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Decrypting the New Whistleblower Law in France

BY SOPHIE PELICIER-LOEVENBRUCK AND CHARLES DUMEL*

On December 9, 2016, France enacted a statute broadly granting whistleblower protections to employees. This new law represents the next step in the evolution of such protections in France. The focus on this area of law originated with the U.S. Sarbanes-Oxley Act of 2002, which triggered—or at least contributed to—an increased interest, from both the public and lawmakers, concerning the status of whistleblowers and the extent of the protection they should be granted.

In France, even the word “whistleblower” was unknown before emergence of the Sarbanes-Oxley Act. Its French equivalent (*“lanceur d’alerte”*) has only been recently coined. The appearance of that French term, first in sociological studies and then in the legal field, greatly increased public attention and interest in such a legal mechanism. The debut of the concept also sparked a number of legal cases, some of which were widely covered in the media.

The legal issues associated with whistleblowing were addressed by French law before the enactment of the 2016 whistleblower statute, but not with a unified, overarching framework. European and French case law had been the main source of authority for defining who should be protected against retaliation after speaking out regarding conduct deemed reprehensible. Judges then referred to and relied on principles of freedom of expression recognized by the French constitution and the European Convention on Human Rights in making decisions. Over time, the French legislature added statutory protections for whistleblowers in specific situations, such as in matters of discrimination,¹ harassment,² corruption,³ grave risk to the public health or the environment,⁴ and in criminal matters.⁵

1 See Code du Travail [C. trav.] [Labor Code] art. L 1132-1 (Fr.).

2 See Code du Travail [C. trav.] [Labor Code] art. L 1152-2 (Fr.).

3 See Code du Travail [C. trav.] [Labor Code] art. L 1161-1 (Fr.).

4 See Code du Travail [C. trav.] [Labor Code] art. L 4133-1 et seq. (Fr.).

5 See Code du Travail [C. trav.] [Labor Code] art. L 1132-3-3 (Fr.).

The new law, Act n° 2016-1691, represents an act “on transparency, the fight against corruption and the modernization of economic life.” Known as the “Sapin II Act,” the law recognizes whistleblowers by affording broader legal protections. This general legal protection replaces the previous specific protections contained only in separate legal statutes. The Sapin II Act defines the conditions under which a person can be recognized as a whistleblower, the procedures that must be implemented and followed, and the protections granted, especially to employees. In this article, we strive to break down these primary components of the law.

Who is Considered a Protected Whistleblower under the Sapin II Act?

Article 6 of the Sapin II Act defines “whistleblower” As follows:

a whistleblower is a physical person who reveals or reports, in a selfless manner and in good faith, a crime or an offense, a grave and obvious violation of an international commitment lawfully ratified or approved by France, of a unilateral Act of an international organization taken on the ground of said commitment, of the law or regulation, or a grave threat or harm to the general interest, of which this person has acquired personal knowledge.

This broad definition calls for several observations.

1. The whistleblower must be a “physical person” but not necessarily an employee.

At the outset, the broad description of “whistleblower” implies that the protected status is not reserved to employees or even to persons acting in a professional setting. It raises the issue of whether the law covers individuals who are complete “strangers” to the company, even though the procedural rules concerning complaints and protective measures established by the Sapin II Act specifically concern employees, external collaborators, and public agents.

This discrepancy did not go unnoticed. The French Senate criticized this apparent contradiction, arguing that it conflicted with the constitutional value of the law’s accessibility and intelligibility. To the contrary, however, the Constitutional Council (“*Conseil Constitutionnel*”) approved this interpretation in its decision evaluating the Sapin II Act’s conformity with the French Constitution.⁶

The Constitutional Council concluded that, by deliberately adopting an expansive definition of “whistleblower,” the legislature had intended to encompass situations outside a professional relationship. Courts in France have recognized that, under this definition, individuals could be considered “whistleblowers,” and they could then be covered by whistleblowing procedures implemented by the legislature in the future. In other words, even though such individuals may not currently have an outlet or protections under the law, the definition should be liberally construed because future legislative action may create outlets and protections for them.

2. The whistleblower’s report must be “selfless.”

According to the legislative debates, only conduct that is “selfless” is covered by the Sapin II Act. This condition implies that the report must be raised in defense of the general interest and not for personal gain, especially financial interest.

As a result, whistleblowing cannot be rewarded under French law. Here, the French legal framework appears to differ significantly from the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act, which allows the Securities and Exchange Commission to reward whistleblowers when their actions lead to substantial financial sanctions.

6 *Conseil constitutionnel [CC] [Constitutional Court] decision No. 2016-74IDC, Dec. 8, 2016 (Fr).*

The requirement of an altruistic motive may mean that victims of the reported, allegedly unlawful conduct do not fall under the whistleblower law. Because the victims could obtain compensation or other relief based on the harm suffered, they arguably act with a personal interest in the outcome.

It is also noteworthy that, based on the public reports and studies conducted about the Sapin II Act, certain individuals cannot qualify for whistleblower status. Indeed, protection is not extended to journalists or any other person whose professional activity is to regularly sound alarms about issues of general interest. Given this exemption, it is unclear whether protections would apply to an employee who is assigned to monitor and ensure that the company complies with its obligations, legal or otherwise.

3. The whistleblower's alert must be raised "in good faith."

The whistleblower's report must be not only selfless but also made "in good faith." French employers should be somewhat familiar with this notion, however, because "good faith" was already a prominent factor in the legal rules protecting whistleblowers in specific areas (corruption, protection of public health and the environment, etc.) before passage of the Sapin II Act.

The French courts, and the European Court of Human Rights (ECHR), likewise have focused on a good-faith element. According to French case law, an employee is considered to have acted in bad faith only when it is established that he or she knew that his or her allegations were false and, therefore, abused his or her freedom of expression. In other words, the mere fact that the allegations of the employee turn out to be unfounded does not show that the employee acted in bad faith. Indeed, even when the accusations ultimately prove groundless, if the employee could reasonably believe in the truth of his or her allegations, he or she will be regarded as having acted in good faith.⁷ As a practical matter, therefore, it is very difficult to prove that an employee did not act in good faith.

In this respect, French judges adopt a position similar to that taken by the ECHR. To determine whether sanctions taken against whistleblowers constitute an infringement on their freedom of expression protected by article 10 of the European Convention on Human Rights, the ECHR assesses the good faith of the whistleblower on the basis of several criteria, including whether:

- the whistleblower had reasonable ground to believe that the information was true;
- the alert served the general interest; and
- the report was not motivated by a personal grievance, a personal antagonism, or the expectation of personal advantage, including pecuniary gain.⁸

These factors give clues as to the meaning of "good faith" but, at the same time, raise questions of interpretation. For example, what is a "reasonable belief" in this scenario?

In its defense, an employer may be forced to prove the bad faith of an employee who may have been sanctioned and even dismissed for reporting allegedly reprehensible misconduct that actually did not take place. The employer must confront a reversal of the burden of proof: the employee is somewhat presumed to have acted in good faith, while the company must show that its decision against the employee was not based on the alert itself. In tackling this burden of proof, the employer may argue that the adverse employment decision was based on some objective consideration, such as misconduct by the employee unrelated to the report and/or an attempt by the employee to avoid discipline by invoking whistleblower status.

⁷ See, e.g., *Cour de cassation [Cass.] [supreme court for judicial matters] soc.*, Dec. 8, 2015, No. 14-16.278 (Fr.) (concerning an alert about alleged facts of moral harassment which, in the end, were not proven).

⁸ See, e.g., *Bucur and Thomas v. Romania*, App. No. 40238/02, ECHR (Jan. 8, 2013); *Guja v. Moldova*, App. No. 14277/04, ECHR (Feb. 12, 2008).

4. Although the statute limits whistleblower coverage to certain types of reports, the possible subject matter of protected reports is very broad.

The Sapin II Act's definition of "whistleblower" purports to narrow the scope of protected reports. The text provides that whistleblower protections extend to individuals who report "a crime or an offense, a grave and obvious violation of an international commitment lawfully ratified or approved by France, of a unilateral Act of an international organization taken on the ground of said commitment, of the law or regulation, or a grave threat or harm to the general interest."

Yet, beyond criminal actions and obvious violations of the law, the statute broadly protects reports of a "grave threat or harm to the general interest." This unrestricted category could encompass many situations and is sure to be a source of debate before the courts in the future. Nonetheless, the Constitutional Council has considered and upheld this broad definition as constitutional.

One important exception concerns information of a secret or confidential nature. The Sapin II Act does not apply, for example, to facts, information, or documents constituting a military secret. Nor does the law extend to employees who disclose protected medical information or who breach the attorney-client privilege. In particular, an attorney cannot divulge information or documents provided by his or her client on the ground that they could otherwise be the subject of an alert by a whistleblower.

Conversely, it is unlikely that an employer will be able to invoke a confidentiality obligation in the employment contract of an employee to prevent the latter from reporting as a whistleblower.

5. The whistleblower must have "acquired personal knowledge" of the information reported.

As revealed during the debates that preceded voting on the Sapin II Act, the statute's reference to the "personal knowledge" of the whistleblower involves two criteria. First, the information cannot be mere speculation or deduction. And, second, the person raising the alert must not be a whistleblower "by proxy," simply repeating information already reported. In light of this second consideration, it remains to be seen whether the person who raised the alert will be regarded as having had "personal knowledge" of the information if that information was revealed to him or her in confidence by another party.

What Reporting Duties Are Imposed on the Whistleblower and on the Employer?

1. The Whistleblower's Responsibilities and Reporting Procedures

The Sapin II Act sets out a graduated reporting procedure for whistleblowers, with three levels of escalation.⁹ Compliance with this procedure is a prerequisite for a whistleblower to be legally protected against retaliation by his or her employer.

At the first level, the whistleblower must notify: (1) his or her supervisor, direct or indirect; or (2) the employer; or (3) a "go-to" person appointed by the employer to handle such reports who has the competence, authority and sufficient means to perform this task. This "go-to" person does not have to belong to the company and can be a physical person or an entity.¹⁰

Employees are thus required to inform the employer of any allegations first, before going to the authorities and the public. The law designates the company as the first level in the reporting line because the employer can directly remedy the alleged misconduct within its control. This step also emphasizes the selfless nature of the report, because if the employee is truly advancing the general welfare, his or her goal would be remediation of the reprehensible conduct.

⁹ See Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-191 of Dec. 9, 2016 on Transparency, the Fight Against Corruption and the Modernization of Economic Life] [hereinafter *Sapin II Act*] art. 8.

¹⁰ See Décret 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'État [Decree 2017-564 of April 19, 2017 on the procedures for accepting reports by whistleblowers within private or public legal entities or state administrations] art. 4.

In the absence of a response from the employer within a reasonable period of time, the whistleblower can inform a judicial authority, an administrative authority, or professional orders as a second step. The reasonableness of the response time is a fact-specific inquiry. Judges likely will assess this reasonableness on a case-by-case basis, depending on the subject of the alert and the complexity of the investigations that may be required.

As a third step, the whistleblower can go to the public with the information if he or she has not received a response from the authorities previously notified.

This graduated process draws direct inspiration from the case law of the ECHR. When balancing the employee's duty of discretion against the freedom of expression, the ECHR maintains that the whistleblower initially must divulge the information to a supervisor or another relevant authority or body. Revelation to the public must be used as a last resort only, when no other options remain.¹¹

In this respect, the French Supreme Court has held a more flexible position—at least preceding the Sapin II Act. Prior case law allowed the whistleblower to go directly to the media without going beforehand to an employer's hierarchy or a judicial authority. It is unclear exactly whether or how this case law will evolve under the new statute.

Moreover, the Sapin II Act allows an exception to this successive framework in situations involving grave and imminent danger or irreversible damages. In such circumstances, a whistleblower may go straight to the authorities or the public. This exception will surely lead to contentious litigation addressing, for example, how to determine what constitutes "grave and imminent danger." Another key question may be whether protections extend to an employee who acted based on his or her "good faith" that such a danger existed (even where it did not exist in fact).

2. The Employer's Responsibilities and Reporting Procedures

The Sapin II Act requires legal entities with at least 50 employees to implement appropriate procedures for accepting reports raised by whistleblowers.

The government Decree n°2017-564 of April 19, 2017, recently detailed the content and the conditions for the establishment of these procedures.¹² According to this Decree, these procedures must specify how whistleblowers can: (1) send his or her report to his or her supervisor, employer or to the "go-to" person; (2) provide, as the case may be, the relevant facts, information or documents to support his or her report; and (3) allow an eventual exchange with the recipient of the report.

The procedures for accepting reports must also include the steps to: (1) acknowledge the receipt of the report and inform its author about the reasonable and foreseeable timeframe for evaluating the report and how the employee will be apprised of the outcome of this assessment; (2) ensure the whistleblower's identity and the facts contained in the report will be kept confidential, even when the report is communicated to third parties for verification purposes; and (3) destroy the portions of the report that could be used to identify its author and the persons targeted after the assessment is completed (the procedure must set a deadline for this destruction, which cannot exceed two months following the closing of the report's evaluation).

Finally, the Decree provides that the whistleblowing procedure must be made readily accessible (e.g., by publication on the intranet, etc.).

¹¹ *Guja v. Moldova*, App. No. 14277/04, ECHR (Feb. 12, 2008).

¹² See Décret 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'État [Decree 2017-564 of April 19, 2017 on the procedures for accepting reports by whistleblowers within private or public legal entities or state administrations] art. 5 and 6.

The determination of the most appropriate framework for the company for the adoption of a whistleblowing procedure (be it in a separate policy, in the company's rules and regulation or through a collective bargaining agreement) is left to the company's discretion.

When evaluating the sufficiency of an employer's whistleblowing procedure, it seems likely that the courts will consider various factors. Factors might include the size, means, and sectors of the employer's operations (finance, banking, health, defense, etc.).

Of course, companies have their own incentives for adopting such procedures or adapting their codes of conduct to address whistleblowing. These measures enable employers to better control the spread of the information, to give themselves the time and means to respond to reports, and to avoid the risky escalation to the authorities and the public. Indeed, according to the Spokesman of the Law Commission of the French National Assembly, failure to implement an appropriate procedure will allow employees to go straight to the second level in the reporting line, i.e. the authorities. Washing one's dirty laundry in private is always better.

In adopting an internal mechanism for reporting, the employer should ensure that the procedure is not so complicated that it prevents the employee from effectively raising an alert. Such a complex procedure could be regarded as an attempt by the company to hinder the report, which would constitute a criminal offense punishable by one year imprisonment and a fine of 15 000 euros.¹³

What Protections Apply to Whistleblowers?

Whistleblowers under the Sapin II Act are entitled to several protections, ranging from antidiscrimination measures to guidance on the appropriate course to file a report. These protections are briefly summarized below.

1. Confidentiality

The procedures established by the employer to register reports must ensure the complete confidentiality of both the identity of the whistleblower(s) and the information collected.¹⁴ No details that could be used to identify the whistleblower can be divulged, except to the appropriate judicial authority and with the consent of the whistleblower.

In addition, the identity of the person(s) whose actions are the subject of the alert is also confidential and cannot be shared, except with the appropriate judicial authority, before the accuracy of the report has been established.

Importantly, these confidentiality obligations work both ways. The law aims to prevent, on the one hand, retaliation by the employer and, on the other hand, harm caused to the persons or entities targeted by the report should it ultimately prove unfounded. To enforce this provision, failure to comply with the confidentiality obligation, be it by the employee or the employer, is punishable by two years' imprisonment and a fine of 30 000 euros.

2. Protections against Discrimination

Safeguard from Retaliation. An individual who meets the definition of a whistleblower, and who follows the proper procedure to submit a report, cannot be subjected to retaliation. An employer cannot deprive a whistleblower of access to a job, an internship, or a vocational training course. Nor may an employer otherwise punish, dismiss, or discriminate against a whistleblower in his or her employment conditions (remuneration, position, qualification, classification, promotion, etc.) for having filed a report.¹⁵

¹³ See Sapin II Act art. 13.I.

¹⁴ See Sapin II Act art. 9.

¹⁵ See Sapin II Act art. 10 (integrated to Code du Travail [C. trav.] [Labor Code] art. L 1132-3-3 (Fr.)).

Any decision made in violation of this rule can, of course, entail damages. The decision is also void, however, which is a rather unusual outcome in French employment law and permits additional remedies. If the decision is found void because the employee was dismissed for having submitted a report, he or she will be entitled to reinstatement (in his or her former position or an equivalent position) as well as back pay.

Adjustment in the Burden of Proof. In addition to the protection of whistleblowers from retaliation, the rules governing the burden of proof are adapted under the Sapin II Act so that the employee and the employer share the burden.

Indeed, the whistleblower does not have to prove his or her allegations as set forth in the report of misconduct. Instead, he or she must establish facts allowing a fact-finder to conclude that the report was made in good faith. Such proof gives rise to a presumption that retaliation occurred. The burden then shifts to the employer to show that its decision was justified by objective considerations unrelated to employee's whistleblowing activity. This adjustment in the parties' burdens also applies to claims involving discrimination or moral harassment (*i.e.*, workplace bullying).

Employers often find it difficult to prove that their decisions were based on objective considerations unrelated to the report, as this seems to require proof of a negative – that is, proof of what one has not done. As a result, to overcome the presumption in favor of the employee, employers may decide to challenge the applicability of the whistleblower protections rather than fight about the reasons underlying the adverse employment decision. For example, employers may try to show that the “would-be” whistleblower actually acted for personal gain.

3. Partial Protection from Criminal Liability

Generally, a whistleblower who reveals information covered by a secret protected by law (*e.g.*, a bank secret, trade secret, etc.) is not criminally liable if this disclosure is necessary and proportionate to the safeguarding of the interest at stake. This protection does not, however, shield the disclosure of military secrets, medical data, or information covered by the attorney-client privilege.

As mentioned earlier, any person (the employer, its representative, etc.) who hinders in any way the submission of a report to the designated representative of the company or to the authorities can incur criminal liability. Such obstruction may be punished with one year imprisonment and a fine of 15 000 euros.

Furthermore, if the employer triggers a criminal investigation against the whistleblower for defamation and this investigation does not lead to prosecution, the judge can elect to fine the employer. If the judge determines that the employer's criminal action was abusive or dilatory, he or she may impose a fine of up to 30 000 euros.¹⁶

These protections against criminal liability, however, do not grant complete immunity to whistleblowers. If their allegations prove false, whistleblowers may face potential civil and/or criminal liability. For example, the employer can file a criminal complaint against the employee for slanderous denunciation (“*dénonciation calomnieuse*”).¹⁷ Moreover, a “false whistleblower” can incur civil liability for the damages caused to the employer by his or her allegation. Such a whistleblower is protected, however, if acting in good faith.

4. Financial Support for the Whistleblower

As a practical matter, a whistleblower may need financial assistance if dismissed by his or her employer in retaliation for submitting a report. With that in mind, the Sapin II Act approved by the French Parliament included a provision allowing the Defender of Rights (“*Défenseur des droits*”)—an independent administrative authority—to provide financial support to the whistleblower.

¹⁶ See Sapin II Act art. 13.

¹⁷ See Code de Procédure Pénale [C. pr. pén.] [Criminal Procedure Code] art. 226-10 *et seq.* (Fr).

Upon reviewing that provision, however, the Constitutional Council found it unconstitutional. The court ruled that the Defender of Rights simply does not have the authority to provide financial assistance to individuals and that the legislature could not grant it such authority. A whistleblower may request assistance from the Defender of Rights in protecting his or her rights and freedoms but cannot obtain financial aid. The Defender of Rights may direct the whistleblower to an appropriate organization for reporting a violation.¹⁸

It is possible that another authority may be appointed in the future to provide financial support for whistleblowers, in addition to the guidance provided by the Defender of Rights.

Relationship of the Whistleblowing Statute to Constitutional Protection

Invoking whistleblower status is an attractive option for employees in court or settlement negotiations because of the leverage it offers. Asserting whistleblower status presents little risk but carries significant potential reward, particularly the potential nullification of the employer's decision. As mentioned earlier, success under the whistleblower statute can render the employer's action void, which is an exceptional remedy under French law.

Even if an employee does not qualify as a whistleblower under the Sapin II Act, he or she may have a constitutional claim. It remains quite possible that courts will assess whether the employer's conduct violated the employee's constitutional rights. If, for example, the alert did not exceed the boundaries of the employee's constitutional freedom of expression, a court could void the employer's discipline against the employee. Indeed, case law provides that a sanction inflicted on an employee is void when it constitutes a violation of a fundamental freedom, such as the freedom of expression.¹⁹ Thus, if an employee is not considered a whistleblower for a reason other than his or her bad faith (as bad faith would remove both constitutional and statutory protections), he or she may still be protected by the freedom of expression.

That being said, the freedom of expression is not without limit. Judges will consider any potential abuses of that freedom by the employee if, for example, he or she made insulting, defamatory, or excessive comments in reporting the employer's allegedly wrongful conduct.

Conclusion

The Sapin II Act represents a significant expansion of protections for whistleblowing employees under French law. It also presents an opportunity for employers to address problems internally and control the publicity of information. Employers should familiarize themselves with the law's definitions and requirements to ensure compliance. In particular, employers should ensure that management receives training or is otherwise informed about the confidentiality and nondiscrimination protections granted to whistleblowers. Moreover, employers with 50 or more employees should create suitable internal reporting procedures and implement them by January 1, 2018 when the corresponding obligation comes into force.

* [Sophie Pélicier Loevenbruck](#) is a Partner, and [Charles Dumel](#) an Associate, at [Fromont Briens](#), a member of [Littler Global](#)

¹⁸ Conseil constitutionnel [CC] [Constitutional Court] decision No. 2016-740DC, Dec. 8, 2016 (Fr.).

¹⁹ See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 30, 2016, No. 15-10.557 (Fr.) (addressing claims by CFO who was terminated for having alerted the judicial authorities concerning criminal actions—swindling and embezzlement of public funds—committed by the employer's director).