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26 October 2022 | Number 3025

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New Whistleblower Protections in France: Considerations for Companies

Companies operating in France should implement or adapt their reporting mechanisms to comply with the new requirements.

On 1 September 2022, new protections for whistleblowers in France entered into force. The protections were passed on 21 March 2022 as law No. 2022-401 (the Law).

The Law provided for the subsequent adoption of a decree aimed at determining the implementation conditions of the procedure for internal reporting by the subject entities and by the external authorities. Such decree has now been adopted — it is decree No. 2022-1284 of 3 October 2022 (the Decree), entered into force the day following that of its publication.

Background

In 2016, France enacted the Sapin 2 law, which created the status of the whistleblower. The law, which granted whistleblowers legal protection with a number of rights and duties, made France one of the leading jurisdictions in whistleblower protection.

Five years later, two French members of Parliament — Raphaël Gauvain and Olivier Marleix — assessed the impact of the Sapin 2 law in an Information Report issued on 7 July 2021 (the Information Report). They highlighted a number of weaknesses of the mechanism implemented by the law, in particular related to its complexity and the legal and financial risks incurred by whistleblowers, given the absence of an adequate support.

By adopting the Law, the French government wanted to rectify the above-mentioned shortfalls of the Sapin 2 law and seized the opportunity of the transposition of the European Directive 2019/1937 of 23 October 2019 (the Directive) in order to strengthen and improve the protection of whistleblowers in France. And by seizing the opportunity related to the transposition of the Directive, the government even went beyond the requirements set forth within the European framework.¹

What are the main new provisions?

The Law's and the Decree's new provisions are numerous and partly reflect the recommendations made in the Information Report. Among the main new provisions:

The definition of "whistleblower" is now broader

A whistleblower is now defined as being:

"a natural person who reports or discloses, in good faith and without direct financial compensation, information concerning a crime, an offence, a threat or a prejudice to the general interest, a breach or an attempt to conceal a breach of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law of the European Union, of the law or of the regulations. If the information was not obtained in the context of professional activities mentioned at I of article 8, the whistleblower must have had personal knowledge of it"

Consequently:

- the condition related to the whistleblower's lack of interest has been removed, in favor of the notion of absence of "direct financial compensation";
- the requirements of a "serious and clear" breach of an international commitment and of a "serious" threat or prejudice to the general interest have also been removed;
- from now on, the whistleblower will be able to benefit from the legal protection if the facts reported are "a threat or prejudice to the general interest";
- the law of the European Union is added to the list of regulations that can be subject to a report;
- the "attempt to conceal" a breach is taken into account; and
- the condition related to the personal knowledge of the information subject to the report is removed in case the whistleblower reports facts of which they became aware in a professional context. To the contrary, this condition remains applicable if the information has not been obtained by the whistleblower in the context of professional activities.

Also, the list of persons who can act as whistleblowers has been extended and now includes, in addition to the external and occasional collaborators: (i) former staff members, (ii) job applicants, (iii) managers, shareholders, and any person holding voting rights within the general assembly of the subject entity, (iv) the persons belonging to the administrative, management, or supervisory body of the subject entity, the co-contractors and sub-contractors of the subject entity, as well as the persons belonging to their administrative, management, or supervisory body or their staff members.

The protection granted to the whistleblower has been extended

- the lack of criminal liability of the whistleblower and of its accomplices has been extended, in order to cover the embezzlement, misappropriation, and concealment of documents and of any other support that contains the information of which they became aware, subject to the condition that the access to such information has been lawfully obtained, and the lack of civil liability of the whistleblower has been established for the damages resulting from their report or disclosure, if

the whistleblower had legitimate reasons to believe that it was “necessary for the safeguarding of the interests at stake”;

- the sanctions against the dilatory or abusive proceedings (the so-called “bâillon” proceedings) have been strengthened: from now on, any abusive proceedings against a whistleblower might be subject to a civil penalty of €60,000 that could be ordered by the civil or criminal courts, without prejudice of granting a compensation, in addition to a complementary sanction of display or dissemination of the decision issued;
- the criminalisation of the retaliation under the standpoint of discrimination has been established: the new article 225-1 of the French criminal code now includes, in the list of persons who might be victims of discrimination, the whistleblowers, the facilitators, and any persons connected with the whistleblowers;
- the whistleblower will be able from now on to benefit from support measures, notably financial assistance and the possibility of obtaining from the judge the payment by the employer of maximum €8,0000 on the whistleblower’s personal training account.
- the whistleblower’s protection is now extended to its entourage, and in particular to:
 - **facilitators**, defined by article 2 of the Law as being “any natural person or legal entity governed by private law that helps the whistleblower to proceed with a report or disclosure (...)”; by including the legal entities in the definition of the facilitators (such as the labor unions or associations), by opposition to the status of the whistleblower which has not been extended to legal entities, the French legislator went beyond the requirements set forth in the Directive — pursuant to the latter, facilitators are natural persons who help the whistleblower within the reporting process, in a professional context;
 - **natural persons “connected” with the whistleblower**, who incur the risk of being subject to retaliation, including a threat or attempt of retaliation, in the context of their professional activities;
 - **legal entities controlled by the whistleblower**, within the meaning of article L. 233-3 of the French commercial code, for whom the whistleblower works or with whom the whistleblower is connected in a professional context.

Other new provisions shall also be noted, such as:

- the exclusion of new secrets from the regime alert: from now on, the secrecy of judicial deliberations and of the judicial inquiry and investigations are also excluded from the protection provided to whistleblowers; consequently, the facts, information, and documents, regardless of their form or support, for which the report or disclosure is forbidden by the provisions related to the national defense secrecy, the medical secrecy, the secrecy of judicial deliberations, the secrecy of judicial inquiry and investigations, and the professional secrecy of lawyers are excluded from the protection provided to whistleblowers;
- the previous hierarchy between the internal and external reporting channel has been removed — the whistleblower can now use the external reporting channel from the outset; this amendment is in line with what the Information Report already recommended, namely a more flexible hierarchy of the reporting channels in order to allow whistleblowers to contact directly the public authorities,

without prior internal reporting; this results from the finding according to which there would still exist a constant readiness to cover up, and maybe even hinder the whistleblowers' reports, which is often counterproductive given that these tactics eventually lead to an external reporting, and sometimes even a public disclosure;

- the public disclosure by the whistleblower can now be done immediately (i) after an external reporting if no adequate measure has been taken, (ii) in case of serious and imminent threat (by way of derogation, it can only be a "clear and imminent" threat for the "general interest" if the information has been obtained within the whistleblower's professional activities, notably when there is a situation of emergency or a risk of irreversible harm), and (iii) if the external reporting entails a risk of retaliation or does not allow an effective remediation. The public disclosure deprives its author of the legal protection granted to whistleblowers if such disclosure harms the interests of the national defense and security; and
- the confidentiality of the reports has been extended and now also covers the third parties mentioned in the report.

How should companies comply in practice with the new requirements?

In light of the significant amendments introduced by the Law and the Decree, subject companies should immediately begin implementing or adapting, as the case may be, their reporting mechanisms.

Subject companies should take the following key points into account:

- **From the labor law perspective:**
 - ✓ organize a prior consultation of the Social and Economic Committee (*Comité Social et Economique*)
 - ✓ organize the information of employees and more generally of persons that might use the whistleblowing channel, and ensure an effective communication
 - ✓ amend internal regulations to recall the existence of the mechanism aimed at protecting whistleblowers
- **Regarding the implementation of the whistleblowing mechanism:**
 - ✓ assess the opportunity of entrusting an external provider with the receipt of the reports
 - ✓ in case of several reporting channels that exist within the company (notably regarding the reporting of attitudes or situations that violate the code of conduct, or in relation to the duty of vigilance), assess the opportunity of implementing or not a single procedure
 - ✓ for groups of companies, assess the opportunity of implementing a single mechanism either for a part of the group or for the entire group (the Law refers in such case to the conditions determined by the Decree, but the latter remains silent with respect to the specific cases of groups of companies²)

- ✓ if the whistleblowing mechanism is aimed at being used within other entities of the group that are located abroad, ensure the compliance of the whistleblowing procedure with the local regulations
- ✓ for companies that have less than 250 employees (regardless of the notion of group), assess the opportunity of sharing between them their resources related to the whistleblowing mechanism and to assessing the accuracy of the allegations subject of the report
- **Regarding the processing of personal data:**
 - ✓ implement adequate measures to ensure the security of data
 - ✓ ensure the compliance with the regulations related to the protection of personal data by referring to the guidelines of the French National Commission for Data Protection and Liberties (CNIL) of 18 July 2019, which is still in force, and by anticipating the issues related to potential data transfers outside the European Economic Area, for instance in case of intra-group managing or in case of using an external provider
- **Regarding the effectiveness of the whistleblowing mechanism:**
 - ✓ ensure an adequate communication regarding the existence of the whistleblowing mechanism to ensure the information of all the persons authorized to make a report
 - ✓ update the company's code of ethics
 - ✓ organize the information and exchanges within the company in relation to the processing of the report, and the adequate staff training
 - ✓ organize the way in which processing the reports is done by implementing, for instance, a structured procedure related to internal investigations and by organizing its progress and potential outcomes

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Endnotes

- ¹ For instance, such is the case of the legal protection offered by the Law to the entities "controlled" by the whistleblower within the meaning of article L. 233-3 of the French Commercial Code, which is a broader notion than the one of "belonging" provided for in the Directive; also, such is the case of the definition given by the Law to the "facilitators", which includes both natural persons and legal entities governed by private law, whilst pursuant to the Directive, the facilitators include only natural persons.
- ² Save for the case provided for at article 7 of the Decree regarding the entities that have less than 250 employees and the case provided for at article 4 of the Decree: "If the subject entity considers that the report is related to facts that occurred or might occur within an entity that is part of the same consolidation perimeter, within the meaning of article L. 233-16 of the French Commercial Code, it can ask the whistleblower to also address the report to such entity. Additionally, if the subject entity considers that the report could be more effectively processed by the other entity, it can ask the whistleblower to withdraw the report received".