

Whistleblowing: are you ready?

In France today, the law on whistleblowing is a profusion of different texts that do not allow companies to see their obligations clearly or whistleblowers to identify their rights and protection.

As French law currently stands, *"a whistleblower is a natural person who discloses or reports, in a disinterested manner and in good faith, a crime or an offence, a serious and manifest violation of an international commitment duly ratified or approved by France, a unilateral act of an international organisation taken on the basis of such a commitment, law or regulation, or a threat or serious harm to the public interest, of which he or she has had personal knowledge"*.

The low use of existing mechanisms or alerts in general proves the ineffectiveness of the legislative arsenal in force, due to (i) a lack of information, (ii) the slow implementation of these tools, although useful, by companies (according to an Ethicorp/AFJE survey of February 2020, only 33.73% of legal professionals think that their company is in full compliance) and (iii) a fear of reprisals for whistleblowers.

We thought it would be useful, a few months before the deadline given to EU Member States to transpose EU Directive 2019/1937 aimed at strengthening whistleblowing mechanisms in Member States' legislation, to provide a reminder of the state of the law in the form of tables and a quick presentation of what should await companies and whistleblowers, subject to adaptations by the French legislator to the guidelines set by the EU.

■ STATE OF THE LAW

APPLICABLE TEXT AND SCOPE RATIONE PERSONAE	SCOPE RATIONE MATERIAE	OBLIGATIONS AND SANCTIONS
<p>Act No. 2001-1066 on the fight against discrimination</p> <p>Article L. 1132-3 of the French Labour Code</p> <p>All companies</p>	<p>Combating harassment and discrimination</p>	<p>Alert transmitted to the employer by an employee or a member of the SEC</p> <p>➤ Prevention obligation</p>
<p>Act No. 2013-316 on whistleblowing in the health sector.</p> <p>Articles L. 4133-1 et seq. of the French Labour Code</p> <p>All companies whose activities are likely to have a negative impact on public health and/or the environment.</p>	<p>Whistleblowing concerning serious risks to the environment</p>	<p>Alert transmitted to the employer by an employee or a member of the SEC</p> <p>Recording of the alert, dated and signed, in a special register, the pages of which are numbered, and which is made available to staff representatives</p> <p>Review of the alert by the employer and the SEC</p> <p>The employer informs the SEC of the action it intends to take on the alert. In the event of disagreement on the validity of an alert within one month, the representative of the SEC may refer the matter to the departmental prefect</p> <p>If the alert is not acted upon, the employer is deprived of the possibility, provided for in paragraph 4 of Article 1386-11 of the French Civil Code, of asserting, in order to exonerate itself from its liability for defective products, that, at the time the product was put into circulation, the state of knowledge did not allow the defect to be detected</p>

APPLICABLE TEXT AND SCOPE RATIONE PERSONAE	SCOPE RATIONE MATERIAE	OBLIGATIONS AND SANCTIONS
<p>Act No. 2016-1691 of 9 December 2016 on transparency, the prevention of corruption and the modernisation of the economy</p> <p>–</p> <p>Sapin II Act</p> <p>Legal entity governed by private law with at least 50 employees</p> <p>Legal entity governed by public law with at least 50 employees</p> <p>Municipalities with more than 10,000 inhabitants.</p>	<p>Reporting:</p> <p>(i) a crime</p> <p>(ii) an offence</p> <p>(iii) a serious and manifest violation of an international commitment duly ratified or approved by France, a unilateral act of an international organisation taken on the basis of such a commitment, law or regulation</p> <p>(iv) a threat or serious harm to the public interest</p>	<p>Implementation of a whistleblowing system while respecting the strict confidentiality of the identity of the whistleblower</p> <p>Choice for the company between internal or external whistleblowing</p> <p>The whistleblower is theoretically protected against reprisals provided that he or she complies with the various stages of reporting:</p> <ul style="list-style-type: none"> – firstly to the line manager or a supervisor – if the company concerned fails to react within 3 months, the alert may be sent to the competent authority (judicial or administrative authority) – if the authority fails to deal with the alert within 6 months, it may be publicised in the media. <p>In the event of serious and imminent danger, the alert may be sent directly to the competent authority.</p> <p>The <i>Défenseur des droits</i> (France's national ombudsman) is competent to collect information from and direct the whistleblowers to the appropriate body in case of uncertainty.</p> <p>Any person who "<i>in any way whatsoever</i>" hinders the transmission of an alert internally to the company or to an authority risks a penalty of up to 1 year's imprisonment and a €15,000 fine.</p>

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<p>Act No. 2016-1691 of 9 December 2016 on transparency, the prevention of corruption and the modernisation of the economy</p> <p>–</p> <p>Sapin II Act</p> <p>Legal entities governed by private law with at least 500 employees and a turnover in excess of €100 million</p> <p>Legal entities governed by private law belonging to a group of companies whose parent company has its registered office in France and which has at least 500 employees and a consolidated turnover in excess of €100 million</p>	<p>Fight against corruption and influence peddling</p>	<p>Implementation of the following measures:</p> <ul style="list-style-type: none"> – Introduction of a code of conduct and an internal whistleblowing system – Mapping of risks of exposure to corruption in the form of regularly updated documentation – Procedures for assessing the situation of customers, first-tier suppliers and intermediaries with regard to risk mapping – Internal or external accounting controls to ensure that books, records and accounts are not used to conceal acts of corruption or trading in influence – Training for managers and staff most at risk of corruption and trading in influence – Disciplinary regime to impose sanctions on company employees in the event of a violation of the company's code of conduct – Internal monitoring and evaluation of the measures put in place <p>In the event of non-compliance:</p> <ul style="list-style-type: none"> ➤ a warning and then, if necessary, compliance injunctions that may be issued by the French Anti-Corruption Agency (AFA) ➤ finally, the AFA's Sanctions Committee may impose a financial penalty of up to €200,000 for individuals and €1,000,000 for legal entities. <p>The methods of implementation of the mechanisms provided for in Article 17 of the Sapin II Act are specified in the recommendations of the French Anti-Corruption Agency, updated on 4 December 2020, and divided into three pillars:</p> <ul style="list-style-type: none"> – Commitment of the governing body – Risk mapping – Risk management

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<p>Act No. 2017-399 of 27 March 2017 on the duty of care of parent companies and contracting companies</p> <p>Any group of companies whose parent company's registered office is on French territory and which employs at least 5,000 employees for 2 consecutive financial years</p> <p>Any group of companies whose parent company's registered office is on French territory or abroad and which employs at least 10,000 employees for 2 consecutive financial years.</p>	<p>Reporting of serious violations of human rights and fundamental freedoms, human health and safety and the environment resulting from the activities of the company and its subsidiaries</p>	<p>The parent company must put in place a due diligence plan at group level, which includes the following measures:</p> <ul style="list-style-type: none"> – risk mapping to identify, analyse and prioritise risks – procedures for regular assessment of the situation of subsidiaries, subcontractors and suppliers – appropriate actions to mitigate risks or prevent serious harm – a whistleblowing system – a system for monitoring the measures implemented and evaluating their effectiveness <p>In the event of failure to comply with the aforementioned obligations and ascertainment of damage or infringement of fundamental rights, any interested party may bring a liability action</p> <ul style="list-style-type: none"> ➤ The absence or inadequacy of a prevention plan constitutes a civil wrong which makes it easier to hold the company liable if it can be proved that the implementation of a prevention measure could have avoided or minimised the damage caused ➤ The liability action may be brought by any interested person, including a trade union, an association, etc.

■ STATUS OF EU DIRECTIVE 2019/1937

APPLICABLE TEXT AND SCOPE RATIONE PERSONAE	SCOPE RATIONE MATERIAE	OBLIGATIONS AND SANCTIONS
<p>1. Private or public sector whistleblowers who have obtained information about violations in a professional context.</p> <ul style="list-style-type: none"> ▪ Persons with employee status (including civil servants) ▪ Persons with self-employed status ▪ Shareholders and members of the administrative, management or supervisory body of a company, including non-executive members, as well as volunteers and paid or unpaid interns ▪ Any person working under the supervision and direction of contractors, subcontractors and suppliers <p>2. Private or public sector whistleblowers who have obtained information about violations in the context of an employment relationship that (i) has not yet started (information obtained during the recruitment process or pre-contractual negotiations) or (ii) has been terminated since the information was obtained</p> <p>3. Third party with the same protection as the whistleblower</p> <ul style="list-style-type: none"> ▪ "Facilitator" ▪ Colleagues or relatives of the whistleblower ▪ Legal entities belonging to or to which the whistleblower belongs 	<p>Acts of the Union concerning these areas (Art. 2):</p> <ul style="list-style-type: none"> – Public procurement – Financial services, products and markets and prevention of money laundering and terrorist financing – Product safety and conformity – Transport safety – Environmental protection – Radiation and nuclear safety – Food and feed safety, animal health and welfare – Public health – Consumer protection – Protection of privacy and personal data, and security of networks and information systems – Violations affecting the financial interests of the Union – Violations relating to the internal market 	<p>Protection of the whistleblower and certain third parties against reprisals and any discriminatory measures taken against them as a result of the whistleblowing.</p> <p>The whistleblower would be able to retain his or her protective status without prior internal reporting in the event of a serious and manifestly unlawful breach and make a direct public disclosure.</p>
<p>Private sector legal entities with 50 or more employees</p>	<p>See above.</p>	<p>Member States shall ensure that private and public sector legal entities establish channels and procedures for internal reporting and for monitoring, after consultation with and in</p>

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<p>Private sector legal entities with 50 to 249 employees may share resources</p> <p>Member States may require private sector legal entities with fewer than 50 employees to establish internal reporting channels and procedures</p>		<p>agreement with the social partners where national law so provides</p> <p>The procedure:</p> <ul style="list-style-type: none"> – prior consultation with staff representatives – management of the alert internally or externally – channels for receiving the alert <u>designed, established and managed in a secure manner that guarantees the confidentiality</u> of the identity of the whistleblower and of <u>any third party mentioned in the alert</u> – a reasonable feedback period <u>of 3 months</u> from the acknowledgement of receipt – provision of clear and easily accessible information on the whistleblowing procedures

■ WISHES

Let us hope that when the Directive is transposed by 31 December 2021, the French legislator will be able to create a more homogeneous and readable law on whistleblowing than is currently the case, in order to guarantee companies and whistleblowers the legal security to which they are entitled.

Companies with more than 50 employees must now consider which whistleblowing mechanism is appropriate for their business (internal and/or external whistleblowing, in particular with a law firm), the attractiveness of the mechanism to employees and third parties (subcontractors, suppliers, customers, etc.) and the obvious interest of such a tool in preventing the financial, economic, legal, reputational, human and social risks that they face today.

The teams at Vivien & Associés are at your disposal to assist you in these considerations.