CONSEIL D'ÉTAT

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## STUDIES BY THE CONSEIL D'ÉTAT

Whistleblowing: Alerting, handling and protecting
Le droit d'alerte : signaler, traiter, protéger

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Studies by the Conseil d'État

# Whistleblowing: reporting, handling and protecting

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# Analysis

France has long had reporting mechanisms in place, in particular for public officials who become aware of crimes or offences in the course of their duties. Following changes in international regulations and in the wake of several high-profile cases, the French legislature has adopted a number of provisions since 2007, whose specific purpose has been to protect people who report such matters in good faith. The provisions relating to whistleblowers cover a very wide field. Nonetheless, they lack coherence as a whole and are not sufficiently precise as to the definition of a whistleblower or the procedures that the party concerned, businesses and administrative authorities should follow or implement. There is also a lack of satisfactory reconciliation between the rights introduced by these provisions and other rights or obligations (such as secrets that are protected by the criminal law and the rights of people targeted by whistleblowers who act wrongfully).

The implementation of these provisions, which are mostly recent, is still limited and fragmentary. Although whistleblowing mechanisms are now well established in large businesses, largely because of the influence of foreign legislation whose scope extends to other territories, this is not the case in small and medium-sized enterprises, which do not appear to be adequately equipped and for which it is often not a priority in a very difficult economic context; finally, in public-sector bodies, implementing these provisions is often still at a very early stage.

# Recommendations

One of the primary objectives of the study is to recall that whistleblowing is a device that complements the mechanisms under the ordinary law already available to employees, public officials and citizens to report wrongdoing or serious risks to the relevant authorities.

The main objective is to give administrative authorities and businesses a sense of responsibility, by making them aware that a warning may reveal the existence of serious malfunctions that it is their role to correct. In this respect, the study recommends that administrative authorities and businesses of a certain size should be respectively obliged and encouraged to adopt confidential and secure procedures to forward the warning, internally, to bodies that are competent to analyse and deal with it and to give such bodies a sufficient level of authority for the warning to be handled effectively.

Moreover, it is essential to provide whistleblowers with a gradation of reporting channels when an internal warning fails to elicit an appropriate response within

a reasonable time frame, or it proves impossible to obtain one. On this point, the study suggests that the case law of the European Court of Human Rights and foreign legislation (in particular in Great Britain and Ireland) provides a useful escalation model: line management, dedicated internal channel (such as an expert in business ethics or ethics committee, whistleblowing mechanism, general inspectorate, etc.) and external channels (competent administrative authority, professional bodies and the courts).

From this perspective, public disclosure would only be envisaged as a last resort.

The study then considers the protection that should be afforded to whistleblowers who act in good faith, i.e. those who had sufficient grounds to believe in the accuracy of the actions and risks they intended to report. Those who issue warnings they know to be entirely or partially inaccurate are thus excluded from the scope of protection. Not only should such people not be protected, but proceedings should be taken against them for making malicious accusations. The same applies to people who report issues with the intention of causing harm, who are likely to have proceedings brought against them for defamation, and those who issue unfair warnings who, similarly, are subject to disciplinary sanctions.

With regard to whistleblowers who act in good faith and might run the risk of reprisals, the study proposes harmonising the existing provisions, ensuring that the scope remains broad in terms of personnel (including protection for people who fall outside the working relationship in the strict sense of the term, such as interns, consultants and even people outside the business or administrative authority concerned) and offering protection against all possible forms of reprisal. In order to prevent such reprisals, the study also suggests equipping the French national ombudsman (Défenseur des Droits) with new powers in relation to whistleblowers who act in good faith and find themselves the target of reprisals. Similarly, it advocates that the public authorities should support civil society initiatives aimed at establishing structures to provide legal advice to potential whistleblowers and supporting them in their subsequent actions.

In order to reconcile protection for whistleblowers with the obligations incumbent on them, the study suggests on the one hand, clarifying the scope of obligations in relation to professional confidentiality to which employees and public officials are obliged to adhere, and on the other hand, clearly identifying the disciplinary and criminal sanctions faced by whistleblowers who act wrongfully or which relate to making malicious accusations and defamation. Mirroring these sanctions, the study identifies civil compensation that could be available to whistleblowers who act in good faith and find themselves facing reprisals.

These recommendations are intended to form a common foundation for all whistleblowing mechanisms. Depending on the areas concerned (corruption, environment, intelligence, public health, etc.) whistleblowers may find themselves in very diverse situations, which argues in favour of maintaining a differentiated approach rather than a single status.

As a result, a dedicated law would create the common foundation but could then adapt the various existing mechanisms (in the French Labour Code, status of civil servants, etc.) to the joint recommendations.

# Introduction

Ethical whistleblowing has become an established reality in our democracy, in the operation of businesses and administrative authorities and more broadly, in public life. As the new face of the vigilant citizen, whistleblowers have won new rights and now appear as a useful, and sometimes necessary, trigger to improve governance. Although some in France are enthusiastic about ethical whistleblowing, others are highly reticent, faced with the twofold risk of generalised suspicion having a destabilising effect on society, and organised informing, a practice which has tarnished some troubled periods in our history and has caused much suffering to people living under totalitarian regimes.

Whistleblowers are neither dissidents seeking to radically oppose a community, nor supporters of civil disobedience claiming some form of "counter-legitimacy". Nor are they informers or today's reincarnation of Classical Athens' false accusers working solely in their own best interests, or slanderers seeking to cause harm or hold others up to public opprobrium. Whistleblowers act in good faith, freely and in the public interest, from within or outside an organisation, to report serious breaches of the law or serious risks that threaten public or private interests, which they have not perpetrated themselves. This study therefore draws a distinction between people whose profession or habitual activity is to issue warnings, such as journalists, and people who report wrongdoing for which they are, at least in part, responsible.

Ethical whistleblowing is a longstanding practice that is currently facing a new set of issues. Along with institutional control procedures, which it does not replace but supplements and strengthens, it aims to prevent improper practices in public and private-sector organisations in a tighter, more responsive and more transparent manner. With the rise of the internet and digital technologies, the channels through which it is expressed have been diversified, globalised and, to a certain extent, deregulated.

Since ethical whistleblowing cannot remain the prerogative of heroic individuals, and because the new channels it uses have given it a degree of power that can sometimes become destructive, it needs to become a safe, accessible and structured procedure; this is why a specific right was created. France has long been familiar with reporting obligations within the public services and businesses, but it has only recently introduced rules designed to protect whistleblowers from the risk of reprisals. Several laws have been introduced to remedy the situation since 2007 and the gap has now largely been filled.

Nonetheless, the state of the law is not particularly satisfactory, since it has developed piecemeal and by accumulation, which has undermined not only its clarity and accessibility but also its overall coherence and the consistency of its

fundamental principles. Moreover, there are still a number of gaps and grey areas, in particular with regard to procedures and the practicalities of issuing and dealing with warnings. Ethical whistleblowing therefore risks being reduced to its most extreme forms, which are often contrary to the public interest ends it is intended to pursue. There is therefore still work to be done on putting whistleblowing in order and updating it.

In order to achieve this, a block of common rules and principles needs to be identified, while recognising the diversity of situations that exists according to their severity and degree of urgency, whether the issuers and recipients of the warning belong to the organisation targeted or not, depending on the nature and importance of the tasks assigned to the organisation, and whether it is in the public or private sector. Since it would be difficult for a single, cross-cutting mechanism to cover such a diverse range of situations, there is a need for finer gradations of reporting procedures, various ways of handling warnings and appropriate protection measures for whistleblowers. Conforming to a simplistic vision of whistleblowing is therefore out of the question, since there is a need both to prevent and crack down on offences while not harming the public and private interests the warning is intended to safeguard, nor endangering secrets that are protected by the law and which would not necessarily have to be revealed to issue the warning. It is also important for warnings received to be handled through appropriate procedures, in order to move swiftly on those that are legitimate and dismiss those that are unjustified or even malicious.

In accordance with the letter of engagement from the Prime Minister, this study offers a critical analysis of the whistleblowing mechanisms in effect and sets out proposals to improve their effectiveness. It is organised in three sections and demonstrates that:

1) although France has long had various reporting mechanisms in place, the multiplication of whistleblowing mechanisms is recent, as is the adoption by the legislature of provisions specifically intended to protect whistleblowers;

2) these mechanisms are not widely used, given that they do not form a coherent whole, are not sufficiently precise as to the procedures to be implemented and do not guarantee effective protection for whistleblowers;

3) improving these mechanisms presupposes the adoption of a common foundation based on secure, staged procedures, effective treatment of alerts and effective protection for both whistleblowers and those who are targeted.

The analyses and proposals set out in this study are the result of research carried out by a working group made up of members of the Conseil d'État along with representatives from administrative authorities, the voluntary sector and the university. Numerous interviews were conducted by the group and are listed in the appendix.

# Proposals

**Proposal no. 1**: Define in law a common set of provisions applicable to anyone who, when faced with facts that constitute serious breaches of the law or carry serious risks, freely and in good conscience decides to issue a warning in the public interest, which would form the basis for a harmonisation of existing sector-specific mechanisms in relation to whistleblowers.

In addition to defining a whistleblower, this common foundation would specify:

- a series of secured, staged procedures available to whistleblowers to issue a warning;

- how the recipients of the warning should deal with it;

- the protection available to whistleblowers acting in good faith against any retaliatory measures.

Vector: *law*.

**Proposal no. 2:** Introduce, based on the case law of the European Court of Human Rights and the legislation in effect in the United Kingdom and Ireland, a series of channels to which cases can be referred by whistleblowers who belong to the organisation they are calling into question: line management, dedicated internal channel (such as an expert in professional ethics, whistleblowing mechanism, general inspectorate, etc.) and external channels (competent administrative authority, professional bodies and the courts). Public disclosure should only be envisaged as a last resort.

Compliance with the correct procedure by a whistleblower who belongs to the organisation called into question would be one of the criteria taken into account by the judge in determining the level of protection they should be afforded.

*Vector*: law (common foundation)

**Proposal no. 3**: Make the whistleblowing mechanisms introduced in businesses and administrative authorities available to external and occasional partners working in or on behalf of these organisations.

*Vector*: regulations for state administrative authorities and health care institutions, law for local authorities and businesses.

**Proposal no. 4:** Make the whistleblowing mechanisms introduced in businesses and administrative authorities available to external individuals and legal entities subject to appropriate adjustments, without making it obligatory.

*Vector*: law and communication campaigns

**Proposal no. 5**: Introduce and guarantee strict confidentiality concerning the identity of whistleblowers as well as that of the people targeted and information gathered by all recipients of the warning, both internal and external, until the legitimacy of the warning has been confirmed.

*Vector*: law (common foundation).

**Proposal no. 6:**

**I.** Introduce an obligation to appoint people who are responsible for gathering warnings issued internally and, if applicable, externally, in all state administrative authorities, health care institutions and large local authorities. The recipients of such warnings could, depending on the circumstances, be a general inspectorate, ethics or professional conduct committee, or ethics specialist. In any event, they must be sufficiently autonomous and occupy an appropriately senior position in the hierarchy.

*Vector*: regulations for state administrative authorities and health care institutions, law for local authorities.

**II.** Encourage the implementation of dedicated internal whistleblowing mechanisms in businesses on the basis of a differentiated approach consisting:

- in large businesses, of consolidating them by tying them to existing structures, for example compliance departments or ethics specialists, and raising awareness of the mechanisms that are already in place;

- in small and medium-sized businesses, of raising awareness among the usual points of contact for warnings, namely line managers and staff representation bodies, where these exist.

*Vector*: soft law (guide to good practice)

**Proposal no. 7:** Continue to make whistleblowing optional rather than obligatory, in contrast to what is already provided by law for specific whistleblowing mechanisms (Article 40 of the Code of Criminal Procedure for reporting crimes and offences; the right to whistleblowing and withdrawal in relation to health and safety at work; Article 434-1 of the Penal Code on informing the judicial or administrative authorities of a crime of which someone might become aware and which can still be prevented or the effects of it limited; article 434-3 of the Penal Code on the mistreatment of children or vulnerable people; articles 223-6 and 223-7 of the Penal Code on failing to provide emergency assistance).

*Vector*: law (common foundation)

**Proposal no. 8:** Specify the arrangements for reconciling provisions on whistleblowing and each of the secrets protected under the criminal law, by determining the conditions under which they can be waived to issue a warning.

*Vector*: sector-specific laws.

**Proposal no. 9:** Set up a portal tasked, as necessary, with forwarding to the relevant authorities warnings made by people who do not know which body to contact, by expanding the powers of the National Commission on ethics and whistleblowing instituted by the Act of 16 April 2013 to areas other than the health and environmental field only, rather than creating a single authority responsible for dealing with warnings.

*Vector*: law (common foundation).

**Proposal no. 10:**

**I.** Work with state administrative authorities, health care institutions and large local authorities to establish an obligation on managers to whom a warning is issued first, to acknowledge receipt and subsequently, keep the whistleblower informed of the follow-up actions taken.

*Vector*: regulations for state administrative authorities and health care institutions, law for local authorities.

**II.** Work with businesses to promote good practice which consists, for managers to whom a warning is issued, first of acknowledging receipt and subsequently, keeping the whistleblower informed of the follow-up actions taken.

*Vector*: soft law (guide to good practice).

**Proposal no. 11**: Provide appropriate arrangement for the person targeted by a warning to be kept informed and define the circumstances in which providing information would not be desirable, in particular to avoid the destruction of evidence.

*Vector*: soft law (instructions for administrative authorities, guides to good practice for businesses).

**Proposal no. 12:**

**I.** Assert in law the principle under which any retaliatory measure taken by the employer against a whistleblower who has acted in good faith shall be null and void; produce as comprehensive a list of examples of such measures as possible and leave it to the judge's discretion to assess, in each particular case, whether the measures taken are contentious.

*Vector*: law (common foundation).

**II.** Harmonise sector-specific legislation relating to protection for whistleblowers on the basis of this principle.

*Vector*: sector-specific laws.

**Proposal no. 13**: Supplement the power of the judge in the administrative courts to give directions by providing explicitly, in the legislation applicable to the public sector, that they may order the administration to actually reinstate a public official whose redundancy, non-renewal of contract or dismissal has been deemed a retaliatory measure taken because of their blowing the whistle.

*Vector*: law (common foundation).

**Proposal no. 14:** Encourage the prosecuting authorities to make use of the possibility of calling for civil sanctions against a person who instigates defamation proceedings against a whistleblower who has acted in good faith and which are declared malicious by a judge, while remaining alert to warnings that are themselves defamatory.

*Vector*: instruction to the prosecuting authorities.

**Proposal no. 15**: Extend the powers of the national ombudsman (Défenseur des Droits) to include protection for whistleblowers who believe they have been the victim of retaliatory measures, as soon as they issue their warning.

*Vector*: legislation.

# Part one

# Although France has long had various reporting mechanisms in place, the multiplication of whistleblowing mechanisms is recent, as is the adoption by the legislature of provisions specifically intended to protect whistleblowers

## 1.1. Public officials have long been under an obligation to report crimes and offences, however whistleblowing in respect of health and safety at work has developed since 1982

### 1.1.1. Article 40 of the French Code of Criminal Procedure has long placed an obligation on public officials to report crimes and offences of which they become aware in the course of their duties

**As custodians of the public interest, public officials have a duty to warn the judicial authorities of serious breaches of the law.** This obligation, which is incumbent on public officials because of their status and role in society, through which they contribute to the operation of justice, is separate from ethical whistleblowing that an individual consciously decides to pursue. Nonetheless, in accordance with the request made to the Conseil d'État, we will examine in detail this first form of reporting. According to a term that has remained unchanged in our criminal law since the code adopted in Brumaire of year IV[1], public officials are required to "denounce" to the French public prosecutor (Procureur de la République) any crime or offence of which they become aware during the course of their duties. The scope of this obligation, which was codified in 1957[2] in the second paragraph of Article 40 of the French Code of Criminal Procedure[3], has been extensively defined by the legislature and clarified by case law.

***Ratione personae*, this reporting obligation concerns three categories of people.** First of all, it applies to public officers and "civil servants" – the latter category being understood in the broad sense, as including all public officials, regardless of

1 Art. 83 of the Code of Offences and Penalties of the 3rd of Brumaire, year IV (25 October 1795).

2 Act no. 57-1426 of 31 December 1957 instituting a Code of Criminal Procedure.

3 According to the second paragraph of Article 40 of the French Code of Criminal Procedure: *"The district prosecutor receives complaints and denunciations and decides how to deal with them, in accordance with the provisions of article 40-1./ Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents"*.

whether they occupy a permanent job in the civil service or as contractual officials under public law[4]. That said, the reporting obligation does not apply to all staff in the administration: it excludes officials who find themselves in a situation covered by private law and in particular, those in the industrial and commercial public services, subject to the exceptions set out in the law and case law[5]. Conversely, it does apply to volunteer staff, suppliers, works contractors and concessionaires working for the administration[6]. Secondly, the second paragraph of Article 40 of the Code of Criminal Procedure refers to "constituted authorities", a category that includes the local representatives of the State – prefects and sub-prefects – and local executives, notably the mayor[7], elected assemblies and independent administrative authorities[8]. With regard to the financial courts, these provisions apply to the principal state prosecutor (Procureur général) at the French National Audit Office (Cour des comptes) and financial prosecutors with the regional and territorial audit courts (Chambres des comptes) – both the latter and the National Audit Office can decide collectively to inform the prosecuting authorities in accordance, respectively, with articles R.135-3, R.241-25 and R.262-80 of the Financial Courts Code (Code des juridictions financières), of facts discovered during their audits that might result in criminal proceedings, in order to refer the matter to the public prosecutor[9]. This obligation would not, however, apply to every court, in the absence of special provisions. Thus neither the Constitutional Court, ruling on matters of electoral law[10], nor administrative judges[11] are subject to it. This does not mean that outside the general framework instigated by these provisions, administrative judges are released from any reporting obligation in relation to criminal cases. Indeed, they have a duty, where reference is made to acts of electoral fraud in a final decision, to pass the file to the relevant public prosecutor, in accordance with article L.117-1 of the Electoral Code[12]. The same applies pursuant to articles R.522-14 and R.751-10 et seq. of the Code of Administrative Justice, where the judge pronounces the setting aside of a decision granting an urban planning authorisation or police measure, or orders their suspension.

4 Cass. Crim. 6 July 1977, *Bull. crim*. no. 255 and 14 December 2000, *Bull. crim*. no. 380.

5 See with regard to a departmental director: CE 26 January 1923, *Robert Lafrégeyre*, Rec. p. 67; see with regard to the manager of the department's accounts office: CE, Sect., 8 March 1957, *Jalenques de Labeau*, Rec. p. 158.

6 G. Chalon, "L'article 40 du code de procédure pénale et le fonctionnaire: nature et portée de l'obligation de dénoncer", *AJFP*, 2003, p. 31.

7 Article L.2211-2 of the Territorial Authorities Code refers to Article 40 of the French Code of Criminal Procedure.

8 See, for example, with reference to the French Data Protection Authority (Commission nationale de l'informatique et des libertés – CNIL): CE, Sect., 27 October 1999, *Solana*, no. 196306.

9 See on this point: Central Prevention of Corruption Department, *Report for 2011 to the Prime Minister and the Minister of Justice*, p. 68.

10 The Constitutional Court, when ruling on matters of electoral law, is not obliged to communicate acts of electoral fraud to the public prosecutor (CC no. 97-2188 AN of 10 July 1997, 6th circ. for Bas-Rhin; See also implic. CC no. 98-2562/2568 AN of 3 February 1999, 9th circ. for Bouches-du-Rhône).

11 CE, 25 October 1991, *Le Foll*, no. 83901, concl. H. Legal and CE, 28 December 2001, *Rivery municipal elections*, no. 233993, concl. C. Maugüé.

12 CE, 2 September 1983, *Sarcelles municipal elections*, no. 51182, concl. B. Genevois, *AJDA*, 1983, p.682.

***Ratione materiae*, the mechanism defined in the second paragraph of Article 40, covers a vast range of criminal offences.** Indeed, it imposes an obligation on a public official to report to the public prosecutor any crime but also any offence that they may have come across in carrying out their duties or, as judged by the Criminal Chamber of the Court of Cassation, in the course of said duties[13]. Although the obligation to report is thus not limited to a particular category of crime or offence, it nonetheless only arises if the known facts are sufficiently likely to be classified accurately as a crime or offence. As a consequence, a situation must only be reported if the facts appear to be "sufficiently well established", if they represent "a sufficiently well characterised attack on the provisions for which [the official or authorities concerned] are responsible for ensuring the application"[14] and finally, if they are likely to be classified as a crime or offence. If these conditions are met, the individual who reports the situation cannot be held liable under administrative law for what is submitted, even if no further action is subsequently taken by the public prosecutor. Where these conditions are not met, the failure to report cannot be considered a breach of duty. The individual who makes or refrains from making a report is also responsible for assessing, under the close control of the administrative judge[15], the reality, nature and severity of the facts of which they are aware and how these have changed over time, though without making any personal statement on the appropriateness of criminal proceedings, which is a decision for the prosecuting authorities only.

***Ratione temporis*, the obligation of diligence provided for in these provisions must be understood in broad terms.** Reports must be submitted "without delay" i.e. "immediately" as provided for in Article 29 of the Criminal Investigation Code of 1808. This is why they are not subject to any particular conditions as to their form and can be submitted to the public prosecutor by a simple letter or oral statement[16]. A report may be submitted directly without authorisation from a line manager[17]. Nonetheless, without undermining the obligation to warn or make fulfilling it any more difficult, a head of department may send out a circular or instruction setting out the practical arrangements for reporting deemed most appropriate for the kind of department and, for example, invite their officials to use a written form[18]. Moreover, in the absence of a specific procedural framework, an official is entitled (but not obliged) to send their report to the public prosecutor via their line manager, on condition that the latter forwards it in accordance with the "requirements of Article 40 of the Code of Criminal Procedure"[19]. In this case, it is incumbent on the official who raises the alarm to ensure it is forwarded as soon as possible and, if necessary, to retake the initiative if their line manager fails or refuses to act. By

13 Cass. Crim., 5 October 1992 and Cass. Crim., 11 July 1983.

14 CE, Sect., 27 October 1999, *Solana*, no. 196306.

15 CE, Sect., 27 October 1999, *Solana*, no. 196306, concl. J.-D. Combrexelle. Note that unlike "positive" administrative decisions to refer a case to the ordinary courts, "negative" decisions that refuse to make a referral are decisions which, if challenged, fall within the competence of the administrative judge (CE, 12 October 1934, *Colombino*, Sirey 1935 III, p.4; CE, 30 September 1955, *Union nationale des syndicats d'opticiens de France*, Rec. p.453; CE, 3 October 1997, *Gaillard-Bans*, no. 10020, JCP 1998).

16 Cass. Crim., 28 January 1992, *Gaz. Pal*. 1992, p.1365.

17 CE, 15 March 1996, *Mr Guigon*, no. 146326.

18 CE, 20 March 2000, *Mr and Mrs Hanse*, no. 200387.

19 Cass. crim., 14 December 2000, *X*, *AJFP* 2001-4, p.54.

entrusting the warning to their line manager, the official transfers but is not entirely released from an obligation of diligence, which must be assessed in broad terms, regardless of the method actually used to forward it to the public prosecutor.

### 1.1.2. An initial whistleblowing right in respect of health and safety at work has been in place since 1982 in businesses and administrative authorities

As the case law of both the ordinary and administrative courts has confirmed, it is not an obligation but a right made available to workers and public officials who are confronted with a serious risk and who consciously decide to issue a warning.

**Act no. 82-1097 of 23 December 1982 on Health, Safety and Working Conditions Committees (CHSCT)** enshrined a right to whistleblowing and withdrawal for workers and staff representatives on the CHSCT, which was later extended to other staff representatives, in order to prevent the occurrence of accidents at work.

**With regard to workers, this right is now included in Article L.4131-1 of the Labour Code. Under this article,** *"The worker shall immediately warn the employer of any work situation where they have reasonable grounds to believe that it presents a serious and imminent danger to their life or health and of any defects they observe in the protection systems".* There are no formal requirements as to how this should be communicated to the employer; in particular, the worker is not obliged to put it in writing[20]. If faced with a situation that presents a danger of this kind, the worker also has a right of withdrawal, including a provision for protection. Indeed, under Article L. 4131-3 of the Labour Code, "No sanction and no withholding of salary may be imposed on a worker or group of workers who have withdrawn from a work situation where they had reasonable grounds to believe that it presented a serious and imminent danger to their life or health". The Court of Cassation has thus consistently ruled that the provisions of the Labour Code do not require the situation encountered by the worker to actually present a serious or imminent danger; simply the fact that the worker had reasonable grounds for believing this is sufficient to justify their exercising their right of withdrawal[21]. Conversely, where the conditions for the right of withdrawal are not met, the worker is exposed to a withholding of salary[22] ; dismissal for professional misconduct may also be ruled in such cases[23]. Finally, pursuant to Article L.4131-4 of the Labour Code, the employer will be automatically found guilty of gross misconduct in respect of a worker who has warned of a risk that has then materialised, and in response to which the employer has failed to take action[24].

**The right to whistleblowing for staff representatives on the CHSCT is defined by the provisions of Article L.4131-2 of the Labour Code.** Under the provisions of this article**,** *"A staff representative on the Health, Safety and Working Conditions Committee, who observes that there is a cause of serious and imminent danger,*

20 CE, 11 July 1990, no. 85416, not pub.
21 See for a recent application: Cass. soc., 5 July 2011, no. 10-23.319.
22 Cass. Crim., 25 November 2008, no. 07-87.650.
23 Cass. soc., 20 January 1993, no. 91-42.028.
24 Cass. soc., 17 July 1998, no. 96-20.988.

*in particular through the intermediary of another worker, shall alert the employer immediately"*. Pursuant to Article L. 4132-2 of the Labour Code, it is the responsibility of the staff representative who alerts their employer to put their opinion in writing, while the employer is obliged "to proceed immediately to an investigation" with the CHSCT representative who alerted them to the danger. It should be noted that the employer is thus obliged not only to use their best endeavours but also to achieve a specific result, insofar as article L.4132-2 of the Labour Code stipulates that they must "take the necessary steps to remedy the situation".

**The right to whistleblowing for other staff representatives is defined by the provisions of Article L. 2313-2 of the Labour Code** and has a different purpose from the whistleblowing right given to workers and staff representatives on the CHSCT. This article derives from Act no. 92-1446 of 31 December 1992 on employment, the development of part-time working and unemployment insurance, and stipulates that "*If a staff representative finds, notably through the intermediary of another worker, that there is an infringement of people's rights, or a danger to their physical and mental health or to individual liberties within the business that is not justified by the nature of the work to be carried out, nor proportionate to the end pursued, they must inform the employer immediately."* Unlike the provisions on the right to whistleblowing for employees and staff representatives on the CHSCT, there is no requirement here for a situation of serious or imminent danger but a "simple" infringement or danger. This enables (non CHSCT) staff representatives to exercise their right to whistleblowing with their employer in situations of serious but not imminent danger, for example, resulting from an excessive workload[25]. The facts likely to give rise to an alert of this kind by a staff representative were subsequently extended by the provisions of Act no. 2012-954 of 6 August 2012 on psychological abuse, acts of psychological abuse and discrimination. In respect of discrimination, the acts referred to in the provisions of Article L.2313-2 of the Labour Code now refer to *"any discriminatory measure in respect of recruitment, compensation, training, redeployment, assignment, classification, qualification, professional promotion, transfer, contract renewal, sanction or dismissal"*. As parliamentary research confirms, the aim was to give staff representatives the ability to report such actions in order to help prevent and identify them within the business[26]. Article L.2313-2 stipulates in paragraph 2, that if such a report is made, the employer must immediately embark on an investigation with the staff representative and take "the necessary measures to remedy" the situation concerned. In practice, few staff representatives are aware of this whistleblowing mechanism, although there does appear to have been some resurgence of it in recent years[27].

**This right to whistleblowing in relation to situations that present a serious and imminent danger to people's lives or safety has been introduced in the three civil-service sectors.** It was first introduced into the national civil service, for which decree no. 82-453 of 28 May 1982 on health and safety at work contains identical

25 "Charge de travail et représentants du personnel", E. Lafuma, Droit social journal, 2011, p.758.
26 Report of the National Assembly Law Commission, no. 86, produced by Ms P.Crozon, 18 July 2012.
27 See "Harcèlement moral", § 257, P. Adam *in Répertoire du droit du travail*, Dalloz, September 2014; "La seconde vie de l'article L.422-1-1 du code du travail", Legal week Social, 5 September 2006, p.1664.

provisions to those set out in the Labour Code[28]. The benefit of these provisions was extended to officials in the local civil service by decree no. 95-680 of 9 May 1995, while the provisions in the Labour Code relation to whistleblowing rights for workers and staff representatives who sit on the CHSCT were made applicable to civil servants in the hospital sector by the provisions of Article L.4111-1 of the same code. Like the Court of Cassation, the Conseil d'État takes the view that the right instigated by these provisions is based on a subjective assessment of the situation by the official, and that it is reliant on the official's personal sense of the existence of a serious and imminent danger and not the objective existence of a danger. It is for the official to determine whether there are grounds to justify the exercise of their right of withdrawal[29]. The other side of being free to assess the situation independently, however, is that exercising the right of withdrawal becomes the official's sole responsibility. If their exercise of this right is not justified, they may be subject to a withholding of salary and may also be sanctioned[30].

## 1.2 The multiplication of whistleblowing mechanisms is, however, recent: it has mainly involved major companies, without the intervention of the French legislature

### 1.2.1. During the 2000s, numerous major French businesses were obliged to establish whistleblowing mechanisms in relation to accounting and financial matters, under the influence of foreign legislation with extraterritorial effects

**Originally, the multiplication of whistleblowing mechanisms in French business was largely of US origin.** The practice of whistleblowing in the United States is a legal tradition with deep historical roots, which brings representatives of civil society – juries made up of ordinary citizens, participants in *class actions* and *whistleblowers* – into the operation of the justice system[31]. Following the scandal over accounting irregularities at *Enron* and *Worldcom* in the early 2000s, the *Sarbanes-Oxley Act* (known as *SOX*), which was adopted with the aim of protecting investors by encouraging transparency in businesses' financial reports, was voted in by a large majority of the House of Representatives and almost the entire Senate

28 These provisions appear in article 5-6 of decree no. 82-453 of 28 May 1982 (as amended by decree no. 2011-774 of 28 June 2011).

29 CE, 2 June 2010, *Minister of Education*, no. 320935, Rec., concl. N. Escaut.

30 CE, 18 June 2014, *Minister of Education*, no. 369531, T.

31 For some authors, other than the *False Claims Act,* which was adopted in 1863 during the War of Secession and is still applicable today, the first legislation on whistleblowers is an act from 1778 adopted by the Continental Congress that was in operation before the United States gained its independence. The act was intended as a response to the indignation that followed the revelations made by sailors in the national navy, who had denounced the acts of torture committed by an officer on British soldiers. See N. Lenoir, "Les lanceurs d'alerte – Une innovation française venue d'outre-Atlantique", La semaine juridique Entreprise et Affaires no. 42, 15 October 2015, p.1492.

before being signed into law by the President of the United States on 30 July 2002. The act obliges businesses whose shares are listed in the United States to conduct an audit to guarantee the accuracy and availability of their financial information and accounting practices, and includes provisions on the independence of auditors and the direct responsibility of company directors. It requires listed companies and their subsidiaries, both in the US and abroad, to implement internal whistleblowing mechanisms designed to prevent problems that might threaten their viability; companies that fail to comply with the act can be sanctioned, notably by their listing being withdrawn. Among the mechanisms it includes are workplace whistleblowing procedures designed to ensure that employees can report information confidentially and that "complaints" submitted by them are dealt with (SOX, section 301(4))[32]. The US legislature's idea is therefore to make employees *"the new linchpin of corporate governance"*[33]. Article 806 of the *SOX* stipulates that no retaliatory action can be taken against employees who have provided evidence of fraud and that they have the right to take legal action against an employer who does engage in retaliation in breach of the act. Protection for *whistleblowers*[34], which lies at the heart of the scheme, is guaranteed by companies' commitment to protecting the anonymity of those who make complaints. Above all, it is guaranteed by effective protection for the whistleblower. The *Dodd-Franck Act* of 2010[35], which was adopted in response to the actions of the banks that caused the systemic crisis of 2008, strengthened protection for whistleblowers who contact the *Securities and Exchange Commission* (SEC) – the US federal body responsible for the financial markets – and who can now obtain compensation in the case of retaliation by their employer[36]. Initially limited to US companies, on 1 July 2005 the obligation to provide a whistleblowing mechanism was extended to the subsidiaries of these companies, regardless of location, and then imposed on foreign companies listed on the New York stock exchange on 1 July of the following year. In the meantime the Japanese legislature picked up the idea, adopting the *Financial Instruments and Exchange Act* of 6 June 2006; known as the Japanese SOX, and like the US law on which it is directly based, it imposes workplace whistleblowing mechanisms for internal control purposes.

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32 *"(4) COMPLAINTS.—Each audit committee shall establish procedures for— ''(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and ''(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.*"

33 V. L. Flament and Ph. Thomas, "Le '*whistleblowing*' : à propos de la licéité des systèmes d'alerte éthique", La semaine juridique sociale*,* 2005, no. 1277.

34 Since the publication of the book by F. Chateauraynaud and D. Torny, "Les Sombres précurseurs: Une Sociologie pragmatique de l'alerte et du risque", Paris, *EHESS*, 1999 (476 pages), the term *whistleblower* has been translated into French by "lanceur d'alerte" in scientific settings and particularly in relation to the issue of health or environmental risks [p.20-26].

35 The *Dodd–Frank Wall Street Reform and Consumer Protection Act* was promulgated by President Obama on 21 July 2010. The act not only provides for protection for ethical whistleblowers, but also offers a financial incentive for those who are willing to disclose information, providing the respective commissions with direct information on breaches of the laws relating to marketable securities or raw materials. The sum paid to the whistleblower is directly correlated with the sanctions finally imposed by the commissions, on condition that these are in excess of $1 million (between 10 and 30%).

36 This is an amendment of chapter 73 of Title 18 headed *"Crimes and criminal procedure"* of the United States Code, which added a new article headed *"Civil action to protect against retaliation in fraud cases"* (1514 A), which provides for the employee to be reinstated and obtain back pay and even the payment of damages, notably including legal fees.

**The concern for transparency and better corporate governance has also resulted in recommendations from European Union bodies and international organisations such as the OECD and the United Nations.** In France, Act no. 2003-706 of 1 August 2003 on financial security follows in the same vein, providing for stronger internal control systems within the business for all limited companies and modernising the supervisory authorities (the Financial Markets Authority). However, it is mainly through the SOX *Act* that French businesses listed in the United States and their subsidiaries have had to familiarise themselves, not without a degree of reluctance, with the implementation of workplace whistleblowing mechanisms. Faced with these new obligations and more frequent examples of the employer being found liable, French businesses have gradually implemented ethical codes or charters setting out rules on conduct that employees must obey in carrying out their duties, as well as workplace whistleblowing procedures that allow them to record breaches of these codes. Whistleblowing mechanisms are now included in compliance programmes and are designed to contribute to the corporate social responsibility assumed by all parts of the business, including employees, who become stakeholders in the internal control mechanisms implemented by management.

**The mechanisms implemented in the main groups share a number of similarities.** For example, employees are given access to a phone number (*hot line, open line* or *help line*), e-mail address or online form on a secure website. In general, they can also contact a member of line management directly. The mechanism is generally managed by the business itself but sometimes outsourced, and allows employees to report problems that could seriously affect the activities of the business or render it seriously liable[37]. The warnings submitted are then checked in a confidential environment and allow the employer to make an informed decision on the corrective actions to be taken. Although these mechanisms are not governed by a specific legal framework, they are still covered by the law. This is noted in the circular from the Direction générale du travail (DGT) no. 2008-22 on 19 November 2008 on ethical charters, workplace whistleblowing mechanisms and internal regulations, which devotes an entire chapter to them (IV-Workplace whistleblowing mechanisms). The controls on such mechanisms are numerous (from administrative controls by labour inspectors or controllers to control by the courts and controls carried out by French Data Protection Authority (CNIL), wherever there are possible similarities with automated processing of personal data (see *below*) and operate in different legal fields (labour law, corporate criminal law, the French Data Protection Act no. 78-17 of 6 January 1978, etc.). Rules under the ordinary law, in particular provisions to protect rights and liberties (for example, article L. 1121-1 of the Labour Code[38], which guarantees the employee's rights and freedoms) can also be invoked.

37 See, on this point, the CNIL's guidelines on its website: http://www.cnil.fr/documentation/fiches-pratiques/fiche/article/les-alertes-professionnelles-enquestions/

38 *"No-one may impose restrictions on people's rights or individual and collective liberties that are not justified by the nature of the work to be carried out nor proportionate to the end pursued."*

## 1.2.2. The CNIL was asked to examine these mechanisms to check their compliance with the requirements of the right to protection of personal data, and has played a leading role in gradually providing a framework for them

**The nature of whistleblowing mechanisms involves the collection of personal data, which therefore raises the question of their compliance with the French Data Protection Act no. 78-17 of 6 January 1978.** As defined in I(4) of Article 25 of the Act, they may take the form of automated processing of personal data[39] and must therefore be authorised by the CNIL. Since no specific legislation on whistleblowing was planned at the time, such warnings were initially treated by the CNIL solely in light of the requirements on the 1978 Act. Initially, the Commission refused to authorise whistleblowing mechanisms that it was able to classify as *"organised systems of workplace informing"*[40]. In an early case, the X France group requested authorisation on 7 January 2005 to create a *"professional integrity mechanism"*, which the CNIL refused on 26 May of the same year. It took the view that *"the mechanism presented was disproportionate to the objectives pursued and the risks of malicious accusations and stigmatisation of employees who were the subject of ethical whistleblowing"*. The CNIL's second refusal, on the same date and on similar grounds, concerned Company Y, which had requested authorisation to install a dedicated phone line on 29 July 2004. It was intended to enable all group employees *"to communicate with the Accounts Supervisory Board of the Board of Directors* (...) *on topics such as inaccuracies and accounting irregularities that could be committed"*. However, its objective was also to alert members of the group's management in the case of a breach of a law or principle in effect in the business, for example a rule on ethical or business conduct.

**The double refusal by the CNIL temporarily created an obstacle to the establishment of whistleblowing mechanisms in France,** precisely at a time when a large number of businesses listed on the stock exchange in the United States were intending to create them to comply with the new rules imposed by the *SEC*. However, following consultations with its European counterparts and the US authorities, the CNIL produced a guidance document on 10 November 2005, setting out the conditions whistleblowing mechanisms must meet in order to comply with the French Data Protection Act.[41]. According to the Commission, however, such mechanisms can only be supplementary, optional and apply to a restricted field. On 8 December 2005, the CNIL also adopted[42] a decision on a single authorisation for automated processing of personal data implemented in the context of whistleblowing mechanisms, in accordance with the guidelines

39 *"Automated processing likely, by its nature, scope or purpose, to exclude people from the benefit of a right, service or contract in the absence of any legislative or regulatory provision".*

40 Deliberations no. 2005-110 and 2005-111 of 26 May 2005.

41 Guidelines document adopted by the CNIL on 10 November 2005 on implementing whistleblowing mechanisms in accordance with the French Data Protection Act of 6 January 1978 as amended in August 2004.

42 Deliberation no. 2005-305 of 8 December 2005 "on a single authorisation for automated processing of personal data implemented in the context of whistleblowing mechanisms" as amended by deliberations no. 2010-369 of 14 October 2010 and no. 2014-042 of 30 January 2014.

established by the Commission. The decision on a single authorisation (AU-004) introduced a simplified authorisation procedure for whistleblowing mechanisms and laid down the conditions businesses had to comply with in order to take advantage of it. This is a purely declaration-based procedure on which the CNIL does not run any checks before issuing an acknowledgement.

Following the changes to AU-004 introduced in 2010, whistleblowing mechanisms covered by the single authorisation were supposed *"to fulfil a legislative or regulatory obligation under French law, aimed at establishing internal control procedures in the areas of finance, accounting, banking and combating corruption"* (article 1). Where there is no legal obligation under French law, the CNIL took the view that those responsible for processing had a legitimate interest in implementing mechanisms in the areas cited above where they were affected by section 301(4) of the SOX Act or the so-called "Japanese *SOX"*. Furthermore, it extended the scope to combating anti-competitive practices. Businesses that could not claim a requirement under one of these pieces of legislation were obliged to send a specific authorisation to the CNIL. Between 2011 and 2013, the CNIL dealt with almost 60 specific requests for authorisation relating to areas that fell outside the scope of AU-004. Implementing these whistleblowing mechanisms was notably justified by the need to comply with other foreign laws, such as the *UK Bribery Act* in relation to combating corruption; corporate governance codes for listed companies (strengthening internal control measures to prevent fraud); or labels, such as AFNOR's diversity label, which provides for the introduction of whistleblowing mechanisms to combat discrimination.

In a context of an increasing number of specific requests and highlighting by the Court of Cassation of the difficulties of interpreting some provisions of AU-004[43], the CNIL felt it was necessary to make a further change to the scope of the authorisation. In 2014, it was extended to the areas of combating discrimination and harassment, health, hygiene and safety at work, and environmental protection. AU-004 now stipulates that in order to take advantage of a statement of compliance, organisations must fulfil two conditions. First, warnings must be limited to the following areas: financial accounting, banking and combating corruption; anti-competitive practices; combating workplace discrimination and harassment; health, hygiene and safety at work; environmental protection. Whistleblowing mechanisms covering other areas require a specific authorisation (article 11 of AU-004). Secondly, warnings must fulfil a legal obligation or a legitimate interest (article 1). Although the warning need not, in principle – apart

43 Cass. soc., 8 December 2009, no. 08-17191: in this instance, the judges of the Court of Cassation were asked to establish whether the whistleblowing mechanism implemented by Dassault Systèmes complied with the obligations imposed by the Act of 6 January 1978 and the deliberation of 8 December 2005. The system implemented aimed to gather complaints from employees on all *"serious breaches of the principles described in the "Code of Business Conduct" in respect of financial or accounting matters or combating corruption"*, but also *"in the event of serious breaches of other principles set out in said Code where there was a threat to the essential interest of the DS group or the moral or physical integrity of an individual (notably in cases of an infringement of intellectual property rights, disclosure of strictly confidential information, conflicts of interest, insider dealing, discrimination and psychological or sexual harassment)"*. Their answer was no, believing that *"a workplace whistleblowing mechanism covered by a statement of compliance with the single authorisation cannot be for any purpose other than that defined in article 1 [of AU-004], which the provisions of article 3 [AU-004] are not intended to modify"*.

from in exceptional cases – be anonymous (article 2)[44] confidentiality must be maintained in order to avoid malicious or defamatory warnings and ensure they are dealt with more effectively (article 4). The mechanism also requires two kinds of information to be made available: one for employees, on the use and objectives of the whistleblowing mechanism, but also the existence of a right of access and correction for people identified during the process (article 8); the other for the person targeted by the warning, who also has a right to the correction or deletion of data (article 9) but is not entitled to learn the identity of the person issuing the warning (article 10). Use of the mechanism in good faith, even if the facts subsequently prove to be inaccurate or do not result in further action, cannot expose the originator to any form of disciplinary action (article 8). The single authorisation also stipulates the length of time for which data can be retained (two months after the end of the verification stage, unless a disciplinary procedure or legal proceedings are instigated: article 6), the implementation of specific security measures governing the circulation of information (article 7) and the organisation of transfers of personal data outside the European Union (article 5).

## 1.3 Changes to European and international regulations and a number of high-profile cases have led the French legislature to adopt numerous provisions on protection for whistleblowers, on a sector-by-sector basis

### 1.3.1. The provisions adopted in respect of combating discrimination, aimed at protecting those who report their concerns, have acted as a framework for provisions protecting whistleblowers

**For the French legislature, it was a question of transposing European directives that provided protection for workers against retaliation by their employer for reporting acts of psychological harassment** (art. L.1152-2 of the Labour Code; prev. art. L.122-49, para. 1) **and discrimination** (art. L.1132-1 of the Labour Code; prev. art. L.122-45, para. 1)**.** Starting with Directive 1976/207/EEC of 9 February 1976[45], the legislature of the European Union required that *"Member States shall take the necessary measures to protect employees against dismissal by the employer as a*

44 As an exception, a warning from someone who wishes to remain anonymous may be dealt with under the following conditions: on the one hand, the severity of the facts mentioned has been established and the factual elements are sufficiently detailed; on the other, the warning must be dealt with subject to particular precautions, such as a preliminary examination by the initial recipient, to establish whether it should be passed on in accordance with the mechanism.

45 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJEC no. L 039, 14 Feb. 1976, p.40-42.

*reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay"*. Directives no. 2000/43/EC of 29 June 2000[46], 2000/78 of 27 November 2000[47], 2002/73 of 23 September 2002[48], 2004/113 of 13 December 2004[49] and 2006/54 of 5 July 2006[50] then all included a comparable provision, under which *"Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment"*.

The protective provisions of **article L.1132-3 of the Labour Code** relating to discrimination were introduced by Act no. 2001-1066 of 2 November 2001 on combating discrimination. The provisions of article **L.1152-2** (prev. art. L.122-49, para. 2) and those of Article L.1152-3 (prev. art. L.122-49, para. 3) were implemented by **Act no. 2002-73 of 17 January 2002** on social modernisation, based on the model of those introduced in respect of sex discrimination or sexual harassment. Indeed, **article L. 1153-3** (art. L.122-46, para. 2), introduced by Act no. 92-1179 of 2 November 1992 on the abuse of authority in sexual matters in working relationships) specifically concerns sexual harassment, which was addressed by the French legislature long before psychological harassment. By introducing the notion of sexual harassment into the Labour Code (C. trav., art. L.122-46), France became one of the first European countries[51] to pass specific legislation on combating sexual harassment at work. Although Act no. 2008-496 of 27 May 2008 on various provisions adapting EU law in the area of combating discrimination ensures a partial transposition of Directives 2006/54/EC of 5 July 2006 and 2004/113/EC of 13 December 2004 referred to above, it also allowed a number of observations by the European Commission to be taken into account. The Commission had, in fact, embarked on three sets of proceedings for failure to fulfil an obligation against France, two of which had resulted in the submission of a formal notice to remedy and the third in a reasoned opinion[52].

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46 Directive 2000/43/EC, 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 9: OJEC no. L 180, 19 July 2000, p.22.

47 Directive 2000/78/EC, 27 Nov. 2000, on equal treatment in employment and occupation, art. 11: OJEC no. L 303, 2 Dec. 2000, p.16.

48 Directive 2002/73/EC, 23 September 2002 amending directive 76/207/EEC, OJEC no. L 269, 5 Oct. 2002, p.0015 – 0020.

49 Directive 2004/113, 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJEC no. L 373, 21 Dec. 2004, p.37.

50 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [OJEC no. L 204 du 26 Jul. 2006, p.23].

51 After Belgium [Royal dec. 18 Sept. 1992 organising the protection of workers against sexual harassment in the workplace], Finland [L. 1 Jan. 1987 on the protection of workers against sexual harassment] and, just before, Spain [Decreto Real no. 11/1993], Austria [L. no. 833-1992, which came into effect on 1 Jan. 1993], Germany [L. 24 June 1994] and Switzerland [Federal law of 24 March 1995].

52 The two notices to remedy, dated 21 March 2007, concerned firstly, Council Directive 2000/78/EC of 27 November 2000 referred to above (which was due to be transposed into law by 2 December 2003 at the latest), and secondly Directive 2002/73/EC of 23 September 2002 (which was due to be transposed into law by 5 October 2005). The reasoned opinion of 27 June 2007 related to Council Directive 2000/43/EC of 29 June 2000, for which the deadline for transposition had been set as 19 July 2003.

One of the objections expressed by the Commission was that protection against retaliation for people who had reported facts relating to discrimination was not strong enough. Now, Article L.1132-1 of the Labour Code includes a principle of non-discrimination. Article L.1132-3 of the Labour Code provides that a worker cannot be sanctioned (dismissed or discriminated against) for providing evidence of or reporting discriminatory actions. It is also set out in articles L.1152-2 and L.1153-3 of the Labour Code[53] that a worker is entitled to the same protection for having provided evidence of or reported psychological or sexual harassment. Act no. 2012-954 of 6 August 2012 on sexual harassment extended the protection of articles L.1152-2 and L.1153-3 referred to above to *"any person in training or on an internship"*. Protection for witnesses is one of the keys to the effectiveness of the right to non-discrimination because, without witnesses, the judge often has no factual evidence indicating that the worker concerned was indeed a victim of discrimination. Moreover, it was to protect the effectiveness of the right for the judge that the Court of Cassation ruled, in 2013, that any measure or sanction taken by the employer and aimed at sanctioning the worker through legal proceedings, aimed either directly at the worker or one of their colleagues, should be declared null and void. The termination of an employment contract in breach of the fundamental right to bring a legal action is null and void (Soc. 6 Feb. 2013 no. 11-11740; reversal of Soc. 20 Feb. 2008, no. 06-40.085). For psychological harassment, this protection is supplemented by the termination of a contract being null and void if it has failed to take into account the provisions of Article L. 1152-2 (art. L.1152-3). For sexual harassment, Article L.1153-4 provides for the nullity of any act contrary to the provisions of Article L.1153-3.

Alongside this protection, Article 3 of the Act of 6 August 2012 referred to above inserted, after Article 225-1 of the Penal Code, which lists the grounds on which discrimination is prohibited, a new Article 225-1-1 prohibiting discrimination following sexual harassment. This article defines discrimination as any distinction drawn between persons because they have been or refused to have been subject to acts of sexual harassment as defined in Article 222-33 of the Penal Code or because they have provided evidence of such acts, including, in the case mentioned in I of the same article, where the statements or behaviours have not been repeated. In the corporate sector, such discrimination is manifested, notably, in a refusal to hire, sanction or dismiss someone, making a job offer, request for a placement or period of workplace training subject to a condition based on one of the elements set out in new Article 225-1-1; a refusal to accept an individual on one of the courses referred to in point 2 of Article L.412-8 of the Social Security Code (art. 225-2). Actions of this kind are punishable by three years' imprisonment and a fine of €45,000 (same article). Other forms of discrimination – less serious than those referred to above and listed in Article L.1153-2[54] of the Labour Code – committed following

53 *"No employee, no person in training or on an internship may be sanctioned, dismissed or discriminated against, either directly or indirectly, notably in respect of compensation, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract for having been or having refused to be subject to repeated instances of psychological harassment or for having provided evidence of or reported such actions."*

54 Discriminatory behaviours in working relationships are stipulated in Article L.1153-2, which states that the employee cannot be sanctioned, dismissed or discriminated against, either directly

the revelation of psychological or sexual harassment are similarly sanctioned. The penalties provided in Article L.1155-2 are one year's imprisonment and a fine of €3,750, as was the case prior to recodification in 2007.

**Although the person reporting acts of discrimination is entitled to well-established protection, they do not enjoy complete freedom: reporting an act of discrimination cannot constitute an abuse of their right to do so** (Cass. soc 3 May 2011, no. 10-14.104; Cass. soc. 28 April 2011, no. 10-30.107). The French legislature has added a reference to the good faith of the witness to the text of the directive[55], which is repeated in the case law to protect a worker who did not know that litigious acts do not fall under the classification of discrimination (this solution is also valid in relation to harassment). The Court of Cassation has held that bad faith is not established simply by the fact that the behaviours reported by the employee were not classified as discrimination by the judge and an employee who reports acts of psychological harassment can only be sanctioned if they can be proven to have acted in bad faith (Cass. soc. 10 March 2009, no. 07-44.092; Cass. Soc. 29 May 2012, no. 11-13.947), while *"the grievance arising from the revelation of acts of psychological harassment by an employee who was not alleged to have acted in bad faith is sufficient in itself to make the dismissal null and void"* (Soc. 10 March 2009, no. 07-44.092; Soc. 12 June 2014, no. 12-28.944). It is also necessary, where no explicit mention is made in the dismissal letter, to record the evidence for the employee that the dismissal is related to the reporting of acts of harassment (Soc. 2 July 2014, no. 13-19.990). Although the case law appears very favourable to the whistleblower, the decision in the case of *the company Sogep* of 6 June 2012 (no. 10-28.345) shows that the employer's argument is not always doomed to failure. According to the Court of Cassation, the judge's ruling on the merits of this case were able to characterise as bad faith the fact that *"the employee had falsely reported non-existent acts of psychological harassment with the aim of destabilising the business and ridding herself of the manager in charge of the accounts department"* (Cass. soc., 6 June 2012).

The right to combat discrimination has, in this way, served as a framework for the right to protect whistleblowers.

### 1.3.2 In 2002, as part of increased efforts to combat mistreatment and sexual abuse of children and vulnerable adults, the legislature made provision for a legal procedure to ensure protection for people who report their concerns

In the early 2000s, combating the mistreatment to which children and vulnerable adults living in medical and social care institutions were subjected was identified as a key priority for the public authorities. As well as establishing a reporting obligation for certain groups of professionals, notably the directors of such institutions,

or indirectly, notably in respect of compensation, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract.

55 Article 3 of the 2008 Act referred to above: *"No person who has provided evidence in good faith or reported a discriminatory action may be treated unfavourably as a result of this."*

sanctioned by Article 434-3 of the Penal Code, and several mechanisms to make reporting easier, the Act of 2 January 2002[56] updating medical and social care provision established a mechanism to provide protection for people who blew the whistle in such situations. The provisions, codified in Art. L.313-24 of the Social Action and Families Code provides that in medical and social care institutions, *"the fact that an employee or official has witnessed poor treatment or deprivation inflicted on a resident or has reported such actions may not be taken into account when deciding on disadvantageous measures concerning them in respect of compensation, training, assignment, qualification, classification, professional promotion, transfer or renewal of their employment contract, or when deciding to terminate their employment contract or impose a disciplinary measure. In the case of dismissal, the judge may rule that the employee be reinstated if they so request."* The circulars setting out the terms for the introduction of this mechanism state that in addition to employees in medical and social care institutions, the principle of protection enshrined in the provisions extends to doctors who report a situation and to public officials in the authorities that control such institutions and who may have uncovered such activities.[57]

### 1.3.3. In 2007, the legislature adopted provisions to protect employees who reported acts of corruption, which are set to be strengthened shortly

**Article 9 of Act no. 2007-1598 of 13 November 2007 on combating corruption introduced, based on Articles L.1152-2 and L.1153-3 of the Labour Code in relation to discrimination, a protection system for employees who report acts of corruption** they have come across in the course of their duties.

**The provisions, which were inserted by a Parliamentary amendment on first reading in the National Assembly[58], were designed to satisfy the requirements of several international texts on corruption.** In particular, these included the stipulations of Article 9 of the Council of Europe Civil Law Convention on Corruption of 4 November 1999[59] , which invites the State Parties to include in their domestic law *"adequate protection against all unjustified sanctions in respect of employees who, in good faith and on the basis of reasonable suspicions, report acts of corruption to the relevant individuals or authorities".* In 2005, the OECD working group responsible for assessing national anti-corruption policies asked the French public authorities to implement these stipulations, emphasising the usefulness of *"stronger protection measures for employees who reveal suspected acts of corruption, in order to encourage these individuals to report such acts without fear*

56 Act no. 2002-2 of 2 January 2002 updating medical and social care provision.

57 Circular DGA 5/SD 2 no. 2002-265 of 30 April 2002 on strengthening procedures for handling reports of mistreatment and sexual abuse of children and vulnerable adults living in medical and social care institutions.

58 Amendment no. 22 presented by Mr Hunault, record of the session on Wednesday 10 October 2007, ordinary session 2007-2008, XIII$^{th}$ legislature, National Assembly.

59 France's ratification of the Council of Europe Civil Law Convention on Corruption of 4 November 1999 was authorised by Act no. 2005-103 of 11 February 2005, before the convention was published by decree no. 2008-673 of 4 July 2008.

*of reprisals"*[60]. This was also the purpose of the recommendations of the Group of States against Corruption – GRECO – set up within the Council of Europe. As the Central Prevention of Corruption Department underlined in its 2011 Annual Report, the United Nations Convention against Corruption (dated 31 October 2003, known as the Merida Convention[61]) also included a very comprehensive set of provisions in relation to reporting acts of corruption, notably in its Article 33 on "Protection of reporting persons", according to which *"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."*

**These provisions are now included in Article L.1161-1 of the Labour Code** and relate exclusively to the protection of any worker who *"[reports] or [provides evidence], in good faith, either to their employer, or to the judicial or administrative authorities, of any acts of corruption they have come across in the course of their duties".* This protection consists of rendering null and void the termination of an employment contract or any other action taken by the employer because of such action by the worker. In the case of a dispute relating to such actions between the worker and the employer, an adjustment in the burden of proof is made to the benefit of the former: while it is the worker's responsibility to establish the facts allowing it to be assumed that they have reported acts of corruption, it is for the employer to prove that their decision *"is justified by objective elements distinct from the employee's declarations or evidence".* Nonetheless, protection is not limitless. A reading of the research carried out by parliament reveals the legislature's desire to avoid providing protection for malicious complaints. This is why the provisions indicate that a worker can only benefit from protection on condition that the revelation of the facts concerned was made "in good faith".

To date, the scope of these provisions has not been the subject of decisions by either the Court of Cassation or the Conseil d'État. On the other hand, they have been applied by the Court of Appeal in Paris, which ruled that the termination of an individual's employment contact was null and void where the employer had not been able to demonstrate that there was no relationship between the termination and the corrupt acts indicated by the person concerned (CA Paris, 13 March 2013, no. 12/03679); conversely, a transfer pronounced in relation to a person who had reported corrupt acts to their employer was deemed lawful, insofar as the employer had, in this instance, been able to show that the transfer was in the interests of the department (CA Paris, 21 March 2013, no. 11/06352).

These provisions have thus established a system of protection for whistleblowers reporting acts of corruption, which is now set to be supplemented by the provisions in the future bill on transparency in economic life.

60 Recommendation no. 5 of the Phase 2 report on France, cited in *Annual Report of the Central Prevention of Corruption Department*, 2011.

61 France's ratification of the United Nations Convention against Corruption was authorised by Act no. 2005-743 of 4 July 2005, before it was published by decree no. 2006-1113 of 4 September 2006.

### 1.3.4. Protection for whistleblowers in respect of serious risks to public health and the environment has been addressed in two laws, one in 2011 and the other in 2013

**In November 2009, the French Agency for the Safety of Health Products (AFSSAPS) suspended the marketing authorisation for Mediator®,** which had been marketed since 1976, primarily on the basis of pharmacovigilance data and a study by the Caisse nationale d'assurance maladie des travailleurs salariés (CNAMTS) health insurance fund. The so-called Médiator® affair created a widespread climate of fear on drugs for human use. Numerous assessments and consultations were then carried out to restore confidence in the French system for ensuring the safety of medicines. Act no. 2011-2012 of 29 December 2011 on improving the safety of medicines and health products marked the end of this work and was characterised by a preparatory phase that called on various stakeholders: in addition to the traditional reports by inspection bodies (IGAS)[62] and parliamentary enquiries[63], the research done by several working groups[64] provided a number of suggestions for improving the safety of health products.

**Included in the recommendations formulated by the joint enquiry on Médiator®, was this one on whistleblowers.** According to the enquiry, *"the Médiator case shows that our safety system for health products operates in a silo, relying on scientific information circulating in a closed circuit"*[65]. Its proposal no. 39 encouraged the public authorities to *"implement a procedure for protecting whistleblowers".* Inspired by the *Whistleblower Protection Act* of 1989 (United States) and the *Public Interest Disclosure Act of 1998* (United Kingdom), it was to result in Article L. 5312-4-2 of the Public Health Code derived from Article 43 of the Act of 29 December 2011 referred to above, taken at the government's instigation from a close rendering of Article L. 1161-1 of the Labour Code derived from Act no. 2007-1598 of 13 November 2007. These provisions introduce protection for people who have contributed to reporting facts that question the safety of medicines and more generally, health products referred to in Article L.5311-1 of the same code (which fall under the jurisdiction of the ANSM). Protection for whistleblowers, who are also not designated as such in Article L. 5312-4-2, remains limited to cases of reporting facts of which they become aware in the course of their duties. It is stipulated that whistleblowers cannot be victims of discrimination, or excluded from a recruitment process or access to an internship or period of professional training; nor can they be sanctioned or discriminated

62 See report by the IGAS *The Médiator® investigation* of 15 January 2011; the *Report on pharmacovigilance and governance of the medicines chain* by the IGAS of 21 June 2011.

63 See the report of the National Assembly's enquiry on Médiator® and pharmacovigilance of 22 June 2011; the Senate report produced on behalf of the joint enquiry: *Médiator®: evaluation and control of medicines* of 28 June 2011"; the report of the National Assembly concluding the enquiry's work on health agencies of 6 July 2011.

64 See the report of the enquiry on redeveloping the French system for controlling the efficacy and safety of medicines by Prof. Debré, member of parliament for Paris, and Prof. Even, president of the Institut Necker, submitted to the President of the Republic on 16 March 2011; the summary report of the Assises du médicament of 23 June 2011 (established on 17 February 2011 by Xavier Bertrand, Minister for Labour, Employment and Health, based on the research carried out by six working groups).

65 Report of the joint mission p.83.

against, either directly or indirectly, notably in respect of compensation, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract. This protection is supported by a system of proof that favours the whistleblower, insofar as in a dispute, the defendant must establish that their decision is justified by objective elements that are distinct from the declaration or evidence offered by the whistleblower.

**This first stage was followed by the adoption of Act no. 2013-316 of 16 April 2013 on the independence of expert assessments in relation to health and the environment and on protection for whistleblowers,** which followed an important discussion on the opportunity to create a High Commission on expert assessments and whistleblowing[66]. Based on a proposal for legislation submitted on 28 August 2012 by the Senate's Greens parliamentary group and prepared in conjunction with numerous community stakeholders, the act was extensively debated in parliament, at the end of which the initial proposal was substantially amended. The Act finally adopted on 16 April 2013 solemnly declares that *"any natural person or legal entity has the right to make public or disseminate in good faith, information concerning a fact, piece of data or action, where ignorance of this fact, piece of data or action appears to them to constitute a serious risk to public health or the environment"* (article 1). It creates a whistleblowing right for a worker who believes that *"the products or manufacturing processes used or implemented by the establishment constitute a serious risk to public health or the environment"* (Article L.4133-1 of the Labour Code) and for a staff representative on the CHSCT who observes *"that there is a serious risk to public health or the environment"* (Article L. 4133-5 of the Labour Code). It extends the scope of the provisions of Article L. 5312-4-2 of the Public Health Code, which was initially limited to events involving the safety of health products and facts related to a serious risk for public health or the environment (see Art. L.1351-1 of the same code). Protection only applies, however, if the whistleblower acts neither in bad faith nor maliciously: article 12 of the Act[67], in these cases, makes reference to the penalties set out in Article 226-10 of the Penal Code on malicious accusations (punishable by five years' imprisonment and a €45,000 fine). The Act applies directly to the area of health products, since it deprives an employer that has not fulfilled its obligations, although it has been warned by an employee who believed, in good faith, that the products or manufacturing processes used or implemented by the establishment constituted a serious risk to public health or the environment, of the benefit of exemption for the risk of development provided for in Article 1386-11 of the Civil Code in respect of responsibility in relation to defective products (Article 13 of the Act).

66 See the proposal for legislation submitted by Claude Saunier in 2005, to create a High Commission for Public Expert Assessment (HAEP); *Chemical risks in daily life: glycol ethers and internal pollutants. Expert assessments for health*, a report by Marie-Christine Blandin, Parliamentary Office for the Evaluation of Scientific and Technological Choices, 2008; *Report on ecological governance in light of the French Presidency of the European Union*, Corinne Lepage, 2008; art. 52 of Act no. 2009-967 of 3 August 2009 on the implementation of the Grenelle de l'environnement talks on the environment.

67 *"Any natural person or legal entity who issues a warning in bad faith or with the intention of causing harm or is fully or at least partially aware that the facts published or disseminated are inaccurate shall be punished in accordance with the penalties set out in paragraph one of Article 226-10 of the Penal Code."*

**In addition to protection for the whistleblower, the actual treatment of the warning is also taken into account.** In the event of a warning issued by a staff representative on the CHSCT, for example, the employer *"shall examine the situation jointly with the staff representative on the Hygiene, Safety and Working Conditions Committee who passed on the warning and inform them of the follow-up action taken."* Article L.4133-3 provides, in the case of a difference of opinion with the employer on the legitimacy of the warning or the absence of any follow-up within one month, the possibility for the worker or their representative to refer the matter to the state representative in the administrative district in which they reside, who can then forward the warning to the authorities and take the necessary steps to protect the employee. All these warnings must be issued in writing. If the prefect does not respond, the case may be referred to the National Commission on ethics and whistleblowing in relation to public health and the environment by a representative employee trade union at the national level (Article 4 of the Act of 16 April 2013 referred to above).

**In order to centralise procedures for the recording of alerts, a National Commission on ethics and whistleblowing in relation to public health and the environment has been established** (Article 2 of the Act of 16 April 2013). The Commission is responsible for monitoring the ethical rules that apply to scientific and technical expertise and to the procedures for recording warnings in relation to public health and the environment. In particular, it is responsible for defining the admissibility criteria for warnings (Article 2(3)) and transferring the warnings received by it to the relevant ministers (Article 2(4)). Decree no. 2014-1629 of 26 December 2014 establishes its composition and operation. It comprises 22 members, appointed by order of the Minister for Sustainable Development for a period of four years, renewable once, and whose appointment cannot be revoked, in order to guarantee their independence. Decree no. 2014-1629 of 26 December 2014 establishes its composition and operation. Article 6 of the Act of 16 April 2013 obliges its members to carry out their duties in accordance with rules on confidentiality, impartiality and independence under the terms of Article 26 of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants. They are thus obliged to make a declaration of any interests *"of any kind, either direct or via a third party",* which is made public. Article 3 of the Act further provides that *"public institutions and organisations that are involved in expert analysis or research in the field of health or the environment shall keep a register of the warnings passed to them and the follow-up actions taken."* The list of public institutions and organisations concerned, a total of 37 (including ANSES and ANSM) was fixed by decree no. 2014-1628 of 26 December 2014. To date, however, the commission has not been set up.

### 1.3.5. Protection for whistleblowers reporting situations of conflicts of interest has been the subject of specific provisions, with the adoption of the law of 11 October 2013 on transparency in public life

**The establishment of a protection scheme for whistleblowers reporting conflicts of interest was first proposed in 2011 and 2012, by two reports submitted to the President of the Republic.** In its report entitled *Pour une nouvelle déontologie de la vie publique*[68], the commission of enquiry into preventing conflicts in public life, chaired by the Vice President of the Conseil d'État – Mr Jean-Marc Sauvé – took the view that the existing whistleblowing mechanisms in the civil service, in particular the mechanism defined in the provisions of the second paragraph of Article 40 of the Code of Criminal Procedure, were inadequate. It concluded that *"internal whistleblowing mechanisms should be introduced along with systems for handling warnings when offences [were] supposed to have been committed".* More specifically, it was proposed to include in the Act the principle that *"a public official who witnesses illicit acts or serious risks of a criminal offence in the course of their professional activities, may alert the authorities with the power to put an end to it, while benefiting from protection in this respect".* These proposals were subsequently refined by the Commission on renewal and ethics in public life, chaired by the former Prime Minister Mr Lionel Jospin and whose report, entitled *Pour un renouveau démocratique*[69], was submitted to the President of the Republic in November 2012. Proposal no. 35 of the report, indeed, recommended *"establishing an open ethical whistleblowing mechanism".* This mechanism was described as follows: *"Any person may submit a warning to the ethics specialist of institutions and administrative authorities responsible for public actors who are particularly exposed to the risk of a conflict of interest, as soon as they identify a potential or actual conflict of interest calling one of these actors into question. In the absence of a response from the ethics specialist, the matter may be referred directly to the Ethics Committee. This whistleblowing mechanism should be open not only to public officials who may become aware of elements that point to a conflict of interest in their professional activity, but all citizens as well."* It was also intended that a whistleblowing mechanism should be combined with an appropriate protection system for the whistleblowers concerned.

**These proposals were picked up again during the drafting of the bill on transparency in public life, which included an article on protection for whistleblowers.** As emphasised by the parliamentary research[70], the provisions in question were directly inspired, in terms of structure, by the provisions of Article L.1351-1 of the Public Health Code (See *supra*, 1.3.3), and could also be compared

68 *Pour une nouvelle déontologie de la vie publique*, Commission of enquiry into preventing conflicts in public life, report submitted to the President of the Republic on 26 January 2011.

69 *Pour un renouveau démocratique*, Commission on renewal and ethics in public life, November 2012.

70 See the report produced on behalf of the Law Commission of the National Assembly on the bill on transparency in public life, no. 1108 and 1109, by Jean-Jacques Urvoas, 5 June 2013; report produced on behalf of the Law Commission of the Senate on the bill on transparency in public life, no. 722, by Jean-Pierre Sueur, 3 July 2013.

with the provisions of Articles L.1161-1, L.1132-3 and L.1132-4 of the Labour Code, protecting workers who report discrimination or acts of corruption they may have come across in the course of their duties. These provisions, which initially featured in Article 17 of the bill, provided for sanctions imposed on officials or individuals who, having become aware of facts constituting a situation of conflict of interests, communicated them in good faith to their employer or the judicial or administrative authorities, being prohibited or declared null and void. It was also stipulated that a whistleblower who acted in bad faith should be subject to the sanctions set out in Article 226-10 of the Penal Code in respect of malicious accusations, i.e. five years' imprisonment and a fine of €45,000.

**These provisions can now be found in Article 25 of Act no. 2013-907 of 11 October 2013 on transparency in public life.** In addition to the protection afforded to whistleblowers who report situations of conflicts of interest, they make explicit provision, in addition to referring the case to the employer or the administrative or judicial authorities, to referral to *"the authority responsible for ethics within the organisation"* and referral to an *"anti-corruption association accredited pursuant to Article 20 (II)"* of the same Act. With regard to the existing provisions on protection for whistleblowers, the Act's main innovation is the establishment of an *ad hoc* authority – the High Commission for transparency in public life – which has the authority, under the terms of its Article 20, for accrediting associations *"intended, according to their articles of association, to combat corruption".* This created a system of protection for whistleblowers combined with specific arrangements for gathering warnings.

## 1.3.6. In adopting the law of 6 December 2013 on combating tax fraud and serious economic and financial crime, the legislature significantly extended the scope of provisions to provide protection for whistleblowers

**During its examination of the bill on combating tax fraud and serious economic and financial crime, the national representatives noted a multiplication of sector-specific mechanisms** in respect of protection for whistleblowers. The parliamentary research thus recorded the existence of a multitude of specific whistleblowers that prohibit *"taking workplace sanctions against people who report acts of discrimination, sexual or psychological harassment, corruption or facts likely to present a serious threat to health or the environment"*[71].

**In order to move beyond an approach based on sector-specific mechanisms and combat tax fraud and serious economic and financial crime more effectively, a proposal was put forward on providing general protection for whistleblowers reporting acts that constitute a criminal offence.** Provisions pursuing this objective did not feature in the bill presented to Parliament by the Government and were inserted during the first reading in the National Assembly, in response to

71 See the report produced on behalf of the Law Commission of the National Assembly, by Yann Galut, no. 1130 and 1131, 12 June 2013; report produced on behalf of the Law Commission of the Senate, by Alain Anziani and Virginie Klès, no. 738, 10 July 2013.

the observation that *"the fact of reporting an offence of which a person becomes aware during the course of their duties is always a burdensome and difficult action to take"*[72]. As a consequence, the national representatives took the view that longstanding mechanisms introducing an obligation to report, in particular paragraph two, Article 40 of the Code of Criminal Procedure should be combined with appropriate protection for the people who made use of it, and proposed inserting two new articles to this effect, in Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants, and in the Labour Code. The intended aim was to extend the scope *rationae materiae* of protection mechanisms for whistleblowers – to all criminal offences – and to extend the scope rationae personae of such mechanisms – to both workers and public officials.

**Ultimately, these proposals led to the insertion of an Article 6 *ter*A in Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants, and an Article L.1132-3-3 into the Labour Code.** Their content is significantly different from that of the amendment initially voted on by the National Assembly. The protection they provide only applies to reporting a crime or offence, not to any other type of criminal offence; it includes making retaliatory measures taken against a whistleblower making such a report null and void; the condition that a report must be made in good faith is mentioned explicitly; in the event of a dispute, a system of proof that is favourable to the whistleblower, based on the model of previous provisions relating to whistleblowers, has been introduced. Finally, an Article 40-5 has been inserted into the Code of Criminal Procedure so that someone who has submitted a report of this kind can be put in contact, on request, with the Central Prevention of Corruption Department, *"where the offence reported falls within this department's area of jurisdiction."*

### 1.3.7. Finally, the Act of 24 July 2015 on the intelligence services provided specific protection for intelligence officials reporting facts likely to represent a manifest breach of the law

**Following a number of cases where whistleblowers found themselves reporting the actions of the intelligence services, in particular in the United States, the national representatives felt it was necessary to introduce a specific protection system.** The provisions concerned were introduced via an amendment to the intelligence bill adopted at first reading by the National Assembly[73]. The parliamentary debates clearly show the legislature's wish to implement a mechanism that is appropriate to the specific requirements of the intelligence field, combined with express provisions on reconciling it with respect for the confidentiality of national defence.

**These provisions are now included in Article L.861-3 of the Internal Security Code.** They are distinct from other protection mechanisms available to whistleblowers on several points. Only a *"manifest breach"* of the legislation relating to intelligence is thus liable to be reported; reports may only be submitted to the National

72 *Ibid.*

73 National Assembly, XIV$^{th}$ legislature, ordinary session 2014-2015, full report, session on Thursday 16 April 2015.

Commission on the Control of Intelligence Techniques (CNCTR) instituted by the Act of 24 July 2015; the CNCTR may then refer the case to the Conseil d'État according to an appropriate procedure and inform the Prime Minister; a referral by the CNCTR to the public prosecutor is also possible, *"in accordance with the confidentiality of national defence"*. Otherwise, like the other legislation examined previously, these provisions render null and void any retaliatory measures taken against a whistleblower of this kind, a favourable regime for whistleblowers in the event of a dispute, and a requirement to act in good faith.

# These mechanisms are not widely used, given that they do not form a coherent whole, are not sufficiently precise as to the procedures to be implemented and do not guarantee effective protection for whistleblowers

## 2.1 The deployment of these mechanisms, which are mostly recent, is still limited and fragmentary, which explains why they are still not widely used

### 2.1.1. In the public sector, the reporting obligation provided for in paragraph two, Article 40 of the French Criminal Procedure Code is still not widely used and its practical implementation faces severe obstacles

**This assessment is broadly shared today.** The Central Prevention of Corruption Department (SCPC) observed in 2010 that in terms of corruption and attacks on probity, *"the administrative authorities and their control structures are not the main sources for action by the judicial authorities"* and that the use of the mechanism provided by Article 40 by public officials *"remains very limited or even non-existent in certain vulnerable sectors"*[74]. In 2011, the SCPC again underlined the *"limitations and weaknesses"* of the reporting mechanisms in the public sector[75]. In January 2011, the commission of enquiry into preventing conflicts in public life confirmed this assessment, indicating in its report that *"use of [this mechanism] is limited"*[76]. In November 2012, the Commission on renewal and ethics in public life recommended a *"strengthening of the strategy to prevent conflicts of interest"* by procedures that are distinct from any *"criminal connotation, comparable to the provision set out on paragraph two of Article 40"*[77], because the provisions concerned were not sufficiently effective. Finally, in a report submitted to the President of the Republic in January 2015, the president of the High Commission on transparency in public life, Mr Jean-Louis Nadal, highlighted the *"relative*

74 Central Prevention of Corruption Department, *Report for 2010 to the Prime Minister and the Minister of Justice*, p.47 and 75.

75 *Ibidem*, p.207.

76 *Pour une nouvelle déontologie de la vie publique*, report by the Commission of enquiry into preventing conflicts in public life, submitted to the President of the Republic on 26 January 2011, p.88.

77 *Pour un renouveau démocratique*, report of the Commission on renewal and ethics in public life, November 2012, p.107.

*ineffectiveness of the reporting procedure provided for in Article 40 of the Code of Criminal Procedure, which is often perceived as informing"*[78]. The study by the Conseil d'État can only echo these assessments.

**Multiple factors may explain the limited use.** Firstly, there are a number of practical and organisational reasons for it: in spite of the circulars and instructions issued, which are still too sparse, public officials are still not adequately informed about their reporting obligations and how these should be implemented in tangible terms. There are also sociological and psychological factors: officials may be afraid of losing control of their cases if they are referred to the public prosecutor and therefore prefer to handle concerns internally. Moreover, they may be afraid of being subject to retaliatory measures, because of the lack of access, until recently (see *supra*, 1.3.6), to clear and extensive protection against these risks. Finally, they may be afraid that investigations by the prosecuting authorities may go beyond initial complaints and reveal other irregularities, undoubtedly less significant ones, but in which they may have been involved. A number of legal factors were also highlighted, around certain conflicts of duties and the absence of a criminal sanction in the case of failing to report[79]. Nonetheless, a failure to comply with the obligation set out in paragraph two of Article 40 may expose a public official to disciplinary or even criminal proceedings in the case of complicity based on Article 121-7 of the Penal Code or non-reporting of crimes on the basis of Article 434-1 of the same code.

### 2.1.2. In the private sector, although whistleblowing mechanisms are now well established in large businesses, this is not the case in small and medium-sized enterprises, which do not appear to be adequately equipped and for which it is not a priority in a context of major economic difficulties

**Almost all major French companies have now established workplace whistleblowing mechanisms, mainly under pressure from recent foreign legislation extending to other territories (see *supra*, 1.2.1).** Statistics from the CNIL show that in 2006, almost 500 businesses had made a declaration about establishing whistleblowing mechanisms under the terms of the single authorisation system it provides. In a press release dated 8 March 2007, the CNIL announced that *"almost 600 French and foreign businesses had declared that they had established mechanisms in accordance with the rules set by the CNIL"*. These were mainly the subsidiaries of US companies, which are subject to the SOX Act. Since then the trend has continued and extended beyond businesses that fall within the scope of US legislation. Major public companies (La Poste, SNCF, Areva, etc.) have, in turn, established workplace whistleblowing mechanisms that comply with the principles defined by the CNIL. These mechanisms are generally characterised by covering a large population, including not only employees but also interns and temporary staff, and being handled internally either by ethics specialists appointed for this

78 J.-L. Nadal, *Renouer avec la confiance publique*, report submitted to the President of the Republic, January 2015, p.128.

79 As confirmed by the Criminal chamber of the Court of Cassation, 13 October 1992, *Bull. crim*.,no. 320.

purpose or, more generally, ethics and professional conduct departments (as is the case at SNCF). In all cases, the people to whom warnings are sent internally occupy senior positions within the organisational hierarchy, mostly as part of general management. In all large corporations, however, in both the private and public sectors, workplace whistleblowing mechanisms are, in line with the CNIL's guidelines, supplementary rather than a substitute *"for the usual points of contact for communicating warnings"* namely managers, staff representatives or the labour inspectorate[80].

**In practice, however, workplace whistleblowing mechanisms are not widely used.** Given the lack of a detailed statistical study to date, it is not easy to assess the current situation with any certainty. Nonetheless, all the key players interviewed for this study, including the representatives of employee and employer organisations, highlighted the limited number of referrals recorded by the workplace whistleblowing mechanisms implemented in large companies. One example concerns a large group listed on the CAC 40, where the workplace whistleblowing mechanism introduced several years ago has only recorded five to ten cases a year, with a workforce of several tens of thousands of employees. Most of the warnings issued within the group concerned issues of human resources organisation and management rather than risks or illegal actions relating to corruption or tax fraud. Increasing the number of warnings should clearly not be an end in itself; nonetheless, it is important to ask why the number of warnings is so low and check that it is not due to the fact that there is not enough awareness of whistleblowing mechanisms in the business or that they are too difficult for employees to access.

**Most small and medium-sized businesses do not have any specific whistleblowing mechanisms at all.** This is a direct result of the size of these businesses. Indeed, it is not realistic to introduce a whistleblowing mechanism comparable to those found in large groups, in businesses that only have a small number of employees and are facing a difficult economic situation. On the other hand, our interviews with small and medium-sized businesses underlined the importance of the role played by local bodies – in the first instance, the employer and, if applicable, staff representatives. They also highlighted the existence of other contacts, external in this instance, which have a particularly detailed understanding of the local situation of small and medium-sized businesses, and which need to be on the alert and could be approached on an *ad hoc* basis, such as sub-prefects, other decentralised state services (such as the regional departments for the environment, planning or housing; regional departments for business, competition, consumer affairs, work and employment) and in particular, the labour inspectorate.

**This brief overview suggests that overall, employees make only very limited use of whistleblowing procedures.** Two recent surveys, carried out on behalf of the organisation Transparency International France, shed more light on this situation[81].

80 "The position of the Labour Ministry", interview with Jean-Denis Combrexelle, "Report or warn" special report, Cadres CFDT journal, no. 439, June 2010.

81 *Fraudes, malversations, lanceurs d'alerte… Comment réagissent les salariés français ?*, studied conducted by the consultancy Technologia, November 2015; *Lanceurs d'alerte : quelle perception de la part des salaries ?*, Harris Interactive, November 2015.

It emerges that although almost a third of the employees consulted say that they have observed fraudulent practices within the workplace, a clear majority say that there are no dedicated whistleblowing procedures in their business, and over 80% say they are unfamiliar with the legislation on whistleblowers. Almost 40% of those surveyed admit that, if they became aware of an act of corruption in their workplace, they would speak to a colleague rather than another individual or body.

### 2.1.3. Implementation by the administrative authorities of the various sector-specific provisions recently adopted by the legislature therefore remains at an embryonic stage

**Unlike large private and public-sector corporations, the administrative authorities have not yet introduced specific mechanisms to collate the warnings referred to them.** Although there are numerous monitoring or vigilance mechanisms in place in relation to health and environmental issues, which are used to pick up weak signals, none of the ministries consulted during the research for this study appears to have implemented a specific system comparable to the whistleblowing mechanisms found in the workplace. In particular, it emerged that no ministry has appointed anyone with responsibility for compiling the warnings issued by public officials within an appropriate framework. Similarly, no circulars have yet been issued, setting out the terms of implementation for the laws recently adopted in respect of protection for whistleblowers. Without a statistical system in place, it is currently impossible to produce an assessment of the number of warnings that may have been issued within the administration based on recent legislative provisions and how they would have been treated (at an administrative level or through the courts). Nonetheless, the information provided by the administrative authorities in relation to this study suggests that the number of warnings issued is still very low.

**The implementation of Act no. 2013-316 of 16 April 2013, in particular, has been patchy.** Pursuant to this act and Decree no. 2014-1628 of 26 December 2014, numerous public institutions have set up registers where they can record the warnings passed to them in relation to public health and the environment. This is the case, for example, at agricultural training colleges, institutions involved in agricultural research or expert analyses, and health agencies. Conversely, as we have seen, the National Commission on ethics and whistleblowing in relation to public health and the environment instituted by Article 2 of Act no. 2013-316 of 16 April 2013 has still not been established, even though the terms of its composition and operation were set out in Decree no. 2014-1629 of 26 December 2014.

**Nonetheless, we can see a trend towards enlarging the prerogatives of certain inspection and monitoring bodies and organisations in relation to warnings.**

Firstly, in the justice area, the constitutional review of 23 July 2008 and its implementing act of 22 July 2010 entitled anyone falling within the jurisdiction of a court who believes, during a court procedure concerning them, that the behaviour adopted by a judge in the course of their duties might make them subject to a disciplinary procedure, may refer the case to the Conseil supérieur de la magistrature

(Judicial Service Commission). The complaint may not be anonymous under any circumstances and must include details of the proceedings concerned as well as the date and identity of the complainant. The complaint is examined by a committee that decides on the admissibility of the request and whether or not it should be forwarded to the Judicial Service Commission's disciplinary panel. The committee is entitled to inform the judge concerned and summon them to a hearing.

**The Inspection générale de la gendarmerie nationale (IGGN), which is responsible for inspecting the gendarmerie, has made a complaint form freely available on the Ministry of the Interior's website, which can be completed by anyone who wishes to inform the inspectorate of any unethical behaviour by the gendarmerie.**[82]**.** The same applies to the Inspection générale de la police nationale (IGPN) which is responsible for inspecting the police, whose reporting system, which is available on the internet[83], enables anyone who believes that have been *"the victim or witness of behaviour likely to call into question officers assigned to a department of the national police force"* to report it to the IGPN by completing an online form. The platform states that the person making the report must include their identity and that *"any misleading reports will be systematically forwarded to the judicial authorities for legal action and may, in certain circumstances, be subject to a complaint by the Ministry of the Interior".* In 2014, the platform received eight reports, six of which were forwarded to the departments concerned for checking and administrative processing.

**It should be noted that none of the administrative authorities that have implemented the new mechanisms has recorded a proliferation of misleading or malicious warnings.**

## 2.2 These provisions cover a very wide field, but form a whole that lacks coherence and consistency and as things stand they have not been fully reconciled with other rights

### 2.2.1. The sector-specific provisions recently adopted by the legislature cover a very wide spectrum but are difficult to interpret and present discrepancies that lead to legal uncertainty

**In order to develop appropriate protection for whistleblowers, the legislature has defined sector-specific rules and regimes, reflecting the wide diversity of issues involved.** It has not yet undertaken the task of defining the common characteristics of these various whistleblowing mechanisms. It is now clear that there is a need for a comprehensive approach. The various laws relating to

82 The IGGN's complaint form is available at: http://www.gendarmerie.interieur.gouv.fr/Contacts/Formulaire-de-reclamation

83 The IGPN platform is available at: http://www.police-nationale.interieur.gouv.fr/Organisation/Inspection-Generale-de-la-Police-Nationale/Signalement-IGPN

protection for whistleblowers adopted since 2001 (see *supra*, 1.3) have certainly extended the areas in which warnings are likely to be issued, by adding new fields such as discrimination, corruption, health and environmental risks, etc. The result, in France, is that these mechanisms cover a very wide spectrum but do not offer an easily accessible overview to potential whistleblowers. In order to satisfy the objective of visibility, institutions such as the Council of Europe have issued recommendations advocating, though not imposing, an overall framework[84]. For the same reason, several states, including the United Kingdom and Ireland, have adopted whistleblowing legislation, which covers all the circumstances which might result in a warning being issued in one statute (see appendix on comparative law). Leaving aside the question of a single piece of legislation rather than sector-specific laws, the provisions currently in effect also leave open the question of their possible extension to other areas. The proposals put forward by the Council of Europe may be helpful in this respect: these support whistleblowing legislation covering all *"risk to the public interest"*[85], which would go well beyond the current provisions of French law.

**It is not always easy for people who wish to issue a warning to know whether or not they are covered by one of the protection mechanisms recently adopted.** Recent legislation on protection for whistleblowers allows various different people to raise the alarm, depending on the circumstances. These include employees (Act no. 2007-1598 of 13 November 2007), workers (Article 8 of Act no. 2013-316 of 16 April 2013), any natural person or legal entity (Article 1 of Act no. 2013-316 of 16 April 2013), any individual (Article 25 of Act no. 2013-907 of 11 October 2013) or a particular category of public officials, in this case officials in the intelligence services (Article 8 of Act no. 2015-912 of 24 July 2015). With regard to the provisions relevant to businesses, the question of whether these provisions do or do not include people with a more distant connection to the working relationship than an employee – such as interns, temporary staff, consultants and volunteers – is not addressed. Similarly, there is a question mark over whether some of these mechanisms are intended to cover legal entities as well as just natural persons. The latter point is clearly established in Act no. 2013-316 of 16 April 2013, which provides in Article 1 that *"any natural person or legal entity has the right to make public or disseminate in good faith, information"* concerning an action that might constitute a serious risk to public health or the environment. Conversely, other mechanisms have no equivalent provision.

With regard to external whistleblowers, Act no. 2013-316 of 16 April 2013 is also the only one to make specific provision for their intervention. Warnings relating to serious risks to public health or the environment, which are likely to be communicated to the National Commission on ethics and whistleblowing can,

84 *La protection des lanceurs d'alerte*, report of a study on the feasibility of a legal instrument to protect employees who disclose information in the public interest, P.Stephenson and M. Levi, December 2012: *"separate legislation is the best way of covering the subject exhaustively and is easier to communicate to all interested parties*(...) *However, we do not see it as a matter of principle. Sector-specific implementation should not be dismissed".*

85 *Protection of Whistleblowers*, § 41, recommendation CM/Rec (2014)7, Council of Ministers of the Council of Europe, April 2014.

indeed, come from *"any natural person or legal entity"*, which includes, where applicable, people from outside the organisations viewed as the source of the risks concerned. Taking account of external whistleblowers is particularly relevant in respect of preventing health and environmental risks. In respect of corruption or preventing conflicts of interest, the question nonetheless remains open as to whether the protection available under the existing provisions is explicitly available to whistleblowers from outside an organisation.

**Depending on the legislation concerned, issuing a warning can be either an obligation or simply an option.** Some provisions, indeed, establish an obligation to report, like the reporting obligation defined in Article 40 of the Code of Criminal Procedure in relation to crimes and offences, but also similar to the obligation defined by the provisions on whistleblowing and withdrawal in relation to health and safety at work (Article L.4131-1 of the Labour Code). Indeed, by extending the right to whistleblowing and withdrawal to serious risks to public health and the environment, Act no. 2013-316 of 16 April 2013 also provided that the warning concerned constituted an obligation for the worker (Article L. 4133-1 of the Labour Code). Conversely, this is not explicit in most other recent legislative provisions, which focus on the protection afforded to whistleblowers: where the legislation is silent, it must therefore be optional. This also reflects the guidelines from the CNIL in respect of whistleblowing in the workplace, which state that it must be optional, not obligatory (see 1.2.2).

**Finally, the various provisions applicable in this area leave open the question of anonymous warnings.** Admittedly, the protection they establish could not, in practice, be afforded to an anonymous whistleblower who did not reveal their identity at any point. The question remains as to whether an anonymous warning is admissible or not, and whether it can be treated. In some areas, the legislation excludes any possibility of anonymous warnings being treated in any way. This is the case for reports submitted to the High Commission on transparency in public life on the basis of Article 25 of Act no. 2013-907 of 11 October 2013 on transparency in public life. Conversely, with regard to health risks that could endanger human life, an agency such as the French Agency for Food, Environmental and Occupational Health & Safety (ANSES) deals with anonymous warnings in the same way as those submitted by people who are clearly identified, in order to examine the risk and mitigate its consequences as swiftly and effectively as possible. The agency has established a process for this purpose, to record and track all warnings, anonymous and otherwise, redirect them to the relevant body and ensure they are followed up.

**The future choices made by the legislature on each of these points are likely to have a substantial impact on the shape of whistleblowing.**

### 2.2.2. The relationship between provisions relating to protection for whistleblowers and obligations in respect of professional confidentiality and secrecy is not satisfactory as it stands

**As the law currently stands, people who, under the provisions relating to protection for whistleblowers, report facts that are covered by professional confidentiality, are often likely to run the risk of criminal proceedings on the basis of the provisions of Article 226-16 of the Penal Code.** Unlike other legislation that permits the disclosure of wrongdoing, the mechanisms that encourage whistleblowing do not address the question of professional confidentiality that is protected in law; most of them view only malicious accusations as limiting the right to whistleblowing. Article 226-13 of the Penal Code[86], however, sanctions the disclosure of confidential information to someone who is not authorised to share it by someone to whom it has been entrusted. The Criminal Chamber of the Court of Cassation applies these provisions rigorously in the case law. The particularly long list of professionals who are subject to confidentiality includes, among others, doctors and health professionals, social services, financial and commercial professions, legal and judicial professions, civil servants and other public officials: all people who are likely to issue warnings in light of the laws recently adopted by Parliament. In order not to be sanctioned on the basis of the provisions of article 226-13 of the Penal Code, in the case of breaching confidentiality, they must be in one of the two situations covered by the provisions of Article 226-14 of the Penal Code. The first situation deals with cases *"where the law imposes or authorises the disclosure of the secret,"* where this authorisation is expressly given by the law. The second situation deals with three cases explicitly cited in this article, including informing the judicial authorities of *"deprivation or physical abuse"* inflicted on a minor or individuals who are unable to protect themselves. Insofar as whistleblowers covered by the various mechanisms examined in the first part of this study are not included in the cases covered by this second situation, it is only if they are covered by the first situation that they could be exempt from the sanctions provided for in Article 226-13 of the Penal Code. However, none of the provisions on the protection of whistleblowers expressly authorises the revelation of facts covered by professional confidentiality. This represents a limit to the protection afforded to whistleblowers, on which no court yet appears to have ruled and which the legislature has not yet addressed.

**With regard to civil servants in particular, the relationship between whistleblowing mechanisms and the ethical obligations they are supposed to respect is still too unclear.** Legal opinion and the case law relating to the application of the provisions of paragraph two, Article 40 of the French Code of Criminal Procedure do, admittedly, provide some form of response. Both legal opinion and the case law have, in fact, clarified the relationship between the reporting obligation set out in this article and the two ethical obligations set out in Act no. 83-634 of 13 July 1983 on the rights

86 According to the terms of Article 226-13 of the Penal Code: *"The disclosure of confidential information by someone to whom it has been entrusted either in writing or by means of a declaration, as a result of their job or a temporary assignment, is punishable by one year's imprisonment and a fine of €15,000."*

and obligations of civil servants: the obligation to maintain professional discretion (Article 26) and the obligation to obey line management (Article 28). On the first of these, several authors agree that the exemptions provided for in paragraph two of Article 26[87] should include reports submitted to the public prosecutor on the basis of Article 40 of the Code of Criminal Procedure[88]. With regard to the obligation to obey line management, the Conseil d'État decided, in the *Guigon* ruling of 15 March 1996[89], that a public official may inform the public prosecutor directly without having to *"refer"* to their line manager. Nonetheless, this ruling should not be taken to mean that a public official issuing a warning by a channel other than their line manager is automatically released from any obligation to obey them. As President Vigouroux confirms, *"given the importance and consequences of such an accusation for the proper operation of the administration, it is recommended that except in specific circumstances, the public official concerned should seek advice from their line manager"* and that *"it is natural and lawful that their line manager should seek to organise and guide policies on reporting to the courts"*[90]. Civil servants are too often left to their own devices in this respect.

## 2.3 The provisions recently adopted by the Parliament, which focus on protection for whistleblowers, are not sufficiently specific about the procedures to be implemented and methods for dealing with justified warnings

### 2.3.1. There is no clear gradation between first internal and then external reporting procedures, in contrast to the approach taken by the European Court of Human Rights and several foreign legislatures

**As things currently stand, the recent provisions on protection for whistleblowers do not provide them with clear instructions as to which channels they can use.** While they are focused on the protection to be afforded to whistleblowers, they are mainly confined to stating that the warning concerned can be communicated

87 According to paragraph two, Article 26 of Act no. 83-634 of 13 July 1983, *"Civil servants must show discretion in respect of all the facts, information or documents of which they are aware in the course or as a result of their duties. Apart from the cases expressly provided for by the regulations in effect, notably in respect of freedom of access to administrative documents, civil servants can only be released from said obligation of professional discretion by an express decision of the authority to which they report."*

88 See implicit sol. Cass. Crim. 6 July 1977, *Bull. crim*. no. 255; G. Chalon, "L'article 40 du code de procédure pénale à l'épreuve du statut général de la fonction publique", AJFP, 2004, p.27; J.P.Foegle and S. Pringault, "Les lanceurs d'alerte dans la fonction publique, les mutations contemporaines d'une figure traditionnelle de l'agent public", AJDA, 2014, p.2256.

89 CE, 15 March 1996, *Guigon*, no. 146326, published.

90 C. Vigouroux, *Déontologie des fonctions publiques*, Dalloz, 2013-2014, p.496-497.

by an individual *"either to their employer, or to the judicial or administrative authorities"* (the phrasing used notably by Act no. 2007-1598 of 13 November 2007 on combating corruption and Act no. 2011-2012 of 29 December 2011 on improving the safety of medicines). Act no. 2013-907 of 11 October 2013 on transparency in public life adds to this list *"the authority within the organisation responsible for ethical conduct"* and *"an accredited anti-corruption organisation".* Act no. 2013-316 of 16 April 2013 on the independence of expert assessment in respect of health and the environment is the only piece of legislation that explicitly provides for the possibility of public disclosure. Furthermore, none of these provisions indicates the order in which cases should be referred to these various channels over time. There is no staged process.

**The case law of the European Court of Human Rights on freedom of expression provides some useful guidance on this point.** Based on Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the right to freedom of expression, the Court has ruled on several cases in which employees or civil servants have used this right to issue a warning about wrongdoing of which they were aware. In its decision on the case of *Guja v. Moldova* on 12 February 2008[91], the Court established a framework on which it has since relied on several occasions. In this ruling, it initially found that *"employees have a duty of loyalty, confidentiality and discretion in respect of their employer"* and that *"this applies in particular to civil servants, insofar as the very nature of the civil service imposes an obligation on its members to act loyally and maintain confidentiality".* It found that, given the obligation to maintain confidentiality, it was important that *"disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public."* In so doing, the Court established the principle of referring cases to a series of channels over time, applicable to employees under both public and private law. Since confirmed by the ruling in *Heinisch v. Germany* of 21 July 2011[92], the case law implies that the employee or civil servant concerned should first refer the case to their line manager; should this prove impossible (insofar as the line manager is personally involved in the wrongdoing in question) or fruitless, they may refer it to the competent administrative or judicial authority; should this referral also prove manifestly impossible or fruitless, then disclosure to the public is a possibility, provided that the information disclosed is in the public interest, that it is accurate and that the employee's or civil servant's actions are not motivated by a personal grievance or animosity or by a desire for personal advantage.

The legislation adopted in the United Kingdom and, more recently, by Ireland in relation to protection for whistleblowers also uses a staged approach. The UK law – the *Public Interest Disclosure Act* adopted in 1998 – which served as a framework for the adoption of the Irish law, is based on a three-stage process[93]. The first stage is to report one or more instances of wrongdoing as defined in the law to the employer.

91 ECHR, Gr. Ch., 2 February 2008, *Guja v. Moldova*, no. 14277/04.

92 ECHR, 21 October 2011, *Heinisch v. Germany*, no. 28274/08.

93 *Making Whistleblowing Work*, presentation by the foundation *Public Concern at Work*, 4 February 2015, Paris.

Should reporting the situation to the employer be ineffective or inappropriate, the case can be referred to a regulator, namely a competent administrative authority or the courts; the warning must therefore be based on information that the whistleblower is confident is based in fact. Should this second referral also be ineffective or inappropriate, the employee may make a public disclosure of the information concerned; again, in order for the employee to benefit from protection under the law, they must be confident that the information is based in fact, that it is in the public interest and that there is a valid reason for disclosing it to the public. The act also stipulates what can be considered a valid reason, noting that this may be a reasonable fear of retaliation in the case of referral to the employer, but also the non-existence of a competent regulator or the exceptional severity of the wrongdoing concerned. The Irish law is based directly on this staged approach, with a clear distinction between the successive channels that provide protection to the individual who refers a case to them: the employer in the first instance; a competent individual prescribed by a minister; the minister if the whistleblower is a public official; a lawyer or trade union leader; other channels, without further details, which implicitly include disclosure to the public.

### 2.3.2. Methods for dealing with justified warnings have to date been practically ignored by the provisions relating to whistleblowers

**Some of the provisions recently adopted by the legislature do, however, address this question.**

This is the case, firstly, with provisions relating to the right to whistleblowing in relation to health and safety at work and the provisions of Act no. 2013-316 of 16 April 2013, which were directly inspired by it in respect of public health and the environment. With regard to these latter provisions, which were codified in Article L. 4133-1 of the Labour Code, they stipulate that when a worker warns their employer of processes that *"represent a severe risk to public health or the environment"*, said warning must be *"formalised in writing"* and above all, *"that the employer must inform the worker who communicated the warning of the follow-up action it intends to take".*

Warnings communicated to the National Commission on ethics and whistleblowing in relation to public health and the environment instituted by Act no. 2013-316 of 16 April 2013, is another example of warnings whose method of treatment is stipulated in the law. Indeed, Article 2(4) of the Act provides that the Commission *"shall communicate warnings referred to it to the relevant ministers, which shall inform the Commission of the follow-up action taken in relation to said warnings and any referrals to health and environmental agencies for which they are responsible as a result of said warnings. The decisions of the relevant ministers concerning the follow-up action taken in response to warnings and possible referrals to agencies must be communicated to the Commission, including their supporting arguments. The Commission shall keep the person or organisation that referred the case informed of its decisions."*

Warnings about the actions of the intelligence services, governed by the provisions of Article 8. of Act no. 2015-912 of 24 July 2015 on intelligence (codified in Article L.861-3 of the Internal Security Code), provide a third example of warnings for which the method of treatment has been defined by the legislature. According to paragraph two, section I of Article L.861-3 of the Internal Security Code, where the National Commission on the Control of Intelligence Techniques *"believes that the illegality observed is likely to constitute an offence, it shall refer the matter to the public prosecutor on the basis of confidentiality in respect of national defence matters, and send all the information made available to it to the Consultative Commission on confidentiality in respect of national defence matters so that the latter may offer the Prime Minister its opinion on the possibility of declassifying all or part of the information for it to be communicated to the public prosecutor".*

**This is not the case with all recent legislation on protection for whistleblowers.** Act no. 2007-1598 of 13 November 2007 on combating corruption and Act no. 2011-2012 of 29 December 2011 on improving the safety of medicines, for example, are confined to mentioning the potential recipients of the warning and the protection likely to be afforded to its originator.

**Yet the question of treatment is essential:** the various opinion polls carried out with whistleblowers show unambiguously that their desire for the warning to be dealt with is one of their leading motivations.

## 2.4 The protection currently afforded to whistleblowers, which relies exclusively on the role of the judge and the extent of which varies from one law to another, is not yet sufficiently effective

### 2.4.1. Protection for whistleblowers, as provided for in the existing legislation, relies primarily on the intervention of a judge and its scope varies from one law to another

**This protection is based on the possibility available to the judge to declare a series of actions taken against a whistleblower, and which might be regarded as retaliatory measures, null and void**. The drafting of legislation on the protection of whistleblowers draws, in this respect, on the provisions adopted by the legislature in respect of discrimination. This consists of drawing up a set of measures likely to be viewed as retaliation – such as sanction, dismissal, discrimination, etc. – and emphasises that no-one who has provided evidence or reported in good faith any risks or wrongdoing to their employer or the administrative and judicial authorities may be subject to such measures, which may be declared null and void by the judge. A system of proof that is favourable to the whistleblower strengthens this protection: it is sufficient for the latter to establish the facts that have led it to assume that the measures to which it has been subjected are retaliatory, while it is for the defendant, i.e. the employer, to prove that its decision is justified by objective elements distinct from the warnings issued.

In its overall structure, the approach adopted by the legislature is in line with that advocated by the Committee of Ministers of the Council of Europe in the recommendation entitled *Protection of Whistleblowers,* which it adopted on 30 April 2014[94]. Indeed, the Council of Europe states in its recommendation that *"whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer"* (point 21); as regards the system of proof to be adopted, it is recommended that *"in legal proceedings relating to a detriment suffered by a whistleblower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated".*

**It remains the case that recent provisions relating to the protection of whistleblowers are not all identical with regard to actions that are likely to be viewed as retaliatory measures.** For example, although some make explicit reference to the termination of an employment contract as one of the actions a judge is likely to declare null and void, if it is established that in the cases concerned it constitutes a retaliatory measure (Article L.1161-1 of the Labour Code; Article 25 of Act no. 2013-907 of 11 October 2013), no such mention appears in Article L.5312-4-2 of the Public Health Code, nor in Article L. 1132-3-3 of the Labour Code. Such differences in drafting can lead to legal uncertainty for people seeking to take advantage of protection. Moreover, some drafting implies that protection is limited to people who are permanently employed in the business or administration concerned, excluding people who work on an ad hoc basis but could still be whistleblowers, for example interns or temporary staff.

### 2.4.2. Finally, this protection applies exclusively in the context of a dispute, i.e. after any reprisals have occurred, with no mechanisms available beforehand to prevent any reprisals from occurring

**The existing provisions are all based on the idea that the judge is the only person able to guarantee the protection that should be afforded to whistleblowers who have reported wrongdoing or risks in good faith.** The idea that whistleblowers in a business could constitute a specific category of employees and in this respect enjoy similar protection to that afforded to protected employees was considered but ultimately dismissed. While legal protection is essential, it should not exclude the intervention, further upstream, of bodies that could prevent retaliatory measures being taken.

**In this respect, several states have established structures responsible for providing support to whistleblowers who believe they have been victims of retaliation.** This is the case in the Netherlands in particular, which was one of the first European countries to introduce specific whistleblowing procedures for civil servants. In 2006, the country created a commission to promote ethical standards and integrity in the public sector, which advises civil servants on appropriate behaviour and the remedies available to them. In 2011, the National Ombudsman extended the scope of its powers to include interventions with whistleblowers after they have made a

94 *Protection of Whistleblowers*, recommendation CM/Rec (2014)7, Council of Europe, 30 April 2014.

report and as a result find themselves exposed to the risk of retaliatory measures. Finally, in 2012, an advice and information point for whistleblowers (*Adviespunt Klokkenluiders*) opened, to offer support to both public officials and private-sector workers who want to make a report or believe they have been victims of reprisals. These are all support structures with no equivalent in France for the time being.

# Part three

# Improving these mechanisms presupposes the adoption of a common foundation based on secure, staged procedures, effective treatment of warnings and effective protection for both whistleblowers and those who are targeted

Although warnings can be issued in multiple areas and call for specific and appropriate provisions, the gaps identified in part two suggest that it would be beneficial for the law to define a common foundation of provisions applicable to ethical whistleblowing. First of all, the law needs to provide a definition of a whistleblower, by specifying that ethical whistleblowing, regardless of the subject, is initiated by an individual who, having observed a serious risk, notably for health or the environment, or serious breaches of laws or regulations, decides to do so freely and in good conscience. A whistleblower must act in the public interest and not seek to further their own interests or harm someone else.

This study also recommends that the law should set out the principles governing ethical whistleblowing, in particular the fact that it is optional and not paid, along with the methods to be used, notably the establishment of secure, staged channels available to the whistleblower. It must also set limits, in particular on how to reconcile it with respect for confidential information protected by criminal law. Finally, the law must define the principles underpinning protection for whistleblowers, ensuring it maintains a balance between the appropriate protection for those who blow the whistle in the public interest and protection for those individuals or legal entities that could be targeted by a warning that ultimately proves to be malicious or unfounded. These general principles applicable to ethical whistleblowing could then be implemented via sector-specific laws in various areas or to tackle certain types of risk. In this respect, particular procedures could be considered for the armed forces.

Part three sets out what a common foundation might include.

**Proposal no. 1**: Define in law a common set of provisions applicable to anyone who, when faced with facts that constitute serious breaches of the law or carry serious risks, freely and in good conscience decides to issue a warning in the public interest, which would form the basis for a harmonisation of existing sector-specific mechanisms in relation to whistleblowers.

In addition to defining a whistleblower, this common foundation would specify:

- a series of secured, staged procedures available to whistleblowers to issue a warning;

- how the recipients of the warning should deal with it;

- the protection available to whistleblowers acting in good faith against any retaliatory measures.

Vector: *law*.

## 3.1 This common foundation must, firstly, be based on staged, secure and widely accessible procedures and a clear relationship between whistleblowing and criminal provisions in respect of confidentiality

### 3.1.1. Defining secure, staged procedures which businesses and administrative authorities would be encouraged to adopt is an essential pre-requisite for implementing existing whistleblowing provisions in full

**Most of the existing provisions are confined to specifying that the warnings concerned must be communicated either to the employer, or to the administrative and judicial authorities,** without further details. This is too general and unclear. In particular, it does not establish any gradation between the channels to which potential whistleblowers might refer a case when they belong to the organisation concerned, whether they work for a business or are public officials, from communicating the warning to their line manager, who would remain their main point of contact, through to referring the matter to a competent administrative body or the courts.

**Under these conditions, it is important to establish in law the principle of gradated channels that might be used by whistleblowers who belong to the organisation implicated.** This is based on the more sophisticated examples of legislation relating to whistleblowers adopted by the United Kingdom and Ireland, and the case law

of the European Court of Human Rights. This type of approach puts line managers, though not necessarily the individual's direct line manager, on the front line as recipients of warnings. This is justified by the fact that, in most cases, it is either direct or indirect line managers who are best equipped to provide an appropriate response to the warning in the shortest time frame. It would only be if a warning did not receive a response within a reasonable time frame, or if it was impossible from the outset, because the line managers in question were themselves involved in the activities being reported, that there would be recourse to a specific internal channel, if the size of the organisation allowed it. Depending on the organisation, this might be a dedicated workplace whistleblowing mechanism or recourse to an internal inspectorate, ethics specialist or ethics committee. An internal channel of this kind must sit at a sufficiently high level of decision-making (such as the executive committee or general management) and those involved must be given a guarantee of independence so that, if required, the necessary measures can be taken to remedy the actions or risks reported. If, and only if, no response were received within a reasonable time frame or proved impracticable, the case could then be referred to an external channel (such as an administrative authority, professional body or the courts).

**From this perspective, public disclosure would only be envisaged as a last resort,** in accordance with the principles established by the European Court of Human Rights in its rulings *Guja v. Moldova* (no. 14277/04, 12 February 2008) and *Heinisch v. Germany* (no. 28274/08, 21 July 2011). Indeed, in the latter ruling, the Court held that *"an employee who wishes to disclose information must first address their line managers or another competent authority. It is only if this proves manifestly impossible that the information may, as a last resort, be brought to the attention of the public."]* In order to assess whether public disclosure would fall into the realm of freedom of expression as defined in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court nonetheless considers other criteria, such as the public interest of the information disclosed, the authenticity of the information, the respective weight of the damage the disclosure risks causing to the organisation targeted and the public interest there might be in securing such a disclosure, as well as the motivation of the person issuing the warning. Taking such criteria into consideration could, in certain circumstances, justify disclosure to the public other than as a last resort.

**Failure to comply with a staged procedure of this kind could, in any event, be taken into account by the judge in deciding on the degree of protection to be afforded to the person who issued the warning.** It should be noted that this position is entirely in line with the recommendation adopted by the Council of Ministers of the Council of Europe on 30 April 2014, according to which: *the fact that "the whistleblower has made a disclosure to the public without resorting to the system may be taken into consideration when deciding on the remedies or level of protection to afford to the whistleblower"* (point 24).

**Proposal no. 2:** Introduce, based on the case law of the European Court of Human Rights and the legislation in effect in the United Kingdom and Ireland, a series of channels to which cases can be referred by whistleblowers who belong to the organisation they are calling into question: line management, dedicated internal channel (such as an expert in professional ethics, whistleblowing mechanism, general inspectorate, etc.) and external channels (competent administrative authority, professional bodies and the courts). Public disclosure should only be envisaged as a last resort.

Compliance with the correct procedure by a whistleblower who belongs to the organisation called into question would be one of the criteria taken into account by the judge in determining the level of protection they should be afforded.

*Vector*: law (common foundation)

### 3.1.2. The whistleblowing mechanisms implemented by businesses and administrative authorities are intended to be widely accessible to both natural persons and legal entities

**As things currently stand, the legislation on whistleblowers, apart from Act no. 2013-316 of 16 April 2013, only covers employees or civil servants acting in the course of their duties.** Whistleblowing and the protection associated with it therefore seem to form an integral part of the working relationship. The consequence of this link, however, is that it excludes many people who might be likely to make a disclosure to a business or administrative authority about serious risks or wrongdoing from the scope of whistleblowing mechanisms.

**For both businesses and administrative authorities, it would be desirable to extend the possibility of using internal whistleblowing mechanisms to people who have a more distant link to the working relationship.** These include occasional employees such as interns, who may, in the same way as employees, become aware of risks or wrongdoing in the course of carrying out their duties. They also include external partners (such as consultants, subcontractors and temporary staff) who, although they are employed by another entity than the one where or on behalf of which they are working, have a detailed understanding of how it operates. Yet to date, it has not been clearly established that these people can make use of the whistleblowing mechanisms established in the businesses or administrative authorities where they are providing their services. As a consequence, it is proposed that internal whistleblowing mechanisms should be made available to people in this situation, which implies defining clear rules in this area and that the organisations concerned should engage in communications aimed at this group of people. This move also means that there should be protection measures available to people who do not fall within the working relationship *stricto sensu* (see *infra*), but who may be subject to retaliatory measures taken both by the principal and by

the entity which is, in legal terms, their employer. In return, they would be obliged to comply with the proposed staged approach and not proceed directly to public disclosure.

> **Proposal no. 3**: Make the whistleblowing mechanisms introduced in businesses and administrative authorities available to external and occasional partners working in or on behalf of these organisations.
>
> *Vector*: regulations for state administrative authorities and health care institutions, law for local authorities and businesses.

**Similarly, people outside of organisations, whether they are individuals or legal entities, should have access to internal whistleblowing mechanisms subject to appropriate adjustments.** As we have seen, Act no. 2013-316 of 16 April 2013 on the independence of expert assessment in respect of health and the environment and protection for whistleblowers is currently the only piece of legislation that makes explicit provision, in article 1, for a warning issued by *"any natural person or legal entity".* This provision is particularly relevant in this instance, insofar as it refers to facts, data or actions that appear *"to represent a serious threat to public health or the environment".* Nonetheless, people outside a business or administrative authority are still likely to be aware of serious risks or wrongdoing in areas beyond the health and environmental fields only. With regard to corruption, a conflict of interests or discrimination, the fact that people outside an organisation may be well placed to alert it to serious risks or even wrongdoing within the organisation cannot be ignored. Furthermore, the provisions of the Act of 16 April 2013 refer only to public disclosure of such information; they do not provide for the possibility of external people contacting the organisation where the risks or wrongdoing are occurring and which need to be stopped. Yet it is eminently desirable that external whistleblowers should first be able to contact the organisations concerned, before making a public disclosure.

**Legal entities could play a particularly useful role as a filter.** For example, involving associations in preventing conflicts of interest is now provided for under Article 25 of Act no. 2013-907 of 11 October 2013 on transparency in public life. This provides that no-one can be subjected to retaliatory measures for having witnessed or reported, in good faith, facts relating to a situation of conflict of interest with an accredited anti-corruption organisation. To date, the High Commission on transparency in public life (HATVP) has accredited three organisations – *Transparency International*, Sherpa and Démocratie directe – that can be contacted by potential whistleblowers. Going forward, these associations can be contacted by whistleblowers and will pass their warning on to the relevant authorities, which they can identify more easily than an individual with less knowledge of the procedures. Act no. 2013-316 of 16 April 2013 also attributes a filtering and forwarding role to associations, providing in Article 4 that the National Commission on ethics and whistleblowing in relation to public health and the environment can be contacted by consumer protection associations (2.), environmental protection

associations (3.) or associations working in the area of quality of health or patient care (4.). It would be beneficial for this forwarding role to be extended to other fields where whistleblowing mechanisms have been implemented.

Whistleblowers outside the organisation should thus be able to access a series of staged channels, which would allow their warning to be dealt with more quickly and could also be beneficial for the organisation concerned, which could address any problems immediately. It should be possible to have prior contact with the internal whistleblowing mechanism of the organisation concerned taken into account by the judge in determining the level of protection a whistleblower from outside the organisation should be afforded.

> **Proposal no. 4:** Make the whistleblowing mechanisms introduced in businesses and administrative authorities available to external individuals and legal entities subject to appropriate adjustments, without making it obligatory.
>
> *Vector*: law and communication campaigns

**Mechanisms for gathering and dealing with warnings must guarantee strict confidentiality:** it should only be possible to reveal information that might identify the whistleblower with their consent. it should only be possible to reveal information that might identify the target of the warning once it has been proven to be justified.

Indeed, people who want to issue a warning about risks or wrongdoing they might have observed are put off unless confidentiality can be guaranteed.

Confidentiality also guarantees that the information reported can be cross-checked before it is disclosed to the public. Cross-checking of this kind is not only necessary to assess whether a warning is justified before taking any follow-up action, but also to avoid the disclosure of erroneous information causing unjustified and sometimes very severe moral harm to the person or organisation targeted, as might have been the case in the past.

These concerns are entirely in line with those expressed, in 2005, by the National Data Protection Commission with regard to workplace whistleblowing mechanisms. Single authorisation no. AU-004[95] adopted by this institution thus provides, in Article 2, that the identity of a workplace whistleblower *"shall be treated as confidential by the organisation responsible for dealing with warnings,"* while *"those responsible for gathering and dealing with warnings in the workplace shall be limited in number, specially trained and obliged to adhere to a contractually defined confidentiality undertaking"* (Article 4).

Again, the principle of the confidential nature of the procedure, which concerns both the whistleblower and the target, should be set out in the law so that it can then be implemented in all organisations that establish mechanisms to gather and deal with warnings.

95 CNIL, single authorisation no. AU-004, deliberation no. 2005-305 of 8 December 2005 on a single authorisation for automated processing of personal data implemented in the context of whistleblowing mechanisms.

**Proposal no. 5**: Introduce and guarantee strict confidentiality concerning the identity of whistleblowers as well as that of the people targeted and information gathered by all recipients of the warning, both internal and external, until the legitimacy of the warning has been confirmed.

*Vector*: law (common foundation).

**Although more widespread use of such secure mechanisms may be desirable, it does not appear either appropriate or realistic to require all employers to introduce them.**

As stated above (2.1.2), confidential, secure internal whistleblowing mechanisms are still relatively uncommon in small and medium-sized businesses, which do not appear to be adequately equipped and for which it is not a priority in a difficult economic environment. For the latter, introducing an obligation to establish an internal whistleblowing mechanism would appear to be very significantly disproportionate to the resources they have available.

**As a result, a differentiated approach for different actors is desirable.**

**For large businesses, it is a question of consolidating and raising awareness of the mechanisms that are already in place because of foreign legislation extending to other territories.** In a context of widespread use of codes of good conduct and ethical charters, many of these businesses have established workplace whistleblowing mechanisms in the form of telephone hotlines or digital platforms, where reports can be made confidentially. In most cases, these mechanisms have existed for almost ten years and good practices can be identified, in terms of how hotlines or platforms operate, arrangements for ensuring confidentiality, positioning the mechanism correctly internally, follow-up actions taken in response to warnings or effective communications campaigns to ensure that the people who might make use of such mechanisms are familiar with them. In this respect, the public authorities should encourage the development of guides to good practice, which should also be inspired by the practical recommendations made by the CNIL, and support communications campaigns to expand the trend and increase the effectiveness of the mechanisms concerned. Such initiatives could also be extended to intermediate-sized businesses (with up to 5,000 employees), many of which, although they are less advanced in this area than the larger companies, do have the necessary resources.

**With regard to very small, small and medium-sized enterprises, the issue is to identify local contacts to whom a case could be referred internally prior to taking it to the administrative authorities or the courts.** The interviews carried out for this study clearly showed the practical impossibility for most of these businesses to establish internal workplace whistleblowing mechanisms comparable to those implemented by large businesses, because of a lack of human resources and adequate funding. As a result, it is desirable, wherever possible, to rely on existing local contacts. These contacts are, firstly, line managers, who have every interest in receiving alerts relating to wrongdoing or risks associated with their business. The

next level of contact, where they exist, should be the staff representation bodies; again, these are normal points of contact for warnings, insofar as they can forward them to the appropriate level and ensure that there is adequate follow-up. In both cases, the issue is not about creating new organisations, but making businesses aware of the advantage they may gain from dealing with justified warnings and raising awareness among local contacts about their role in receiving warnings.

**With regard to state organisations, health care institutions and large local authorities, which have a role in protecting the public interest and have access to significant resources, there should be an obligation to establish dedicated internal whistleblowing mechanisms.** Very few of these organisations currently have whistleblowing mechanisms in place and the contrast with some foreign administrations or large businesses is stark. Change is admittedly taking place and the research carried out for this study showed that some administrative authorities have established mechanisms to gather warnings relating to discrimination, while others had expanded the role of their general inspectorate or control bodies. Establishing ethics specialists in each ministry to whom crimes, offences and conflicts of interest can be reported, as provided for in the bill on ethics and the rights and obligations of civil servants, will be significant progress. None of these avenues, however, is sufficient. At the same time, they show that an obligation to establish a single system – identical in each administrative authority – appears to be unrealistic. The obligation in question would therefore be for each administrative authority to identify a point of contact within the organisation, which may, if necessary be a body (general inspectorate or control body, ethics committee or professional conduct committee) or an individual (ethics specialist, whose role would be expanded). This body or individual must be sufficiently autonomous and have guaranteed independence while occupying a sufficiently senior position in the hierarchy to be able to act on any justified warnings referred to them. The warnings concerned could therefore relate to any of the fields for which the legislature has provided specific protection (discrimination, harassment, corruption, crimes and offences, conflicts of interest and severe risks to public health and the environment).

**In small local authorities, the issue is more about identifying the right points of contact internally, without creating new mechanisms.** Once again, it is line managers who are likely to be working in the front line, as well as staff representation bodies where these exist. Should the line management in these local authorities itself have been called into question, any warnings would naturally have to be communicated externally, initially to the prefectural services, which are responsible for monitoring legality.

**In any case, all organisations will be responsible for running their internal mechanisms, ensuring both that people are aware of them and that they are effective.** This implies communicating about these mechanisms to those who are likely to use them. It also implies dissuading those managers within an organisation who might oppose their proper operation, in particular by reminding them that anyone who fails to follow up a warning or deliberately obstructs the process is likely to face disciplinary sanctions and, in certain circumstances, could be

held criminally liable (for example, if the life of another person is endangered). Finally, it implies a periodic assessment of the effectiveness of the mechanisms implemented and reporting on the assessment using appropriate tools such as the human resources report, where this exists, or comparable mechanisms.

**Proposal no. 6:**

**I.** Introduce an obligation to appoint people who are responsible for gathering warnings issued internally and, if applicable, externally, in all state administrative authorities, health care institutions and large local authorities. The recipients of such warnings could, depending on the circumstances, be a general inspectorate, ethics or professional conduct committee, or ethics specialist. In any event, they must be sufficiently autonomous and occupy an appropriately senior position in the hierarchy.

*Vector*: regulations for state administrative authorities and health care institutions, law for local authorities.

**II.** Encourage the implementation of dedicated internal whistleblowing mechanisms in businesses on the basis of a differentiated approach consisting:

- in large businesses, of consolidating them by tying them to existing structures, for example compliance departments or ethics specialists, and raising awareness of the mechanisms that are already in place;

- in small and medium-sized businesses, of raising awareness among the usual points of contact for warnings, namely line managers and staff representation bodies, where these exist.

*Vector*: soft law (guide to good practice)

**It is still the case that whistleblowing by each of these people must be optional and only obligatory in the specific circumstances set out in the existing legislation.**

Three types of provision currently make reporting to the competent authority obligatory. In the first place, and for public officials only, there are the provisions of Article 40 of the Code of Criminal Procedure, which relates to the nature – crime or offence – of the actions leading to the warning being issued. Next, for all workers, come the provisions on exercising the right to whistleblowing and withdrawal with regard to health and safety at work. Finally, there are the provisions in the Penal Code relating to crime prevention, mistreatment of vulnerable people and assistance to people in danger.

Apart from these three circumstances, there appears to be no benefit in making whistleblowing an obligation. The optional nature of exercising the right to blow the whistle was explicitly emphasised by the CNIL in its single declaration AU-004, derived from deliberation no. 2005-305 of 8 December 2005. Conversely, it is not included in the provisions recently adopted by the legislature, which deal with the protection that should be afforded to whistleblowers. In this respect, it should be

included in the common legislative foundation. The opposite solution, namely making whistleblowing obligatory, does not appear to be either appropriate or realistic. In terms of opportuneness, going down this route could encourage a proliferation of malicious warnings, and from a pragmatic point of view, it seems very difficult to predict what control judges could exercise over failure to comply with an obligation of this kind.

**Proposal no. 7:** Continue to make whistleblowing optional rather than obligatory, in contrast to what is already provided by law for specific whistleblowing mechanisms (Article 40 of the Code of Criminal Procedure for reporting crimes and offences; the right to whistleblowing and withdrawal in relation to health and safety at work; Article 434-1 of the Penal Code on informing the judicial or administrative authorities of a crime of which someone might become aware and which can still be prevented or the effects of it limited; article 434-3 of the Penal Code on the mistreatment of children or vulnerable people; articles 223-6 and 223-7 of the Penal Code on failing to provide emergency assistance).

*Vector*: law (common foundation)

### 3.1.3. The relationship between whistleblowing mechanisms and criminal provisions in respect of confidentiality needs to be clarified

**As things currently stand, and with the notable exception of the law on intelligence, the various pieces of legislation on whistleblowing do not address the question of the connection between the protection they introduce for the whistleblower and the protection for certain secrets covered by the provisions of the Penal Code. Yet there cannot be effective protection for whistleblowers if they may be confronted at any time with compliance with the confidentiality of all information protected under criminal law.**

Reconciling respect for confidentiality and protection for whistleblowers means making delicate judgments, insofar as the protection provided by the Penal Code with regard to different kinds of confidentiality (medical confidentiality, professional confidentiality, national defence confidentiality, etc.) can arise from agreed or constitutional imperatives. Moreover, not all secrets have the same intensity and some (medical secrets, national defence secrets, etc.) are more prominent than others.

Furthermore, given that in some instances the case law has established the prevalence of confidentiality over other imperatives, for example the obligation to give evidence in court, the issue is not only one of disclosure to the press – far from it. We cannot dismiss the possibility of a whistleblower being prosecuted and convicted for a breach of confidentiality, even if they have confined their actions to using the internal channels recommended by this study or they have reported facts

to the courts pursuant to Article 40 of the Code of Criminal Procedure.

The conflict between respect for confidentiality protected by the law and the rights and guarantees available to whistleblowers could be mitigated by the establishment of recipients authorised to share certain secrets in respect of internal warnings.

In any case, the general provisions on protection for whistleblowers are not sufficient to breach confidentiality protected under the law; this can only be achieved by express legislative provisions setting out each of the secrets they intend to reveal. In fact, provisions that disregard breaches of confidentiality that are protected under the criminal law have already been introduced for whistleblowers in the intelligence field, as cited, and for certain professionals, notably in the health care sector, in cases that concern protection for the integrity of children or vulnerable people.

It is for the legislature to determine, in other sector-specific items of legislation, the conditions under which it is possible to disregard certain secrets protected under the criminal law in order to blow the whistle and thus, on a case-by-case basis and depending on the secrets concerned, reconcile the possibility of issuing a warning about certain facts and the necessity of protecting the confidentiality of such facts. Adopting express proposals is even more important in cases where the pre-eminence of confidentiality could be a real hindrance to the operation of whistleblowing mechanisms, both internally and with the administrative and judicial authorities.

The idea of an easier exemption from confidentiality in the context of internal warning channels is one of the possible avenues that could be considered. With regard to referring a case to the courts, it appears that the legislature needs to tackle this question in order to allow exemptions, depending on the nature and system for each secret that is protected by law and, if necessary, appropriate procedures, intended to make the process safe for the whistleblower and protect them from possible criminal sanctions punishing the breach of protected secrets.

Ultimately, regardless of the circumstances, it will still be for a judge to decide whether there has been a breach of confidentiality that could be sanctioned under the criminal law.

**Proposal no. 8:** Specify the arrangements for reconciling provisions on whistleblowing and each of the secrets protected under the criminal law, by determining the conditions under which they can be waived to issue a warning.

*Vector*: sector-specific laws.

## 3.2 Rather than creating a central authority, effective treatment of justified warnings calls for a single portal tasked, where necessary, with forwarding them to the relevant authorities and encouraging the latter to inform whistleblowers of the actions taken

### 3.2.1. Creating a central authority for dealing with warnings appears neither necessary nor even desirable

**Creating a central authority responsible for dealing with all warnings once the use of internal whistleblowing mechanisms has been exhausted does not appear to be desirable, as in addition to the inherent cost of this kind of organisation, such an authority could not have the necessary skills for effective treatment.** In practice, the provisions on whistleblowers cover highly different fields, from corruption to discrimination, conflicts of interest of serious risks for public health and the environment. In each of these fields, handling a warning requires sophisticated technical skills to decide on appropriate measures. As far as health is concerned, the French Agency for Food, Environmental and Occupational Health & Safety has high-level professionals and laboratories that enable warnings to be treated in the areas of food, the environment, health, work and consumer affairs. These resources are far removed from those that need to be available to the High Commission on transparency in public life in order to identify situations of conflicts of interest, or those available to the Central Prevention of Corruption Department to identify corrupt practices. Duplicating existing specialist structures would make no sense, and gathering all the resources able to deal with warnings issued in these various fields together in a single authority does not appear either helpful or even a serious possibility. This study does not therefore recommend the creation of a central authority of this kind.

### 3.2.2. Conversely, it would appear desirable to establish a body tasked with redirecting the residual number of warnings issued by people who do not know which authority to refer to

Once all internal whistleblowing mechanisms have been exhausted, the main difficulty whistleblowers can face relates to identifying the relevant authorities to receive and deal with their warning. Indeed, different authorities are involved depending on the field concerned – discrimination, corruption, crimes and offences, public health or the environment. Except for cases that need to be referred directly to the courts, for example in relation to crimes and offences, the competent authorities are administrative bodies (agencies, independent administrative authorities and decentralised state services), which potential whistleblowers may struggle to identify. With regard to the fields covered by the existing provisions on

protection for whistleblowers, the following administrative authorities are given as illustrative examples of useful points of contact on the basis of some of the powers attributed to them:

- Corruption: Central Prevention of Corruption Department (SCPC);
- Conflicts of interest: High Commission on transparency in public life (HATVP);
- Discrimination and harassment: National ombudsman and regional departments for business, competition, consumer affairs, work and employment (DIRECCTE);
- Environment: French Environment and Energy Management Agency (ADEME), French Agency for Food, Environmental and Occupational Health & Safety (ANSES), regional departments for the environment, planning and housing (DREAL) and the Nuclear Safety Authority (ASN);
- Public health: French Agency for Food, Environmental and Occupational Health & Safety (ANSES), French National Agency for the Safety of Medicines and Health Products (ANSM), French Institute for Public Health Surveillance (InVS), Biomedicines Agency, National Cancer Institute, Institute for Radiological Protection and Nuclear Safety (IRSN); Nuclear Safety Authority (ASN); French Anti-Doping agency (AFLD).

**Although these institutions all have websites and are easy to identify for anyone who is familiar with the sector, this is not always the case for whistleblowers and establishing a single whistleblowing portal is therefore desirable.** The role of a portal of this kind would be residual, insofar as it would not have to be used by people who knew which administrative authorities to contact and who tend to issue the most warnings: they would continue to make direct referrals. The aim would simply be to forward warnings issued by people who did not know whom to contact. Its role would therefore simply one of forwarding. It would not be a filter either, as sorting the warnings referred to it would assume it was in a position to deal with them which, as we have seen, appears to be somewhat unrealistic in light of the diverse range of fields in which warnings may be issued. Prior to forwarding the warnings communicated to it, the portal would need to register them, so that the whistleblowers who used it could, if necessary, know that no response had been received in a reasonable time and address the consequences accordingly.

Concerns of this kind have already led the legislature to create a National Commission on ethics and whistleblowing in relation to public health and the environment in accordance with Act no. 2013-316 of 16 April 2013. Indeed, under the terms of Article 2(4) of the Act, the Commission's role is to *"[communicate] warnings referred to it to the relevant ministers, which shall inform the Commission of the follow-up action taken in relation to said warnings and any referrals to the health and environmental agencies for which they are responsible as a result of said warnings".* Because the Commission has not yet been set up, these provisions have not yet been implemented. Nonetheless, the task of establishing a single whistleblowing portal could be entrusted to said National Commission on ethics and whistleblowing, which would mean extending its powers beyond just the health and environmental fields and changing its composition, which reflects its current powers in health and environmental matters.

In any case, it would seem desirable for a portal of this kind to be subject to a periodic evaluation, in order to ensure its effectiveness.

> **Proposal no. 9:** Set up a portal tasked, as necessary, with forwarding to the relevant authorities warnings made by people who do not know which body to contact, by expanding the powers of the National Commission on ethics and whistleblowing instituted by the Act of 16 April 2013 to areas other than the health and environmental field only, rather than creating a single authority responsible for dealing with warnings.
>
> *Vector*: law (common foundation).

### 3.2.3. Finally, there is a case for encouraging, and if applicable, obliging the managers and authorities to whom cases are referred to inform both whistleblowers and their targets of the actions taken in response to the reports they receive

**In the absence of such information from the authorities to which warnings are referred, whistleblowing lacks any substance.** This point was made abundantly clear during the interviews carried out for this study: a warning that does not elicit any kind of response feeds a level of distrust in the authority or manager asked to deal with it. Yet a lack of response is still the rule in too many cases: 40% of the people questioned in a recent survey stated that, if confronted with evidence of corruption in their workplace, they would stay silent because they had the impression nothing would be done if they issued a warning[96]. Rather than an additional rule of procedure that would burden overworked administrative authorities with decreasing resources, it is, in fact, the first stage in dealing with a warning.

**It would also seem necessary to promote the obligation for the authority to which a warning is issued, first to acknowledge receipt and then keep the whistleblower informed of any follow-up action taken in response to their warning.** The practice of issuing an electronic acknowledgement has been widespread in the administrative authorities since the adoption of the Code on the relationship between the public and the administrative authorities, which states in Article L.112-11 that *"any message sent to an administrative authority by electronic means and any payment made by means of a remote service* (...)*must be acknowledged by means of an electronic receipt and, where this is not instant, by an electronic acknowledgement of its having been recorded"*. It could be extended beyond just the administrative authorities to which these provisions apply. The same could apply to the information subsequently provided on the follow-up action taken in response to the warning. This duty of information does not only apply to the whistleblower but also the individual or organisation implicated: it is just as essential that the latter is kept informed by the authority or manager to

96 *Lanceurs d'alerte : quelle perception de la part des salariés ?*, Harris Interactive, November 2015.

which a warning is issued, for the purpose of implementing a procedure involving both sides in order to establish the legitimacy of the warning, except for specific cases and stages in the procedure where such information might facilitate the destruction of evidence.

**The duty to keep both the whistleblower and those implicated informed should initially fall to line managers.** In reality, this is a normal function of management: a manager who receives a warning about a serious risk or wrongdoing should not simply impose silence in either a business or an administrative body. Furthermore, silence would be all the more harmful to an organisation if, in the absence of a response being provided within an appropriate time frame, a whistleblower belonging to the organisation could, in accordance with the staged approach described above, legitimately refer the case to an external channel, either an administrative authority or the courts, while retaining the benefit of full protection against retaliatory measures.

**Proposal no. 10:**

**I.** Work with state administrative authorities, health care institutions and large local authorities to establish an obligation on managers to whom a warning is issued first, to acknowledge receipt and subsequently, keep the whistleblower informed of the follow-up actions taken.

*Vector*: regulations for state administrative authorities and health care institutions, law for local authorities.

**II.** Work with businesses to promote good practice which consists, for managers to whom a warning is issued, first of acknowledging receipt and subsequently, keeping the whistleblower informed of the follow-up actions taken.

*Vector*: soft law (guide to good practice).

**Proposal no. 11**: Provide appropriate arrangement for the person targeted by a warning to be kept informed and define the circumstances in which providing information would not be desirable, in particular to avoid the destruction of evidence.

*Vector*: soft law (instructions for administrative authorities, guides to good practice for businesses).

## 3.3 Effective protection for whistleblowers who act in good faith calls for a harmonisation and strengthening of existing provisions and the establishment of appropriate structures, in addition to the role already played by judges in the ordinary and administrative courts

### 3.3.1. Harmonise and supplement existing provisions in order to strengthen the protection afforded to internal whistleblowers

**As things currently stand, existing legislation relating to protection for whistleblowers shows a significant degree of variation. All the legislation is based on drafting that was directly or indirectly inspired by the provisions applicable to discrimination.** This consists of listing actions that will automatically be null and void if it proves that there were taken as retaliatory action by the employer. The lists in question vary, however, depending on the fields covered by particular provisions. While some make explicit reference to dismissal, others do not, even though a decision to dismiss someone can undoubtedly constitute a retaliatory measure taken by an employer because of warnings made by one of the employees they manage. It would also be useful to harmonise the existing provisions by using a formulation that is both more concise and more comprehensive, which would target retaliatory measures that might be taken by an employer against a whistleblower placed under their authority, providing examples including, among others, disciplinary sanctions, redundancy, dismissal or, where applicable, non-renewal of a contract. The effect of this would be to cover a wide field, while leaving it to the judge's discretion to assess, in each specific case, whether the negative measures taken by the employees were prohibited retaliatory measures. If so, the judge will be entitled not only to declare said measures null and void, but also to award damages to the whistleblower against whom they were taken.

**Proposal no. 12:**

**I.** Assert in law the principle under which any retaliatory measure taken by the employer against a whistleblower who has acted in good faith shall be null and void; produce as comprehensive a list of examples of such measures as possible and leave it to the judge's discretion to assess, in each particular case, whether the measures taken are contentious.

*Vector*: law (common foundation).

**II.** Harmonise sector-specific legislation relating to protection for whistleblowers on the basis of this principle.

*Vector*: sector-specific laws.

**As well as being harmonised, these provisions, which are aimed exclusively at internal whistleblowers, could be strengthened.** As far as public officials are concerned, provision could be made for judges in the administrative courts to order the reinstatement of an official who has been a victim of retaliatory measures that have led to their dismissal.

Reinstating or renewing the contract of someone who has issued a legitimate warning and then been the subject of a retaliatory measure, which is recognised as such by a judge, appears to be a logical consequence if the retaliatory measure involved redundancy, non-renewal of a contract or dismissal. That said, such a path may be difficult to implement in practice in organisations that are not of a sufficient size to offer the party concerned a job in a department where they would not suffer further reprisals. In small businesses, reinstatement of this kind is somewhat unrealistic: in most cases, the person who has issued a warning before finding themselves facing retaliatory measures finds that they are ostracised by the work community and returning to it – which they do not necessarily want – is difficult to imagine in practical terms. The situation is different in local authorities, however, which are not only guardians of the public interest but also of sufficient size to offer the person concerned a redeployment in acceptable conditions, if necessary in another department from the one where they were originally employed.

As things currently stand under the ordinary law governing the civil service, a decision by a judge in the administrative courts to declare the dismissal of a civil servant in a permanent post null and void, where it has been established that it was a retaliatory measure, implies the official's legal reinstatement, as well as their actual reinstatement in a comparable position and even, in some cases, in their previous job[97]. The same applies in the case of a judge in the administrative courts declaring the decision to dismiss an official on an indefinite contract null and void. It is not the case, however, for employees on fixed-term contracts. Two solutions can then be envisaged. A judge in the administrative courts declares the dismissal of these officials null and void, implying retroactive legal reinstatement; however, the administration is not obliged to reinstate them in practice except where, on the date of the decision by the courts, the contract has not yet reached its normal expiry date, which only happens very rarely. With regard to a judge in the administrative courts declaring the non-renewal of a fixed term contract null and void, this does not necessarily imply, under the terms of Articles L.911-1 and L. 911-2 of the Code of Administrative Justice, the renewal of the contract but only a re-examination of the official's situation[98]. In this second case, declaring the decision null and void does not necessarily imply the official's actual return to their job or to a comparable job.

As a consequence, the power of the judge in the administrative courts to give directions should be enhanced, so that declaring the dismissal of a public official null and void, where it has been established that this was a retaliatory measure, in all circumstances implies their actual reinstatement or the renewal of their contract.

97 V. CE, Sect., 16 October 1959, *Guille*, p.516; CE, 27 April 2012, no. 327732.
98 See, for example, CE, 25 May 2007, no. 279648.

**Proposal no. 13**: Supplement the power of the judge in the administrative courts to give directions by providing explicitly, in the legislation applicable to the public sector, that they may order the administration to actually reinstate a public official whose redundancy, non-renewal of contract or dismissal has been deemed a retaliatory measure taken because of their blowing the whistle.

*Vector*: law (common foundation).

### 3.3.2. Improve protection for external whistleblowers by encouraging public prosecutors to ensure that whistleblowers who act in good faith do not become victims of wrongful defamation proceedings

**The legislation protects only internal and not external whistleblowers, regardless of whether they are natural persons or legal entities. T**he protection afforded to external whistleblowers is not the same, insofar as they are not likely to suffer reprisals from an employer. They can, however, be subject to intimidation, pressure or vexatious legal proceedings brought by those targeted by the warning.

**External whistleblowers are particularly likely to face wrongful proceedings for defamation.** The interviews carried out for this study have shown that those targeted by warnings issued by external whistleblowers often instigated such proceedings, which are covered by the provisions of Article 29 of the Act of 29 July 1881 on the freedom of the press, even though such proceedings may only rarely result in a conviction. The use of such proceedings is, nevertheless, a disincentive for whistleblowers, given their speed and the ease with which they attract media coverage.

**In order to prevent this risk, the prosecuting authorities could be instructed to make use of the possibility of calling for sanctions under the civil law against those who instigate vexatious proceedings.** With regard to press violations, there are no criminal sanctions that can be imposed on those who make wrongful use of such proceedings[99]. Conversely, it is permissible for a judge hearing a case for defamation to pronounce civil sanctions for vexatious proceedings as well as damages. However, such sanctions are rarely imposed in practice, insofar as they would require submissions from the prosecuting authorities to support them. Using them more frequently in cases that use defamation proceedings as a retaliatory measure against a whistleblower would help to bring an end to this form of harassment.

**Proposal no. 14:** Encourage the prosecuting authorities to make use of the possibility of calling for civil sanctions against a person who instigates defamation proceedings against a whistleblower who has acted in good faith and which are declared malicious by a judge, while remaining alert to warnings that are themselves defamatory.

*Vector*: instruction to the prosecuting authorities.

99 This runs counter to the provisions for malicious accusations, in which someone who knowingly begins an action for denunciation they know to be unfounded, risks receiving a criminal sanction.

### 3.3.3. Reserve all protection mechanisms for whistleblowers who act in good faith, while sanctioning those who act wrongfully or maliciously

The legislation on protection for whistleblowers makes the provision of such protection conditional on **the person having acted in good faith**, which this study recommends should be reasserted. Verifying that this is the case should not, however, rely exclusively on the subjectivity of the issuer of the warning (their intentions) but must take into account the more objective element of whether they had a reasonable belief in the truthfulness of the facts they intended to report in light of the information to which they had access.

More broadly, the discussions that have taken place in the context of this study have shown that the right to whistleblowing has, from the outset, been linked to the pursuit of the public interest. A warning cannot, under any circumstances, be issued in order to benefit individual interests, for reasons of personal animosity or with the intention of causing harm; similarly, it should not be seen as a kind of informing for those who make wrongful use of it. Sanctions exist for each of these cases, of which all those involved should be aware.

First of all, there are disciplinary sanctions. Any wrongful warning, in either a business or administrative authority, can indeed result in disciplinary sanctions by the employer or authority with disciplinary powers.

There can also, however, be criminal sanctions.

As a result, a warning issued by someone who is aware that the information it contains is entirely or partially inaccurate exposes the originator to prosecution on the basis of **Article 226-10 of the Penal Code on malicious accusations. T**his offence has existed in the Penal Code for a long time, and exposes anyone who commits it to a penalty of five years' imprisonment and a fine of €45,000, as well as being ordered to pay any damages that might be awarded to the victim, and to pay their legal costs.

Similarly, publicly disclosing a piece of information that undermines the honour or respect of the person or organisation concerned can be classed as **defamation.** This is covered by provisions 29 to 32 of the Act of 29 July 1881 on the freedom of the press and carries a penalty of a maximum fine of €45,000 if it is committed against a public body.

**Positive law therefore already has mechanisms in place to prevent the multiplication of wrongful or malicious warnings, without the need to create new offences or introduce other specific provisions.**

### 3.3.4. Establish structures and procedures both before and after a warning is issued, so that judges are no longer the only ones guaranteeing effective protection for whistleblowers

**As things currently stand, the legislative provisions relating to protection for whistleblowers rely solely on judges, who are tasked, where applicable, with declaring the retaliatory measures taken against them null and void.** Each of these provisions is based on a system of proof that favours the whistleblower, insofar as it is the defendant, i.e. the employer, which must establish that their decision is justified by objective elements that are distinct from the warnings issued.

**Moreover, judges in the ordinary and administrative courts are likely, in addition to declaring unjustified retaliatory measures null and void, to award compensation or indemnities respectively to whistleblowers** who have suffered as a result.

Finally, emergency proceedings can be brought before a judge in both the ordinary and administrative courts so that any provisional measures necessary to protect whistleblowers can be taken quickly.

Although these mechanisms are essential they place protection for whistleblowers in an exclusively litigious context. As a result, it would be desirable to introduce preventive mechanisms for this type of dispute.

**A first type of action for the public authorities would consist of supporting civil-society initiatives aimed at creating support and advice organisations for whistleblowers.** Numerous organisations already play a very active role in providing support for whistleblowers. Several have considered the creation of a "whistleblowers' centre" which could offer potential whistleblowers legal advice and appropriate support. Such initiatives could be supported by the public authorities insofar as they are equipped to advise potential whistleblowers upfront about the procedures to follow in order to benefit fully from the protection afforded under the law and so that effective responses can be given to their warnings, as well as informing them about their rights.

**At the pre-litigation stage, there is also the possibility for the national ombudsman to enforce the rights of people who believe they have been victims of retaliatory measures because of the warnings they have issued** in the fields covered by the law. A discussion involving both parties could be organised before the case is taken to the judge, if necessary. This would again help to prevent the multiplication of disputes, by mobilising the skills and experience of the national ombudsman with regard to combating discrimination, along with the network of contacts to which the ombudsman has access across the country.

Under the terms of Article 4(3) of Act no. 2011-333 of 29 March 2011, based on Article 71-1 of the Constitution, the national ombudsman is currently responsible for *"combating direct or indirect discrimination prohibited by law* (...)". In this respect, they may be contacted by anyone who believes they have been a victim of discrimination and are tasked with carrying out the necessary investigations to establish the reality of the situation. The ombudsman has significant powers to

investigate and make enquiries in this respect. These include the right to receive any evidence that may be useful for carrying out their enquiries, which cannot be withheld on the grounds of confidentiality except with regard to secrets relating to national defence, state security or foreign policy (Article 20). They can also summon the people concerned to a hearing and carry out checks in situ (Article 22). Finally, should their investigations establish that the allegations made are justified, the ombudsman has two solutions available to them: either to proceed on the basis of recommendations and an amicable settlement, which is the institution's preferred route, or, in the most serious cases, to support sanctions, by appearing before a judge in the ordinary courts as an expert, or by asking the Minister of the Interior or the Minister of Justice to impose administrative sanctions in the case of public officials.

Under these powers, which are stipulated in Act no. 2008-496 of 27 May 2008, which contains various provisions adapting European Union law in the area of combating discrimination, the ombudsman already has a role in protecting whistleblowers with regard to people who have reported acts of discrimination. One of the ways of extending the powers of the ombudsman to whistleblowers, in this respect, could consist of classifying retaliatory measures taken against people because of the warnings they have issued as discrimination under the law. This would amount to adding a new discrimination criterion to those set out in Article 1 of the Act of 27 May 2008.

It is not self-evident, however, that a retaliatory measure taken in response to a warning issued by someone should be viewed as discrimination in the strict sense of the term, insofar as discrimination is usually associated with the personal attributes of the person concerned (age, gender, ethnic background, etc.) rather than their actions. This study therefore does not advocate amending Article 1 of the Act of 27 May 2008 but adding to Article 4 of the act governing the role of the national ombudsman, a new power to ensure protection for the rights of people who face retaliatory measures because of warnings issued in the fields covered by the law.

> **Proposal no. 15**: Extend the powers of the national ombudsman (Défenseur des Droits) to include protection for whistleblowers who believe they have been the victim of retaliatory measures, as soon as they issue their warning.
>
> *Vector*: legislation.

### 3.3.5. Dismiss the idea of financial incentives for whistleblowers

**All actors interviewed during the course of this study confirmed their opposition to the introduction of financial incentives for whistleblowers, primarily because of the risk of encouraging wrongful or malicious warnings.** These views are in line with the assessment made by the European Court of Human Rights in its ruling in *Guja v. Moldova* of 12 February 2008 (no. 14277/04), whereby *"an act motivated by a personal grievance or a personal antagonism or the expectation of personal*

*advantage, including pecuniary gain, would not justify a particularly strong level of protection"*. Moreover, there are existing compensation mechanisms in place for people who provide useful information to certain administrative authorities; people who receive compensation in the usual way are not comparable to whistleblowers as defined in this study and the provisions introducing protection mechanisms for them. Whistleblowers, indeed, find themselves unexpectedly faced with wrongful behaviour or a risk; it is therefore not a usual activity for them and they act in the public interest, rather than to secure compensation.

## 3.4. These recommendations are intended to form a common foundation for all whistleblowing mechanisms

**The research carried out for this study has shown that, depending on the fields concerned, whistleblowers can find themselves in a very diverse range of situations based on their expectations, the people around them and the arrangements for appropriate protection.** This diversity argues for a differentiated rather than a blanket approach. From a legislative point of view, this differentiated approach consists of maintaining provisions on protection for whistleblowers in the sector-specific laws (Labour Code, civil service regulations, discrimination law, Public Health Code, Internal Security Code, etc.) rather than combining them all in a single law and ignoring the inevitable differences between each of the sectors concerned.

**The recommendations above, however, are intended to form a common foundation for all the existing sector-specific provisions, so that they all comply with one framework.** In this respect, the Conseil d'État believes that the adoption of a common foundation could give rise a single law, which could also amend each of the existing sector-specific provisions in accordance with the principles set out above. Proceeding in this way would have the benefit of increasing the coherence of all these provisions, while maintaining the specific characteristics of each of the sectors concerned as well as the general principles.

# Conclusion

Whistleblowing has not yet reached the age of maturity. Since 2007, it has grown and developed rapidly and now needs to be clarified, harmonised and enhanced, so that a culture of ethical whistleblowing can flourish in both businesses and the administrative authorities.

A common definition of an “ethical” whistleblower needs to be reaffirmed, based on the principles of good faith, disinterestedness, non-payment and freedom. In certain well defined cases, based on the nature of the duties carried out or the severity of the facts or risks identified, an obligation to blow the whistle may be imposed. But in other cases, there should be freedom to choose.

Common rules should also underpin the practical arrangements for whistleblowing mechanisms, based on principles of proportionality, confidentiality and effectiveness. A variety of reporting channels must be made accessible and used as part of a staged process, on a scale appropriate to the situation concerned; the identity of whistleblowers and the information gathered by recipients must remain confidential; reconciling the need for confidentiality in areas protected by the law and protection for the whistleblower must be provided for in law and implemented in tangible terms by the judiciary ; where there is a doubt over the choice of recipient, whistleblowers must be able to issue their warnings via a general portal on the internet, which is responsible for forwarding them to the relevant authority so that it can deal with them; protection against any retaliatory measures must be harmonised and measures that are not permitted should appear on a single list that is as comprehensive as possible, without depriving judges of their power to use their discretion; the victims of such measures must be able to refer a complaint to the national ombudsman and, in the case of litigation, the power of judges in the administrative courts to give instructions must allow them to remedy an official’s illegal dismissal effectively.

Additional measures must be taken in all businesses and administrative authorities to ensure ethical whistleblowing mechanisms become a practical reality. Their accessibility needs to be clarified, particularly in the case of external or occasional staff working for the organisation concerned; people, entities and authorities tasked with dealing with warnings must be clearly identified and, regardless of their title or status, enjoy sufficient autonomy and occupy a senior position in the hierarchy. For small and medium-sized businesses, special awareness-raising and support measures must be envisaged.

An ambitious reworking of our whistleblowing law should be based on two pillars: on the one hand, a common foundation, making it possible to identify an ethical whistleblower and define their rights and obligations clearly; on the other, a body of special rules, enshrined in legislation or regulations or provided under soft law

measures, setting out – given the diversity of situations and, in particular, the organisation and particular operation of each business and administrative authority – the practical arrangements for whistleblowing and measures taken to inform and raise awareness. Modernising it in these ways does not mean a root-and-branch reform of our whistleblowing law; rather, it is about enhancing it, supplementing and using its full potential based on a pragmatic, balanced approach that is faithful to the principles and values that underpin and inspire it.

# Appendices

**Appendix 1 – Letter of engagement from the Prime Minister**

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# Appendix 1 – Letter of engagement from the Prime Minister

Paris, 17 July 2015

The Prime Minister
to
Mr Jean-Marc Sauvé
Vice President of the Conseil d'État

Re: Request for study on ethical whistleblowing.

Ethical whistleblowing has recently been introduced into French law and now features in several pieces of legislation.

The Act of 13 November 2007 on combating corruption introduced this concept into Article L.1161-1 of the Labour Code.

The Act of 29 December 2011 on improving the safety of medicines and health products was incorporated into the Public Health Code Article L.5312-4-2 applicable to people who have reported or provided evidence, in good faith, of facts relating to the safety of certain products referred to in Article L.5311-1 of the same code.

The Act of 16 April 2013 on the independence of expert assessments in respect of health and the environment and protection for whistleblowers includes various provisions on whistleblowers. Among other things, it instituted a National Commission on ethics and whistleblowing in relation to public health and the environment. This defines the rules on whistleblowing in relation to public health and the environment.

The Act of 11 October 2013 on transparency in public life includes a section 6 "Protection for whistleblowers" and an Article 25, which deals with people who, in good faith, report or provide evidence of conflicts of interest relating to members of the government, senior local executives or senior public officials.

The Act of 6 December 2013 on combating tax fraud and serious economic and financial crime introduced an Article L.1132-3-3 into the Labour Code. This sets out the rules for protection of people who have, in good faith, reported or provided evidence of acts that constitute a crime or offence, which they have come across in the course of their duties. The same Act inserted a similar provision at Article 6 ter A of the Act of 13 July 1983 on the rights and obligations of civil servants. The bill on ethics and the rights and obligations of civil servants also includes provisions on this matter. Finally, during the debate on the Intelligence Bill, Parliament introduced into the Internal Security Code a new Article L.861-3 providing protection for any official in one of the intelligence services bringing facts representing a clear breach of the law to the attention of the National Commission on the Control of Intelligence Techniques.

Moreover, drafts of European directives could also soon include provisions in this area.

All these pieces of legislation share the fact that they govern the situation of someone who believes they have uncovered serious information and brings it to the attention of someone else. They all protect the persons concerned provided they have acted in good faith.

Given the variety of legislative provisions and their recent increase in number, I believe a review of this area should be carried out. A critical analysis is a necessary pre-requisite before introducing any new provisions that may be required, particularly in terms of sector-specific legislation.

I would therefore like the Conseil d'État to examine the concept of ethical whistleblowing, its usefulness, its relationship with issuing an early warning to the relevant managers, its limitations and the sanctions applicable in the case of wrongful whistleblowing. Comparisons should be drawn with the existing provisions in the criminal law and criminal procedure, particularly Article 40 of the Code of Criminal Procedure.

Your work may include practical proposals to clarify the mechanism and ensure protection for those concerned, but also on how to avoid going to extremes, and protect both individuals and legal entities from wrongful or malicious "warnings".

During your research, you may call on any of the ministerial departments concerned, particularly within the Ministry of Justice, Ministry of the Economy and Finance, Ministry of Social Affairs, Health and Women's Rights, Ministry of Labour, Employment, Vocational Training and Social Dialogue, and the Ministry of Decentralisation and the Civil Service.

I would like this study to be submitted to me by the end of 2015.

Manuel Valls

# Appendix 2 – Composition of the working group

***President*: Ms Emmanuelle Prada Bordenave, senior member of the Conseil d'État**
***Rapporteur*:** Mr Tristan Aureau, junior member of the Conseil d'État,
with the support of Ms Mylène Bernabeu, senior judge in the administrative court and administrative court of appeal, and Mr Stéphane Eustache, judge in the administrative court and administrative court of appeal

**For the Conseil d'État,**

Mr Michel Pinault, president of section (h) of the Conseil d'État
Mr Philippe Carré, member of the Conseil d'État on secondment, member of the Reports and Studies section and the Finance section

**For the academic sector,**

Mr Henri Oberdorff, emeritus professor of the University of Grenoble-Alpes.

**For the non-profit sector,**

Ms Nicole-Marie Meyer, project officer at Transparency International,
Mr Glen Millot, coordinator of the Sciences Citoyennes foundation

**For the central administrative authorities,**

***Ministry of Ecology, Sustainable Development and Energy***

**Legal Affairs Department**
Mr Julien Boucher, Director of Legal Affairs
supported by Mr Benjamin Thywissen, head of bureau for general law, criminal law, European and international environmental law in the sub-department of legal affairs relating to the environment and urban planning in the Legal Affairs Department

**General Commission on Sustainable Development**
Mr Lionel Moulin, head of mission for risks, environment and health in the research team of the Research and Innovation Department

***Ministry of Justice***

**Civil and Legal Affairs Department**
Mr Jean-Christophe Gracia, head of department, deputy director

**Department of Criminal Affairs and Pardons**
Ms Caroline Nisand, deputy director,
supported by Mr Thibault Cayssials, judge in the office of specialist criminal legislation and Ms Sonya Djemni-Wagner, project officer to the director of the

**Central Prevention of Corruption Department**
Mr Pierre Berthet, adviser

*Ministry of the Economy and Finance*

**Legal Affairs Department**
Mr Jean Maïa, Director of Legal Affairs
supported by Mr Pascal Filippi, head of the employment policy bureau and Stéphane Derouin, deputy head of bureau, law relating to employment policy and regulated professions

*Ministries of Social Affairs*

**Legal Affairs Department**
Mr Philippe Ranquet, Director of Legal Affairs
supported by Ms Maud Lambert-Fenery, project officer to the Director of Legal Affairs

**Ministry of Labour, Employment, Vocational Training and Social Dialogue, Department of Labour**
Mr Olivier Toche, head of department,
accompanied by Ms Cynthia Métral, deputy head of bureau for individual labour relations, Ms Anne-Gaëlle Casandjian, deputy head of bureau for physical, chemical and biological risks at the Department of Labour and Ms Annie-Claude Carel, project officer in the sub-department of labour relations, office of individual labour relations

**Ministry of Social Affairs, Health and Women's Rights, Department of Health**
Mr Frédéric Séval, head of users' rights, legal and ethical affairs division,
supported by Ms Sarah Rueda, legal consultant responsible for quality of law and ethics

*Ministry of the Interior*

**Department of Public Freedoms and Legal Affairs,**
Mr Thomas Andrieu, Department of Public Freedoms and Legal Affairs and Ms Pascale Léglise, deputy director of legal advice and litigation,
supported by Mr Amaury Vauterin, head of bureau, civil service disputes and legal protection for civil servants and Mr François-Xavier Prost, deputy head of bureau

*Ministry of Decentralisation, state reform and the civil service*

**Administration and Civil Service Department**
Ms Florence Cayla, legal adviser to the DGAFP, supported by Anne-Brigitte Masson, deputy head of bureau for the General Civil Service Regulations and social dialogue and Mr Antoine Thomas, legal affairs researcher at the civil service and social dialogue office at the DGAFP

# Appendix 3 – List of people interviewed

*The job titles mentioned are those that applied on the date when the persons concerned were interviewed. (listed in alphabetical order)*

Sofia Afonso, legal and compliance manager at LEEM, supported by Ingrid Callies, manager of the ethics and professional conduct division;

Jean-Paul Bouchet, General Secretary of CFDT Cadres, supported by Ute Meyenberg, expert with UNI Europa Finance and member of the Banking Stakeholder Group of the European Banking Authority;

Jean-Baptiste Carpentier, interministerial delegate for economic intelligence;

Michel Chassang, president of the UNAPL, supported by Chirine Mercier, general representative;

Bruno Dalles, director of the Tracfin unit of the Ministry of Finance and Public Accounts;

Edouard Geffray, General Secretary of the CNIL;

Professor Alain Grimfeld, Honorary President of the National Consultative Committee on Ethics (CCNE), President of the Prevention and Precaution Committee;

Frédéric Grivot, President of the National Union of Small and Medium-Sized Industries of the CGPME, supported by Franck Gambelli, member of the Social Affairs Committee;

Mireille Gueye, General Secretary of the General Union of Engineers, Executives and Technicians of the CGT

Christiane Lambert, first vice-president of the FNSEA;

Professor Gérard Lasfargues, Deputy Director General for Scientific Affairs at ANSES;

Gérard Le Houx, Senior Engineer (bridges, waterways and forests) General Council for the Environment and Sustainable Development;

Catherine Mir, deputy head of department for nuisance prevention and environmental quality at the Department of Risk Prevention, Ministry of Ecology, Sustainable Development and Energy;

Isabelle Roux Trescases, head of general economic and financial control for the financial ministries

Richard Senghor, General Secretary for the National Ombudsman

Joëlle Simon, Director of Legal Affairs at MEDEF, supported by Chantal Foulon, Deputy Director, Department of Labour Relations and Dominique Lamoureux, Director of Ethics and Responsibility at Thales;

Guillaume Valette-Valla, General Secretary of the High Commission on transparency in public life.

# Appendix 4 – Legislation relating to protection for whistleblowers

## Act no. 2007-1598 of 13 November 2007 on combating corruption (extracts)

"Article 9

I. – Book I of part one of the Labour Code as drafted on the basis of order no. 2007-329 of 12 March 2007 on the Labour Code (Legislative Part) is supplemented by a title VI as follows:

"TITLE VI
CORRUPTION

Art. L.1161-1. – No-one may be denied access to a recruitment procedure or to an internship or period of in-house training and no employee may be sanctioned, dismissed or discriminated against, either directly or indirectly, notably in respect of compensation, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract for having reported or provided evidence, in good faith, either to their employer, or to the judicial or administrative authorities, of acts of corruption of which they have become aware during the course of their duties.

Any termination of an employment contract arising as a result, and any provision or act to the contrary shall be automatically null and void.

In the case of a dispute relating to the application of the first two paragraphs, and provided that the employee concerned or candidate applying for a job, internship or period of in-house training establishes the facts allowing it to be assumed that they have reported or provided evidence of acts of corruption, it shall be for the defendant, in light of the evidence, to prove that their decision is justified by objective elements distinct from the employee's declarations or evidence. The judge will reach his or her conclusion having ordered all the investigations he or she deems necessary."

## Act no. 2011-2012 of 29 December 2011 on improving the safety of medicines (extracts)

"Article 43

Article L. 5312-4-2 is inserted after Article L.5312-4 as follows:

"Art. L.5312-4-2. – No-one may face discrimination, be denied access to a recruitment procedure or to an internship or period of professional training nor be sanctioned or discriminated against, either directly or indirectly, notably in respect of compensation, treatment, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract for having reported or provided evidence, in good faith, either to their employer, or to the judicial or administrative authorities, of facts relating to the safety of the products referred to in Article L.5311-1, of which they have become aware during the course of their duties.

"Any provision or act to the contrary shall be automatically null and void.

In the case of a dispute relating to the application of the first two paragraphs, and provided that the person establishes the facts allowing it to be assumed that they have reported or provided evidence of facts related to safety, it shall be for the defendant, in light of the evidence, to prove that their decision is justified by objective elements distinct from the person's declaration or evidence. The judge will reach his or her conclusion having ordered all the investigations he or she deems necessary."

## Act no. 2013-316 of 16 April 2013 on the independence of expert assessment in respect of health and the environment and protection for whistleblowers

"TITLE I: RIGHT TO WHISTLEBLOWING IN RELATION TO PUBLIC HEALTH AND THE ENVIRONMENT

Article 1

Any natural person or legal entity has the right to make public or disseminate in good faith, information concerning a fact, piece of data or action, where ignorance of this fact, piece of data or action appears to them to constitute a serious risk to public health or the environment.

The information that they make public or disseminate must not include any defamatory or offensive accusations.

TITLE II: THE NATIONAL COMMISSION ON ETHICS AND WHISTLEBLOWING IN RELATION TO PUBLIC HEALTH AND THE ENVIRONMENT

Article 2

A National Commission on ethics and whistleblowing in relation to public health and the environment shall be created, with responsibility for monitoring the ethical rules that apply to scientific and technical expert assessments and to the procedures for recording warnings in relation to public health and the environment.

To this end, it:

1. Shall issue general recommendations on the principles of professional conduct specific to scientific and technical expert assessments in relation to health and the environment, and ensure they are disseminated;

2. Shall be consulted on the codes of professional conduct implemented in public institutions and organisations that are involved in expert assessments or research in the field of health or the environment, the list of which is fixed in accordance with the conditions laid down in Article 3. Where an ethics committee is set up in said institutions or organisations, it shall receive their annual report;

3. Shall define the criteria used to establish the admissibility of an alert and the information placed on the registers held by the public institutions and organisations referred to in point 2;

4. Shall communicate warnings referred to it to the relevant ministers, which shall inform the Commission of the follow-up action taken in relation to said

warnings and any referrals to health and environmental agencies for which they are responsible as a result of said warnings. The decisions of the relevant ministers concerning the follow-up action taken in response to warnings and possible referrals to agencies must be communicated to the Commission, including their supporting arguments. The Commission shall keep the person or organisation that referred the case informed of its decisions;

5. Shall identify best practices, in France and abroad, and issue recommendations concerning systems for exchanging information between scientific bodies and civil society on scientific expert assessment procedures and the rules of professional conduct relating to them;

6. Shall produce an annual report addressed to Parliament and the government, which assesses the actions taken in response to its recommendations and the warnings referred to it, as well as the implementation of procedures to record warnings by the public institutions and organisations referred to in 2. Where necessary, this report shall include recommendations on the reforms that should be undertaken to improve the operation of expert scientific and technical assessments and the management of warnings. It shall be published and accessible on the internet.

Article 3

Public institutions and organisations that are involved in expert assessments or research in the field of health or the environment shall keep a register of the warnings passed to them and the follow-up actions taken.

A decree issued by the Conseil d'État shall specify the list of such institutions or organisations and the arrangements for maintaining the registers.

Said register shall be accessible to the ministerial control bodies responsible for supervising the institutions and organisations tasked with maintaining them and to the National Commission on ethics and whistleblowing in relation to public health and the environment.

Article 4

The National Commission on ethics and whistleblowing in relation to public health and the environment may intervene of its own accord or be required to do so by:

1. A member of the government, member of the National Assembly or senator;

2. A consumer protection organisation accredited pursuant to Article L.411-1 of the Consumer Code;

3. An environmental protection organisation accredited pursuant to Article L.141-1 of the Environment Code;

4. An association operating in the field of the quality of health care and patient treatment accredited pursuant to Article L.1114-1 of the Public Health Code;

5. A representative employee trade union operating at the national level or an inter-professional employers' organisation;

6. The national body for a profession working in the health or environmental sectors;

7. A public institution or organisation involved in expert analysis or research in the field of health or the environment.

Article 5

The National Commission on ethics and whistleblowing in relation to public health and the environment shall include, among others, members of the National Assembly and senators, members of the Conseil d'État and the Court of Cassation, members of the Economic, Social and Environmental Council and people who are qualified in respect of their work in the areas of risk assessment, ethics or professional conduct, social sciences, employment law, environmental law or public health law, or who belong to public institutions or organisations involved in expert assessment or research and which have carried out joint expert assessment projects.

A decree issued by the Conseil d'État shall set out the operational arrangements and composition of the National Commission on ethics and whistleblowing in relation to public health and the environment in order to ensure equal representation of men and women.

Article 6

Members of the National Commission on ethics and whistleblowing in relation to public health and the environment and those who support or occasionally collaborate with them shall be subject to rules on confidentiality, impartiality and independence in carrying out their duties.

They shall be required to make a declaration of interests when they take up the role. This shall include interests of any kind, either direct or via an intermediary, which the individual making the declaration has currently or has had in the five years prior to taking office, with businesses, institutions or organisations whose activities, techniques or products relate to the health or environmental sectors and with consultancy firms or organisations working in the same sectors. It shall be made public and updated as necessary, by the party concerned, and at least once a year. The persons referred to in this article may not take part in work, discussions or votes within the Commission until the declaration has been produced or updated. They may not, subject to the penalties provided for in the first paragraph of Article 432-12 of the Penal Code, take part in any work, discussions or votes if they have a direct or indirect interest in the matter at hand. They shall be obliged to maintain professional confidentiality under the same conditions as those defined in Article 26 of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants.

Article 7

Details of how this article is applied shall be explained in a decree issued by the Conseil d'État.

TITLE III: EXERCISE OF THE RIGHT TO WHISTLEBLOWING IN RELATION TO PUBLIC HEALTH AND THE ENVIRONMENT IN A BUSINESS ENVIRONMENT

Article 8

Title III, Book I of part four of the Labour Code is supplemented by a Chapter III as follows : "Chapter III: "Right to whistleblowing in relation to public health and the environment

"Art. L.4133-1. – The worker shall warn their employer immediately if they believe, in good faith, that the products or manufacturing processes used or implemented by the establishment constitute a serious risk to public health or the environment.

“The warning must be formalised in writing in accordance with the regulations.

“The employer must inform the worker who communicated the warning of the follow-up action it intends to take.

“Art. L.4133-2. – A staff representative on the Health, Safety and Working Conditions Committee, who observes, in particular through the intermediary of another worker, that there is a serious risk for public health or the environment, shall alert the employer immediately.

“The warning must be formalised in writing in accordance with the regulations.

“The employer shall examine the situation jointly with the staff representative on the Hygiene, Safety and Working Conditions Committee who passed on the warning and inform them of the follow-up action taken.

“Art. L.4133-3. – In the case of a disagreement with the employer on the legitimacy of a warning communicated in accordance with Article L.4133-1 and L.4133-2 or in the absence of follow-up action within one month, the worker or staff representative on the Hygiene, Safety and Working Conditions Committee may refer the matter to the state representative in the département.

“Art. L.4133-4. – The Hygiene, Safety and Working Conditions Committee shall be informed of warnings communicated to the employer pursuant to Articles L.4133-1 and L.4133-2, the follow-up action taken and possible referrals to the state representative in the département pursuant to Article L.4133-3.

“Art. L.4133-5. – A worker who blows the whistle pursuant to this chapter shall benefit from the protection provided under Article L.1351-1 of the Public Health Code.”

Article 9

Article L.4141-1 of the Labour Code is supplemented by a paragraph as follows:

“It shall also organise and provide information to workers on the risks to public health or the environment presented by the products or manufacturing processes used or implemented by the establishment and the measures taken to remedy them.”

Article 10

Article L.4614-10 of the Labour Code is supplemented by a paragraph as follows:

“It shall meet in the event of a serious event associated with the activities of the institution that has harmed or could have harmed public health or the environment.”

TITLE IV: MISCELLANEOUS PROVISIONS

Article 11

Book III, part one of the Public Health Code is supplemented by a title V as follows:

“TITLE V

PROTECTION FOR WHISTLEBLOWERS

“Art. L.1351-1. – No-one may be denied access to a recruitment procedure or to an internship or period of professional training nor be sanctioned or discriminated against, either directly or indirectly, notably in respect of compensation, treatment,

training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract for having reported or provided evidence, in good faith, either to their employer, or to the judicial or administrative authorities, of facts relating to a serious risk to public health or the environment of which they may become aware during the course of their duties.

"Any provision or act to the contrary shall be automatically null and void.

In the case of a dispute relating to the application of the first two paragraphs, and provided that the person establishes the facts allowing it to be assumed that they have reported or provided evidence, in good faith, of facts related to a danger for public health or the environment, it shall be for the defendant, in light of the evidence, to prove that their decision is justified by objective elements distinct from the employee's declaration or evidence. The judge will reach his or her conclusion having ordered all the investigations he or she deems necessary."

Article 12

Any natural person or legal entity who issues a warning in bad faith or with the intention of causing harm or is fully or at least partially aware that the facts published or disseminated are inaccurate shall be punished in accordance with the penalties set out in paragraph one of Article 226-10 of the Penal Code.

Article 13

Any employer receiving a warning in respect of public health or the environment, which has not complied with the obligations incumbent on it pursuant to Articles L.4133-1 and L.4133-2 of the Labour Code shall lose their entitlement to the provisions of Article 1386-11(4) of the Civil Code.

This act shall be executed as state law."

## Act no. 2013-907 of 11 October 2013 on transparency in public life (extracts)

"Section 6: Protection for whistleblowers

Article 25

I. – No-one may be denied access to a recruitment procedure or to an internship or period of professional training nor be sanctioned, dismissed or discriminated against, either directly or indirectly, notably in respect of compensation, treatment, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract, for having reported or provided evidence, in good faith, either to their employer, to the authority responsible for professional conduct within the organisation, to an anti-corruption organisation accredited pursuant to section II, Article 20 of this Act or Article 2-23 of the Code of Criminal Procedure or to the judicial or administrative authorities, of facts relating to a situation of conflict of interest, as defined in Article 2 of this Act, concerning one of the persons referred to in Articles 4 and 11, of which they may have become aware during the course of their duties.

Any termination of an employment contract arising as a result and any act to the contrary shall be automatically null and void.

In the case of a dispute relating to the application of the first two paragraphs of this section I, and provided that the person establishes the facts allowing it to be assumed that they have reported or provided evidence, in good faith, of facts related to a situation of conflict of interest, it shall be for the defendant, in light of the evidence, to prove that their decision is justified by objective elements distinct from the employee's declaration or evidence. The judge may order any investigation he or she deems useful.

II. – Any person who reports or provides evidence of a situation of conflict of interest, as defined in I of this article, in bad faith or with the intention of causing harm or is fully or at least partially aware that the facts published or disseminated are inaccurate shall be punished in accordance with the penalties set out in paragraph one of Article 226-10 of the Penal Code."

## Act no. 2013-1117 of 6 December 2013 on combating tax fraud and serious economic and financial crime (extracts)

"TITLE III: WHISTLEBLOWERS

Article 35

I. — After Article L. 1132-3-2 of the Labour Code, an Article L. 1132-3-3 is inserted as follows:

"Art. L.1132-3-3.-No-one may be denied access to a recruitment procedure or to an internship or period of in-house training and no employee may be sanctioned, dismissed or discriminated against, either directly or indirectly, notably in respect of compensation, as defined in Article L.3221-3, profit-sharing or distribution of shares, training, redeployment, assignment, qualification, classification, professional promotion, transfer or renewal of their contract for having reported or provided evidence, in good faith, of facts constituting a crime or offence of which they have become aware during the course of their duties.

"In the case of a dispute relating to the application of the first paragraph, and provided that the person establishes the facts allowing it to be assumed that they have reported or provided evidence, in good faith, of facts constituting a crime or offence, it shall be for the defendant, in light of the evidence, to prove that their decision is justified by objective elements distinct from the employee's declaration or evidence. The judge will reach his or her conclusion having ordered all the investigations he or she deems necessary."

II. – After Article 6 bis of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants, an Article 6 ter A is inserted as follows:

"Art. 6 ter A.-No measure concerning, among other things, recruitment, confirmation in post, training, grading, discipline, promotion, assignment or transfer may be taken in respect of a civil servant for having reported, or provided evidence, in good faith, of facts constituting a crime or offence of which they have become aware during the course of their duties.

"Any provision or act to the contrary shall be automatically null and void.

Article 36

An Article 40-6 is inserted after Article 40-5 of the Code of Criminal Procedure as follows: "Art. 40-6. – A person who has reported a crime or offence committed in their business or administrative authority shall be put in contact, on request, with the Central Prevention of Corruption Department, where the offence reported falls within this department's area of jurisdiction."

## Act no. 2015-912 of 24 July 2015 on intelligence (extracts)

"Article 8

(… ) IV. – The same chapter I is supplemented by an Article L.861-3 as follows:

"Art. L.861-3. – I. – Any official of a service referred to in Article L.811-2 or a service designated by a decree issued by the Conseil d'État as provided for in Article L.811-4 who becomes aware, during the course of their duties, of facts likely to constitute a manifest breach of this book may bring these facts to the attention of the National Commission on the Control of Intelligence Techniques only, which may refer the matter to the Conseil d'État in accordance with the conditions stipulated in Article L.833-8 and inform the Prime Minister.

"Where the Commission believes that the illegality observed is likely to constitute an offence, it shall refer the matter to the public prosecutor on the basis of confidentiality in respect of national defence matters, and send all the information made available to it to the Consultative Commission on confidentiality in respect of national defence matters so that the latter may offer the Prime Minister its opinion on the possibility of declassifying all or part of the information for it to be communicated to the public prosecutor.

"II. – No official can be sanctioned or discriminated against, either directly or indirectly, notably in respect of compensation, recruitment, confirmation in post, grading, discipline, treatment, training, redeployment, assignment, qualification, classification, professional promotion, transfer, suspension or renewal of their contract as a result of having, in good faith, brought the facts mentioned in I to the attention of the National Commission on the Control of Intelligence Techniques. Any act that contravenes this paragraph shall be null and void.

In the case of a dispute relating to the application of the first paragraph of section II, it shall be for the defendant to prove that their decision is justified by objective elements distinct from the employee's declaration or evidence.

"Any official who reports or provides evidence of the facts referred to in I in bad faith or with the intention of causing harm or is fully or at least partially aware that the facts are inaccurate shall be subject to the penalties set out in paragraph one of Article 226-10 of the Penal Code." (…)"

# Appendix 5 – Comparative law

Note – Whistleblowing mechanisms in five countries – the United States, United Kingdom, Ireland, Italy and the Netherlands – were examined in particular detail for this study. The aim of this appendix is not to provide an exhaustive list of whistleblowing legislation but to highlight significant examples of the regulations that exist in each country to provide protection for whistleblowers.

## 1. The United States: the cradle of protection for whistleblowing

The False Claims Act of 2 March 1863 marks the birth of whistleblowing, with a federal system to protect the United States from fraudulent public contracts, although it does not make explicit reference to the term "whistleblowing".[100] Amended first in 1943 and then in 1986, it is viewed as one of the most generous and most efficient laws on whistleblowers in the world, because of its so-called qui tam clauses[101]. A citizen who can prove that the government has been a victim of deceit can therefore prosecute the originator on behalf of the federal state to recover the sums obtained. The mechanism provides for a fine of twice the amount of obtained fraudulently from the state. As compensation for the risks taken and efforts made in filing a complaint, the whistleblower can receive a share of the sums recovered, generally of between 15 and 25%[102]. The law enabled the country to recover some $22 billion between 1986 and 2008, and $13.3 billion between 2009 and 2012 (including $4.9 billion in 2012 alone)[103].

### *Systematic protection for federal agents who blow the whistle*

Adopted in response to the "Pentagon Papers" affair in 1971, followed by Watergate in 1972, the Civil Service Reform Act of 1978 provides protection for the first time for public officials who blow the whistle. The main relevant law today is the ***Whistleblower Protection Act*, (or WPA) *adopted on 10 April 1989*** following the Challenger space shuttle disaster in 1986. This only covers public-sector officials at the federal level, but most of the individual states have adopted their own legislation to provide protection for whistleblowers (see infra). Disclosure of information is protected if the originator suspects and can provide reasonable evidence of the breach of a law or regulation, or if they reveal flagrant mismanagement (particularly in financial terms), an abuse of authority or a

100 See N.-M. Meyer, " Le droit d'alerte en perspective: 50 années de débats dans le monde", AJDA no. 39/2014, 24 Nov. 2014, p-p.2242-2248. According to the author, a more accurate date would be 1778, when the United States Congress passed an initial law following a report of cases of torture in the US Navy (p.2243).

101 See *La protection des lanceurs d'alerte*, report of a study on the feasibility of a legal instrument to protect employees who disclose information in the public interest, by P. Stephenson and Michael Levi, Council of Europe, 20 Dec. 2012, p.23.

102 *Qui tam*: abbreviation for *qui tam pro domino rege quam pro se ipso in hac parte sequitur* or "who brings the action for the king as well as himself". In tax year 2013 alone, whistleblowers are thought to have received $345 million.

103 See N.-M. Meyer, op. cit., p.2244.

"substantial and specific" risk to health or safety. Nonetheless, there are limits, such as when warnings are prohibited by law (e.g. if they relate to military secrets or security).

The implementation mechanism provided by the WPA must be "robust and easily accessible"104: whistleblowers who suffer reprisals can file a complaint with an independent investigation and prosecution body (the US Office of Special Counsel), which examines the warning; this is then passed on to a quasi-judicial agency, the Merit Systems Protection Board, which either confirms or dismisses the warning. If necessary, the whistleblower can appeal to the Court of Appeals for the Federal Circuit.

With regard to possible reprisals, the burden of proof rests primarily with the employer. The employee only has to establish that: 1) they have uncovered behaviour that falls into a category classed as wrongdoing by the law; 2) they have reported it to the correct person or body; 3) reporting the incident goes beyond simply doing their job or falls outside normal procedures; 4) they have made their report to someone other than the person at fault; 5) they were reasonably confident of the actions they have reported; 6) a measure has been taken against them at work. Where the employee can establish the above, it falls to the employer to show that they would have taken the same measure if no disclosure had been made105.

Legal protection for federal whistleblowers was strengthened under President Obama by the ***Whistleblowers Protection Enhancement Act*** of 27 November 2012, which re-examined a number of interpretations in the case law, which had had the effect of reducing the scope of protection afforded to whistleblowers by the 1989 law[106]. It also extended the scope of protection (for example, to the distortion of the results of scientific research), improved the compensation scheme for harm suffered by whistleblowers, tightened the use of confidentiality clauses and discouraged improper use of disciplinary procedures. Finally, it introduced procedural innovations designed to ensure fairer treatment for people brought before a court and allowed the *US Office of Special Counsel* to take part in legal proceedings free on a voluntary basis.

***Institutionalising whistleblowing to combat fraud***

**The *Sarbanes-Oxley* (or *SOX*)**[107]**,** a federal law that extends to other territories and was adopted in reaction to the stock-market crash of 2001-2002, applies directly to all listed companies and indirectly to the European subsidiaries of US companies listed on the stock market. As well as establishing a broad definition of the term

104 See the Council of Europe report cited above, p.22.

105 See the Council of Europe report cited above, p.23.

106 See, on this point, the 2014 report from the Central Prevention of Corruption Department, submitted to the Prime Minister and the Minister of Justice, p.202. There is therefore now protection for: " *1) a warning given to anyone (including, if applicable a line manager) who has participated in the act of wrongdoing; / 2) a warning relating to facts that have already given rise to a warning; / 3) a warning given when the whistleblower was not in their job; / 4) a late warning in relation to the date on which the acts were committed; / 5) a warning given during the course of the whistleblower's normal duties. Moreover, the warning is protected regardless of the whistleblower's intention (or "motive")*".

107 *Corporate and Criminal Fraud Accountability Act.*

'whistleblower' and the right to contact the press, it requires businesses to set up internal, independent audit committees and allow employees to issue warnings internally that are protected (i.e. their confidentiality is guaranteed) and, if they wish, anonymous, on matters relating to finance and accounts (Art. 301). It also places an obligation on all employees to report to the *Securities and Exchange Commission* (SEC) – the US federal body responsible for the financial markets – any frauds committed by their employer or their client. At the same time, the SOX Act provides (Art. 806) for criminal sanctions (fines or imprisonment) and an obligation to provide compensation[108] for those who take retaliatory measures against whistleblowers. The primary focus of the legislation is the interests of shareholders rather than the general public, by encouraging a sense of responsibility among the business's employees and directors. Companies that do not comply with these obligations are subject to heavy penalties imposed by the Nasdaq, the New York Stock Exchange or the SEC[109]. The cost to businesses of setting up internal whistleblowing mechanisms of this kind has been heavily criticised[110].

More recently, **the *Dodd–Frank Wall Street Reform and Consumer Protection Act*,** promulgated on 21 July 2010, not only provides for protection for ethical whistleblowers, but also offers a financial incentive for those who are willing to disclose information, providing the respective commissions with direct information on breaches of the laws relating to marketable securities or raw materials. The sum paid to the whistleblower is directly correlated with the sanctions finally imposed by the commissions, on condition that these are in excess of $1 million (between 10 and 30%) and that the whistleblower does not embark on legal proceedings[111].

***Specific characteristics of the legislation***

Given the federal structure of the United States, where each state has its own constitution, setting out the organisation of its legislative, executive and judicial powers, and its own judicial structure, with a Supreme Court at the top, and the predominance, in the private sector, of so-called *at-will employment*[112], the level

108 This is an amendment of chapter 73 of Title 18 headed *Crimes and criminal procedure* of the *United States Code*, which added a new article headed *Civil action to protect against retaliation in fraud cases* (1514 A), which provides for the employee to be reinstated and obtain back pay and even the payment of damages, notably including legal fees.

109 *Listing manual* of the New York Stock Exchange (art. 303A.10) and Nasdaq *Listing manual* (art. 4350): these stipulate that listed companies must have a code of ethics for board members, executives and employees, which must include ethical whistleblowing procedures and protection for whistleblowers.

110 In his book *How – Why How We Do Anything Means Everything*, 26 October 2011, published in French by Dunod, Dov Seidman cites the following figures. According to the Wall Street Journal, audit costs increased by 30% in a year. Similarly, the Financial Executive International believes that it takes 2,000 hours of effort to ensure the mechanisms of a typical business with a turnover of $25 million are compliant.

111 By way of example,in 2014 one foreign whistleblower received $30 million from the SEC. Between August 2011 and September 2013, the *SEC* received 6,573 reports and complaints from whistleblowers (*in 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, US Securities and Exchange Commission).

112 According to this principle, the theory of which was developed by Horace Gray Wood in his 1877 treatise *Master and Servant*, and then confirmed by the Supreme Court (see, for example, *Adair v. United States*, 208 U.S. 161 (1908)), an employee may be dismissed without notice *"for good cause, or bad cause, or no cause at all"*.

of protection afforded to whistleblowers varies significantly, depending on the state. This is true in both the private and the public sector. The level of protection afforded to whistleblowers in administrative authorities below the federal level varies quite widely by state, insofar as individual states are not under any obligation to transpose the rules applicable at the federal level[113].

## 2. The United Kingdom: whistleblowing in the public interest

In the 1980s and 1990s, the United Kingdom experienced a series of disasters and financial scandals that forced it to act: the ferry that sank off the coast of Zeebrugge in 1987, the explosion of the Piper Alpha oil platform in the North Sea in 1988 and the collapse of the Maxwell group in 1991, revealing a pension fund fraud of some £440 million. The reports of the public enquiries carried out reached the conclusion that these disasters could have been avoided if employees of the companies concerned had disclosed the problems within each business. As a result, the UK Parliament voted almost unanimously, on the grounds of *public interest*, in favour of the Public Interest Disclosure Act 1998 (or PIDA). The aim of the legislation was twofold: on the one hand, to offer extensive protection to employees who blow the whistle and on the other, to encourage British businesses to adopt internal procedures to support whistleblowing.

### The *Public Interest Disclosure* Act, an accomplished example of comprehensive protection for whistleblowers

Initially framed by the ***PIDA***, protection for whistleblowers in both the public and private sectors, was significantly reformed by the ***Enterprise and Regulatory Reform Act*** of 25 April 2013, which came into effect on 1October 2013 and by ***the Amendment to the Prescribed Persons Order*** of 2014. This legislation is often presented as the most accomplished example of "comprehensive" regulations in this area[114]. Other countries, notably Ireland, Japan and South Africa, have also used it as the basis for their own legislation.

Without detailing the somewhat complex provisions of the *PIDA*, the broad outlines are as follows. Firstly, the definition of wrongdoing is broad. It includes disclosing information relating to acts of corruption or any other criminal offence, civil offences (such as negligence or non-compliance with contracts or administrative law), judicial errors, risks to health, safety or the environment and, significantly, the fact of covering up any of such acts. Warnings that constitute a criminal offence

113 See, on this point, the report from the Central Prevention of Corruption Department cited above, p. 203: *"Although the level of legal protection afforded to whistleblowers is theoretically high in the federal administration and in the administrative authorities of those states that have drawn on federal legislation, it appears still to be low in some states and in very large swathes of the private sector. The fate of a US whistleblower therefore often lies in the hands of the judge. It must be said, in this respect, that the case law of the various courts involved is complex and overall seems not to be particularly favourable to whistleblowers, except in cases where they have acted on the basis of federal laws that expressly guarantee protection for whistleblowers, such as the False Claims Act or the Dodd-Franck Act.*

114 See the Council of Europe report cited above, p.20: *"The 2009 PACE Report states:* 'The UK indeed appears to be the model in this field of legislation.'"; see also the report of the SCPC cited above, p.206: *"Transparency International estimated in 2013 that the updated legislation in the United Kingdom was one of the most advanced in Europe, along with that of Luxembourg, Romania and Slovenia".*

are not protected (for example, disclosures that undermine the national interest in respect of state security or international relations).

Whistleblowers – most workers are covered – can refer cases to their employer, the authorities or the press, based on a principle of proportionality and a clear, three-stage escalation procedure.

In 2013, for internal disclosures, the principle that protection for the whistleblower was dependent on their having acted in good faith was replaced by a requirement for a "reasonable belief" in the "public interest" of the disclosure, one of the criticisms of the law being that the notion of good faith had been interpreted too freely by British employment tribunals. The intention was therefore to refocus on the initial objective of the *PIDA* by excluding complaints based on personal motives.

With regard to external channels, the 2014 reform resulted in the inclusion of members of parliament in the list of people to whom a whistleblower can turn. External disclosures via the press are possible where the whistleblower has no other option for reporting their concerns, faced with the lack of a satisfactory response from the public authorities they have contacted.

With regard to protection for the whistleblower, they are entitled to remain in their job until the case comes to court (thanks to a special emergency procedure) and are entitled to full compensation for any harm suffered (without any upper limit) [115], compensation may, however, be reduced in cases of bad faith. A series of provisions aim to provide effective protection for unfair dismissal or any other retaliatory measure (to the *"detriment"* of the whistleblower) for people who have reported suspicions of wrongdoing to their employer or the regulatory authorities. When a complaint is filed with an employment tribunal under the PIDA, the case is transferred, with the complainant's consent, to the relevant regulatory authorities, which decide whether or not to investigate (for fraud, non-compliance with health and safety legislation, etc.). The term 'detriment' used in the Act is defined very broadly: based on the case law, even a failure to investigate a concern raised can constitute a detriment[116].

Finally, any clauses introduced into employment contracts to prohibit ethical whistleblowing on a preventive basis (known as *"gagging clauses"*) had already been deemed null and void since 1996. Since 1 October 2013, employers have been indirectly responsible for any reprisals taken against a whistleblower in the company by another of their employees. Introducing prevention measures may, however, be viewed as a mitigating circumstance in the case of a dispute.

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115 Financial loss: this is not subject to the usual maximum limit for damages in the English courts (€78,335 in 2015). Financial loss takes into account the age of the whistleblower and their chances of finding another job if they are dismissed. In this case of 17 August 2011*(Watkinson v Royal Cornwall Hospitals NHS Trust* no. 1702168/08), a whistleblower aged 53 was awarded over £1 million in damages.

116 Examples of protection for whistleblowers from *'detriments'* inflicted by their employer because of their disclosure are plentiful: suspension (*Bhebhe v Birmingham Trust* no. 1304678/11), job transfer (*Merrigan v University of Gloucester* no. 1401412/10), geographical transfer (*Mitchell v Barclays Bank plc* no. 2502431/12), publicly naming the whistleblower in the company (*Okoh v Metronet Rail Ltd* no. 2201930/06), sidelining (*Vinciunaite v Taylor Gordon Ltd* no. 3104508/10), psychological harassment and exclusion (*Carroll v Greater Manchester Fire Service* no. 2407819/00).

### *The* UK Bribery Act *2010, legislation against bribery with extraterritorial reach*

**The *UK Bribery Act*** 2010, which has been in effect since 1 July 2011 (known as the ***UKBA***), emerged following the 2008 crisis and is viewed as the strictest anti-bribery law to date. It provides for sanctions (unlimited fines and ten years' imprisonment) against giving or receiving bribes, bribery of a foreign public official and failure to prevent bribery by businesses. It includes whistleblowing mechanisms that are "secure, confidential and accessible for both internal and external parties".

It covers not only British nationals, businesses and territory but also has extra-territorial reach where an act has occurred on British territory or it has occurred elsewhere in the world by a person with a "close connection" with the United Kingdom (citizenship, British head office or residence, third parties).

The offence of failure to prevent bribery applies to any legal entity operating, even partially, in the United Kingdom, and to 'associated persons'. Businesses that do not operate in the United Kingdom can be required to implement appropriate procedures if they work with businesses that are subject to the UKBA. The latter, whether they are British or not, are required to check their partners' compliance, failing which non-compliant companies can be quarantined.

The UK Corporate Governance Code also requires companies listed on the London Stock Exchange to ensure that mechanisms are in place for staff to report any irregularities in confidence, and for such concerns to be followed up independently on the basis of proportionality.

#### *Specific characteristics of the legislation*

In 2007, a survey by Ernst & Young found that 86% of senior British executives working in multinationals felt that they were at liberty to report cases of fraud or corruption, compared with an average of 54% in continental Europe. A number of criticisms have been levelled against the *PIDA*, however, which is seen as overly complex and, despite the range of scenarios covered, not sufficiently protective. The national anti-corruption plan published by the British authorities on 18 December 2014 included plans to consider additional measures to strengthen protection for whistleblowers by the Home Office working in conjunction with the Department for Business, Innovation and Skills. The same plan includes a detailed evaluation of the implementation of whistleblowing provisions in 2018.

In the light of experience, the organisation *Public Concern at Work*, a foundation created in 1993[117], advocates a comprehensive approach to reform of the *PIDA*, in particular by requesting a broadening of the categories of people protected (including protection for job seekers) and a review of the categories of wrongdoing covered by the law, with a view to including serious mismanagement, a blatant waste of funds and abuse of power. Progress should be noted in more closely

117 This organisation, which contributed to the design of the *PIDA*, was formed to offer free, confidential advice to workers who want to blow the whistle but do not know how to proceed effectively. Their members, who are required to maintain professional confidentiality, can make the disclosure on their behalf if requested to do so. Between 1993 and 2012, the organisation dealt with around 20,000 calls, 71% of which were from people who had already raised the issue with their line manager.

defined areas, such as the health sector: the *Small Business, Enterprise and Employment Act* 2015, for example, prohibits any discrimination against job seekers who have blown the whistle specifically in the public health sector (the *National Health Service*).

Finally, and paradoxically the *PIDA* suffers from a relatively low level of recognition among British citizens. Indeed, a survey commissioned in 2011 by *Public Concern at Work* showed that 77% of adults in the United Kingdom were unaware of the existence of the PIDA or did not think there were any laws that protected whistleblowers. In this respect, it recommends increased awareness-raising efforts by the public authorities[118].

## 3. Ireland: from a sector-specific to a comprehensive approach

Initially, Ireland opted for including protection for whistleblowers in sector-specific regulations – 12 in total, including protection for minors *(Protections for Persons Reporting Child Abuse Act 1998)*, the public sector *(Ethics in Public Office Act 2001*), health (*Health Act 2004*, as amended by the *Health Act 2007),* charitable organisations (*Charities Act 2009*) and combating corruption *(Prevention of Corruption Acts 2010).*

Against the background of a series of scandals linked to corruption within the public authorities, a bill was presented in 1999, with the aim of ensuring comprehensive regulation of whistleblowing and its protection. However, the process of adopting the bill remained at a standstill for seven years, for reasons of legal complexity, until it was finally abandoned. Ireland has reviewed its position in the light of criticism, in particular from the Standards in Public Office Commission. The report submitted in 2012 by the Mahon Tribunal (created in 1997 to investigate allegations of bribes paid to political leaders) noted that the fragmented nature of the rules on whistleblowers had created an opaque and complex system, which was likely to dissuade some people from reporting acts of corruption[119]. The Irish government has drawn on the findings of this research to announce the creation of a framework providing the same protection for whistleblowers in all sectors of the economy. At the same time, whistleblowers have benefited from a positive image in terms of public opinion, in particular by revealing the mistreatment meted out to patients at a psychiatric hospital in Dublin, banking fraud and acts of corruption within local authorities and central government.

The ***Protected Disclosure Act 2014*** **(or *PDA*) –** which applies both to the private and the public sector – is inspired by the experience of other countries, such as the United Kingdom (*PIDA*), South Africa and New Zealand (laws on "protected disclosures", adopted in both countries in 2000), and the principles and recommendations developed by the G20, OECD, UN and the Council of Europe. This goes beyond the *PIDA* insofar as it covers some additional areas, of which the most significant is the illegal or inappropriate use of public funds. The law also covers cases where "an act or omission by or on behalf of a public body is oppressive, discriminatory or

118 See the Council of Europe report cited above, p.22.

119 See report cited above, p.14; also, the report *Whistleblowing in Europe: legal protections for whistleblowers in the EU*, Transparency International, 2013.

grossly negligent or constitutes gross mismanagement". The legislation adopts a broad definition of "workers", which includes subcontractors, temporary staff and interns as well as employees.

Disclosures are protected if they satisfy a number of conditions, including *"reasonable belief"* in the truthfulness of the facts disclosed. The concept of *"good faith"* found in the text of the *PIDA* is not expressly included in the Irish law. In principle, protection still applies even if the information disclosed does not subsequently reveal any wrongdoing. The recipients of a protected disclosure or the people who are aware of it must not disclose information that reveals the identity of the whistleblower, unless they consent or unless such a disclosure is essential for the investigation of the allegations to be effective, to prevent serious harm or to comply with general legal principles. Anonymous disclosures are not protected.

The law echoes and refines the idea of a *"scale of disclosure channels"* , enshrined in the *PIDA;* compliance with this determines the availability of protection, which can be very extensive. As well as a disclosure procedure in stages – the first of which is the employer – it also offers protection both upstream, with a summary procedure to protect the whistleblower's job until the trial (similar to the *PIDA*) and downstream, with financial compensation in the case of unfair dismissal after making a protected disclosure of up to five years' pay. However, this system is less generous than the *PIDA,* which provides for full compensation for loss of earnings (including years of retirement) and psychological harm.

The Irish legislation also provides immunity from any civil prosecution that may be taken against whistleblowers, and a favourable system in the event of defamation proceedings. It also offers them the possibility of taking action for *"tortious liability"* against a third party for having taken retaliatory measures against them, or even against a member of their family[120], which is not included in the *PIDA*.

Finally, public bodies – ministerial departments, local authorities and certain other bodies financed by public funds – must set up whistleblowing procedures for their employees (or former employees) and send them written information on the procedures. They are also obliged to publish an annual report recording the number of protected disclosures that have been brought to their attention and the actions undertaken in relation to them. There is no similar obligation on employers in the private sector. The *Workplace Relations Commission*[121] has, however, published a *Code of Practice on the Protected Disclosures Act 2014 (PDA)*, which encourages them to set up reliable whistleblowing mechanisms and ensure employees are properly informed.

120 The legislation is drafted sufficiently broadly to allow an interpretation of this kind.

121 An independent organisation created on 1October 2015 under the *Workplace Relations Act 2015* (no. 16 of 2015). Among other things, it receives complaints from employees and whistleblowers who allege that discriminatory measures have been taken against them in connection with the disclosure they have made. If the employer fails to comply with the Commission's decision, employees may appeal to the *Labour Court*.

## 4. Italy: a fragmented approach to preventing corruption

Legal protection for whistleblowers in the public sector was non-existent in Italy until recently; it is still at an embryonic stage and restricted to a specific area, namely preventing corruption, which seems to be a key area of the country's public policy.

***Emerging legislation in the public sector only:***

Article 1 (paragraph 51) of Act no. 190/2012 of 6 November 2012 on various provisions to prevent and eradicate corruption in the public administration[122] amended Article 54 bis of decree-law no. 165/2001 of 30 March 2001 on "consolidation of public services" by providing for protection for whistleblowers – namely public officials who make a disclosure to the judicial authorities, the National Audit Office or the *Autorità nazionale anticorruzione* (ANAC) – the national anti-corruption authority [123] – or to their line manager, any behaviours in breach of the law of which they have become aware as a result of their professional activities.

The whistleblower is then protected against dismissal, demotion and discriminatory measures, in the case of reporting acts of corruption only. Protection does not apply if the whistleblower is guilty of libel (which is viewed as obstructing the course of justice) or defamation (given the need to protect the reputation of people who are wrongly accused). Within the context of a disciplinary procedure, the identity of the person who has made the disclosure cannot be revealed without their consent, unless the challenge to the disciplinary complaint is based on evidence obtained from additional sources that are entirely separate from the fact that they have made a disclosure. If, on the other hand, the challenge to the complaint is based either fully or partially on the disclosure made, their identity can be revealed if it is absolutely essential to defend the person accused. Finally, the use of discriminatory measures must be reported to the civil service department[124], so that it can take the necessary measures within its powers, by the individual concerned or by the most representative trade unions in the administrative authority affected by the disclosure.

**The new Civil Service Code of Conduct**[125] sets out in Article 8 on *Prevention of corruption*, the duties of public officials in this respect. The official is thus obliged to comply with the measures imposed by the administration to prevent illegal activities and in particular, the orders set out in the national plan on preventing corruption: this includes an obligation to cooperate actively, which in practical terms means reporting to their line manager any illegal situations in the administration of

122 *"Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità' nella pubblica amministrazione".*

123 In 2014, decree-law no. 90 was adopted, authorising the ANAC to impose sanctions on administrations that have not adopted a three-year plan to prevent corruption. It also gives it the power to receive complaints relating to wrongdoing by public officials.

124 A structure equivalent to a department, which reports to the Ministry for Simplification and the Public Administration.

125 *Codice di condotta dei dipendenti pubblici,* adopted by Presidential Decree no. 62 of 16 April 2001. This defines the standards of diligence, loyalty, impartiality and good conduct that public officials are obliged to uphold in carrying out their duties.

which they may be aware. The Ministry of Simplification and Public Administration has published a template for reporting illegal behaviour based on these provisions, which can be found online on its website.[126]

In March 2015, the Minister of the Economy, Pier Carlo Padoan, presented a *vade mecum* on *"preventing corruption in companies controlled or held by the Ministry of the Economy and Finance".* Among the practical measures set out this document of around a dozen pages, the Treasury intends to ask the companies concerned to promote the role of *"whistleblowers"* by guaranteeing them *"suitable protection and encouraging employees to report illegal acts of which they are aware"*. In May 2015, another soft law mechanism was adopted by the ANAC, which set out *Guidelines in respect of protection for public officials who report wrongdoing*. These explain the procedural arrangements for making disclosures within an administrative authority and for automated receipt of reports by the ANAC, which has equipped itself with a dedicated IT system for gathering the reports that fall under its jurisdiction.[127]

***The lack of legal protection in the private sector***

As in Germany, whistleblowers in the private sector do not always benefit from specific legal protection, apart from the protection they may be granted on a case-by-case basis by the courts, based on unfair dismissal legislation. In a ruling of 14 March 2013, the Supreme Court in Italy, however, confirmed that the employee's obligation of loyalty, confidentiality and discretion only applied where their employer was acting legally[128].

In recent years, private firms have implemented workplace whistleblowing mechanisms to enable employees to report wrongdoing, in particular in connection with embezzlement, with most mechanisms designed in accordance with the *SOX Act.*

***Specific characteristics of the legislation***

The Italian system of protection for whistleblowers is still only recent and is noteworthy for the narrow scope of legal protection, which has attracted criticism for the fact that it only covers the reporting of corrupt acts in the public sector. It was analysed by the OECD in its report *"Integrity Review of Italy. Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth"* published in September 2013. In particular, the OECD has encouraged Italy to adopt a broader policy in this area. This would be based on the five following elements: clear and comprehensive legislation; protection mechanisms; clear procedures and secure channels for reporting illegal acts; implementation mechanisms; The Italian parliament is currently examining or debating bills to introduce "reward" mechanisms for whistleblowers – following the example of US legislation – and to broaden the existing system to include the private sector[129].

126 *Modello per la segnalazione di condotte illecite (c. d. whistleblower).*

127 Determina dell'autorità nazionale anticorruzine 28 aprile 2015 no. 6 *"Linee guida in materia di tutela del dipendente pubblico che segnala illeciti",* in Gazz. Uff. 14 maggio 2015, n° 110; see also, on the conditions for the application of art. 54 bis of decree law no. 165/2001 of 30 March 2001: INAIL, Circolare – 28/07/2015, n. 64 Disposizioni attuative dell'art. 54-bis del D.Lgs. n° 165/2001, *recante norme in materia di "Tutela del dipendente pubblico che segnala illeciti"* (c.d. *"whistleblower"*).

128 See the report from the SCPC 2014 cited above, p.208.

129 See G. Gargano, "La "cultura del Whistleblower" quale strumento di emersione dei profili

## 5. The Netherlands: aiming for innovative solutions?

Although the Netherlands does not currently have any standalone national legislation, there is a range of laws and procedures which, despite their limitations, are outlining the beginnings of a protection system for whistleblowers. This is supported by initiatives developed by civil society, for example, the creation of the secure, anonymous platform *Publeaks*, **which is designed to offer whistleblowers the possibility of sharing their information with the media.**

***Future legislation focused on the public sector:***

In 2001, the Netherlands became one of the first European countries to introduce explicit whistleblowing procedures for civil servants[130]. This was followed by the creation, in 2006, of the Commission for Ethics and Integrity in the Public Sector, which provides advice to civil servants; the expansion in 2011 of the *Office of the National Ombudsman* **to include action in response to whistleblowing; and the opening in 2012 of a whistleblowers' advice and information centres (***"Adviespunt Klokkenluiders"*[131]), where public- and private-sector employees can get support and advice.

As regards the public sector, the **regulations on whistleblowers for central government and the police** came into effect in 2010. Similar provisions were adopted for the defence sector and then extended to other parts of the civil service from 1 January 2014. The system is innovative insofar as it offers the possibility of making a disclosure about wrongdoing in a department or organisation where the whistleblower is not or no longer personally employed (for up to two years after the end of their contract). Their managers must ensure that the whistleblower can continue to carry out their duties without hindrance, including by preventing any form of retaliation by their colleagues. A *"confidential integrity adviser"* is appointed in each government department, to whom cases of misconduct or breaches of professional conduct rules likely to cause serious harm to the state can be reported in confidence; the adviser provides feedback on the follow-up action taken in response to the disclosure and, if necessary, explains the other steps the whistleblower can take. The confidentiality of the disclosure is guaranteed (the identity of the whistleblower is kept secret if they so request).

Moreover, if a whistleblower or confidential adviser wishes to dispute the conclusions of an internal or external enquiry and refer the case to the courts, they will receive a partial reimbursement of the costs of the proceedings, such as fees for legal assistance (up to €5,000). If the conclusions of the internal enquiry are not satisfactory, if the enquiry takes too long (more than 12 weeks) or even if there are valid reasons, it is possible to report concerns to the Commission for Integrity (which is made up of independent experts appointed by the Minister of the Interior). Disclosures to the media, however, are not protected.

decisionali della pubblica amministrazione", Federalismi.it, rivista di diritto pubblico italiano comparato, Europeo, 13 January 2016.

130 See the report *Whistleblowing in Europe: legal protections for whistleblowers in the EU*, Transparency International, 2013.

131 The Dutch equivalent of "whistleblower" is "Klokkenluider", which literally means "bell-ringer". It was used for the first time by Professor M. Bovens in 1987.

Finally, although there is no law providing explicit protection for employees in the private sector, the Labour Foundation (STAR – the national platform for employer and employee associations) has developed a code of conduct and encouraged its members to include whistleblowing procedures in all collective bargaining agreements. Although they are very clear, these procedures are not widely applied in Dutch businesses, many of which are averse to independent mechanisms and insist that all complaints are dealt with internally.

***The project to create a "Whistleblowers' centre"***

An initial bill presented in 2012, produced by an alliance of six political parties, was adopted by the House of Representatives on 17 December 2013 with the aim of creating a "Whistleblowers' centre" or *"Huis voor klokkenluiders"*. It was not adopted by the Senate, which requested an amended bill. A second bill was adopted by the House of Representatives in July 2015. This is currently before the Senate and the Dutch Council of State issued an opinion on 30 January 2015. This would be an organisation with a degree of independence and a budget of €3.5 million a year. It would offer protection and advice to whistleblowers but also be able to make direct enquiries about any situation that has been reported, both in the public sector and the private sector. The "Whistleblowers' centre" would thus have significant investigative powers, in particular in the public sector, which would go well beyond the Commission for Integrity's current areas of responsibility. Government institutions would be obliged to let it have access to all the information it needed during the course of its investigation. The text under discussion also provides for legal protection for whistleblowers, who could not be dismissed while an enquiry led by the "Whistleblowers' centre" was underway.

# Appendix 6 – Contribution from Professor Henri Oberdorff on the notion of ethical whistleblowing

In its traditional sense, 'blowing the whistle' is about preventing an imminent danger or risk in order to take the necessary measures to stop it in sufficient time. This falls within the realm of traditional whistleblowing in the workplace, for example in the emergency or security services. The notion of ethical whistleblowing is quite different. It is instigated by *"a person or group who breaks silence to report, reveal or disclose past, current or future acts intended to breach a statutory or regulatory framework or which are contrary to the common good or public interest"*[132]. An ethical whistleblower, who has a certain sense of responsibility and is acutely aware of their duty to act vigilantly as a citizen, is motivated to disclose serious problems in either the public authorities or in a business. They take the view that conscience should prevail over the duty of obedience because they consider that they have an ethical duty to tell the truth about what they have found, for example in the course of their professional activities. Fundamentally, to echo the words of Albert Camus, it is about being a rebel, *"a man who says no, but whose refusal does not imply a renunciation."*[133]

Numerous cases of ethical whistleblowers have arisen in the last few years. Some have become very famous, even at the global level. Edward Snowden, Julien Assange and Irène Frachon, *"now feature in the pantheon of digital citizenship, in the firmament of civic disobedience"* [134]. Others are less well known, *"but they are all driven by their conscience in a rebellious movement"*[135]. The increase in ethical whistleblowing is very significant. It suggests a form of mistrust in relation to all authority, a stage in *"counter-democracy"* to use Pierre Rosanvallon's term[136]. It also emphasises the fact that other traditional control channels are failing.

That said, the very broad notion of ethical whistleblowing remains a delicate one, balanced as it is between disclosure and disobedience.[137] The whistleblower is also difficult to categorise in legal terms. Indeed, at first glance, *"the whistleblower appears in their relationship with the state more like a legal informer than someone who is simply disobedient"*[138]. This explains why sector-specific legislation has been adopted to organise such disclosures, both in the United States and in France. In a broader sense, the whistleblower is closer to the *"parresiast"* referred to by Michel Foucault in his lectures at the Collège de France[139], i.e. someone who takes the risk of telling the truth, as Socrates once did. This first type of whistleblowing

132 Fr. Chateauraynaud, "Lanceur d'alerte", *in Dictionnaire critique et interdisciplinaire de la participation*, Paris, GIS Démocratie et Participation, 2013, URL: http://www.dicopart.fr/fr/dico/lanceur-dalerte

133 A. Camus, *L'homme révolté*, NRF Gallimard, 1951, p.20.

134 N. Truong, "À quoi servent les lanceurs d'alerte", Le Monde, 9 November 2015.

135 W. Bourdon, Le Monde, 9 November 2015.

136 P. Rosanvallon, *La contre-démocratie, la politique à l'âge de la défiance*, Seuil, 2006.

137 D. Lochak, "L'alerte éthique, entre dénonciation et désobéissance", AJDA, 2014, p.2236.

138 S. Slama, "Le lanceur d'alerte, une nouvelle figure du droit public ?"AJDA, 2014, p. 2231.

139 M. Foucault, *The Courage of Truth. The Government of Self and Others II*, lectures at the Collège de France, Gallimard-Seuil, 2009.

is relatively easy to regulate. It is an altogether trickier matter for the broader sense of the term, which seems, based on certain aspects of disobedience, close to the notion of resistance to oppression, which is proclaimed as a natural and imprescriptible right by Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen. Ethical whistleblowing is a combination of these two approaches.

The new concern for ethical whistleblowing in France is justified by the collective desire to improve the overall operation of our democracy. It draws on a long tradition, notably in the United States[140], by the recommendations of the Council of Europe[141] and by the case law of the European Court of Human Rights on freedom of expression. Indeed, democratic states are no longer ranked solely on the basis of economic criteria but also on their efforts against all forms of corruption. Non-governmental organisations also produce rankings based on national systems that monitor integrity in public and economic life.[142] Vigilance among citizens is essential for combating corrupt phenomena or practices. The main aim is to make democracy better and for it to set a more positive example. This means creating secure conditions for both whistleblowers and the use of ethical whistleblowing.

## Ethical whistleblowing as a tangible expression of new civic vigilance

Ethical whistleblowing represents a new form of civic vigilance in a democracy. It warns about problems found both inside and outside public institutions or businesses. It is not dissimilar to the revelations made by investigative journalists who take practical steps with regard to the right to know[143]. It also contributes to freedom of expression. Ethical whistleblowing provides a way of telling the truth to serve the public interest using methods appropriate to the times

*Speaking the truth for the public interest*

Ethical whistleblowing is a modern form of "parrhesia". It *"is the courage of the truth in the person who speaks and who, regardless of everything, takes the risk of telling the whole truth that he thinks, but it is also the interlocutor's courage, in agreeing to accept that hurtful truth that he hears"*[144]. In more tangible and more specialised terms, the truth is likely to be revealed in cases that have already been well structured in legal terms, in French law, as: reporting acts of corruption in the private sector[145]; reporting facts relating to the safety of medicines and health products[146] ; reporting serious risks to public health and the environment[147];

140 N.-M. Meyer, " Le droit d'alerte en perspective: 50 années de débats dans le monde", AJDA, 2014 p.2242; N. Lenoir, "Les lanceurs d'alerte, une innovation française venue d'outre-atlantique", La semaine juridique, entreprises et affaires, no. 42 15 October 2015.

141 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec (2014) 7

142 Transparency France, National Integrity System Assessment, The French system for transparency and integrity in public and economic life. http://www.transparencyfrance.org/e_upload/pdf/rapport_sni_transparence_international_france.pdf

143 E. Plenel, *Le droit de savoir*, Don Quichotte, 2013

144 M. Foucault cited above

145 Art. 9 of Act no. 2007-316 of 16 April 2007 on combating corruption and creating Article L.1161-1 of the Labour Code

146 Art. 43 of Act no. 2011-2012 of 29 December 2011 on improving the safety of medicines and health products, creating Article L.5312-4-2 of the Public Health Code

147 Art. 11 of Act no. 2013-316 of 16 April 2013 on the independence of expert assessment in

reporting conflicts of interest in public life[148]; reporting any fact that constitutes a crime or offence[149]; actions contrary to the principle of non-discrimination, including gender discrimination[150]; facts constituting sexual harassment[151] or psychological harm[152]. All of these possible problems are connected, for the whistleblower, with concerns around defending the public interest.

The whole point, for an ethical whistleblower, is to tell the truth. *"It is therefore important to establish whether the person concerned, in making their disclosure, acted in good faith and with the conviction that the information was correct, whether the disclosure served the public interest and whether or not the originator had access to more discreet means to report the acts in question."*[153] Whistleblowers act in the public interest, which they wish to defend in so doing. They do not therefore think about their own interests, but are conscious of their responsibilities as a citizen. *"The public interest is not only the concern of the public authorities. In reality it is a matter for every citizen. Indeed, acting in the public interest implies that everyone is capable of distancing themselves form their own interests"*[154] Yet civic vigilance is only possible if every citizen plays their part in defending the public interest, and perhaps if it becomes essential in reporting problems that are ethically reprehensible. It requires citizens to *"take democracy seriously"*[155]

*Using methods appropriate to our times*

This new civic vigilance must also be exercised responsibly. Indeed, ethical whistleblowers must also act ethically. If they have access to a structured procedure to issue their warning, they must actually use it, rather than jumping ahead and seeking untimely media coverage. The European Court of Human Rights makes this very clear in the case law: *"In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public."* [156] Indeed, inappropriate use of media outlets can also have very negative effects on democracy.

Nevertheless, it is important to assess the changes that have been brought about by digital technology, including its impact on the issue of ethical whistleblowing. Indeed, digital platforms are appearing to be increasingly well suited *"to the*

respect of health and the environment and protection for whistleblowers, creating Article L.1351-1 of the Labour Code

148 Art. 25 of Act no. 2013-907 of 11 October 2013 on transparency in public life

149 Art. 35 of Act no. 2013-1117 of 6 December 2013 on combating tax fraud and serious economic and financial crime and Art. 6 ter A of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants

150 Art. 6 bis of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants

151 Art. 6 ter of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants

152 Art. 6 *quinquies* of Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants.

153 According to the principles developed by the ECHR, 12 February 2008, *Guja v. Moldova*, no. 142277/04

154 Conseil d'État, public report, 1999, *L'intérêt général*, ED no. 50 1999, 357

155 F. Hartmann, *Lanceurs d'alerte, les mauvaises consciences de nos démocraties*, Ed. Don Quichotte, 2014

156 ECHR, 12 February 2008, *Guja v. Moldova*, no. 142277/04 § 73

*vigilance, reporting and scoring. Better, the internet is a tangible expression of these powers. ... the internet has become a general space for monitoring and assessing the world. Far from being a simple instrument, it embodies the very function of surveillance..."*[157] Indeed, we might ask whether *"the most innovative contribution the internet has made is for users to at least assess the appropriateness of a public policy and at the other extreme, to challenge it. It is about expressing a form of cyber-resistance via the internet."*[158] It is highly symptomatic that the whistleblowers who receive the most media coverage have often used the internet to act. Cyber-resistance has shown how effective it can be in recent years, including in non-democratic regimes.

## The role of ethical whistleblowing in a better democracy

*"Ultimately, ethical whistleblowing should contribute to but not impede the proper operation of public authorities and businesses and therefore the smooth running of our country's public, economic and social life."* [159] Its role is not to prevent democracy from working while it remains functional, but to make it better and more complete. Ethical whistleblowing is a kind of virtuous quest. This assumes that it is sufficiently secure.

*A more complete democracy in procedural terms*

Democracy is not simply about regularly electing political leaders to give them political legitimacy. It is also inseparable from political ethics and impeccable behaviour in the management of public and private affairs. This was very clearly expressed by Alain, who took the view that *"democracy gives the people the power to oversee and make judgments. That's all it takes. All wrongdoing is secret"*[160] Ethical whistleblowing also helps to refine democracy. Indeed, for several years we have seen greater prominence for concepts that had been neglected for some time, such as ethics, professional conduct, evaluation, transparency and civic vigilance. These notions are all designed to support the proper operation of all public and private structures. Moreover, there has been an increase in social activism and a renewal of militant action to make democracies more effective. This has given rise to specialist associations and organisations such as: Anticor, Association Sherpa, la Quadrature du Net, Fondation Sciences citoyennes, Sea Shepherd France, Transparency International France, etc.

The ethical whistleblower is also a new figure in this modernisation of democracy. Indeed, as the Council of Europe emphasises in its recommendation on protection for whistleblowers, they are important for a true democracy to operate properly: *"individuals who report or disclose information on threats or harm to the public interest can contribute to strengthening transparency and democratic accountability"*[161] Civic vigilance plays a part in the democratic process precisely

157 P. Rosanvallon, op. cit., Seuil, 2006 p.75
158 H. Oberdorff, *La démocratie à l'ère du numérique*, PUG, 2010 p.96
159 J.-M. Sauvé, speech to the Fondation sciences citoyennes and Transparency International France symposium on Whistleblowers, National Assembly, February 2015
160 Alain, *Propos de politique*, Ed. Rieder, Paris, 1934 p.324
161 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec (2014) 7

because it monitors the proper operation of that process, including by demonstrating targeted mistrust in respect of public or economic powers. It contributes to the creation of participative democracy as a complement to representative democracy and strengthens the idea of continuing democracy.

*Democracy with the ability to secure ethical whistleblowing*

For this new kind of civic vigilance to function, it is essential for ethical whistleblowers who act in good faith to be properly protected. This means creating a real whistleblowing culture. The task is far from simple, insofar as it means designing a more comprehensive set of procedures than currently, to raise doubts over the operation of the public authorities, administrations or businesses. However, *"employers need to understand why it is in their best interests to encourage those who work for them to report concerns about wrongdoing or risk of harm early enough and to make it safe for them to do so."*[162] At the same time, it is about respecting *"the right balance, on the one hand, between freedom of expression and the freedom of the press, which include the protection of journalistic sources and whistleblowers within the civil services, and on the other, protection for state bodies' confidential data."*[163]

Numerous proposals have been put forward to provide security for ethical whistleblowing in the broad sense of the term. Indeed, the current French approach, which consists of segmenting whistleblowing procedures by area, lacks legibility and visibility, particularly given that not all facts revealed necessarily constitute a crime or offence pursuant to Article 40 of the Code of Criminal Procedure. This means not only broadening the scope of whistleblowing, but also strengthening the protection available to whistleblowers and organising it more effectively. There is a proposal, for example, to introduce *"a secure information channel for whistleblowers to allow them to contact an independent person responsible for protecting them from any threats or reprisals."*[164] The High Commission on transparency in public life has pointed the way, insofar as it can already be contacted by citizen-led anti-corruption associations. This can only help *"rebuild public trust"*[165]. Similarly, other proposals have suggested organising comprehensive protection for whistleblowers.[166] It has even been suggested that there should be a move towards *"constitutional recognition of 'ethical whistleblowers'... to establish the democratic legitimacy of their actions".* [167] It is also essential to have access to guidance and information on the practical steps to take.[168]

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162 Council of Europe, Protection of Whistleblowers, Recommendation CM/Rec (2014) 7, explanatory memorandum § 91

163 ECHR, 19 January 2016, *Görmüs and others v. Turkey*, no. 49085/07, § 52

164 Recommendation no. 13 of the report from the Commission on the Law and Freedoms in the Digital Age, National Assembly, 2015.

165 J.-L. Nadal, *Renouer avec la confiance publique*, Documentation française, 2014.

166 Comprehensive bill on protection for whistleblowers, Y. Galut, National Assembly, 3 December 2015.

167 D. Rousseau, *Radicaliser la démocratie, propositions pour une refondation*, Seuil, 2015, p.224.

168 Practical guidelines for French whistleblowers, Transparency International France; See also W. Bourdon, E.Plenel and G. Ryle, "Une plateforme de protection des lanceurs d'alerte, pour la défense des libertés", Le Monde, 24 April 2014.

Ethical whistleblowing cannot be based solely on the new heroes of democracy who agree to take risks in order to tell the truth about major problems. It must be able to rely on ordinary citizens acting as virtuous lookouts to contribute to the proper operation of both public authorities and businesses.

Henri Oberdorff
*Emeritus Professor of the University of Grenoble-Alpes*
31 January 2016

# Appendix 7 – Whistleblowers and professional confidentiality (note from the French Ministry of Justice)

DEPARTMENT OF CRIMINAL AFFAIRS AND PARDONS
SUB-DEPARTMENT OF CRIMINAL NEGOTIATION AND LEGISLATION
Specialist criminal legislation office
Author: Thibault Cayssials

## Whistleblowers and professional confidentiality

**Summary**: The relationship between criminal provisions that sanction breaches of professional confidentiality and those that authorise the disclosure of certain facts can sometimes appear uncertain. The legislation does not always provide a satisfactory answer to this conflict of standards. Like other legislation that permits the disclosure of wrongdoing, the mechanisms that encourage whistleblowing do not address the question of professional confidentiality that is protected in law. As a consequence, although there are specific provisions protecting whistleblowers from disciplinary sanctions in the professional context, someone who has disclosed facts that are confidential can be held criminally liable for their actions.

Whistleblowers can be defined as people who use any means to bring wrongdoing they have discovered during the course or as a result of their duties to the attention of their employers, the administrative authorities or the courts, or the public.

Such revelations may, however, run counter to the interests of the whistleblower's line management or implicate them, and thus pose a threat to the whistleblower's work situation.

Because such disclosures are made in the public interest, they should be encouraged and those who make them should not be left to face a Cornelian dilemma, i.e. either disclosing wrongdoing or protecting their personal interests.

Several laws have been introduced since 2007 to provide whistleblowers with protection from any retaliatory or discriminatory measures in the workplace.

That said, whistleblowing is also likely to undermine professional confidentiality that is protected by law, breach of which is sanctioned by Article 226-13 of the Penal Code.

However, protection for professional confidentiality cannot be absolute and in certain cases the legislature authorises disclosure where it deems that confidentiality conflicts with another social value of at least the same importance.

Apart from these mechanisms for whistleblowers, there are also numerous pieces of legislation that impose or authorise the disclosure of certain facts.

All of these must be examined to resolve the conflict between those that impose silence and those that impose or authorise disclosure.

## I. Protection of professional confidentiality

Article 226-13 of the Penal Code sanctions the disclosure of confidential information to someone who is not authorised to share it by someone to whom it has been entrusted[169]. Professionals whom the law or regulations designate as custodians of a secret may be incriminated. People who are simply bound by a contractual confidentiality clause, however, are excluded from its scope. By relying on sector-specific provisions to define what is covered by professional confidentiality, the law takes a blanket approach to those who breach confidentiality, without any distinction between the various professions.

The very extensive list of professionals who are subject to confidentiality includes, in particular: Doctors and health professionnels ; Social services ; financial and commercial professions (bankers, statutory auditors and chartered accountants) ; Legal and judicial professions (lawyers, notaries, bailiffs, auctioneers and receivers); Civil servants and other public officials.

All of these professions are likely to be affected by whistleblowing, whether it is a question of revealing financial offences or the existence of a serious risk to public health.

## II. Legal mechanisms that justify the disclosure of professional secrets

Professional confidentiality cannot be absolute and there are cases in which a breach of confidentiality is authorised or ordered on public interest grounds. It therefore appears inconceivable that someone who reveals a professional secret could be sanctioned when the revelation is allowed under other legislation.

### *The type of law or régulation*

Article 122-4 of the Penal Code provides that someone cannot be held liable for an act that is subject to criminal sanctions if it is ordered or authorised by a law or regulation[170]. This may be a criminal or civil law. In principle, a regulation cannot provide exemption from a law, unless it is a regulation that sets out the conditions for applying a law under the authority of said law. Numerous cases justify the revelation of facts covered by professional confidentiality[171].

### *Express exemptions provided by Article 226-14 of the Penal Code*

Article 226-14[172] of the Penal Code provides for a number of situations in which the

169 Article 226-13 of the Penal Code: *"The disclosure of confidential information by someone to whom it has been entrusted either in writing or by means of a declaration, as a result of their job or a temporary assignment, is punishable by one year's imprisonment and a fine of €15,000."*

170 Article 122-4 of the Penal Code: *"A person is not criminally liable who performs an act prescribed or authorised by legislative or regulatory provisions*[...]*".*

171 See, for example, Article L.3113-1 of the Public Health Code, which requires doctors to report certain contagious diseases to the health authorities.

172 Article 226-14 of the Penal Code: *"Article 226-13 is not applicable to the cases where the law imposes or authorises the disclosure of the secret. In addition, it is not applicable: / 1. To a person who informs a judicial, medical or administrative authority of cruelty or deprivation, including sexual abuse, of which he has knowledge and which has been inflicted on a minor or a person unable to protect himself because of his age or physical or psychological statue; / 2. To a doctor or any other health professional who, with the consent of the victim, brings to the knowledge of the public prosecutor or the collection, treatment and evaluation centre for concerns relating to minors who are or may be in danger, referred to in paragraph two of Article L.226-3 of the Social Action and Families Code, instances of cruelty*

provisions of Article 226-13 of the same Code do not apply :
- Where the law imposes or authorises the disclosure of the secret;
- Where they concern facts cited in article 226-14.

Apart from the specific situations listed, Article 226-14 also stipulates that the justification for the order or authorisation under the law is a reason for not invoking criminal liability and it is questionable whether it would be wise to introduce a provision that would compete with the general provisions of Article 122-4 of the Penal Code cited above, without adding anything new. Nonetheless, there are legal mechanisms in place, notably those that protect whistleblowers, which allow the disclosure of certain facts, without necessarily allowing the revelation of professional secrets.

## III. Legal mechanisms that do not justify the disclosure of professional secrets

***Failure to report crime or mistreatment***

Articles 434-1[173] and 434-3[174] of the Penal Code sanction the failure to reveal certain facts and conflict directly with those that sanction breaches of professional confidentiality.

The conflict of interest here, between provisions that require people to speak out and those that require them to remain silent, is clear. The final paragraphs of the articles cited above expressly provide that people who are bound by confidentiality cannot be accused of crimes of non-disclosure.

This was not the case under the previous Penal Code, since the previous Article 62, which was replaced by Article 434-1, was silent on the relationship with provisions that sanction maintaining professional confidentiality.

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*or deprivation, either physical or psychological, that he has observed in the exercise of his profession that cause him to believe that physical, sexual or psychological violence, of any sort, has been committed. Where the victim is a minor or a person unable to protect himself because of his age or physical or psychological state, his consent is not necessary; / 3. To health professionals or social work professionals who inform the prefect and, in Paris, the chief of police, that someone who consults them presents a danger to himself or to other people when they know that this person has a weapon or has manifested the intention to acquire one. / Alerting the competent authorities under the conditions provided for by the present article may not lead to criminal, civil or disciplinary sanctions against the originator except if it is established that they did not act in good faith."*

173 Article 434-1 of the Penal Code: *"Any person who, having knowledge of a felony the consequences of which it is still possible to prevent or limit, or the perpetrators of which are liable to commit new felonies that could be prevented, omits to inform the administrative or judicial authorities, is punished by three years' imprisonment and a fine of €45,000. / Except where felonies committed against minors under fifteen years of age are concerned, the following are exempted from the provisions above: / 1. direct relatives and their spouses and the brothers and sisters and their spouses, of the perpetrator or accomplice to the felony; / 2. The spouse of the offender or accomplice to the felony, or the person who openly cohabits with him. / Also exempted from the provisions of the first paragraph are persons bound by an obligation of secrecy pursuant to the conditions laid down under article 226-13."*

174 Article 434-3 of the Penal Code: *"Any person who, having knowledge of maltreatment, deprivations, or sexual assaults inflicted upon a minor under fifteen years of age or upon a person incapable of self-protection by reason of age, sickness, infirmity, psychical or psychological disability or pregnancy, omits to report this to the administrative or judicial authorities is punished by three years' imprisonment and a fine of €45,000. / Except where the law otherwise provides, persons bound by an obligation of secrecy pursuant to the conditions set out under article 226-13 are exempted from the above provisions.*

The case law and judges in the lower courts remained divided on the possibility of sanctioning the failure to disclose a crime committed by someone bound by professional confidentiality.[175] and the Court of Cassation never addressed the issue.

In the case of a conflict of offences, there are two possible interpretations. Either each provides exemption from the other and they cancel each other out. Someone who commits one of the two offences will still not be criminally liable if they obey the stipulations of the other. Or one of the offences provides exemption from the other and it is then a question of identifying which of the two constitutes a special law.

***Failure to prevent a crime or offence and failure to assist a person in danger***

Article 223-6[176] of the Penal Code sanctions, on the one hand, the fact of not preventing a crime or offence against a person's bodily integrity and on the other, the fact of not providing assistance to a person in danger.

The criminal law is silent here on the relationship with provisions that protect confidentiality.

The circular of 14 May 1993 setting out the provisions of the new Penal Code and Act no. 92-1336 of 16 December 1992 on its entry into effect stipulates that Article 223-6 of the Penal Code is applicable to people who are subject to confidentiality and that in the case of mistreatment endangering the physical integrity of a minor or vulnerable person, a doctor may not fail to act without incurring the penalties provided in said article.

This interpretation takes into the account the fact that the legislature did not exclude people who are bound by confidentiality from the scope of criminal liability as it did concerning non-disclosure of a crime or mistreatment. Nevertheless, the case referred to covers one of the exemptions explicitly provided for in Article 226-14 of the Code of Criminal Procedure.

It should also be noted that while Article 223-6 does not exclude people who are bound by confidentiality, nor does it explicitly authorise them to make a disclosure.

Reconciling these two apparently contradictory requirements appears possible nonetheless, since the required intervention can take various forms and does not necessarily imply revealing facts that are covered by confidentiality.

175 See, on the one hand, Lyon 1 April 1988 and on the other, Agen 1 March 1991.

176 Article 223-6 of the Penal Code: *"Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of €75,000. / The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations."*

***The obligation for public officials to report offenses***

Paragraph 2, Article 40[177] of the Code of Criminal Procedure places an obligation on all public officials to reveal to the judicial authorities any crimes and offences of which they become aware during the course of their duties.

Three categories of people are concerned: the constituted authorities, public officials and civil servants. Since the criminal law has generally upheld a broad definition of the term civil servant, it is accepted that the obligation falls on all public officials. Judges in the criminal courts only exclude administration officials whose situation is covered by private law: officials in the industrial and commercial services, public service concession holders and those who cooperate occasionally with the public services.

Nonetheless, the existence of specific provisions for officials responsible for identifying and recording offences[178] would suggest that while they may not be excluded from the scope of Article 40, at least its extent is reduced. Many of the texts instituting independent administrative authorities or public services also contain an equivalent or[179] separate provision[180].

This is a personal obligation and a public official who reports wrongdoing to the public prosecutor without referring to their line manager is not guilty of an offence[181]. That said, this provision does not exempt the civil servant from their duty to report their observations to their line management. Conversely, there is no requirement for the report to be made by the civil servant and it can be made by their line manager[182].

This obligation is not sanctioned by any legislation[183]. It is based on the idea that a civil servant must not be indifferent to the commission of a crime or offence discovered during the course of their duties even if reporting offences does not fall within their powers.

177 Article 40 of the French Code of Criminal Procedure: *"The district prosecutor receives complaints and denunciations and decides how to deal with them, in accordance with the provisions of article 40-1. / Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents."*

178 See, for example, Article 19 of the French Code of Criminal Procedure for police officers responsible for criminal investigations *("Officers in the criminal investigation department are obliged to inform the public prosecutor immediately of any crimes, misdemeanours or petty offences of which they are aware"*) or Article L.172-16 of the Environment Code for environmental inspectors (*"Offences concerning the provisions of this Code and its implementing legislation are recorded in a statement of offence which shall be deemed reliable unless there is evidence to the contrary. These statements of offence shall be sent to the public prosecutor within five days of their closure"*).

179 See, for example, Article 143-3 of the Financial Courts Code: *"If, in carrying out its checks, the National Audit Office discovers facts that could lead to criminal proceedings, it may inform the public prosecutor for the National Audit Office, who will refer to the matter to the Minister of Justice and advise both the minister concerned and the Minister of Finance. It shall refer facts that could justify the involvement of the Court of Budget and Financial Discipline to the public prosecutor at said court."*

180 See, for example, the provisions of the Monetary and Financial Code, which require certain public officials to declare their suspicions in relation to money laundering (Articles L.561-2 and L.561-15).

181 CE, 15 March 1996, *Guigon.*

182 Cass. Crim., 14 December 2000.

183 Cass. Crim., 13 October 1992.

The provisions of Article 40 could be viewed as a legal order as defined in Article 122-4 of the Penal Code and thus mean that a public official who revealed a secret in order to report an offence would not be liable.

Although this interpretation does not appear to cause difficulties for many public officials, it is different for some of them, when maintaining confidentiality is associated with principles of constitutional value or established by convention. Notable examples include public-sector medical and healthcare professions, where professional confidentiality protects the right to privacy[184].

If Article 40 were to justify the offence of disclosing facts covered by professional confidentiality, its corollary would be to vary the extent of the secret, depending on whether the professional who holds it belongs to the public or private sector.

Admittedly, it could be held that doctors in the public sector are not civil servants and are therefore not subject to the provisions of Article 40 of the Code of Criminal Procedure. Although this solution, which runs counter to the broad definition of civil servant in the criminal law, resolves part of the problem, it does not address the issue of other people working in the public health services.

Moreover, given that the legislature has intervened specially by adopting Article 226-14 of the Criminal Code to authorise doctors and health professionals to reveal certain offences in a limited number of specific cases, it is difficult to conclude that Article 40, which makes no distinction between crimes and offences, constitutes a general justification.

Circulars from the Ministry of Health expressly state that the provisions of paragraph two, Article 40 do not allow health personnel to reveal secrets in the absence of a special provision[185].

The case law has never examined this issue.

***Specific protection mechanisms for whistleblowers***

The system initially related to revealing acts of corruption[186], before being extended to the safety of health products[187], the risk caused to public health or the environment[188], to the revelation of conflicts of interest[189], and then further extended to all crimes and offences[190]. Protection for whistleblowers was also introduced into the intelligence field[191].

184 The Constitutional Council attaches the right to respect for privacy to the individual liberty guaranteed by Article 2 of the Declaration of the Rights of Man and the Citizen of 26 August [1789]. The same right is guaranteed by Article 8 of the European Convention on Human Rights.

185 See instruction no. 2011-139 of 13 April 2011 on appropriate conduct in the case of illegal possession of narcotics by a patient being cared for in a health care institution.

186 Article L.1161-1 of the Labour Code created by the Act of 13 November 2007 on combating corruption.

187 Article L.5312-4-2 of the Public Health Code created by the Act of 29 December 2011 on improving the safety of medicines and health products.

188 Article L.1351-1 of the Public Health Code created by the Act of 16 April 2013 on the independence of expert assessments in respect of health and the environment and protection for whistleblowers.

189 Article 25 of the Act of 11 October 2013 on transparency in public life.

190 Article L.1132-3-3 of the Labour Code and Article 6 ter A of the Act of 13 July 1983 as drafted in the law of 6 December 2013 on combating tax fraud and serious economic and financial crime.

191 Article L.861-3 of the Internal Security Code created by the Intelligence Act of 24 July 2015.

Once a warning has been issued, a person who has acted in good faith is entitled to protection against any retaliatory or discriminatory measure in their professional activities.

Nonetheless, none of the provisions cited above expressly authorises the revelation of facts covered by professional confidentiality. As a consequence, the provisions that sanction a breach of the law must be considered a special law.

Moreover, these mechanisms are formulated in such a way that they relate to protection in a professional context. This is either civil or disciplinary protection and does not release the whistleblower from criminal liability.

As a consequence, it appears that people who, by making a disclosure, fall within the scope of the provisions referred to above, reveal facts covered by professional confidentiality, expose themselves to criminal prosecution on the basis of Article 226-13 of the Penal Code.

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# Appendix 8 – The relationship between statutory obligations and the reporting obligation in the civil service (note from DGAFP)

**MINISTRY OF THE CIVIL SERVICE**
**DGAFP**
**Legal adviser to the Director General**
**Florence Cayla**

SUB-DEPARTMENT OF REGULATIONS AND SENIOR MANAGEMENT
Civil service and social dialogue office at the DGAFP
Antoine Thomas

## The relationship between statutory obligations and the reporting obligation in the civil service

Act no. 83-634 of 13 July 1983 on the rights and obligations of civil servants sets out the statutory framework for the duties exercised by civil servants. Among the obligations on both civil servants and contractual officials governed by public law, those referred to articles 26 to 29 of the Act are critical, particularly with regard to their relationship with line management.

These include the fundamental obligations of professional confidentiality and discretion (Art. 26) alongside the duty to satisfy requests for information from the public (Art. 27), and the duty of obedience expressed in the principle of line management, except in the case of a manifestly illegal order that might present a serious threat to the public interest (Art. 28). The duty of maintaining discretion is also enshrined in the case law[192].

These obligations establish a framework for civil servants and public officials to exercise their freedom of opinion (guaranteed by Article 6 of the same Act) and freedom of expression, enshrined in Article 11 of the Declaration of the Rights of Man and of the Citizen and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Failure to fulfil these obligations can expose the civil servant to disciplinary sanctions and, if applicable, to the penalties provided for under the criminal law (Art. 29).

Paragraph two, Article 40 of the Code of Criminal Procedure (CPP) similarly places an obligation on public officials to inform the public prosecutor, without delay, of any crime or offence they may come across in the course of their duties and to submit related any information and documentation[193].

192 CE, 11 January 1935, *Bouzanquet*, Rec. p. 44.

193 See paragraph two, Article 40 of the French Code of Criminal Procedure: *Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any*

While they do not impose any additional obligations on civil servants, the statutory protection mechanisms against psychological or sexual harassment and illegal discrimination (Art. 6, 6 *bis*, 6 *ter*, 6 *quinquies* of the Act of 13 July 1983 cited above) acknowledge that public officials, based on the protection afforded to them, have the right to report provide evidence of such actions regarding another official.

The legislative provisions on protection for whistleblowers examined by the working group are enshrined in this statutory framework. One of these mechanisms was introduced in Article 6 ter A of the Act of 13 July 1983 as drafted in Act no. 2013-1117 of 6 December 2013 on combating tax fraud and serious economic and financial crime, in order to protect officials who had reported or provided evidence, in good faith, of facts constituting a crime or offence. The bill on ethics and the rights and obligations of civil servants provides for an extension of this protection when the facts are deemed to represent a conflict of interests[194].

Reconciling these rights and the obligation to report with respect for the various obligations associated with professional ethics that civil servants must fulfil, means that they must consider the nature of the facts or actions reported, what they are aiming to achieve and the interests at stake, to determine the extent of their obligations and the appropriate actions to take, and measure the risks inherent in any disclosure.

Indeed, the European Court of Human Rights (ECHR) has ruled on the relationship between civil servants' statutory obligations of loyalty and discretion, and the disclosure of confidential information. It has thus established a framework for the limits that can be placed on civil servants' freedom of expression, while believing that the disclosure of illegal conduct or actions observed by public officials in the workplace should be protected in certain circumstances. It has established that principle that, given the obligation imposed on civil servants to maintain professional confidentiality, it is important for reports of such actions to be made first to the civil servant's line manager or another authority or competent body, and that disclosure to the public, in good faith and in order to serve the public interest, should only be envisaged as a last resort, *"where this is clearly impracticable"* (ECHR, 12 February 2008, *Guja v. Moldova*, no. 14277/04)[195]. This ruling confirms the legitimacy of ethical obligations applicable to public officials and that of the mechanisms used to implement a staged reporting procedure for illegal conduct or acts, before they are disclosed to the public.

The relationship between the obligation established by Article 40 of the CPP and the statutory obligations of professional confidentiality and discretion, and obedience

*relevant information, official reports or documents".*

194 As defined in the bill on ethics and the rights and obligations of civil servants, which reflects the definition of conflict of interests found in paragraph one, article 2 of Act no. 2013-907 of 11 October 2013 on transparency in public life.

195 The relationship between these various methods of disclosure is assessed on the basis of six criteria: the existence of other reporting options other than public disclosure; the public interest at stake; an assumption of the authenticity of the information disclosed; the proportionality of the harm caused to the employer; the good faith of the person who made the disclosure; the proportionality of the sanction.

to line management, is discussed in this note[196]. In light of national and European case law, this relationship seems to be based on two principles: first, the pre-eminence of public order in respect of the criminal law over statutory obligations (I) and secondly, the principle of responsibility in implementing mechanisms (II).

**I/ The principle: statutory obligations carry less legal weight than paragraph two, Article 40 of the French Code of Criminal Procedure**

**1.1- The specific case of professional confidentiality**

Under the terms of Article 26 of the Act of 13 July 1983 cited above, civil servants are obliged to maintain professional confidentiality *"within the confines of the rules set out in the Penal Code"*.

Professional confidentiality, which is designed to protect the interests of private citizens and constituents, and the conditions under which it may be breached, are governed by the Penal Code. A breach of professional confidentiality is subject to criminal sanctions (Article 226-13 et seq. of the Penal Code). Specific legislation provides a stronger framework for certain secrets that protect higher interests (notably defence secrets and the confidentiality of deliberations), which is not considered in the following arguments.

The provisions of Article 226-13 of the Penal Code provide that *"the disclosure of confidential information by someone to whom it has been entrusted either in writing or by means of a declaration, as a result of their job or a temporary assignment, is punishable by one year's imprisonment and a fine of €15,000,"*

The relationship between disclosure in respect of paragraph two, Article 40 of the CPP and the obligation to maintain professional confidentiality results from the following provisions of the Penal Code.

Article 226-14 of the Penal Code provides that *"Article 226-13 is not applicable to the cases where* ***the law imposes or authorises the disclosure of the secret."***

As a result, disclosure by a civil servant to the prosecuting authorities pursuant to paragraph two, Article 40 of the CPP of information necessary to establish a crime or offence may not be subject to criminal or disciplinary sanctions on the basis of a breach of professional confidentiality (Cass. crim, 6 July 1977, no. 76-92990; CE, Sect., 15 March 1996, no. 146326).

Criminal or disciplinary proceedings are not excluded, however, in the case of unlawful use of the provisions of paragraph two, Article 40 of the CPP or, in this instance, of disclosure to the public or negligence in respect of statutory obligations.

196 There are few decisions by the Conseil d'État on this issue. The High Commission considers, with regard to a personal obligation, that it is not its responsibility, in the absence of a specific provision, to implement the provisions of paragraph two, Article 40 of the Code of Criminal Procedure (CE, Sect., 16 November 2007, no. 300711). As a result, administrative case law relates mainly to disciplinary questions, where there are facts that have led an official, in accordance with the implementation of Article 40 of the Code of Criminal Procedure, to be criticised for a failure to fulfil one of their statutory obligations (CE, 15 February 1961, no. 42460).

**1.2- The obligation to maintain professional confidentiality, the duty of loyalty and the principle of hierarchy cannot impede the reporting of a crime or offence.**

**1.2.1 Professional discretion and the obligation of loyalty**

With regard to the obligation of professional discretion, paragraph two, Article 26 of the Act of 13 July 1983 cited above provides that *"apart from the cases expressly provided for by the regulations in effect, notably in respect of freedom of access to administrative documents, civil servants can only be released from said obligation of professional discretion by an express decision of the authority to which they report."* It applies *"in respect of all the facts, information or documents of which they are aware in the course or as a result of their duties".*

While confidentiality is defined in law and sanctioned under the criminal law, the obligation to maintain professional discretion forms part of the civil service regulations and is sanctioned under disciplinary procedures. Civil servants are obliged to maintain professional discretion and in principle, can only be released from this obligation with the agreement of their line manager.

The provisions of paragraph two, Article 40 of the CPP institute a personal obligation for civil servants, which prevails over the obligation of professional discretion. These provisions authorise them to breach the confidentiality of information and documents of which they become aware during the course of their duties, by contacting the public prosecutor directly, without necessarily referring the matter to their line manager.

The Conseil d'État rejected a request to refer a priority question of constitutionality on Article 26 of the Act of 13 July 1983 cited above to the Constitutional Council, in respect of an appeal against the automatic imposition of retirement for a breach of the obligation of professional discretion. The Conseil d'État considered that in not providing guarantees allowing civil servants to make a public disclosure about serious problems in a public service, in the public interest, without facing disciplinary sanctions, Article 26 did not represent a disproportionate attack on civil servants freedom of expression and communication.

In reaching this conclusion, the Conseil d'État relied not only on the possibility available to a civil servant to be released from their obligation to maintain professional discretion by a decision of the authority to which they report, as provided for in Article 26 of the Act of 13 July 1983 cited above, but also on the obligation to report to the public prosecutor, without delay, as set out in paragraph two, Article 40 of the Code of Criminal Procedure, and judicial control of the legality of a disciplinary sanction with regard to a failure to fulfil the obligation to maintain professional discretion. It held that all of these elements were of a nature to guarantee, for the purposes of the application of Article 26, *"the necessary reconciliation between, on the one hand, maintaining public order and the requirements of the public services and on the other, respect for freedom of expression and communication".*

The result is that an official who has complied with the procedure provided for in Article 40 of the CPP cannot be sanctioned on the grounds of a failure to fulfil their obligation of professional discretion (CE, 5 February 2014, no. 371396)[197].

The obligation to report provided for in paragraph two, Article 40 of the CPP also prevails over the duty of loyalty, since it imposes an obligation on any public official to provide an opinion "without delay" to the public prosecutor without any preliminaries, or other details. This "exemption" from the duty of loyalty has been confirmed by the Conseil d'État, which recalled that the procedure set out in Article 40 of the CPP did not require a public official reporting facts to the public prosecutor to refer to their line manager (CE, Sect., 15 March 1996, no. 146326; see also: Cass. crim. 19 September 2000, no. 99-83960). This position is particularly justified when the acts reported have been carried out by the official's line manager.

### 1.2.2 Hierarchical principle

With regard to public officials' duty of obedience, the case law in the administrative courts relates mainly to cases of officials who have been sanctioned for refusing to carry out an order or take a particular post. The administrative courts do not appear to have ruled on cases of disclosure in respect of Article 40 of the CPP where an official has been sanctioned for failing to comply with their duty of obedience.

At least one decision by a judge concerns a disciplinary sanction taken against an official as a result of disclosing information about a judicial enquiry to the press, following a complaint he had made for forgery and use of forgeries in public accounts, but for failures such as refusing to obey orders with no direct link to the disclosure. This was a question of sanctioning the fact that the official had used interviews with journalists to inform them about his dispute with his employer (in this case, the local mayor) and denigrating the latter, for having implicated his colleagues in an offensive manner and having refused to obey the orders of his line manager (CE, 12 May 1997, no. 132477).

This example shows that, independently of the legal prevalence of the obligation to disclose under Article 40 of the CPP over the civil servant's statutory obligations, disclosures can only be made strictly in accordance with these various statutory obligations.

**II- . Reconciling the official's actions with their statutory obligations when making a disclosure.**

Prior authorisation from an official's line manager to make a disclosure on the basis of Article 40 of the CPP is not necessary and line management cannot demand this without contravening the provisions of the article[198]. Conversely, involving line

197 The Conseil d'État's stance on this matter complements that of the Criminal Chamber of the Court of Cassation, on the scope of the procedure set out in Article 40 of the Code of Criminal Procedure, which ruled that the obligation arising from Article 40 of the Code of Criminal Procedure did not authorise a public official to infringe the obligation of discretion to which they are subject apart from disclosures provided for by the Code, nor to reveal the facts that they consider as wrongdoing to individuals (Cass. crim., 6 July 1977, no. 76-92990).

198 See the article by G. Chalon, "L'article 40 du code de procédure pénale à l'épreuve du statut général de la fonction publique", AJDA, 2004, no. 6 p.27

management in making the disclosure does appear to be possible[199], and desirable, in the interests of the official.

**2.1- The role of line management in making a disclosure under Article 40 of the CPP.**

**2.1.1. Authority of the head of department to indicate the practical arrangements for implementation**

While the provisions of Article 40 of the CPP reject any requirement for prior authorisation from line management before making a disclosure, they do not object to recommendations as to the practical arrangements for doing so.

The Conseil d'État, for example, has ruled that *"since the provisions of Article 40 of the Code of Criminal Procedure do not set out any requirements on how they are applied in practice, the Minister of Education, in his capacity as head of the department, has the authority to indicate the practical arrangements he considers most appropriate, given the nature of the service in question, for passing on information"*[200].

Recommendations on informing line management and methods of disclosure can be given by the head of department.

**2.1.2 The principle of the civil servant's responsibility balances out their contradictory obligations by connecting them.**

Article 28 of the Act of 13 July 1983 cited above provides that *"Any civil servant, regardless of their seniority, is responsible for carrying out the tasks assigned to them. They must comply with the instructions given by their line manager, except where the order given is manifestly illegal and might present a serious threat to the public interest.*

*They are not released from any of the responsibilities placed on them by their subordinates' own responsibilities."*

The principle of responsibility set out here provides helps to reconcile the obligation to make a disclosure in paragraph two, Article 40 of the CPP with the hierarchical principle and its corresponding duty of obedience.

Indeed, as soon as a civil servant informs their line manager of facts that are likely to constitute a crime or offence, they broaden the scope of the obligation to report to their line management. That said, this does not release them from their personal obligation[201]. If they do not receive a response from their line manager, they must inform the prosecuting authorities, which would then be akin to a legal form of disobedience. In this respect, it is useful to recall that Article 6 ter A of the Act of 13 July 1983, cited above, provides statutory protection for a civil servant who,

199 Cass. Crim., 14 December 2000 (Bull. crim.), confirming, with regard to the requirements of Article 40 of the CPP, the disclosure made by the line manager of inspectors at the DGCCRF who had observed criminal acts.

200 CE, 20 March 2000, no. 200387, Rec.

201 Cass. Crim., 14 December 2000, no. 00-86595, Bull. crim., no. 380.

acting in good faith, has reported or provided evidence, particular to the judicial authorities, of facts constituting a crime or offence of which they have become aware during the course of their duties.

**2.2- Ethical obligations frame the terms of a disclosure**

The disclosure referred to in paragraph two, Article 40 of the CPP must be made strictly in accordance with the requirements it imposes as to its recipient and content, and in particular the type of facts concerned. As well as fulfilling this obligation, it does not release the official from compliance with their statutory obligations, particularly in respect of their line management.

An official who reports acts committed by their line managers to the prosecuting authorities must do so in good faith. A disclosure in which the official presented the views held by their line manager in a biased manner in order to denounce them, or was excessively critical of the decisions made by their line managers, could constitute a breach of their obligation to act loyally. Similarly, the obligation arising from paragraph two, Article 40 of the CPP does not authorise a public official to infringe the obligation of discretion to which they are subject apart from disclosures provided for by the Code, nor to reveal the facts that they consider as wrongdoing to individuals or the public (CE, 5 February 2014, no. 371396). The Conseil d'État's position on this reflects and supports that of the Criminal Chamber of the Court of Cassation on the limits of disclosure provided for in paragraph two, Article 40 of the CPP (Cass. crim, 6 July 1977, no. 76-92990).

The Conseil d'État has had occasion to rule on the appropriateness of the various methods of disclosure of facts that have been reported in accordance with Article 40 of the CPP. It has ruled that it was inappropriate to report information to journalists on the existence of a dispute with one's line management and to denigrate the latter, in respect of revelations relating to a complaint of forgery and the use of forgeries in public accounts, with regard to the minutes of a meeting of the municipal council, thus upholding the disciplinary sanction imposed (CE, 12 May 1997, no. 132477).

In a decision of 31 December 2014 (CAA Paris, no. 13PA00914)[202], the Administrative Court of Appeal in Paris has also ruled that, although some of the facts reported in a published book criticising certain police practices had been disclosed on the basis of Article 40 of the CPP, the official from the Ministry of the Interior concerned had not demonstrated that *"they had clearly been unable to act in any other way than by publishing the book, whose content, and the promotion of the book the official secured in the media, were driven by a deliberately polemical intention".* The Court also found that although the civil servant concerned had relied on their duty to issue a warning, they had not demonstrated that *"they had informed their line manager, in the requisite manner, of the actions they deemed to be unethical in the department to which they belonged."* The disciplinary sanction imposed on them for breaching their duty of discretion was therefore justified.

Furthermore, although the publication of a book and taking part in television programmes to criticise problems in their department, without authorisation from

202 Decision published with the conclusions of the public rapporteur in AJDA, 2014, p.644

their line manager, was deemed inappropriate, the judge ruled that a breach of this kind could not justify excluding the person concerned from a career progression list (CE, Sect., 27 July 2005, no. 260139).

It emerges from these rulings that the judge makes a case-by-case assessment of the legal channels used by the official in respect of the facts disclosed, taking into account the reporting or disclosure methods used (in particular, in light of the principles of discretion and loyalty), how the disclosure is expressed and what the official is aiming to achieve. The judge is therefore exercising strict control over the proportionality of the methods used, with regard to the actions or facts covered by the disclosure and its consequences for the authority concerned.

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Where it is a matter of balancing statutory obligations against the obligation to report set out in Article 40 of the CPP, judges in the administrative courts give greater weight to the criminal law.

Although the implementation of Article 40 of the CPP has been legally protected, since the Act of 6 December 2013 cited above, by Article 6 ter A of the Act of 13 July 1983 cited above, it can only be done in strict compliance with the requirements set out in Article 40 of the CPP and does not release the official either from fulfilling this obligation or from adhering to their statutory and ethical obligations. In this respect, the principle of responsibility provides a means of reconciling contradictory requirements, by linking them to the duty of loyalty.

The place and role of line management in implementing the obligation to report remain essential, including where the legislation is silent, and *a fortiori* in exercising the new rights constituted by whistleblowing mechanisms.

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