BIENNIAL REPORT

The protection of whistleblowers in France

2022 - 2023

Ensuring that the law forgets no one

Défenseurdesdroits

RÉPUBLIQUE FRANÇAISE

BIENNIAL REPORT

Whistleblower protection in France

2022–2023

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EDITORIAL

Ensuring that the rights and freedoms of whistleblowers are respected is a recent challenge for the Defender of Rights.

Support for whistleblowers, the fifth area of responsibility entrusted to the institution in 2016 and strengthened in 2022, in fact permeates the whole of the institution and its other missions.

For the Defender of Rights, protecting whistleblowers means helping to fight discrimination against those who refuse to keep quiet about attacks on the public interest. In so doing, we are working to guarantee freedom of expression in both the public and private sectors.

However, it also means improving the fight against infringements of children's rights, forms of discrimination prohibited by law, infringements of the rights of users of public services and breaches of ethics by the security forces, revelations of which are facilitated by protecting those reporting these issues.

Ensuring that the rights and freedoms of whistleblowers are respected is therefore not only an integral part of the Defender of Rights' remit, but also helps to consolidate it.

It is therefore with the same rigour that has characterised the institution's work for the past thirteen years that we have constantly called on the public authorities to take ambitious action to protect and promote the rights of whistleblowers.

From this point of view, the 2022 legislative and regulatory reform of whistleblowing law holds out the promise of improved and more effective protection of rights.

The institution now receives several hundred requests for support every year and works in coordination with more than forty authorities responsible for processing whistleblowing reports. Its growing expertise in this area enables it to report to the President of France and the Presidents of the National Assembly and Senate on the state of whistleblower protection, including shortcomings and progress made.

This is the purpose of this first biennial report on the overall performance of whistleblower protection, which shows that the 2022 reform should not be seen as the end of the road but rather as the beginning of the construction of an institutional and legal system that protects whistleblowers.

Notwithstanding the commitment of the various external authorities and civil society, the success of such a reform depends on the effective involvement and support of the public authorities.

CLAIRE HÉDON
The Defender of Rights

CÉCILE BARROIS DE SARIGNY
Deputy in charge of whistleblower support

INTRODUCTION

Since 2016, the Defender of Rights has been responsible for providing support to whistleblowers. In this capacity, the Defender of Rights informs, guides and defends those who report incidents.

The Organic Law of 21 March 2022 also instructed the Defender of Rights to submit a report every two years to the President of France, the President of the National Assembly and the President of the Senate "*on the overall operation of whistleblower protection, based on information provided by the authorities responsible for processing and collecting whistleblowing reports*"[1].

This first biennial report therefore looks at two aspects of whistleblower protection in France. On the one hand, it looks at the Defender of Rights' role as a party responsible for supporting whistleblowers and handling the complaints made to it in this role, informed both by the difficulties that whistleblowers who approach it may face and by those encountered by the private and public bodies responsible for processing the reports made to them.

On the other hand, it looks at the Defender of Rights' role as an observer of whistleblower protection, informed by the report that the external authorities are required to send to it each year on their activities in collecting and processing whistleblowers' reports. From a methodological point of view, information is transmitted on the basis of a statistical form, drawn up by the Defender of Rights, inviting each of the authorities to specify the number of whistleblowing reports received during 2022 and 2023, the procedures for receiving them, the sectors concerned and the action taken on them. These forms, together with the analyses developed by these authorities, enable the Defender of Rights to develop the most detailed mapping possible of whistleblower protection in France.

However, this privileged observer perspective is not limited to the field of the external authorities alone. The mission of the Defender of Rights to protect whistleblowers is carried out in close collaboration with all the stakeholders involved in this field, including non-profit organisations and charitable associations, non-governmental organisations, international networks, judges and lawyers, who all participate with the institution in the effective implementation of the provisions drawn up to guarantee freedom of expression to whistleblowers. This ongoing dialogue also helps to clarify the independent administrative authority's view of whistleblower protection systems in France. It confirms the special position of the latter body in the overall operation of whistleblower protection.

Although it is based on discussions with all those involved in whistleblower protection, the findings set out in this biennial report remain the sole responsibility of the Defender of Rights.

Nevertheless, given the breadth of the panorama covered by this review, this report appears likely to contribute to compliance with the obligation set out in Article 14 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, according to which " *Member States shall ensure that competent authorities review their procedures for receiving reports, and their follow-up, regularly, and at least once every three years.*"

The 2022-2023 report is the Defender of Rights' first biennial report on the overall operation of whistleblower protection.

It comes against the backdrop of a major legislative reform culminating in Law 2022-401 of 21 March 2022 aimed at improving whistleblower protection. The report therefore devotes a great deal of space to describing the legal framework and the various institutional stakeholders now involved in the system. Its assessment of the implementation of this recent reform with regard to the collection and processing of whistleblowing reports is necessarily partial.

This report is also an opportunity for the Defender of Rights, as authorised by Article 32 of the Organic Law of 29 March 2011, to make recommendations for legislative and regulatory amendments that it deems useful.

Whistleblowing law has two main strands: firstly, whistleblower protection and, secondly, the processing of their requests. There have been significant developments in each of these areas. The rules governing whistleblower protection, which have undergone a major overhaul, have also been clarified by case law, with a view to improving the situation of whistleblowers in the face of threats of reprisals (I).

At the same time, the rules governing the processing of whistleblowing reports have been tightened, leading to the development of a precise procedural framework and the establishment of external authorities as new stakeholders in whistleblowing law (II).

In this, its first biennial report, the Defender of Rights describes recent developments in whistleblower protection and notes the progress made in this area. Nevertheless, it recommends that the system be strengthened and that adjustments be made to ensure that whistleblowing reports are handled effectively by the designated authorities. Its recommendations are addressed to the Government, along with suggestions for best practice, primarily aimed at the authorities responsible for collecting and processing whistleblowing reports.

I· WHISTLEBLOWER PROTECTION: A RENEWED LEGAL FRAMEWORK

The legal framework for whistleblower protection was radically overhauled in 2022 and 2023. Four texts have been adopted, including an organic law and a law, as well as two decrees, designed both to make the whistleblowing process more secure and to give whistleblowers the means to defend themselves against potential reprisals[2]. These texts enshrine the special place of the Defender of Rights in the measures adopted.

At the end of these two years, the first thing to note is that the recent legislative and regulatory framework has significantly improved whistleblower protection. However, this overall observation calls for two comments. Firstly, it is already apparent that the system has a number of weaknesses that should be corrected. Secondly, the effective implementation of this legal framework by all the stakeholders involved, whether whistleblowers themselves, private and public entities or the authorities processing whistleblowing reports, the courts or the Defender of Rights, requires clarification of the legal concept of whistleblowing.

A· THE EMERGENCE OF A PROTECTIVE FRAMEWORK

In France, the concept of whistleblower is relatively recent. Coined by the sociologist Francis Chateauraynaud, it refers to a "*person or group who breaks the silence in order to report, reveal or denounce facts – past, present or future – which breach a legal or regulatory framework or enter into conflict with the common good or general interest*"[3].

A number of high-profile cases have highlighted the role of the civic-minded individual who decides, in the public interest, to denounce reprehensible or illegal practices with a view to remedying them.

Whistleblowers may help to bring probity to the workings of public and private institutions by making disclosures, but in doing so they expose themselves to a number of risks, including being dismissed or subjected to legal or administrative proceedings designed to intimidate them.

In the face of these threats, and in order to encourage disclosures that help to protect the public interest, whistleblower protection measures have gradually become a necessity.

1· SUCCESSIVE ADVANCES IN WHISTLEBLOWER RIGHTS

The last few decades have seen the adoption of provisions designed to substantially strengthen whistleblower protection.

THE LAW OF 9 DECEMBER 2016, THE FIRST "STATUS" FOR WHISTLEBLOWERS

In France, the development of legislation to protect whistleblowers was initially reflected in the adoption of sector-specific protection measures, particularly in the professional sphere. These measures were developed in the 1990s and 2000s, under the impetus of several European directives related to equal treatment and the fight against discrimination, but also in response to certain scandals, particularly in the health sector[4], to the need to fight against corruption and criminal offences, and to prevent risks to public health or the environment.

In response to a request for a study from the Prime Minister, the Conseil d'État published a report in February 2016 entitled "*Le droit d'alerte: signaler, traiter, protéger*" ("Whistleblower rights: report, process, protect"), in which it took stock of these disparate systems and put forward proposals to improve their effectiveness.

The report highlighted the fact that the proliferation of sector-specific measures made them difficult to understand, and that the differences between them created legal uncertainty for whistleblowers, particularly when it came to determining whether they were entitled to the protection provided by these measures.

Whistleblower protection against reprisals also appeared inadequate, and deficient in that it was confined exclusively to the context of litigation, with no mechanism in place upstream to prevent such measures.

In light of these findings, the Conseil d'État recommended the adoption of "*a set of common provisions applicable to any individual who, faced with facts constituting serious breaches of the law or entailing serious risks, freely and conscientiously decides to issue a warning in the public interest*".

This was the background to the introduction of Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the Sapin II Law.

This text represents an essential step towards improving whistleblower protection by providing, for the first time, a general definition of a whistleblower together with a common set of measures to protect against possible reprisals.

It was based on a broad definition of whistleblowing, encompassing not only illegal practices but also conduct harmful to the general interest, without reference to any particular field, and on the introduction of a reporting procedure, compliance with which was conditional on the application of rules designed to protect whistleblowers against reprisals. The "tiered" whistleblowing procedure required whistleblowers to report the facts firstly within their own professional structure. Only if the reporting procedures failed to deliver a response within a reasonable period of time, were they then allowed to turn to another authority (administration, judicial authority or professional body). In the absence of a response within three months, public disclosure could be envisaged.

In addition to this general definition, the law strives to implement the first uniform whistleblower protection regime in France. Extending sector-specific protection measures, it explicitly prohibits retaliation by making any action taken in response to a report null and void[5]. It recognised the possibility of bringing a case before an industrial tribunal in summary proceedings in the event of termination of an employment contract in connection with a whistleblowing report, enabling more effective legal recourse[6]. To the same end, it gave the administrative judges the power to order the reinstatement of the whistleblower in his or her job[7].

In order to limit the risk of gagging procedures and encourage whistleblowers to report issues, the law also establishes, for the first time, the principle that whistleblowers are not criminally liable and penalises behaviour that impedes the transmission of a report[8].

In practice, however, the provisions of the Law of 9 December 2016 have proved difficult to implement and, moreover, insufficiently protective compared with the risks incurred by whistleblowers. In addition to the imprecision of the definition, the graduated or tiered reporting procedure proved to be complex and dissuasive as it required whistleblowers to contact their employer first.

The Defender of Rights has echoed the limits of the system in various opinions[9], and at the hearing of the Defender of Rights in July 2021 as part of the evaluation of the impact of the legislation by the MPs Raphaël Gauvain and Olivier Marleix. As they pointed out, "*the protection and support of whistleblowers remains weak in practice, sometimes exposing whistleblowers to major difficulties*"[10].

THE REFORM IMPOSED BY EUROPEAN DIRECTIVE (EU) 2019/1937

In 2021, France's obligation to transpose European Directive (EU) 2019/1937 on the protection of individuals who report breaches of European Union law has given French lawmakers the opportunity to go a step further by strengthening the rights of whistleblowers.

In this context, the Defender of Rights issued two opinions[11], in which she reiterated her doubts about the solidity of the French system, while stressing that adoption of the law transposing the directive offered a unique opportunity that the public authorities should seize to improve the clarity of the system defined by the Sapin II Law and significantly strengthen the rights of whistleblowers.

It was against this backdrop that Organic Law no. 2022-400 of 21 March 2022, aimed at strengthening the role of the Defender of Rights in whistleblowing, and Law no. 2022-401 of the same date, aimed at improving whistleblower protection, both introduced by MP Sylvain Waserman, were adopted. These texts have been referred to the Conseil d'État for an opinion[12].

The bulk of the reform results from the transposition of the directive, but French lawmakers have made the ambitious choice to give maximum scope to the EU text. The directive is in fact a sector-specific text, which sets out standards for whistleblower protection in a professional context and in certain specific areas precisely listed in its annex (public procurement, services, financial products and markets, product safety and compliance, etc.). The Law of 21 March 2022 goes beyond this.

It transposes the rules set out in the directive for all whistleblowing reports, whether professional or not, and in all areas. It was therefore decided to retain a single regime for whistleblower rights, within the broad scope already retained by the Law of 9 December 2016, which included the specific areas of the Directive. The Defender of Rights called for this ambitious approach, which would preserve the advances made by French lawmakers in 2016 and strengthen the unified approach to the status of whistleblowers.

Transposition of the directive has made a number of advances compulsory. In particular, it put an end to the graduated or tiered procedure, requiring French lawmakers to give whistleblowers the choice of reporting internally or directly to an external authority. The directive describes the conditions under which whistleblowing reports are handled by this external authority. The Law of 21 March 2022 was supplemented on this point by a Decree of 3 October 2022[13].

The directive also clarified and broadened the scope of the definition of whistleblower, while imposing a protection regime for those who provide assistance to whistleblowers. Lastly, it significantly strengthened the protection regime.

QUESTIONS FOR...

SYLVAIN WASERMAN

CHAIRMAN OF ADEME (FRENCH ENVIRONMENT AND ENERGY MANAGEMENT AGENCY), FORMER MEMBER OF PARLIAMENT

As a Member of Parliament, you championed a major legislative reform to improve whistleblower protection. The time has come for an initial assessment. What were the main obstacles encountered during the passing of the law and the Organic Law of 21 March 2022? What were you most pleased about in the text adopted? What do you regret most?

Like many other MPs, I asked myself during my term of office how would I make a tangible and concrete contribution. I look at the law on whistleblower protection as a magnificent parliamentary adventure, with unique moments and a path that could have been interrupted at any stage. It all started with some inspiring words from Edward Snowden following a report I wrote for the Parliamentary Assembly of the Council of Europe, which was widely adopted. This was followed by a draft law written with my small team of parliamentary assistants, which had no chance of succeeding in a conventional process. The government opted to accelerate its course in a very tight parliamentary schedule and this cleared the way. Two visits to the Conseil d'État and active support from the French Ministry of Justice shored it up from a legislative point of view. The law was then passed unanimously on first reading in the National Assembly, propelling it forward, before a consensus was reached with the Senate with some difficulty, but was ultimately entered into law following a conclusive joint committee and a final vote on the text. In the end, the Constitutional Council confirmed two major points: the clear development of the role of the Defender of Rights in this area and a legal innovation with the possibility, in the event of an imbalance of resources between the prosecution and the defence, that a financial provision in favour of a whistleblower may be definitively acquired.

All this was achieved after two years of constant dialogue with NGOs and company representatives, with the Defender of Rights and her Secretary General, with whistleblowers, journalists and legal experts. A genuinely collective parliamentary achievement – because everything could have come to a halt at any point – resulting in a "no regrets" text that has made France one of the most advanced countries in this field.

How do you think the success of such a reform can be measured?

I know from experience that a piece of legislation takes shape as it is interpreted by the courts. Things were no different for this law, in particular with an emblematic case that was widely publicised and which confirmed its scope in concrete terms. I believe that we have achieved a fair balance, a "ridge path" between the expectations of some and the limitations of others, between major advances and new solutions that must always be devised with discernment. In reality, every time a citizen decides to report a breach because they know that our law protects them, it will be a success for them, for this reform and for our democracy! It is now up to the Defender of Rights and the deputy responsible for whistleblowers to oversee full application of the text and to measure its limits in concrete terms, case after case. It is also up to my successors at the National Assembly to take over. Because whistleblower protection is a subject that Parliament must tackle constantly, in order to evaluate, analyse and monitor the way in which our democracy protects all those who have the courage to reveal the unacceptable when they witness it, rather than remaining silent. This point was emphasized by Edward Snowden during our hearing at the very beginning of my involvement in this issue, and it has guided my actions. This is the challenge facing a society that has understood that protecting whistleblowers has become a new pillar of our democratic edifice.

2· A MORE SATISFACTORY LEGISLATIVE FRAMEWORK

The whistleblower protection regime has been maintained in its original framework, the Sapin II Law, within the chapter reserved for it. The reform essentially came into force on 1 September 2022.

Progress has undoubtedly been made by the new legislation, which has reinforced and corrected the framework established in 2016 on a number of key points. However, despite the progress made, there are already loopholes in the system that need to be addressed without delay.

SUBSTANTIAL GUARANTEES

Under the terms of section I of Article 6 of the amended Law of 9 December 2016:

" *I.- A whistleblower is a natural person who reports or discloses, without any direct financial compensation and in good faith, information relating to a crime, an offence, a threat or harm to the general interest, a violation or an attempt to conceal a violation of an international undertaking duly ratified or approved by France, of a unilateral act of an international organisation taken on the basis of such an undertaking, of European Union law, or of a French law or regulation. Where the information was not obtained in the course of the professional activities referred to in section I of Article 8, the whistleblower must have had personal knowledge of it.*"

The person making the report

In principal, the system applies to everyone. In domestic law, however, whistleblowers are natural persons as the legislator has always refused to extend the protection regime to legal entities.

However, legal entities may now be protected as "facilitators". Facilitators are described in the law as natural persons or not-for-profit private legal entities who help a whistleblower to report or make a disclosure (art. 6-1).

In the same way as "natural persons in contact with a whistleblower" and "legal entities controlled" by the whistleblower, they enjoy protection against reprisals equivalent to that of the whistleblower.

This category was created in 2022 when the directive was transposed, although France went beyond what was required by the directive, which only referred to natural persons under this term.

It also follows from the general definition that whistleblowers cannot be motivated by financial interests. The criterion of "no direct financial consideration for reporting", which expresses this idea, has fortunately replaced the criterion of disinterestedness which appeared in the initial law[14]. Taken in its broadest sense, the notion of disinterestedness could lead to the status of whistleblower not being granted to people who have a personal interest in making their report, for example to denounce the breaches of a competitor or in the event of a pre-existing conflict with their employer. Nonetheless, the fact that whistleblowers are not remunerated remains an essential part of the definition of whistleblower in French legislation, which differs in this respect from the legislation in force across the Channel. The remuneration of those making a disclosure is not totally excluded, such as tax advisers[15] who may be compensated for information provided to the tax authorities. However, this case remains on the fringes of whistleblower status, and is governed by its own rules, which do not provide any specific protection against reprisals.

The field of reporting

The scope of what can be reported is very broad. This does not only include breaches, but also information about breaches[16], as well as attempts to conceal these breaches, whether or not in a professional context[17]. Whistleblowers acting outside a professional context are however required to have personal knowledge of the facts.

Furthermore, pursuant to section II of Article 6 of the amended Law of 9 December 2016: "*II.- Facts, information and documents,*

regardless of their form or medium, the revelation or disclosure of which is prohibited by the provisions relating to national defence confidentiality, medical confidentiality, the secrecy of judicial deliberations, the secrecy of judicial investigations or proceedings or the professional confidentiality of lawyers are excluded from the whistleblowing regime defined in this chapter".

The secrecy of judicial deliberations and the secrecy of the judicial investigations or proceedings were added by the Directive to the list of other forms of secrecy and confidentiality mentioned in the Law of 9 December 2016. No protection is granted in these areas, which are protected by rules of secrecy and confidentiality and remain excluded from the scope of whistleblower reporting.

The reporting procedure

The law now allows whistleblowers to freely choose the most appropriate course of action for their situation, by authorising them to use either internal or external reporting[18] as a first option. This is a significant improvement in the system.

External reports must be made to one of the authorities designated by law, specifically the external authorities responsible for collecting reports, which are precisely identified[19].

In principle, public disclosure can only take place after a prior external report has been made without an appropriate response, within a period of three or six months[20]. It may also be considered in cases of "*serious and imminent danger*" or "*imminent or obvious danger to the general interest*" when the whistleblowing report is made in a professional context[21]. In line with the requirements of the directive, the law now allows whistleblowing reports to be brought directly to the attention of the public if referring the matter to an external authority "*would expose the person making the disclosure to a risk of reprisals or would not allow the matter to be dealt with effectively, given the particular circumstances of the case*".

Whistleblower protection

Whistleblowers are protected by a ban on reprisals and by support measures.

Prohibiting and punishing reprisals

Article 10-1 of the Sapin II Law provides a non-exhaustive list of prohibited reprisals, such as dismissal, refusal of promotion, damage to an individual's reputation or improper referral for psychiatric or medical treatment, as well as "*threats or attempts to resort to such reprisals*". Such a list, which illustrates the many and varied ways in which retaliatory measures are taken against whistleblowers, is particularly welcome.

The court hearing a challenge to these measures applies a special evidentiary system, similar to those used in the field of discrimination[22]. As soon as a claimant presents factual elements that give rise to the assumption that he or she has made a report under the conditions provided for by law, it is up to the defendant to prove that his or her decision is duly justified (III of art. 10-1). Unlike the victim of discrimination, who must present evidence enabling the existence of direct or indirect discrimination to be presumed before the court, the shift in the burden of proof benefits the whistleblower as long as he or she presents evidence enabling the presumption that he or she has made a report in accordance with the law (and not to presume the existence of reprisals).

This adjustment to the burden of proof is applicable before an industrial tribunal, to which the law explicitly states that case may be referred.

Whistleblowers are also not criminally liable for infringements of secrets protected by law[23] and – thanks to Directive (EU) 2019/1937 – for obtaining, storing or concealing information if they have lawful knowledge of it, in other words without committing an independent criminal offence. In addition, he or she is not liable for any damage caused by a report or public disclosure[24].

In order to promote the reintegration of whistleblowers, where reinstatement in their original post no longer seems possible,

the law also allows the industrial tribunal to oblige the employer to increase the professional training allowance of the whistleblower to the maximum level[25]. The administrative judge may order the reinstatement of public employees in their jobs[26].

To act as a deterrent, the law also provides for penalties (one year's imprisonment and a €15,000 fine) in the event of gagging procedures or any other act designed to obstruct reporting[27]. Any abusive or dilatory proceedings brought against a whistleblower in connection with a libel or defamation complaint are now punishable by a civil fine of €60,000[28]. This amount, increased in 2022, corresponds to double the amount set by the Law of 9 December 2016.

An additional penalty may also be issued obliging the posting or publication of the decision pronounced against the person responsible for such a procedure or guilty of obstructing the transmission of a report[29].

Lastly, since the Law of 21 March 2022, anyone who takes reprisals against a whistleblower is liable to a criminal penalty of three years' imprisonment and a fine of €45,000[30], particularly in the event of refusal of employment, disciplinary action or dismissal.

Support measures

Whistleblowing is a decision with far-reaching consequences for the whistleblower, particularly in professional terms. He or she is potentially in a conflict of loyalty with regard to his or her employer or colleagues. In addition to reprisals, which affect them professionally, whistleblowers can also face insecurity.

With regard to support for whistleblowers, the law provides that the judge hearing a case involving a reprisal or gag order may award a provision for the costs of the proceedings to whistleblowers whose financial situation justifies it, or even, where their financial situation has seriously deteriorated as a result of the whistleblowing or public disclosure, a provision to cover their subsistence[31].

Since the 2022 reform, the law also provides that the external authorities responsible for collecting reports may, where appropriate jointly, "*ensure that psychological support measures are put in place for individuals who have issued a report under the conditions laid down [by law] and grant them temporary financial assistance if they consider that their financial situation has seriously deteriorated as a result of making the report*"[32].

Taken together, these measures form a relatively comprehensive set of provisions to prevent reprisals, most of which stem from the 2022 reform. Combined with the streamlining of procedures, the increased protection represents significant progress for whistleblowers in France.

FAULT LINES ALREADY APPARENT

While the existence of this new framework is to be welcomed, potential improvements to the whistleblower protection system have already come to light.

Little-known legislation

The deterrent effect of protective rules will depend on how they are used by whistleblowers and the courts. On several occasions since 2016, the Defender of Rights has emphasised how little was known about the whistleblower protection regime. All too often, whistleblowers make the news, claiming to be whistleblowers without really being aware of the legislative framework in which they can operate. The Defender of Rights has been able to verify this on several occasions in recent months.

In fact, there has been no government communication on this particular system. Communication on this subject would however appear to be crucial. Firstly, because it would enable potential beneficiaries of protection to make use of the system. Secondly, because the status of whistleblower, a term so often used nowadays, is in reality subject to compliance with substantive and procedural conditions. Providing information about the system would therefore enable as many people as possible to benefit from effective whistleblower protection. It would also encourage a change of perspective on

these democratic watchdogs that the public authorities have pledged to defend and, by extension, on the reporting of breaches.

RECOMMENDATION 1

Provide funding for communication on the protection and promotion of whistleblowers.

Legal entities excluded

In its various opinions, the Defender of Rights has called for the strict definition of a whistleblower to be lifted to allow all legal entities, such as trade unions, charitable associations and non-profit organisations or non-governmental organisations, to report illegal practices, risks or threats contrary to the general interest and to benefit from the resulting protection in the event of reprisals[33]. Legal entities are liable to suffer as a result of decisions such as the refusal of grants or approvals, or to be held civilly or criminally liable in connection with a whistleblowing report they may have made.

Extending the definition of whistleblower would make it possible to prevent this type of action. It would also make whistleblowing a collective act, breaking the isolation in which whistleblowers often find themselves, while limiting their exposure to the risk of reprisals. For charitable associations and non-profit organisations, who play a considerable role in denouncing environmental or public health problems, this possibility could be of paramount importance. They, like all legal entities with expertise in their field, could be the source of particularly well-founded reports that could be dealt with effectively.

Protecting legal entities would therefore be a way of encouraging whistleblowing.

The decision taken in 2022 to open up facilitator status to both natural persons and legal entities also raises a number of difficulties. Given the way in which the legislation has been drawn up, the facilitator can only exist alongside a whistleblower, who remains responsible for making the report on an individual basis and therefore shoulders the risks of reprisals. As regards charitable associations and non-profit organisations, the collective model that underpins their actions makes it difficult to intervene on the basis of a purely individual act.

In fact, to date, no legal entity has sought protection or support from the Defender of Rights as a facilitator.

RECOMMENDATION 2

Guarantee protection for legal entities as whistleblowers.

Lack of protection in the field of national defence and security

As the Defender of Rights has already pointed out, the Parliamentary Assembly of the Council of Europe recommends "*ensuring that persons working in the field of national security benefit from specific legislation that provides a better framework for criminal prosecution for violation of state secrecy in conjunction with a public interest defence exception*"[34]. For the European Court of Human Rights, the general interest may justify the disclosure of information relating to the practices of the armed forces[35].

However, the Sapin II Law excludes these matters from its scope, and there is no specific system, like the one that exists in the field of intelligence, to oversee disclosures while protecting those who make them. The amendment tabled to this effect during examination of the Law of 21 March 2022 in the Senate was rejected, due to the lack of full consideration on the subject[36]. However, it is worth thinking about.

The current situation is detrimental on several counts. It is detrimental to the imperatives of national defence, since it discourages reporting in this area where the stakes, especially financial, are particularly high. Furthermore, it can lead to the public disclosure of facts and elements that should remain secret. Any whistleblowers who might risk disclosure, in whatever form, would not be protected by law.

The Defender of Rights considers that it would be more protective both for the interests of national security and for whistleblowers themselves if the legislator adopted a specific procedure.

RECOMMENDATION 3

Provide for a specific reporting system at national level for issues concerning national security and defence secrecy.

Insufficient economic and financial support

The financial assistance that can be granted by the judge can only deal with the most dramatic situations. As already recommended[37], the Defender of Rights continues to advise changing the conditions for obtaining legal aid by making it easier to grant to whistleblowers.

Financial support must also be available ahead of any legal proceedings. This is not currently the case. The financial assistance provided for by law, outside the context of litigation, covers only the most tragic situations ("seriously deteriorated"). Moreover, it relies on authorities, none of which has been allocated a budget that would enable it to respond effectively to requests for financial support. Such needs are nonetheless real on the part of whistleblowers who approach these institutions. To date, of the authorities where support has been sought, none have able to provide this support.

The same applies to requests for psychological support, which, although envisaged by the Law of 9 December 2016, is also the responsibility of external authorities.

The Defender of Rights recommends that consideration be given to implementing two types of system.

Firstly, the creation of a whistleblower support fund to provide financial assistance to those making reports and who meet the conditions for whistleblower protection. This fund could be financed by the financial penalties imposed for failure to comply with the obligation to set up reporting procedures, if it were decided to introduce such penalties, or by a specific budget.

Secondly, psychological support must be offered within a framework that also remains to be determined. This support could take the form of covering the cost of sessions with professionals (psychologists, etc.) or the provision of a free service, paid for directly by the public authorities.

As part of the work carried out with the NEIWA network, the Defender of Rights was able to observe practices in other European countries. The need to deal with the psychological impact of whistleblowing is a widely shared concern. There is no doubt that it is in the interests of both the whistleblower and the employer (particularly, to ensure a good working environment). In several countries, organisations such as Transparency International Ireland[38] offer specialised psychological support services for whistleblowers. Elsewhere in Europe, the support system is also based on public institutions, such as the Dutch Whistleblowers' Authority, which offers psychosocial assistance directly or through a psychologist, or the Federal Institute for Human Rights in Belgium, which refers whistleblowers to partner psychologists and covers the cost of consultations[39].

France must put in place an effective support system.

RECOMMENDATION 4

Improve financial and psychological support for whistleblowers significantly, particularly by setting up a whistleblower support fund and providing psychological counselling.

The flaws that have already been identified are not critical but they are considerably slowing down the effective implementation of the reform. Steps must be taken quickly to address these flaws.

QUESTIONS FOR...

LAURENCE FABRE
HEAD OF PRIVATE SECTOR AND HIGHER EDUCATION PROGRAMMES AT TRANSPARENCY INTERNATIONAL FRANCE

In the light of the law passed in 2022, what do you see as the main reasons for satisfaction in terms of improving whistleblower protection?

France now has a well-developed body of legislation that provides better protection for whistleblowers and promotes the development of whistleblowing within organisations from a legal perspective.

By granting whistleblowers immunity from criminal prosecution for offences directly related to the information communicated for the purposes of whistleblowing, French lawmakers have given whistleblowers the protection they need to combat the strictest gagging orders. The provision measures are also to be welcomed, given that the obstacles to whistleblowing also lie in the financial cost that whistleblowers have to bear simply for having reported, in good faith, facts that could amount to a crime, an offence, a threat or harm to the general interest.

Lastly, the text extends certain protections offered to whistleblowers, in particular protection against reprisals, to natural persons and not-for-profit private legal entities (trade unions, charitable associations and non-profit organisations) who are in contact with the whistleblower: facilitators who help to make the report or disclosure, colleagues, friends and family. It provides whistleblowers with vital support that breaks their isolation, in particular by enabling trade unions within organisations to play an essential role alongside them. They should be given more training in this area so that they can play their role to the full.

In practice, have you already seen the effects of the 2022 reform? How, in your opinion, might the success of such a reform can be measured?

Transparency International France is authorised to receive reports of corruption through its Centre for legal support and civic action (CAJAC). The aim of the law is to encourage whistleblowing, and especially the whistleblowing provided for in the Sapin II Law's corruption prevention plan. There is still a lack of visibility and understanding about the system and this is preventing it from becoming a truly civic and responsible tool serving the general interest.

However, even though Transparency International France has not seen an increase in the number of whistleblowing reports since the reform, it notes that more reports are being made to external authorities, in particular the French Anti-Corruption Agency, and can only welcome this.

Furthermore, within companies, the removal of the first internal tier has made it clear that it is up to organisations to encourage dialogue on integrity issues, so that information is available internally. This should improve the culture of whistleblowing.

What action, if any, needs to be taken now to improve whistleblower protection?

The law alone cannot establish a culture of whistleblowing. Education of the general public must be led by the upper echelons of government, as part of overall management of the fight against corruption, if we are to enable everyone to report, in a responsible manner, issues that are detrimental to the general interest. At a time when there are unprecedented levels of drug trafficking in European societies – a factor in corruption and money laundering – reporting from everyone is necessary to contribute to the common good.

Every citizen must be able to trust that he or she will be listened to, in complete confidentiality and impartiality, and that no reprisals will be taken against him or her, and that he or she will be protected.

Whistleblowers must also receive financial and psychological support. Whilst admittedly this is provided for by law, it is however woefully lacking. The role of the whistleblower can only become visible if, at the highest level, steps are taken to actively provide financial and psychological protection. It is only under these conditions that whistleblowers will be able to emerge from their isolation and from the situation of weakness in which they still find themselves. Contributing to the public interest should not come at the expense of your professional, personal and psychological life. This is still all too often the case.

Lastly, in companies, internal reporting must not only be encouraged but also explained through increased awareness-raising; communication that observes anonymity, is more open and less cautious must be implemented.

From now on, the law and actions must converge.

3· THE PROTECTIVE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The progress made in recent years in whistleblower protection is based in particular on the contributions of case law from the European Court of Human Rights. It was used before the introduction of protective legislation[40], and may still be used in all cases where the law does not provide for measures to combat reprisals in connection with a disclosure.

Referring to the work of the Council of Europe[41], the European Court of Human Rights recognises that whistleblowers are entitled to protection of their right to freedom of expression on the basis of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

This protection, the Court points out, is based on taking account of characteristics specific to the existence of an employment relationship: on the one hand, the duty of loyalty, reserve and discretion inherent in the relationship of subordination which derives from it and, where appropriate, the obligation to respect a secret provided for by law; on the other hand, the position of vulnerability, particularly economic, as regards the person, public institution or undertaking on which they depend for their work, as well as the risk of suffering reprisals on the part of the latter[42].

Two decisions are central to the case law of the European Court of Human Rights. In the first judgement, *Guja v. Moldova*[43] delivered by the Grand Chamber on 12 February 2008, the Court set out a precise and methodical framework for examining potential infringements of whistleblowers' freedom of expression, based on six criteria for assessing the proportionality of the infringement of the whistleblower's freedom of expression: the means used to make the disclosure, the authenticity of the information disclosed, good faith, the public interest served by the information disclosed, the harm caused and the severity of the sanction.

These are all references that resonate with current French legislation.

This case law was very recently confirmed by another Grand Chamber judgement, *Halet v. Luxembourg*, dated 15 February 2023, concerning the criminal conviction of one of the whistleblowers in the so-called "*Luxleaks*" scandal[44]. Acknowledging that the claimant's freedom of expression had been infringed, as he had disclosed agreements between a multinational company and the Luxembourg tax authorities and had handed over documents used by a journalist in a broadcast, the Court reiterated the criteria in the *Guja* case in a completely new European and international regulatory context. While refusing to lay down an "*abstract and general definition*" of a whistleblower, the Court provided important clarifications on the scope of Article 10 of the Convention in relation to disclosures.

In particular, the Court specified that the order of priority between internal and external channels was not absolute. In principle, internal reporting channels should be preferred, but this is not the case when the internal channel "*lacks reliability or effectiveness*", when the whistleblower risks being exposed to reprisals or when the information he or she intends to disclose concerns the very essence of the activity of the employer concerned. In the case

in question, recourse to the media appeared to be the only way of ensuring the effectiveness of the whistleblowing procedure, given that the tax optimisation practices disclosed were legal and part of the employer's normal activities. The Court also held that it was not necessary for the information to be unpublished for it to be in the public interest.

The Court then upheld the principle of balancing the harm caused against the public interest, specifying that in addition to the harm caused to the employer alone, all the harmful effects that the disclosure at issue was likely to cause had to be taken into account. Account must therefore be taken not only of the reputational damage suffered by the accused company, but also of the harm caused to the private interests of its customers, as well as the public interest in preventing and punishing theft and respecting professional secrecy. In this case, however, the Court held that "*in view of [...] the importance, at both national and European level, of the public debate on the tax practices of multinationals, to which the information disclosed by the applicant made an essential contribution [...] the public interest in disclosure of that information outweighed all the detrimental effects*".

This important decision confirms the contribution of the European Court of Human Rights to the effective protection of whistleblowers, through the prism of freedom of expression.

B· THE ROLE OF THE DEFENDER OF RIGHTS IN WHISTLEBLOWER PROTECTION

Under the terms of Article 4 of the Organic Law of 29 March 2011 on the Defender of Rights, the Defender of Rights is responsible for "*informing, advising and directing to the competent authorities any person making a whistleblowing report under the conditions laid down by law, and for defending the rights and freedoms of whistleblowers and persons protected under a reporting procedure*".

Recent developments in whistleblower protection have been made in conjunction with the Defender of Rights, an independent administrative authority with constitutional status. Its activity in this area has grown significantly and continues to increase.

1· EXTENDING THE JURISDICTION OF THE DEFENDER OF RIGHTS TO WHISTLEBLOWERS

In its 2016 study, the Conseil d'État proposed to "*extend the jurisdiction of the Defender of Rights to protect whistleblowers who consider themselves to be victims of reprisals, from the moment they make a report*"[45]. A number of considerations were put forward in support of such a choice, in particular the competence and experience acquired by the Defender of Rights in the fight against discrimination, which could be usefully employed to assert the rights of people who consider themselves to be victims of retaliatory measures and thus prevent an increase in litigation.

In line with this proposal, the Organic Law of 9 December 2016 on the jurisdiction of the Defender of Rights for the guidance and protection of whistleblowers[46] was passed. When this text was referred to it, the Constitutional Council explicitly linked the new mission of the Defender of Rights to the scope of its original jurisdiction in the field of discrimination[47]. It nonetheless suppressed the provisions allowing the Defender of Rights to grant financial assistance to a whistleblower, at his or her request, considering such prerogatives are too far removed from its mission of ensuring respect

for rights and freedoms as defined by Article 71-1 of the Constitution.

EXTENDED MISSIONS

The jurisdiction of the Defender of Rights' as regards whistleblower protection was strengthened by the Organic Law 2022-400 of 21 March 2022, as the institution had requested.

Essentially, the Organic Law redefines the Defender of Rights' mission of assistance and support, enabling it not only to intervene on behalf of all whistleblowers, regardless of the regime to which they belong, but also to act on behalf of other persons "*protected in the context of a reporting procedure*", i.e. facilitators and persons in contact with a whistleblower[48].

The Defender of Rights has also been given the possibility of issuing an opinion on the status of whistleblowers in order to protect them upstream against reprisals to which they may be subjected[49].

The Defender of Rights can also "*direct whistleblowers to the competent authorities*" and redirect reports at the request of authorities to which a report has been incorrectly referred. Identifying the authority responsible for processing the whistleblowing report is a natural extension of the institution's mission to protect whistleblowers. Details on this point were provided by the Law of 21 March 2022 and its implementation Decree of 3 October 2022[50].

These missions are in addition to those relating to the processing of whistleblowing reports in the institution's areas of jurisdiction (children's rights, discrimination, code of ethics for people working in security and relations between users and public services), which are described in the second part of this report.

To lead the fifth mission of the Defender of Rights, a post of deputy responsible for supporting whistleblowers has been created, reporting to the Defender of Rights. A whistleblower support unit has been set up to centralise and process whistleblower cases in conjunction with the various investigation units.

FURTHER ACTIONS

Since 2022, several communication and information initiatives by the Defender of Rights have helped to raise public awareness of the whistleblower protection system and the institution's role in this area.

The Defender of Rights website now includes information on guidance and protection for whistleblowers[51].

Above all, a guide aimed directly at whistleblowers or people wondering about this subject was written and published in March 2023 to explain the legal framework for whistleblowing[52]. This guide, designed to make the whistleblowing process more secure, may be accessed directly on the Defender of Rights website. In addition to the publicity it gives to the system, the guide is, for the Defender of Rights, a tool enabling whistleblowers to contact it and effectively benefit from the protective framework intended for them. This is a very popular document. An English translation is now available.

Alongside these actions aimed at the general public, the Defender of Rights met with numerous trade unions and several charitable associations and non-profit organisations, with whom it felt important to discuss the contours and challenges of the system for protecting whistleblowers. These discussions showed that the whistleblower protection system needs to be better known and promoted.

The Defender of Rights has also been invited to meet various law firms, the Bar Association of the Conseil d'État and the Court of Cassation (French Supreme Court), as well as universities. Finally, the Defender of Rights met with magistrates.

This extension of the jurisdiction of the Defender of Rights and the greater visibility of its mission to protect whistleblowers have been accompanied by a considerable increase in referrals to the institution in 2022 and 2023.

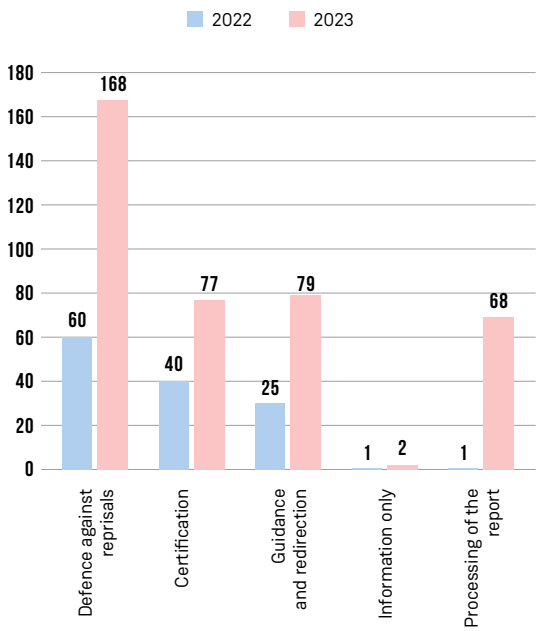
Over the past year, 306 complaints were sent to the Defender of Rights and forwarded to the whistleblower support unit, an increase of 128% compared to 2022.

Behind the figure of 306, however, lies a larger number of requests. Complaints may actually include several requests – a person may, for example, submit a report to the Rights Defender and request an opinion on his or her status as a whistleblower.

In 2023, the Defender of Rights thus recorded 394 requests for whistleblowers.

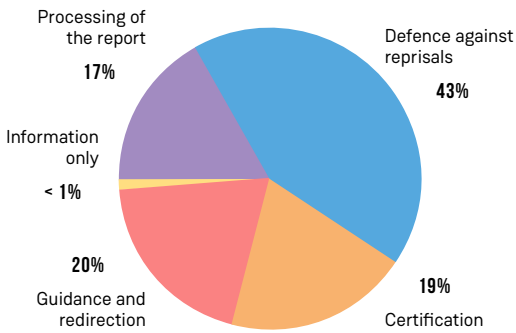
Given the respective dates of entry into force of these measures, this report focuses on the data collected in 2023, the first full year of application of the reform, which appears to be the most relevant.

NUMBER OF REQUESTS SUBMITTED TO THE DEFENDER OF RIGHTS BY REQUEST TYPE, 2022 AND 2023



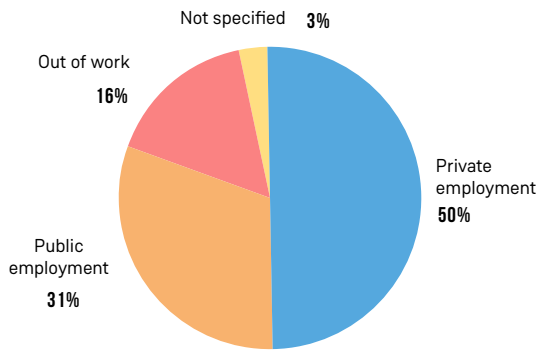
The remaining requests for information are presumably partly met by reading the whistleblower's guide, while requests for individual support (protection against reprisals, certification) are also significant. Guidance and redirection missions represented almost a quarter of the activity of the Defender of Rights in whistleblowing in 2023.

BREAKDOWN OF REQUESTS SUBMITTED TO THE DEFENDER OF RIGHTS BY REQUEST TYPE, 2023 (%)



Taking into account all the requests (processing of the report, referral, support for the whistleblower), it appears that the people who contact the Defender of Rights most often do so in a professional setting (81% of cases); the majority are employees in the private sector.

BREAKDOWN OF REQUESTS SUBMITTED TO THE DEFENDER OF RIGHTS BY AREA OF ACTIVITY, 2023 (%)



2· THE WORK OF THE DEFENDER OF RIGHTS IN PROTECTING WHISTLEBLOWERS

Since the Organic Law of 21 March 2022, the work of the Defender of Rights to "*defend the rights and freedoms of whistleblowers*" can take two main forms.

CERTIFY WHISTLEBLOWERS TO PROTECT THEM UPSTREAM FROM ANY REPRISALS THEY MAY SUFFER

The Defender of Rights may be called upon to take a position on whether an individual is a whistleblower, which will be formalised in an opinion.

Under the terms of Article 35-1 of the 2011 Organic Law, the Defender of Rights may: "*be called upon by any person to give an opinion on their status as a whistleblower with regard to the terms and conditions set out in Articles 6 and 9 of Law no. 2016-1691 of 9 December 2016.*

Any person may also refer their case to it for an opinion as to whether he or she has complied with the conditions for benefiting from protection provided by another specific mechanism for reporting breaches and for protecting the person making the report, as provided for by law or regulation.

Opinions (...) are issued within six months of receipt of the request ".

Since 2016, as part of its missions to provide guidance or protection, the Defender of Rights has already been required to assess whether a person referring their case to the Defender of Rights because they believed they were being subjected to reprisals met the conditions to be considered as a whistleblower. Only once this question had been examined could the Defender of Rights intervene in support of the claimant.

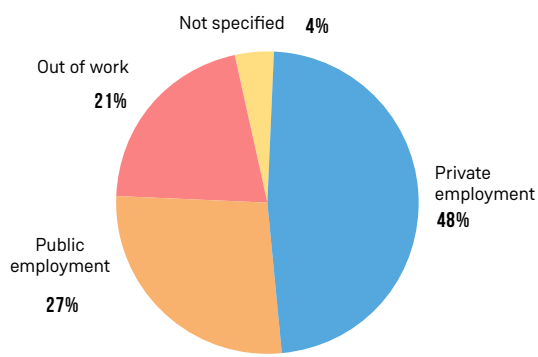
However, the Organic Law of 21 March 2022 has given the institution the power to decide, if the matter is referred to it, solely on the whistleblower status of the person making a report, by issuing, where appropriate, an opinion to that effect. This opinion, known as "certification" and which takes the form of a document analysing the person's status as a whistleblower in light of the applicable provisions, is given outside and/or before any context of reprisals. Above all, it aims to inform whistleblowers, as soon as possible after they have made a report, of the protection to which they are entitled. This document may, if the person so wishes, be brought to the attention of their employer in order to protect them from potential reprisals. Once in possession of this certification, the beneficiary is also able to react rapidly following the occurrence of reprisals, particularly before the urgent applications judge (summary proceedings).

The opinion leads the Defender of Rights to take a position on compliance with the substantive and procedural reporting conditions to which recognition of whistleblower status is subject by virtue of the Law of 9 December 2016 or a specific scheme.

In 2023, almost 80 requests submitted to the Defender of Rights sought such an opinion, three quarters of which concerned employees or public servants fearing reprisals in their professional setting. Around 50% of all requests for an opinion came from private sector employees. The six-month deadline set by the organic law was generally met.

As pointed out during the parliamentary proceedings and as ruled by the Constitutional Council[54], the opinion of the Defender of Rights, which is non-binding, does not replace the decision that may *ultimately* be made by the judge hearing the

BREAKDOWN OF REQUESTS FOR CERTIFICATION SUBMITTED TO THE DEFENDER OF RIGHTS BY AREA OF ACTIVITY, 2023 (%)



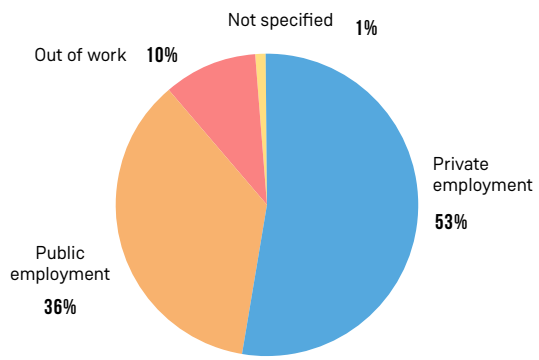
case on the legality of a reprisals allegedly linked to a report. This opinion nonetheless confirms that, according to the Defender of Rights, the person making the report meets the conditions to be classed as a whistleblower as per the terms of the law and that, as such, the burden of proof may be adjusted in the event of any adverse measures subsequent to the report. This is therefore is an important element in preventing reprisals.

DEFEND WHISTLEBLOWERS AGAINST REPRISALS

The Defender of Rights may be called upon to take a position on the existence of reprisals suffered by a whistleblower, which will be formalised in legal recommendations or findings.

When a person considers that he or she has already suffered reprisals, the certification seems to be of lesser value since it does not lead the Defender of Rights to give an opinion on the measures suffered by the whistleblower. In the event of reprisals, the institution is most often called upon to intervene – in a more traditional way – by issuing reminders of the law, legal recommendations or findings. While these decisions obviously lead to an analysis of the whistleblower status, their main purpose is to rule on the existence of unlawful adverse measures linked to a report.

BREAKDOWN OF REQUESTS FOR PROTECTION SUBMITTED TO THE DEFENDER OF RIGHTS BY AREA OF ACTIVITY, 2023 (%)



In 2023, almost half of the requests submitted to the Defender of Rights were for such intervention, and more than 50% of these concerned the private sector.

THE USE OF INVESTIGATIVE POWERS

As part of its mission to protect whistleblowers, the Defender of Rights may use the powers afforded by Articles 18 to 23 of the Organic Law of 29 March 2011 for information purposes.

In particular, the Defender of Rights may collect, after formal notice if necessary, any information and documents that may be useful in carrying out its mission, or ask for explanations from any person brought before it as part of a hearing with both parties.

The Defender of Rights can also hold hearings, which has proved useful in untangling the web of responsibility in some particularly complex cases (multiple employers, malfunctions within a department prior to the report).

Depending on the information gathered, it may submit its analysis of the situation to the respondent, inviting it to submit its observations before taking a final position.

When a person considers that they have already suffered reprisals and refers the matter to the Defender of Rights, the latter's position is most often preceded by this investigation of the person responsible for the adverse measure with both parties present. It is permitted to waive this phase involving both parties with regard to certification when it appears that it could be detrimental to the whistleblower. This is the case when the respondent is unaware of the identity of the whistleblower, or even unaware that a whistleblowing report has been made if it has been sent to an external authority. The opinion regarding the whistleblower status mentions whether or not it was preceded by a hearing with both parties.

Whichever method of intervention is chosen, the Defender of Rights ensures that the whistleblower fully understands and agrees in advance to this investigation with both parties.

EXAMPLES

CERTIFICATION REQUESTS[53]

The Defender of Rights ruled on the whistleblower status of two nurses who reported to their employer acts of mistreatment committed against residents of a nursing home where they worked, after having been informed by the residents' families.

It also examined the situation of a public sector worker who reported the dangerous conditions in which chemicals were stored in a school. Until then, he had not been subject to any sanctions and had always been given favourable performance reviews, and he wanted to protect himself against any unfavourable developments.

In 2023, the institution was also approached by private-sector employees who had sent a report to the National Financial Prosecutor's Office implicating their employer in a potential breach of trust and misappropriation of public funds, and who feared reprisals, some of them imminent. In these cases, it was possible to produce the certification, as a matter of urgency, before the urgent applications judge in early 2024.

Finally, the institution examined the whistleblower status of the son of a resident of a nursing home, who had repeatedly reported incidents of mistreatment and shortcomings in the care of residents of this establishment, before making them public through press articles. In particular, the Defender of Rights considered that the facts in question made it possible to determine that there was a serious and imminent danger that justified bringing the facts to the attention of the public. The certification request was granted.

REQUESTS FOR ACTION TO COMBAT REPRISALS

The Defender of Rights recommended that the Ministry of the Interior ensure, as part of future promotion campaigns, that the principle of non-discrimination is respected when examining the application of a police officer who had reported breaches of code of conduct among law enforcement officers, as well as granting him or her the benefit of civil servant protection for all reprisals suffered linked to his or her report.

The Defender of Rights was informed of the situation of the director general of services in a municipality, who claimed that the end of his secondment to the functional post he occupied was the result of a whistleblowing report he had made about a purportedly unlawful decision. The Defender of Rights requested an explanation from the municipality. It then closed the case when the interested party signed a memorandum of understanding, which was approved by the court. In accordance with its terms, the municipality undertook to reverse its decision and pay the claimant a sum corresponding to the reconstitution of his wages.

The Defender of Rights presented its findings before the administrative judge, as part of an appeal challenging the legality of the warning given to a police officer who had reported to his superiors the behaviour of certain colleagues towards members of the public, which he considered unethical. On appeal, the Defender of Rights insisted on the rule for adjusting the burden of proof, which it felt the administrative court had not applied. In a ruling dated 28 June 2023[55], the Paris Administrative Court of Appeal found in favour of the police officer, ruling that the penalty imposed on him could not be considered justified by factors unrelated to the report.

The Defender of Rights presented its findings before industrial tribunal hearing regarding the situation of a doctor whose professional situation had changed unfavourably after he had reported illegal practices within the establishment that employed him; this analysis was taken up by the court.

3· COORDINATED ACTION: NEIWA

The Network of European Integrity and Whistleblowing Authorities (NEIWA) was created in May 2019 in The Hague ahead of the publication of European Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of European Union law. The initial idea behind the creation of such a network was for the authorities that had already been set up to draw on comparative law and existing practices in other Member States, providing national debates on the transposition of the directive with sound arguments for optimal transposition into national and regional legislation.

The members of NEIWA are "competent authorities" as per the terms of the directive. These are public authorities in the Member States and candidate countries that advise and protect whistleblowers and/or monitor the processing of whistleblowing cases. Some of them also investigate the substance of the reports sent to them.

This network enables its members to:

- share their expertise and experience, both theoretical and practical as well as in strategic terms, in order to improve whistleblower protection and/or the handling of whistleblowing reports in their country;
- jointly develop tools, produce studies or publish joint positions or statements;
- develop collaboration with the institutions of the European Union and, in particular, the European Commission, in order to evaluate implementation of the Directive by Member States and to monitor the development of European law in this area;
- identify partnerships with other European or international organisations and non-governmental organisations in this field.

The network has been meeting regularly since 2019. At its 8th General Meeting in March 2023, the NEIWA network adopted a Board of Directors, a Chair and a founding text: the Rome Declaration[56].

Since 2023, the network has also benefited from recognition at European Union level, as it now participates in the group of national experts, convened annually by the European Commission, responsible for monitoring the transposition and application of Directive (EU) 2019/1937 on whistleblower protection.

Comparative work was carried out in 2023, focusing in particular on the study of financial or psychological support measures for whistleblowers, the recognition of whistleblower status, the receipt and handling of reports, including anonymous whistleblowing reports, and the various sanctions systems.

Through the coordinated commitment of its member institutions, the NEIWA network aims to contribute to national and European debates by using all the options offered by the directive. Its aim is to strengthen an effective system for whistleblower protection and for the effective monitoring and/or handling of whistleblowing, in particular by implementing the highest standards set out in the European Directive in each of the EU Member States.

C· WHISTLEBLOWERS: A CONCEPT IN THE PROCESS OF BEING CLARIFIED

Given the recent nature of the legislation, case law on whistleblowers is still in its infancy in France, particularly that of the Conseil d'État and the Court of Cassation. However, a number of important decisions were taken in 2022 and 2023.

The Defender of Rights has nonetheless suggested changes in case law, by issuing its findings right up to the cassation stage. The many requests for protection it has received have also led it to take a position on the definition of whistleblowers and the conditions for implementing certain protection measures.

1· APPLICATION OF THE LAW OVER TIME

As part of the requests submitted, the Defender of Rights first of all had to specify the conditions for applying laws protecting those making reports over time.

In a decision of 28 May 2020, the institution had already considered that the applicable text had to be determined on the date of the alleged reprisals, and not on the date of the whistleblowing report[57]. This doctrine was reiterated when it came to choosing between the successive versions of the Law of 9 December 2016, after amendments resulting from the Waserman Law came into force on 1 September 2022.

This solution is based on the general principles governing the entry into force of the law, including the principle of non-retroactivity. It is based on the idea that this principle, set out in article 2 of the Civil Code, does not preclude the immediate application of a text to a past situation provided that no definitively established or lawfully acquired legal status is affected. As a result, the law can have an immediate effect on ongoing situations that have not yet been lawfully established[58].

In this respect, the Defender of Rights notes that the whistleblower's situation is lawfully established only from the point at which he or she is likely to use one of the protection mechanisms provided for by the law, i.e. the moment when the whistleblower believes they are being subjected to reprisals. It is therefore this date that should be taken into consideration when assessing whistleblower status and the associated protections.

This solution guarantees that whistleblowers whose reports were made before the entry into force of the Law of 9 December 2016, or that of 21 March 2022, will benefit from the protections or improvements to them that the legislator intended to make immediately applicable.

2· WHISTLEBLOWER STATUS

As complaints have progressed, the Defender of Rights has been led to define the concept of whistleblower, and thus to refine its contours.

THE SITUATION OF THE VICTIM

A number of people have turned to the Defender of Rights for support in their status as whistleblowers, reporting incidents of which they were the only victims (harassment, discrimination, decisions taken concerning their child, action taken by legal authorities in response to a criminal complaint, etc.).

After analysis, the Defender of Rights did not grant the requests of these claimants, considering that the whistleblowing procedure does not *in principle* concern a victim when the latter is acting exclusively on their own behalf or when they have no information indicating that it is reasonable to believe that the denounced facts are not limited to their own situation.

It is clear from the parliamentary work surrounding the adoption of the Law of 9 December 2016 that the very notion of whistleblower presupposes that the person using this term is motivated by an interest that goes beyond his or her personal situation[59]. In the words of the Conseil d'État's study, whistleblowers are a "*new face of the vigilant citizen*" rather than an "*informer or sycophant acting in his or her own personal interest*". They act in the name of the general interest, and not simply to repair or remedy the wrongdoing to which they have been subjected.

This conception of the whistleblower was not called into question by the directive of 23 October 2019, which refers to "*harm to the public interest*", like the European Court of Human Rights, nor by the Law of 21 March 2022[60].

In light of these considerations, when the matter is referred to the Defender of Rights by someone only reporting acts to which he or she have been victim, or who has no evidence to establish that the acts go beyond his or her personal situation, the Defender of Rights does not accord them whistleblower status. If necessary, it suggests that the victim be assisted by the institution as part of its other missions[61], or invites him or her to take advantage of the other available legal channels, in particular by lodging a formal complaint.

THE CASE OF STAFF REPRESENTATIVES OR TRADE UNION DELEGATES

Subsequent to case referred to it on several occasions by staff representatives or trade union delegates, the Defender of Rights has also had to clarify the relationship between exercising a mandate and the whistleblowing process.

The status of staff or trade union representative does not, in principle, preclude recognition as a whistleblower[62]. However, it is clear from parliamentary work on the Law of 9 December 2016 that the legislator did not intend to protect trade unions, legal entities, or persons whose role is to report or punish breaches and who make a report in this context[63]. The Law of 21 March 2022, while allowing staff representatives to act as facilitators, did not call this choice into question.

In practice, in order to define the applicable legislative framework, the Defender of Rights make a distinction based on whether the employee representative or trade union delegate has acted within the framework of his or her mandate (particularly by making statements within the bodies dedicated to the exercise of this mandate, such as the social and economic committee) or whether he or she has departed from his mandate to act, independently, as part of his or her own reporting procedure. In the first case, the person making the report cannot benefit from the status of whistleblower but only, and only if he or she fulfils the conditions, from the protections attached to their mandate[64].

> *For example, the Defender of Rights recognised the status of whistleblower for a trade union representative, member of the health, safety and working conditions committee (CSSCT) and deputy secretary of the social and economic committee (CSE) of his employer who, after having denounced internally a situation of psychological and physical harassment between employees in the workplace, had, in the absence of a satisfactory reaction, decided to bring the facts to the attention of the Public Prosecutor.*

As with victims, when it receives a request for protection, the Defender of Rights always examines whether a staff representative or trade union delegate who does not qualify as a whistleblower could benefit from support in another capacity, particularly in the event of discrimination because of his or her trade union activities.

THE REPORTING PROCESS

According to the recent case law of the Court of Cassation, it is up to the employee to address their employer in such a way that the latter cannot "*legitimately claim to be unaware that, in this message, the employee was denouncing [the] facts*" set out in their report[65].

"*If the employee were too "imprecise", too "vague" or too "ambiguous" about the facts reported*"[66], this would deprive the whistleblower of any protection.

Expressing simple doubts or disagreements, for example in the context of work meetings or during e-mail exchanges between colleagues, cannot therefore be equated with making a whistleblowing report, as this cannot be taken to show a real intention to report these facts.

The Defender of Rights was led to deny the status of whistleblower to an individual who had contacted their employer, mentioning "problems with a service provider who was threatening to call the Labour Inspection regarding unsuitable premises [...] as well as the potential offence of illegal sub-contracting" on the grounds that this was not a report as per the terms of the Sapin II Law.

Similarly, the Defender of Rights did not recognise as whistleblowing reports simple questions about the "vagueness" surrounding the interpretation of legislation or a general allegation regarding a public policy that has been regularly debated for several years.

Apart from such situations, the Defender of Rights recommends a considerate approach to those who report incidents. In the first place – and the Court of Cassation has ruled accordingly[67] – it is advisable not to place the delicate burden of considering the acts committed on the person making the report.

Secondly, it would seem contrary to the spirit of whistleblower protection to require whistleblowers to give a precise description of the facts that they believe have been or are about to be committed. Not all whistleblowers would be able to do this. What matters is that the report is unambiguous.

Finally, in addition to the whistleblowing procedure, the report must relate to one of the categories of irregularity identified in article 6 of this law (specifically, a crime, misdemeanour or violation of the law or of an international convention). Although the text was made more flexible in 2022 and the concept of "*serious threat to the general interest*" was replaced by "*threat to the general interest*" (imposed by the transposition of the 2019 directive), not all criticisms fall within the scope of a whistleblowing report. In particular, the reporting of simple malfunctions, such as the inefficient allocation of tasks or inadequate circulation of information within a company, does not fall within the scope of the directive if they are not serious enough to constitute a threat or harm to the general interest.

THE REQUIREMENT OF GOOD FAITH

As freedom of expression traditionally finds its limit when this right is abused[68], the requirement of good faith became necessary for the French legislator since a common definition of whistleblower was adopted in the Law of 9 December 2016. Neither Directive (EU) 2019/1937 of 23 October 2019 nor the Law of 21 March 2022 have questioned this requirement, which in French law appears to be consubstantial with the concept of whistleblower. It is also frequently included in the specific systems for protecting whistleblowers. In the case law of the European Court of Human Rights, the concept is decisive.

The Court of Cassation and then the Conseil d'État have clarified the interpretation of the requirement of good faith.

The Court of Cassation first ruled that bad faith " *can only be established when the employee knows the facts reported are false and not from the mere fact that the allegations reported have not been proven*"[69]. The bad faith of the person making the report cannot therefore be inferred from the mere fact that the conduct reported has not been proven or that it has not been considered as a crime or an offence by the judge. On this last point, the Court of Cassation and the Conseil d'État have ruled in agreement that the facts reported need only be "*likely to constitute an offence or a crime*"[70] or "likely to be considered an offence or a crime"[71].

For the Court of Cassation, knowledge that the allegations reported are false may sometimes be deduced from the whistleblower's conduct[72], or from the wording of the accusations made, specifically their general and non-detailed nature[73], the deliberate exaggeration of facts or their caricatured presentation[74], or even from the context of the report[75].

In the same vein, the Conseil d'État recently refused to uphold the good faith of an employee who had made accusations "*in general and outrageous terms, without the person concerned having subsequently been able to specify them in any way". The report was also shown to be "part of a smear campaign directed against his former line manager, involving repeated accusations of illegal practices that [the person making the report] was unable to substantiate with any factual evidence"*[76].

In line with this case law, the Defender of Rights assesses the requirement of good faith by taking two factors into consideration.

Firstly, it makes sure that the whistleblower's actions are honest and fair, with no malicious intent.

> *The Defender of Rights refused to recognise the status of whistleblower to a person making a report because of the venom of the accusations made against the respondent, giving credence to the existence of personal animosity, as well as the discrepancy between the scale of the facts reported and the evidence provided to substantiate them.*
>
> *Similarly, when contacted by an employee who had reported alleged misuse of company assets and various frauds involving his employer after having been dismissed himself for similar acts, the Defender of Rights noted that there was nothing to suggest that this employee had not knowingly and freely taken part in carrying out of the acts, nor that he would have ended up reporting the acts if his contract had not been terminated. It concluded that his good faith had not been established.*

The Defender of Rights then assesses the existence of evidence giving the whistleblower reasonable grounds to believe that what he or she is reporting is true, i.e. that he or she has not acted on the basis of a rumour or a suspicion that is not supported by any evidence.

> *The Defender of Rights refused to recognise the status of whistleblower to an employee who had reported the personal use of a vehicle by a colleague and the reimbursement of travel expenses in amounts he considered abnormal, without having sufficient information to corroborate his allegations.*

It is important, however, not to adopt too broad an interpretation of the concept of good faith, resulting in focusing on the whistleblower's motivation – which is necessarily difficult to grasp – rather than on the veracity of the facts reported and their nature.

In its opinions, recommendations and findings, the Defender of Rights has pointed out that the mere existence of a pre-existing dispute with the employer is insufficient to presume that the person making the report has acted with the aim of harming the employer. The same applies to the mere fact that the report was made after the employee's employment contract expired.

> *For example, the Defender of Rights recognised the status of whistleblower for an employee who, prior to her reports, had brought a case before the industrial tribunal due to the psychological harassment she considered that she had suffered at the hands of her employer.*
>
> *The Defender of Rights also considered that detailed testimonies from colleagues of the person making the report, which corroborated the mistreatment reported within a social healthcare facility, were sufficient to attest to the existence of reasonable grounds to believe that the facts were true.*

PUBLIC DISCLOSURE OF THE REPORT

In line with the case law of the European Court of Human Rights, according to which, except in special circumstances, "*public disclosure must be considered only as a last resort, where it is manifestly impossible to act otherwise*", Article 8, section III of the Law of 9 December 2016 strictly regulates the circumstances in which a report may be made public.

The fact that the publicity given to a whistleblowing report is subject to conditions is a response to the desire to protect the entity in question, particularly in terms of reputation. It ensures that processing the report does not also involve a public debate when the facts have not been established. However, it may be necessary to bring a whistleblowing report to the attention of the public, particularly if the authorities concerned fail to act, or to deal with an emergency situation.

The law provides that a report may be made public in four circumstances:

- in the absence of an appropriate response from the external authority within three or six months[77];
- in the event of serious and imminent danger (for reports issued outside a professional setting);
- in the event of imminent or obvious danger to the general interest (for reports issued in a professional setting);
- where referral to one of the competent authorities would expose the person making the disclosure to a risk of reprisals or would not enable the subject of the disclosure to be effectively remedied.

Following on from the latter, the European Court of Human Rights, in the case of *Halet v. Luxembourg* of 15 February 2023, granted direct public disclosure through a media outlet when this appeared to be the only realistic way of sounding the alarm.

The temptation is sometimes strong for whistleblowers to publicise the facts they wish to expose. When it receives a request for information prior to a report, the Defender of Rights regularly reiterates the conditions for public disclosure.

During the processing of cases, the Defender of Rights considered what should be understood by public disclosure of the report, beyond the use of mainstream and social media, taking into account the purpose of disclosing the report to third parties.

> *The Defender of Rights considered that distributing leaflets through letterboxes or posting details on a website constituted public disclosure of the report. On the other hand, sending a report to a charitable association or to trade union representatives does not constitute public disclosure of the report when the purpose of the contact is to obtain assistance or support in the reporting process, and not*

> *to publicise the facts. This reasoning is consistent with the new possibility for these organisations to qualify as facilitators as per the terms of the Law of 9 December 2016.*

The notion of danger, authorising public disclosure, has also been clarified.

> *The Defender of Rights considered that a situation of systemic mistreatment of people cared for in a nursing home, the reporting of unjustified care likely to endanger the patient's health or a particularly unhealthy work climate with professional blackmail in which the employees of an association were placed could be considered as a danger authorising disclosure.*
>
> *On the other hand, it considered that the reporting of conditions in which a mathematics test was being held at a high school did not constitute a situation of serious and imminent danger, nor did it pose an imminent or obvious threat to the general interest that might justify publicising the report less than three months after the test was held, by sending a message to all the parents of the pupils concerned.*

ADJUSTING THE BURDEN OF PROOF FOR REPRISALS

The rule for adjusting the burden of proof of reprisals at aimed whistleblowers is based on the one introduced in the field of discrimination and harassment. It represents a necessary mitigation for victims in areas where the imbalance between them and the perpetrator of the contested measures is particularly marked.

The rule is now set out in section III of Article 10-1 of the Law of 9 December 2016. As a result, if the person making the report presents evidence from which it can be presumed that he or she made a report under the conditions set out in the law, the onus is on the employer to prove that his or her decision is "*duly justified*"; in other words, that it is not linked to the whistleblowing report.

According to the case law of the Conseil d'État, the principle of adjusting the burden of proof cannot be applied if the very purpose of the dismissal is based on the report. In such circumstances, the perpetrator of the measure cannot be required to establish that it is unrelated to the report, since the perpetrator assumes that this is indeed the case. The judge's assessment then focuses on whether the official or employee was in a situation in which he or she could be penalised for having made a report, or whether, on the contrary, he or she fell within the scope of a whistleblower protection system[78]. If this is the case, the measure is null and void.

In judicial case law, the Court of Cassation, agreeing with the analysis of the Defender of Rights, ruled that this principle of adjusting the burden of proof was applicable before the urgent applications judge of the industrial tribunal[79]. In so doing, it also reiterated that it was up to the urgent applications judge, "*even in the presence of a serious dispute, to put an end to the manifestly unlawful disturbance constituted by the termination of an employment contract following a whistleblowing report*", in line with Article 12 of the Law of 9 December 2016, which reiterates the possibility for employees to implement this emergency procedure, in accordance with the rules of ordinary law.

The possibility for whistleblowers to challenge adverse measures that they consider to be linked to their whistleblowing report by way of summary proceedings and to benefit from this favourable evidential regime before the emergency applications judge marks a very important step forward in support of more effective protection for whistleblowers. As the reinstatement of whistleblowers is in practice only possible in the short term, it must be possible for the judge to order it quickly.

II· THE ESTABLISHMENT OF A RIGHT TO TREAT WHISTLEBLOWERS

In addition to the benefits for the general interest, the handling of whistleblowing reports is both the deep-rooted aspiration of whistleblowers and one of their essential rights.

In its recommendations on whistleblower protection, the Council of Europe points out that "*appropriate treatment by employers and public authorities of public interest disclosures will facilitate the taking of action to remedy the exposed threats or harm*"[80].

Appropriate treatment of reports also confirms the whistleblower's legitimacy and satisfies the demand that is central to the whistleblowing process.

There is a precise framework for handling reports, both in terms of how they are collected and how they are processed.

In general, the Defender of Rights observes that the changes made by the Law of 21 March 2022 – largely by transposing Directive (EU) 2019/1937 – are likely to improve the handling of reports.

The procedural framework has been strengthened and simplified for internal whistleblowing, to the professional structure concerned, and external whistleblowing, to the competent authorities designated by law.

The fact that the external authorities responsible for collecting whistleblowing reports are now designated specifically helps to ensure that the voice of whistleblowers is taken into account, as they now have an identified point of contact. Where necessary, the Defender of Rights guides individuals in their dealings with these authorities.

2022 and 2023 were special in that new provisions, some of which were completely unprecedented, were implemented in these years.

However, an initial assessment may be formed of the choices made in the first few months following implementation of the Law of 21 March 2022 and its implementation Decree of 3 October 2022[81], both those intended to improve the procedures for collecting and handling reports in general, and those intended to outline the procedure for collecting external reports.

The procedural framework is clearly simpler and more operational for whistleblowers. Setting up the external authorities responsible for collecting reports as new stakeholders in the whistleblowing law is still a challenge, and one that each of these authorities, in conjunction with the Defender of Rights, is seeking to meet.

A· A FRAMEWORK FOR COLLECTING AND HANDLING REPORTS

Under the Law of 9 December 2016, whistleblower status is subject to compliance with conditions relating to the purpose of the report and the conditions under which it is made[82]. The procedural obligations thus fall very directly on the person making the report.

The law envisages three ways of making a whistleblowing report: internal reporting, external reporting and public disclosure. The decision to use one or other of these means rests with the whistleblower, whilst remaining subject to the provisions of the law.

The procedure is now relatively clear for potential whistleblowers. For the recipients of the report, the procedural constraints have however increased.

1· A CLEAR, UNIFIED FRAMEWORK

The period 2022-2023 marks the entry into force of the provisions of the Law of 21 March 2022, which have sought to correct the imperfections of the initial system. The law now authorises whistleblowers to freely choose the most appropriate course of action for their situation, allowing them to use either internal or external reporting as a first option.

STRENGTHENING THE PROCEDURAL FRAMEWORK

The procedural constraints have been eased for whistleblowers, but have been tightened for the recipients of reports.

As regards internal reporting, the obligation to introduce a specific procedure in organisations with more than 50 employees dates from 2016. However, the Law of 21 March 2022 extends the list of people who can use this specific procedure. The internal channel, initially open to members of staff plus external and temporary workers, now also concerns shareholders, members of the management or supervisory board, as well as members of staff and members of the administrative, management or supervisory bodies of contractors, subcontractors and suppliers. Going beyond the requirements of the directive, the law also includes people who have applied for a job, where the information was obtained as part of that application.

The procedure for collecting and processing whistleblowing reports was strengthened by the Decree of 3 October 2022, particularly regarding the procedures for receiving reports, processing times and feedback to the whistleblower.

With regard to external reports, a set of rules has been laid down for the management of reports received by the designated authorities.

IDENTIFYING THE AUTHORITIES RESPONSIBLE FOR COLLECTING REPORTS

Under the Law of 9 December 2016, in its original version, after making an internal report that remained unanswered, the whistleblower could address a "*judicial authority, administrative authority or professional order* "[83].

The text left some uncertainty as to which administrative authorities were actually competent to deal with the report, which was a potential hindrance both to the reporting process and to the rapid handling of the report.

The Law of 21 March 2022 clarified the concept of external authorities responsible for collecting reports.

Article 8 of the Law of 9 December 2016 designates four categories of stakeholder:

- the "*authorities designated by* ", i.e. those listed in the Decree of 3 October 2022, of which there are 41[84];
- the judicial authority;
- various bodies of the European Union;
- the Defender of Rights, as the authority responsible for directing whistleblowers to the authorities best placed to deal with their reports.

It should be noted that the Defender of Rights is also one of the 41 external authorities mentioned by the Decree of 3 October 2022 to deal with reports falling within its various areas of jurisdiction (children's rights,

discrimination, code of conduct for persons exercising security duties and user relations with public services).

2· THE RELATIONSHIP BETWEEN THE VARIOUS REPORTING CHANNELS

Despite the standardisation of the rules introduced in 2016, whistleblowers must still make choices as to the procedure to follow when reporting. This is partly due to the fact that specific reporting frameworks have been maintained in the regulatory landscape, but have only been partially linked to the overall framework.

In addition to the choice of procedure, there is also the question of whether or not to report internally rather than externally.

OVERALL FRAMEWORK AND SPECIFIC FRAMEWORKS

Not all the special rules governing certain reports disappeared in 2016. They remain outside the overall framework with which they are coordinated in principle.

Preeminence of the specific framework

The Sapin II Law now lays down the principle that if the conditions for application of a specific whistleblowing system are met, the overall framework does not apply, except as regards measures to support and protect whistleblowers that are more favourable to them than those provided for in the specific system[85]. The Law of 21 March 2022 also brought about a welcome harmonisation of the protection available to whistleblowers under these specific regimes, by making a reference to the overall framework for the application of several of them.

Recently, in the case of employees, the Court of Cassation ruled that the specific provisions took precedence over the overall framework, meaning whistleblowers falling within the scope of Article L. 1132-3-3 of the Labour Code are therefore not required to make a report by following the tiered procedure set out in Article 8 of the Law of 9 December 2016[86].

However, the work of making an exhaustive inventory of specific regulations, most of which predate the Law of 9 December 2016, prior to the necessary harmonisation of procedures for collecting and processing reports, has not been done.

The landscape is particularly complex, however, given the abundance of applicable rules. In the broadest sense of the term – which encompasses all the special provisions governing disclosures of wrongdoing – there are more than a dozen specific laws[87].

These laws, which are sector-specific, set out conditions for whistleblowing that differ from those in the Sapin II Law and are generally more flexible[88].

Among the specific frameworks that are relatively broad in scope are the rules on whistleblowing relating to crimes and offences of which employees or civil servants become aware in the course of their duties[89]. For both employees and civil servants, specific rules also provide for the collection of reports from witnesses of discrimination and sexual or psychological harassment[90].

Other rules have a more limited material scope. Employees can thus report manufacturing processes that present risks to health and the environment in accordance with the terms of Article L. 4133-1 of the French Labour Code and public officials may report conflicts of interest, with reference to Article L. 135-3 of the French Civil Service Code.

In the financial sector, certain reports are subject to an *ad hoc* procedure with the French Prudential Supervision and Resolution Authority (Autorité de Contrôle Prudentiel et de Résolution or ACPR)[91] or the Financial Markets Authority (Autorité des Marchés Financiers or AMF)[92]. In the field of intelligence, the National Oversight

Commission for Intelligence-Gathering Techniques (Commission Nationale de Contrôle des Techniques de Renseignement or CNCTR) is the authority designated to collect the reports described in article L. 861-3 of the French Internal Security Code, in accordance with the procedure laid down therein.

This diversity is a source of complexity both for whistleblowers and for the authorities responsible for collecting reports, who do not know whether or not they should fall within the scope of the Sapin II Law or another field. Employers are encountering the same difficulties.

In the final analysis, it would appear that it is essential to identify and harmonise these measures in order to promote and secure the reporting procedure.

RECOMMENDATION 5

Make an inventory of all the specific reporting systems and, where necessary, harmonise the procedures for collecting and processing reports.

Confusion among whistleblowing systems in the field of anti-corruption

Article 17 of the Law of 9 December 2016 required the directors of major companies and public industrial and commercial establishments (EPICs) to put in place procedures designed to prevent and detect acts of corruption or influence peddling from being committed in France or abroad. The French Anti-Corruption Agency (AFA) is responsible for monitoring compliance with these systems, including the "*internal reporting system designed to enable the collection of reports from employees concerning the existence of behaviour or situations contrary to the company's code of conduct*".

The legislator did not coordinate this internal anti-corruption whistleblowing system with that of article 6 of the Sapin II Law, which defines whistleblowers, either in 2016 or in 2022. With the benefit of hindsight, however, it would appear that a review of the specific features of the anti-corruption mechanism should be undertaken in coordination with the AFA.

As it stands, it appears to the Defender of Rights that the scopes of these provisions overlap and that the whistleblowing of Article 17 of the Sapin II Law necessarily falls within the scope of Article 6 (failure to comply with the code of conduct constituting, *at the very least,* harm to the general interest). As a result, the obligations relating to whistleblowing in Article 6 (reinforced by the Waserman Law and the Decree of October 2022) apply to anti-corruption whistleblowing.

Companies may choose to adopt a single system for collecting whistleblowing reports, whether they fall within the scope of Article 6 or Article 17 of the Sapin II Law.

RECOMMENDATION 6

Initiate discussions, in coordination with the AFA, on how the rules on anti-corruption whistleblowing fit in with the overall framework of the Sapin II Law.

The lack of a framework for whistleblowing in the field of national defence and security

As has already been pointed out (see recommendation 3), there is currently no specific system for collecting whistleblowing reports in the field of national defence and security.

THE CHALLENGE OF INTERNAL REPORTING

According to the explanatory memorandum to Directive (EU) 2019/1937 on the detection and prevention of breaches of Union law, for effective action, "*it is essential that the relevant information reaches those who are closest to the source of the problem, who are best placed to investigate and who have the necessary powers to remedy it, if possible*"[93].

With this in mind, the European Union, and subsequently France, have promoted internal

whistleblowing systems, while requiring that they be both secure for the whistleblower and effective in remedying the malfunctions or illegalities reported. The fact that internal whistleblowing is no longer an obligatory step for whistleblowers can only encourage companies and public employers to strengthen the guarantees offered to whistleblowers in the professional sphere.

There are two ways of making an internal whistleblowing report:

- referral to the direct or indirect line manager, the employer or a representative appointed by the employer;
- application of a dedicated procedure set up within the entity to enable internal whistleblowing report to be collected under secure conditions[94]. This *ad hoc* procedure is mandatory for organisations with more than 50 employees, in accordance with the provisions of article 8-I-B of the Sapin II Law. It is now described in the Decree of 3 October 2022.

Given the potential risks of conflicts of interest, the application of the *ad hoc* procedure is an essential guarantee to encourage internal reporting.

In the private sector, some of the companies concerned moved quickly to apply the 2022 reform and adapt the procedures they had put in place in 2016 following adoption of the Sapin II Law. The Defender of Rights was asked on several occasions to address compliance specialists and various law firms[95] after the entry into force of the Law of 21 March 2022 and its implementation decree.

In this context, the question of the organisation of procedures for collecting and handling reports within the groups was often raised. Directive (EU) 2019/1937 allows for pooling between companies with 50 to 249 employees, but not beyond this threshold[96]. The aim is to authorise the sharing of resources without, however, escalating the report to a level far removed from the whistleblower, as this would slow down the processing of the report and undermine the confidentiality of the process. The Law of 21 March 2022 also refers to the threshold of less than 250 employees for pooling.

As far as groups are concerned, the legislator has chosen to deal with the issue separately[97], without however mentioning any threshold. The law may appear ambiguous on this point, especially as the Decree of 3 October 2022 does not clarify the issue. Since 2016, several large companies have decided to handle reports within their parent company. However, this strategy seems to be called into question by the texts. The European Commission is also taking a firm stance on the 249 threshold, refusing to exceed it and to distinguish between groups and non-groups. In its reply dated 2 June 2021, cited during parliamentary proceedings before the Senate, the Commission took the view that the directive requires any company with more than 50 employees to set up an internal procedure for collecting and processing reports, regardless of whether or not it is part of a group, with the pooling of resources being possible only for companies with between 50 and 249 employees (whether or not within the same group). Unless this point changes, the pooling of resources for the collection and processing of whistleblowing would appear to be restricted to companies or groups of companies with fewer than 250 employees. However, as permitted by the decree, entities can still choose to assign the management of receiving reports to a third party (whether a natural person or not)[98].

With regard to internal reports, the issue of collecting personal data in connection with these reports was clarified with the adoption of the new "professional reporting" guidelines by the French Data Protection Authority (CNIL) on 6 July 2023, following a public consultation. This document, which is aimed at both private and public sector organisations, as well as third parties offering services for collecting and processing reports, explains the conditions for processing personal data within internal report collection and management systems.

Now that the law has been clarified, we need to ensure that it is implemented. In the private sector, at the end of 2019, a survey showed that only 51% of managers had an internal whistleblowing system in their company[99].

For companies subject to AFA supervision, the situation is more satisfactory. Of the companies actually inspected by the AFA, only 15% were found to be in breach.

In the public sector, the reform of internal whistleblowing procedures appears to be less advanced than in the private sector.

Government ministries, most of which had adopted the procedures required by the Law of 9 December 2016, must now update their systems. Only a few have managed to do so[100], with the others potentially held back by the fact that the circular being prepared by the Directorate General for Administration and the Civil Service (DGAFP) has not yet been published.

For other public stakeholders, the difficulties stem from the complete lack of a procedure. Before the 2022 reform came into force, only some of the public sector entities covered by the reform had complied with the obligation to put in place an appropriate procedure for collecting and processing whistleblowing reports. This was the finding of a survey carried out at the end of 2018 by the Defender of Rights in central and local government (ministries, regions and departments) and in France's thirty largest cities, which showed that less than 30% of them had set up procedures for collecting reports, and complied with the obligation to inform their employees about this new system. This assessment was confirmed by the AFA for local public services[101].

These surveys should be repeated and organised at national level.

The results may lead us to consider whether it is necessary to implement a more restrictive system, as recommended by the Defender of Rights in its opinion of 16 December 2020, opening up the possibility of imposing financial penalties on organisations that fail to comply. In 2022, the absence of sanctions was justified by the fact that external whistleblowing competed directly with internal whistleblowing. This was seen as a sufficient incentive factor with, where appropriate, the possibility of pooling or outsourcing the collection or processing of whistleblowing reports[102] to encourage the implementation of collection procedures.

> *The Defender of Rights is regularly contacted by claimants who criticise the lack of internal whistleblowing procedures within entities that are required to set them up. As the legislation stands, the institution simply reminds the entity in question of its legal and regulatory obligations or, if it falls within the scope of Article 17 of the Sapin II Law, forwards the request to the AFA as part of its mission of monitoring compliance with whistleblowing procedures.*

RECOMMENDATION 7

Assess the percentage of companies and public authorities up to date with their obligations to set up a system for collecting internal reports.

RECOMMENDATION 8

Where appropriate, assess the conditions for implementing a system of controls and penalties, particularly financial penalties, for defaulting public or private sector bodies.

B· EXTERNAL AUTHORITIES RESPONSIBLE FOR COLLECTING WHISTLEBLOWING REPORTS: NEW STAKEHOLDERS IN THE RIGHT TO REPORT

As required by Directive (EU) 2019/1937, France has designated a set of competent authorities to receive reports *via* external and independent channels.

In addition to the judicial authority and various European Union institutions[103], 41 authorities have been grouped together under the concept of "*external authorities responsible for collecting reports*" by the Decree of 3 October 2022[104]. The Defender of Rights, who is one of these 41 authorities, has also built a network with them.

The specific reports of the external authorities feed into the biennial report of the Defender of Rights. For 2022, although the decree designating them had only been in force for a matter of months, the Defender of Rights received only a few reports. In 2023, 34 external authorities were able to submit the required document on time. The content of the reporting is extremely varied, both in terms of the number of reports received and processed and the difficulties encountered.

1· A NEW CATEGORY OF STAKEHOLDER: EXTERNAL AUTHORITIES RESPONSIBLE FOR COLLECTING WHISTLEBLOWING REPORTS

The procedure for collecting and handling external reports is organised around three ideas:

- the designation of authorities specifically responsible for collecting and handling reports in a given area of responsibility;
- the application of a specific procedure, the terms and conditions of which are largely determined by EU law;
- the designation of a pivotal institution, the Defender of Rights, responsible for ensuring the fluidity of the system by directing whistleblowers to the competent authority or redirecting reports sent to an authority that does not consider itself competent.

The Decree of 3 October 2022 sets out these various stages, which are largely governed by Directive (EU) 2019/1937. There have nonetheless been difficulties regarding implementation of the procedure established and imposed on the authorities chosen by the public authorities.

DESIGNATED AUTHORITIES: NECESSARY CHOICES BUT QUESTIONS REMAIN

It is essential that the list of external authorities is large enough to cover a wide range of whistleblowing reports. Clear and simple procedures are also essential to ensure that whistleblowers are able to comply with them. Their effective protection depends on it, as does their willingness to report incidents.

The Government has chosen to select a list of 41 authorities. Most are administrative authorities, some are independent administrative authorities, whilst there are also central government departments and certain professional bodies.

However, the list appended to the Decree of 3 October 2022 raises a number of questions. Although the authorities selected, which vary widely in nature, cover a spectrum of activities and thus a relatively wide range of potential whistleblowing reports, not all of them appear, at first sight, to have the powers and resources to deal effectively with reports.

This is particularly true of mediation authorities, which have no decision-making or advisory powers. The same applies to authorities which, like the French National Authority for Health (HAS), have neither investigative powers nor the power to impose sanctions[105].

Other authorities with decision-making powers, on the other hand, have a strictly defined area of responsibility into which it is difficult to fit the handling of whistleblowing reports. This is the case of the Comité d'Indemnisation des Victimes des Essais Nucléaires (CIVEN), a commission set up to compensate victims of nuclear testing. While the texts governing its action make it responsible only for examining claims for compensation submitted on the basis of Law no. 2010-2 of 5 January 2010 on

the recognition and compensation of victims of French nuclear testing[106], the Decree of 3 October 2022 designates it to collect and process reports in the health sector.

The designation of the Établissement Français du Sang (French Blood Donor Organisation), which is above all an operator and not a health or expert agency, also raises similar questions in the health sector.

The current list also needs to be extended. It should include the regional health agencies, which, given their expertise and their role of observing and monitoring health facilities at a local and regional level, would appear to be in a position to deal directly with reports in the health sector. ANSM (Agence nationale de sécurité du médicament et des produits de santé), France's drug regulatory agency, is also missing, as are the primary health insurance funds (caisses primaires d'assurance maladie or CPAM), in view of their respective responsibilities for pharmacovigilance and combating social security fraud.

Lastly, several external authorities note that they handle whistleblowing reports by calling on a third-party structure or service. The Délégation Générale de l'Emploi et de la Formation Professionnelle (DGEFP–General Delegation for Employment and Vocational Training) is therefore mainly called upon to deal with situations of fraud involving the partial activity scheme or the personal training allowance (CPF), for which it must necessarily refer the matter to the relevant decentralised departments or operators for investigation and, where appropriate, potential action. Similarly, the Inspection Générale des Affaires Sociales (IGAS–General Inspectorate of Social Affairs) has no power of injunction or sanction to deal with the reports it receives on its own. As a result, it frequently has to turn to the various authorities responsible for primary control (regional health agencies, regional directorates for the economy, labour, employment and solidarity, *etc.*) to assess situations and determine what measures can be taken to remedy them.

Despite consultation with the various ministries concerned, it appears that the competent authorities were determined without prior consultation with all those who were to be designated.

However, such consultation is necessary to assess the actual capacity of each authority to collect and process reports in a given sector, and to make any necessary additions.

RECOMMENDATION 9

Reassess the relevance and supplement the scope of the list appended to the Decree of 3 October 2022 in consultation with the authorities mentioned therein or intended to be mentioned therein.

SPECIFIC AREAS OF INTERVENTION IN TERMS OF REPORTING

Although France has chosen to opt out of the limited scope of Directive (EU) 2019/1937 on whistleblower protection, it has adopted a procedure for collecting and handling external reports based precisely on the areas covered by EU law. As a result, the Decree of 3 October 2022 only applies to external authorities in the sectors it mentions, which echo those of the directive.

IGAS is thus designated as the authority responsible for collecting reports in the public health sector, even though it is more generally competent in the field of "*public policies on social security and social welfare, health and social protection, work, employment and vocational training*"[107]. The Public Finances Directorate General (DGFIP) is mentioned in the 2022 decree only in relation to "*breaches affecting the financial interests of the European Union: for value added tax fraud*" and "*breaches relating to the internal market: for corporation tax fraud*". Income tax fraud or pension payment fraud issues, which do not involve a breach of European Union rules but could be referred to this authority, are therefore outside the scope of the decree.

The approach adopted has raised questions from the authorities concerned. It has proved to be relatively complex to implement in practice as well as being difficult for whistleblowers to understand.

The status of external authority has two consequences: it must be one of the authorities to which whistleblowers can regularly turn, and it must be subject to a set of procedural and organisational rules defined by the Decree of 3 October 2022.

Given the first of these consequences, a flexible interpretation of the area of responsibility of the external authorities is advisable, unless external reporting is to be rendered meaningless. The Defender of Rights therefore considers that a whistleblower that contacts an external authority whose name appears on the list of the Decree of 3 October 2022 has indeed made an external report as per the terms of Article 8 II, 1° of the Law of 8 December 2016.

It is up to this authority to deal with the report if it falls within its area of responsibility. However, it is only obliged to do so by complying with the procedural rules of the 2022 decree if the report actually falls within the material scope assigned by this decree for the authority to cover. If this is not the case, the authority will deal with the report as per its normal procedures.

The question of the material scope of the area of responsibility of the Decree of 3 October 2022 rests therefore solely with the administrative authorities and not with the persons making the report.

Some authorities have chosen to align all their report handling procedures with the Decree of 3 October 2022. Other authorities, such as the AMF, were already implementing a specific procedure stemming from French or European law predating the Sapin II Law and the 2019 Directive[108]. The "reporting" procedure described in the Decree of 3 October 2022 is part of this system.

However, most external authorities have retained their traditional channels for handling requests alongside the "reporting" procedure. This is the case, for example, with the DGFIP, which has no intention of changing the procedures for collecting reports on tax situations through the specific channels it has made available to users, or the procedure for tax advisors. The same applies to the Defender of Rights, who distinguishes between whistleblowers and non-whistleblowers when a report is submitted.

More generally, it seems essential for the authorities to work on effective communication so that people who contact them have information beforehand on the appropriate procedure for collecting reports. Errors

are potentially time-consuming for the authorities and hamper the rapid processing of requests, whatever they may be. By way of illustration, an analysis of the referrals sent to the Directorate General of Labour (Direction Générale du Travail or DGT) shows that those making referrals are unfamiliar with the system. The whistleblower system is frequently misunderstood and used for strictly individual complaints concerning disputes between an employee and an employer or former employer, which means that requests must then be redirected.

The authorities also need to decide how to distinguish between whistleblowing reports and ordinary reports. For cases referred to the Defender of Rights, the distinction is made with regard to both the terms of the request or the reference to a reporting system and its content.

GOOD PRACTICE

Inform potential whistleblowers of the existence of procedures for handling requests other than whistleblowing reports and guide the claimant towards the appropriate procedure.

TEXTS THAT NEED TO BE HARMONISED

One of the difficulties brought to the attention of the Defender of Rights by the external authorities involves coordinating the various rules governing the operation of these authorities with those resulting from the Decree of 3 October 2022.

The question has arisen particularly with regard to the national councils of various professional bodies, of which there are nine among the external authorities[109]. The organisation and operation of these authorities are largely governed by legislative provisions, which have not been coordinated with the rules on processing and collecting whistleblowing reports. As they stand, the rules governing these national councils do not appear to be suitable for processing reports in their area of responsibility.

Basically, the national councils of professional bodies have been given responsibility for collecting and processing reports, even though they have no powers of inquiry or investigation. The only course of action open to national councils is to initiate disciplinary proceedings, which may prove inappropriate when reports are not targeted at a particular professional or are still too vague, even if they appear serious at the time they are made. Quite often, the national council's only recourse is to refer the matter to a third-party institution, *via* the Defender of Rights, such as a regional health agency.

Furthermore, in most national councils, particularly those of the healthcare professional bodies, referral to the disciplinary chamber is subject to a vote by the elected members of the national council[110]. This raises questions not only about the national council's ability to protect the confidentiality of whistleblowers, as required by law and decree, but also about the ultimately conditional nature of the effective processing of the whistleblowing report. It is not always possible to make a request anonymous, given the subject of the report or the size of the professional body or order concerned. Setting up a restricted committee would require a change in the regulations.

The result of the Defender of Rights' discussions with the national councils of healthcare professional bodies is that the latter, which have all mobilised to set up an *ad hoc* procedure for collecting reports in accordance with the Sapin II Law, are not opposed to being designated as external authorities. This status them a new way of gathering “weak signals” about dysfunctions within the profession concerned. However, the vast majority of national councils feel that they are unable to process these signals.

Another difficulty lies in the apparently conflicting demands to which certain authorities are subject. This is the case for several authorities operating in the financial sector, such as the AMF and the ACPR, whose texts explicitly state that they are bound by obligations of professional secrecy, which in practice means that there is no

communication whatsoever on investigations in progress[111]. However, the Law of 9 December 2016 and the Decree of 3 October 2022[112] require the same authorities to keep whistleblowers informed of the measures envisaged (notification within three months) as well as the final result of the due diligence carried out.

As it stands, after discussions with the Defender of Rights, these authorities have reformulated the messages sent to whistleblowers. They have chosen to inform whistleblowers as precisely as possible, as soon as their request is received, of the action likely to be taken. This involves describing the applicable procedure and the deadlines for potential decisions, including those that are intended to be made public, which will be brought to the attention of the whistleblower. Subsequently, the authority will specify whether it considers the matter to fall within its area of responsibility or not, whether it intends to file the report before any investigative measures are taken, whether it intends to conduct further checks – without specifying whether or not these are investigative measures or simply requests for information – or even whether any measures have been taken. However, whistleblowers will not be informed of the nature of any investigative measures or their outcome, apart from any decisions made public by the authority.

RECOMMENDATION 10

Harmonise the provisions governing the organisation and operation of external authorities with those governing the collection and processing of reports. Make the necessary legislative and regulatory changes.

THE DEFENDER OF RIGHTS' MISSION OF GUIDANCE AND REDIRECTION

Since the 2022 reform, the Organic Law has entrusted the Defender of Rights with the mission of guiding and redirecting reports[113].

Whistleblowers can send a report to the institution, which will direct the person to "*the authority or authorities best placed to deal with the matter*". The Defender of Rights may also receive referrals from an external authority that considers a referral to fall outside of its remit or that the referral also falls within the remit of another authority. Reports can be transferred between external authorities without going through the Defender of Rights. When the matter is referred to it by a whistleblower or an authority, the Defender of Rights may decide that the report should be sent to an authority that is not listed among the external authorities in the Decree of 3 October 2022 if it appears that this is the authority best able to deal with it effectively.

In 2022 and 2023, more than 90 referrals were made to the Defender of Rights. When a case is referred to it in this way, the institution does not send the report itself, but informs the person making the referral of the authority to which he or she can turn. It is up to the person making the report to decide – particularly with regard to the authority in question[114] – whether he or she intends to report the indicated authority. When examining requests for referral, the Defender of Rights does not analyse the status of whistleblower, nor does it assess the merits of the report, leaving this to the authority to which the request was made. However, in the guidance letters sent to the person potentially making a report, it sometimes draws attention to the fact that the report will not be treated as a whistleblowing report if the person making the report is a legal entity or if it does not go beyond the claimant's personal situation, and reminds the claimant of the need to have sufficient information for the request to be processed effectively.

Three requests for redirection were sent by the external authorities to the Defender of Rights in 2023. However, requests for redirection from other authorities have risen sharply since the start of 2024 (15 between January and March). Some of these requests led the institution to designate an authority not included in the list appended to the Decree of 3 October 2022[115]. When addressing these third-party authorities, the Defender of Rights takes care to remind them of their confidentiality obligations when processing reports. Letters are sent to the authorities in a double envelope after the whistleblower has been informed.

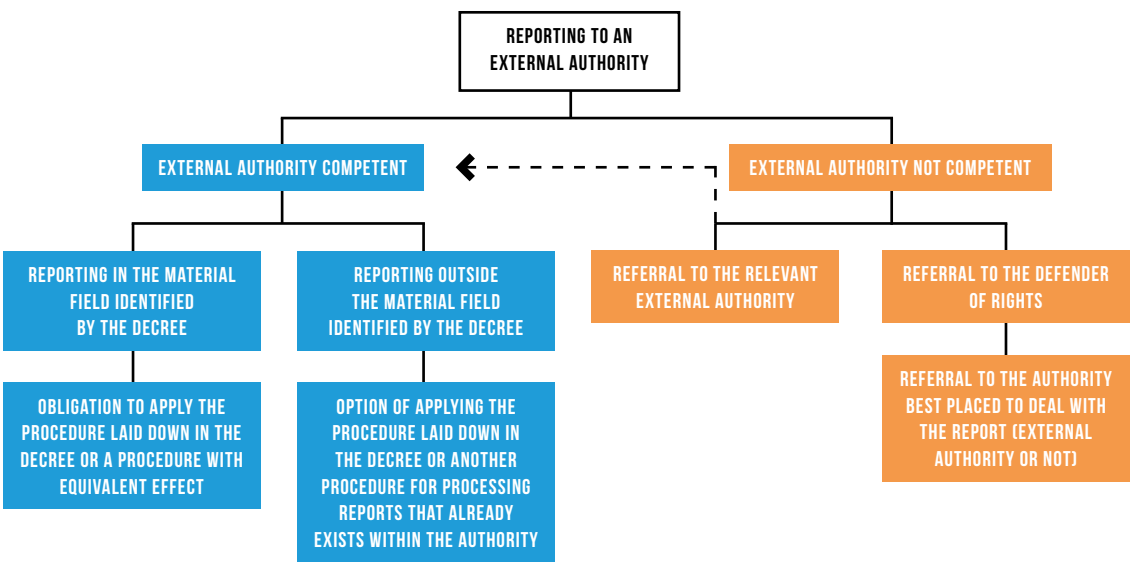
To speed up addressing questions about determining the competent authorities, the Defender of Rights has set up an informal network bringing together all the external authorities. The network met on several occasions, in particular when the whistleblowers' guide was published in March 2023, and again in autumn 2023, to review the implementation of procedures within each authority.

Meetings were also organised with the authorities responsible for financial matters and with the national councils of professional bodies to discuss issues specific to these authorities.

Two documents have been drawn up by the members of the network: a directory of contacts on the subject of whistleblowing within each authority, and a document outlining the scope of each authority's area of responsibility, with elements of internal doctrine. This information enables both the Defender of Rights' whistleblower support unit and the external authorities themselves to direct reports fairly quickly. Some cases have required the organisation of *ad hoc* meetings between the Defender of Rights and the external authorities.

For transmission to the external authorities, the Defender of Rights has an IT tool that allows encrypted emails to be sent.

WHICH PROCEDURE FOR WHICH AUTHORITY?



2· THE PROCESSING OF WHISTLEBLOWING REPORTS BY EXTERNAL AUTHORITIES

Designation as an external authority has had repercussions in each of the authorities concerned. However, it is certainly too early to measure the effects on the number of reports received.

AN UNDERTAKING FROM EXTERNAL AUTHORITIES TO IMPLEMENT THE PROCEDURES PROVIDED FOR IN THE DECREE OF 3 OCTOBER 2022

The regulatory text sets out two series of obligations: one relating to determining the procedure for collecting and processing reports[116] and the other relating to publication of information on the procedures for processing reports and the rights of whistleblowers[117].

Subject to the provisions specific to each external authority, the Defender of Rights considers that the Decree of 3 October 2022 does not require the procedure for collecting and processing reports to be formalised in a specific act.

The external authorities have all moved to comply with their procedural obligations. By[1] April 2024, 32 out of the 41 authorities had formalised and put online the procedure for collecting and processing reports (see Appendix).

One authority (DGEFP) opted to use an external service provider to roll out this paperless service via a public procurement contract (UGAP). It found it difficult to find a service provider capable of meeting all the specifications drawn up for the development of the service, which led to delays in opening its whistleblowing channels to the public. The other authorities worked with their internal departments.

In most cases, the procedure was put online at the same time as it was adopted. As required by the Decree of 3 October 2022, the authorities have made every effort to make their procedure easily accessible and comprehensible to the general public.

QUESTIONS FOR...

THE FRENCH NUCLEAR SAFETY AUTHORITY (ASN)

What impact has the Law of 21 March 2022 and its implementation Decree of 3 October 2022 had on your authority, particularly in terms of operation, the number of reports received and the "quality" of the reports?

The ASN decided, of its own volition and without waiting for the law to impose it, to set up a system for collecting and processing reports at the end of 2018. The system already met most of the obligations now incumbent on the external authorities responsible for collecting and processing whistleblowing reports.

The recent regulatory reforms have had no visible impact on the number of reports received. Their quality has gradually improved overall. This improvement may be due to the ever-increasing communication about the existence of the system in conjunction with the publication of new texts.

However, the improved protection for whistleblowers and simplification of the requirements for whistleblower status, information that is posted on the dedicated portal of the ASN website, have greatly improved the information available to whistleblowers: their rights, the authorities they can contact, the procedures they must follow and the consideration given to the facts reported.

In addition, the fact that the Defender of Rights set up an exchange network between external authorities and a contact point for clarifying legal provisions has been invaluable. The network provided an opportunity to compare the problems faced by the various authorities and to discuss the solutions each one has found. The ASN has asked the external authorities contact point to specify the conditions for exchanging information with authorities other than those responsible for collecting and processing whistleblowing reports but who are competent stakeholders in the processing of certain reports.

Do you think the scheme is likely to be successful in the authority's area of responsibility?

Most of the reports received by ASN have technical aspects that need to be investigated, but the findings are of the same type as those made during routine inspections. Nevertheless, the collection of reports has already proved useful: some reports have brought to the attention of the ASN information that an inspector, without a specific in-depth examination, would not have discovered, such as incorrect manufacture or repair of equipment. In such cases, only external information can reveal and remedy the situation. The system establishes the right conditions to encourage this.

Can you already see any ways of improving the system for collecting and processing reports by the external authorities?

Based on ASN's feedback, there are two possible improvements:

- *Make arrangements for processing whistleblowing reports involving authorities other than those responsible for collection and processing. Responsibilities for environmental protection or medical care, for example, are divided between numerous authorities, sometimes partly overlapping. Whistleblowing reports cannot always be split up precisely, and joint action is more effective.*
- *Inform the external authorities of the outcome when a case falling partly within their remit is processed by the Defender of Rights. If the Defender of Rights grants whistleblower status to a person, the corresponding external authority is not informed of this decision, nor the reasons for it. It could be informed. This would avoid divergent treatment and enrich its experience.*

STILL A LIMITED NUMBER OF REPORTS

For the moment, the reports seem to be concentrated in a few sectors and institutions.

However, it is too early to draw general conclusions on the quantitative and qualitative results of the work of the external authorities, given the very recent nature of the legislation and availability of online reporting procedures.

To date, some of them have received few or no reports. For example, of the 34 external authorities that submitted statistics, 11 received no reports and 24 received fewer than 25 reports in 2023.

The situation is different for some external authorities. In 2023, ten of them were contacted by 25 or more people claiming to be whistleblowers (ACPR, CNIL, French National Medical Council (CNOM), AFA, the Defender of Rights, AMF, DGT, IGAS, ASN and DGFIP). Some of these authorities were already tasked with collecting and processing reports before being designated as external authorities in 2022. Several have also set up a system for collecting reports, which they have communicated about or made particularly visible[118]. In its report, the DGFIP points out that the publication of information about whistleblowing on its website has led to dozens of reports.

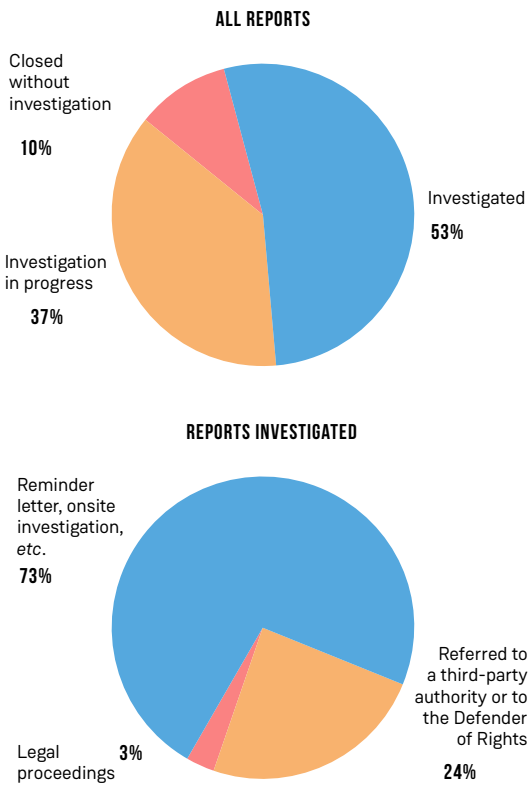
These authorities have faced the difficulty of distinguishing the whistleblowing procedure from their other missions of receiving reports from the general public. By way of illustration, in 2020 and 2021 the AMF received several hundred reports, more than half of which were actually questions from individuals about financial savings products, financial intermediaries and suspected investment fraud ("Épargne Info Service" (EIS) line) and did not constitute reports as per the terms of the Sapin II Law. As processing this stream of reports is a time-consuming activity, the Authority decided to modify its whistleblowers website in November 2021. Since then, the number of EIS reports received through whistleblower communication channels has fallen by 43%.

Examination of the situation for the authorities most referred to shows that a significant number of the reports received (a third to more than half) turned out not to

qualify as whistleblowing reports as per the terms of the Law of 9 December 2016.

The vast majority of reports that did fall within the scope of the whistleblowing system were found to be well-founded. As far as action taken is concerned, it should be noted that the processing of reports has quite regularly led to the issue of a reminder letter or onsite investigations.

BREAKDOWN OF WHISTLEBLOWING REPORTS SENT TO EXTERNAL AUTHORITIES, BY ACTION TAKEN, 2023 (AS A %)



Note: the data in this graph relates to the 22 external authorities that provided this information.

Some of these external authorities questioned the usefulness of the reporting system in relation to their usual complaint processing procedures. The procedure sometimes appears to be a source of complexity, both for users and for the employees responsible for implementing it, without providing any real added value. Other authorities have pointed out that processing a request as a whistleblowing report requires particular responsiveness. This has led them to improve the efficiency of their process, in terms of both the time taken to acknowledge receipt and provide feedback.

Many of the authorities who have received reports also point out that whistleblowing reports received by telephone are rarely usable. Calls often consist of establishing contacts, or even requests for information unrelated to a whistleblowing report. When a registration system has been set up, the messages sent to the institutions are often empty or unrelated to the reporting procedure.

The content of the feedback provided posed difficulties for authorities subject to specific obligations of professional secrecy.

QUESTIONS FOR...

THE FINANCIAL MARKETS AUTHORITY (AMF)

What impact has the Law of 21 March 2022 and its implementation Decree of 3 October 2022 had on your authority?

The Law of 21 March 2022 and its implementation decree have given the AMF the opportunity to cooperate closely with the Defender of Rights, particularly in preparing the report that is sent to it each year, and to benefit from its expertise in resolving any difficulties encountered in interpreting or applying the new rules. The transparency of the reporting process has also been improved. The AMF has reviewed the wording of the messages sent to whistleblowers at the various stages of the process.

This initiative is designed to meet the obligation to provide information to whistleblowers while respecting the professional secrecy to which AMF staff are bound. Lastly, this change in legislation provided an opportunity to raise awareness among AMF staff responsible for analysing and processing reports.

Do you think that the procedure adopted by the Decree of 3 October 2022 improves the way in which whistleblowers reporting to your authority are dealt with?

The procedure introduced by the Decree of 3 October 2022 has undeniably improved the processing of whistleblowing reports within the authority and fostered more effective coordination between the various stakeholders involved, while also raising awareness among other stakeholders. This procedure has provided an opportunity to clarify and deepen the analysis of whistleblowing reports internally before any discussion with the liaison officers designated within the AMF's operational divisions. In addition, the adjustments made have optimised processing times, guaranteeing greater responsiveness in the management of reports.

Do you think the system will eventually generate reports within your authority's area of responsibility?

It is possible that the system will lead to an increase in the number of whistleblowing reports over the long term, although the extent of this increase is difficult to predict. In 2023, we saw a marked increase (+20%) in visits to the whistleblower pages on our website. In 2024, after just one quarter, the number of reports recorded was three times higher than in the same period for the previous year.

Can you already see any ways of improving the system for collecting and processing reports by the external authorities?

We plan to continue securing our channels and information systems for collecting whistleblowing reports.

Furthermore, while article 14 of the decree provides for a review of the procedure every three years, we feel it would be appropriate to introduce ongoing monitoring of our procedure to ensure that it continues to meet the objectives set by law. We also believe it is important to maintain excellent cooperation between the external authorities responsible for collecting reports to ensure that whistleblowing reports are handled consistently.

The review period covered by this first report did not lead to the collection of statistics that would be meaningful for the work of external authorities. In the light of all the feedback received from the authorities, it may nevertheless be advisable at this stage to continue efforts to raise awareness of the missions of the external authorities. Communication work is therefore needed, within each authority or as part of a campaign run by the Government. The guide published by the Defender of Rights also helps to raise awareness of whistleblowing systems, and it too could be publicised more widely on institutional websites.

RECOMMENDATION 11

Raise awareness, through communication, of the external authorities and more generally of how whistleblowing protection works as a whole.

3· QUESTIONS ABOUT THE PROCEDURE FOR THE COLLECTING AND PROCESSING OF WHISTLEBLOWING REPORTS BY EXTERNAL AUTHORITIES

From establishing procedures to collecting the first reports, the period 2022-2023 was marked by various questions from the external authorities about the practical arrangements to be adopted and more essential aspects of the system, such as control of the whistleblower status or the information that can be provided about action taking regarding a report.

The authorities have reflected on these issues collectively, in conjunction with the Defender of Rights, each determining the best way to meet the procedural requirements for collecting and processing external reports.

THE CHALLENGES OF STAFF ORGANISATION AND TRAINING

The procedure involves setting up a specific organisation to prevent any unauthorised person from obtaining access to the information collected in a report. The Decree of 3 October 2022 also requires that the "*members of staff*" appointed to each authority have "*by virtue of their position or status, the skills, authority and resources required to carry out their duties*".

The specific organisation chosen is not always formalised within the external authorities. Where this is the case, it is reflected in practice by adopting internal orders or recommendations (such as instructions or internal memos[119]). Circulars have sometimes been sent to all members of the authority's network (as in the case of the DGFIP) to ensure that whistleblower cases are forwarded to the appropriate department as quickly as possible. One authority, the AMF, has undertaken to raise awareness among its staff, and more specifically reception staff, on managing external persons claiming whistleblower status, as well as the mail service.

Where the authorities have the necessary resources, they adopt technical solutions to protect case files in their dematerialised version.

When it comes to choosing dedicated staff, situations vary widely. In reality, some external authorities have little leeway, given their modest size or the way they are organised. Several authorities have set up a dedicated unit, usually within Legal Affairs. In some authorities (e.g. DGFIP), the contact person responsible for collecting external reports is the same as for internal reports. Within the General Inspectorate for the Environment and Sustainable Development (IGEDD), reports are currently handled by a team of five people, attached to the Policy Committee.

In the national councils of the healthcare professional bodies, the notion of "*members of staff*" has been widely interpreted as allowing both employees and elected representatives to be appointed to the "whistleblowing" units, whose views are seen as essential in assessing the relevance of the report.

It is difficult to meet the training requirements at this stage. Training courses are certainly available on the market, but apart from their cost, they are mainly geared towards processing internal whistleblowing reports (in both the private and public sectors). The Defender of Rights has been asked to respond to the demand for training from external authorities by organising it in-house. This training can only be provided to external authorities, as the Defender of Rights does not have the human resources to provide more extensive training.

ORGANISATION OF RECEIPT OF THE REPORT

Facilitating the whistleblowing process presupposes that the proposed reporting channels are both accessible and secure.

Dedicated channels

The obligations laid down by the Decree of 3 October 2022 relate firstly to establishing a dedicated channel for receiving reports, which must be accessible for both verbal and written reports.

In practice, written submissions are received via an online reporting form or a shared mailbox. It is also frequently possible, or even recommended (Defender of Rights, National Council of the Order of Veterinary Surgeons, etc.), to send reports by post because of the

guarantees it offers in terms of confidentiality (compared to IT risks). The Defender of Rights advises encouraging the practice of double enveloping, i.e. inserting the elements of the report in a closed envelope bearing only the words "WHISTLEBLOWING REPORT" and inserting this envelope in a second envelope bearing the address of the authority to which the report has been sent.

GOOD PRACTICE

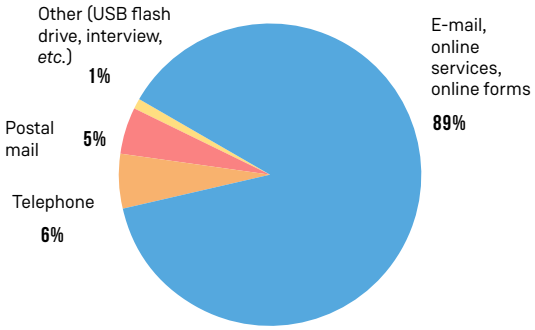
When sending whistleblowing reports by post, recommend that potential whistleblowers use the double envelope system.

The appointment of a multitude of authorities in the same sector (health, social care), without any coordination between them, could be a source of complications. For example, while the DGEFP has chosen to offer a paperless reporting form via an online platform, the DGT and IGAS have opted for a shared mailbox. A single solution for collecting reports and a procedure shared by all three authorities would have been clearer for users and more cost effective in terms of resources for the three authorities. By way of illustration of these difficulties, errors have already been noted in the choice of external authorities between the DGT and the DGEFP in the reports received. It will be necessary to assess the extent to which the difficulties persist over time and their magnitude in the longer term.

The obligation to offer a verbal reporting system meant that tools had to be put in place to collect such reports, which most authorities did not have. As permitted by the decree, some authorities do not respond directly but require the whistleblower to leave a voice message (Defender of Rights, ACPR, DGEFP). For the Defender of Rights, 233 messages were left reporting an issue between[1] March 2023 – the date the line was installed – and 31 December 2023. Aside from the potential cost of setting up a dedicated telephone number, this method of receiving reports has proved to be ineffective. All too often, the telephone number is seen by outsiders primarily as a means of contacting the authority – in fact, it is sometimes the only number available – and many of the messages left have nothing to do with a whistleblowing report.

Generally speaking, the majority of whistleblowers contact the external authorities via online forms, online services or emails.

REFERRAL PROCESS OF THE EXTERNAL AUTHORITIES



QUESTIONS FOR...

THE FRENCH ANTI-CORRUPTION AGENCY

The AFA is an authority that used to collect whistleblowing reports before being designated as the external authority responsible for collecting reports by the Decree of 3 October 2022. Has this designation changed your practices?

In order to facilitate whistleblowing and increase the guarantees offered to those reporting, the AFA decided to set up a single system in 2023 for receiving and processing all the reports received, managed by the Control department.

Law no. 2022-401 of 21 March 2022 aimed at improving whistleblower protection and Decree no. 2022-1284 of 3 October 2022 have made it necessary to adjust the procedures for collecting and processing whistleblowing reports. Internal procedures and data collection tools have been completely overhauled to bring them into line with the new regulatory framework. This has led to increased management workload, but it has also provided greater guarantees for those

making whistleblowing reports. Tools have been developed to make reporting more secure.

This new framework is undoubtedly one of the reasons for the increase in the number of whistleblowing reports received by the AFA. While the AFA received between 250 and 300 reports per year since its creation in 2018, the Agency received 435 in 2023.

What recommendations would you give to people who wish to submit a whistleblowing report?

It is important to be aware of the jurisdiction of the AFA: we can receive and process whistleblowing reports relating either to acts likely to constitute breaches of probity (corruption, influence peddling, misappropriation of public funds, favouritism, unlawful acquisition of interest, extortion), or to measures to prevent and detect breaches of probity implemented by companies and public entities.

In addition to the whistleblowing report, it is very useful to send documents or factual information to support the facts reported.

What advice would you give to employers who may be faced with reports of breaches of probity?

Companies that pass the thresholds (€100m turnover and 500 employees) set out in Article 17 of the Sapin II Law are required to put in place a series of measures to prevent and detect corruption and influence peddling, including "an internal whistleblowing system designed to enable the collection of reports from employees regarding the existence of conduct or situations contrary to the code of conduct". The recommendations published by the AFA in the Official Journal of the French Republic (Journal officiel de la République française) in January 2021 and the guide published by the AFA on internal investigations help companies to set up an effective internal whistleblowing system.

In addition, companies with more than 50 employees are required to set up an internal whistleblowing and whistleblower protection system that complies with the requirements of Articles 6 et seq. of the Sapin II Law and Decree no. 2022-1284 of 3 October 2022.

In practice, many companies have set up a unified system for collecting internal reports.

Public sector employers are subject to the same obligation under the aforementioned 2022 decree.

The AFA notes that setting up an effective internal whistleblowing system is a valuable tool for preventing and detecting breaches of probity. It is also a guarantee of credibility, as whistleblowers may be tempted to refer a matter to an external authority if the internal whistleblowing system does not inspire confidence.

In particular, when an employer is confronted with reports of breaches of probity, it is important to have them analysed by competent and authorised persons (including if they are anonymous) in order to identify the appropriate action to be taken, and to carry out an internal investigation whenever necessary, taking care to preserve the confidentiality of the person making the report.

Anonymity

The external authorities have discussed collectively the appropriate action to take subsequent to anonymous reports.

Directive (EU) 2019/1937 and French legislation do not specify whether it is mandatory to receive anonymous whistleblowing reports. This flexibility was essentially justified by the desire to give employers the option of refusing whistleblowing reports where they are unable to check that the people submitting them are in fact those authorised to do so by law (employee, trainee, former employee, etc.). The same flexibility has been granted to external authorities.

As provided for in the Decree of 3 October 2022, it is up to these authorities – like employers – to indicate the action taken on anonymous whistleblowing reports and therefore to take a stand on this point.

Some authorities refuse to deal with anonymous reports under the specific whistleblower procedure, while agreeing to take them into account and examine them, where appropriate, under the ordinary law procedure applicable before them (National Council of the Order of Veterinary Surgeons, National Council of the Order of Chiropodists and Podiatrists, DGEFP, DGFIP).

For these authorities, analysis of whistleblower status must be sufficiently reliable to justify the implementation of the whistleblower system. Some, particularly in the economic sector, fear that they will not be able to detect malicious actions.

However, most authorities have opted to receive and process anonymous reports as part of the whistleblowing procedure. This is the case for the Defender of Rights and the AMF, for which anonymous reports account for a significant proportion of all reports received (almost 40% in 2022, and 28% in 2023). The Defender of Rights considers that anonymity is the ultimate guarantee for whistleblowers of the confidentiality of their actions and is often a prerequisite for going ahead with disclosure.

GOOD PRACTICE

Welcome anonymous reports.

However, in practice, receiving and processing an anonymous whistleblowing report means being able to exchange information with the person making the report and, if necessary, obtain further information on the substance of the report. It is therefore generally recommended that the person making the report provide contact details (e.g. an e-mail address created for the purpose), even in the case of an anonymous whistleblowing report, so that the request can be investigated. Failing this, and in the absence of sufficient information on the reality of the report, it is difficult to act on the request.

PROCESSING A WHISTLEBLOWING REPORT

The authority to which the matter is referred will consider in turn whether the request is admissible and whether it is well-founded, in conditions that guarantee the confidentiality of the whistleblower's actions.

Preliminary screening for whistleblower status

Under the terms of the Decree of 3 October 2022, it is the external authority's responsibility to examine whether the person making the report complies with the conditions set out in Article 6 of the Law of 9 December 2016, i.e. to ensure that he or she meets the definition of a whistleblower.

It seems reasonable to require external authorities to treat reports sent to them as "whistleblowing reports" only if the person making the report claims to have done so or to be a whistleblower.

On the other hand, the Defender of Rights recommends a flexible approach to the admissibility of requests. It urges authorities to reject only those requests that clearly do not fall within the scope of the Sapin II Law, such as those made by legal entities, by a victim acting solely on his or her own behalf, or which clearly concern a minor malfunction. Apart from these cases, whistleblowing reports must be processed without, for example, the authority asking any further questions about good faith.

Excessive rigour in examining the admissibility of reports would appear to be too restrictive for the external authorities, whose efforts should be focused on studying the facts reported. The preliminary phase of examining the admissibility of the application must also be rapid.

GOOD PRACTICE

Adopt a flexible approach to admissibility requirements and exclude from the scope of the whistleblowing procedure only those reports that clearly fall outside the scope of the Sapin II Law.

Feedback

Whistleblowers must be informed of the receipt of their report within seven days of its receipt. The process is usually automated.

Subsequently, the procedure requires that, within a reasonable period of time not exceeding three months, information on the measures envisaged or taken to assess the accuracy of the allegations made in the whistleblowing report and to address its content be communicated to the person making the report. This period may be extended to six months for particularly complex cases.

Directive (EU) 2019/1937, which is the source of the obligation, mentions (recital 66) giving: "*feedback to the reporting persons about the action envisaged or taken as follow-up, for instance, referral to another authority, closure of the procedure based on lack of sufficient evidence or other grounds, or launch of an investigation, and possibly its findings and any measures taken to address the issue raised, as well as about the grounds for the choice of that follow-up*".

Feedback is not the same as processing the report. This is merely an update, which must be sufficiently precise to reassure the whistleblower that his or her report has been taken into account and is being processed. Understood in this way, the obligation appears to be easily met. For authorities subject to particular constraints in terms of secrecy or confidentiality, the terms of the response are adapted.

FEEDBACK MESSAGES FROM THE DEFENDER OF RIGHTS

CHILD WELFARE UNIT

Dear Madam,

You have referred the situation of pupils attending X to the Defender of Rights. I am the legal adviser responsible for examining your referral from the point of view of children's rights.

I would like to inform you that I will shortly be sending letters to the school, (...) and to the departmental directorate of national education services requesting information from them, particularly pertaining to the measures taken to deal with the problems you have identified. The origin of the referral will remain confidential and your name will not be mentioned.

Please do not hesitate to contact me again, by e-mail or telephone, if you would like any further details about our services or if you would like to send me any additional information to that which you have already provided.

I will, of course, keep you informed of the outcome of your referral.

Yours faithfully,

(...)

HEALTH AND SOCIAL CARE UNIT

Dear Madam,

You referred the matter to the Defender of Rights, in particular because of the difficulties encountered in reporting the conditions in which patients were treated by Doctor X, then head of the occupational health and safety department at hospital Z.

Your case has been assigned to me for investigation into the substance of the whistleblowing report; the task of informing, guiding and protecting whistleblowers falls to another department of the institution.

In this initial stage, I would like to inform you that the public prosecutor has authorised the Defender of Rights to investigate your complaint, excluding any search for criminal wrongdoing, which is the exclusive responsibility of the judicial authorities.

Consequently, in its letters dated 17 and 18 July 2023, the services of the Defender of Rights questioned hospital Z about its procedures for processing reports and the National Medical Council about actions taken subsequent to the complaints lodged against Doctor X.

I will be sure to keep you informed of any developments.

Yours faithfully,

(...)

Guarantees of confidentiality

Under the terms of Article 9 of the Law of 9 December 2016: "*[...] Information likely to identify the whistleblower may only be disclosed with the whistleblower's consent. It may, however, be communicated to the judicial authorities if the persons responsible for collecting or processing the whistleblowing reports are required to report the facts to the judicial authorities. The whistleblower is informed of this, unless there is a risk that this information could compromise the legal proceedings. Written explanations are attached to this information.*

Information identifying the person who is the subject of a report may only be disclosed, except to the judicial authorities, once it has been established that the report is well-founded.

II.–Disclosing the confidential information defined in section I is punishable by two years' imprisonment and a fine of €30,000."

Strict confidentiality of the identity of whistleblowers, the persons to whom they refer and the information collected is central to the legal protection for whistleblowers. It is a major guarantee that whistleblowers will not suffer reprisals in connection with their reports, and that their reports will be dealt with in the best possible conditions.

First and foremost, confidentiality must be guaranteed within the authorities. The procedure (limiting rights of access to case

files, anonymisation, etc.) must be designed with this in mind.

Secondly, confidentiality requires us to consider the conditions under which the whistleblowing report should be investigated.

The issue of preserving the identity of the whistleblower does not arise in every case, as the person making the report may agree to the person he or she is criticising being informed of the action taken. In any case, the question must be asked.

There are several possible configurations. Some authorities, such as the French Competition Authority, guarantee a very high level of identity protection throughout the procedure. This confidentiality can be ensured by drafting an official record of the whistleblower's statements, which, along with the accompanying documents (e-mails, contracts, audio recordings, etc.), will be completely anonymised on receipt of the case file. Subsequently, the parties involved in the proceedings may only access this anonymised version of the record, while the is kept in an *ad hoc* register accessible only to authorised persons and, where applicable, to the magistrates hearing the case (in particular, in the case of the Competition Authority, the liberty and custody judge during an inspection and seizure at company premises). This high level of protection may be regarded as optimal.

In other authorities, the approach is less systematic, but where it is possible in practice, the person implicated is asked to provide explanations without being told the identity of the whistleblower. The need to preserve the anonymity of whistleblowers does not always allow very precise questions to be asked as part of the investigations, which can complicate the work of substantiating potential breaches. The authorities decide on a case-by-case basis whether or not they are in a position to intervene.

If it appears that, given the information provided by the person making the report and due to his or her position in the company, there is a risk that he or she may be identified, the authority may also decide to refer the matter to itself, if permitted by law. This was the case, for example, for an authority to which an employee of a company had referred a number of potential breaches of the regulations, who could have been identified on the basis of the information provided and his position within the company. This authority decided to open a control procedure to allow an "exploratory" investigation of the elements provided in the report by its services directly on site, on the company's premises, without risking indirectly revealing the identity of the whistleblower while allowing them to corroborate the elements of the report with the observations and documents found. In most cases, such an approach presupposes that the factors giving rise to the report are sufficiently tangible to justify the authority acting on its own initiative.

When a case is referred to the judicial authorities, the whistleblower's identity may be disclosed to them. In principle, the whistleblower is informed of this unless this information could compromise the legal proceedings.

In addition to the confidentiality of the whistleblower, the Defender of Rights recommends that, before communicating any information about a case, questions be asked about what information implicates third parties who can be identified.

GOOD PRACTICE

Before communicating any elements of a case to a third party authority, ask what information implicates third parties who can be identified.

Action taken subsequent to reports

It is too early to make an overall assessment of the action taken on the reports received by the authorities during 2023.

However, it should be noted that the rules on the time limits within which the authorities must acknowledge receipt of requests or provide feedback help to ensure that whistleblowing reports are dealt with quickly and as a matter of priority. The external authorities show an increased commitment to respecting them.

Initiating an investigation may in itself lead to the situation being remedied. For example, one authority testified that its intervention with an administration that had been implicated in a whistleblowing procedure made the latter aware of the risks of a practice that it immediately corrected. The whistleblower was informed and the case was closed.

In their reports to the Defender of Rights, several external authorities emphasised that they had received a relatively large number of whistleblowing reports with little substantiation, which led to them being closed because the claimant was unable or unwilling to provide further evidence. Potential whistleblowers could be given appropriate information on the need to have sufficient evidence to enable them to verify the veracity of the facts reported.

GOOD PRACTICE

Inform whistleblowers, in an appropriate manner (website, at the time of receipt of the referral), of the need to have sufficient evidence to enable them to verify the veracity of the facts reported in order for their report to be processed.

CONCLUSION

"*Reporting issues must become the normal reflex of any responsible citizen who becomes aware of serious threats to the general interest*" (Resolution 2300,[1] October 2019). This Council of Europe resolution describes a goal that we must be striving to reach.

In this first biennial report on the overall performance of whistleblower protection, covering the years 2022/2023, the Defender of Rights observes that a turning point has been reached in whistleblowing law. Significantly more favourable in terms of the protection afforded, ambitious in terms of the collection and processing of reports, this law has made a great deal of progress in terms of both legislation and regulations.

However, shortcomings are already apparent in the regulations which, while they do not appear to cast doubt on the effectiveness of the new framework, must be quickly corrected, if necessary with the required financial resources. The public authorities must also immediately review, with the organisations concerned, the capacity of the designated external authorities to receive and process reports in their area of responsibility.

Fundamentally, it seems that the rules protecting whistleblowers and those enabling their reports to be processed need to be promoted and highlighted more by the public authorities. Unless awareness is raised about whistleblowers' rights, they will not be used by those they are intended to protect, or will be used too late, after possible reprisals.

RECOMMENDATIONS TO THE GOVERNMENT

1: Provide funding for communication on the protection and promotion of whistleblowers.

2: Guarantee protection for legal entities as whistleblowers.

3: Provide for a specific reporting system at national level for issues concerning national security and defence secrecy.

4: Improve financial and psychological support for whistleblowers significantly, particularly by setting up a whistleblower support fund and providing psychological counselling.

5: Make an inventory of all the specific reporting systems and, where necessary, harmonise the procedures for collecting and processing reports.

6: Initiate discussions, in coordination with the AFA, on how the rules on anti-corruption whistleblowing fit in with the overall framework of the Sapin II Law.

7: Assess the percentage of companies and public authorities up to date with their obligations to set up a system for collecting internal reports.

8: Where appropriate, assess the conditions for implementing a system of controls and penalties, particularly financial penalties, for defaulting public or private sector bodies.

9: Reassess the relevance and supplement the scope of the list appended to the Decree of 3 October 2022 in consultation with the authorities mentioned therein or intended to be mentioned therein.

10: Harmonise the provisions governing the organisation and operation of external authorities with those governing the collection and processing of reports. Make the necessary legislative and regulatory changes.

11: Raise awareness, through communication, of the external authorities and more generally of how whistleblowing protection works as a whole.

APPENDIX

LINKS TO INFORMATION ON THE PROCEDURES OF EXTERNAL AUTHORITIES REGARDING WHISTLEBLOWING REPORTS (IN FRENCH)

FRENCH ANTI-CORRUPTION AGENCY (AFA)

https://www.agence-francaise-anticorruption.gouv.fr/fr/procedure-recueil-et-traitement-des-signalements

FRENCH NATIONAL AGENCY FOR FOOD, ENVIRONMENTAL AND OCCUPATIONAL HEALTH & SAFETY (ANSES)

https://www.anses.fr/fr/system/files/Note-lanceurs-alertes.pdf

FRENCH NATIONAL AGENCY FOR INFORMATION SYSTEMS SECURITY (ANSSI)

https://cyber.gouv.fr/signalement-par-un-lanceur-dalerte-adresser-une-alerte-lanssi

FRENCH PRUDENTIAL SUPERVISION AND RESOLUTION AUTHORITY (ACPR)

https://acpr.banque-france.fr/controler/signaler-lacpr-un-manquement-ou-une-infraction

FRENCH COMPETITION AUTHORITY

https://www.autoritedelaconcurrence.fr/fr/page-riche/le-dispositif-lanceur-dalerte

OFFICIAL STATISTICS AUTHORITY (ASP)

https://www.autorite-statistique-publique.fr/lanceurs-dalerte/

FRENCH NUCLEAR SAFETY AUTHORITY (ASN)

https://www.asn.fr/espace-professionnels/signalement-a-l-asn

FINANCIAL MARKETS AUTHORITY (AMF)

https://www.amf-france.org/fr/formulaires-et-declarations/lanceur-dalerte-0

FRENCH LAND TRANSPORT ACCIDENT INVESTIGATION BUREAU (BEA-TT)

https://www.bea-tt.developpement-durable.gouv.fr/lanceurs-d-alerte-a1202.html

COLLEGE OF INSPECTOR GENERAL OF THE FRENCH ARMED FORCES

https://www.defense.gouv.fr/cga/differents-roles-du-cga/lanceur-dalerte-definition-processus-signalement

COMPENSATION COMMISSION FOR VICTIMS OF NUCLEAR TESTING (CIVEN)

https://www.gouvernement.fr/organisation/comite-d-indemnisation-des-victimes-des-essais-nucleaires-civen/signalement-lanceur-d-alerte

FRENCH DATA PROTECTION AUTHORITY (CNIL)

https://www.cnil.fr/fr/saisir-la-cnil/lanceurs-dalerte-adresser-une-alerte-la-cnil

NATIONAL COUNCIL OF THE ORDER OF DENTAL SURGEONS

https://www.ordre-chirurgiens-dentistes.fr/pour-le-chirurgien-dentiste/lanceur-dalerte/

NATIONAL COUNCIL OF THE ORDER OF NURSES

https://www.ordre-infirmiers.fr/procedure-lanceurs-d-alertes

NATIONAL COUNCIL OF THE ORDER OF PHYSIOTHERAPISTS

https://www.ordremk.fr/actualites/kines/adresser-une-alerte-au-conseil-national/

FRENCH NATIONAL MEDICAL COUNCIL

https://www.conseil-national.medecin.fr/publications/actualites/lanceur-dalerte

NATIONAL COUNCIL OF THE ORDER OF CHIROPODISTS AND PODIATRISTS

https://www.onpp.fr/exercice/signalements/lanceurs-d-alerte.html

NATIONAL COUNCIL OF THE ORDER OF PHARMACISTS

https://www.ordre.pharmacien.fr/l-ordre/les-missions/signalement-plainte-alerte/comment-lancer-une-alerte-externe

NATIONAL COUNCIL OF THE ORDER OF MIDWIVES

https://www.ordre-sages-femmes.fr/ordre/lanceur-dalerte/

NATIONAL COUNCIL OF THE ORDER OF VETERINARY SURGEONS

https://www.veterinaire.fr/je-suis-veterinaire/mon-exercice-professionnel/les-fiches-professionnelles/lanceurs-dalerte

GENERAL INSPECTORATE OF THE FRENCH ARMED FORCES (CGA)

https://www.defense.gouv.fr/cga/differents-roles-du-cga/lanceur-dalerte-definition-processus-signalement

DEFENDER OF RIGHTS

https://www.defenseurdesdroits.fr/recueil-et-traitement-des-alertes-relevant-des-domaines-de-competence-du-defenseur-des-droits-366

GENERAL DELEGATION FOR EMPLOYMENT AND VOCATIONAL TRAINING (DGEFP)

https://travail-emploi.gouv.fr/emploi-et-insertion/lanceurs-d-alerte/article/lanceurs-d-alerte-quand-et-comment-adresser-une-alerte-a-la-dgefp

DIRECTORATE-GENERAL FOR CUSTOMS AND INDIRECT TAXES (DGDDI)

https://www.douane.gouv.fr/la-douane/lanceur-dalerte

PUBLIC FINANCES DIRECTORATE GENERAL (DGFIP)

https://www.economie.gouv.fr/dgfip/dispositif-dalerte-et-de-protection-des-lanceurs-dalerte-la-dgfip-en-matiere-de-tva-et-dimpot

DIRECTORATE-GENERAL OF LABOUR (DGT)

https://travail-emploi.gouv.fr/droit-du-travail/le-reglement-des-conflits-individuels-et-collectifs/article/lanceurs-d-alerte-quand-et-comment-adresser-une-alerte-a-la-dgt

FRENCH BLOOD DONOR ORGANISATION (EFS)

https://www.efs.sante.fr/procedure-lanceur-dalerte

FRENCH NATIONAL AUTHORITY FOR HEALTH (HAS)

https://www.has-sante.fr/jcms/p_3473165/fr/exercer-son-droit-d-alerte

GENERAL INSPECTORATE OF SOCIAL AFFAIRS (IGAS)

https://igas.gouv.fr/Procedure-de-lancement-d-alerte.html

GENERAL INSPECTORATE FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT (IGEDD)

https://www.igedd.developpement-durable.gouv.fr/lanceur-d-alerte-signaler-une-atteinte-a-l-a3965.html

MEDIATOR FOR NATIONAL EDUCATION AND HIGHER EDUCATION

https://www.education.gouv.fr/procedure-lanceur-d-alerte-380316

CENTRAL ARMS AND EXPLOSIVES SERVICE (SCAE)

https://www.interieur.gouv.fr/ministere/organisation/secretariat-general/service-central-des-armes-et-explosifs

NOTES

[1] Article 36 of Organic Law no. 2011-333 of 29 March 2011 on the Defender of Rights.

[2] Organic law no. 2022-400 of 21 March 2022 aimed at strengthening the role of the Defender of Rights with regard to whistleblowing, Law no. 2022-401 of 21 March 2022 aimed at improving whistleblower protection; Decree no. 2022-1284 of 3 October 2022 relating to the procedures for collecting and processing whistleblowing reports and setting the list of external authorities established by Law no. 2022-401 of 21 March 2022 aimed at improving whistleblower protection and Decree no. 2022-1686 of 28 December 2022 relating to increasing the training allowance of whistleblower employees.

[3] F. Chateauraynaud, "Lanceur d'alerte", in Dictionnaire critique et interdisciplinaire de la participation, Paris, GIS Démocratie et Participation, 2013; see also, Francis Chateauraynaud, Didier Torny, *Les Sombres précurseurs, une sociologie pragmatique de l'alerte et du risque*, Éditions de l'École des Hautes Études en Sciences Sociales, Paris, 1999, note p. 426. See, more generally, on whistleblower protection, *Protéger les lanceurs d'alerte, la démocratie technique à l'épreuve de la loi*, O. Leclerc, LGDJ, *Les lanceurs d'alerte*, under the direction of M. Disant and D. Pollet-Panoussis, LGDJ, *L'avenir des lanceurs d'alerte dans l'Union européenne*, edited by G. Bargain and C. Koumpli, Mare and Martin.

[4] Mediator case.

[5] Article 10 of the Law of 9 December 2016, amending articles 6 ter A of Law no. 83-634 of 13 July 1983 and article L. 1132-3-3 of the French Labour Code.

[6] Article 12 of the Law of 9 December 2016.

[7] Article 11 of the Law of 9 December 2016.

[8] Article 13 of the Law of 9 December 2016.

[9] Defender of Rights Opinion No. 20-12 of 16 December 2020 on the transposition into France law of Directive (EU) 2019/1937 and Opinion No. 21-16 of 29 October 2021 on two draft laws on the whistleblower protection.

[10] Information report on assessment of the impact of Law no. 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation, known as the "Sapin II Law", French National Assembly, Messrs. Raphaël Gauvain and Olivier Marleix, p. 139.

[11] Aforementioned opinion of the Defender of Rights no. 20-12 and 21-16.

[12] See opinion no. 404001 of 4 November 2021 of the Conseil d'État on a draft law aimed at improving whistleblower protection and opinion no. 404000 on a draft organic law aimed at strengthening the role of the Defender of Rights with regard to whistleblowing.

[13] Decree no. 2022-1284 of 3 October 2022, cited above.

[14] In line with the requirements of Directive (EU) 2019/1937 excluding from the protection scheme "whistleblowers" who "report breaches to law enforcement authorities in exchange for reward or compensation", Recital 30 of the Directive.

[15] Article L. 10-0 AC of the tax procedure handbook. See the recent decision of the Paris Administrative Court, 27 September 2023, no. 22PA04079, regarding entry into force of the system.

[16] Which we owe to Directive (EU) 2019/1937.

[17] See the interpretation in this sense of the Law of 9 December 2016, prior to the reform: decision no. 2016-740 DC of 8 December 2016 of the Constitutional Council.

[18] Article 8 of the Law of 9 December 2016, as amended.

[19] On this point, see the additions made by Decree no. 2022-1284 of 3 October 2022.

[20] Six months if the authority referred to is the judicial authority, an institution of the European Union or the Defender of Rights as part of its mission of guidance. Three months for referrals to other external authorities.

[21] The Law of 9 December 2016 originally required "*serious and imminent danger*" or "*a risk of irreversible damage*".

[22] Introduced by the legislator in 2013 for employees or public sector workers when reporting a crime or an offence, this evidentiary regime is inspired by pre-existing provisions relating to the fight against discrimination, themselves adopted under the influence of European Union law and in particular Directive 97/80/EC of 15 December 1997 on the burden of proof in matters of gender-based discrimination.

[23] Provided that such disclosure is necessary and proportionate to safeguard the interests in question, see article 122-9 of the French Penal Code.

[24] Provided that he or she had reasonable grounds for believing that the reporting or public disclosure of all such information was necessary to safeguard the interests involved, see Article 10-1 of the Law of 9 December 2016.

[25] Article 12 of the Law of 9 December 2016.

[26] Article L. 911-1-1 of the Code of Administrative Justice.

[27] Article 13 of the Law of 9 December 2016.

[28] Article 13 of the Law of 9 December 2016.

[29] Article 13-1 of the Law of 9 December 2016.

[30] Articles 225-1 and 225-2 of the French Penal Code.

[31] Article 10-1, III of the Law of 9 December 2016.

[32] Article 14-1 of the Law of 9 December 2016.

[33] Opinion of the Defender of Rights No. 20-12 of 16 December 2020 on the transposition into French law of Directive (EU) 2019/1937.

[34] Council of Europe Resolution 2300 (2019), no. 12.2.

[35] *Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016; see also, *Bucur and Toma v. Romania*, no. 40238/02, 8 January 2013.

[36] See No. COM-19, 13 December 2021.

[37] Opinion of the Defender of Rights No. 20-12 of 16 December 2020 on the transposition into French law of Directive (EU) 2019/1937.

[38] https://transparency.ie/news_events/psychological-support-service-launched-whistleblowers-ireland

[39] https://institutfederaldroitshumains.be/fr/lanceurs-dalerte/demandez-un-soutien

[40] See Court of Cassation, Soc., 30 June 2016, no. 15-10.557, Court of Cassation, Soc., 19 Jan. 2022, no. 20-10.057, Court of Cassation, Soc. 16 February 2022, no. 19-17.871, published in the bulletin.

[41] Council of Europe, Parliamentary Assembly, Recommendation 1916 (2010), Protection of "whistleblowers"; Resolution 1729 (2010) Protection of "whistleblowers", see also Recommendation of the Committee of Ministers CM/Rec (2014) 7, of 30 April 2014.

[42] European Court of Human Rights (ECtHR), Grand Chamber, 15 February 2023, *Halet v. Luxembourg*, req. no. 21884/18.

[43] ECtHR, 12 February 2008, *Guja v. Moldova*, req. no. 14277/04. Also see, for application to an employee working under private law, ECtHR, 21 July 2011, *Heinisch v. Germany*, req. no. 28274/08.

[44] ECtHR, Grand Chamber, 14 February 2023, *Halet v. Luxembourg*, req. no. 21884/18, see also, the referral decision, ECtHR, 11 May 2021, *Halet v. France*, req. no. 21884.18.

[45] Study by the Conseil d'État, "Le droit d'alerte: signaler, traiter et protéger", 2016, p. 75. Proposal no. 15.

[46] Organic Law No. 2016-1690 on the jurisdiction of the Defender of Rights for the guidance and protection of whistleblowers.

[47] Constitutional Council, Decision no. 2016-741 DC of 8 December 2016.

[48] Article 4 of Organic Law no. 2011-333 of 29 March 2011 on the Defender of Rights.

[49] Under the conditions now defined in article 35-1 of the 2011 Organic Law.

[50] Decree no. 2022-1284 of 3 October 2022 on the procedures for collecting and processing whistleblowing reports and setting the list of external authorities established by Law no. 2022-401 of 21 March 2022 aimed at improving whistleblower protection.

[51] https://www.defenseurdesdroits.fr/orienter-et-proteger-les-lanceurs-dalerte-180

[52] https://www.defenseurdesdroits.fr/sites/default/files/2023-07/ddd_guide-lanceurs-alertes_maj2023_20230223.pdf

[53] Details likely to affect the confidentiality of the cases, which are otherwise anonymised, have been redacted.

[54] Constitutional Council, Decision no. 2022-838 DC of 17 March 2022.

[55] Paris Administrative Court of Appeal, 2nd chamber, 28 June 2023, no. 21PA04628.

[56] https://www.huisvoorklokkenluiders.nl/binaries/huisvoorklokkenluiders/documenten/publicaties/2023/03/24/neiwa-declaration-24-maart-2023/Rome_DECLARATION+final.pdf

[57] Grenoble Court of Appeal, 6 May 2021, no. 19/00084.

[58] Court of Cassation, Civ. 3rd, 29 January 1980, no. 78-14.598, published in the bulletin. See also, with regard to the award of redundancy payments, Conseil d'État, 27 June 1958, Syndicat national autonome des personnels du ministère de l'industrie et du commerce ("National Independent Trade Union for Personnel from the Industry and Trade Ministry"), Lebon T. 823, or in tax matters, Conseil d'État, Ass. 14 May 1964, no. 36226, also in Tables.

[59] "*The whistleblower must not be affected by the disorder he or she denounces, in which case it is up to him or her to make a formal complaint*" (Rapporteur in the Senate no. 712 [2015-2016], 22 June 2016 [Chap. II]). See also B. Querenet-Hahn and A. Renard, Le régime de protection des lanceurs d'alerte issu de la loi Sapin 2 ("The whistleblower protection system derived from the Sapin II Law"), Cahier de droit de l'entreprise 1/2018. Case 3: "*The legislator's intention is not to grant whistleblower protection to victims who are personally affected by the facts revealed and would therefore reveal them in a self-interested manner [...]*"

[60] It is clear from parliamentary work that the disinterestedness criterion has been removed, as it would have excluded from protection all persons who might have an interest, however indirect, in the report.

[61] By virtue of section 3 of Article 4 of Organic Law 2011-333 of 29 March 2011, the Defender of Rights is competent to protect victims of prohibited forms of direct or indirect discrimination, including victims of discriminatory harassment, in particular sexual harassment, including in public employment.

[62] See, implicitly, Conseil d'État, 27 April 2022, no. 437735, in the Recueil et Conseil d'État, 8 December 2023, no. 435266, in Tables.

[63] Parliamentary report no. 712 on Law no. 1691-216 of 9 December 2016, p. 47.

[64] An adverse measure decided against an employee representative may in fact constitute discrimination in connection with his or her trade union activities or mandate, rendering it null and void pursuant to Articles L. 1132-1 and L. 1132-4 of the Labour Code or L. 131-1 and L. 131-12 of the French Civil Service Code.

[65] Court of Cassation, Soc., 1 June 2023, no. 22-11.310, published in the bulletin. The decision was handed down in the context of application of the specific regime applicable to the reporting of crimes and offences by employees (article L. 1132-3-3 of the French Labour Code). See, previously, Court of Cassation, Soc., 19 April 2023, no. 21-21.053, published in the bulletin.

[66] Patrice Adam, "L'alerte du salarié associé", Droit social, 2023, p. 736.

[67] See also Court of Cassation, Soc., 4 Nov. 2020, no. 18-15.669 and Court of Cassation, Soc., 30 June 2016, no. 15-10.557, published in the bulletin.

[68] Court of Cassation, Soc., 3 May 2011, no. 10-14.104 and Court of Cassation, Soc., 28 April 2011, no. 10-30.107, published in the bulletin. In this sense, see also ECtHR, 12 February 2008, *Guja v. Moldova*, req. no. 14277/04.

[69] Court of Cassation, Soc., 8 July 2020, no. 18-13.593 and, more recently, Court of Cassation, Soc., 13 September 2023, no. 21-22.301 published in the bulletin. The wording is directly inspired by the solutions adopted for psychological harassment, on the basis of articles L. 1152-2 and L. 1152-3 of the French Labour Code, see Court of Cassation, Soc., 10 March 2009, no. 07-44.092, Soc., 7 February 2012, no. 10-18.835 and Soc., 10 June 2015, no. 13-25.554, all three published in the bulletin.

[70] Court of Cassation, Soc., 4 November 2020, no. 18-15.669, in the bulletin. For a more recent example, see Court of Cassation, Soc.,[1] June 2023, no. 22-11.310, published in the bulletin.

[71] Conseil d'État, 8 December 2023, no. 435266, in Tables.

[72] Court of Cassation, Soc., 16 September 2020, no. 18-26.696, published in the bulletin.

[73] Court of Cassation, Soc., 13 January 2021, no. 19-21.138, published in the bulletin.

[74] Court of Cassation, Soc., 5 July 2018, no. 17-17.485, unpublished.

[75] Court of Cassation, Soc., 13 January 2021, no. 19-21.138, cited above.

[76] Conseil d'État, 8 December 2023, no. 435266, in Tables.

[77] Three months when the authority referred to is an authority designated by the Decree of 3 October 2022 and six months in the case of a whistleblowing report to the public prosecutor or an EU authority.

[78] Conseil d'État, 27 April 2022, no. 437735, Recueil. See also, Paris Administrative Court of Appeal, 28 June 2023, no. 21PA04628.

[79] Court of Cassation, Soc.,[1] February 2023, no. 21-24.271, published in the bulletin.

[80] Recommendation CM/Rec (2014)7 of the Committee of Ministers to EU member states on whistleblower protection (adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies).

[81] Decree no. 2022-1284 of 3 October 2022. This text replaces the provisions of Decree No. 2017-564 of 19 April 2017 on procedures for collecting whistleblowing reports from public or private legal entities, or State administrations.

[82] The whistleblower's guide published by the Defender of Rights reminds us of this point.

[83] Article 8, section I.

[84] The list, area of responsibility and contact details of these authorities are set out in the whistleblowers' guide published by the Defender of Rights.

[85] Article 6, section III.

[86] Court of Cassation, Soc. 15 February 2023, no. 21-20.342, published in the bulletin; same reasoning concerning the requirement of disinterestedness: Court of Cassation, Soc., 13 September 2023, no. 21-22.301 and Court of Cassation, Soc., 8 November 2023, no. 22-12.433 published in the bulletin.

[87] See the measures referred to in Report No. 299 (2021-2022) by Catherine Di Folco on behalf of the Senate Law Commission, submitted on 15 December 2021 as part of the examination of the proposed law to improve whistleblower protection, p. 60 et seq.; see also "*The whistleblower in all its forms: a practical and theoretical guide*". Institut Messine. https://www.institutmessine.fr/_files/ugd/4a6dba_32da2c059682488288299b2dec3314e3.pdf

[88] For example, there is no requirement to follow a tiered procedure as envisaged in 2016.

[89] Governed respectively by article L. 1132-3-3 of the French Labour Code, as well as by article L. 135-1 of the French Civil Service Code, which reproduces the terms of article 6 ter A of Law no. 83-634 of 13 July 1983 on the rights and obligations of civil servants.

[90] Articles L. 1152-1 et seq., article L. 1121-2 of the French Labour Code, in the case of employees; articles L. 133-3 and L. 131-12 of the French Civil Service Code for public sector employees.

[91] Article L. 511-41 of the French Monetary and Financial Code.

[92] Articles L. 634-1 and L. 634-3 of the French Monetary and Financial Code.

[93] Recital (47) of Directive (EU) 2019/1937.

[94] The procedure is described in Articles 1 to 8 of the Decree of 3 October 2022, which followed on from Decree No. 2017-564 of 19 April 2017 on procedures for collecting whistleblowing reports from public or private legal entities, or State administrations. The Decree of 3 October 2022 came into force the day after its publication.

[95] Notably those who have been commissioned by companies to manage the receiving of reports, as permitted by the Decree of 3 October 2022.

[96] Article 8.

[97] Article 8, section I, B and C of the Law of 9 December 2016.

[98] Article 7 of the Decree of 3 October 2022.

[99] Opinion of the Defender of Rights No. 20-12 of 16 December 202012 on the transposition into French law of Directive (EU) 2019/1937.

[100] French Interior and Agriculture Ministries, see Order of 8 January 2024 on the internal procedure for collecting and processing whistleblowing reports within the Ministry of the Interior and Overseas France, Order of 14 March 2024 on the procedure for collecting whistleblowing reports within the departments reporting to the Minister of Agriculture, Food, Agrifood and Forestry.

[101] French Anti-Corruption Agency (AFA), *Enquête sur la prévention de la corruption dans le service public local* ("Investigation into the prevention of corruption in local public services"), analysis report, November 2018, p. 26.

[102] Article 8, section I, B of the Law of 9 December 2016.

[103] See 4° of Article 8-II of the Law of 9 December 2016 "*[…] institution, […] body or […] agency of the European Union competent to collect information on breaches falling within the scope of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 […]*".

[104] See the list appended to this report.

[105] See articles L. 161-37 et seq. of the French Public Health Code.

[106] See also Decree no. 2014-1049 of 15 September 2014 on the recognition and compensation of victims of French nuclear testing.

[107] Article 42 of Law no. 96-452 of 28 May 1996 on various health, social and statutory measures.

[108] In July 2016, the AMF set up a mechanism enabling anyone to report a potential breach of the regulation, which was extended to all regulations that the AMF is responsible for ensuring compliance with subsequent to the Sapin Law of 9 December 2016, see EU Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation).

[109] French National Medical Council, National Council of the Order of Physiotherapists, National Council of the Order of Midwives, National Council of the Order of Pharmacists, National Council of the Order of Nurses, National Council of the Order of Dental Surgeons, National Council of the Order of Chiropodists and Podiatrists, National Council of the Order of Veterinary Surgeons, National Council of the Order of Architects.

[110] In some national councils, such as the National Council of the Order of Pharmacists, it is the president who refers the matter to the disciplinary chamber.

[111] Article L. 621-4 II of the Monetary and Financial Code for the AMF, and Article L. 612-17 of the Monetary and Financial Code for the ACPR.

[112] Article 8, section I, C of the Law of 9 December 2016 and articles 10 and 15 of the Decree of 3 October 2022.

[113] Article 35-1 of the Organic Law of 29 March 2011 and article 8 of the Law of 9 December 2016.

[114] It is conceivable that some reluctance may be linked to the referral of cases to the judicial authorities.

[115] Including regional health agencies and a primary health insurance fund (CPAM).

[116] Articles 10, 11 and 12.

[117] Article 13.

[118] See DGT ministerial note dated 11 August 2023; AMF website; DGFIP website.

[119] AMF Instruction DOC-2018-13, applicable on 14 December 2018

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