



EQS Experience Day

Foghorn or Siren Song? Roadmap for Multinationals on How to approach the New EU Whistleblowing Requirements

Zurich, 18 September 2024

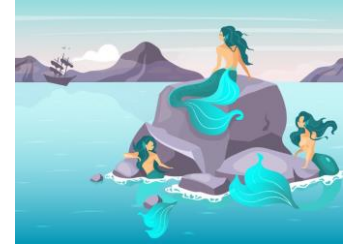
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Agenda

KEYNOTE SPEECH (30 mn) / Q&A session (15 mn)

- 1) Introduction: the macro-level view of Whistleblowing
- 2) The New EU Whistleblowing requirements
- 3) Whistleblowing and the Best-in-class standards
- 4) The Investigation challenge for sensitive issues
- 5) Key takeaways
- 6) Q&A

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01

Foghorn or Siren Song? Roadmap for Multinationals on How to approach the New EU Whistleblowing Requirements

Introduction: the macro-level view of Whistleblowing

Introduction: the macro-level view of Whistleblowing

Detecting Integrity breaches

Detection is of utmost important because:

Integrity breach as part of business

- Integrity breaches encompass **all kind of malpractices** (fraud, including corruption, harassment, non-ethical issues)
 - Such misbehaviors are committed at **all levels of the organization** (management, operations, workers)
 - There are internal and external threats
- Workplace misconduct is perpetrated **all around the globe**, including in Europe (no geographical boundary)

External pressures and costs on the rise

- Regulatory pressure on Integrity matters has **highly increased** and will continue to do so.
- Corruption is a **criminal offense** in most countries.
- Costs of fraud have a real, financial impact on organizations, plus possible sanctions.
- It may imply significant human and reputational costs.
- **Harassment and ESG topics** are also now becoming part of the regulatory and legal landscapes.

The mechanisms of a whistleblowing program shall be assessed regularly and adjusted constantly as schemes evolve and become more complex. Its efficiency shall also increase over the time.

COMMENT: Integrity breaches may have significant financial and reputational impacts for an organization.

- Example: the average cost of fraud only for a corporation amounts to 4-5% of annual revenue (ACFE, 2010-2024).

Introduction: the macro-level view of Whistleblowing

The most important detection channel

Three large categories of detection ways for Integrity breaches:

Corporate culture

- Informal internal tip-off
- Whistleblowing channel
- Awareness

Corporate controls

- Internal / external audits
- Risk management
- Compliance Management
- Corporate security
- Change of personnel / separation of duties

External tip-off

- Incident (illness, epidemic, etc.)
- Law enforcement and authorities investigations
- Negative media
- NGO / External alert systems
- Foreign jurisdictions

FIG. 13 HOW IS OCCUPATIONAL FRAUD INITIALLY DETECTED?

Source: ACFE, 2024 Report to the Nations

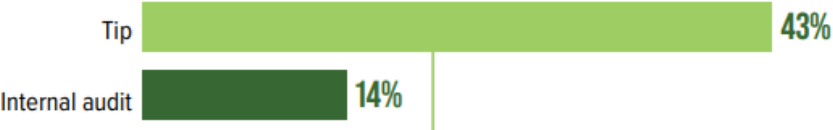


FIG. 14 WHO REPORTS OCCUPATIONAL FRAUD?



The “Corporate Culture” category has ever been the most important one, with the “tips” from employees (informal and through organized alert systems; historically through hotlines and then through online platforms).

Introduction: the macro-level view of Whistleblowing

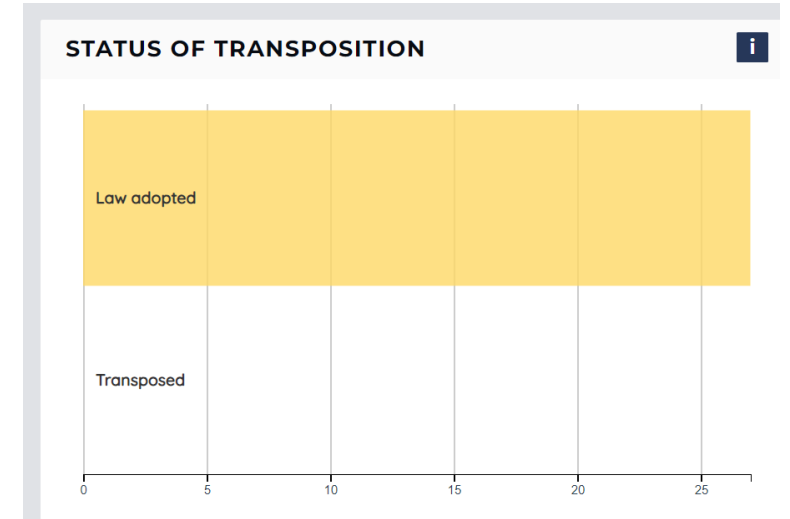
What on a global scale?

US ROOTS WITH A GLOBAL REACH

- Alert systems have been progressively and strongly developed for **more than two decades in the Anglo-Saxon organizations** because of the US legal pressure. It has implied their EMEA operations, in particular since 2010 onwards.
- **Now** the regulatory landscape has been designed **at the EU level** with the EU Whistleblowing Directive.
- Spreading and increase of the **DPAs** (Deferred Prosecution Agreement) from the US all around the world, including current lobbying in Switzerland.
- **New US significant legal rulings since 2021**: Corporate Transparency Act, Jan. 2021 (effective since Jan. 2024); FEPA (Foreign Extortion Prevention Act), Dec. 2023

THE EU WHISTLEBLOWING DIRECTIVE

- The status of the 2019 Directive's transposition in the EU: **all 27 EU Members with a Law adopted as of mid-June 2024.**
 - *Only Estonia and Poland had been still transposing it at national level as of mid-May 2024 (Estonia passed its Law on 24 May and Poland on 14 June 2024).*
- **Switzerland has been directly and indirectly impacted** and it is going further...
 - *Directly: at the Confederation level and in some Cantons (i.e. Geneva in particular, with the LPA)*
 - *Indirectly: in many large private organizations, often with international presence*



Source: Website - EU Whistleblowing Monitor, as of 15 May 2024

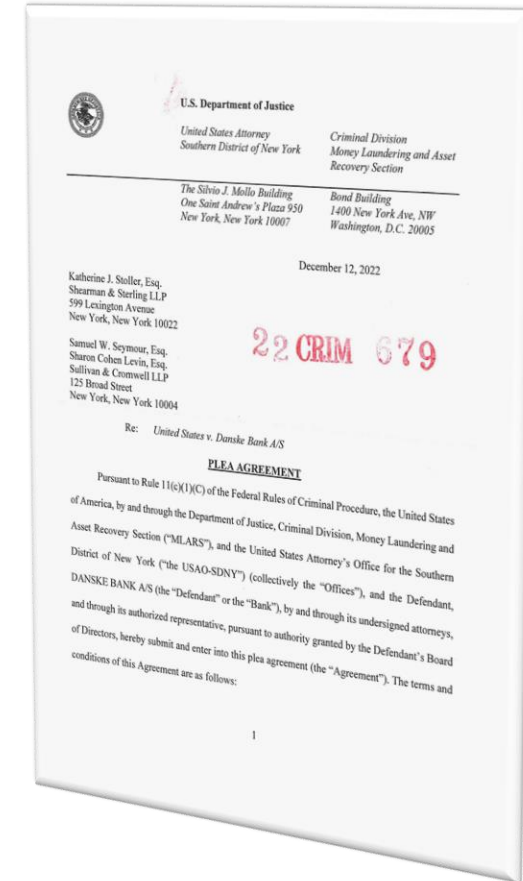
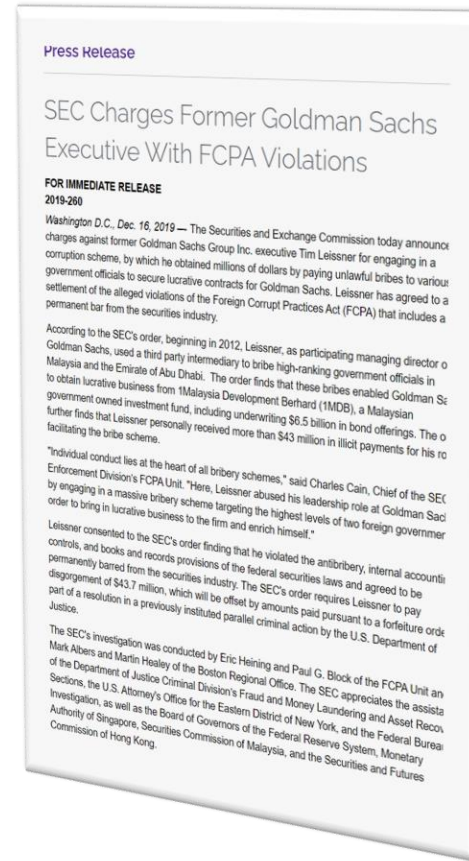
Introduction: the macro-level view of Whistleblowing

Some famous examples

(1) 1MDB (Justo / journalist B. Brown)

(2) Danske Bank (Wilkinson)

(3) Other examples in Switzerland and in Europe, with cross-border aspects: UBS (Birkenfeld), Petrobras (Magnus), the FIFA case (Blazer), the Russian Laundromat (OCCRP; money laundering through Moldova and Latvia, global scale).



1 common factor in each case: one whistleblower!

Important take away: KEEP CONTROL!

02

Foghorn or Siren Song? Roadmap for Multinationals on How to approach the New EU Whistleblowing Requirements

The new EU Whistleblowing requirements

The new EU Whistleblowing requirements In a nutshell



EU mandatory requirements

EU Member States had to implement the EU Whistleblower Directive into national law until latest December 2021. Delays were observed but they now did it all.



Switzerland's neighboring

France (02/2022), Italy (03/2023), Germany (07/2023) and Austria (02/2023) have progressively approved new Whistleblower laws according to the EU Whistleblower Directive: all four adopted between February 2022 and summer 2023.



Commitment for business leaders

Private companies with more than 50 employees need to adhere to the EU Whistleblower Directive. A period of grace until 17 December 2023 had applied for companies with less than 249 employees. Public sector is also part of the Directive.



Financial Service Providers

Certain sectors (e.g., Financial Service Providers) have to implement the EU Whistleblower Directive regardless of the amount of employees.



Protection

A national implementation needs to protect a whistleblower from all kinds of retaliation (e.g., suspension, termination, demotion, refusal of promotion, discrimination etc.). The whistleblower's anonymity has to be protected (access rights).

The new EU Whistleblowing requirements

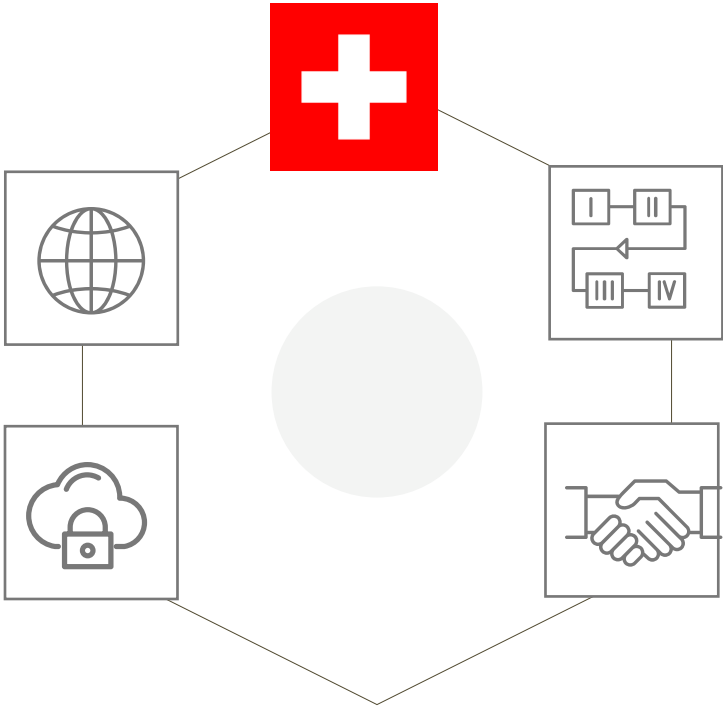
Our view on its impact on Swiss organizations

International Corporates: action!

Internationally operating corporations in Switzerland which employ more than 50 individuals in an EU country are impacted by the EU Whistleblower Directive.

The Protection's challenge

Currently there is no definite protection for whistleblowers in Switzerland. Courts of law decide on a case-by-case basis whether a whistleblower report was justified.



Whistleblowing Processes globally

We recommend to implement Whistleblowing processes not only at the headquarters, but also in all the international locations (or at least in the key ones)

Include many Internal Stakeholders

The implementation of a Whistleblower Directive shall involve multiple departments: starting with the Management, involving deeply the Human Resources department, but also the Data Protection Officer.

Approximately 90% of all Whistleblowers **first try to address** existing grievances or misconduct **internally** before turning to external agencies or the press.*

Source: *Prof. Dr. Hauser et al (2021), Whistleblowing Report 2021

The new EU Whistleblowing requirements

On a practical basis : the key mandatory points

Handling the alerts (compliance, fraud, ethics)

- ❑ Who is concerned? Many organizations as threshold are low. *Factor 1*
 - ❑ Private sector: 50 workers (exception in the FS) or possibly less at the national level; Public sector: all organizations with possible exceptions for municipalities with less than 10,000 inhabitants or less 50 employees
- ❑ Who can report? Many people in the organization's ecosystems
 - ❑ Any person who acquired information on potential wrongdoings in a work-related activity (long list of current and past **stakeholders**)

- ❑ A three-tiered **reporting system**: internal, external (with locally-appointed authorities) or public disclosure *Factor 2*
 - ❑ Types of internal channels: in-house, outsourced or shared (i.e. for private companies with 50 to 249 workers or for municipalities).
 - ❑ They must ensure confidentiality and various written or oral ways of reporting (line management, online platform, hotline, etc).
 - ❑ Compliance with the EU GDPR and national data protection laws
- ❑ The recipient shall be the “**the most appropriate** person or department” (i.e. independence and no conflict of interest)

The new EU Whistleblowing requirements

On a practical basis : the key mandatory points

Treatment of the whistleblowers

- ❑ **Procedural elements (i.e. deadlines):** acknowledgement of the receipt of the alert within 7 days, follow-up feedbacks during the 3 month-period /from the expiry of the initial 7-day time-limit), information of the outcome and closing of the alerts, track and trace of the alert received and related investigative reports, and adequate storage. *Factor 3*
- ❑ **Whistleblower's protection against retaliation** (i.e. reversed burden of proof in case of retaliation; possible extended relatives and close colleagues).
- ❑ **Proportionate sanctions** against organizations that are not able to ensure confidentiality, that obstruct about properly reviewing or investigating the alerts or that show retaliations. *Factor 4*

The new EU Whistleblowing requirements

How to leverage the key factors

Factor 1 (Scope)

- Whistleblowing policy
- Proactive risk mapping
- Involvement of HR / Human risks

Factors 3 and 4 (Procedures & Retaliation)

- Tone from the Top
- Whistleblowing policy
- Amendment of the HR policies + Ethics officer's duty
- Information & Communication

Factor 2 (Reporting system)

- Tone from the Top
- Core organizational and governance impacts
 - Assessment of the possible risk exposure
 - Confidentiality of the alert system and GDPR compliance
 - Ethics officer, Independence and clear information flows
- Design of the Whistleblowing management systems
 - Adequation with the aforementioned impacts
 - Risk mapping, alert categorization and rights of access
 - No language restrictions
- Whistleblowing policy
- Quality of the investigative work

Foghorn or Siren Song? Roadmap for Multinationals on How to approach the New EU Whistleblowing Requirements

Whistleblowing and the Best-in-class standards

Whistleblowing and the Best-in-class standards

The ISO-Standard 37002

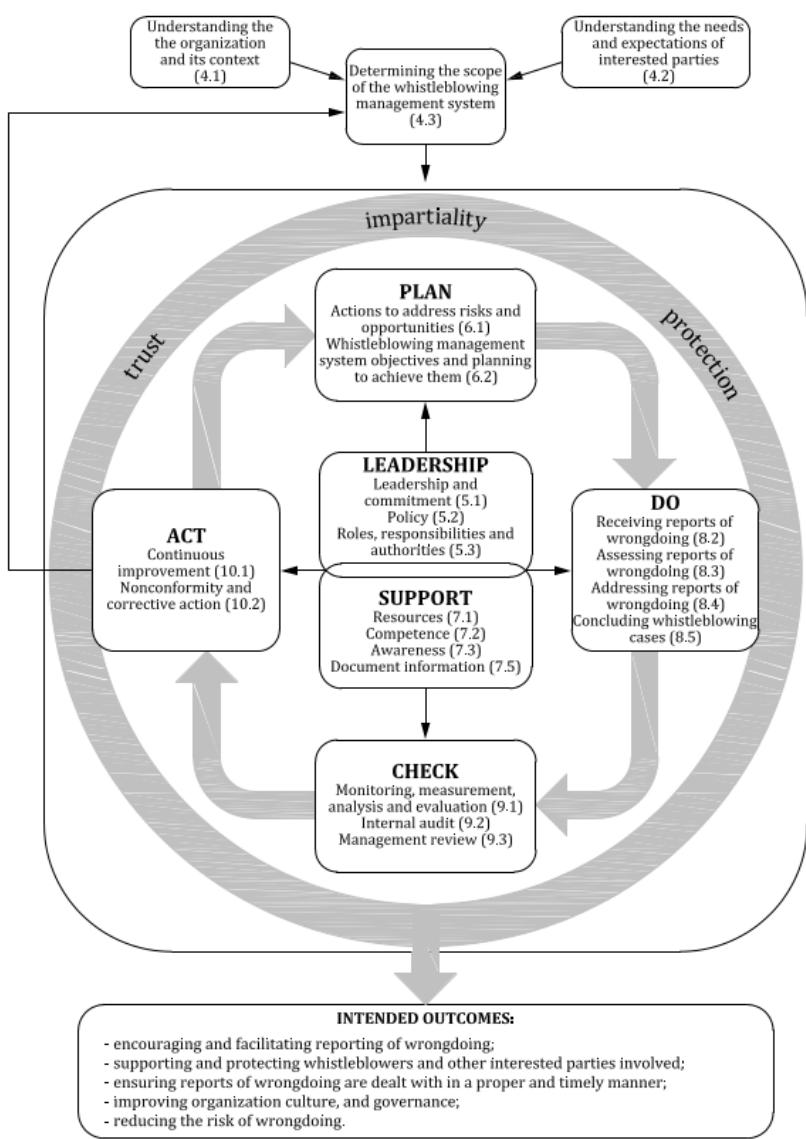
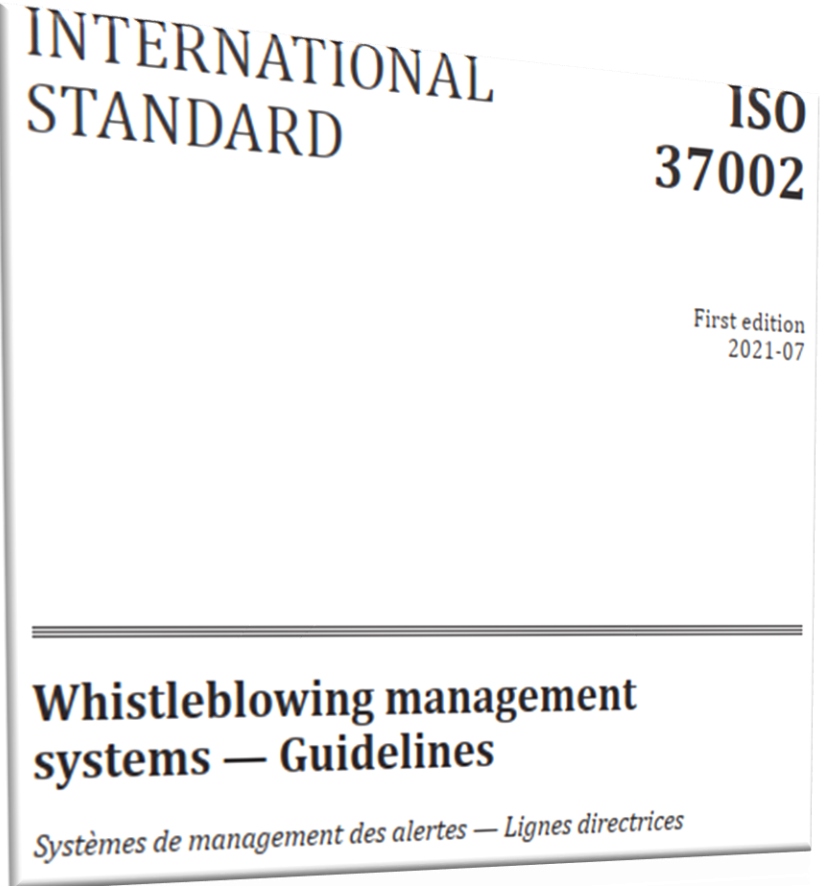
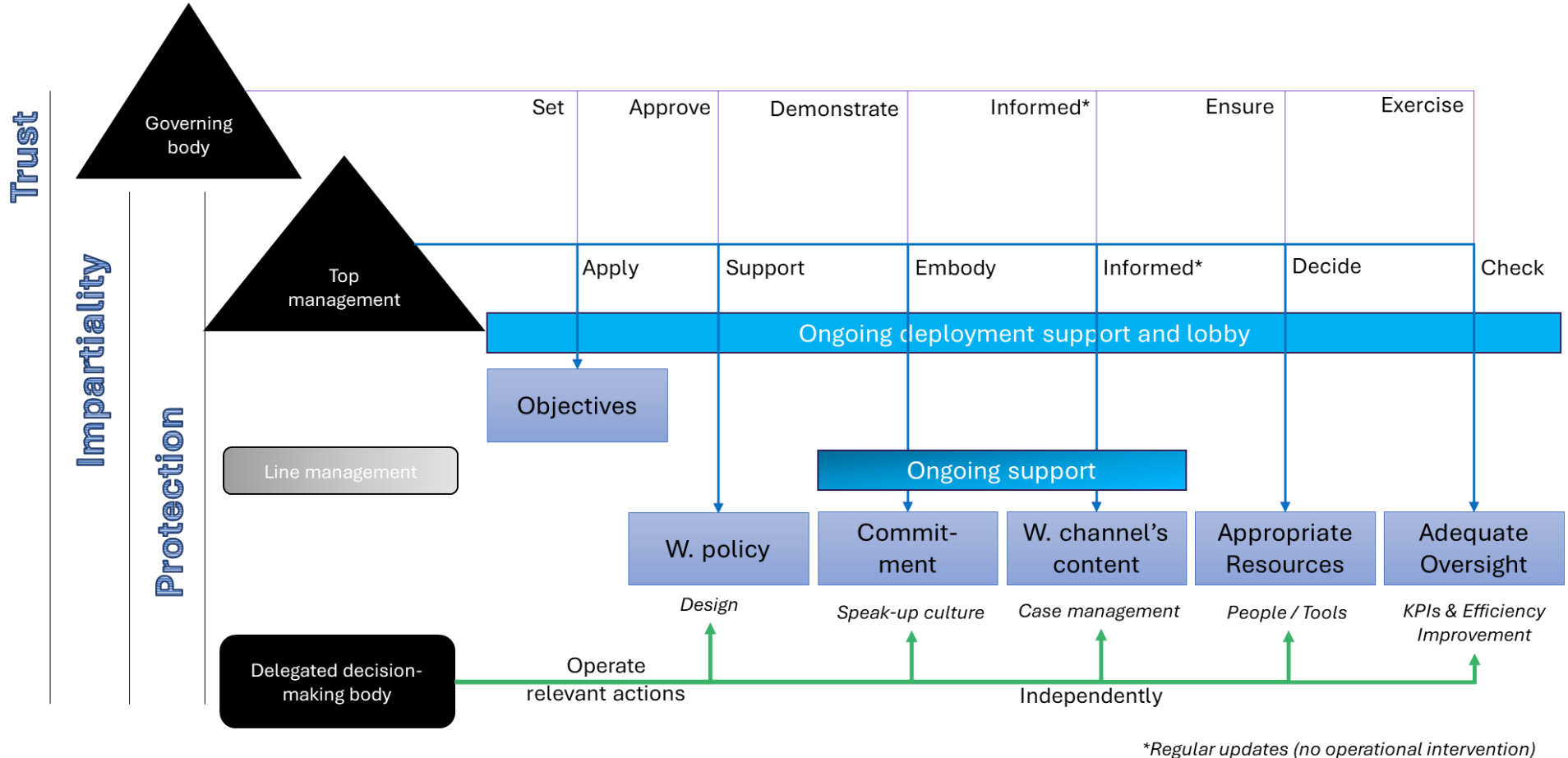


Figure 1 — Overview of a whistleblowing management system

Whistleblowing and the Best-in-class standards

The ISO-Standard 37002

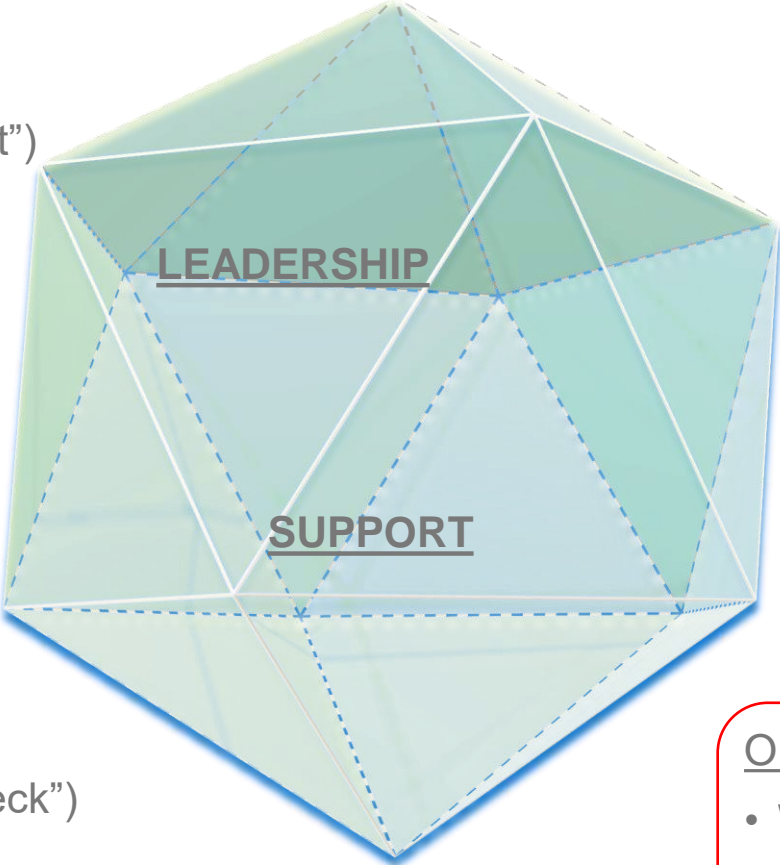
ISO 37002: Leadership, Support & Access to the Alerts (i.e. “Governance framework”)



Whistleblowing and the Best-in-class standards

The ISO-Standard 37002

IMPROVEMENT (“Act”)



PLANNING

- Context of the organization
- Ethics culture
- Action planning & coord.
- Whistleblowing policy

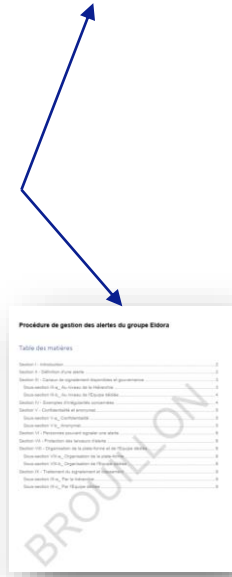
Factor 2

OPERATIONS (“Do”)

- Which Alert system?
- Ethics Committee / Officer
- Reporting / Investigations

E	Droit et Normes Civ.	Consommations	Dangerosité Subst. et Polluons	Non-améliorations RSE et Energie
	Maîtrise qualité Produits - Services	Non-qualité Alimentation et Agro.	Fautes / Systèmes de Curabilité	Maîtrise gestion Déchets / Gaspillages
S	Travail des enfants	Travail forcé / Travail au noir	Discrimination / Harcèlement	Droit du Travail & Santé et Sécurité
	Conditions Emploi Recrutement	Utilisation Internet et Messagerie	Salaires et Rémunérations	Gestion RH / Performance Emploi
	Recrutement	Liberté de syndicat		
G	Intégrité et Éthique (dont Pollution, Cartelage)	Pratiques Vie Privée Employés	Pratiques / Syst. de management internes	Respect Lois et Normes
	Non-respect des valeurs et régimes	Transparence financière	Concurrence déloyale	Conflits d'intérêts
	Fraude financière et Détournement d'actifs			Comptabilité / Avantages (dont Cadeaux)
	Actifs, Organisation et Ressources Clients	Utilisation Biens et Ressources	Discrétion et Protection des Données	

- Needs
- Scope
- Objectives
- Flows
- Alert type calibration
- Guidelines



Whistleblowing and the Best-in-class standards What in relation to Fraud Risk Management?

International regulatory recent developments in Fraud Risk Management

❑ COSO** « Fraud Risk Management Framework » (since 2016; updated in 2023)

- ❑ First “Fraud Risk Management Guide” in 2016, with an important update with the ACFE in 2023
- ❑ 5 stages: 1-Control environment (“Tone at the Top”, Leadership, Support), 2-Fraud risk analysis, 3-Control activities (via prevention and detection), 4-Information & Communication and 5-Monitoring.

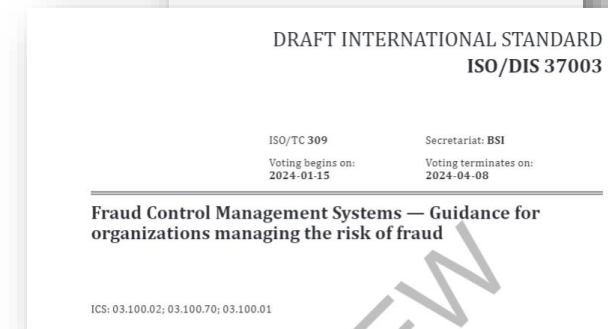
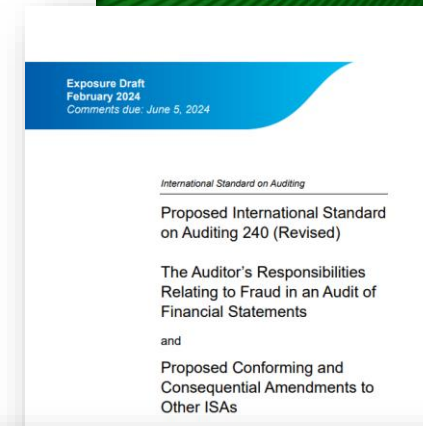
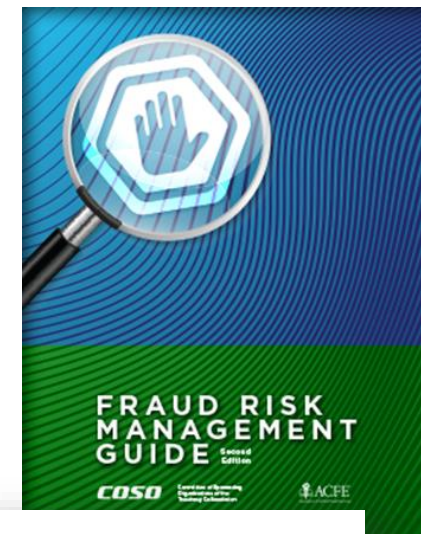
❑ International Standard on Auditing (ISA) 240 (existing norm, revision 2024)

- ❑ Draft, Feb. 2024 – Revision: “*Renforcing the professional skepticism throughout the audit*”
- ❑ “*Applying a fraud lens on risk identification and assessment*”

❑ ISO-Standard 37003 (Draft stage) – Coming soon

- ❑ Draft, as of May 2024: guidance for the “Fraud Control Management Systems”

** “Committee of Sponsoring Organizations of the Treadway Commission” is a reputed US-based global organization. It aims at “developing thought leadership that enhances internal control, risk management (ERM), governance and fraud deterrence”.



Whistleblowing and the Best-in-class standards What in relation to Anti-corruption?

Alert systems: part of the most important anti-corruption laws globally

❑ US, UK and China legislations with potential “extra-territoriality”

- ❑ The FCPA (and the RICO Act in particular + a few other US Acts, including the recent ones, such as FEPA)
- ❑ The UK Bribery Act
- ❑ *The PRC Criminal Law & The PRC Anti-Unfair Competition Law (AUCL)*

❑ EU countries are also strengthening their muscles

- ❑ Speech of Ursula von der Leyen, The State of the Union 2022, Sept. 2022: a future Anti-Corruption Directive?
- ❑ The Sapin 2 Law, in France (n°2016-1691, Dec. 2016), and the related Agence Francaise Anti-Corruption (AFA)
 - ❑ The most robust Law in Europe in that field (inspired by the FCPA / UKBA), which is the most-strongly enforced in the EU (also, with DPAs).
- ❑ Recent updates of criminal codes (CC) and new legislations in many European countries
 - ❑ Germany (CC), Ireland (The Criminal Justice (Corruption Offenses) Act 2018, Spain (CC), Italy (CC and the 2019 Spazza Corrotti Law), Netherlands (CC), etc.

Whistleblowing and the Best-in-class standards

The national look-up: the French case

- ❑ What are the relevant, national legislations of your business operations?
- ❑ Transposition of the EU Whistleblower Directive in France since 2022: through the Law of March 2022, effective since September 2022, which was followed by Decree n°2022-1686, in December 2022.
 - ❑ Very strict application of the Directive
- ❑ The 2016 Sapin 2 Law effective since June 2017: split into 8 pillars***, including Pillar 2 dedicated to the “*alert procedure for corruption and other forms of breach of integrity*”. They are all under the “The Tone of the Top”.
 - ❑ Those pillars are fully integrated and detailed in the AFA questionnaire from Nov. 2018, revised in July 2021.
 - ❑ Article 17 of the Law (scope): companies with more than 500 employees and EUR 100 turnover must comply with the requisite processes
 - ❑ Chapter 2 of the Law: the Articles 6 to 15 are dedicated to protection of whistleblowers. Article 8 (in force since January 2018) requires enterprises with more than 50 employees to implement an alert system (Pillar 2).

4 octobre 2022 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE Texte 6 sur 66

Décrets, arrêtés, circulaires

TEXTES GÉNÉRAUX

MINISTÈRE DE LA JUSTICE

Décret n° 2022-1284 du 3 octobre 2022 relatif aux procédures de recueil et de traitement des signalements émis par les lanceurs d’alerte et fixant la liste des autorités externes instituées par la loi n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d’alerte

NOR : JUSC2222980

Publics concernés : personnes morales de droit public employant au moins cinquante agents, à l’exclusion des communes de moins de 10 000 habitants, des établissements publics qui leur sont rattachés et des établissements publics de coopération intercommunale qui ne comprennent parmi leurs membres aucune commune excédant ce seuil de population ; les administrations de l’État ; les personnes morales de droit privé et les entreprises exploitées en leur nom propre par une ou plusieurs personnes physiques, employant au moins cinquante salariés ; toute autre entité relevant du champ d’application des actes de l’Union européenne mentionnés au B de la partie I et à la partie II de l’annexe à la directive (UE) 2019/1937 du Parlement européen et du Conseil du 23 octobre 2019 sur la protection des personnes qui signalent des violations du droit de l’Union ; autorités compétentes au sens du 1° du II de l’article 8 de la loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

Objet : fixation des modalités suivant lesquelles sont établies les procédures internes de recueil et de traitement des signalements et les procédures de recueil et de traitement des signalements adressés aux autorités compétentes, et de la liste de ces autorités.

Entrée en vigueur : le texte entre en vigueur le lendemain de sa publication.

Notice : chaque entité concernée détermine l’instrument juridique le mieux à même de répondre à l’obligation d’établir une procédure interne de recueil et de traitement des signalements. Par exemple, une entreprise pourrait l’établir au sein d’une note de service. Elle adopte cet instrument conformément aux dispositions législatives et réglementaires qui le régissent. Pour les administrations de l’État, la procédure est créée par voie d’arrêté. Les entités peuvent adopter une procédure identique à plusieurs d’entre elles, sous réserve d’une décision concordante des organes compétents de chacune d’elles. Il peut en être ainsi, notamment, dans les groupes de sociétés.

Au même titre que l’article 167 de la loi du 9 décembre 2016 qui prévoit l’application de l’article 8 en Polynésie française, dans les Iles Wallis et Futuna et en Nouvelle-Calédonie, le décret est rendu applicable dans ces mêmes collectivités. Les dispositions du décret s’appliquent également dans les collectivités d’outre-mer soumises au principe d’identité législative : Guadeloupe, Guyane, Martinique, La Réunion, Mayotte, Saint-Martin, Saint-Barthélemy et Saint-Pierre-et-Miquelon.

Références : le décret est pris en application de l’article 8 de la loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique. Il peut être consulté sur le site Légifrance (<https://www.legifrance.gouv.fr>).

La Première ministre,
Sur le rapport du garde des sceaux, ministre de la justice,
Vu la directive (UE) 2019/1937 du Parlement européen et du Conseil du 23 octobre 2019 sur la protection des personnes qui signalent des violations du droit de l’Union ;
Vu la loi organique n° 2011-333 du 29 mars 2011 modifiée relative au Défenseur des droits, notamment son article 35-1 ;
Vu le code de commerce, notamment ses articles L. 225-102-4 et L. 233-16 ;
Vu le code de la défense, notamment son article L. 4122-10 ;
Vu le code général de la fonction publique, notamment ses articles L. 3 à L. 5 et L. 124-2 ;
Vu le code de la sécurité sociale, notamment son article L. 130-1 ;
Vu la loi n° 2016-1691 du 9 décembre 2016 modifiée relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, notamment ses articles 6 et 8 dans leur rédaction résultant de la loi n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d’alerte ;
Vu l’avis de la Commission nationale de la négociation collective, de l’emploi et de la formation professionnelle en date du 12 septembre 2022 ;
Vu l’avis du Conseil national d’évaluation des normes en date du 15 septembre 2022 ;

***1-Code of Conduct, 2-Alert procedure for corruption and other forms of breach of integrity, 3-Bribery & corruption risks map, 4- Assessment of third parties, 5- Accounting procedures, 6-Training, 7-Disciplinary regime and 8-Control & evaluation

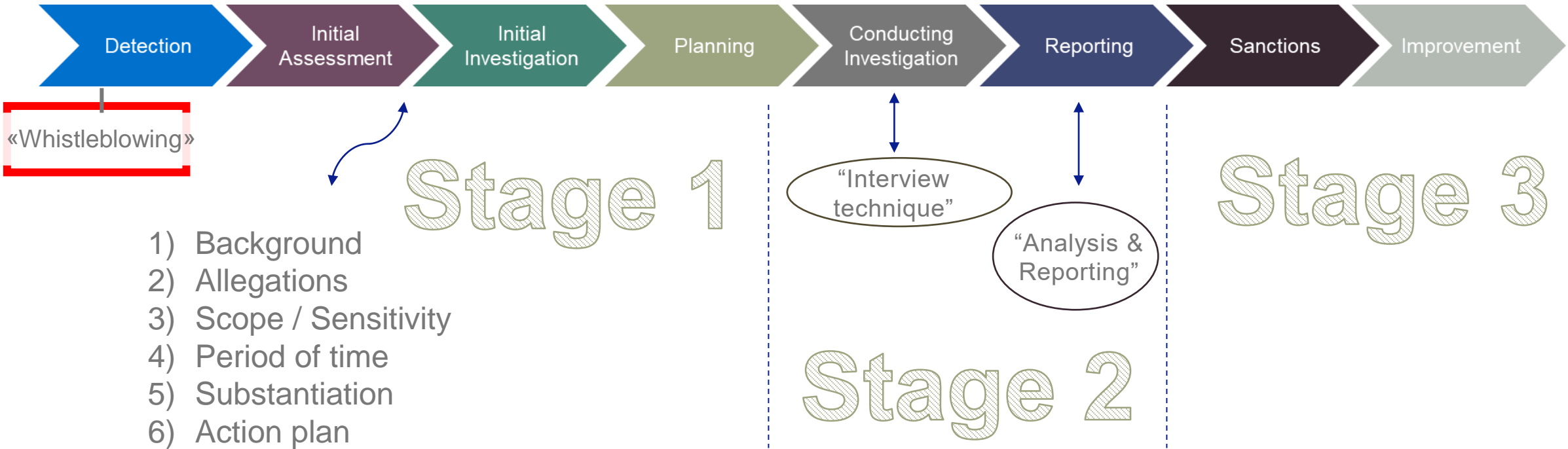
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The Investigation challenge for sensitive issues

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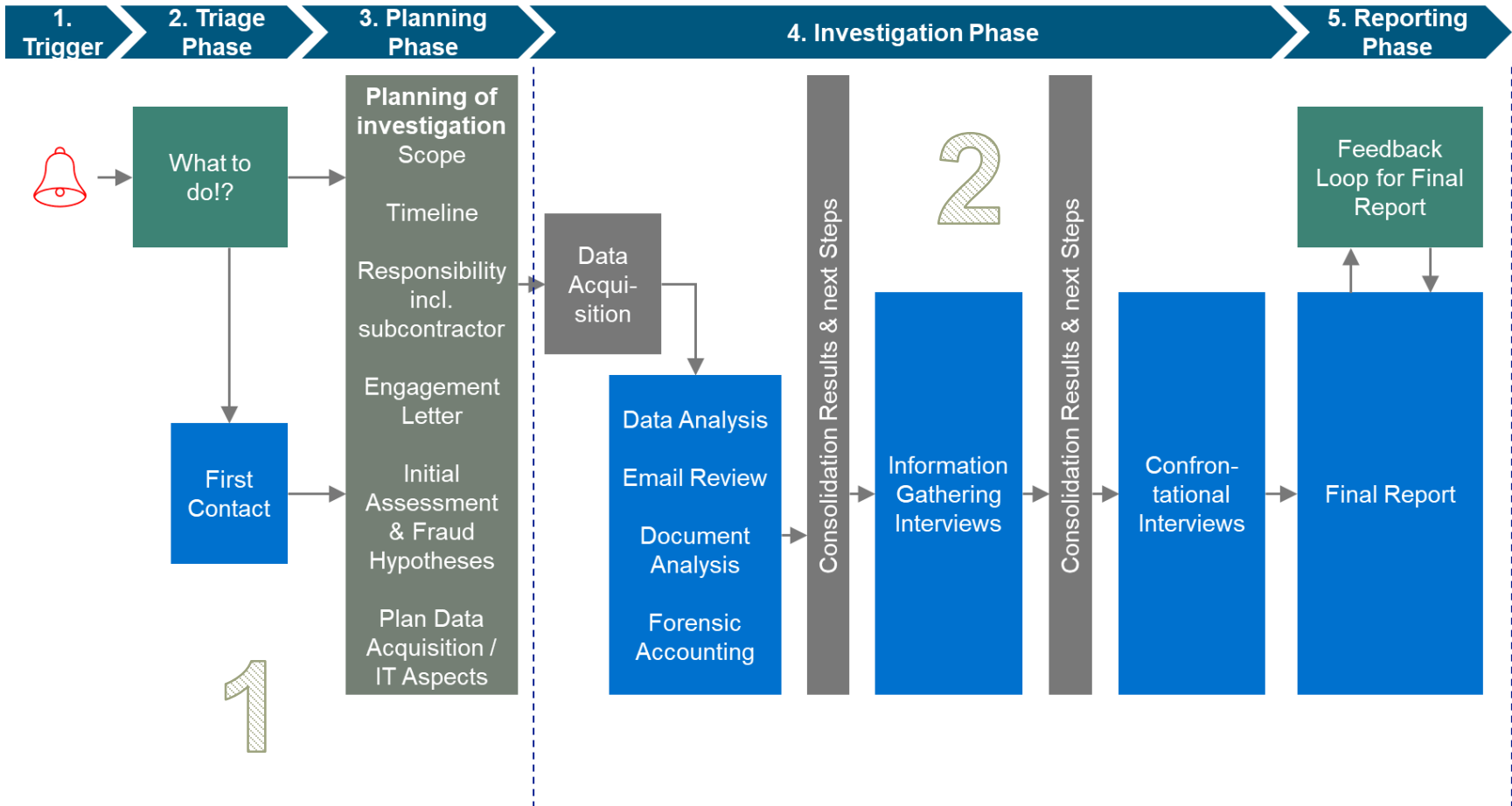
The Investigation protocol of an Integrity issue

A progressive and structured approach that should be tailored to each case.
Three key factors all along: critical thinking, independency and questioning.



The Investigation challenge for sensitive issues

Focus on the 2 first stages of the Investigation protocol



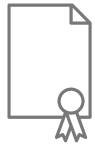
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Foghorn or Siren Song? Roadmap for Multinationals on How to approach the New EU Whistleblowing Requirements

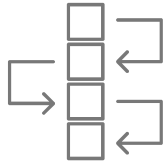
Key takeaways

Key takeaways

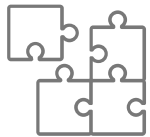
Be proactive, organized and smart in your whistleblowing strategy



CRITICITY - Alert systems became mandatory (in the EU) and are part of a good governance. They are largely deployed by multinationals. Don't lose control!



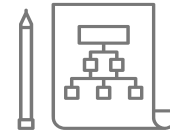
METHODOLOGY - Whistleblowing systems shall offer complete confidentiality, no language restrictions and ensure a guided process, such as with the ISO 37002.



STAKEHOLDERS – Design and implementation require that everyone is accountable, including management. External stakeholders as threats.



DEDICATED RESOURCES - In addition to the design phase, the responsibilities for handling promptly the alerts should be clarified and set (i.e. „reporting office“).



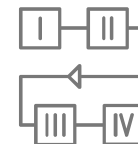
INDEPENDENT INVESTIGATIONS - It should be evaluated who carries out the investigations (especially the complex or sensitive ones) and who is responsible for the follow-up measures.



AWARENESS AND CORPORATE CULTURE - Framework conditions for education and spread of the whistleblowing culture should be created and nurtured (i.e. regular communication, guidelines, trainings, etc).



PROTECTIVE MEASURES – The protection of whistleblowers and „well-being“ of leavers should be a cornerstone of the HR strategy and compliance teams.



LOCAL FIT – Identify your international exposure, including in Europe, and monitor the local whistleblowing and criminal laws. Adapt your defense.

Foghorn or Siren Song? Roadmap for Multinationals on How to approach the New EU Whistleblowing Requirements

Q&A session



Thank you for your listening and participation!

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