

## Adoption of a European Directive on the Protection of Whistleblowers

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the "Directive") is intended to establish common minimum standards among European Union countries to protect whistleblowers.

### Context

After the introduction of isolated measures protecting whistleblowers, a general protection was introduced into French law by Law No. 2016-1691 of 9 December 2016, known as the "Sapin 2 Law."<sup>1</sup>

Although the regime provided by the Directive is very similar to the one provided by the Sapin 2 Law, the French entities subject to the Directive will nevertheless be required to adjust their internal procedures in order to fully meet the European requirements.

### Definition of Whistleblower

According to the definition given by the Council of the European Union, "whistleblowers" are persons who report, in the context of their work, wrongdoing that can harm the public interest.

Thus, contrary to the Sapin 2 Law, the Directive expressly limits its scope of application to the information on wrongdoings obtained "in a professional context."

Moreover, the Directive does not include two of the criteria laid out by the Sapin 2 Law: the necessity for the whistleblower to be disinterested and to have personal knowledge of the facts revealed.<sup>2</sup>

In addition, the Directive extends protection to persons who help whistleblowers (such as colleagues or relatives).<sup>3</sup>

### Wide Scope of Application

The protection of whistleblowers offered by the Sapin 2 Law covers the disclosure or reporting of (i) a crime or offence, (ii) a serious and manifest violation of an international commitment, regularly ratified or approved by France, of a unilateral act of an international organization undertaken on the basis of such commitment, law, or regulation, or (iii) a serious threat or harm to the public interest about which the whistleblower has personal knowledge.

The Directive is aimed at enhancing the reporting on infringements of European Union law and policies in various areas, such as public procurement, financial services, prevention of money laundering, or public health.<sup>4</sup>

<sup>1</sup> Law No. 2016-1691 on transparency, the fight against corruption and the modernization of economic life

<sup>2</sup> Article 6 of the Sapin Law 2

<sup>3</sup> Article 4 of the Sapin Law 2

<sup>4</sup> Cf. the areas listed in Article 2 -1 of the Directive.

The definition of whistleblower under European law is slightly different from that in the Sapin 2 Law. The two acts also have different scopes of application.

However, the transposition of the Directive into French law should lead to a single, harmonised regime in order to avoid the complexity that would result from the coexistence of two distinct regimes for the protection of whistleblowers, one of which would be derived from the Sapin 2 Law and the other from the Directive.<sup>5</sup>

### Hierarchy of Reporting Channels

Like the Sapin 2 Law, the Directive distinguishes between three channels of reporting:

- the internal reporting channels within the private or public sector entity;
- the external reporting channels, i.e. those set up by the judicial authority, the administrative authority, and the professional orders<sup>6</sup>;
- the public sphere, including the media and social networks.

However, the Directive does not address the hierarchy established by the Sapin 2 Law among these three channels.

Indeed, in order to benefit from the protective mechanism resulting from the Sapin 2 Law, the whistleblower must first use the internal mechanism by informing his or her direct or indirect hierarchical superior, his or her employer, or a referent designated by the latter.

It is only in the absence of due diligence on the part of the person to whom the alert is addressed "within a reasonable period of time" that the whistleblower may have recourse to external channels and then to the public sphere, as a last

resort, if the alert is not dealt with by the competent authority within three months.<sup>7</sup>

In a more protective manner, the Directive only encourages, but does not require, whistleblowers to use internal channels within their organization as a priority. Thus, contrary to the Sapin 2 Law:

- the Directive protects the whistleblower who directly uses an external channel without having first used the internal procedures set up by his or her employer;
- only the public disclosure must be preceded by an alert, whether internal or external, that has not given rise to an appropriate response in order for its author to benefit from the protection regime.

In addition, the Directive imposes precise time limits for the recipients of both internal and external alerts to process these alerts, which is a source of security and predictability for the whistleblowers.

Companies and competent authorities are thus required to:

- send an acknowledgement of receipt of the alert to its author within seven days<sup>8</sup>; and
- inform the whistleblower of the measures envisaged or taken within three months (this period may, in duly justified cases, be extended to six months for external alert procedures).

### Transposition of the Directive

The Directive will have to be transposed by the Member States by 17 December 2021 at the latest.

<sup>5</sup> See in this sense the Senate's European motion for a resolution on the proposal for a Directive, 20 June 2018.

<sup>6</sup> Article 8 of the Sapin Law 2. The Directive leaves it to the Member States to designate the authorities competent to receive alerts.

<sup>7</sup> Article 8 of the Sapin 2 Law

<sup>8</sup> Article 9 and 11 of the Directive

Only a few weeks after the adoption of the Directive, several NGOs and trade unions sent an open letter to the French President asking to be involved in its transposition. The authors of the letter requested that the Sapin 2 Law regime be overhauled on this occasion and recommended, among other things, that the hierarchy between internal and external reporting channels be completely removed from the French regime.

The internal alert channels should among other features enable alerts to be dealt with swiftly and provide feedback to the authors of the alerts.

The monitoring of the legislative process for transposing the Directive will facilitate adapting reporting channels to the new requirements derived from it.

## The Authors



**Loïc Henriot**  
Partner  
+33 1 53 53 45 03  
[Email Loïc](#)



**Muriel Goldberg-Darmon**  
Partner  
+33 1 53 53 45 06  
[Email Muriel](#)



**Louise Le Guilchet**  
Associate  
+33 1 53 53 44 95  
[Email Louise](#)



**Magalie Jullien**  
Associate  
+33 1 53 53 44 79  
[Email Magalie](#)

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[www.cohengresser.com](http://www.cohengresser.com)  
[info@cohengresser.com](mailto:info@cohengresser.com)  
+1 212 957 7600  
+33 1 53 53 45 00

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