

FRANCE

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NEW MEASURES STRENGTHENING THE PROTECTION OF WHISTLEBLOWERS: AN INCREASINGLY DIFFICULT CONCILIATION WITH THE COMPANIES' INTERESTS?

On March 17, 2022, the French Constitutional Council declared all the provisions of the new Law¹ "aiming at improving the protection of whistleblowers" compliant with the Constitution, except for Article 11, which was unrelated to the other provisions. France becomes the 8th European Union member state to implement the Directive of October 23, 2019 "on the protection of persons who report breaches of Union law"².

The new Law, which will enter into force on September 1, 2022, strengthens the current framework by expanding its scope (1.). In addition, the Law now allows for direct external reporting by eliminating the tiered system instituted by the Sapin II Law (2.). Lastly, it considerably extends the protection of whistleblowers and the people who help them (3.).

1. THE EXPANSION OF THE WHISTLEBLOWER'S STATUS AND OF THE REPORTING SCOPE

- The new Law defines a whistleblower as "a natural person who reports or discloses, **without direct financial compensation** and in good faith".

The former criterion of "disinterestedness" is replaced by the absence of direct financial compensation. This notion refers to the Directive, which provides that persons who "have been identified as informants or registered as such (...), and report breaches to enforcement authorities in return for reward or compensation" do not fall within the definition of whistleblower.

- The new law also **removes the requirement of personal knowledge of the facts reported** when the information was obtained in a professional context.
- Furthermore, **the protection granted to the whistleblower is extended to "facilitators"**, defined as natural persons and private non-profit legal entities (such as trade unions and associations) that have assisted the whistleblower in the reporting process. Protection is also extended to individuals connected to a whistleblower who are at risk of retaliation in the course of their professional activities, as well as to entities controlled by the whistleblower, and to those for which he or she works.
- These modifications are likely to lead to an increased flow of reports and the admissibility of certain reports that were previously excluded from the scope of the Sapin II Law.

¹ Law No. 2022-401 of March 21, 2022, aimed at Improving the Protection of Whistleblowers.

² Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019, on the protection of persons who report breaches of Union law.

2. THE POSSIBILITY TO FILE AN IMMEDIATE REPORT WITH THE AUTHORITIES

- The main change introduced by this Law is **the ability to file an immediate external report**, eliminating the different compulsory stages instituted by the Sapin II Law.
- Whistleblowers will now be able to benefit from the protection regime if they report externally, without having first reported the facts using the internal reporting system existing within their company. The external report may be directed to the competent authority that will be designated by Decree, i.e. the Defender of Rights, the judicial authority, or a relevant institution, body, office or agency of the European Union.
- The public disclosure may take place immediately:
 - in the event of a "*serious and imminent danger*",
 - if the external report would put the whistleblower at risk of retaliation, or "*would not allow the subject matter of the disclosure to be effectively addressed*",
 - regarding information obtained in a professional context, in the event of "*imminent or manifest danger to the general interest.*"
- The public disclosure may also occur following an external report, if the report has not been dealt with within a period of time to be further set out by Decree.
- It is unfortunate that the law does not provide for companies to be informed of the existence of an external report regarding facts that directly concern them, and be able to deal with these reports or implement adequate remedial measures.
- There is also a concern that the way in which external reports will be handled by the authorities might be complex and time consuming, limiting their practical effectiveness.

3. WHISTLEBLOWERS BENEFIT FROM ENHANCED PROTECTION MEASURES

- The new Law strengthens the protection of both whistleblowers and facilitators.
- More specifically, it establishes a **non-exhaustive list of fifteen retaliatory measures**, sanctioned by nullity, and increases the amount of the civil fine incurred by a person who would have initiated civil or criminal proceedings against a whistleblower, in order to hinder his or her reporting ("gagging procedure").
- Moreover, **the principle of non-liability of the whistleblower is reinforced both on a civil and a criminal level**. The whistleblower cannot be held civilly liable for the damages caused by a report made in good faith.

Most importantly, neither the whistleblower nor his/her accomplice may be penalized for having removed, misappropriated or concealed, in the context of the report, confidential documents containing information lawfully obtained.

- The text also introduces **financial assistance** for whistleblowers who initiate legal proceedings because they are victims of retaliation or subject to a "gagging" procedure.

- The judge may grant an advance payment, which can be made final at any time, to cover the whistleblower's legal expenses, as well as an additional advance payment to a whistleblower whose financial situation has seriously deteriorated.

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The Decree will specify some practical aspects, in particular regarding the reception and processing of external alerts, and the measures that companies will have to implement to adapt their internal reporting procedure.

This new Law will likely incite companies to strengthen their existing mechanisms to encourage their employees and contractors to report internally.

CONTACTS

THIERRY DOR

dor@gide.com

SOPHIE SCEMLA

sophie.scemla@gide.com

FRANÇOIS VERGNE

f.vergne@gide.com

DIANE PAILLOT DE MONTABERT

diane.paillotdemontabert@gide.com

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