Executive summary

THE DEFENDER OF RIGHTS' EUROPEAN MEETINGS

Protecting whistleblowers: a European challenge

Paris | 3 December 2019

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RÉPUBLIQUE FRANÇAISE

Foreword

Since December 2016, the Defender of Rights has been the independent administrative authority responsible for orientation and protection of whistleblowers. As such, it means to play its role to the full in the European Directive of whistleblowers' transposition into French law.

On 3 December 2019, with three years of expertise to its credit and after issuing repeated warnings on the weaknesses of the French system, the Defender of Rights held the first European Colloquium on this subject, bringing together whistleblowers, sociologists, legal experts, practitioners and public authorities from a dozen European countries. The event provided valuable insight with regard to improving the effectiveness of whistleblower protection in the context of the upcoming transposition of Directive 2019/1937 of 23 October 2019 on protection of persons who report breaches of Union law.

Above all, the Defender of Rights calls for preservation of the progress resulting from Law no.2016-1691 of 9 December 2016, known as Sapin II, in particular its broad definition of whistleblower including non-work-related individuals, and the more inclusive scope of reports. It also recommends that the Government not content itself with a strict transposition of the Directive, but go further, clarifying the role of legal persons (NGOs, trade unions) in reporting procedures, and including a special reporting mechanism at national level relating to questions of national security and military secrecy.

It would also like the transposition to provide an opportunity to establish clear, operational legislation on the subject, accessible to everyone. In particular, it will be necessary to harmonise protection regimes and reporting mechanisms, and clarify coordination of the regime for protection of whistleblowers with the regime for protection of trade union representatives. It will also be necessary to ensure that the law is better known and inform citizens of their new rights in clear public fashion.

In substance, in order to provide whistleblowers with maximum protection, special provisions will have to be included, designed to better mitigate the feelings of isolation and solitude expressed by whistleblowers themselves. To do so, it is important that the institution responsible for their protection can provide them with the necessary assistance, lending them financial support if required via the relaxation or extension of existing provisions, guaranteeing that their identity will remain confidential throughout the procedure, and enabling action to be taken upstream of reprisals through development of legal mechanisms. The role played by NGOs and trade unions called upon to lend their assistance to whistleblowers will also have to be clarified.

Major human and financial resources are essential to the implementation of these recommendations.

As regards the reports themselves, improvement of their follow-up and processing is of key importance, in particular by designating external authorities for each field, competent to take responsibility for processing reports and keeping whistleblowers informed. Such bodies will have to enjoy the independence required to process reports with neutrality and impartiality. Finally, it will be necessary to ensure compliance with the legislation, in particular by stepping up monitoring of compliance with effective implementation of report collection procedures and making regular assessments of mechanisms.

The Defender of Rights will be organising legal workshops bringing together all stakeholders, with a view to developing legally viable technical proposals.


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Introduction

On the occasion of the third anniversary of the Sapin II Act of 9 December 2016, the Defender of Rights, which was entrusted with guidance and protection of whistleblowers by Organic Act no.2016-1690, enacted the same day, devoted its first European Meeting to the theme "Protecting whistleblowers: a European challenge".

Organised with a view to fostering expression of as many viewpoints as possible, combining theoretical approaches and testimonies, this colloquium brought together whistleblowers, sociologists, legal experts, practitioners and public authorities from various European countries to participate in three roundtables. Its goal was not only to draw attention to the issues, strengths and weaknesses of whistleblower protection regimes implemented in the European Union, but also to propose avenues for improving them and guaranteeing whistleblowers a high level of protection.

At a time when all the European Union's Member States are required to transpose the European Directive, it appears of importance to highlight the general and sometimes divergent recommendations resulting from these exchanges, as outlined by all participants including the Defender of Rights.

These recommendations, which seek to encourage the development of reporting (I) and improve the protection of whistleblowers (II) by institutions providing specific guarantees (III) may be helpful in guiding the European Directive's transposition (IV) and application of the legislation resulting from it (V). They call for important choices that States, France in particular, will have to make in order to provide whistleblowers with a secure, clear and genuinely protective framework.

1. Encouraging development of reporting

As a fundamental freedom and to which a considerable democratic stake is attached, reporting must be encouraged. With this observation as a starting point shared by all the speakers, a wide range of solutions were considered and debated.

REMUNERATING WHISTLEBLOWERS

The possibility of encouraging reporting by remunerating whistleblowers is a controversial issue

As was emphasised, a number of countries (including South Korea, the United States and Lithuania) financially reward whistleblowers in order to encourage them to report wrongdoings, but also to compensate any expenses resulting from retaliation they have suffered. Korea's Anti-corruption and Civil Rights Commission paid out the equivalent of USD 9.4m between 2012 and 2016 for reports of cases of corruption, while the United States' financial market authority, the Security Exchange Commission (SEC), paid out over USD 387m to 67 whistleblowers on the basis of the Dodd-Frank Act.

However, a clear distinction must be made between financial aid designed to compensate loss of income, as is provided for in the Netherlands for example and which everyone agrees on, and rewarding reporting, which is more controversial.

Such financial support is provided for in the European Directive of 23 October 2019 but is left to the discretion of Member States[1].

In the Defender of Rights' opinion, without going as far as remunerating whistleblowers and despite the constitutional obstacle, a form of financial aid to whistleblowers should be considered, intended to cover damages, as already exists in a number of European countries.

COLLECTIVISING REPORTING

The possibility of seeing reporting as a collective procedure, whereas up until now it has always been thought of as an individual act, was also discussed.

Although this solution – considered as a remedy for the whistleblower's isolation, in particular in the face of the risks involved – gave rise to reservations, they did not preclude new synergies being anticipated, in particular with trade unions.

In this respect, the European Directive provides unions with the opportunity to play a more important role within the states of the European Union.

[1] *Article 20 §2 of the European Directive of 23 October 2019: "Member States may provide for financial assistance and measures of support, psychological support in particular, for whistleblowers in the context of legal proceedings".*

ENABLING LEGAL PERSONS TO ACT AS WHISTLEBLOWERS

In more consensual fashion, consideration was given to extending the definition of whistleblower to legal persons, also with a view to limiting often isolated and vulnerable individuals' exposure to risks.

From a rather different angle, when the Directive on protection of persons who report breaches of European law was being drafted, emphasis was put on the need to provide protection to legal persons helping whistleblowers. The introduction of a protective status for facilitators could, for example, stop them being summoned for complicity in situations where whistleblowers themselves would be personally protected. A development of this kind would contribute to a better definition of the role played by associations.

In the Defender of Rights' opinion, a protective status for facilitators should be provided for, and legal persons (NGOs, trade unions, etc.) should be able to issue or lend support to reports.

INCREASING SANCTIONS

A number of European countries have implemented systems providing for sanctions – monetary sanctions in particular – to be imposed on employers that do not comply with the relevant obligations. Such is the case in Italy and the United Kingdom, where the authorities overseeing financial ethics can impose fines on employers that have failed to meet their obligations with regard to whistleblowers.

In the Defender of Rights' opinion, sanctions should be provided for failure to comply with most if not all relevant obligations.

IMPLEMENTING A SYSTEM ENSURING THAT REPORTS ARE PROCESSED

One of the main obstacles to reporting is to do with uncertainties as to whether reports will be followed up. Why should someone who observes practices harmful to the general interest take the risk of making a report when there is no certainty that it will be followed up? This is why the Directive establishes the obligation of following up whistleblowers' reports and keeping them informed.

From this perspective, the commissions, committees and mechanisms responsible for assessing and investigating facts must have a measure of credibility, and, above all, report and expertise, report and enquiry, report and investigation, and report and investigative capacity should all be simultaneous concerns.

2. Ensuring better protection of whistleblowers

With a view to ensuring better whistleblower protection, a good many recommendations were made by the various speakers with regard to the nature of the protection that should be provided.

ENSURING THEIR IDENTITIES REMAIN CONFIDENTIAL

Much emphasis was put on the deceptively obvious fact that the best protection provided to whistleblowers against retaliation consisted of keeping their names secret. From this perspective, the European Directive's provisions imposing sanctions against individuals breaching the duty of confidentiality are sure to play a determining role.

ACTING UPSTREAM OF RETALIATION RATHER THAN AFTER IT HAS HAPPENED

In the same way, prevention of retaliation may seem a more effective form of protection than imposition of legal sanctions. Given the time taken for courts to deliver rulings, many years may sometimes go by before a whistleblower is reinstated and his/her rights restored. Intermediate solutions such as mediation or voluntary transfer might well mitigate this problem.

Whatever the case, prohibition of retaliation is not enough in itself to ensure that whistleblowers are protected.

BREAKING THE WHISTLEBLOWER'S ISOLATION

The isolation and loneliness of the whistleblower, emphasised by all the testimonies heard during this colloquium, call for action on the part of numerous stakeholders (institutions, associations, NGOs, trade unions, etc.) in a position to provide free and independent advice as well as support, and in particular, psychological support.

This situation also requires that these same stakeholders are able to help whistleblowers prove the facts they wish to report, an often delicate operation for an individual acting on their own.

Beyond this difficulty, the precautionary principle applicable with regard to the environment requires action to be taken to prevent any risk of serious and irreversible damage to the environment despite absence of definite proof. In these conditions, shifting of the burden of proof, as provided for by the European Directive, will necessarily act as a lever to be activated by the stakeholders concerned in their support of whistleblowers.

OPENING UP A SPECIAL PATHWAY TO WHISTLEBLOWERS ENABLING THEM TO ACCESS PUBLIC-SECTOR EMPLOYMENT AND SO COMBAT THEIR INCLUSION ON BLACK LISTS

With a view to ensuring better protection of whistleblowers who have suffered retaliation, it is important to implement measures ensuring their return to employment in the face of the risk of being sidelined. In this context, one suggestion was to provide whistleblowers with the guarantee of facilitated access to public-sector employment.

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3. Setting up authorities providing guarantees

Protection of whistleblowers is achieved by setup of institutions or authorities capable of providing specific guarantees.

BUILDING TRUST

In order to contend with the very considerable resistance that the notion of whistleblower still inspires, in particular in companies and the administration, we need to have institutions that engender trust and a measure of acceptance. In this respect, their independence is of key importance. The Italian example tends to show that a national authority would seem to be more effective than several decentralised authorities, as its National Anticorruption Authority (ANAC) saw the number of reports made to it increase exponentially while local anticorruption offices received fewer reports over the same period.

BEING CLEARLY IDENTIFIED AND HAVING WELL DEFINED COMPETENCES

The example of the United Kingdom highlights the need to clearly define the competences of authorities responsible for whistleblower protection. Regulatory bodies have very different ways of perceiving whistleblowers. Some are only interested in the facts reported, while others believe they also have a duty to protect whistleblowers. Such a situation creates confusion and weakens whistleblower protection.

A NATIONAL AUTHORITY RESPONSIBLE FOR OVERSEEING IMPLEMENTATION OF LEGISLATION

In countries where several mechanisms designed to encourage and protect whistleblowers coexist, it would seem necessary to ensure their coherent application. Doing so requires a national authority responsible for guaranteeing their coherence.

The European Directive of 23 October 2019 leaves it to Member States to designate the external authorities taking responsibility for reports.

The system must ensure that the authorities designated by States are capable not only of monitoring whistleblowers, informing them, guiding them and combating any reprisals or retaliatory measures they might be subjected to, but also of following up reports made via the various channels and making sure that reports are properly processed at the appropriate level. This requires that they be assigned substantial competences, with special, strong powers of intervention.

In more general terms, they must be competent to disseminate a reporting culture and oversee implementation of mechanisms. Such authorities must also possess adequate resources to support whistleblowers, who often end up in very difficult financial, professional and psychological situations.

4. Transposition of the Directive

The Directive, which is regarded as a major step forward, was discussed in most contributions, along with the conditions for its transposition.

DISPARITIES BETWEEN EUROPEAN COUNTRIES

Not all European States protect whistleblowers in the same way, when they protect them at all. A study of the systems implemented in the States that signed the OECD Anti-Bribery Convention reveals major disparities, with some States providing whistleblowers with partial protection (against dismissal, for example) and other providing more comprehensive protection but limited to specific sectors (the civil service and the financial sector, for example).

In many European Union's States, legislation remains fragmentary, inadequate, and often sectoral.

This situation considerably weakens whistleblowers' situations: as Antoine Deltour's testimony makes all too clear, they may not be covered by the legal mechanism that was nevertheless implemented for their protection.

A MAJOR STEP FORWARD

As a result of compromise, the Directive has been the subject of criticism, lamenting in turn its complexity, a material scope of application limited to breaches of Union law alone, a personal scope of application limited to natural persons in the context of professional relationships (which, despite its wide sense, excludes citizens and users), the fact that it takes no account of the special nature of reports relating to national security and military secrecy, and the fact that legal persons and trade unions cannot sound reports.

In addition, its transposition could create a risk of regression of whistleblower protection in some countries, or lead to implementation of dual-standard mechanisms, with whistleblowers covered by the Directive provided with better protection than those coming under different regimes.

Despite these various criticisms, the Directive, which meets the need to harmonise regimes in Europe, is seen as an innovative text that makes the European Union a leading light in whistleblower protection at global level.

A TRANSPOSITION METHOD

The European Commission intends to lend its support to Member States by creating an expert group with a view to sharing best practices. It will also try to ensure that the Directive's major concepts are properly understood.

In order to further the debate essential to its transposition, it was suggested that input from the expert group be supplemented by whistleblowers themselves, making them fully-fledged actors in the transposition, and, more generally, that a digital platform be created to enable consultation of European citizens.

As regards France, a number of speakers wanted to see a rapid transposition of the Directive while others stressed the need for a patient, exhaustive, interministerial method of transposition.

In the Defender of Rights' view, the transposition must be the result of interministerial collaborative work, better able to guarantee maximum coherence to the text and bringing together all competent ministries under the aegis of the Ministry of Justice.

The goal is not to end up with a minimal adaptation but to completely overhaul the system in order to correct the Sapin II Act's inadequacies in the context of an ambitious transposition. The Defender of Rights intends to contribute to this by organising legal workshops bringing together all partners concerned.

A SPECIAL PROBLEM FOR STATES ALREADY PROVIDED WITH A SPECIFIC FRAMEWORK

The European Directive does not provide for a single model. Each country must therefore decide upon its own organisation.

However, the challenge seems rather more complex for States that already have a protective framework; they are compelled to take advantage of the protection provided by the Directive while maintaining the effectiveness of the existing regime, without calling it into question or disrupting it unnecessarily.

GOLD-PLATING THE DIRECTIVE

There was a general consensus on the need to gold-plate the Directive. Although it defines a common core of minimum standards guaranteeing effective protection of whistleblowers, it also offers the possibility of going further, with its Article 25 providing for a non-regression clause and the possibility of adopting more favourable measures.

Hence, Member States are invited to make full use of all the room for manoeuvre provided by the Directive. This constitutes a major challenge for the Council of Europe, making it possible to bring together 48 countries with independent authorities capable of providing appropriate protection for whistleblowers in the years to come.

As regards France, gold-plating is also widely recommended, as the Sapin II Act is already a highly progressive piece of legislation, in particular on the scope of application.

It will therefore be a question of preserving the existing system's advantages, in particular as regards material and personal scopes of application, which are wider than those set out in the Directive.

5. Beyond transposition

Whatever texts are adopted upon completion of the transposition, most speakers made recommendations as to how they should be applied and the resources required to put them into full effect.

ENSURING COMPLIANCE WITH LEGISLATION

As can be seen from the example of the French Anti-Corruption Agency (AFA); whistleblower protection is achieved by ensuring that the relevant tools provided for actually exist, and that they are made available to a company's employees and partners alike. On the basis of ex-post processing of reports, the risk mapping process can also be rounded off, corrective measures adapted accordingly and, more generally, the system for preventing and detecting instances of corruption updated.

ENSURING THAT THE SYSTEM'S VARIOUS STAKEHOLDERS ARE FULLY INFORMED AND AWARE OF THE ISSUES INVOLVED

The European Commission encourages Member States, once they have transposed the Directive, to organise information and awareness-raising campaigns targeting the public at large. To be effective, campaigns should provide general information on legal reporting channels and protection, and promote a positive perception of whistleblowers as individuals who act in the public interest and through loyalty to their organisations and society as a whole.

Such campaigns would also further reassure and encourage potential whistleblowers, and promote a genuine culture of transparency.

ENSURING THAT THE DIRECTIVE'S VARIOUS STAKEHOLDERS RECEIVE TRAINING

In some countries, training sessions are held (some of them organised by NGOs) on how to implement internal reporting procedures and how judges should handle reporting cases. Judges may sometimes have to hold a certificate before being allowed to preside over reporting cases. Judges that have received such training have a very different view of the cases referred to them.

DISSEMINATING BEST PRACTICES

As the NEIWA network's Paris Declaration makes clear[2], it plays an essential role in this area.

[2] *In May 2019, the prospect of adopting a new Directive on protection of persons who report breaches of Union law led the Defender of Rights to join forces with seven other organisations meeting at the Hague and co-found a new Network of European Integrity and Whistleblowing Authorities (NEIWA). The Network met for a second time in Paris in December 2019 in the presence of the European Commission, with a view to discussing the interpretation and methods of transposition of Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on protection of persons who report breaches of Union law. The Network's goal is to ensure setup or reinforcement of effective whistleblower protection regimes and systems for monitoring and/or processing reports, in particular by enforcing the highest standards provided for by the European Directive in each and every European Union Member State: see the Paris Declaration issued by the Network, which now has 14 members.*

DEVOTING ENOUGH RESOURCES TO THE MANAGEMENT AND ASSISTANCE OF WHISTLEBLOWERS

Whatever mechanisms are adopted, their effectiveness will be greatly reduced if not enough resources are provided. A close watch should therefore be kept on the resources allocated to bodies responsible for managing the regime.

Such resources could be provided by creation of a whistleblower support fund provisioned by fines, as well as by measures designed to support companies, medium-sized companies in particular, as they may have need of financial or practical assistance when implementing and managing reporting channels.


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Recommendations resulting from the colloquium

Preserve the achievements of European legislations on whistleblowers by applying the Directive's non-regression clause (Article 25)

As regards the Sapin II Act, this is mainly a matter of:

- Maintaining the wide personal scope of application (including users/citizens);
- Maintaining the wide material scope of application (including facts that constitute serious harm or threats to the general interest).

Encourage development of reports

- Enable legal persons (NGOs, trade unions, etc.) to act as whistleblowers;
- Include special provisions at national level relating to questions of national security and military secrecy;
- Clarify the coordination of the whistleblower protection regime resulting from the Directive with sectoral protection regimes;
- Define clear operational legislation accessible to everyone;
- Develop use of fines rather than criminal sanctions (e.g. when report collection procedures have not been implemented).

Guarantee whistleblowers better protection

- Break whistleblowers' isolation:
  - clarify the role played by trade unions in the assistance they provide to whistleblowers;
  - guarantee whistleblowers free, independent advice, and financial and even psychological support;
- Guarantee that the whistleblower's identity remains confidential throughout proceedings;
- Reinforce whistleblower protection, in particular upstream of retaliation.

Designate competent institutions providing guarantees, in order to build trust

- Guarantee the independence of the national authority(ies) responsible for supporting whistleblowers and processing and following up their reports;
- Provide them with adequate resources and competences to carry out their missions successfully;
- Step up monitoring of compliance with effective implementation of report collection procedures.

Develop information and training actions for all stakeholders in the regime

- Provide for adequate means to ensure these new rights are fully effective;
- Organise awareness-raising campaigns for citizens;
- Develop cooperation at European level (NEIWA network) and at international level.

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