, socialists, and greens stated the intention to 'install at every department a channel through which internal dysfunctions or malpractices could be forwarded in confidentiality' (Verhofstadt 1999: 3).<sup>3</sup> This intention can be seen as an extension of broader political institutional reforms within the context of New Public Management. The then Secretary of State Freddy Willockx perceived whistleblowing policies as a vital part of crisis management (Willockx 2000: 43-44). However, the past decade has seen a number of whistleblowing Bills being tabled in federal parliament. None of these has made it into legislation. This was different at Flemish level, where a Bill was introduced into Flemish parliament in 2003 (nrs 1658(2002-2003)/1 and 1659(2002-2003)/1). It was unanimously approved by the commission for institutional reforms as well as at the plenary session (nr 51) in 2004. Hence we will first discuss whistleblowing legislation at the Flemish level before giving more detail on the developments at federal level.

### **4.1. The Flemish Decree on Whistleblowing**

The Flemish Whistleblowing Decree of 2004 was implemented through two protocols: one between the Ombudsperson and the Flemish government (4 June 2005), and one between IAVA (internal audit of the Flemish administration) and the Flemish Ombudsperson (17 May 2006). The policy is stipulated in the Civil Servant Statute (13 January 2006) under ART II. 2-4.

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<sup>3</sup> Our translation of 'op elk departement een meldpunt waar op vertrouwelijke basis interne dysfuncties of mistoestanden kunnen worden doorgegeven.'

Since then, former and current civil servants, contractual employees, and apprentices can raise a concern with their line manager, heads of unit, or directly to the internal audit of the Flemish administration (IAVA) if that superior is involved in the malpractice, or if raising the concern to the superior was unsatisfactory. In addition, one can raise the concern with the Flemish Ombudsperson when one experiences or fears retaliation. Besides this tiered route, if one has sound reasons to fear the line manager will try to prevent them from making a disclosure about crimes, the public servant has the duty to inform the Public Prosecutor.

Besides broad coverage of people able to raise concern, the policy also has a broad subject matter. It stipulates that concerns can be raised about negligence, abuse, or crime within one's unit. The Belgian Privacy Commission has commented that this is too broad (Belgian Privacy Commission 2007), and has advised to limit the subject matter to issues relating to internal accounting, auditing, corruption, financial malpractice, or other serious issues that needed to be stipulated in a code of conduct. None of the other actors experiences this as an issue. There is a renewed code of conduct (covers six areas, including speaking up and secrecy) as of 2010 (Bourgeois 2011). Also, a review of the whistleblowing policy conducted by the Ombudsperson and IAVA in 2010 states there is no discussion about what are cases of negligence, abuse or crime. These can be very concrete facts, but 'negligence' can also refer to an organization that does nothing to deal with a well-known problem of bullying in that organization (Ombudsperson 2011a).

The policy stipulates a good faith requirement. Whistleblowers will not enjoy protection in cases of 'bad faith, personal gain, or false disclosures that damage a department or person'.<sup>4</sup> This formulation lacks the clear delineation of 'honest belief' which the TI Guidelines suggest.

Protection can be asked when raising a concern with the Ombudsperson (verbal or in writing) about a possible malpractice or about retaliation. The Ombudsperson will carry out a preliminary screening of the issue before

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<sup>4</sup> Our translation of 'gevallen van kwade trouw, persoonlijk voordeel of valse aangifte die een dienst of persoon schade toebrengen'

granting protection. The Ombudsperson ensures concern is raised in good faith and is not obviously unfounded. Also, concerns cannot be raised anonymously. If protection is granted then this lasts until two years after the end of the investigation initiated by the Ombudsperson, and protects the whistleblower from any disciplinary procedure, overt or covert measures. Burden of proof rests with the 'employer'. Specific for the protection granted by the Ombudsperson is that the head of Department and the Minister is notified that the whistleblower now enjoys protection. This raises an issue with regard to confidentiality which we will explain further on.

The policy incentivizes internal whistleblowing. As with any citizen concern, the Ombudsperson upholds a claim or complaint only when it has been raised first with the agency about which one is making the complaint (Ombuds Decree 1998 Art 13.2). With regard to whistleblowing, there might be good reasons why the whistleblower chose not to raise their concern inside first. The Ombudsperson will readily accept these, or advise the internal audit (IAVA) route. If the Ombudsperson regards the concern as founded, an investigation will follow. In practice, the Ombudsperson will ask IAVA to conduct the investigations. While the Ombudsperson is mandated to outsource the investigation to a private auditor firm, this only happens when specific expertise (eg IT forensics) is needed.

IAVA and the Ombudsperson provide the external access for whistleblowers in the Flemish public services. IAVA is the centralized internal audit for all these services. It belongs to the Flemish administration but is operationally independent from any other unit, department, or agency within that administration. It would audit the audits of those public bodies that have their own internal audits, and is fully mandated to undertake forensic audits. The Ombudsperson on the other hand, is appointed by and reports to the Flemish Parliament. The implication is that the Ombudsperson includes some reporting on whistleblowing in its annual reports. These are publicly available. The Ombudsperson will formulate advice to improve the functioning of the public body from which the concern stems.

IAVA says it receives 10 to 15 whistleblower concerns per year, of which half provide enough information to start a forensic audit (Ombudsperson 2009). The annual reports of the Ombudsperson provide a resumé of the issue, escalation, and recommendations with regard to the whistleblowing cases. Table 1 gives an overview of number of whistleblowing cases upheld by the Ombudsperson.

Table 1. Number of whistleblower protections granted by the Ombudsperson

Year	2006	2007	2008	2009	2010	2011
Nr cases	5	2	1	0	0	3

The peculiarity of the Flemish whistleblowing policy is that the Ombudsperson functions as the body that receives complaints about retaliation. If the Ombudsperson grants protection, it can put someone ‘safe’ in their job for two years. Yet something seemed to be going wrong there. In its annual report for 2010, the Ombudsperson writes that a number of talks were held with some ‘aspiring whistleblowers’ but that none of these wanted to come forward officially. The explanation given is that there remains a fear to bear the burdens of blowing the whistle all by themselves (Ombudsperson 2010a: 57). In its report for 2011, we read that in a limited number of preliminary investigations the decision was made in the interest of the whistleblower, not to start up the whistleblower protection (Ombudsperson 2011b: 27). This sounds odd. How could not granting protection be in the interest of the whistleblower?

This has to do with the issue of confidentiality. If one raises concern with IAVA (internal audit), then confidentiality is guaranteed. In contrast, if the Ombudsperson granted protection, then the whistleblower’s superior, and the functional Minister will be informed that this person now enjoys protection. Obviously there is a loss of confidentiality in that case, at least on paper. This has very recently been amended (Flemish Parliament 1699 nr 3, 24 October 2012) as we will explain further.

Whistleblowers sometimes underestimate the ability of others to find out their identity. Sometimes wrongdoers guess. In other situations the whistleblower will have expressed concerns or asked questions about the appropriateness of a particular practice. If they later on blow the whistle to an agency that comes in to investigate that practice, it can be very obvious who the whistleblower was. In those cases, even the strictest confidentiality will not keep the whistleblower unidentified within his or her organization. One could argue that 'waiving' a written notification that 'someone is keeping an eye on this' serves as a better protection for the whistleblower.

Clearly, in 2010 and 2011, some whistleblowers were scared off by this approach, and in some other cases, even the Ombudsperson thought this would expose the whistleblower to a higher risk of retaliation.

In its Planning 2010-2016 the Flemish Ombudsperson explicitly states it is not including short-term initiatives to improve whistleblower protection (Ombudsperson 2010a). The document refers to fear and suffering as the reasons why so few whistleblowers come forward. It suggests that perhaps the best way to lower these thresholds is the open the route for voluntary re-employment within the Flemish public sector.

The Flemish whistleblowing policy was reviewed in 2010 (Ombudsperson 2011a). This review finds that the policy was successful in avoiding abuse of the whistleblowing policy. It leads the ombudsman (Bart Weekers) to maintain stipulations in the policy on scope and good faith requirements.

There is some discussion in the review with regard to the coverage of the policy. The Ombudsperson's mandate also covers city councils. Hence citizens can make complaints about these local units to the Ombudsperson. Thus in theory these local units should also be covered by the Ombudsperson with regard to whistleblowing. However, the protocol (Ombudsperson 2009: appendix 3) for cities seeking coverage by the Ombudsperson states that whistleblowing concerns will not be dealt with. The review (Ombudsperson 2011a) states that the whistleblowing policy seems to work less well in correlation with size and isolation of the unit. Hence the ombudsman writes that many units at local level are not yet fit for whistleblowing policies.

The most important aspect of the review is the recommendation for a change to the mandate of the Ombudsperson. In order to improve the ability of whistleblowers to move on with their lives and careers, and in order to compensate for the weaknesses in protection, the review suggests to include in the protection measures the possibility of a re-employment of the whistleblower elsewhere in the Flemish public sector. It further suggests leaving out the requirement to inform the whistleblower's superior of the protection. This would create the flexibility for the Ombudsperson to decide case-by-case and in collaboration with the whistleblower, on how to make protection more effective.

In a very recent session - 24 October 2012 - the Flemish Parliament has approved a number of amendments (1699(2011-2012)/nr3) to the whistleblowing policy for Flemish civil servants implemented through the Decree on the Ombudsperson. This latest development improves whistleblower protection in three ways.

First, limitations for concerns or complaints that can be taken up by the Ombudsperson have been removed, thereby broadening the scope of concerns that can be taken up by the Ombudsperson.

Second, the stipulation that the Ombudsperson must inform the whistleblower's superior that the whistleblower enjoys protection is removed. The implication is that the Ombudsperson can now decide case-by-case and in the interest of the whistleblower whether or not to disclose the identity of the whistleblower and inform the head of department that the whistleblower enjoys protection.

Third, re-employment of the whistleblower (if the whistleblower wants this) in another organisation within the Flemish public sector is now inscribed as one of the protection measures.

This indicates the policy review has been very effective in leading to pragmatic piecemeal legislative changes.

## 4.2. Federal Bills<sup>5</sup>

There have been seven whistleblowing Bills at federal level, one in 2005 (Senate nr 3-1288/1), one in 2007 (Senate nr 4-338/1), one in 2009 (House of Representatives DOC 52-2337/001), two in 2010 (Senate nr 5-217/1 and House of Representatives DOC 53-0316/001), one in 2011 (Senate nr 5-217/2), and one in 2012 (Senate nr 5-1491/1). Christian Democrats have submitted Bills in the Senate, and the Greens in the House of Representatives and in the Senate in 2012. The 2011 Bill is the only one to have been discussed.

All but one of these Bills (the 2011 Bill) are very similar. The reason is that they are resubmissions of a previous Bill after new elections: in the Senate, the 2010 Bill is a resubmission of the 2007 Bill, which is a resubmission of the 2005 Bill; and the 2012 Bill is the same as the 2010 Bill in the House of Representatives; the 2010 Bill in the House of Representatives is a resubmission of the 2009 Bill. All of these consist of a proposal to put in place the same whistleblowing policy at federal level as the existing one at Flemish level. They seek to expand the mandate of the federal ombudspersons to be a recipient for federal civil servants' whistleblowing concerns and offer them protection. The 2010 Bill in the House of Representatives is still 'hanging' and has not yet been discussed in a commission.

The 2011 Bill in the Senate is technically an amendment to the 2010 Bill in the Senate, but *de facto* amounts to a new separate law. In March 2012 it was discussed in the Commission for Internal Affairs and Administrative Matters, where the decision was made to ask for external advice from the Council of State, which issued its advice (nrs 51.084 & 51.085) in November 2012 (Belgian Senate 5-217/3, 18 December 2012). The thrust of the advice is that the proposed reporting procedures are too complex. The stipulations with regard to time frames and types of information for a qualified report and investigation increase the risk that a genuine whistleblower might lose their protection due to a procedural error. The Council of State also advises that the proposed scheme should be tabled as a new Bill rather than an amendment to a previous one, and

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<sup>5</sup> Due to recent legislative developments the chapter on federal Bills is no longer accurate. Click [here](#) to view the latest version of the Bill (5-217/9).

that this new Bill should include an explanation of aim and justification for each article. Overall, the advice is an important step which is promising, but it also means whistleblower legislation at the federal level is not likely before the next elections in 2014. Nevertheless, this is the furthest a whistleblowing Bill has come at federal level. Hence we will describe and comment on this proposed policy.

The proposed policy has broad coverage. It would apply to statutory and contractual employees, and apprentices working in a federal administrative department. The subject matter is broad as well. The policy covers 'suspected breaches of integrity', meaning breaches of legislation, decisions, circulars, internal regulations and internal procedures, unacceptable risks to life, health, or safety of persons or the environment, breach of professional duties, and advising or ordering someone to commit a breach of integrity. It does not cover discrimination. Also important to note is that the proposal explicitly states motivation is not a criterion (Art.5) but uses the phrases 'reasonable suspicion' and 'honest belief' as necessary criteria.

The policy stipulates a two-tiered approach. At the first (internal) tier (Art.6.1), an employee can raise a concern with his line manager who is obliged to treat this confidentially and is responsible for safeguarding that employee from reprisals. Alternatively, if the employee desires, concerns can be raised with the Confidential Advisor Integrity of the department where the employee works.

The second (external) tier (Art.6.2), consist of a 'central recipient for suspected breaches of integrity' which would be installed with the federal ombudsperson, who is appointed by and reports to parliament. Whistleblowers can access the second tier if: 1) there is no confidential advisor within the federal department where they work, 2) if they do not wish to raise their concern internally, 3) if the head of the department where they work is involved in the suspected wrongdoing, or 4) if the suspected wrongdoing takes place in a different federal department than the one they work in.

The formalities for raising a concern about a suspected breach of integrity are stipulated in Art.7 to Art.9. This is a rather complex matter. A whistleblower who wants to raise a concern internally needs to ask – in writing – for a preliminary

advice from the confidential advisor. When one wants to access the external tier, one needs to ask a preliminary advice from the federal ombudsperson. This request for advice requires the whistleblower to provide elements that show the suspicion of wrongdoing is based on a reasonable and honest belief. The recipient of the request for advice can invite the whistleblower for further clarification of the concerns before delivering the written advice to the whistleblower. A positive advice will be given if the recipient finds the concern substantiated and formally correct. If the concern is found substantiated but not formally correct, the recipient will make recommendations to the whistleblower. The whistleblower can ask the federal ombudsman for advice if the confidential advisor has given a negative advice.

Once a whistleblower has received a positive advice from the federal ombudsperson, they must then decide whether and how they want to make the disclosure.<sup>6</sup> The whistleblower has to confirm they want to raise the concern they raised in the request for advice. If they do, it becomes a disclosure. This confirmation has to be done in writing and must include the choice to make an open or a confidential disclosure. In an open disclosure the identity of the whistleblower will not be kept confidential.

The law proposal also includes stipulations about the investigation following a disclosure and the required elements of reporting on the investigation (Art.14 to Art.10), as well as stipulations with regard to the protection offered by the federal ombudsperson (Art.15 to Art.17). It is noteworthy that protection is offered not only to the whistleblower, but also to employees who were involved in the investigation, and any advisory employee to the whistleblower. None of these enjoy protection if they were involved in the alleged wrongdoing.

In our view, the proposal contains both positive as well as problematic elements. Positive elements are:

1. It encourages people to raise concern inside their department. The instatement of a confidential advisor is important to make this encouragement work, but it is crucial this advisory position would have

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<sup>6</sup> 'advice' is used as a translation for 'avis' and 'advies'; 'disclosure' is used as translation for 'dénonciation' and 'melding'.

- enough independence. Perhaps this avenue would be more trusted if the advisory role would be linked to the internal departmental audit function.
2. The external route is independent from the executive government, and reports to parliament. This also ensures that the public will at least be able to access some data on how the policy is working.
  3. The proposal has broad coverage and scope. As with the policy at Flemish level, this undercuts the opinion of the Privacy Commission that the scope of whistleblowing policies should be restricted to financial wrongdoing.
  4. Broad protection that is offered, not just to the whistleblower but also to those in an advisory role or involved in the investigation. Protection is offered against dismissal, demotion, missing promotion, disciplinary measures, denial of pay raise, unfavourable performance evaluation, withholding of access to facilities and training, and denial of annual leave.
  5. Motivation is explicitly ruled out as a ground for denying protection. Instead, honest belief and reasonable suspicion are used.
  6. There is at least the intention of the legislators to involve whistleblowers in the investigation.
  7. The whistleblower has the option to make either an identified or confidential disclosure. This might be another way to deal with the problem of (fear of) reprisals mentioned by the Flemish ombudsperson. Opting for the confidential route would allow the federal ombudsperson to launch an investigation without disclosing the identity of the whistleblower while still granting them protection. Under the current Flemish policy, the ombudsperson informs the whistleblower's head of department that the whistleblower enjoys protection. The Flemish ombudsperson reports that this frightens off some potential whistleblowers from coming forward, hence why in a number of cases it was decided not to offer protection. It seems the current federal Bill has taken this concern on board by offering a confidential route.

In our opinion there are also some problematic aspects about the federal Bill:

1. The proposed policy is preoccupied with the procedure to raise a concern. It stipulates many time restrictions – e.g. the recipient has two weeks after the request for advice has been made to invite the whistleblower for clarification and there is another two weeks to give to give clarification, the recipient then has another two weeks to formulate the advice, and another two to send it to the whistleblower, in the case of a negative advice from the confidential advisor the whistleblower has ten weeks to request advice from the federal ombudsman who has twelve weeks to respond, in the case of a positive advice the whistleblower has two weeks to confirm they want to make a disclosure, etc. There are also many stipulations with regard to necessary elements of a request for advice to qualify it as correct and hence acceptable, regardless whether or not the concern is deemed substantiated. The apparently zealous endeavour to provide a detailed procedure to raise concern might stem from an intention to close loopholes, but the upshot of overly detailed procedures is also a huge risk to the whistleblower, who might be denied of protection or investigation of their concern due to procedural errors. It seems these hurdles have been deliberately inserted into the proposed policy, so as to ‘avoid unnecessary disclosures’ (p18 in the commentary to the proposal).<sup>7</sup>
2. The two stepped approach to raising a concern – first a written request for advice and then a written confirmation turning the advice into a disclosure – is a problematic and confusing element in the law proposal. While the two are consistently distinguished in the articles describing the procedure, the articles on protection only mention ‘disclosure’ (Art.15). Hence it is not clear if one would be entitled to protection for requesting an advice that was found correct and substantiated without having confirmed this as a disclosure. This will lead to problems in practice because (a) requests for advice need to be made in writing, hence these are on record, and (b) the whistleblower has only two weeks to confirm the disclosure upon receiving positive advice.

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<sup>7</sup> My translation of ‘L’on évite ainsi un afflux de dénonciations inutiles’

3. The proposal contains a confusing stipulation relating to claims about reprisals (Art.16). The federal ombudsperson is the recipient for such claims, even when the concern was raised with the internal recipient. The confusion rests with the stipulation of the burden of proof. As it reads now, the whistleblower has to provide proof of actual or threatened reprisals, upon which the burden of proof is then reversed to the federal administration to show these reprisals are not happening.<sup>8</sup>
4. In our view the most fundamental problem of the proposal is that it does not identify a body that can realistically carry out investigations in an effective and independent manner. The proposal foresees that the federal ombudsperson carries out the investigation, 'if necessary assisted by experts' (Art.11).<sup>9</sup> The way the federal ombudsperson currently works will require such expert assistance in every whistleblowing case. If the federal ombudsperson takes up a citizen's complaint about the functioning of a federal administrative department, it 'investigates' by written dialogue with the federal department at stake. It is obvious that this will not satisfy investigatory requirements of whistleblowing cases. Further, the federal ombudsperson aims at mediation and conflict resolution. This makes it the right candidate to offer protection and receive claims about reprisals, but not to carry out investigations.

In the Flemish whistleblowing policy, it is also the ombudsperson who receives concerns or complaints about reprisals, and who offers protection. Investigations however are carried out by the Flemish internal audit (IAVA), or in specific cases (such as IT-forensic investigations) this is outsourced. This body is mandated to carry out forensic audits and overrides departmental internal audits.

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<sup>8</sup> My translation of 'Si un member du personnel protégé par les médiateurs fédéraux peut apporter aux médiateurs fédéraux, au cours de la période de protection, des preuves suffisantes, fondées sur des éléments et des faits, de l'existence ou de la menace de mesures [...] la charge de la preuve qu'aucune mesure ou menace de mesure n'est ou n'a été prise ou formulée incombe à l'autorité administrative fédérale [...]'

<sup>9</sup> My translation of 'federale ombudsmannen en desgevallend de deskundigen die de federale ombudsmannen bijstaan'

Unfortunately there is no parallel at federal level to the Flemish internal audit. There is a Federal Audit Committee (ACFO-CAAF). Since April 2010, this audit committee is comprised of seven independent experts who are not statutory employees but receive attendance fees. The Federal Audit Committee is respected as a source of expertise and advice for the departmental internal audits, but is not equipped to carry out forensic audits. Neither are the departmental internal audits the right body to carry out investigations ordered by the federal ombudsperson. Not only do they lack the required independence to achieve enough credibility for investigating whistleblowing concerns, but the reality is that only half of the federal administrative departments have internal audits, including those who outsourced the audit to a private firm (EU Compendium 2011: 36).

The Central Office for the Repression of Corruption (CDBC-OCRC) is equipped to undertake the required investigations, but is only mandated to carry out judicial investigations, as it is part of the Director General of the Judicial Police. Its predecessor, the Superior Control Committee (HCT-CSC) resorted until 1997 under the Prime Minister and was mandated to carry out administrative investigations in all public administrations. In response to some recent scandals, politicians from diverse parties suggested to restore the Superior Control Committee. It seems to us that this could be done rather easily. After all, the Superior Control Committee still exists as an entity, albeit void of any staff or resources. Hence it would suffice an executive decision to allocate resources and staff for a centralised investigatory body to become operational (TI 2012: 191-194). In order to make the external whistleblowing tier effective at federal level, it seems inevitable to either consider this restoration idea seriously, or to set up a centralised internal audit in addition to the Federal Audit Committee.

### **4.3. Auxiliary legislation**

There is no whistleblowing legislation covering the private sector in Belgium. However, some legislation aimed at specific wrongdoing has provisions that are either similar to whistleblowing or could be used by whistleblowers experiencing reprisals. We briefly describe these in this section.

Art.49 of the competition law of 2006 establishes a clemency regulation for companies who denounce a cartel they are part of, providing partial or full waiving of fines. In practice, the clemency regulation is referred to as the whistleblower policy (Wijckmans 2006, Wijckmans and Tuytschaever 2008)). Companies have to make a formal clemency request to the Belgian Competition Authority. Table 2 gives an overview of the number of clemency requests.

Table 2. Overview of clemency requests (based on data from annual reports Belgian Competition Authority)

year	2011	2010	2009	2008	2007
nr of requests	1	5	7	7	6

The anti-money laundering law of 2010 (revising and renumber articles of the law of 11 January 1993), stipulates that financial professions have a duty to disclose suspicions of money laundering activities. These professions include bankers, insurance brokers, notaries, auditors, accountants, and tax consultants. They are obliged to disclose suspicions to the Belgian Financial Intelligence Processing Unit (CFI-CTIF). The law also stipulates such a duty for property brokers and lawyers. Lawyers need to disclose suspicions of money laundering with the Solicitor General of the Bar.

Legislation covering both public and private sector which can be relevant for whistleblower experience retaliation is the law on prevention of psychosocial pressure caused by work of June 2007, which modifies the law of 2002. This is also known as the anti-mobbing law. The law stipulates organisations are required to have a prevention advisor on physical and psychological violence, sexual harassment, and bullying. The law also advises organisations to put in place a confidential advisor. These provide internal avenues for employees who wish to make a complaint. The law offers protection from dismissal for employees whose complaint is upheld, as well as for witnesses who testify in court. The available data covers number of cases per region, gender, sector, and

organisation size, and whether the complaint was about violence, sexual harassment, or bullying. It does not provide information to suggest how many of these were reprisals against whistleblowers.

## **5. Perceptions and political will with regard to whistleblower protection in the public sector**

This section will discuss public perception of and political will towards whistleblowing in the Belgian public sector. With regard to political will, we would like to distinguish between will of politicians and of actors in current and proposed whistleblowing policies. With actors we mean those who play a role in whistleblowing policies, either as recipients, administrators, or investigators.

There seems to have been reached a critical mass of positive will for whistleblowing policies at actor level, and possibly this is starting to infect political will as well. This is most obvious at Flemish level. People from the internal audit (IAVA) and the ombudsperson show a highly professional attitude towards the role of whistleblowing in good governance. Rather than merely fulfilling their designated roles, these actors are actively seeking ways to improve the quality of whistleblowing practice, both in terms of investigation as well as protection for the whistleblower. In our view, IAVA should be seen as holding the expertise on whistleblowing in Belgium, and this expertise should be consulted when designing policies at other levels. IAVA is also heavily involved in preventative measures, i.e. bringing about cultural change in organisations with regard to people who raise concerns. Under the leadership of the newly appointed integrity coordinator in October 2010, IAVA had an important know-how input in the creation of an additional centralised low-threshold recipient for questions and concerns related to integrity. An existing helpline for stress and other psychosocial issues at the workplace is being expanded to also offer advice on integrity issues. Together with the Central HR agency (AgO), IAVA also contributed to the creation of an integrity network within the various Flemish government institutions. This network, called the Virtual Bureau Integrity, was launched in January 2012, aims at being a platform for integrity actors. Prevention of whistleblowing conflict escalation is one of its points of attention.

How does this affect political will? Obviously, the Flemish legislation came about through politicians, and IAVA's formation in 2006 was the result of political will. Yet the critical mass developed within and between institutions is important to sustain momentum of that political will. It is people within these institutions that

formulate proposals for piecemeal change and progress. The central low-threshold helpline/advice/recipient as well as the Virtual Bureau Integrity would not have come about by political will alone, and given the delays with which these came about, it seems plausible that they have been actioned because of actors' persistence.

At federal level the political will seems more ambivalent. The previous State Secretary for the Co-ordination of the Fight Against Fraud (Carl Devlies) explicitly supported whistleblowing policies. In response to a question posed to him in the Justice Commission of the House of Representatives in December 2010, he said that it would be a great step forward if parliament would approve the then proposed whistleblowing regulation (Devlies 2010: 21). The current State Secretary John Crombez, however, responded to the TI NIS report for Belgium that a whistleblowing policy is definitely not a priority. He has stated this both in the press as well as in his answer to a question in the Senate on 7 June 2012 (Crombez 2012: 14). Instead, the State Secretary sees the strengthening of the audit procedures as a better way to secure integrity. Also of little hope is the answer given by the previous Minister of Justice (Stefaan De Clerck) to a question posed to him in the Justice Commission of the Senate (De Clerck 2011: 36)), on the whistleblowers in the Hazodi case (see below for a discussion of that case). The Minister said that while a statute for whistleblowers is something that needed thought, there is also the concern about abuses of such a statute for personal or vindictive reasons. The combination of not seeing whistleblowing policies as a priority, and the immediate connotation of people abusing such a policy, could indicate a decrease of political will.

On the other hand, within the administration there are clear signs of a growing will. There is now a platform where people from various federal departements can regularly meet to discuss and invite experts to talk on integrity related issues.

There are no legislative initiatives at the level of the Brussels Capital Community. Neither are there any yet at the Walloon level. However, there are some – albeit minimal – indications of a positive evolution. As noted, whistleblowing Bills at

the federal level were co-signed by both Flemish as well as French speaking politicians of the Greens (Groen-Ecolo) and Christian Democrats (CD&V-Cdh).

Also, on 30 November 2012, Transparency International organised a session on civil servants' duty to report wrongdoing and their need to be protected. The session was presided by Patrick Dupriez, President of the Walloon Parliament and member of the Greens (Ecolo).

Finally, connotations in the press of the term whistleblowing – in its French equivalent of 'donneur d'alerte' or 'lanceur d'alerte'<sup>10</sup> – seem to be shifting from denunciator – dénonciateur – to citizens who speak out with regard to social or environmental concerns (see a special volume of *Imagine*, September 2009). Still, it seems the press in the Southern part of the country is somewhat underestimating whistleblowing.

In contrast, the press in the Northern part of the country (the Flemish speaking part) appears to be overshooting the term whistleblowing – in its Dutch translation 'klokkenluiden'.<sup>11</sup> It is used for behaviours that technically have nothing to do with whistleblowing, like politicians who, in their oppositional role question members of executive, i.e. a member of the city council of Genk taking up a report on environmental health issues (Nieuwsblad 29 September 2010), or a whole political party tagged as whistleblower for taking up its oppositional role in a radical way in some cases (LDD in De Morgen 22 January 2011). This same political party (LDD – a small libertarian party) has marketed itself as whistleblower on several occasions since. Nevertheless, the term is widely used in press reports on both public and private sector cases of corruption or fraud, which shows the term is growing some currency in the Flemish press.

Although the arrest of the European Court of Human Rights in the case Martin Tillack (STERN journalist) vs Belgium is internationally regarded as an important Belgian whistleblowing case (he was arrested by the Belgian police and the case resolved around protection of journalists' sources), it received little coverage in the Belgian press. The most recent whistleblowing case which received major coverage in press as well as on television, is the Hazodi case.

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<sup>10</sup> Translates as alarm launcher or giver.

<sup>11</sup> Translates as bell ringer.

The Hazodi case unspins as follows. Early 2009, four administrative employees of the Hazodi police zone (Hasselt, Zonhoven, Diepenbeek) make anonymous complaints to Prosecutor-General of Hasselt, Comité P (centralised internal audit of the police), and tax inspection. These consist of allegations about fraud with overwork payments, allowances for mileage, clothing, and food, dropping dossiers of theft and parking tickets, and exam fraud. After a number of these complaints, and some superfluous investigations, the Prosecutor-General drops charges against the chief of police, but recommends the police chief would restore trust within the corps. The chief of police makes some restructurings, but these are not beneficial to the whistleblowers – perhaps they were not so anonymous after all. One gets dismissed and others are get a different job role. They perceive this a reprisal and raise their concerns with the prevention advisor. One of them also goes to the employment tribunal, which demands the chief of police to correct his decisions.

At this stage, the police union (NSPV) supports the whistleblowers and send a dossier bundling 23 complaints to the Minister of Internal Affairs. Meanwhile, the Prosecutor-General is charging two of the whistleblowers with theft of confidential files (when they were collecting evidence for their fraud allegations). Early October 2011, a week before their trial for stealing confidential files, the whistleblowers go public. Panorama aired a documentary on the case, suggesting the Prosecutor-General of Hasselt is trying to ‘hush up’ the case. The Major of Hasselt – who is also overseeing the Hazodi police force, is interviewed on television, and does not seem to be aware of what is going on. Two days later, a private forensic auditing firm (i-Force) is contracted in to investigate the fraud concerns. A week later, the two whistleblowers are acquitted from the charges of theft of confidential files.

At the end of October 2011, the Major of Hasselt suspends the chief of police. Early December 2011, i-Force issues its report on the investigation, stating that they have found frauds totalling €476.000 since 2006 within the Hazodi police force, thereby indicating the whistleblowers’ information was correct but at the same time suggesting three of the whistleblowers had also indirectly received illicit payments.

In January 2012, the Public Prosecutor's Office investigates the involvement of the Prosecutor-General of Hasselt in 'hushing up' the case. Their finding is that the Prosecutor-General did not make mistakes in handling the case. Meanwhile, former colleagues of the whistleblowers state through their union, that they do not want the whistleblowers reinstated in their jobs. In April 2012, one of the whistleblowers returns to work in the Hazodi police corps, in a different job and department as her previous role. The three others have found a job in police forces of Antwerp and at the federal level. Also, the Minister of Justice takes charge of the investigations upon the suspension of the chief of police, and later that month Comité P and the federal police search the offices of the Hazodi police force. In June 2012 it is announced that the chief of police remains suspended.

While this case shows the wrongdoing was stopped in the end, and somehow the whistleblowers found a way to move on, the way this cases escalated leaves no winners. First, the whistleblowers had to expose their concerns and story in the media in order to attract public attention to the fact that they were being charged with stealing confidential files when gathering evidence of public interest wrongdoing. This show of protection-by-scandal is precisely what effective whistleblowing policies aim to prevent. Second, reputations of the whistleblowers, the magistrates in Hasselt, the Major of Hasselt, and the Hazodi police force were seriously damaged. When those in the Hazodi police corps said that they did not want the four to return to work with them, it was partly because they held the four whistleblowers responsible for their police force being perceived as 'bad cops', something these police officers found stressful to work under (Nieuwsblad 15 October 2011).

A second important, although less mediatised case relates to whistleblower reprisal to a whistleblower in Xios, a poly-technic higher education institution. Apparently, the school's social work department suffered from a malfunctioning organisational culture, where intimidation amongst staff and towards students was common (Ombudsperson 2011b: 19-20). Things escalated during an external validation process. A teacher approaches members of the validation commission to talk to them about her concerns. Colleagues see this. Soon after, teaching hours are taken away from this teacher and she gets relocated to a job

outside of the department. In September 2011 she requests protection from the Flemish Ombudsman, who upholds the request and after an investigation advises the school to reinstate the whistleblower in the department with her teaching hours. The Ombudsman's advice is also sent to the Ministers of Education and of Government Administration, who also urge the school to act upon the advice. The school refuses to act upon this. However, the Ombudsman's report on the case is taken up by the Provincial Council overseeing the school, and decides in June 2012 to merge Xios with another school as of the academic year 2012-2013, and appoints a new manager for the merged school.

This case shows that if raising concern internally or to an audit (the external validation commission) cannot correct malpractice because of an internally corrupt culture, whistleblowing is not going to be easy. However, protection from the ombudsperson in this case, gives an immediate remedy for the whistleblower (job protection) and also takes away the burden for the whistleblower to carry the case further. Here, it was the Flemish Ombudsperson who initiated the investigation, and sent his advice to the school and the appropriate Ministers. The fact that the ombudsperson reports to parliament, makes sure that Ministers are informed wrongdoing which was not resolved internally has escalated, that these Ministers cannot simply neglect this advice, and that it can be mentioned in a publicly available report should the case not be resolved. Both in terms of efficiency and effectiveness of the investigation as well as burden on the whistleblowers, the two cases stand miles apart.

## **6. Perceptions and political will with regard to whistleblower protection in the private sector**

This section is structured as follows. We first analyse existing (or pseudo-existing) regulatory policy of whistleblowing in the private sector. After that we present an overview of existing internal whistleblowing policies at company level. We then proceed with an evaluation of whistleblowing practice: whether policies work, management attitudes, what the different positions are and who is taking these.

### **6.1. Which regulatory policies exist?**

#### **6.1.1. Labour Law**

At a Q&A session in the Belgian Senate in December 2006, the then Minister of Work (Peter Vanvelthoven, Socialist Party Sp.a) was asked what the difference was between the private and public sector in terms of legal protection for whistleblowers, whether he planned any initiative to improve whistleblower protection, and what his vision was on a specific statute for whistleblowers (Belgian Senate 2007a: 9129).

The Minister responded that although there are no specific provisions in the Belgian employment law with regard to whistleblowing, a number of general principles can provide guidance. He names three such principles. The first is that employer and employee owe each other 'awe and respect' (art. 16 law of 3 July 1978).<sup>12</sup> The second principle the Minister of Work mentions as applicable to whistleblowers is that an employer cannot arbitrarily dismiss a worker (art. 63 law of 3 July 1978). This law only applies to manual workers, but the Minister adds that administrative workers can access similar provisions under the 'figure of legal abuse'.<sup>13</sup> The third principle mentioned in the Minister's reply is protection against workplace bullying implemented through the law of 4 August 1996.

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<sup>12</sup> Our translation of 'eerbied en achting'.

<sup>13</sup> Our translation of 'figuur van het rechtsmisbruik'.

The Minister also replies that he is not aware of any court cases relating to private sector whistleblowing. His conclusion is that given the general principles already in place through the employment law, there is no reason to develop a specific statute for whistleblowers in the employment law. However, the assumptions on which Mr. Vanvelthoven bases his conclusion are mistaken.

Let us take a closer look at the three general principles used to shed off responsibility for working out a specific whistleblowing policy. The 'awe and respect' stipulation in art. 16 of the law of 3 July 1978 remains too vague to be effectively used in relation to internal whistleblowing. The remainder of art.16 states that during the execution of the contract employer and employee must act with decency and according to moral norms. There is nothing in art.16 that entices employers to define policies to manage conflicts escalating from workers who raise concerns.

More to the point, art.17 of the same law (law of 3 July 1978) contains stipulations which could easily be used against whistleblowers. For example, par.2 of art.17 imposes a duty on employees to act according to orders and instructions from the employer or those delegated by the employer. Thus if an employer instructs an employee to act so as to cover-up wrongdoing, not following that instruction can be interpreted as a breach of contract. Par. 3a of art.17 imposes on employees a duty to refrain from making known company secrets, and personal or confidential data which the employee comes to know in the course of his or her employment. Again, this stipulation can be interpreted against whistleblowers, as it can be read as an implicit gagging-order.

There is however a missed opportunity in art. 17 of the law of 3 July 1978. Par. 3b imposes on employees a duty to refrain from committing or co-operating in acts of unfair competition. In a pro-social sense whistleblowing in the private sector, both internal as well as external, can be regarded as acting upon a refusal to collaborate in organisational practices amounting to unfair competition. It is conceptually possible to anchor whistleblowing policies for the private sector on this stipulation (par 3b art 17 law of 3 July 1978). This would promote an understanding of whistleblowing as conducive to open and fair markets. Such a phrasing would also focus more on the wrongdoing whistleblowers help to

identify (internally and externally) rather than on the reprisals whistleblowers often suffer. We admit freely here that this would not work where wrongdoing is harmful to the organisation but not to fair competition.

The second principle – non-arbitrary dismissal of manual workers and figure of legal abuse for administrative workers – also focuses on the reprisals whistleblowers can suffer rather than their concerns of wrongdoing in their workplace. However, arbitrary dismissal is reminiscent of the US employment-at-will doctrine which was a pivotal target for whistleblowing activism from the 1970's onwards (Vandekerckhove 2006). Restrictions on arbitrary dismissal offer scope for whistleblower protection in two ways. The first is that it can be used to incur litigation from an employer when things go wrong. The second is that it offers scope for an order to be reinstated into one's job. The latter rarely happens. One can argue that if whistleblowing escalates into a court case on unfair dismissal, considerable time will have elapsed from the moment when internally raising a concern started to go wrong, and also that the court case itself indicates the necessary trust between employee and employer is not reparable.

A peculiar feat about Belgian employment law is that it distinguishes manual workers from administrative workers.<sup>14</sup> The law of 3 July 1978 applies for manual workers only. Art. 63 of that law imposes a duty on the employer to motivate a dismissal. This can be related to the employee's behaviour or attitude, or can stem from a necessity of the corporation or the department (for example a restructuring). In a dispute the onus of proof for the motivation is on the employer. Unmotivated dismissals can be sanctioned with a litigation of six months' pay. Hence this is a *de facto* cap on litigation for a whistleblower – assuming he or she wins the case.

However, the law of 3 July 1978 does not apply for administrative workers. In their case, the employer does not have a duty to motivate dismissals. With regard to administrative workers the employer has a right to dismiss. However, this right should not be abused. Hence the phrase 'figure of legal abuse' used by the

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<sup>14</sup> Manual worker is 'arbeider' in Dutch and 'travailleur' in French; administrative worker is 'bediende' in Dutch and 'actionné' in French.

Minister means the abuse of the right to dismiss. In disputes, the abuse of the employer's right to dismiss is on the employee. The employee must show that his or her dismissal is not something an employer who acted with 'due diligence' would do, and that the dismissal has caused the employee damage beyond the normal damage associated with a dismissal (e.g. loss of income is not an abnormal damage). Best practice whistleblower policy puts the burden of proof on the employer to show the employee was dismissed for reasons other than raising a concern. Hence it comes over as odd that a policy maker would refer to the 'figure of legal abuse' as a general principle where whistleblowers can find protection.

The third idea put forward as an avenue for whistleblower protection is through the anti-bullying or anti-harassment legislation. However, there is no data as to how many whistleblowers suffering reprisals have used this particular legislation or the internal organisational policies that come with the legislation. According to an expert interviewee, anti-harassment procedures are not easily accessible for whistleblowers. The procedures require someone to bring evidence of a pattern of behaviour. Reprisals against whistleblowers do not necessarily follow a straightforward pattern. The anti-harassment legislation does oblige organisations to mandate a prevention advisor and a confidential advisor (smaller organisations can use an external provider). These people can be a first contact person for whistleblowers suffering reprisals, but in order for them to start a procedure offering protection, there needs to be substantial evidence of a pattern of harassment. Hence the statement that this legislation provides an appropriate avenue for whistleblowers is not credible, especially since there is an absolute lack of data on this.

Since Mr. Vanvelthoven (the then Minister of Work) stated in December 2006 that he was not aware of any court case involving reprisals against whistleblowers, an interesting case was brought before the Labour Court in Liege in 2007 (Adriaens 2009). The case is interesting because it also shows how hard it is for an administrative employee to prove a misuse of the employer's right to dismiss. In September 2001, an administrative employee of a gas station was dismissed. He claims this was as a reprisal for raising a number of legitimate

questions and requests. In 1999, two years before his dismissal the employee had filed a complaint with the police after he had been attacked by a client. A couple of months later, labour inspection officers did an audit after his labour union had made a complaint. In March 2001 the employee had made a written grievance with regard to some irregularities regarding wages. In May 2001 the employee, together with a couple of colleagues, had made a written request to the employer to improve security measures around the back door of the gas station in order to avoid burglary. A week later the employee was attacked at night in the gas station, resulting in him being unfit for labour until 16 September 2001. When returned to work on the 17th from sick leave, he was dismissed by his employer.

The employee claimed abuse of the employer's right to dismiss, and disputed his dismissal in court. The employer claimed his dismissal had nothing to do with the issues the employee had previously raised, but rather were the outcome of a reorganisation of their gas stations. The Labour Court concluded that the employee had failed to prove legal abuse by his employer. They acknowledged the concerns the employee had raised were legitimate, but that he had not sufficiently proven a link between him raising those concerns and his dismissal. The Labour Court also reminded that in principle the employer has a right to dismiss (administrative employees), and that this cannot be checked by a judge (Adriaens 2009, commenting on A.R. 34.042/06, Labour Court Liege 18 September 2007).

Without commenting further on the case, or questioning the judgement of the Labour Court, the case is stunning because it illustrates how difficult it might be for whistleblowers who suffer reprisals to prove this in court. In the same light it makes Mr. Vanvelthoven's claim that whistleblowing administrative employees can draw on the 'figure of legal abuse' to find protection nonsense.

### **6.1.2. Corporate Governance**

In 2004 the Corporate Governance Commission published a Code of Corporate Governance for publicly listed companies. In 2009 the Commission published an

updated code. The same wording is used: it requires listed companies to install an audit committee. One of its responsibilities is to monitor internal control systems. This includes reviewing

the specific arrangements in place which the staff of the company may use, in confidence, to raise concerns about possible improprieties in financial reporting or other matters. If deemed necessary, arrangements should be made for proportionate and independent investigation of such matters, for appropriate follow-up action and arrangements whereby staff can inform the chairman of the audit committee directly. (Commissie Corporate Governance 2004: 5.2/9; 2009: 5.2/16 of appendix C)

The law of 6 April 2010 on strengthening corporate governance in publicly listed corporations, combined with the Royal Decree of 6 June 2010 imposes a duty on listed corporations to publish a corporate governance statement, in which they identify the Belgian Corporate Governance Code 2009 as the code they apply, with a 'comply or explain' requirement. Although this does imply that the statement must include a description of the 'most important characteristics of the internal control and risk management systems of the corporation'<sup>15</sup> - without specifying what the key characteristics are - the vast bulk of new requirements relate to transparency on remuneration of management and board members (Commissie Corporate Governance 2011b).

Guidelines to the 2009 Code include a list of questions Boards of Directors can use to evaluate a company's internal control system. One suggested evaluation question under '3.4 Communication' (Commissie Corporate Governance 2011a: 27) to the Audit Committee, which has the responsibility for ensuring appropriate internal control systems, is whether there exist means of communication for employees to report suspicions of inappropriate facts?<sup>16</sup>

The public consultation on the Guidelines to the 2009 Code (Commissie Corporate Governance 2012) show there is a huge demand for examples, cases, and best practices on different aspects of internal control deemed important in the 2009 Code and guidelines, and there is a lot of willingness from respondents

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<sup>15</sup> My translation of 'belangrijkste kenmerken van de interne controle- en risicobeheerssystemen van de vennootschap'.

<sup>16</sup> My translation of 'Bestaan er communicatiemiddelen om vermoedens over ongepaste feiten aan het licht te brengen?'

in the public consultation to engage in workshops aimed at exchanging cases and best practices. This momentum provides an opportunity to further enhance the understanding of the benefits of internal whistleblowing.

The FSMA - financial services regulator - did two studies to assess whether listed companies comply with the 2009 Code. The studies show an improvement. In 2010 92% (compared to 46% in 2009) of the listed companies complied with 2009 Code stipulation on describing the internal control systems in the corporate governance charter, at least as far as internal control systems relate to the process of financial reporting (FSMA 2011).

The Belgian Corporate Governance Commission has also published a Code of Corporate Governance for non-listed corporations. The first was published in 2005, and is known as the Code Buysse. In 2009 the Commission published an updated code, the Code Buysse II. None of these mention channels to communicate concerns about malpractice.

## **6.2. Which corporate policies exist?**

The 2009 Corporate Governance Code requires listed companies to comment on their internal control system in their Corporate Governance Statement, including internal policies or procedures for workers to raise concerns (stipulation 5.2 and specified in 5.2/16 in Appendix C of the 2009 Code). The 2009 Code does not, however, prescribe in any way minimal requirements of such policies or procedures, nor does it prescribe a minimum description of the characteristics of those policies. Hence there is a huge variation in the amount of information companies give in their Corporate Governance Statements on their internal control systems, whether these include whistleblowing policies, and what these look like.

Some more information can be found when we also look at companies' annual reports and what they make publicly available on the company website. Table 1

gives an overview of information on internal whistleblowing policies of BEL20 companies<sup>17</sup> found in the course of this research.

Table 3. Whistleblowing policies in BEL20 companies (based on public data)

Company Name	Sector	Information found in	Comment
<b>AB Inbev</b>	Brewery	CG charter 2012	Hotline (24/7 telephone or internet), third party administered, confidential and anonymous concerns. Promise of non-retaliation (p33)
<b>Ackermans &amp; van Haaren</b>	Holding	none found online	
<b>Ageas</b>	Insurance	Annual Report 2011	Internal alert line for employees and others (appendix 10). Justifies not publishing policy on the website in terms of this would not help the issue (p35)
<b>Befimmo</b>	Industrial and office REITs	Terms of Reference of the Audit Committee 2010 Code of Ethics 2007	One of the duties on the audit committee is to review specific arrangements through which employees or others can raise concerns in confidentiality (p3).  Employees can 'apply to the Compliance Officer' for any suspected breaches of the code (p2 of the Code of Ethics)
<b>Bekaert</b>	Engineering	Code of conduct 2009 (appendix 3 of CG Charter 2012)	Policy identifies internal tiers: line manager, HR, Group Internal Audit. Promises confidentiality and non-retaliation (p11)
<b>Belgacom</b>	Telecom	Website	Alarm Bell Procedure for employees. Reports are made to compliance on breaches of code of conduct, law, and internal and external

<sup>17</sup> The BEL20 is the benchmark stock market index for Euronext Brussels. It consists of a selection of companies traded on the Brussels Stock Exchange. It is a market-value weighted index deemed to be a representation of the Belgian equity market. Companies selected for the BEL20 are large cap and at least 15% of its shares must be free float.

			regulations.
<b>Cofinimmo</b>	Industrial and office REITs	Code of conduct 2005	Employees can inform compliance of 'preoccupations about possible irregularities' (p15)
<b>Colruyt</b>	Food retail	Internal Regulations of the Audit Committee (2006)	Employees can report financial irregularities to the audit committee (p2)
<b>Delhaize</b>	Food retail	Website	Full policy details ('I Share Line') - specific European ISL procedure.  Promise of confidentiality (anonymous possible) and non-retaliation.
<b>D'Ieteren</b>	Car retail	Activity Report 2011	Reports that 20 calls were made in 2011 to the 'Speak Up Line', nine of which were deemed valid and have been investigated and resolved (p44).  No description of policy at group level, but hotlines on website of Belron (92.7% owned by D'Ieteren) in Australia, New Zealand, UK, and USA.
<b>Elia</b>	Energy	Compliance Office Report 2011	Notes that after evaluation (2009 Code as benchmark) a recommendation was made that the company needs to implement a whistleblowing policy (p5)
<b>GBL</b>	Holding	CG Charter 2011	'The Committee puts in place and ensures the proper application of a whistleblowing procedure' (p16)
<b>GDF Suez</b>	Energy	Ethics Charter 2009	Uses wording in terms of establishing a culture. On the role of the Ethics Officer: 'They also provide help and guidance to employees who ask or share concerns about ethical issues' (p20)
<b>KBC</b>	Financial services	Group Compliance Rules 2010	Group Compliance Rule 14 is a full whistleblowing policy. Tiered approach. Promise of non-retaliation.
<b>Mobistar</b>	Telecom	CG Charter	Mentions that Internal

			Control includes evaluation of a whistleblowing policy, and that the Audit Committee will investigate and act upon reports of financial or other irregularities. (p26)
<b>Nyrstar</b>	Metal	Code of Business Conduct 2011	Full policy. Tiered approach: line manager, then compliance officer. Confidential or anonymous. Promise of non-retaliation, and feedback on action taken as a result of the report.
<b>Solvay</b>	Chemics pharma	& Annual Report 2011	Hotline, third party administered. 'To voice any difficulties or pose questions in complete confidence' (p201). Unclear about how accessible the policy is: 'is progressively being made available to employees' (p200)
<b>Telenet Group</b>	Telecom	Website	States a whistleblowing policy is part of the code of conduct. No further information given.
<b>UCB</b>	Chemics Pharma	& Annual Report 2011	UCB Integrity Line is a 24/7 hotline. Employees 'are expected' to report suspected breaches via regular channels (line manager and HR), and only use the Integrity Line as a last resort.  Policy was imposed through a Corporate Integrity Agreement (Office of Inspector General of the Dept. of Health and Human Services) as part of settlement in May 2011 with the authorities in the USA.
<b>Umicore</b>	Non-ferro	Code of conduct	States the company aims at establishing an open debate culture. In that context, employees are responsible for raising concerns with their line manager, local or regional HR, Corporate Legal, or Internal Audit, in a tiered

approach. Retaliation is explicitly stated as a breach of the Code of conduct. False reports will be sanctioned.

There is a considerable variation both in terms of information made publicly available on the internal whistleblowing policy. In that light, BEL20 companies can be placed on a continuum, going from (1) companies giving no information or the bare minimum wording to comply with the 2009 Code, (2) companies mentioning explicitly that they have a whistleblowing policy or a Speak Up procedure but not giving further information, (3) companies that give some indication as to what kind of procedure they have implemented, to (4) companies that give a richer description of the procedure along with additional stipulations. Table 2 shows the resulting placing of the BEL20 companies on that continuum.

Table 4. BEL20 companies continuum of richness in publicly available information on their whistleblowing policy

Continuum descriptor	Companies
(1) no info or minimal compliance with 2009 Code	Ackermans & van Haaren, Befimmo
(2) explicit mentioning of a policy but no info on policy	Ageas, Cofinimmo, Colruyt, GBL, Mobistar, Telenet
(3) give an idea of kind of policy	AB Inbev, Belgacom
(4) rich description	Bekaert, Delhaize, D'Ieteren (subsidiary company), GDF Suez, KBC, Nyrstar, Umicore
Anomalies	Elia, Solvay, UCB

This categorisation needs to be read with some caution. For example, Ackermans & van Haaren is a holding. We did not find any reference to an internal procedure at holding level. This does not imply that none of the subsidiaries have such procedures. However, our limited research did not come across any. Compared to the other holding in the BEL20, GBL, the only difference is that GBL states their audit committee puts in place and assures the proper functioning of a

whistleblowing procedure. Yet we did not find any further information or description of what that policy might look like.

Another reason why we must caution the reader is that there are no guarantees that the publicly available information (or the lack of it) on a company's whistleblowing policy is indeed representative of the attitude of management and board towards the value of internal whistleblowing. This was confirmed by our expert interviewees. Three interviewees stated that there is often a discrepancy between what is externally communicated and what is internally practiced. A possible explanation for this could be that departments who train and monitor on compliance and integrity - and hence who operate internal whistleblowing policies - have another drive and discourse than the departments who formulate the company's external communication.

Three other expert interviewees said that corporate governance charters and related statements are often the result of combining different 'flavours', namely that of international group level management and that of local Belgian management. One can read the core idea in the policy, but how this is acted out at a concrete organisational level is always dependent on the interpretation of that core idea by local management. This is even more likely to be the case where USA and UK cultures mingle with continental cultures, for example after a merger.

A further three interviewees explained that representativeness of public communication on these issues very much depended on the target audience of that communication. In that light, a company might be putting effort into implementing an internal procedure, but if it is not to be used by non-employees then the company might see no reason to publish its policy on its public website. There might also be differences in terms of where a company's most important stakeholders reside. A company oriented towards the USA would then be more incentivized in externally communicating about its efforts on providing ways for employees to raise concerns than a company with no or very little exposure to those markets and authorities.

Thus we cannot conclude that companies that do not provide publicly available information about their whistleblowing procedures do not have them.

Nevertheless, there remain interesting features in the policies that are more openly communicated. Let us first comment on the anomalies listed in table 4. Elia notes that they are lacking an internal whistleblowing policy. From what Solvay notes we can infer that it is currently working at implementing a whistleblowing policy. Finally, UCB had a policy imposed as part of a settlement with the USA authorities. These are clear indications that at least until 2011 not all BEL20 companies had internal policies.

From those listed in table 4 as offering a rich description of their internal policy we can infer some patterns. We make these inferences based on important elements in internal whistleblowing policies identified in Vandekerckhove and Lewis (2012).

One of the important elements in whistleblowing policies relates to the roles and responsibilities whistleblowing procedures attribute to specific organisational functions. Policies differ on whether they channel all concern to a specialised body or rather distribute responsibilities making the proper functioning of internal whistleblowing a shared concern within the organisation. Bekaert, Delhaize, KBC, Nyrstar, and Umicore make explicit reference to a tiered approach. The internal tiers are typically line manager, HR, compliance officer, internal audit. Delhaize lists all these as a first tier and places its 'I Share Line' as an additional channel. Umicore makes an explicit reference to its aim of establishing an open debate culture, but the culture-approach is even more pronounced and elaborated on in the GDF Suez Ethics Charter.

A second element of whistleblowing policies we comment on here relates to whether concerns can be raised confidential, anonymous, or both. Bekaert and D'Ieteren only use the term 'confidential'. Delhaize and Nyrstar explicitly mention the possibility of both raising concerns confidentially or anonymously.

A third important policy element relates to the protection of whistleblowers. Within organisations this amounts to an explicit promise of non-retaliation. Bekaert, Delhaize, GDF Suez, KBC, Nyrstar, and Umicore all explicitly promise non-retaliation.

Other elements identified as important in Vandekerckhove and Lewis (2012) relate to registering of concerns, monitoring and review of the policy. D'Ieteren was the only company offering some data on the number of cases reported through their hotline and the number of investigated cases. None of the companies we researched provided information on how they monitor the operation of their whistleblowing procedures, or on who is involved in reviewing them.

A further important policy element is the training provided to employees and managers on internal whistleblowing. Some companies mention training vaguely, but no information on specific ethics or integrity training relating to internal control systems is provided.

A final important element we wish to comment on relates to whether raising concerns is formulated as an obligation or duty, or not. There is growing academic literature raising questions about formulating whistleblowing as a general employee duty. Tsahuridu and Vandekerckhove (2008) and Vandekerckhove and Tsahuridu (2010) have argued the risks for whistleblowers and organisations of imposing such a general duty, mainly because it does not make sense to impose a duty on someone to put themselves at risk, and because a general duty to raise concern can only work if the acts of wrongdoing can be clearly described and it can be unambiguously prescribed who is expected to know of such behaviour. Nevertheless, Moberly and Wylie (2011) show that more than 96% of US companies formulate whistleblowing as a duty in their codes of ethics. In the European sample of Hassink et al (2007), this was 66%. In our sample we could only find an implicit hint at such a duty in the wording used by Umicore, stating it is considered a responsibility of employees that they will raise a concern. The opposite is found in the Delhaize policy, which explicitly states employees are under no obligation to report and those who do not report will not be sanctioned for not reporting. This however does not rule out that for the companies we researched, subsidiaries in the USA might use different wording in their codes of ethics.

Nevertheless, introducing an internal whistleblowing policy is not always that obvious in Belgium. A recent example is that of CASA, a home decoration retailer,

who announced early September 2012 that it would implement a hotline for employees to disclose information on other employees' unethical behaviour. The management of CASA came to that decision after it suspected up to one third of thefts from its stores were committed by staff. Management states it has the responsibility for the well-being of the company and its employees (De Standaard 2012). Reactions have been mixed, with the main opposition coming from the unions who believe the hotline will create a climate of suspicion and fear (RTBF 2012).

When Fortis Bank introduced an internal hotline in 2005 to comply with the Sarbanes-Oxley Act (SOX), this was immediately opposed by union representatives within the bank (Munster 2005). They stated it was an attempt to install a tell-tale culture, and made a complaint with the Belgian Privacy Commission. Earlier that year, a case in Germany and one in France saw labour unions win similar complaints in labour court. This prompted the Belgian Privacy Commission to formulate a position on internal whistleblowing systems (Belgian Privacy Commission 2006).

The Privacy Commission focuses in its advice on the risks involved when processing personal data as an inevitable part of operating a whistleblowing policy. Its advice states it aims to find a balance between the interests of the organisation, the whistleblower, and the accused.<sup>18</sup> It reaches that balance by commenting on a number of dimensions, including proportionality, transparency, and the individual's right to access, change, and delete data on oneself. The Commission acknowledges that SOX stipulations are not something US listed companies cannot comply with, thus it sees any (foreign) legislation requiring companies to have whistleblowing policies as a good reason to have one.

On the other hand, the Commission does formulate specific stipulations as to what kind of policies it deems fit to balance the interests of the various parties it sees as relevant. For example, the Commission is obviously worried about the guarantees whistleblowing policies can offer to keep the identity of the

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<sup>18</sup> Our translation of 'de organisatie, de klokkenluider, en beklaagde.' Note that the advice omits the public interest.

whistleblower confidential. Policies must specify categories of staff that have access to that data, and a list of these categories must be made available to the Commission (Belgian Privacy Commission 2006: 4 fn2).

Further, the advice stipulates that there must be an explicit policy specifying different modi and scope of disclosures, processes behind the disclosure channel, and sanction for justified and unjustified reports. It also requires that employees must be sufficiently informed about this. Further stipulations include that anonymous reporting should not be advertised, nor should there be any duty on employees to report wrongdoing. A hotline should only be a complementary channel of last resort. Finally, only specialised staff should be mandated to receive complaints or reports of wrongdoing. The reason the Commission makes this stipulation is that it must be staff that is able to work independently enough from the day-to-day management so it could not be pressured into revealing personal data about whistleblowers or the accused. Hence the advice from the Belgian Privacy Commission is in line with the guidance from the European Group on Data Protection (the 29 Group). However, this advice often contradicts other authoritative guidelines on the issue (see Vandekerckhove and Lewis 2012 for a detailed analysis).

## **6.3. Do corporate policies work?**

### **6.3.1. How does management think about whistleblowing?**

If C-level management and boards think about internal whistleblowing channels, it is in terms of a risk management tool, five expert interviewees said. Two of them suggested that engineering type of businesses were more likely to see raising a concern internally as a normal practice. These types of professionals seemed to have a safety driven notion of risk management, rather than a financial one. However, another interviewee said the issue of internal whistleblowing is not at all seen as a pressing one at Enterprise Risk Management level. This confirms an international tendency (Tsahuridu 2011).

The idea of protecting the whistleblower from reprisals is a scary one for some managers, according to four of our interviewees. There is fear for negative media coverage and its impact on the company should things escalate. There is also fear that it would function as a channel for false and malicious accusations. One interviewee said that whereas management might be interested in what kind of malpractice is going on, they are not interested in protecting those who give that information. Another interviewee said that managers want to know what goes wrong in their organisations, but they have no clue as to what employees who raise a concern go through.

Our interviewees also mentioned that some managers think their organisation can do without internal whistleblowing. However, in a moment of crisis these managers quickly change their minds, especially in publicly traded companies. Another interviewee said that companies are constantly being bombarded with consultants who want to implement such procedures, yet managers and employees are often annoyed by that pressure.

### **6.3.2. Who is in favour; who is opposed?**

In the cases we mentioned earlier of Fortis and Casa implementing a whistleblowing policy, it was labour unions who opposed this and who launched a negative media campaign. One interviewee explained that unions have

difficulty with anything that relates to compliance. Another interviewee said that whereas audits love it, unions hate it. However, two other expert interviewees had a very different view on the union position. Unions are not 'per definition' opposed to internal whistleblowing procedures. It depends on the relationship between management and union representation within a company. 'Labour union', like 'management', are not monolith categories. Within some companies unions have been pioneering. In other companies they have been laggards.

There was general agreement among the interviewees that compliance officers and audit departments are perhaps, within organisations, the biggest supporters of internal whistleblowing. One interviewee found this obvious as such procedures belong to their core business. Another interviewee said that compliance was definitely a supporter, but only when this existed as a stand-alone and independent function within a company.

But there were also more nuanced position about who is in favour and who is not. One interviewee said that management seems to develop in inclination towards a 'USA-styled structures and procedures approach', but work floor employees want a much more pragmatic approach. Another interviewee found that top management is blocking any real implementation of internal procedures because they know they will have to deal with sensitive information and human relations type of conflicts that are hard to resolve. Finally, one of our interviewees was of the opinion that compliance and ethics officers are often themselves the problem. Their training is far too legalistic and hence they only think in terms of shielding the employer from liability.

### **6.3.3. Hotlines?**

There was a general agreement among the interviewees that whistleblowing hotlines are very rarely used, and why this is the case. An expert said that some managers reason that if hotlines are not used, it means these systems do not work, and hence one does not need them. These managers very rarely ask the question why hotlines are not being used. The main reason according to our interviewees was that there is a lack of trust in the processes behind such

hotlines. Interviewees acknowledged that very often this lack of trust is fully justified. There is far too little follow-up to make these hotlines credible: managers are not held responsible for encouraging their staff to raise concerns, it remains unclear who runs these hotlines, and there is a lack of visible results. Hotlines are often introduced through a one-off awareness campaign. Hotlines that are integrated into a continued risk management communication have more success.

However, interviewees said that this does not imply that Belgian private sector workers do not raise concerns. They do, but are very reluctant to do so through a hotline. Instead, they prefer to do this informally. They would go to the compliance officer in person with their concern, adding 'I didn't say this, but now you know'. Or they would simply raise their concern with someone they trust, even if that is someone who is not mandated to take action. This is an exponent of the preference to resolve things locally, and pragmatically. While two interviewees thought that the fact that concerns are raised is more important than raising them through the appropriate procedure, three other experts gave good reasons why an informal approach is not appropriate. First, if a concern is raised with the wrong people (who are not mandated to investigate and correct malpractice) it is not safe to assume that the 'message will find its way to the right place'. It would require very receptive management for that to happen. Secondly, this does not endorse open communication. On the contrary, assuming informal networks and channels will work entails a risk of feeding gossip and deteriorating culture. Thirdly, some interviewees said that not having formal channels leave an internal whistleblower more at risk to reprisals.

There was a very strong agreement among the interviewees that even if hotlines are very rarely used, it is still necessary to have them as a channel of last resort. Interviewees mentioned: that more sensitive issues required more objective (and more 'distant') channels, and that it is useful if other recipients (other channels) have concern with regard to their own autonomy and independence. Another position was that having a clear procedure including a hotline is a strong communication of vision on 'how this organisation wants to deal with concerns'. It is absolutely needed if the vision is to find its way into the

organisational culture (as pattern of behaviour). Clear guidelines and clearly defined norms lead to a lower threshold for employees to raise a concern openly and directly. In that sense, a clear and strong internal whistleblowing policy can result in a lesser need to use the procedures, because just having them clear and strong encourages an open debate culture.

#### **6.4. Ways forward**

The stipulation in the 2009 Corporate Governance Code for listed companies, along with the reporting obligations imposed by the law of 6 April 2010 seems to have considerable effect. Listed companies must write something on their internal control systems in their Corporate Governance Charter. However, companies tend to write the minimum necessary to comply. Whereas a considerable numbers of companies have internal whistleblowing policies, it is often found in their codes of conduct. Companies should not simply refer to these codes in their charter but also include some details on their internal policies. Although this might not change management practice immediately, it would at least be a stronger pledge to take internal whistleblowing policies seriously as an internal control system. In connection to that, we noticed a considerable variation in wording and detail of the internal whistleblowing policy, at least with regard to what information companies make publicly available. At this stage, we regard this variation as a positive feature because it implies that companies that do write such policies are not simply copying each others rhetoric. Whereas there are no guarantees that what companies write about their internal whistleblowing policies is representative of the attitudes towards whistleblowing of their management and boards, these stakeholders have made it clear that they find it necessary to exchange examples, stories, and best practices on corporate governance arrangements (Commissie Corporate Governance 2012). Hence there is an opportunity to invite employers to share experiences with regard to running internal whistleblowing procedures. A weakness related to the corporate governance topic is that the Code Buysse II, the corporate governance code for non-listed companies makes no mention at all of internal whistleblowing policies. Although such a mentioning would not make

it legally binding for non-listed companies to describe their internal controls, again it would symbolically strengthen internal whistleblowing policies as an essential feature of good governance.

Leading on from the opportunity of discussing examples and best practices, there is a need to develop a discourse of how internal whistleblowing fits within a Belgian culture. It is quite common to see 'our culture' used as a counter-argument to whistleblowing policies (Vandekerckhove 2006) but this is always an over-statement (Park et al 2008). Likewise in Belgium. References have been made that whistleblowing is not 'in our culture' (Munster and Padoan 2005, Hein Lannoy cited in Leys and Vandekerckhove 2010). However, reality is more nuanced. We learn from our expert interviews that there is a general dislike or at least unease with Anglo-like procedures (USA or UK), where a hotline is the most obvious way to implement internal whistleblowing. There was consensus among our interviewees that these are currently not working in Belgium. Reasons given for that were a distrust among employees of the processes behind such hotlines, and the lack of seriousness in promoting or communicating them. Although this suggests a cultural barrier to hotlines, one of the key findings from the expert interviews is that it is definitely not the case that Belgian employees opt to remain silent when they perceive malpractice in their work place. There was general agreement that employees do raise their concerns, but prefer informal routes. Many expert interviewees saw this as worrisome because it implies that concerns are often raised in the wrong place - with people they trust but who are not mandated to investigate or correct wrongdoing. It was also suggested this could lead to increased gossip, and could deteriorate organisational culture. Most experts held the view that a hotline is nevertheless important, either as a channel of last resort or as a way to communicate management's vision on raising concerns. It is important to further develop with Belgian managers, board members, compliance officers, and HR practitioners good practice examples of implementing formal whistleblowing channels other than hotlines. There is much to be gained from this. It could generate culturally feasible and trusted internal whistleblowing policies that ensure concerns are raised with people who can action correcting malpractices, whilst avoiding the 'uncomfortable' use

of hotlines. Employers have every reason to engage in such a dialogue. After all, the UCB example shows that it is not impossible that foreign powers impose a hotline policy regardless of Belgian fears or distrust.

A similar separate dialogue amongst labour union representatives would be helpful to avoid 'smear campaigns' against the notion of whistleblowing as 'employees raising concern about malpractice in their workplace'. This results in enforcing negative connotations to whistleblowing in the press. In contradiction to the impression given by media reports that unions are opposed to internal whistleblowing, expert interviewees did not agree unions were always opposed. Much depends on the existing relation between management and union representatives, and it is crucial to discuss the policy with union representatives before implementing it. One possible aim of a union dialogue might be a framework of requirements for internal whistleblowing policies from a union point of view. A further aid to bridge management and union attitudes to internal whistleblowing might come from the advice of the Belgian Privacy Commission. Its preoccupation with confidentiality, and balancing interests of organisation, whistleblower, and accused could be used as a starting point for a dialogue towards balancing both risk management and protection dimensions of whistleblowing.

Such a balance is needed. Management tends to underestimate the difficulties whistleblowers can face before and after they raise their concerns inside their organisations, and are generally worried that whistleblower protection would attract abuse and malicious intent. In that light it is important to develop a long-term strategy to strengthen whistleblower protection through legislation. The strategy has to be long-term because there is no leverage for short-term effective legislative success. One huge barrier is the burden of proof being on the administrative employee to show an employer is abusing their 'right to dismiss'. This makes the prospects of a dismissed administrative employee whistleblower to win their case almost nil. An seemingly obvious route to strengthen the position of the whistleblower is to enforce this through a broadening of the anti-harassment legislation. An internal whistleblower who experiences reprisal could then make a complaint about these reprisals with the confidential advisors.

However, it would be unwise to opt for that route to strengthen the position of whistleblowers. First because an employee needs to bring a strong case (including witnesses) showing specific behavioural patterns, which do not necessarily fit whistleblower experiences. Second because a confidential advisor's first aim is to find reconciliation. The confidential advisor's position is not strong enough to investigate, correct, and sanction malpractice in the workplace. A much stronger strategy to strengthen the whistleblower position would be to use Art 17 Par 3b of the law of 3 July 1978 as a leverage to clearly position the employee who raises a concern about malpractices as someone who acts in the public interest. The referred to paragraph imposes a duty on employees to refrain from committing or co-operating in acts of unfair competition.

In line with this, awareness needs to be increased with the general public, employees, and management that workplace malpractices have a wider societal impact than merely job satisfaction. From our expert interviews we learned that the issue of whistleblowing is not on the radar of enterprise risk management in Belgium, and that not only is there a lack of integrity training provisions for compliance officers in general (TI 2012: 294), Belgian compliance officers have a background which is too legalistic. The implication of that is that they too often lack the 'soft skills' necessary in handling potential whistleblowing conflicts.

## 7. SWOTs

Table 5. Public sector

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• Good practice at Flemish level</li> <li>• Expertise and trouble-shooting (IAVA)</li> <li>• Evidence of pragmatic piecemeal legislative changes based on policy review (Flemish Ombudsperson review of 2010 and Flemish Decree of 24 October 2012)</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Lack of institutional structure (investigatory body at federal level)</li> <li>• Lack of legislative initiatives at Walloon level</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• International pressure</li> <li>• Critical mass at federal level? (spill-over to politicians?)</li> <li>• If whistleblowing legislation would be passed at federal level, this might take away fear on Walloon side? (Flemish fear for abuse seems diminished)</li> <li>• Early signs of political will at Walloon level</li> <li>• Advice Council of State</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• Over-zealous procedures in proposal at federal level which would work against whistleblower trust</li> <li>• Economic recession and communitarian issues around constitutional reforms towards increased autonomy for the regions might distract political attention away from good governance</li> </ul>

Table 6. Private sector

<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• 2009 Corporate Governance Code requires listed companies to comment on systems through which employees can safely raise concerns</li> <li>• there is variation in the approach taken by companies towards internal whistleblowing</li> <li>• Belgian Privacy Commission has a position on internal policies, emphasising guarantees for confidential reporting</li> </ul>	<p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• no reference is made to systems for employees raising concerns in the Corporate Governance Code for non-listed companies (Code Buysse II)</li> <li>• lack of protective measures for whistleblowers</li> <li>• bad recent media coverage (CASA)</li> <li>• the issue is not on the ERM radar</li> </ul>
<p><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• employees in Belgium do not remain silent; concerns are raised (but rather informally)</li> <li>• employers are eager to discuss best practices with regard to further implementing the 2009 Corporate Governance Code</li> <li>• internal whistleblowing policies can be externally imposed (e.g. UCB), the implication of which is that having a policy can become a more widespread practice regardless of national debate or preferences</li> <li>• Par. 3b of Art. 17 of the law of 3 July 1978 imposes a duty on employees to refrain from committing or co-operating in acts of unfair competition.</li> </ul>	<p><b>Threats</b></p> <ul style="list-style-type: none"> <li>• people raise concern in the wrong place (informally), which can lead to gossip or the concern not being taken up)</li> <li>• there is a general dislike or at least unease with Anglo-like procedures</li> <li>• managers tend to fear abuse of protective measures</li> <li>• there have been cases where labour unions campaign against internal policies</li> <li>• perhaps the most obvious route for increasing protection would be through the anti-harassment legislation, and hence through the confidential advisors. However, their position within companies remains weak.</li> <li>• there is a lack of training for compliance officers in general, and more specific for the 'soft skills' involved in handling whistleblowing conflicts.</li> </ul>

## 8. Conclusions and suggested action plan

From the research presented in this report, we can draw the following conclusions with regard to whistleblowing in the Belgian public sector:

- there is good practice at Flemish level: there is good cooperation between recipients at different levels, and policy reviews are successfully translated at political level,
- there is an emerging political and institutional will at the Walloon level to understand whistleblowing in a more positive light, and it is very promising to see these wills emerge at the same time,
- at federal level, the institutional drive that has existed for quite some time seems to make some progress: there is an integrity network across departments, and ideas from the institutional side are finally seeing some translation to the political side (i.e. the new Bill and the calls for an investigative body).

From the research presented in this report, we can draw the following conclusions with regard to whistleblowing in the Belgian private sector:

- internal whistleblowing has been taken up in the context of corporate governance for listed companies but not for non-listed companies,
- there is further advice from an authoritative body (Belgian Privacy Commission) which takes into account and attempts to balance concerns from various stakeholders,
- whereas there is a general unease with hotlines, the Belgian culture is one where employees raise their concerns about workplace malpractice informally, and often unsuccessful,
- there is a need and a demand for developing good practice examples on governance, including internal whistleblowing policies,
- there are no legal protection measures for private sector whistleblowers in Belgium, nor is there a viable short-term route to legally strengthen the position of whistleblowers.

From our research, and the resulting SWOT analysis, we suggest the following action points towards successful whistleblowing in the Belgian public sector:

1. Strengthen the request at the political level for an appropriately mandated investigatory body at federal level.
2. At the Walloon level, establish an integrity network at institutional level.
3. Support the monitoring of the advice and help line at Flemish level, and where possible and desirable publish results.
4. Gather success stories of internal whistleblowing.

5. Organize an annual cross regional/federal conference on integrity, to support institutional momentum, and facilitate the traveling of ideas from institutional to political level.

From our research, and the resulting SWOT analysis, we suggest the following action points towards successful whistleblowing in the Belgian private sector:

6. Facilitate a dialogue among managers, board members, compliance officers, and HR practitioners on how to build more formal and trusted channels for employees to raise concerns.

7. Facilitate a dialogue among union representatives on conditions and characteristics of acceptable internal whistleblowing policies.

8. Develop a long-term viable strategy for strengthening the position of whistleblowers through legal protection.

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## Appendix: Charts

**Title:** Ombudsdecreet 7 July 1998 (amended by Decree 7 May 2004 to implement whistleblower protection, further amended by Decree on 24 October 2012), accompanied by protocols of 4 July 2005 between the Ombudsperson and the Flemish government, and of 17 May 2006 between the Ombudsperson and IAVA.

Protocols have not been amended yet to reflect changes by Decree of 24 October 2012.

	Yes	No	Partial	Notes
Broad definition of whistleblowing	X		X	Limitations to scope were removed by Decree 24 Oct 2012)
Broad definition of whistleblower			X	Civil servant, apprentice, or contractual employee of a Flemish governmental body.
Broad definition of retribution protection			X	Protection when reporting to the Ombudsperson: against dismissal and disciplinary measures related to the reporting. Burden of proof is with the employer.  Protection extends until two years after the end of the investigation.
Internal reporting mechanism	X			Internal audit (IAVA)
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality	X			Confidentiality extended to reporting to Ombudsperson (Decree 24 Oct 2012)
Anonymous reports accepted		X		
No sanction for misguided reporting			X	Deliberately false reporting will lead to informing the head of the department of such reporting.
Whistleblower complaints authority	X			Ombudsperson
Genuine day in court		X		
Full range of remedies	X			Protection against dismissal and disciplinary measures related to the reporting (until two years after end of investigation). Decree 24 Oct 2012 adds re-employment in another organisation with the Flemish public sector.
Penalties for retaliation		X		
Involvement of multiple actors		X		

**Title:** Wetsvoorstel betreffende de melding van een vermoedelijke integriteitsschending in de federale administratieve overheden door haar personeelsleden.

Proposition de loi relative à la dénonciation d'une atteinte présumée à l'intégrité dans une autorité administrative fédérale par un membre de son personnel.

Belgian Senate (5-217/2)

Law proposal on the reporting of a suspected breach of integrity within the federal administrative agencies by employees.

	Yes	No	Partial	Notes
Broad definition of whistleblowing	X			Suspected breaches of legislation, decisions, circulars, internal regulations and internal procedures, unacceptable risks to life, health, or safety of persons or the environment, breach of professional duties, and advising or ordering someone to commit a breach of integrity. It does not cover discrimination
Broad definition of whistleblower	X			Civil servant, contractual employees, apprentice, personnel working on a service contract.
Broad definition of retribution protection	X			Protection for whistleblower and for those who give witness during investigation.  Protection granted by Ombudsperson: against dismissal, not extending a temporary contract, not extending a probationary period into a temporary contract, relocation or denial of relocation when requested, disciplinary measures, denying salary increase, withholding opportunities for career advancement or other resources, denial of annual leave, giving a negative evaluation.
Internal reporting mechanism	X			To confidential advisor, in writing.
Whistleblower participation			X	This is intended but not that obvious
Rewards system			X	
Protection of confidentiality	X			On whistleblower's request when reporting to Ombudsman. Always in internal route.
Anonymous reports accepted		X		
No sanction for misguided reporting			X	Disciplinary investigation following a deliberately false report.
Whistleblower complaints authority	X			Federal Ombudsperson, reporting to parliament.
Genuine day in court		X		
Full range of remedies		X		

Penalties for retaliation		X		
Involvement of multiple actors		X		

**Title:** Artikel 29 Wetboek van Strafvorderingen; Article 29 Code d’Instruction Criminelle (17 November 1808) – Article 29 Criminal Law

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		Imposes a duty to report crimes come across during one’s mandate, to the Crown Prosecutor
Broad definition of whistleblower	X			All civil servants and public officials, at any level of government
Borad definition of retribution protection		X		none
Internal reporting mechanism			X	For those working in tax administration, crimes related to tax must first be reported to one’s head of department.
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted		X		
No sanction for misguided reporting		X		
Whistleblower complaints authority		X		
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		

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