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Whistleblower France

WHISTLEBLOWER FRANCE

General principles

Historical evolution of ethical alert protection in France

Before the adoption of a legal framework considered "global"[1] on the protection of whistleblowers in 2016, the protection of ethical whistleblowing in France has its roots in labour law and civil service law and is followed by the adoption of sectoral legislation.

Since **1795**[2]**,** French criminal legislation has provided for the obligation to "denounce" to the Public Prosecutor the commission of crimes or offences of which he acquires knowledge in the course of his duties. This obligation was introduced in **1957 in** article **40 of the Code of Criminal Procedure**[3]. In **1982**[4]**, the** legislator provided for a right of alert[5] and withdrawal for[6] workers and the employee representative[7] on the Committee on Health, Safety and Working Conditions (CHSCT), which was[8]then extended to employee representatives (in **1992**)[9], in order to prevent the occurrence of accidents at work. By **Decree No. 82-453 of 28 May 1982** on health and safety, this right to alert was introduced in the State civil service. It was extended to civil servants in the territorial civil service by **Decree No. 95-680 of 9 May 1995** and to civil servants in hospitals (by provisions **L. 4111-1 of the Labour Code**). By **Act No. 93-122 of 29 January 1993,** a central corruption prevention service was created to assist whistleblowers in the public service (without the power to initiate proceedings on their own) at the

[1] Florence Chaltiel Terral, *Les Lanceurs d'alerte*, Dalloz, 2018, p.54 et s.

[2] Article 83 of the Code of Offences and Penalties of 3 Brumaire Year IV (25 octobre 1795)

[3] **Article 40 Code of Criminal Procedure** "The public prosecutor shall receive complaints and denunciations and assess the action to be taken in accordance with the provisions of article 40-1.
Any constituted authority, public officer or civil servant who, in the performance of his duties, becomes aware of a crime or offence shall be required to give notice thereof without delay to the public prosecutor and to transmit to that judge all information, minutes and acts relating thereto".

[4] Law n° 82-1097 of 23 December 1982 relating to the Health, Safety and Working Conditions Committees (CHSCT)

[5] **L. 4131-1 of the Labour Code** "The worker shall immediately alert the employer of any work situation which he has reasonable grounds to believe poses a serious and imminent danger to his life or health and of any defect which he notices in the protection systems".

[6] **L. 4131-3 of the Labour Code**" "No sanction or deduction of wages may be imposed on a worker or group of workers who have withdrawn from a work situation which they had reasonable grounds to believe poses a serious and imminent danger to the life or health of each of them"; Cass.... soc, 5 juillet 2011, n° 10-23.319: according to settled case law, the provisions of the Labour Code do not require that the situation encountered by the worker does not indeed present a serious or imminent danger, the mere fact that the worker had reasonable grounds to believe this being sufficient to justify the exercise of the right of withdrawal; But when the conditions for the right of withdrawal are not met, the worker is exposed to a deduction on wages (Cass crim.., 25 November 2008, No. 07-87.650.) and dismissal for misconduct may, in such a case, also be pronounced (Cass. soc., 20 January 1993, No. 91-42.028)

[7] **L. 4131-2 of the Labour Code** "The employee representative on the Social and Economic Committee, who notes that there is a serious and imminent cause of danger, in particular through a worker, shall immediately alert the employer in accordance with the procedure provided for in the first paragraph of Article L. 4132-2. »

[8] It is also provided that the inexcusable fault of the employer is automatically retained for the benefit of the worker who has reported a risk that has materialized and against which the employer has refrained from acting (Cass. soc., 17 juillet 1998, n° 96-20.988.)

[9] **L. 2313-2 of the Labour Code,** based on Act No. 92-1446 of 31 December 1992 on employment, the development of part-time work and unemployment insurance (Unlike the provisions relating to the right of alert of employees and staff representatives at the CHSCT, there is no requirement here for a situation of serious or imminent danger but a "simple" violation. (Council of State, *Study on whistleblowing protectio,* 2016 (Conseil d'Etat, *Le droit d'alerte : signaler, traiter, protéger*, Etude adoptée le 25 février 2016 par l'assemblée générale plénière du Conseil d'Etat, La documentation française, avril 2016), p. 21

request of an agent (only in cases of corruption). Since the **law n° 2012-954 of 6 August 2012 on** sexual harassment, the right of alert has been extended to acts of moral harassment and discrimination[10].

These provisions, which are entirely dedicated to the right to work - private or public - were supplemented by **sectoral laws in the 2000s**, without however enshrining the generic term whistleblower or a common status or a protective regime. Under the influence of foreign legislation with an extraterritorial scope, the **Act of August 2003 [1] on financial security was**[11] adopted. It enshrines the obligation of large companies to set up internal professional alert systems, codes or ethical charters[12]. The **Act of 13 November 2007 on the fight against corruption**[13] introduces article L. 1161-1 of the Labour Code protecting private sector employees from any reprisals, if it is reported in good faith acts of corruption observed in the performance of their duties and allows a reversal of the burden of proof. The **law of 11 October 2013 on the transparency of public life**[14] and the **law of 6 December 2013 on tax fraud**[15] and serious economic and financial crime prohibit reprisals against employees and public officials who report acts of corruption or conflicts of interest.
In addition, the **Act of 29 December 2011 on strengthening the health safety of** medicines and health products introduces article 5312-4-2 of the Public Health Code[16] prohibiting discrimination against persons who report in good faith either to their employer or to the administrative and judicial authorities facts relating to health safety of which they have become aware during the performance of their duties. The **law of 16 April 2013 on health and environmental alert**[17] reinforces the alert on three levels: First, it defines for the first time the whistleblower in these sectors (without attributing this name to it[18]); second, it establishes the National Commission on Ethics and Alerts in Public Health and the Environment responsible for their effective treatment; finally, it introduces into the Labour Code the obligation to alert the employer if he considers, in good faith, that the products or manufacturing processes used or implemented by the establishment pose a serious risk to public health or the environment (article 4133-1 Labour Code). In the event of a discrepancy, it is expected that the Prefect could be notified.
Finally, the **Act of 29 June 2016 on ethics and the rights and obligations of civil servants**[19] creates protection for public officials (as well as the military) who disclose **conflicts of interest** by prohibiting reprisals for reporting conflicts of interest.

[10] The employee representative can contribute to the prevention and detection within the company of "discriminatory behaviour in terms of hiring, remuneration, training, reclassification, assignment, classification, qualification, professional promotion, transfer, renewal of contract, sanction or dismissal" (L. 2313-2 of the Labour Code). The second paragraph of Article L. 2313-2 specifies that if such an alert is issued, the employer shall immediately conduct an investigation with the employee representative and take "the necessary measures to remedy" the situation in question.
[11] Act No. 2003-706 of 1 August 2003 on financial security
[12] Today, following the Sapin law, these obligations are part of the "compliance program" contributing to corporate social responsibility.
[13] Law No. 2007-1598 of 13 November 2007 on the fight against corruption
[14] Law No. 2013-907 of 11 October 2013 on the transparency of public life
[15] Law No. 2013-1117 of 6 December 2013 on the fight against tax fraud and serious economic and financial crime
[16] Law No. 2011-2012 of 29 December 2011 on strengthening the health safety of medicines and health products
[17] Law n° 2013-316 of 16 April 2013 on the independence of health and environmental expertise and the protection of whistleblowers
[18] **Article 1 of the Act of 16 April 2013** provides that "Any natural or legal person has the right to make public or disseminate in good faith information concerning a fact, data or action, if he considers that failure to take into account such fact, data or action poses a serious risk to public health or the environment. The information it makes public or disseminates must refrain from any defamatory or offensive accusation. »
[19] Act No. 2016-483 of 20 April 2016 on ethics and the rights and obligations of civil servants

To simplify this legislative fragmentation, **Act No. 2016-1691 of 9 December 2016** on transparency, the fight against corruption and the modernization of economic life[20], known as "Sapin 2" (hereinafter referred to as "Sapin law"), was adopted. It is considered to be the legal basis that simplifies and strengthens the protection of whistleblowers, which has so far been considered insufficient and which was scattered throughout the French legal system. Even if we will explain, as the study progresses, the reasons for putting these statements into perspective (simplification and strengthening), we will first briefly present the French system for the protection of whistleblowers[21].

The positive law in force

Following a summary presentation of the positive law in force (A), the Sapin law and the texts that allow its implementation (B) will be presented. We will then describe the specific laws that are still in force and coexist with the Sapin (C) law. It will be easy to see that the French legal landscape may seem complete, but it remains complex.

A. Summary presentation

Most of these laws mentioned above are still in force. Nevertheless, the Sapin Act repeals their provisions containing protective measures for whistleblowers in order to erase the scattering of legislation. The Sapin law thus creates a "general status of the whistleblower"[22].

Definition of the whistleblower

Is a whistleblower under Article 6 of the law of 9 December 2016:

> "a natural person who discloses or reports, in a disinterested and good faith manner, a crime or misdemeanour, a serious and manifest breach of an international commitment duly ratified or approved by France, a unilateral act of an international organisation taken on the basis of such an undertaking, the law or the regulations, or a serious threat or prejudice to the general interest, of which he has personal knowledge. ».

General status of the whistleblower

The general status of the whistleblower is summarized as follows:

- Nullity of retaliation
- No criminal liability
- Confidentiality guarantee (of identities and information)
- Civil and criminal sanctions against perpetrators of reprisals
- Protection against any reprisals, direct or indirect, in the context of work with adjustment of the burden of proof
- Suspensive summary proceedings following a dismissal - including in the case of a fixed-term contract.

On condition:

- To meet the definition of the whistleblower
- Comply with reporting procedures.

[20] Law n°2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life

[21] These provisions will be specified in the study; the purpose here is to provide an overview.

[22] Terminology used by Transparency International France, Practical guide for alerters, 2017, p. 41 et seq. As well as by the Ministry of Justice in the 2018 circular, *op.cit.*, p. 4

Application

This general status of the whistleblower applies to whistleblowers employed in the public and private sectors and to all reports (except as detailed below). This means that the Sapin Act amends and also applies to the following cases:

- Products or manufacturing processes posing a serious risk to **public health or the environment** (Act of 16 April 2013 on the independence of health and environmental expertise) even if the reporting procedure is specific to this sector (see annex);
- **Active or passive corruption**, breach of trust, embezzlement of public funds, illegal taking of interests or slipping from public to private sectors ("*pantouflage*"), relating to members of the government, main local executives or persons entrusted with a public service mission (Law of 11 October 2013 on the transparency of public life);
- **Conflicts of interest** that may constitute an illegal acquisition of interests (law of 20 April 2019 on ethics and the rights and obligations of civil servants).

Outside the scope of the Sapin law

But the Sapin law does not modify:

- The law of 6 December 2013 on tax fraud;
- The law of 24 July on intelligence.

These laws provide for specific procedures and protections.

In addition, the **pre-existing provisions in the Labour Code**, mentioned above, for individual labour relations (discrimination, moral or sexual harassment and their testimony) remain applicable while having been amended by the Sapin Act.

B. The general framework and implementing regulations

After this summary presentation, it is important to get to know the texts more closely. We will see that despite the fact that the Sapin law has provided a general framework and has been accompanied by various other texts allowing its implementation, the existence of different specific laws depending on the status of the public official as well as on the nature of the alert, which makes the legal landscape always complex.

a. The law of 9 December 2016 (Loi Sapin)

We will summarize below the content of the Sapin law on whistleblowers (1). However, it seems to us essential for the assessment of French protection to stress that the Sapin law is not a text specifically adopted for the sole purpose of protecting whistleblowers (2).

1. The content of the law on whistleblowers (articles 6-16)

The Sapin Act uses for the first time the term "whistleblower" [23] and adopts an **extensive definition**[24] **of** whistleblower (**Article 6**(1)), which is at the same time **common to both the public and private sectors**. In addition, it establishes a **specific regime for the** protection of whistleblowers, as explained in **Articles 7 to 16 of the** Act, by amending, supplementing or repealing the provisions of existing legislation.

[23] On the issue of the name of the "whistleblower", *below*

[24] S. Dyens, "Le lanceur d'alerte dans la loi ''Sapin 3'' : un renforcement en trompe-œil", in *Anticorruption, La loi Sapin 2 en application*, Dalloz, coll. Grand Angle, pp. 17-27 (article published in *AJCT*, March 2017, pp. 127 et seq.), spec. pp. 17-20

Articles **6 (paragraph 2) and 7 provide for the articulation of the protection of whistleblowers and that of secrets**. Article 6 (2) excludes from the protective regime facts and information covered by defence secrecy, medical secrecy and the secrecy of relations between a lawyer and his client. The second (Article 7) creates "a justification for the offence of breach of professional secrecy in favour of the whistleblower"[25]. **Article 8** establishes **the procedure** within which the alert must be issued so that the natural person can benefit from the status of whistleblower and therefore from the protective regime. It also specifies the **bodies and authorities** to which the alert must be sent and the possibility for the whistleblower to be **directed and assisted by the Human Rights Defender**. This provision is central in that it establishes two reporting procedures: the ordinary procedure, which has **three levels of reporting** (1. hierarchical authority or "alert referent" or ethics referent, 2. judicial or administrative authority; 3. public dissemination) and the **emergency procedure** in cases of serious and imminent danger or in the presence of a risk of irreversible damage (judicial or administrative authority and possibility of public dissemination). **Article 9** provides for the protection of the whistleblower in terms of the **confidentiality obligation for the** recipients of the alert. **Article 10** amends the provisions of the Labour Code (applicable to employees in the private sector) and the Act of 13 July 1983 (applicable to employees in the public sector) concerning the **prohibition of discrimination against a whistleblower**. **Article 11** adds a provision to the Code of Administrative Justice so that the competent judges can order the **reinstatement of an employee or agent who has been dismissed**, non-renewed or reinstated without regard to the provisions prohibiting discriminatory measures. **Article 12** provides for the right to refer to the **Labour Court in the event of termination of the contract** following the notification of an alert as defined in Article 6. **Article 13** (first paragraph) creates a **special offence of obstructing the transmission of an alert** issued under the conditions of Article 8 and thus provides for the applicable penalties[26]. The second paragraph of **Article 13** provides for the possibility of an **increase in the penalty imposed by the investigating judge on anyone who brings an abusive or dilatory civil action in the event of a complaint of defamation against a whistleblower**. Article 14 was declared unconstitutional by the French Constitutional Court (it provided that the Human Rights Defender could grant financial assistance or financial relief to the whistleblower[27]). **Article 15 repeals** the protective provisions for whistleblowers that were **scattered before 2016** in the Public Health Code, the Labour Code and the Act of 11 October 2013 on the transparency of public life. It introduces a paragraph into the **Defence Code** prohibiting **discriminatory measures against a military** whistleblower within the meaning of article 6. **Article 16** provides for a specific mechanism for the protection of **whistleblowers, reporting a breach in the financial field to the financial** market's authority or the prudential supervision and resolution authority.

2. The Sapin law is not a law whose exclusive purpose is the protection of whistleblowers

[25] Circular of 31 January 2018 from the Director of Criminal Affairs and Pardons (Ministry of Justice) on the presentation and implementation of the criminal provisions provided for by Act No. 2016-1691 of 9 December 2016, CRIM/2018-01/G3-31.01.2018 (hereinafter Circular from the Ministry of Justice), p. 5

[26] V. Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", in M. Disant, D. Pollet-Panoussis, *Les lanceurs d'alerte*, LGDJ, p. 183; see also Circular of 31 January 2018 of the Director of Criminal Affairs and Pardons (Ministry of Justice) on the presentation and implementation of the criminal provisions provided for in Act No. 2016-1691 of 9 December 2016, CRIM/2018-01/G3-31.01. 2018

[27] Constitutional Council No. 2016-741 DC of 8 December 2016[Law on transparency, the fight against corruption and the modernisation of economic life]; also Decision No. 2016-740 DC of 8 December 2016[Organic Law on the competence of the Human Rights Defender for the guidance and protection of whistleblowers]

Act No. 2016-1691 of 9 December 2016 is a law whose title makes it clear that it aims to cover several aspects, the three main ones could be grouped as follows[28]:

- The fight against corruption and breaches of probity; the protection of whistleblowers is part of this component;
- New transparency obligations such as the establishment of a public directory of interest representatives;
- Strengthening and modernizing economic life (strengthening financial regulation, protecting consumers in financial matters, improving farms and financing businesses, improving the company's growth path).

It contains 169 provisions, only 11 of which concern the protection of whistleblowers (Articles 6 to 16). The "catch-all" nature of the law has been underlined by the doctrine and it has not escaped the Constitutional Council[29] that the law, which was adopted under the accelerated procedure for reasons that remain unexplainable and questionable[30], contained unconstitutional provisions.

The explanatory memorandum of the law[31] shows a double justification for provisions 6 to 16, disconnected from human rights protection concerns. The protection of whistleblowers is provided for as a means of strengthening citizens' confidence in public action as well as a means of improving the country's economic activity (by combating the corruption to which the whistleblower may contribute). In this sense, it should be noted that "the protection of employees denouncing risks... is gradually being incorporated into a system entirely designed with reference to the fight against corruption"; thus "the link between the alert and the expertise is broken down and the collection of alerts is enclosed in a hierarchical network"[32].

b. The law of 9 December 2016 on the new competence of the Human Rights Defender (guidance and protection of whistleblowers)

The adoption of the Sapin 2 law was also accompanied by the **adoption of Organic Law No. 2016-1690 of 9 December 2016**[33]. This law added the guidance and protection of whistleblowers to the competences of the **Human Rights Defender**, who is an independent constitutional authority of the French Republic. It also specifies the prohibition of retaliatory measures against any person who has brought an action against the Human Rights Defender.

c. The decree of 19 April 2017 on procedures for collecting alerts

[28] In this sense, see Pierre Villeneuve, "Loi Sapin II, collectivités territoriales et lutte contre la corruption : le traitement des alertes éthiques", *Droit Administratif*, n°5, May 2017, prat. 1

[29] Who sanctioned certain provisions as "legislative riders", Cons. const., 8 Dec. 2016, No. 2016-741 DC, cons. 50, 82 ("Introduced at first reading, these provisions do not have any link, even indirectly, with those contained in the bill tabled on the National Assembly's desk. They were therefore adopted according to a procedure contrary to the Constitution. »)

[30] Jean-Marie Brigant, "La loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique - À propos de la loi n° 2016-1691 du 9 décembre 2016", JCP G, 2016, p. 6

[31] The explanatory memorandum can be consulted here;
The lack of correspondence between the explanatory memorandum and the final text of the law does not guarantee the same level of understanding of all the provisions; v. above all the lack of correspondence between Chapter 2 of the law (Articles 6 to 16, protection of whistleblowers) and Articles 6 to 16 of the explanatory memorandum.

[32] O. Leclerc, *Protéger les lanceurs d'alerte, La démocratie technique à l'épreuve de la loi*, LGDJ, 2017, p. 69 ("The effectiveness of the support provided by the Human Rights Defender is thus significantly reduced"); Florence Chaltiel Terral, *Les lanceurs d'alerte,* Dalloz, 2018, p. 65

[33] Organic Law No. 2016-1690 of 9 December 2016 on the competence of the Human Rights Defender for the guidance and protection of whistleblowers (article 2)

Decree No. 2017-564 of 19 April 2017[34] **was adopted pursuant to** article 8 III of the Sapin Act in order to provide for the implementation of procedures for collecting alerts issued by whistleblowers within legal persons governed by public or private law or State administrations. These provisions are analysed in this study [mainly under the heading "Reporting procedure(s)"].

d. The instruments for implementing the decree (orders, guides, circulars)

For State administrations, it is provided that the procedure for collecting alerts must be created by order. To date, various ministries have adopted **orders (“*arrêtés*”) relating to the procedure for collecting alerts issued by whistleblowers**: Ministry of National Education and Youth[35] and Ministry of Higher Education and Research[36], Ministry of Culture[37], Ministry of the Interior and Ministry of Overseas France[38], Ministry of Foreign Affairs[39]. Other **decentralised administrations**[40]**,** including local authorities, have also adopted the necessary **texts to set up** procedures for collecting alerts issued by whistleblowers[41]. However, it should be stressed that the implementation of the procedure set out in Article 8 of the Sapin Act does not concern small employer’s organisations (less than 10,000 inhabitants/less than 50 agents), which leaves a certain uncertainty for the launching of alerts by agents and employees employed by them[42].

e. The circular of 19 July 2018 for the application of the Sapin law in public bodies

For the harmonious application within the civil service of articles 6 to 16 of the Sapin Act, **the circular of 19 July 2018**[43] was adopted by the Ministry of Action and Public Accounts. This text mainly enables State administrations to understand the relationship between the Sapin law and the statutory

[34] Decree No. 2017-564 of 19 April 2017 on procedures for collecting alerts issued by whistleblowers within legal persons governed by public or private law or State administrations

[35] Order of 10 December 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of National Education

[36] Order of 3 December 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of Higher Education and Research

[37] Order of 12 March 2019 on the procedure for collecting alerts issued by whistleblowers within the Ministry of Culture

[38] Order of 16 November 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of the Interior and the Ministry for Overseas France

[39] Order of 29 June 2018 on the procedure for collecting alert alerts to the Ministry of Foreign Affairs; online interface for issuing an alert here

[40] Order of 20 April 2018 on the procedure for collecting alerts issued by whistleblowers within the Caisse des dépôts et consignations; Société du Grand Paris adopted Decision No. 2017-106 of 29 December 2017 creating a steering committee for anti-corruption provisions and laying down the procedure for processing alerts issued by whistleblowers; The Pôle emploi General Management adopted Instruction No. 2018-5 of 26 January 2018 on the collection and processing of alerts issued by whistleblowers;

[41] The Occitan Region: Order of 2 May 2018 on the procedures for collecting and processing alerts issued by whistleblowers; an alert alert alert form is annexed to the order; For the City of Paris, the implementation of an alert collection procedure has been published in a letter containing explanations and an email address ethique@paris.fr; The Communauté d'agglomération Plaine Vallée Forêt de Montmorency in a deliberation n°DL2018-12-19_6 adopted during the ordinary session of 19 December 2018 decided to establish a procedure for collecting alerts issued by whistleblowers; for the Seine et Marne department a circular was published by its management centre: http://circulaires.cdg77.fr/?-Instauration-d-une-procedure-de- .

[42] *infra*

[43] Circular of 19 July 2018 on the procedure for reporting alerts issued by public officials and the guarantees and protections granted to them (pdf - 635.6 KB) (hereinafter Circular of 19 July 2108)

obligations of civil servants arising from Act No. 83-634 of 13 July 1983 on the rights and obligations of civil servants; the doctrine underlined the complex articulation of these texts[44].

f. The circular of 31 January 2018 of the Ministry of Justice

For the harmonious application of the provisions of criminal law, the **Ministry of Justice** has also adopted a **circular of 31 January 2018** explaining - among other things - the implementation of the criminal provisions concerning the whistleblower provided for by the Sapin law[45]. It affirms the creation of a fact justifying the offence of breach of professional secrecy in favour of the whistleblower and makes explicit the creation of two offences intended to guarantee his protection.

g. The single authorization of the CNIL (awaiting GDPR standards)

Until the entry into force of the GDPR (25 May 2018), a **single authorisation**[46] from **the French Data Protection Authority** (CNIL) provided for the rules to be complied with by the controller of automated processing of personal data in the context of professional alert. This ruling is still valid **pending the production of the GDPR standards** by the CNIL.

A. Specific laws

The Sapin law coexists with different special regimes applicable according to the status of the public official (a) as well as according to the sector in which the alert is issued (b).

a. For the public official

Today, even if we consider that the alerting public official is a beneficiary of global protection[47], it should be noted that the reporting of an alert in the public service can under no circumstances be based solely on the provisions of the Sapin law. On the one hand, "**The protection regime applicable to officials who may issue an alert depends on the status of the official concerned**, regardless of the introduction of a compulsory procedure for collecting alerts"; on the other hand, this protection regime must be **linked to the ethical obligations of** civil servants, which will be examined below[48].
Hereunder are the texts that concern the public official who launches the alert according to his status but also according to the sector of the civil service in which he is employed:

1. **Depending on the status of the agent:**

- **Article 6 ter A of the law of 13 July 1983[49]:** civil servants, probationary civil servants, contractual agents under public law, occasional civil servants

[44] S. Dyens, "Le lanceur d'alerte dans la loi ''Sapin 3'' : un renforcement en trompe-œil", in *Anticorruption, La loi Sapin 2 en application*, Dalloz, coll. Grand Angle, pp. 17-27 (article published in *AJCT*, mars 2017, pp. 127 et seq.), spec. pp. 23-25 (B. Une articulation complexe avec la procédure "Lebranchu")
[45] Circular of 31 January 2018, Ministry of Justice, Circular on the presentation and implementation of criminal provisions provided for in Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, CRIM/2018-01/G3-31.01.2018, JUSD1802971C
[46] Deliberation No. 2017-191 of 22 June 2017 amending Deliberation No. 2005-305 of 8 December 2005 on the single authorisation of automated processing of personal data implemented as part of professional alert systems (AU - 004); however, the single authorisations adopted by the CNIL no longer have legal value as from 25 May 2018. Pending the production of RGPD repositories, the CNIL has decided to keep them accessible in order to allow data controllers to direct their first compliance actions. (Source: CNIL)
[47] D. Pollet-Panoussis, "L'agent public, lanceur d'alerte", in M. Disant, D. Pollet-Panoussis, op. cit., p. 146 et seq.
[48] *infra*
[49] Act No. 83-634 of 13 July 1983 on the rights and obligations of civil servants (below, General Statute of the Civil Service)

This provision applies to[50] civil servants and probationary civil servants as well as contractual agents governed by public law pursuant to II of Article 32 of the law of 13 July 1983. These provisions apply to public officials on each of the three sides of the public service (state, territorial, hospital). Article 6 ter A of the 1983 Act also applies to casual employees of the civil service.
The complex articulation (in practice) of Article 8 of the Sapin Law with the specific procedure of Article 6 ter A of the Law of 13 July 1983 resulting from the Law of 6 December 2013 (alert only for facts likely to be qualified as a conflict of interest[51]) is underlined by the doctrine[52], unlike the Constitutional Council which has established the intelligibility of these provisions[53].

- **The Labour Code**: private law employees of the EPICs[54], private law agents employed by public entities

Employees governed by private law in public industrial or commercial establishments as well as employees governed by private law employed by other public bodies benefit from the protection provided for in **Article L. 1132-3-3-3 of the LabourCode**[55].

[50] Article 6 ter A of the General Statute: "No measure concerning, in particular, recruitment, tenure, remuneration, training, evaluation, appraisal, performance appraisal, discipline, promotion, assignment and transfer may be taken with regard to an official for having reported or testified, in good faith, to the judicial or administrative authorities of facts constituting a crime or likely to be qualified as a conflict of interest within the meaning of Article 25a(I) of which he became aware in the exercise of his duties.
No civil servant may be punished or subjected to any discriminatory measure, directly or indirectly, for having reported an alert in accordance with articles 6 to 8 of Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life.
Any provision or act to the contrary is null and void.
In the case of a conflict of interest, the official must have previously alerted in vain one of the hierarchical authorities to which he or she reports. He may also testify such facts to the ethics referent provided for in Article 28a.
In the event of a dispute relating to the application of the first four paragraphs, as soon as the person presents factual elements that give rise to the presumption that he or she has reported or testified in good faith to facts constituting a misdemeanour or a crime, a situation of conflict of interest or an alert within the meaning of Article 6 of the aforementioned Law No 2016-1691 of 9 December 2016, it is for the defendant, in the light of the evidence, to prove that his decision is justified by objective factors unrelated to the statement or testimony of the person concerned. The judge shall form his or her conviction after having ordered, if necessary, all investigative measures he or she considers appropriate.
An official who reports or testifies to facts relating to a situation of conflict of interest in bad faith or to any fact likely to lead to disciplinary sanctions, with the intention of causing harm or with at least partial knowledge of the inaccuracy of the facts made public or disseminated shall be punished by the penalties provided for in the first paragraph of Article 226-10 of the Criminal Code. »

[51] *infra*

[52] S. Dyens, "Le lanceur d'alerte dans la loi ''Sapin 3'' : un renforcement en trompe-œil", in *Anticorruption, La loi Sapin 2 en application*, Dalloz, coll. Grand Angle, pp. 17-27 (article published in *AJCT*, March 2017, pp. 127 et seq.), spec. pp. 23-25

[53] Cons. const. 8 Dec. 2016, n°2016-741 DC, op. cit.

[54] EPIC: public establishment of an industrial or commercial nature

[55] Article L. 1132-3-3-3 Labour Code: "No person may be excluded from a recruitment procedure or from access to a traineeship or a period of on-the-job training, no employee may be punished, dismissed or subjected to any direct or indirect discriminatory measure, in particular as regards remuneration, within the meaning of Article L. 3221-3, measures of profit-sharing or distribution of shares, training, reclassification, assignment, qualification, classification, professional promotion, transfer or renewal of contract, for having reported or testified, in good faith, to facts constituting a tort or a crime of which he became aware in the performance of his duties.
No person may be excluded from a recruitment procedure or from access to a traineeship or a period of professional training, no employee may be sanctioned, dismissed or subjected to any direct or indirect discriminatory measure, in particular as regards remuneration, within the meaning of Article L. 3221-3, measures to encourage or distribute shares, training, reclassification, assignment, qualification, classification, professional

In addition, the law of 9 December 2016 did not amend **article L. 4131-1 of the Labour[56] Code** relating to the right of alert and withdrawal in the event of serious danger to the life or health of the worker or a defect in the protection system. It therefore remains applicable as well.

2. By public service sector (military, intelligence officers)

- **The Defence Code**

Article 15 of the law of 9 December 2016 introduced a new paragraph to **article L. 4122-4 of the Defence Code[57]** applicable to military personnel, which is similar to the aforementioned article 6 ter A.

Thus, article L. 4122-4 of the Defence Code protects the public official who decides to proceed with a report by defining the scope of the facts and acts for which no unfavourable measure may be taken against him. The other components of protection resulting from the general status of the whistleblower are not applicable.

Under the terms of article L. 4122-4 of the Defence Code, the soldier who is the author of an alert is only entitled to specific protection against disciplinary sanctions and discriminatory measures if he has

promotion, transfer or contract renewal, for having reported an alert in accordance with Articles 6 to 8 of Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.

In the event of a dispute relating to the application of the first and second paragraphs, where the person presents facts that give rise to the presumption that he or she has related or testified in good faith to facts constituting an offence or a crime, or has reported an alert in accordance with Articles 6 to 8 of Act No 2016-1691 of 9 December 2016, it is for the defendant, in the light of the evidence, to prove that his or her decision is justified by objective factors unrelated to the declaration or testimony of the person concerned. The judge shall form his or her conviction after having ordered, if necessary, all investigative measures he or she considers appropriate. »

[56] Article L. 4131-1 Labour Code "The worker shall immediately alert the employer of any work situation which he has reasonable grounds to believe poses a serious and imminent danger to his life or health and of any defect which he notices in the protection systems.

He can withdraw from such a situation.

The employer may not ask the worker who has exercised his right to withdraw to resume his activity in a work situation where there is still serious and imminent danger resulting in particular from a defect in the protection system. »

[57] Article L4122-4 of the Defence Code "No measure concerning, in particular, recruitment, remuneration, training, tenure, evaluation, appraisal, appraisal, discipline, promotion, assignment and transfer may be taken with regard to a member for having reported or testified, in good faith, to the judicial or administrative authorities, facts constituting a crime or likely to be qualified as a conflict of interest within the meaning of Article L. 4122-3 of which he became aware in the exercise of his duties.

No military personnel may be punished or subjected to any discriminatory measure, directly or indirectly, for having reported an alert in accordance with articles 6 and 7 and article 8, paragraph I, of Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life.

Any provision or act to the contrary is null and void.

In the case of a conflict of interest, the member must have previously alerted one of his or her line authorities in vain. He can also testify such facts to the competent ethics referent mentioned in Article L. 4122-10.

In the event of a dispute relating to the application of the first four paragraphs of this article, where the person presents factual evidence that gives rise to the presumption that he or she has reported or testified in good faith to facts constituting an offence, a crime, a conflict of interest situation or an alert within the meaning of Article 6 of the aforementioned Act No. 2016-1691 of 9 December 2016, it is for the defendant, in the light of the evidence, to prove that its decision is justified by objective factors unrelated to the statement or testimony of the person concerned. The judge shall form his or her conviction after having ordered, if necessary, all investigative measures he or she considers appropriate.

A member who reports or testifies to facts relating to a situation of conflict of interest or to any fact likely to lead to disciplinary sanctions in bad faith, with the intention of causing harm or with at least partial knowledge of the inaccuracy of the facts made public or disseminated shall be punished by the penalties provided for in the first paragraph of article 226-10 of the Criminal Code.»

complied with the procedure described in article 8, paragraph I, of Act No. 2016-1691 of 9 December 2016[58]. It is also only on this condition that he will be able to benefit from the special regime of proof provided for in the penultimate paragraph of Article L. 4122-4 of the Defence Code.
The order of 23 August 2018 of the Ministry of the Armed Forces provides for the procedure for collecting reports of internal alerts within the Ministry for all civilian, military and casual personnel[59].
According to the circular of 19 July 2018, Article 15(I) of the Law of 9 December 2016 does not extend to the military the possibility, provided for in Article 8(II) of the same Law, of making a direct report to a competent external authority in the event of serious and imminent danger or in the presence of a risk of irreversible damage[60].

- **Law n°2015-912 of 24 July 2015 on intelligence service officials**

The Act of 9 December 2016 does not apply to officers of the General Directorate of External Security, the Directorate of Defence Protection and Security, the Directorate of Military Intelligence, the General Directorate of Internal Security, the National Directorate of Intelligence and Customs Investigations, the Intelligence Processing and Action against Illegal Financial Circuits Service. Maintained by the Sapin Act, Act No. 2015-912 of 24 July 2015 on intelligence supplements the internal security code of[61] Book VIII "Intelligence" and creates specific protection for agents reporting a "manifest violation" of this book.
Indeed, knowledge of facts likely to constitute a manifest violation of Book VIII of the Internal Security Code must be reported to the Committee for the Control of Intelligence Techniques ("*Commission de contrôle des techniques de renseignement*") in accordance with the procedure provided for in Article **L.861-3 of the Internal Security Code[62]**.

[58] Circular 19 July 2018, p. 15
[59] Order of 23 August 2018 on the procedure for collecting alerts to the Ministry of the Armed Forces, issued pursuant to III of Article 8 and I of Article 15 of Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life
[60] Nevertheless, the decree of 23 August 2018 on the procedure for collecting alerts to the Ministry of the Armed Forces, issued pursuant to III of Article 8 and I of Article 15 of Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life creates this possibility (Article 11)"... In the event of serious and imminent danger or in the presence of a risk of irreversible damage, he may bring this alert directly to the attention of the authorities mentioned in the first paragraph of Article 9 of this Decree and make it public. "»)
[61] The Internal Security Code includes all the laws and regulations relating to internal security and organizes (Book VIII) the intelligence services, which contribute "to the national security strategy and to the defence and promotion of the fundamental interests of the Nation" (art. L811-1).
[62] **L. 861-3 Internal Security Code** "I. -Any agent of a department mentioned in Article L. 811-2 or of a department designated by the decree in Council of State provided for in Article L. 811-4 who, in the performance of his duties, becomes aware of facts likely to constitute a manifest violation of this book may bring these facts to the attention of the National Commission for the Control of Intelligence Technology, which may then refer them to the Council of State under the conditions provided for in Article L. 833-8 and inform the Prime Minister.
Where the commission considers that the illegality found is likely to constitute an offence, it shall refer the matter to the public prosecutor in accordance with national defence secrecy and forward all the information brought to its attention to the National Defence Secrets Commission so that the latter may give the Prime Minister its opinion on the possibility of declassifying all or part of this information with a view to transmitting it to the public prosecutor.
II - No servant may be sanctioned or subjected to any direct or indirect discriminatory measure, in particular as regards remuneration, recruitment, establishment, performance appraisal, discipline, treatment, training, reclassification, assignment, qualification, classification, professional promotion, transfer, interruption or renewal of contract, for having brought, in good faith, the facts mentioned in I to the attention of the National Commission for the Control of Intelligence Technology. Any act contrary to this paragraph is null and void.

This Commission may refer the matter to the public prosecutor when it considers that the reported illegality is likely to constitute an offence. At the same time, the **Consultative Commission on National Defence Secrets** is seized so that an opinion can be given to the Prime Minister on the need to declassify all or some of the elements with a view to their transmission to the public prosecutor[63].

b. Other sectors

1. Health and environment
   For alerting in the **health and environment** sector, see Annex.
2. Banking and insurance
   Alerting in the **banking and insurance** sector may take place through mandatory internal channels but also through external channels specifically provided for this purpose by Art. **L.634-3 of the French Monetary and Financial Code**[64]. This involves referring the matter to the Financial Markets' Authority ("*Autorité des marchés financiers*") or to the French Prudential Supervisory and Resolution Authority ("*Autorité de contrôle prudentiel et de resolution*") in accordance with the procedures defined by these bodies. This specific procedure applies to alerts relating to any failure to comply with the obligations defined by European regulations and the Monetary and Financial Code or the General Regulation of the Financial Markets' Authority and supervised by one of these two authorities[65].
3. Tax fraud
   The Sapin Act does not amend Act No. 2013-1117 of 6 December 2013 on the fight against **tax fraud[66].** This means that this law remains in force and the protection of the whistleblower it provides (articles 35 and 36 of law n°2013-1117) is the only one applicable. Article 35 provides for **protection against any** direct or indirect **reprisals in the** context of work with an adjustment of the burden of proof in favour of the whistleblower. Article 36 provides for the possibility that the tax fraud whistleblower may put in **contact with the central corruption prevention service** (now the French Anti-Corruption Agency). The other components of the whistleblower's general status are therefore not *a priori* applicable (e.g. criminal absence of criminal responsibility, confidentiality, sanctions against the perpetrators of reprisals). The extension of the Sapin law in the event of a tax fraud alert will depend on the judge's

In the event of a dispute relating to the application of the first paragraph of this II, it shall be for the defendant to prove that its decision is justified by objective factors unrelated to the statement or testimony of the servant concerned.
Any agent who reports or testifies to the facts mentioned in I, in bad faith or with the intention of causing harm or with at least partial knowledge of the inaccuracy of the facts, shall be liable to the penalties provided for in the first paragraph of Article 226-10 of the Criminal Code.

[63] Human Rights Defender's Orientation Guide, p. 23

[64] **Article L634-1 of the Monetary and Financial Code** "The Autorité des marchés financiers and the Autorité de contrôle prudentiel et de résolution shall set up procedures to ensure that they are informed of any failure to comply with the obligations defined by European regulations and by this Code, the Insurance Code, the Mutual Insurance Code and the Social Security Code or the General Regulation of the Autorité des marchés financiers and that they are supervised by one or the other of these authorities.
The General Regulations of the Autorité des marchés financiers, in respect of that authority, and an order of the Minister of the Economy, in respect of the Autorité de contrôle prudentiel et de résolution, shall lay down the detailed rules for the application of this Chapter. »

[65] Human rights defender, Guide - Orientation and protection of whistleblowers, July 2017, p. 23 (below Human rights defender orientation guide) as well as Transparency International France, Guide for whistleblowers, 2017, p. 33

[66] Law of 6 December 2013 on tax fraud

assessment[67]. Since the Sapin law is an anti-corruption law, the fact that the Sapin law ignores its articulation with the law on the fight against tax fraud is - at the very least – surprising.

4. Aviation safety

   Air safety alert: The employer and the Minister responsible for civil aviation must be kept informed of any type of event likely to have consequences for air safety[68].

Objective field of application

Both **private and public sectors** are covered by the provisions of the Sapin II Law.

The **duty** to put in place a whistleblowing **internal channel** applies **only** to:

- legal entities under private law with at least 50 employees;
- legal entity under public law with at least 50 employees and agents;
- state administration;
- department; region; municipality with more than 10,000 inhabitants; establishment of inter-municipal cooperation with its own tax system for a municipality of more than 10,000 inhabitants.

Categories of subjects to whom the protection applies

A. Who is protected

According to Article 6 of the law of 9 December 2016, a whistleblower is:

> "a natural person who discloses or reports, in a disinterested manner and in good faith, a crime or misdemeanour, a serious and manifest breach of an international commitment duly ratified or approved by France, a unilateral act of an international organisation taken on the basis of such an undertaking, the law or the regulations, or a serious threat or prejudice to the general interest, of which he has personal knowledge. ».

Some clarifications are required:

The Constitutional Council has come to define the general nature of this definition: it has therefore been specified that the procedure of Article 8 of the Sapin Law is limited only to

> " whistleblowers making an alert against the organisation employing them or the one to which they collaborate in ***a professional context***. "»[69].

Consequently, the procedure provided for in Article 8 of the Sapin Law is intended to collect alerts from agents, holders or contract staff belonging to the structure subject to the obligation. It also applies to trainees and apprentices[70] as well as to external and occasional collaborators of the administration, bodies or communities concerned, such as a voluntary user of the public service who actually participates in its execution, either as a reinforcement or by substituting a public official[71].

[67] In this sense Transparency International France, Guide 2017, *op.cit.*, p.43

[68] Human Rights Defender's Orientation Guide, *op.cit.*, p. 24

[69] Decision No. 2016-741 DC of 8 December 2016, cons. 7; it should be noted that the senators who referred the case to the court pointed out that the law was clearly unintelligible in that it defined the whistleblower very broadly, whereas the reporting procedure defined by Article 8 seemed to concern only the employees of the body concerned by the alert. The doctrine strongly criticizes the interpretation of the constitutional judge ("with an argumentative power that does not fail to impress", S. Dyens, op. cit., Grand Angle Dalloz, p. 20) which confirms that the limitation of the Sapin law procedure in a professional context without finding intelligibility there.

[70] Circular of 19 July 2018 from the Minister for Action and Public Accounts, *op.cit.*, p. 3

[71] The circular from the Seine et Marne Management Centre thus gives some interesting examples:
Public service users crossing children in front of the school in support of an ATSEM, accompanying a class on a school trip, participating in work within the school, helping to set up a podium at a local festival, source http://circulaires.cdg77.fr/?-Instauration-d-une-procedure-de-

Pursuant to the provisions of article 34, paragraph V, of Act No. 2000-321 of 12 April 2000, the procedure is also open to local law officials employed by the State's public administrations and agencies abroad.

Only ***natural persons*** are covered by this definition and the applicable regime. Associations, trade unions, professional orders or other legal persons, which could help whistleblowers to raise the alert, do not fall within the scope of this definition. For the Human Rights Defender, this constitutes a decrease in the level of protection[72] in terms of health and environmental risks insofar as the previous provisions of law of 16 April 2013[73] provided that legal entities could refer cases to the National Commission on Ethics and Alerts in Public Health and the Environment (CNDASE)[74]. **However, the fact that the law does not grant the status of whistleblower to legal persons does not prevent NGOs, trade unions or professional orders from receiving and filtering alerts and reporting**[75]. However, the secrecy of the whistleblower's identity must be guaranteed by these legal entities when carrying the alert.

In addition, it should be noted that the repeal of existing protection regimes, in particular the provisions of the Act of 16 April 2013 on the independence of health and environmental expertise and the protection of whistleblowers, can also be considered as ***a lowering of the level of requirement*** when granting whistleblower status. As the Human Rights Defender points out[76], in the space of three years, the ***requirement for an assessment by an independent and specialised commission*** has been ***changed to a self-assessment by the whistleblower***. Indeed, according to this law, the CNDASE was responsible for defining the criteria[77] on which the admissibility of an alert had to be based, as well as the elements included in the registers kept by the establishments and public bodies specified by the law (article 2-3° of the law of 16 April 2013/ repealed).

This amendment of the legal framework (described by the Defender of Rights as "improvisation"[78]) certainly makes it possible to create a general status for the whistleblower in France that could be welcomed, but it can also be considered that **self-qualification** exposes the whistleblower to doubts that may prevent his reporting.

B. What acts are likely to be reported

The acts and facts likely to be reported are provided for by the definition in Article 6 of the Sapin Law but are not listed by the Decree of 19 April 2017.

[72] Jacques Toubon, "Independent reading of a legislative innovation. La création du dispositif de protection des lanceurs d'alerte", in M. Disant and D. Pollet-Panoussis, *The whistleblowers. What legal protection? What limits,* LGDJ, 2017

[73] Article 1 of the law (repealed) of 16 April 2013 " "Any natural or legal person has the right to make public or to disseminate in good faith information concerning a fact, data or action, if the lack of knowledge of such fact, data or action appears to him to pose a serious risk to public health or the environment. The information it makes public or disseminates must refrain from any defamatory or offensive accusation. »

[74] National Commission on Ethics and Alerts in Public Health and the Environment

[75] In this sense Eric Alt, "New protections for whistleblowers - About law n° 2016-1691 of 9 December 2016", JCP G, n°4, 23 January 2017, doctr. 90, p. 6

[76] In this sense, Jacques Toubon, "Independent reading of a legislative innovation. La création du dispositif de protection des lanceurs d'alerte", in M. Disant and D. Pollet-Panoussis, *The whistleblowers. What legal protection? What limits,* LGDJ, 2017, p. 403

[77] Today the Commission is publishing guidance guides such as "From alert to warning: criteria for assessing the CNDASPE" (April 2018 version)

[78] In this sense, Jacques Toubon, "Independent reading of a legislative innovation. La création du dispositif de protection des lanceurs d'alerte", in M. Disant and D. Pollet-Panoussis, *The whistleblowers. What legal protection? What limits,* LGDJ, 2017, p. 40

It is about[79]:

- a crime or misdemeanor,
- a serious and manifest violation of an international commitment duly ratified or approved by France, a unilateral act of an international organization taken on the basis of such an undertaking, the law or the regulations,
- or a serious threat or injury to the public interest.

Certain **clarifications** are necessary since the contours of the certain terms of these acts are subject to interpretation:

While it is easier to understand the first case (the facts likely to be classified as criminal), it should be noted here[80] that for public officials there is also a separate procedure provided for in **article 40 of the Code of Criminal Procedure;** this **requires** any constituted authority, whether public official or civil servant, who acquires, in the performance of his duties, **knowledge of a crime or offence to** give notice thereof without delay to the public prosecutor and to transmit to that judge all information, minutes and acts relating thereto. The articulation of Article 40 CPP[81] with the procedure of Article 8 of the Sapin Law is not exempt from difficulties for the officer carrying an alert[82]. The circular of 19 July 2018 does not provide any real clarification[83].

In addition, for **acts "likely to be qualified as a conflict of interest",** employees must take into account the specific procedure of article 6 ter A of the law of 13 July 1983 as introduced by the law of 20 April 2016 (Ethics Act), which provides for a warning in vain from one of the hierarchical authorities to which the employee belongs, as well as the possibility of testifying of such facts to the ethics referent ("ethics law" procedure)[84]. However, the same article (6 ter A of the 1983 law) also provides for the protection of whistleblowers as provided for by the Sapin law. The **articulation of the two procedures** (Ethics Act and Sapin Act) is not clear[85].

The circular of 19 July 2018 specifies that "Conflicts of interest may only be reported within the meaning of Article 6 of the Law of 9 December 2016 if they constitute an offence of unlawful taking of interests, a serious and manifest violation of the law, or a threat or serious prejudice to the general interest. "»[86].

It must also be specified that **the intensity of** these facts, acts or damages is a condition for the alert to enter into the provisions of the Sapin Act. The damage must also be serious regarding to the public interest. The circular of 19 July 2018 specifies:

[79] Transparency International France's Alerting Guide (2017) lists some legal bases on which an alert can be based, pp. 38-40

[80] *infra*

[81] (reminder) Article 40 CODE OF PENAL PROCEDURE, paragraph 2 "Any constituted authority, public officer or civil servant who, in the performance of his duties, acquires knowledge of a crime or offence shall be required to give notice thereof without delay to the public prosecutor and to transmit to that judge all information, minutes and documents relating thereto. »

[82] Its articulation with the ethical obligations of public officials is already complex; see Annex 8 of the study of the Council of State (Conseil d'Etat).

[83] Circular of 19 July, op. cit. p. 3

"The procedure under Article 40 is open to a more restricted public than the procedure under the law of 9 December 2016. Compliance with the procedure of the law of 9 December 2016 is also essential to enable the authors of the alert to benefit from all the protections and guarantees it grants. »

[84] This procedure is based on the so-called "Ethics" or "Lebranchu" law named after its rapporteur.

[85] See the virulent criticism of S. Dyens and his effort to clarify in S. Dyens, "Le lanceur d'alerte dans la loi Sapin 2 : un renforcement en trompe-œil, *op.cit.*, p. 23 et seq.

[86] Circular of 19 July 2018, op. cit., p. 6

"The assessment of the seriousness of the facts, acts, threats and injuries shall be the primary responsibility of the whistleblower, before proceeding with the report "»[87].

These conditions raise new questions about the effectiveness of the protective device required by the Sapin law. How can a natural person who is neither a judge nor a legislator assess the general interest? How can gravity be assessed in technical areas where expertise is required?

In addition, the alert may relate to acts or facts which do **not constitute a criminal offence but which are simply detrimental to the** general interest. While reporting a simple threat may seem protective of the general interest, it is not protective for the whistleblower: "It is to be feared that the absence of illegality as a condition to the report deters the potential whistleblower. (...) Reporting something illegal is not easy (...) So reporting something that is not illegal…[88]."

It should be recalled that, in the field of health and the environment, the law of 16 April 2013 provided for more flexible requirements: "Any natural or legal person has the right to make public or disseminate in good faith information concerning a fact, data or action, if the lack of knowledge of such fact, data or action ***appears to pose a serious risk to*** public health or the environment. (...)" (repealed provision).

The fact that this probability of risk should be brought to the attention of an independent authority, (CNDASE) having specific resources and knowledge to assess the alert, constituted a guarantee for the person issuing an alert. Even if this Commission has only recently actually existed[89], the disappearance of the risk assessment competence corresponds to a decline in protection in these specific sectors, as noted by the Human Rights Defender[90].

In addition, with regard to alerting in the health and environment sector before the **repeal of the** definition of whistleblower in this sector by Sapin law "alerting [was] not limited to revealing offences or breaches: it affirm[ed] the existence of a risk, which he reasonably existing, even if the risk is not proven. **It [was] then possible to avoid health and environmental damage by promoting the identification of warning signs and their timely treatment**[91].

C. Conditions and limits to the granting of alerting status

The protection of the whistleblower in France is fundamentally dependent on the subjective element of the good faith of its author (a). In the public service, the alert may be issued provided that the staff member complies with the ethical obligations (duty of loyalty) by virtue of his status (b). The alert must also be balanced with the obligations of secrecy (c). Finally, compliance with the various reporting channels provided for by the Sapin law conditions the protection of the whistleblower (d). We will see that alert protection in France is subject to important limits and in any case a very restrictive framework that must be respected in order to benefit from the protection regime.

a. Good faith and disinterested reporting

Good faith is central in that it is a **condition for granting** whistleblower **status** and its protection *stricto sensu* [burden of proof, absence of criminal responsibility in the event of a breach of confidentiality, protection against discriminatory measures taken by the employer (see *below*[92])].

[87] *Ibidem*, p. 6
[88] S. Dyens, "Le lanceur d'alerte dans la loi Sapin 2 : un renforcement en trompe-œil, *op.cit.*, p. 19
[89] v. Health and Environment Annex
[90] J. Toubon, *op.cit*., p. 403
[91] O. Leclerc, *op. cit*., p. 47
[92] *infra.*

"A whistleblower is a natural person who reveals or signals, in a disinterested and good faith... " (article 6 of the Sapin law).

To satisfy the condition of a report made in good faith, the author must have

> "a **reasonably established conviction in the veracity of the facts** and acts he intends to report in relation to the information to which he has access, and be **free from any intention to harm**»[93].

In addition, the definition of whistleblower also provides that the alert must be *disinterested, which* means that

> "the person issuing the alert may not act to satisfy a particular financial or other interest."»[94], [95].

The notion of good faith therefore makes the legitimacy of the alert depend on a **subjective element** and not solely on the objective interest of the disclosure of information to society[96]. In other words, the notion **leads "to focus on the whistleblower's intentions rather than on his message**"[97].

Nevertheless, **recent case law in** summary proceedings of the Lyon Labour Court has nevertheless adopted a **more balanced** conception of good faith:

> "the whistleblower shall be considered to be acting in good faith, provided that he has reasonable grounds to believe that the information disclosed was true, even if it subsequently appears that this was not the case, and provided that he does not have an unlawful or unethical purpose".

The compliance of this approach with Resolution 1729 of the Parliamentary Assembly of the Council of Europe[98] was welcomed [99] as it helps to neutralise the fears raised by Article 6 of the Sapin Law.

b. The balancing with the ethical obligations of public officials (duty of loyalty)

Freedom of expression in the French civil service is not guaranteed in the same way as in the private sector[100], or the status of European Union civil servants[101]. The general civil service statute only enshrines **freedom of opinion** (article 6 of the general civil service statute). However, the freedom of opinion which is based on freedom of expression[102] must be **reconciled in French law with the**

[93] Circular of 19 July 2018, *op.cit*. p. 10
[94] Circular of 19 July 2018, *op.cit*. p. 10
[95] However, even if we understand the interest in distinguishing *disinterested* alerts from alerts issued in *good faith, it* should be noted that the two may be confused in the sense that suspicion of a particular interest (promotion, grudge, salary benefits or other) may reverse the author's good faith. This means that the condition of good faith is not limited to the definition given in the circular but includes the disinterestedness of the whistleblower. Joining (in good faith and disinterestedly) may therefore appear more as a tautological and as an additional argument for the interpretation of good faith as a subjective element conditioning protection. We are therefore not faced with a *protection of the alert* but of the whistleblower; on its intention therefore depends the protection of the general interest....
[96] Eric Alt, "New protections for whistleblowers - About law n° 2016-1691 of 9 December 2016", JCP G, n°4, 23 January 2017, doctr. 90
[97] Juliette Alibert and Jean-Philippe Foegle, "First victory for a whistleblower in summary proceedings under the "Sapin II" law. ", La Revue des droits de l'homme[On line], Actualités Droitss-Libertés, online on 29 April 2019, accessed on 30 April 2019. URL: http://journals.openedition.org/revdh/6313; DOI: 10.4000/revdh.6313, p. 7
[98] Resolution No. 1729 (2010) of the Parliamentary Assembly of the Council of Europe
[99] Juliette Alibert and Jean-Philippe Foegle, "First victory for a whistleblower in summary proceedings under the "Sapin II" law. "», p. 5-7
[100] L-2281-1 of the Labour Code
[101] Article 17a of the Staff Regulations of Officials of the European Union
[102] A. Taillefait, *Droit de la fonction publique*, Dalloz, 8th ed., p. 718

obligation of obedience, the "obligation of reserve" and the obligations of loyalty and professional discretion as well as secrecy incumbent on the public official.

In the public service, ethical alert therefore involves "public trust in institutions, the credibility of services, the impartiality of administrative decisions, in short, exemplarity"[103],[104].

The exercise of the "right of alert" is therefore hampered by obligations incumbent on public officials; they are of jurisprudential origin or enshrined in the general statute of the civil service (law n°83-634 of 13 July 1983).

It is about:

- The obligation of professional secrecy and professional discretion (art. 26[105]);
- The principle of hierarchical obedience, except in the case of a manifestly illegal order likely to seriously compromise a public interest (art. 28[106]);
- The "obligation of reserve" (established by case law[107]), i.e. an obligation to remain neutral in one's words and actions during the performance of one's duties but also outside. The duty of reserve thus prohibits the making, publicly, of outrageous statements targeting superiors or, more generally, devaluing the administration[108].

Thus, the agent wishing to issue an alert is part of a logic of insubordination[109] which could be translated into a "**right to disobey**", resulting from Article 28 of the General Statute. However, the exercise of this "right" is strictly conditioned by case law[110] and makes it possible to affirm that the "legality of the implementation of the duty of disobedience is only an exceptional hypothesis in French administrative case law"[111].
Finally, it should be noted that the **second paragraph of article 40 of the Code of** Criminal **Procedure** is also considered as a legal basis for alerting by public officials. It provides for an **obligation on** any constituted authority, public officer or civil servant to give notice to the public prosecutor when he is

[103] G. Koubi, "Liberté d'expression et droit des fonctions publiques in C. Fortier, *Le statut général des fonctionnaires : trente ans et après*, colloque des 11 et 12 juillet 2013, Paris, Dalloz, p. 229
[104] On the requirement of exemplarity in public action: Christelle Oriol (Public Rapporteur), " Les contours du devoir d'alerte des agents publics ", Revue Actualité Juridique du Droit Administratif (*AJDA)*, 2015, p. 639
[105] Article 26 (General Civil Service Regulations) "Civil servants are bound by professional secrecy within the framework of the rules laid down in the Criminal Code.
Officials must exercise professional discretion with regard to any facts, information or documents of which they become aware in the course of or in connection with the performance of their duties. Except in cases expressly provided for by the regulations in force, in particular as regards freedom of access to administrative documents, officials may be released from this obligation of professional discretion only by an express decision of the authority to which they are subject. »
[106] Article 28 (General Staff Regulations) "All civil servants, whatever their rank in the hierarchy, shall be responsible for the performance of the tasks entrusted to them. He must comply with the instructions of his superior, except in cases where the order given is manifestly unlawful and likely to seriously compromise a public interest. (…) »
[107] EC, 11 January 1935, *Bouzanquet*, Rec. p. 44
[108] A. Taillefait, *Droit de la fonction publique*, Dalloz, 8th éd., pp. 715-716
[109] L. Ragimbeau "Le droit d'alerte des agents publics : enjeux et perspectives", in M.-C. Sordino, *Lancers d'alerte : innovation juridique ou symptôme social ?,*Presses de la Faculté de Monpellier, 2016 p. 106
[110] The relaxation of the principle of hierarchical obedience is not easily accepted by the judges: "the manifestly unlawful character is erased in favour of the serious breach it causes to the public interest in order to determine the legality of the use of disobedience" (A. Taillefait, *Jurisclasseur*, Fasc. 183, p. 12)
[111] A. Taillefait, "Le devoir de désobéissance de l'agent public", *Revue Lamy Droit Civil*, n° 51, p. 5

aware of a crime or misdemeanour in the performance of his duties. This provision, often **perceived as denunciation**[112]**,** has been **used very little to date**[113] **due to the** lack of criminal sanctions in the event of non-application by the persons concerned[114], but also probably because of the fact that "the Public Prosecutor's Office is not considered by the ECtHR as an independent judicial authority, the link with the executive branch having not been broken"[115]. In any case, it is interesting to note that the study of the Council of State ("Conseil d'Etat", supreme administrative court) resolves the problem of the public official's contradictory imperatives (Article 40 CPP and ethical obligations) by placing **the hierarchical authority** in a pivotal role[116], which fuels a **culture of internal alert in** France**.**

c. The balancing with the protection of secrets

An alert, by definition, aims to reveal information that is not known. However, some of this information is protected information in the sense that those who have access to it are subject to an obligation of secrecy. The law contains secrecy obligations that constitute limits to the alert in addition to those previously set out (good faith, duty of loyalty).

The violation of secrecy obligations excludes the whistleblower of the protection provided and renders him liable (civil, criminal, disciplinary). Some secrecy obligations are ***absolute***[117], i.e. the information covered by this type of secrecy cannot be reported; in the event of a violation, the author is not protected by the provisions of the Sapin Act (art. 6 (2)); some other secrecy obligations are ***relative***, i.e. in the event of a collision between secrecy obligation and ethical reporting[118], the law dictates the conditions under which the author of an alert may be exempt from criminal liability when violating secrecy.

Secrecy is **absolute** according to the Sapin law (article 6 al. 2) for the information covered by:

- Defence secrecy (military and intelligence officers)
- Medical confidentiality (doctors and health professionals
- The secret between the lawyer and his client.

Secrecy is **relative** for any other professional who is bound by an obligation of professional secrecy (including business secrecy[119]). This is not expressly provided for, but this interpretation is necessary following a parallel reading of the wording on absolute secrets (Art. 6 para. 2 Balsam Fir Law[120]) and

[112] E. Alt, « Lanceurs d'alerte : un droit en tension », *JCP G*, n°43, 20 octobre 2014, doctr. 1092

[113] According to the 2013 criminal policy report of the Directorate of Criminal Affairs and Pardons, prosecutors generally report too few transmissions on the basis of article 40 of the Code of Criminal Procedure, cited in Jean-Louis Nadal Report, *Renouer la confiance publique*, Report to the President of the Republic on the exemplarity of public officials, La documentation française, 2015, pp. 128 et seq.

[114] Laure Romanet et Lionel Benaiche, *Les lanceurs d'alerte, auxiliaires de justice ou gardiens du silence ? L'alerte éthique en droit français*, Editions de santé, Collection Hygiéa, 2014, pp. 26-41

[115] Migaud J.P. and Terrel I., "Les lanceurs d'alerte, agents actifs de la politique criminelle", in *Politique(s) criminelle(s), Mélanges en l'honneur de C. Lazerges*, Dalloz, 2014, p. 731-732

[116] Conseil d'Etat, *Le droit d'alerte: signaler, traiter, protéger*, Etude adoptée le 25 février 2016 par l'assemblée générale plénière du Conseil d'Etat, La documentation française, avril 2016, pp. 130-132 (ci-après Etude du Conseil d'Etat)

[117] E. Alt, « Lanceurs d'alerte : un droit en tension », *JCP G*, n°43, 20 octobre 2014, doctr. 1092, p. 4

[118] It is clear that ethical reporting cannot be described as an "obligation" and the consequence of this "deontological fragility"; it is already difficult to justify the search for a balance between an obligation and a right, therefore even more difficult between an obligation and an action with an illegal connotation but whose right is beginning to organize the conditions of legality....

[119] *infra* (protection *stricto sensu* irresponsible criminal liability for breach of professional secrecy)

[120] "Facts, information or documents, in any form or medium, covered by national defence secrecy, medical secrecy or the secrecy of relations between a lawyer and his client are excluded from the alert regime defined in this chapter. "(article 6 al. 2 of the Sapin law).

the general wording of Article 7 ("a secret protected by law"[121]); it is understood that any other secret may be disclosed and its author will be protected (exempt from criminal liability) provided that its author respects the legal conditions.

The circular of the Ministry of Justice of 31 January 2018[122] expressly states that Article 7 of the Sapin Act creates a justification for the offence of breach of professional secrecy in favour of the whistleblower, which was lacking until the Sapin Act[123].

d. Compliance with the procedure

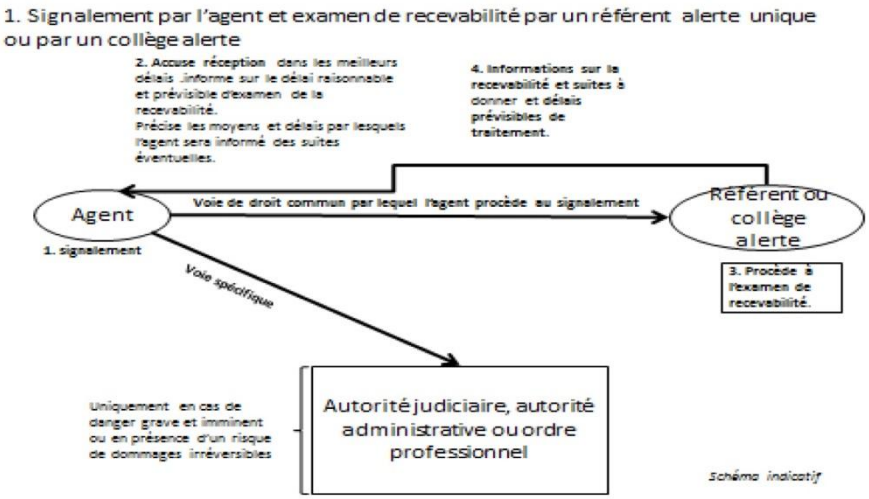
Compliance with reporting channels is a condition and at the same time a limit to the protection of the whistleblower in France; indeed, the Sapin law provides in Article 7 that the whistleblower who violates a secret protected by law will not be criminally liable if - among other things - his reporting "takes place in accordance with the reporting procedures defined by law".

The analysis of the reporting procedure in France will be the subject of the following developments.

Channels to report irregularities

French legislation requires that an **alert must be** reported in **stages** (internal body, external authority, public disclosure) except in cases of urgency directly justifying an external alert and public disclosure.

Two procedures are therefore provided for: the **ordinary procedure** giving priority to internal reporting (Article 8-I Loi Sapin) (A) and the **derogation procedure** allowing the internal channel to be bypassed (Article 8-II Loi Sapin) (B).



(Schematic procedure - next page - source Circular of 19 July 2019)

[121] "**Article 122-9 Criminal Code -** A person is not criminally liable if he infringes a secret protected by law, if such disclosure is necessary and proportionate to the protection of the interests in question, if it is made in accordance with the reporting procedures defined by law and if the person meets the criteria for defining the whistleblower provided for in Article 6 of Law No 2016-1691 of 9 December 2016 (..."). (article 7 of the Sapin law)

[122] Ministry of Justice, Circular on the presentation and implementation of criminal provisions provided for in Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, CRIM/2018-01/G3-31.01.2018, NOR No.: JUSD1802971C, p. 5

[123] The note from the Ministry of Justice annexed to the 2016 study of the Council of State (before the adoption of the Sapin Act), after an examination of the legal provisions justifying the disclosure of professional secrecy, concluded that none of these provisions expressly authorised an ethical alert. The author of an alert could thus be exempt (up to the Sapin law) from civil or disciplinary liability but not from criminal liability; see Annex n° 7 of the Study of the Council of State, *op.cit.*, spec. p. 123-124

A. The ordinary graduated procedure

The standard reporting procedure consists of three steps (also known as alert "channels"):

1. **Internal reporting**, i.e. to the employer, the direct or indirect superior or the designated "alert referent";
2. **External reporting to the** competent administrative or judicial authority or to professional bodies; this step can only take place if there is no reaction to the internal report after a "reasonable period" has elapsed;
3. **Disclosure to the public of** the alert, if the external alert is not processed by the above-mentioned authorities.

As noted "The challenge for the legislator was to implement a mechanism that would be sufficiently binding to prevent abusive disclosures or on minor facts, and sufficiently flexible to avoid stifling information on a potentially compliant hierarchy "[124].

Compliance with this graduated procedure is a condition for the potential whistleblower to benefit from the protective status provided for by the Sapin law and concerns any whistleblower reporting acts committed in the course of his work, regardless of the number of employees or agents of his organisation or the number of inhabitants of the community. **Following these steps, one after the other, is an obligation for the whistleblower, who is therefore not free to choose the channel that seems most appropriate to him**. Case law also states that the whistleblower must be able to demonstrate that he has taken the necessary steps internally before seeking an external body[125].

What the Sapin law has introduced and which may be a source of misunderstanding consists of the new obligation to set up a “system for collecting alerts”. This obligation concerns the internal reporting stage and is addressed to certain large organizations, which ***ultimately*** **creates a different procedure to follow for an internal reporting, depending on the size of the organization**.

In any case, in the absence of such a system (either because it is not provided for by law -e.g. “small organisations”-, or because the (large) organisation has not yet implement it, or because it is inoperative -e.g. defective alert mailbox) the report must first be made internally - in any case other than that of serious and imminent danger (derogation procedure) -.
After these introductory elements, it is necessary to see the specific features of each of the stages of the ordinary graduated procedure:

a. The first step: internal reporting

1. Two preliminary details on the internal alert

i. The consolidation of a culture of internal alert

The introduction to the Sapin Act could be seen as consolidating a "**culture of internal reporting**" since both the Act and the implementing decree of 19 April 2017 as well as the circular of 19 July 2018 and the AFA (Anticorruption French Agency) recommendations insist on details of setting up such internal mechanisms.

The **justification for** an "internal reporting culture" could be multiple:

[124] E. Alt, « De nouvelles protections pour les lanceurs d'alerte - . - À propos de la loi n° 2016-1691 du 9 décembre 2016 », La JCP G n° 4, 23 Janvier 2017, doctr. 90,
[125] e.g. EC, 31 March 2017, No. 392316; EC 24 May 2017, No. 389785

- Prevent reputational risk and breach of trust in the State or the company for facts not yet proven, especially in the event of abusive denunciations[126];
- Allowing a balance between the ethical obligations of public officials and whistleblowing protection[127];
- The internal channel could be seen as the most appropriate to put an end to the offences and acts that are the subject of the alert;
- The internal alert can also be seen as a "secure" device for the potential whistleblower that would not be lost in the procedure to be followed.

The discussion of the relevance of these arguments or their potential to protect the public interest in an alert is not the subject of this study. Below are some notable points concerning the internal alert as well as the content of the internal reporting system as it results from the decree, the circular and the various decrees and texts adopted pursuant to the Sapin law.

ii. The establishment of a different internal reporting procedure depending on the size of the organisation

In order to facilitate the whistleblower and to make public and private bodies more accountable, the Sapin law provides for the establishment of systems for collecting alerts (Article 8-III), a requirement that the decree of 19 April 2017 specifies.
However, the **requirement to set up such systems does not apply to all public and private sector organisations**. The **criteria of** the number of inhabitants and the number of employees are used.

Thus, internal reporting in **large** employer **organisations** will be carried out through the *special* alert collection *mechanism* provided for by the Sapin Act; internal reporting in **small organisations** must be carried out, according to the interpretation of the Human Rights Defender, by *traditional post* by registered letter with acknowledgement of receipt.

2. The internal reporting procedure in "large employer's organizations"

Hereafter will be explained : the obligation to set up an internal alert system and its recipients in the major employer's organisations[128], the content of the system (ii), the vagueness of the admissibility period (iii), the examination of the admissibility of an alert under this system (iv), the processing of the alert and the new imprecision of the processing time (v).

i. The obligation to set up an internal alert system and its recipients

The collection of ethical alerts is a **procedural obligation**[129] for several administrations, local authorities and legal entities governed by private and public law, as provided for in Article 8 of the Sapin Act and clarified by Decree No. 2017-564 of 19 April 2017, but has a precise scope.
The bodies which must set up the procedure for collecting alerts are as follows:

- Legal entity under private law with at least 50 employees (company, etc.);

[126] "During their hearing, its representatives considered that its legitimacy should not be denied to the superior whose lack of probity we do not have to prejudge. We cannot assume that an alert should be immediately made public that could have an impact on the structure concerned even if the facts are not fully proven. ", National Assembly Report, p. 52
[127] *supra*
[128] Terminology used by the Human Rights Defender in the Orientation Guide (op. cit.)
[129] S. Dyens, « Recueil des alertes éthiques. Une nouvelle obligation procédurale pour les collectivités territoriales », in *Anticorruption. La loi Sapin 2 en application*, Dalloz Grand Angle, 2018

- Legal entity under public law with at least 50 employees and agents (public administrative establishment, public industrial and commercial establishment, etc.);
- State Administration;
- Department ;
- Region ;
- Municipality with more than 10,000 inhabitants;
- Establishment of inter-municipal cooperation with its own tax system for a municipality of more than 10,000 inhabitants[130].

In State administrations (central administrations, decentralised services, services with national competence) this procedure is created by an order of the competent minister or ministers[131]. The order of the minister concerned may also provide for the possibility of a joint procedure (**mutualisation**; interesting, for example, in the intermunicipal framework) for services placed under his authority and also for public establishments placed under his supervision, after a decision to this effect by the competent bodies of these establishments (Article 2 of the decree of 19 April 2017). Even if this provision has been welcomed, the difficulties of application (which the decree seems to ignore) are diverse (manager, responsibility of which municipality)[132].

For the other legal persons, territorial communities or public authorities concerned, the decree of 19 April 2017 allows greater flexibility in order to let them choose the appropriate instruments for meeting their obligations. These may include codes of conduct, charters of ethics, memos[133]. The possibility of **mutualisation** is also provided for. The instrument chosen must be adopted in accordance with the laws or regulations governing the legal person.

ii. The content of the internal alert mechanism

The disclosure of the implementation of the alert mechanism is an obligation of large organizations and must be carried out in such a way as to make it effectively known to staff members, agents, external or occasional collaborators (notification, posting, publication on the website, email, etc.) (article 6, decree of 19 April 2016).

The system for collecting alerts must specify the methods by which the whistleblower can report. It must be specified in accordance with Article 5-I of the Decree:

1° who must be the addressee of the alert (supervisor, employer, "alert referent");

2° that the person issuing the alert must provide information, facts and documents supporting his alert when he has these elements at his disposal;

3° that the person who issued the alert must provide information enabling exchanges with the person to whom the alert is addressed.

The decree also provides for the obligation to specify in the alerting mecanism the procedures for managing the alert once it has been received by the addressee (Article 5-II). Thus, it must be explained:

[130] For S. Dyens, this perimeter is disappointing because less than 1000 municipalities exceed 10000 inhabitants, see S. Dyens, « Recueil des alertes éthiques. Une nouvelle obligation procédurale pour les collectivités territoriales », in *Anticorruption. La loi Sapin 2 en application*, Dalloz Grand Angle, 2018, p. 58

[131] These instruments of concretization have been mentioned above, *supra*

[132] S. Dyens, « Recueil des alertes éthiques. Une nouvelle obligation procédurale pour les collectivités territoriales », in *Anticorruption. La loi Sapin 2 en application*, Dalloz Grand Angle, 2018

[133] These instruments of concretization have been mentioned above, *supra*

1° that the author of the reporting must obtain an acknowledgement of receipt as soon as he has reported ("without delay") as well as of the time limit for examining his admissibility; this time must be "reasonable and foreseeable"; it must be specified what action the whistleblower should expect ;
2° the exact content of the confidentiality guarantee to which the organization undertakes to adhere;
3° the destruction of the elements of the file (in the event that no action is taken within a maximum period of two months from the closure of the file; in such a case the author of the alert must be informed of the destruction);
4° the existence (or not[134]) of automated processing of alerts issued in accordance with national legislation on the protection of personal data.

iii. The vagueness of the admissibility period

The definition of the waiting period for the admissibility of the alert (admissibility period) is left to the discretion of the persons who receive the alert without any other limit than that of the "**reasonable and foreseeable**" nature (art. 5-II-1° decree of 19 April 2017). It should be noted that the decree merely reiterates the requirement of a "reasonable" time limit provided for in Article 8 -I-al. 3 of the Sapin Act and does not provide any clarification other than the addition of the word "foreseeable" alongside "reasonable"[135].

The texts adopted pursuant to the Decree of 19 April 2017 by various ministries, regions or public bodies mostly use the expression "reasonable and foreseeable time" for examining the admissibility of the alert[136] without further specifying it; they suggest that the assessment of this time limit **will depend**

[134] It should be noted that the Occitania Region has chosen not to allow automated processing of alerts issued by whistleblowers. "Article 4 The collection and processing of alerts is not subject to automated processing". Order of 2 May 2018 on the procedures for collecting and processing alerts issued by whistleblowers.

[135] Decree of 19 April 2019 article 5-II "1° To inform the author without delay of the receipt of his alert, as well as of the reasonable and foreseeable time necessary for the examination of its admissibility and the manner in which he is informed of the action taken on his alert;".

[136] E. g. Article 7-2° of the decree of 16 November 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of the Interior and the Ministry of Overseas France ("Sets the foreseeable and reasonable time limit for examining the admissibility of his alert"); e. g. Article 6 Order of 23 August 2018 on the procedure for collecting alerts from the Ministry of Defence ("The recipient shall acknowledge receipt of the alert as soon as possible and inform the person to whom it is addressed of the confidentiality guarantees mentioned in Article 10. It shall assess the reasonable and foreseeable time required to examine admissibility and communicate it to the person issuing the alert. It may request additional information from it. "Region Occitanie, Decree on procedures for collecting and processing alerts issued by whistleblowers, Annex 1 "Receipt of the alert by the "alert referee"... mentions to the author of the alert the foreseeable time required to examine its admissibility", p. 3; Order of 20 April 2018 on the procedure for collecting alerts issued by whistleblowers within the Caisse des dépôts et consignations, Article 6 "According to detailed procedures in a procedure for collecting alerts specific to the Caisse des dépôts et consignations, the compliance officer shall acknowledge receipt of the alert and inform its author of its admissibility within a reasonable time, specifying the means of information and the foreseeable deadlines for informing him of the action taken on his alert. If there is no feedback on the admissibility of the alert within the foreseeable reasonable time limit set by the acknowledgement of receipt, the officer who issued the alert may, in good faith and disinterestedly, refer the matter directly to the judicial authority, the administrative authority or the professional orders, depending on his situation. If these authorities or professional orders fail to process the alert within three months, the alert provided for in Article 2 of this Order may be made public by the whistleblower. "Decree of 10 December 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of National Education," Article 6. - An acknowledgement of receipt of the alert shall be sent without delay to the person issuing the alert. This acknowledgement of receipt shall indicate the guarantees of confidentiality from which he benefits, the procedures for communicating with the referent and shall set the foreseeable time limit for examining the admissibility of his alert. This period shall take into account the information or documents provided when the alert was sent. "(*idem* for the Ministry of Higher Education, article 6 of the decree of 3 December 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of Higher Education and Research).

on each case and that the addressee of the alert (referent or superior) **must inform the whistleblower accordingly in the** acknowledgement of receipt.

The circular of 19 July 2018 is explicit on this point:

"The reasonable period shall be fixed by the addressee with regard to the purpose of the alert"[137].

To date, only the College of the French Anti-Doping Agency specifies that the examination of the admissibility of the alert must be carried out within two months[138].

However, the admissibility period is central insofar as the latter is crucial to the whistleblower in order to assess of the organisation's diligence in managing the alert internally. On this admissibility period depends the time from which the whistleblower may contact the external authorities (step 2). Some management centres ("Centres de gestion") explicitly remind of this:

"It is therefore up to the whistleblower to assess the "lack of diligence" of the first addressee of his alert to check the admissibility of the alert, as well as the duration of the "reasonable" period allowing him to refer the matter to the competent authorities (second stage of the procedure). (...) Subject to the discretion of the courts, where such a time limit is indicated, it may serve as a useful reference point for the whistleblower. The absence of information at the end of the period thus indicated could then be sufficient to enable the whistleblower to refer the matter to the authorities referred to in step 2. "» .[139]

Or "If the community or entity to which the whistleblower first refers the matter is competent for stopping the problems giving rise to the reporting, the whistleblower has no reason to continue his action. However, if, within a reasonable time, the latter has no reply on the admissibility of the alert, he may alternatively or simultaneously refer the matter to the competent authorities. It should be noted that it would be difficult for the judge to consider it unreasonable, since a time limit has been clearly indicated in the internal procedure set by the local authority, since in such a case, the whistleblower is supposed to have been informed in advance, unless perhaps the time limit set by the local authority seems manifestly excessive in view of the simplicity of the case. »[140]

It should be recalled that **early external referral** may prevent the application of the protective regime to the whistleblower by leading him into the **ground of bad faith** allowing the accused person to sue him for defamation. On the other hand, in view of this regulatory ambiguity, one might wonder whether an excessively long wait on the whistleblower's part as a precaution could not engage his responsibility for non-assistance to a person in danger (art. 223-6 Criminal Code) or for an offence against judicial proceedings such as for example Article 434-1 of the Criminal Code, providing for an offence against anyone "with knowledge of a crime whose effects can still be prevented or limited, or whose perpetrators are likely to commit new crimes that could be prevented, not to inform the judicial or administrative authorities".

"It would therefore be good administration for the public structure to take advantage of this procedural obligation to determine *a priori* and very precisely … what could this reasonable time limit be"[141].

[137] Circular of 19 July 2018, op. cit., p. 9

[138] Article 8 of Deliberation No. 2017-62 ORG of 6 July 2017 of the College of the French Anti-Doping Agency concerning the procedures for collecting alerts from whistleblowers" Article 4-5. - The person issuing the alert shall be informed within two months of the action taken by the President of the Agency. »

[139] Centre interépartemental de Gestion de la Petite Couronne de la région Ile-de-France, Guide à l'intention des collectivités et établissements de la petite couronne, La procédure d'alerte éthique, p. 18

[140] Centre de gestion de la Seine-et-Marne http://circulaires.cdg77.fr/?-Instauration-d-une-procedure-de-

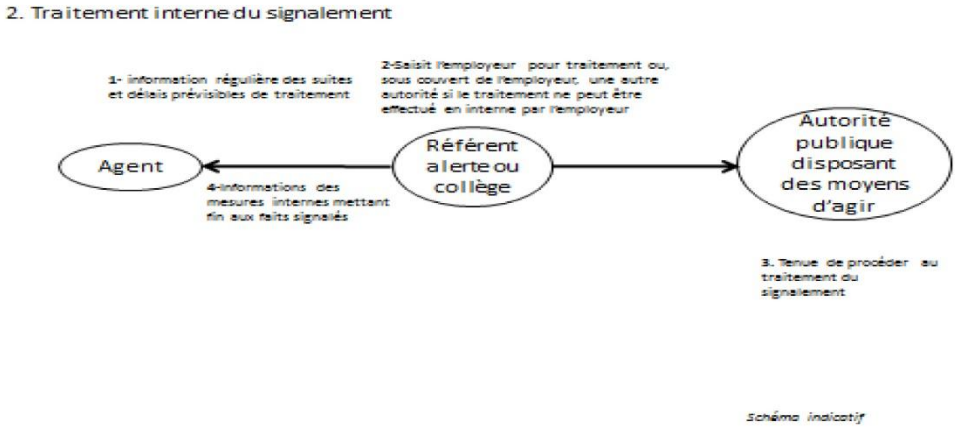
[141] S. Dyens, "Recueil des alerts éthiques : une nouvelle obligation procédurale pour les collectivités territoriales", *Revue Actualité Juridique Collectivités Territoriales* (*AJCT)*, 2017, p. 443 et seq.

iv. Examination of the admissibility of an alert

In all cases, the examination of the admissibility of the alert implies the assessment by the addressee (referent or superior) with regard to the definition of the whistleblower specified in Article 6 of the Sapin Law, i. e.:

- the alert author is a natural person;
- he is disinterested and does not act to satisfy a particular interest, e. g. salary[142];
- the report is made in good faith within the meaning of a "reasonably established conviction in the veracity of the facts and acts he intends to report with regard to the information to which he has access, and is free from any intention to harm"; It should be noted here that the 2018 circular does not hesitate to recall article 6 ter A of the law on the status of civil servants and thus alert the potential whistleblower to the risk of exposing himself to the sanctions of article 226-10 of the Criminal Code (slanderous denunciation) in the event of evidence of bad faith.
- the facts are credible ("the admissibility check does not imply a thorough check"[143]).
- the facts and acts reported are likely to constitute a crime, a misdemeanour, a serious and manifest violation of the law, a regulation, an international commitment, a serious threat to the general interest;
- they occurred in the professional field;
- the exchange means with the person making the report[144] (which would mean that anonymous alerting is practically not allowed).
- it is not about facts, information and documents covered by absolute secrecy (defence, medical, lawyer-client relations)

v. Processing of the alert and the new vagueness of the processing deadline



(source: Circular of July 19, 2018)

Following an alert, the person issuing must be informed of the action taken, which may be of three kinds:

- or the report is inadmissible and the author is informed of the refusal ; the law and the decree remain silent as to the possibility of appealing against this refusal to process the report. It is only provided that the file must be destroyed within two months of the closure of all admissibility or verification operations (art. 5-II-3° of the 2017 decree);

[142] Circular of 19 July 2018, *op. cit*., p. 9
[143] Circular of 19 July 2018, *op. cit*., p. 9
[144] Circular of 19 July 2018, *op. cit*., p. 9

- either the addressee of the alert requests more information from the person issuing the alert and informs him of new deadlines for admissibility;
- either the alert is admissible and the addressee informs the author of the alert of the expected processing time.

In the absence of information on the consequences of his internal reporting, the whistleblower is theoretically free to proceed to the external alert, which would exempt him from his duty of loyalty[145]. However, since the processing time is not fixed either by law or by decree, it is not easy to assess whether the alert is in vain[146]. Nor is this new time limit clarfied either by the legislator or by the regulatory authority. At the moment of this study, various departments, agencies and communities choose to maintain the vagueness of the processing deadline[147]. The Minister of the Interior sets this period at three months[148].

According to the 2018 circular, when reporting requires internal measures to be implement to stop the reported acts or events, the organization is required to do so without delay. Where the body cannot act directly or indirectly, the alert shall be forwarded without delay to the other competent authorities to process it[149].

The addressee of the alert must remain the only contact person for the person issuing the alert and must ensure that he is regularly informed of the action taken (progress in processing the alert, choice made by the public authority, measures implemented, closure[150]).

Since the possibility for the whistleblower to issue an external alert (step 2) depends on this time limit, it is easy to understand how this imprecision leaves the whistleblower in a state of legal uncertainty (which does not exist with regard to step 2, as we will see).

3. **Ambiguity about the alert in small agencies and the interpretation of the Human Rights Defender**

There is no regulatory or legislative **basis to** determine the precise procedure to be followed for the internal alert of:

- A company with less than 50 employees;
- A public establishment with less than 50 employees and agents;
- A municipality with less than 10,000 inhabitants;
- An inter-municipal cooperation establishment with its own tax system for a municipality with less than 10,000 inhabitants.

[145] "It will be up to the whistleblower to consider that the absence of information on the action to be taken''within a reasonable time'' constitutes implicit authorisation by his hierarchical authority. Proof of the vain nature of''his'' alert will enable him to''continue'' the reporting procedure and, on the other hand, must exempt him from any ethical responsibility for failure to obey the hierarchical priory (sic.) in the event that he has referred the matter to another administrative or judicial authority', Pierre Villeneuve, " Loi Sapin II, collectivités territoriales et lutte contre la corruption : le traitement des alertes éthiques ", *Droit administratif,* n°5, May 2017, prat. 1

[146] Pierre Villeneuve, "Loi Sapin II, collectivités territoriales et lutte contre la corruption : le traitement des alerts éthiques", *Droit administratif*, n°5, May 2017, prat. 1

[147] E.g. Article 7 of the Order of 12 March 2019 on the procedure for collecting alerts issued by whistleblowers within the Ministry of Culture; Article 7 of the Order of 10 December 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of National Education; Article 8 of the Order of 23 August 2018 on the procedure for collecting alerts
the Ministry of the Armed Forces; article 6 of the decree of 20 April 2018 on the procedure for collecting alerts issued by whistleblowers within the Caisse des dépôts et consignations

[148] E.g. Article 8 of the Order of 16 November 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of the Interior and the Ministry for Overseas France;

[149] Circular of 19 July 2018, *op. cit.*, p. 11

[150] Circular of 19 July 2018, *op. cit.,* p. 11

Thus, for public authorities or institutions that do not meet either of the two conditions of the decree (authorities with less than 10,000 inhabitants or less than 50 employees), the **Human Rights Defender's Guide on Whistleblowing Protection** suggests some procedural elements, to be taken with caution in view of the absence of texts applicable to such entities. The status of the whistleblower therefore remains relatively unclear, as well as the employer's responsibilities in this case, which could explain why the decree encourages the **sharing (mutualisation) of the "alert referent**" in the smallest structures[151].

In such cases, the whistleblower must notify the employer or organisation in writing by registered mail with acknowledgement of receipt, following the confidentiality rules applicable to communities with more than 10,000 inhabitants or more than 50 agents.

If within a reasonable period of time (which remains to be defined or interpreted - which constitutes a limit to the protection of the whistleblower) no action has been taken, the agent or employee must contact again the person or organization mentioned in the first step, in the same form (in writing by registered mail with acknowledgement of receipt) to ensure that he does not intend to respond.

4. The recipient of the internal alert: the privileged place of the alert referent (in relation to the hierarchical superior)

Even if the Sapin law seems to put the hierarchical superior, the employer and the "alert referent" on an equal footing in receiving an alert[152], the normative and explanatory texts of this internal procedure create a **privileged place for the "alert referent",** thus supposed to become "the ultra-majority receptacle, if not exclusive of internal alerts"[153]. This promotion of the "alert referent" would make it possible to eliminate the criticism that the obligation of internal alert is a first obstacle to the alert. This solution is necessary in the case of "plausible reasons to suspect that the hierarchy is involved" in the facts being reported.

The combined reading of the decree of 19 April 2017, the circular of July 2018 and the recommendations of the AFA suggest that the role of the "alert referent" becomes central in the reception and processing of the alert.

It should be pointed out that the obligation to **designate a "alert referent" concerns *expressis verbis* only the same (large)** organisations concerned by the system for collecting alerts (Article 4-1 (1), Decree of 19 April 2017). **For other bodies, designation remains optional but recommended**[154].

The decree provides that the "alert referent" may be a natural person or any entity governed by public or private law, whether or not it has legal personality (art. 4-I-al. 3) ; he must have, by his position, **sufficient** competence, authority and **resources to carry out his missions** (art. 4-I-al. 2 of decree 2017). He is subject to the confidentiality obligation of Article 9 of the Sapin Law. His identity must be specified in the procedure for collecting alerts (art. 4-II of Decree 2017).

The decree offers the possibility of designating **the "ethics referent" as the "alert referent"**, without making it an obligation[155]. The function of the "ethics referent" was created by Act No. 2016-483 of 20 April 2016, known as the "ethics law", which established a right for all civil servants to consult an "ethics referent" (article 28 bis of Act No. 83-634 of 13 July 1983 on the rights and obligations of civil

[151] http://circulaires.cdg77.fr/?Cas-particulier-des-collectivites

[152] Article 8-I Fir Law "I. - The report of an alert is brought to the attention of the employer's direct or indirect superior or a referent designated by the employer. »

[153] S. Dyens, « Recueil des alertes éthiques. Une nouvelle obligation procédurale pour les collectivités territoriales », in *Anticorruption. La loi Sapin 2 en application*, Dalloz Grand Angle, 2018

[154] This recommendation could be understood in the 2018 circular, p. 8

[155] The absence of an obligation to focus on the same referent the two functions (deontological and alert) can be regrettable since an obligation to designate a "secular referent" in public administrations is also provided for.

servants). We could thus see in this rapprochement - that the 2017 decree allows - the **creation of a "right to consult an alert referent**".

In any case, since the competent external authority (step 2) can only be consulted if domestic remedies are exhausted, it **must be specified whether the alert referent is the first or the only internal interlocutor or whether the hierarchical superior must also be involved in the** reporting procedure.

However, it is worth **highlighting here the question raised by the reading of the Ministry of the Interior's Order on the implementation of the system for collecting alerts**, because it seems to transform the recipient of the alert into the "whistleblower" of the whistleblower. Indeed, article 14 of this Order provides for the obligation that the addressee of the alert (referent or hierarchical superior) must refer the matter to the public prosecutor under article 40 of the Code of Criminal Procedure against a whistleblower who reports or testifies to facts or acts of bad faith, with the intention of causing harm or with at least partial knowledge of the inaccuracy of the facts[156].

b. The second step: external reporting

If the admissibility of the alert is not examined within a reasonable time limit set by the addressee of the alert, the officer who issued the alert may contact the competent external authority. In the current state of the national law, **external alerts can therefore only be issued in the event of failure to the internal alert**[157] (except in cases of serious and imminent danger, see below).

The law specifies that these authorities are

- **Administrative authorities**: this refers to authorities such as the High Authority for the Transparency of Public Life and the French Anti-Corruption Agency because of their powers and possibilities to investigate and decide in the field covered by the alert[158];
- Either **the judicial authority**;
- Either **the professional orders**.

[156] Article 14 of the Order of 16 November 2018 on the procedure for collecting alerts issued by whistleblowers within the Ministry of the Interior and the Ministry for Overseas France
"The addressees of an alert shall refer the matter to the public prosecutor on the basis of Article 40 of the Code of Criminal Procedure when the author of the alert relates or testifies to facts or acts in bad faith, with the intention of causing harm or with at least partial knowledge of the inaccuracy of the facts made public or disseminated, thereby exposing himself to the penalties provided for in the first paragraph of Article 226-10 of the Criminal Code. This public action is independent of any disciplinary proceedings initiated by the competent authorities against the author of an abusive alert. »

[157] In this sense, Circular 2018, op. cit., p. 11; also e.g. IGC Petite Couronne, *Guide for Communities and Establishment of the Petite Couronne, La procédure de l'alerte éthique*, June 2018, p. 19-20
Here are also the words of the Vice-President of the Conseil d'Etat delivered in a conference organised by the Fondation Sciences Citoyennes et Transparency International, mentioned in this guide "Because he does not seek to destabilise the organisation to which he belongs, but to correct the deficiencies that weaken him, priority must indeed be given to an endogenous alert, to superiors, inspection bodies or the entity specially dedicated to processing reports. Only after the internal channels of alert have been exhausted and definitively found to be ineffective, can the agent turn to external channels of dissemination, taking care to alert the person best able to stop the offence found or prevent the feared risk. In most cases, the first external channel to be preferred is the communication of facts to the judicial institution. Such communication is even an obligation for any person when it makes it possible to prevent or limit the effects of a crime (articles 434-1 and 434-2 of the Criminal Code) and, in the case of public officials, when an offence, crime or misdemeanour is committed (article 40 paragraph 2 of the Code of Criminal Procedure). The second external channel consists in referring the matter to the competent administrative authorities to carry out investigations independently, or to bodies specifically responsible for assisting whistleblowers (...). Finally, the third and largest channel is to inform elected officials or members of civil society and, in particular, to reveal information to the media. ", see the whole speech: https://www.conseil-etat.fr/actualites/discours-et-interventions/lanceurs-d-alerte-la-securisation-des-canaux-et-des-procedures

[158] Examples given by circular 2018, op. cit. , p. 9

The competent external authorities have **three months** to provide evidence of effective handling of the alert insofar as Article 8-I-al. 3 provides that "if not processed by one of the competent bodies, the alert may be made public".

These authorities are bound by the obligation of confidentiality, which is part of the whistleblower's protective measures.

This second step is valid regardless of the size of the organization, as seen in the case of internal reporting.

However, **it should be noted that the Sapin Act did not intend to modify the rules governing the referral and competence of these authorities**[159]. Only the whistleblower who has been dismissed following the reporting of an alert may refer the matter to the Labour Court in summary proceedings (Article 12, Sapin Act), but this is a referral which does not concern the urgent handling of the facts and acts reported.

Finally, it should be noted that both the legislator and the executive branch have **remained laconic about this second stage - compared to the details available about the internal alert**. However, the new European directive is much more demanding on the specification of external warning, to which the French legal system will have to adapt in the coming years.

c. The third step: public disclosure

As a last resort, if the competent external authority does not actually take charge of the matter within three months, the alert may be made public. This period shall run from the date of the referral to the said authority.

The French legislator has made official the third channel consisting in informing elected representatives, members of civil society and revealing to the media facts and acts of crime. Until the Sapin law this method of disclosure was "neither planned nor regulated, without being expressly prohibited"[160]. Nevertheless, despite this legislative recognition, it is certain that the media channel [still] remains the *ultimate ratio*: it is **intended to be activated only in a subsidiary manner because of the risks that such disclosure would incur to the public authorities and the interests they serve**[161].

In this regard the Human Rights Defender highlights by specifying that

"**This exceptional device should only be used with great discretion because you can only avoid criminal responsibility, if your assessment of the urgency of the situation is indisputable**. Public disclosure can therefore only be considered as a last resort, if it is clearly impossible to do otherwise to stop the risk that you report[162].

B. The derogation procedure in the event of serious and imminent danger or in the event of risk of irreversible damage

Article 8 -II of the Sapin Act provides for a "derogation procedure" according to which the alert may be brought directly to the attention of the competent external authority. The same article provides for that in such a case the alert may also be made public.

In this case, the whistleblower may **escape the obligation to refer the matter to his or her superior or referent as a matter of priority** and may therefore refer the matter to the judicial authority, administrative authority or professional order concerned. According to the Human Rights Defender's

[159] Circular of 19 July 2018, op. cit., p. 7

[160] v. intervention vice-president of the Council of State https://www.conseil-etat.fr/actualites/discours-et-interventions/lanceurs-d-alerte-la-securisation-des-canaux-et-des-procedures

[161] *ibidem*

[162] Human Rights Defender, Guide, *op. cit*. p. 17

Guide, these authorities may be **seized alternatively or simultaneously** by registered letter with acknowledgement of receipt and preferably, using the "**double envelope**" procedure to guarantee confidentiality[163]. The person may alternatively disclose the information to the public. According to the Human Rights Defender, this final step of disclosure can be used, if the person considers that the content of the report is of a particularly serious nature[164].

This exceptional alert channel is not an obligation but a possibility[165], which means that the agent or employee can choose the internal channel, even in case of serious and imminent danger[166].

The *sine qua non* condition for the use of this procedure is the existence of a serious and imminent danger or the presence of a risk of irreversible damage. The assessment of these concepts remains complex. It should also be noted that the law requires "existence" and not a reasonable belief in the existence of the danger.

The circular of 19 July 2018 specifies:
"The classification of serious and imminent danger results from objective elements assessed according to the circumstances of the case"[167].

With regard to **civil servants** circular No. 95/15 of 25 March 1993 :
"*This assessment can only be made on a case-by-case basis, under the control of the judge, knowing that it can be defined as:*
- serious, any danger likely to result in an accident or illness resulting in death or that appears likely to result in prolonged permanent or temporary disability;
- imminent, any danger likely to occur suddenly within a short period of time.[168] "»[169].

The Human Rights Defender's Guide emphasises that this exceptional measure should **only be used with great discretion** because the whistleblower is exposed to the risk of being found **criminally liable,** if his assessment of the urgency of the situation is questionable[170].

[163] *ibidem*
[164] *ibidem*
[165] The derogation procedure is not valid for the military, according to Article L. 4122-4 of the Defence Code. Decree of 23 August 2018 on the procedure for collecting alerts from the Ministry of Defence, provides for the possibility of a similar derogation procedure in the case of an alert issued by the military.
[166] V. S. Dyens, *op. cit.*, Dalloz Wide Angle, 2018, p. 22
[167] Circular of 19 July 2018, op. cit., p. 9
[168] Circular No. 93/15 of 25 March 1993 on the application of Act No. 82.1097 of 23 December 1982 (amended by Act No. 91.1414 of 31 December 1991) and Decree No. 93.449 of 23 March 1993, pp. 14-16
[169] "Beyond the risk of accidents and occupational diseases, the health risk includes the effects of harmful effects related to working conditions when these harmful effects become acute and create an imminent danger. The danger can emanate from a machine, a work environment, a manufacturing process. The notion of imminence, according to the circular of 25 March 1993, refers to situations "where the risk is likely to occur suddenly and within a short period of time". For judges, it is the proximity of the occurrence of the damage and not the existence of a "threat" that must be taken into account. Imminence is therefore defined as the probability of an occurrence in the near future. "source: http://circulaires.cdg77.fr/?-Instauration-d-une-procedure-de-#ancre_top
[170] Human Rights Defender, *Orientation Guide*, *op.cit.* p. 17

In addition, it should be noted that **the relationship between the two possibilities** (competent external authority and public disclosure) is not **clear** and leaves the potential whistleblower in considerable legal uncertainty. Parliamentary debates maintain the doubt of their hierarchy[171].

It is probably for this reason that the Human Rights Defender's orientation guide provides advice: "Public disclosure can therefore only be considered as a last resort if it is clearly impossible to do otherwise to stop the risk to report. "» [172].

Consequently, if the derogation procedure exists to allow a certain flexibility[173] necessary for certain situations, the disorder in front of which the person wishing to take this path is not negligible.

Protection of the privacy of the reporter

Confidentiality (of identities and information) **is guaranteed**.
The obligation of confidentiality of whistleblowers must be understood in the sense of its two components:
- the **prohibition of disclosure of any information related to the alert** (the identity of the whistleblower, information subject to alert, the identity of the accused person in the context of the alert). The obligation does not apply where the whistleblower consents to the disclosure of his identity or where the disclosure is made to the judicial authority. Any breach of confidentiality can lead to a two-year prison sentence and a €30.000 fine.
- the compliance with French law on the protection of personal data as regards the processing of personal data recorded as part of the reporting system (data protection). (AU – 004).
Details in the next paragraph.

Protection against retaliation, discrimination and mobbing

Protection *stricto sensu*
It should be noted that the *strict sensu* protection of the whistleblower consists, following the Sapin law, in a set of measures whose effectiveness will have to be assessed.

These are the **prohibition of any reprisal measure** (A), the **guarantee of confidentiality** (B) and the **criminal protection** consisting of several components (compliance penalty involving the establishment of an internal alert system, absence of criminal responsibility for breaching the obligation of secrecy, breach of confidentiality, breach of confidentiality, offence of obstructing the alert, increased penalties in the event of a complaint for defamation against an alert whistleblower) (C). The whistleblower's protection in terms of financial relief was initially provided for by the Sapin law but its conformity with the Constitution was denied by the French constitutional judge[174].

[171] "Derogations have been introduced to allow, in urgent cases, direct referral to second level contacts or even disclosure to the public. ", Rapp. Ass. Nat. No. 4045, p. 52; on the criticism of the word "even" used by the Rapporteur v. S. Dyens, *op.cit.*, Dalloz Grand Angle, p. 23
[172] Human Rights Defender, *Orientation Guide*, *op.cit.* p. 17
[173] Rapp. Ass. Nat. No. 4045, p. 52
[174] To the regret of Eric Alt, *op.cit., JCP G*, No. 4, 23 janvier 2017, doctr. 90; against: about the discussion on the financial assistance of whistleblowers by the Human Rights Defender v. J. Toubon, in M. Disant, *op. cit.*, pp. 404 et seq.; The different arguments of the Human Rights Defender (J. Toubon) about financial relief :
- The introduction of this new modality of intervention in favour of whistleblowers gave the Human Rights Defender a purely discretionary power;
- This financial support introduced inequality between claimants;

A. Protection against retaliation

Various guarantees are provided for by the Sapin law covering the general issue of protecting a whistleblower against reprisals for his action: the -in principle- prohibition of any sanction or other discriminatory measure (a), the mitigation of the burden of proof in the event of a dispute arising from these measures (b), the possibility for the administrative judge to request the reinstatement of the whistleblower to his last work position (c).

a. Prohibition and nullity of reprisals

In preventive terms, the legislator provides for the prohibition of any sanction measure and any other measure of a direct or indirect discriminatory nature against a person who has reported the facts provided for in the definition of the whistleblower. In the event of such measures being taken, they are void by law. This is particularly important in the event of dismissal, since in this case the dismissal will be "deemed never to have been pronounced" (sic.)[175].

Article 10 -I-1° of the Sapin Act provides for this prohibition for employees governed by private law by amending Article L. 1132-3-3-3 of the Labour Code to this effect. It thus provides an open-ended list of examples of retaliation measures due to an alert (dismissal, remuneration, profit-sharing, distribution of shares, training, reclassification, assignment, qualification, classification, professional promotion, transfer, renewal of contract). Any provision or act taken against an employee in breach of this prohibition is null and void (article L. 1132-3-4 of the Labour Code).

Similarly, article 10- II - 2° of the law repeats this prohibition for civil servants by amending article 6 ter A of law n°83-634 of 13 July 1983. Thus, Article 6 ter A invalidates any discriminatory sanction or measure imposed on the officer reporting an alert. Examples of prohibited measures are listed in a non-limitative manner: recruitment, tenure, remuneration, training, evaluation or performance appraisal, discipline, promotion, assignment, transfer.

This prohibition and the invalidity of such acts are therefore rules applicable to all employees, employees under private law, civil servants, contractual agents under private or public law, employees. They are also provided for the military officers (Article L. 4122-4 of the Defence Code).

b. Mitigation of the burden of proof in the event of a dispute relating to reprisals

In the event of a dispute relating to a violation of the prohibition of reprisals[176], for example dismissal, non-renewal of contract, transfer, etc., the Sapin law provides protection for the whistleblower in procedural terms. It consists in assigning the burden of proof to the employer who would have subjected the employee to reprisal measures because of a report made under Article 6 of the Sapin Act.

- Involving the Human Rights Defender in the representation, financial support and compensation of whistleblowers would have diverted his functions beyond the constitutional framework specific to the IAA, whose authority is based on the independence, neutrality and impartiality of the decision-making process;

[175] Eric Alt, *op.cit*., *JCP G*, n°4, 23 janvier 2017, doctr. 90, p. 6

[176] For civil servants, disputes are judged by the Administrative Tribunal; for employees and agents employed under private law, the Labour Court is the competent court. It should be noted that Article 12 of the Sapin Act expressly introduced the jurisdiction of the Labour Court in the event of termination of the employment contract following the notification of an alert (Article 12 of the Sapin Act, "In the event of termination of the employment contract following the notification of an alert within the meaning of Article 6, the employee may refer the matter to the Labour Court under the conditions provided for in Chapter V of Title V of Book IV of Part I of the Labour Code").

Thus, article 10 (I-2° and II-2°) provides that as soon as the person presents facts that allow to presume that he/she relates facts constituting a crime, or that he/she has reported an alert under the terms of the Sapin Act, "it is up to the defendant, in view of the evidence, to prove that his/her decision is justified by objective factors unrelated to the declaration or testimony of the person concerned. ». This provision, which applies to both civil servants and employees on private law contracts, is identical in the Defence Code and therefore also applies to the military.

It should be noted that good faith is a condition for granting the status of whistleblower and for receiving the protection provided for; thus, "An official who reports or testifies to facts relating to a situation of conflict of interest in bad faith or to any fact likely to lead to disciplinary sanctions, with the intention to harm or with at least partial knowledge of the inaccuracy of facts made public or disseminated shall be punished by the penalties provided for in the first paragraph of article 226-10 of the Criminal Code. "(art. 10- II- 3° Sapin Law amending in this sense article 6 ter A of the law of 13 July 1983). The same provision is provided for the military (art. L. 4122-4 of the Defence Code).

c. Reinstatement of the employee as a corrective measure of reprisal

In continuity with the automatic invalidity of retaliatory measures such as dismissal, the protection of the whistleblower is strengthened by the Sapin law insofar as his reinstatement is provided for as well as the severance pay if the employee does not request his reinstatement[177].

Indeed, article 11 (Sapin law) inserts an article into the Code of Administrative Justice (article L. 911-1-1-1) providing for the possibility for the judge to order the reinstatement of any person who has been the subject of a dismissal, non-renewal of his contract or revocation in violation of the legal provisions prohibiting retaliation measures.

Thus, the right (and not the obligation) to reinstate may be prescribed by a judge under Article L. 4122-4 of the Defence Code (Military), the second paragraph of Article L. 1132-3-3-3 of the Labour Code (employees of the private or public sector working under private law contracts) or the second paragraph of article 6 ter A of Act No. 83-634 of 13 July 1983 on the rights and obligations of civil servants (public officials), including where that person was bound by a fixed-term relationship with the legal person governed by public law or the private law body responsible for the management of a public service.

Moreover, according to Article 2 of Order No. 2017-1387 of 22 September 2017[178] following the nullity of a discriminatory dismissal (as provided for in Article L. 1153-4 of the Labour Code) where the employee does not request reinstatement or where reinstatement is impossible, the judge grants him/her an indemnity, at the expense of the employer, in an amount corresponding at least to the wages of the last six months[179], [180].

B. The obligation of confidentiality

The obligation of confidentiality of whistleblowers must be understood in the sense of its two components:

- the prohibition of disclosure of any information related to the alert (identity of the whistleblower, information subject to alert, identity of the accused person in the context of the alert (it will be called confidentiality *stricto sensu*);

[177] Eric Alt, *op.cit*., *JCP G*, n°4, 23 janvier 2017, doctr. 90, p. 6

[178] Ordinance No. 2017-1387 of 22 September 2017 on the predictability and security of labour relations

[179] See commentary on article L. 1235-3-1, Labour Code 2018, Christophe Radé et *allii*, Dalloz, April 2018, p. 338

[180] Florence Chaltiel Terral, *Les lanceurs d'alerte*, Dalloz, 2018, p. 93

- the compliance with French law on the protection of personal data as regards the processing of personal data recorded as part of the reporting system (data protection).

a. Prohibition of disclosure

Article 9 of the Sapin law[181] and article 5-II-2° of the decree of 19 April 2017[182] fill the gap that existed in terms of confidentiality in sectoral systems protecting whistleblowers before 2016, as this has been highlighted by the Council of State[183].

From now on, all recipients of the obligation to set up an alert procedure, regardless of the form they decide to give to this procedure (register, mailbox, form, letter)[184] within their organisation or administration, are required to guarantee the non-disclosure of the identity of the whistleblower. Confidentiality guarantees are required for all persons responsible for managing and processing the alert. The obligation does not apply where the whistleblower consents to the disclosure of his identity or where the disclosure is made to the judicial authority.

According to the circular of 19 July 2018, any communication to third parties (defined as "any person required to manage or process the alert, other than the author and addressee of the alert"[185]) of all or part of the information relating to the alert is limited to what is strictly necessary for the purposes of managing and processing the alert.

Moreover, once the objective pursued by the data collection has been achieved or when no action has been taken on the alert, there is no longer any need to keep the data and they must be deleted within a maximum period of two months from the closure of all admissibility or verification operations. The persons concerned must be informed of this closure (article 5-II-3° of the decree of 19 April 2017).

The accompaniment of this obligation by penalties provided for in the Penal Code (two years' imprisonment and a 30,000€ fine) gives full value to the envisaged protection of the whistleblower[186].

However, if the collection of data may seem "normal" in the context of a system that requires a certain number of recipients to be aware (in order to process) of alerts, it is certain that this choice by the legislator does not offer the same guarantees as anonymization[187]. In other words, anonymising the alert - e. g. following receipt and so that only the "alert referent" subsequently knows who is the author

[181] Article 9 Sapin Law
"I- The procedures implemented to collect alerts, under the conditions mentioned in Article 8, shall guarantee strict confidentiality of the identity of the authors of the alert, the persons targeted by it and the information collected by all the recipients of the alert. Information likely to identify the whistleblower may not be disclosed, except to the judicial authority, without the consent of the latter. Elements likely to identify the person implicated by an alert may not be disclosed, except to the judicial authority, until the alert has been established as well-founded. II. - Disclosure of the confidential elements defined in I is punishable by two years' imprisonment and a fine of €30,000. »

[182] Article 5-II-2° decree of 19 April 2017
"To guarantee the strict confidentiality of the person issuing the alert, the facts on which the alert is based and the persons concerned, including in the event of communication to third parties where this is necessary for the sole purpose of checking or processing the alert; To destroy elements of the alert file likely to allow the identification of the person issuing the alert and of the persons covered by it where no action has been taken, as well as the deadline which may not exceed two months from the end of all admissibility or verification operations. The person issuing the alert and the persons covered by it shall be informed of this closure. »

[183] Conseil d'Etat, Study, 2016, *op. cit.*, p. 14 [" Proposal No. 5 : Establish and guarantee the strict confidentiality of the identity of the alert's authors and, before the validity of the alert is confirmed, of the persons it targets and the information collected by all recipients, internal and external, of the alert. "»], p. 60,

[184] Circular of 19 July 2018, p. 13

[185] Circular of 19 July 2018, p. 13

[186] *infra*

[187] *infra* (protection of personal data)

of reporting - would make the objective of the ban on disclosure of alerts more effective and allow the focus to be on the subject of the alert. Nevertheless, in the current framework of positive law in France, anonymisation is not recommended by the national authority for the protection of personal data (CNIL), as we will see below.

In addition, the obligation of confidentiality concerns not only the identification information of the whistleblower but also any information collected in the context of the alert, as well as **that of the person concerned by the alert**. Since in a so-called "protection of whistleblowers" system it is also a question of protecting those against whom the alert is addressed, it is worth noting a new argument in favour of legislative intervention for conciliation of diverse interests and not only for the protection of the whistleblower.

b. Protection of personal data and anonymization

Under the heading "confidentiality guarantee", it is essential to *distinguish the prohibition of* disclosure of the identity of the whistleblower *from the requirement for compliance of* warning devices with the Personal Data Protection Act ("Loi informatique et libertés", LIL)[188]. While the CNIL (National Data Protection Authority) has very progressively accepted processing of data on whistleblowing, its reluctance was ***only partly*** based on the protection of whistleblowers. The main fear of the CNIL was that of the implementation of an organised system of professional denunciation in the working field[189], an argument that makes it possible to simultaneously cover the risks for both the issuer of the alert and the person concerned. This original reasoning still justifies the persistence of the CNIL's mistrust of anonymity in alert reporting systems[190].

Today, the processing about whistleblowing comply with the LIL only on the condition that the controller undertakes to comply with the CNIL's "single authorisation" ("Autorisation Unique -004", AU-004)[191] pending the replacement of the reference system, following the GDPR (which has repealed the prior formalities). The CNIL website[192] presents the scope of AU-004 by setting out: the sectors of activity excluded from the scope of application, the controllers concerned, the purposes pursued, the data concerned and the data excluded from the single authorisation, the period of data retention, the recipients, the security and confidentiality requirements, the transfers of data outside the European Union.

[188] Law n°78-17 of 6 January 1978, amended (known as the "Data Protection Act", hereinafter LIL)

[189] CNIL, "... the implementation by an employer of a system designed to organise the collection from its employees, in whatever form, of personal data concerning facts contrary to the company's rules or to the law attributable to their colleagues at work, in so far as it could lead to an organised system of professional denunciation, can only call for a reservation of principle on its part... ", deliberation CNIL 2005

[190] Camille Blanquart, "Les lanceurs d'alerte et la protection des informations confidentielles au sein de l'entreprise", *La Semaine Juridique Social,* n° 37, 18 Septembre 2018, p. 5

[191] Deliberation No. 2017-191 of 22 June 2017 amending Deliberation No. 2005-305 of 8 December 2005 on the single authorisation of automated processing of personal data implemented in the context of professional alert systems (AU-004);

[192] https://www.cnil.fr/fr/declaration/au-004-dispositif-dalertes-professionnelles

It is important to note that the scope of application of AU-004, which will be the basis of the new standard (under preparation by the CNIL)[193] has been gradually extended[194], especially following the Sapin law, to such an extent that it can be stated that "the almost unlimited extension of the facts that can be reported and the generalisation of the implementation of these measures considerably diminish the interest of a framework by the CNIL which aimed precisely to confine them"[195].

In terms of anonymization, article 2 of AU-004, entitled "Processing the identity of the issuer of the alert and the person concerned", provides as follows:

"The author of the professional alert must identify himself/herself but his/her identity is treated confidentially by the organisation in charge of managing the alerts. The **organisation must not encourage persons who are intended to use the device to do so anonymously**. By way of exception, the alert of a person who wishes to remain anonymous may be dealt with under the following conditions:
- the seriousness of the facts mentioned is established and the facts are sufficiently detailed;
- the processing of this alert must be subject to special precautions, such as a prior examination, by its first recipient, of the possibility of its dissemination... (…) »

Thus, the confidentiality of the whistleblower does not include the guarantee of anonymity, which is only allowed in exceptional cases. However, as pointed out, because of this -in principle- prohibition of anonymity, the whistleblower might prefer to turn to an NGO or trade union that is able to issue the alert while protecting its identity. He might also prefer a journalist who can protect the secrecy of his sources[196].

In short, when we talk about guaranteeing the confidentiality of whistleblowers in France, we must understand the prohibition of disclosure of the identity of the whistleblower (and the person concerned) as well as the obligation of compliance of the alert system with the national law on the protection of personal data and now the GDPR. The fear that the protection of whistleblowers may deviate towards organised denunciation justifies the use of anonymity only in very exceptional cases (in reality discouraged by the competent authority for the protection of personal data).

C. Criminal protection of the whistleblower

French criminal law knew well before the adoption of the Sapin law of "mechanisms for denunciation and disclosure" of harmful facts that could look alike whistleblowing protection, which **continue to be in force**. Some examples [197] :

[193] CNIL, Projet de référentiel relatif aux traitements de données à caractère personnel destinés à la mise en œuvre d'un dispositif d'alerte, 11 April 2019; "In order to consult with the bodies concerned by these draft references, the CNIL proposes a public consultation that will make it possible to enlighten the Commission through the contributions and concrete examples it receives. (...) At the end of this phase, the draft, enriched by the comments received, will be submitted to the CNIL plenary session for consideration with a view to adopting a final document. "CNIL, electronic public consultation on the reference system for the processing of personal data intended for the implementation of an alert system (link to the consultation here)

[194] Before the amendment resulting from the Sapin law in 2017, the 2005 authorization concerning alerts in the financial, banking, accounting, auditing and corruption fields was amended twice: in 2010 to include alerts relating to anti-competitive practices and alert systems provided for by the *Japanese SOX* law and in 2014 to include alerts relating to harassment and discrimination in the workplace, safety, health and hygiene at work and environmental protection

[195] Anne Debet, Nathalie Metallinos, "Après la loi Sapin II, la CNIL modifie son autorisation unique (AU-004) relative aux dispositifs d'alerte professionnelle", *Communication Electronic Commerce* n° 11, November 2017, comm. 91

[196] Eric Alt, *op.cit., JCP G*, n°4, 23 janvier 2017, doctr. 90, p. 6

[197] v. examples Marie-Christine Sordino, « Lanceur d'alerte et droit pénal : entre méfiance et protection », *Anticorruption. La loi Sapin 2 en application*, Dalloz Grand Angle, 2018 pp. 176-177

- **Article 40 of the Code of Criminal Procedure** creates an obligation for any constituted authority, public officer or civil servant to give notice to the public prosecutor when he or she becomes aware of a crime or misdemeanour in the performance of his or her duties;
- **Article 122-7 of the Criminal Code** provides for the "state of necessity" as ground for absence of criminal responsibility or mitigation of liability. According this article : "A person who, in the face of a present or imminent danger which threatens himself, others or property, performs an act necessary to safeguard the person or property, unless there is a disproportion between the means employed and the gravity of the threat, is not criminally responsible. »
- **Articles 434-1 et seq. of** the **Criminal Code** also provide for offences of obstructing access to justice, for example for anyone who does not inform the judicial and administrative authorities after having heard of a crime whose effects can still be prevented or limited (343-1 Criminal Code) or for anyone who does not inform the same authorities of deprivation, ill-treatment or sexual assault or sexual abuse of a minor[198] or a person who is unable to protect himself/herself because of age, illness, infirmity, physical or mental disability or pregnancy (343-3 Criminal Code) or who obstructs the truth (343-4 Criminal Code);
- The French **Commercial Code** requires statutory auditors to disclose to the public prosecutor any criminal acts of which they have become aware, without their liability being engaged by this disclosure (L. 823-12 Commercial Code), as well as penalties for the violation of this obligation on the part of the statutory auditors (L. 820-7 Commercial Code).

In 2016, the Sapin law provides specific criminal guarantees to the whistleblower in two ways:
The first, *indirect*, is the establishment of an internal warning system as part of the "compliance programme penalty" or "**compliance penalty**" addressed to large public bodies and large companies[199]. This is the creation, under American influence[200], of a new sanction provided for in Article **131-39-2 of the Criminal Code** introduced by Article 18 of the Sapin Act consisting, inter alia[201] of the **penalty of setting up an internal alert system**. Without going into detail, it should be noted that this article - in parallel with provisions containing criminal guarantees expressly benefiting whistleblowers - makes it possible to understand the balances (or tightrope walking) that the Sapin law tries to build when it enshrines a general regime for the protection of the whistleblower. It would not be an exaggeration to see this provision as an effort to **resolve internally cases involving unethical conduct in order to avoid sanctioning the organization's reputation**. Moreover, as stated, "although the legislator has

[198] Many texts, particularly at the national education level, have organised in this context reporting procedures, Circ. 97-119 of 15 May 1997, see A. Taillefait, "Fonction publique de l'Etat, Obligations des agents publics", *Jurisclasseur, Adm*., Fasc. 183, §106

[199] "... employing at least five hundred employees, or belonging to a group of companies whose parent company has its registered office in France and whose workforce includes at least five hundred employees, and whose turnover or consolidated turnover exceeds 100 million euros... This obligation is also applicable: 1° To the presidents and general managers of public industrial and commercial establishments employing at least five hundred employees, or belonging to a public group whose workforce includes at least five hundred employees, and whose consolidated turnover or consolidated turnover exceeds 100 million euros;", Article 17 of the Sapin Law

[200] "corporate monitoring",

[201] Other measures introduced in the compliance penalty, of which internal alert is a part: Code of conduct for employees, risk mapping, procedures for assessing the situation of customers and suppliers, accounting control procedure, employee training, appropriate disciplinary regime

qualified it as a sentence, the specialists on criminal law discuss its relevance [202],[203] since... pursuing the objective of prevention... only responds imperfectly to the definition of the sentence *stricto sensu* and contributes to the dilution of the notion"[204].

The second facet of criminal guarantees, which is more direct, could make it possible to affirm a real strengthening of the protection of the whistleblower; indeed, the Sapin law introduces the **absence of his criminal responsibility** - under certain conditions - (a), the **offence of breaching the** whistleblower's **obligation of confidentiality** (b), **the offence of obstructing whistleblowing** (c) and increase of the **penalties in the event of a complaint for defamation against** a whistleblower (d).

a. Absence of criminal responsibility in the event of a breach of professional secrecy

Since the absence of criminal responsibility is very important to the potential whistleblower, its effectiveness deserves to be measured. The outlines of the principle and then its limits, as demonstrated by specialists on criminal law, are exposed below.

1. The principle: The creation of a fact justifying the offence of breach of professional secrecy in favour of the whistleblower

Article 7 of the Sapin Act supplements the Criminal Code with article 122-9, according to which:

"A person who infringes a secret protected by law is not criminally liable if such disclosure is necessary and proportionate to the protection of the interests in question, if it is made in accordance with the reporting procedures defined by law and if the person meets the criteria for defining a whistleblower provided for in Article 6 of the Law on Transparency, Anti-Corruption and the Modernisation of Economic Life. ».

The Circular of the Ministry of Justice interpreting this provision in January 2018 states:

"A link between the right of alert and other secrets (in particular professional secrets) that are criminally protected is provided for. A new article 122-9 of the Criminal Code creates a new justification for the whistleblower who has violated, under certain conditions, a secret that is criminally protected"[205].

According to this interpretative instruction given by the Ministry of Justice, the problem of the relationship between secrecy and the protection of whistleblowers seems to have been resolved: the criminal immunity of the whistleblower is provided for in the event of a breach of any other secret[206], except those specified (national defence secret, medical secret or secret of relations between a lawyer and his client) in Article 6 of the Sapin Act, which defines the whistleblower.

[202] Emmanuel Breen, "La ''peine de mise en conformité'' in the Sapin 2 bill: the suit is beautiful but it has been turned upside down", *JCP G*, 2016, p. 651

[203] On the development of negotiated criminal justice: Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", in M. Disant and D. Pollet-Panoussis, *Alarm whistleblowers, What legal protection? What are the limits?* LGDJ, 2017, p. 178, Mignon-Colombet A., and Hannedouche-Leric S., "Le nouveau dispositif anti-corruption de la loi Sapin 2 : quelles avancées et quelles zones d'ombre? *"JCP G*, 2017, pp. 128 et seq.; Quentin B., "L'avènement d'une justice répressive ''négociée'', en matière financière" *JCP G*., 2017, doctr. 126

[204] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", in M. Disant and D. Pollet-Panoussis, *op.cit.,* LGDJ, 2017, p. 178

[205] In this sense, the Circular of the Ministry of Justice, p. 5

[206] v. also on the theme of the secrecy and protection of whistleblowers Camille Blanquart, « Les lanceurs d'alerte et la protection des informations confidentielles au sein de l'entreprise », *La Semaine Juridique Social,* n° 37, 18 Septembre 2018, 1292

In terms of business confidentiality[207], this interpretation is also confirmed by the law of 30 July 2018 transposing the directive of 8 June 2016 on the protection of business confidentiality since it introduces the following rule:

secrecy would not be binding where the obtaining of a secret, use or disclosure of an information covered by secret occurred in the exercise of freedom of expression and in particular in the exercise of freedom of the press, or to reveal, in order to protect the general interest and in good faith, illegal activity, misconduct or reprehensible conduct, "including in the exercise of the right of reporting an alert defined in Article 6 of Law n°2016-1691 of 9 December 2016" (Art. L. 151-8 of the Commercial Code).

The French constitutional judge confirmed this articulation of norms according to which the absence of criminal responsibility of the whistleblower is one of the exceptions to the protection of business secrecy[208], making it possible to reassure the worried voices of the criminal law specialists[209].

2. The limits of the whistleblower's grounds justifying absence of criminal responsibility

Article 7 of the Sapin Act, as well as the circular of the Ministry of Justice and Article L. 151-8 of the French Commercial Code (as regards business confidentiality) strictly determine the applicability of this criminal immunity clause. However, the sibylline nature of the various conditions reduces the effectiveness of the whistleblower's protection[210].

Indeed, apart from the limits imposed by the guarantee of absolute secrecy (national defence, medical secrecy, lawyer-client relations), it should be noted that there are limits linked to the conditions for applying this exemption from criminal liability. Thus, we will see that the Sapin law does not allow "to constitute a sufficient rampart against the repression[211]" of the whistleblower.

These limits can be summarized as follows:

- In terms of the legality of offences and penalties

Insofar as the French legislator makes the definition of the whistleblower and the reporting procedure preconditions of Article 122-9 of the Criminal Code, it goes without saying that absence of criminal responsibility can only benefit those who meet the conditions of the definition and who follow the indicated procedure.

However, the definition of the whistleblower includes a number of elements (e.g. threat to the general interest, good faith) whose equivocal nature[212] could make it possible to question compliance with the principle of the legality of offences and penalties. Despite the fact that these obscure points may lead to engage the whistleblower's criminal liability, the French constitutional court has established a "postulate of absence of imprecise character" in the legal definition of the whistleblower.

The same reasoning applies to the procedure. As noted "The formalism created [by Sapin law] influences substantive criminal law by conditioning the absence of criminal responsibility of the

[207] Awaiting clarification from the Human Rights Defender, who had adopted Opinion No. 18-11 of 10 April 2018 with a different assessment; also mentioned in his 2018 Annual Report, p. 67

[208] Cons. constit., n° 2018-768 DC of 26 July 2018, cons. 23 "The legislator has thus defined this exception to the protection of business secrecy in sufficiently precise and unequivocal terms. Grievances based on disregard for the objective of constitutional value of accessibility and intelligibility of the law and negative incompetence must therefore be dismissed.

[209] Agnès Robin, « Alerte et secret des affaires » in Marie-Christina Sordino (dir.), *Lanceurs d'alerte : innovation juridique ou symptôme social* ?, Presses de l'Université de Montpellier, 2016, *op.cit.*, pp. 123-145, spec. 136 et seq.

[210] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", in M. Disant and D. Pollet-Panoussis, *Alarm whistleblowers, What legal protection? What are the limits?* LGDJ, 2017, p. 177-191

[211] Franck Ludwiczak*, op.cit*., LGDJ, 2017, p. 179

[212] *supra*

whistleblower"[213]. Since the inaccuracies in the alert procedure are not uncommon (superior or deontologist or both? or to whom to turn when the superior is involved and the deontologist is not designated? procedure for small employer organizations not provided for by law; imprecise deadlines before moving on to external alert, ambiguity as to the articulation between external alert and public alert etc[214]), the application of article 122-9 of the Criminal Code is therefore risky for the potential whistleblower view to the link between 122-9 and such ambiguities.

- The absence of criminal responsibility is not a principle

Reading article 122-9 of the Criminal Code makes it easy to understand that only reporting actions violating a secret protected by law can be covered by the justification of absence of criminal responsibility. Consequently, any information not protected by secrecy cannot be grounded on the basis of article 122-9 of the Criminal Code.

Thus, in matters of *open data*, or in any other case where professional secrecy is not applicable, it will be necessary for the whistleblower to prove the intangible existence of the act or threat reported, as well as his good faith in order to justify absence of criminal responsibility.

- The uncertain nature of absence of criminal responsibility: justification fact or ground for non-imputabity

It should be recalled that the “justification facts” make the acts committed lawful when all the conditions are met; the “grounds of non-attributability (non-imputability)” maintain the objectively punishable nature of the act but establish a lack of intentionality of the offence. The criminal law specialists see in article 122-9 of the Criminal Code a *sui generis* ground justifying absence of criminal responsibility which corresponds to both the category of justification facts and the grounds of non-imputability[215].

Indeed, on the one hand, the condition of good faith demonstrates that the legislator "presupposes a willingness to violate secrecy... which hinders the conviction of a total absence of free will characteristic of the category of grounds of non-imputability, such as coercion or the abolition of discernment"[216]. Thus, article 122-9 does not allow a ground of non-imputability to be established.

On the other hand, the absence of criminal responsibility of article 122 -9 seems to be based on self-defence or necessity, both of which fall into the category of justification facts. Nevertheless, the justification facts make an offence in accordance with the law and all actors (author, co-author, accomplice) benefit from it. Since the **activation of Article 122-9 depends on the restrictive definition of the whistleblower and compliance with the alert procedure (of which he is the only one concerned), Article 122-9 is not a classic case of justification facts, although it is considerably closer to it**.

This uncertainty of qualification in criminal law is central insofar as it maintains the original ambiguity of the protection of whistleblowers: denunciation or duty of disobedience? In all cases, it makes it possible to observe that ethical alert is an *a priori punishable* action but can be *justified* (under conditions). The circular of the Ministry of Justice[217] confirms this view when it qualifies article 122-9 of the Criminal Code as a justification fact.

[213] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", in M. Disant and D. Pollet-Panoussis, *Alarm whistleblowers, What legal protection? What are the limits?* LGDJ, 2017, p. 183
[214] *supra*
[215] Opposite: Circular of the Ministry of Justice, op. cit., p. 5
[216] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", *op.cit.*, LGDJ, 2017, p.187
[217] Circular of the Ministry of Justice, op. cit., p. 5

However, an action that is punishable (and then justified) is considered to be -in principle- dangerous. Following the Sapin law - which introduces ethical alert into the Criminal Code as a justification fact, it is questionable whether corruption is dangerous or whistleblowing.

- The conditions of necessity and proportionality as limits to absence of criminal responsibility

The absence of criminal responsibility provided for in article 122-9 is an **exception** to criminal liability for breach of secrecy. Consequently, the interpretation of the conditions of necessity and proportionality **require a restrictive interpretation** by the judge.

However, it should be stressed first of all that the strict necessity and proportionality of a **threat or serious prejudice to the general interest**, implied by the definition of whistleblowing in the Sapin law, are not established facts and therefore is not an easy matter for the judge to appreciate their necessity and proportionality.

Moreover, it follows that the breach of secrecy is justified only if it is necessary to safeguard the interests in question. The necessity will probably be interpreted as meaning that there are no other means available to the whistleblower to save the interest in question. Thus, "the whistleblowing is subject to a principle of subsidiarity and cannot therefore consist of a usual means of revealing information"[218]. In addition, failure to comply with the reasonable time limit provided for in Article 8 of the Sapin Law may lead the judge to believe that the breach of secrecy was not necessary[219].

Proportionality is assessed in terms of the balance between the means used and the result sought. It thus presupposes the demonstration of the safeguarding of a value of general interest higher than that of the violated secret. It is likely that the search for a balance between the protection of secrecy and freedom of expression will be at stake. Failure to comply with the graduated reporting procedure could convince the judge of the disproportionate means used[220].

- In terms of prosecutions and penalties incurred for the whistleblower

Defamation accusation

Academic specialists in criminal law makes the parallelism between the requirement of respect for the reporting procedure and the admissibility of the exception about good faith allowing the defendant prosecuted for defamation to escape criminal liability[221]. It is thus explained on the basis of case law (ECHR and the Highest Court in French Judiciary: “Cour de Cassation”) that the presumption of bad faith that determines the qualification of the defamation may also be used in the case of an alert based on the absence of a serious investigation prior to the alert. Thus, "an irregular disclosure with regard to the steps of Article 8 [of the Sapin Law] will constitute an obstacle to the demonstration of a serious investigation essential to the admissibility of the exception about good faith"[222]. The demonstration of the whistleblower's bad faith in order to bring him into the field of defamation is further accentuated by the imprecision of the waiting period between the external alert (judicial, administrative authorities, professional orders, etc.) and public disclosure. Thus, in the case of early disclosure of the reported information, the lack of seriousness of the investigation or even the illegitimacy of the objective pursued could be supported[223].

[218] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", *op.cit.*, LGDJ, 2017, p. 189
[219] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", *op.cit.*, LGDJ, 2017, p. 190
[220] *ibidem*
[221] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", *op.cit.*, p. 3
[222] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", *op.cit.*, p. 184
[223] Franck Ludwiczak, "Le droit d'alerte aux risques de la répression pénale", *op.cit.*, p. 185

Thus, criminal proceedings for defamation is not a fictitious danger for a potential whistleblower and the legislator is aware of this. To balance this serious risk of ineffectiveness in protecting whistleblowers, the Sapin law introduces, as we will see, an increase in the penalties incurred in the event of a lawsuit for libel against a whistleblower.

Criminal liability of the public official for slanderous denunciation

The Sapin Act does not forget to rectify the Act of 13 July 1983 on the rights and obligations of civil servants and to add that:

"An agent who has reported or testified to facts relating to a situation of conflict of interest in bad faith or any other fact likely to lead to disciplinary sanctions, with the intention of causing harm or with at least partial knowledge of the inaccuracy of the facts made public or disseminated shall be punished by the penalties provided for in article 226-10 paragraph 1 of the Criminal Code. »

The paradox is apparent: on the one hand, the status of the whistleblower is activated by the reporting of acts constituting a "***threat to the*** general interest"; on the other hand, "***at least partial*** knowledge of the ***inaccuracy of*** facts made public or disseminated" can activate the pursuit of disciplinary sanctions for libelous denunciation. However, reporting a ***threat*** to the public interest inevitably involves partially inaccurate facts (since it is a threat and not a violation). Consequently, the risk that the public official may be accused of slanderous denunciation can be easily understood, especially since ethical obligations already constitute considerable limits to the alert, as it has been exposed.

For all these different reasons, specialists in criminal law states that "in the face of a legal regime that is too restrictive as a result of a too narrow field of offences and admission conditions that are difficult to meet, the loophole of Article 122-9 of the Criminal Code may well be applied only too rarely. It thus removes a large part of its effectiveness from the protection of the whistleblower, who would have gained more from the consecration of an exception in good faith, extended to all the offences to which he is exposed and inspired by the criteria of internal and European case law, in order to be effectively elevated to the rank of active agent in criminal policy"[224].

b. The offence of breaching the confidentiality of the whistleblower

According to article 9-II of the Sapin law: “Disclosure of the confidential information defined in I shall be punishable by two years' imprisonment and a fine of 30,000€.”

Thus, the obligation of confidentiality, as discussed above[225], takes on its full value by being accompanied by penalties in the event of non-compliance insofar as "anonymity is not realistic in the context of a professional alert"[226].

c. The offence of obstructing the alert

The Sapin law also strengthens the protection of whistleblowers by creating a new offence. According to article 13, any person who obstructs in any way whatsoever the transmission of a report (hierarchical superior, ethics referent, alert referent, other employer) to the persons and organisations receiving the report (discussed above) is punished by one year's imprisonment and a 15,000€ fine.

d. Increasing penalties for defamation lawsuits against whistleblowers

[224] *ibidem*; Migaud J.P. and Terrel I., "Les lanceurs d'alerte, agents actifs de la politique criminelle", in *Politique(s) criminelle(s), Mélanges en l'honneur de C. Lazerges*, Dalloz, 2014, p. 744

[225] *supra*

[226] M.-C. Sordino, "Alerting and Criminal Law: Between Distrust and Protection", *op. cit*. 2018, p. 180

Instead of 15,000 €, the fine is increased to 30,000 € when the investigating judge or chamber receives an abusive libel complaint against a whistleblower.
At the end of these elements and without minimising the efforts to strengthen criminal protection by the Sapin law, it should be noted that the risk incurred by the whistleblower to be accused of slanderous denunciation, defamation, violation of secrets, has not been avoided by the Sapin law and yet these are major risks for those who wish to make a report. The criminal protection of the whistleblower in France could then be characterized as symbolic, especially since the law does not hesitate to specify the criminal protection of the person (natural or legal) targeted by the alert.

D. Criminal protection of the person accused by the alert

The Sapin Act expressly introduces protective measures for the person implicated by an alert. These are mainly **confidentiality guarantees**.
It is thus provided that the requirement of strict confidentiality applies not only to the whistleblower and the information collected but also to the person concerned by the alert (**Article 9 of the Sapin Act**). In addition, information likely to identify the person implicated by an alert may not be disclosed, except to the judicial authority, until the alert has been established as well-founded. Finally, the violation of this obligation is punishable by two years' imprisonment and a fine of 30,000 €, according to the same article.
With regard to civil servants, the circular of 19 July 2018[227] adds that:
If the agent's claim is unfounded and he considers himself to be the victim of a **threat**, **insult, defamation or insult, the** IV of **Article 11 of the law of 13 July 1983** protects him as long as no personal fault can be attributed to him. Where the alert results in the **referral to courts** before which the defendant agent will have costs to cover, **these costs may be covered under the** functional protection provided for in Article 11 of the above-mentioned Law of 13 July 1983.
As **slanderous denunciation** is expressly provided for by the last paragraph of Article 6b A, services are encouraged to take into consideration requests for the granting of functional protection that may be made in such cases by the official concerned by the alert".

Sanctions

As already said, the offence of obstructing the alert is punishable by imprisonment (one year) and/or a criminal fine (up to EUR 15.000).
Instead of 15,000 €, the fine is increased to 30,000 € when the investigating judge or chamber receives an abusive libel complaint against a whistleblower.
A breach of confidentiality of the whistleblower can lead to punishment such as imprisonment up to two years and a fine up to EUR 30.000 (individuals) or EUR 150.000 (legal entities).
This sanction apply also for a breach of confidentiality of the person accused by the alert.
In case a whistleblower acts in bad faith, he/she can be held liable under tort law and face criminal or disciplinary sanctions, for example, slander (up to 5 years of imprisonment and a criminal fine up to EUR 45.000) or dismissal for fault.

[227] Circular of 19 July 2018, *op. cit*., p. 15

Burden of proof

As already said, in the event of a dispute relating to a violation of the prohibition of reprisals[228], for example dismissal, non-renewal of contract, transfer, etc., the Sapin law provides protection for the whistleblower in procedural terms. It consists in assigning the burden of proof to the employer who would have subjected the employee to reprisal measures because of a report made under Article 6 of the Sapin Act.

Thus, article 10 (I-2° and II-2°) provides that as soon as the person presents facts that allow to presume that he/she relates facts constituting a crime, or that he/she has reported an alert under the terms of the Sapin Act, "it is up to the defendant, in view of the evidence, to prove that his/her decision is justified by objective factors unrelated to the declaration or testimony of the person concerned. ». This provision, which applies to both civil servants and employees on private law contracts, is identical in the Defence Code and therefore also applies to the military.

It should be noted that good faith is a condition for granting the status of whistleblower and for receiving the protection provided for; thus, "An official who reports or testifies to facts relating to a situation of conflict of interest in bad faith or to any fact likely to lead to disciplinary sanctions, with the intention to harm or with at least partial knowledge of the inaccuracy of facts made public or disseminated shall be punished by the penalties provided for in the first paragraph of article 226-10 of the Criminal Code. "(art. 10- II- 3° Sapin Law amending in this sense article 6 ter A of the law of 13 July 1983). The same provision is provided for the military (art. L. 4122-4 of the Defence Code).

Organizational measures

No special authority has been appointed for the evaluation of the implementation of the provisions of the Sapin II Law on whistleblowing.

The implementation of the obligation to set up an internal channel according to the decree of 2017 is not followed by any sanction or special supervision.

According to art. 17-II Sapin II law the internal reporting procedure is one of the eight compliance mechanisms (“compliance policy” or “anticorruption plan”) concerning companies with at least 500 employees or a turnover of more than 100€ million and public bodies with industrial and commercial functions (in French EPIC) or belonging to a public group with at least 500 employees and a turnover of more than 100€ million.

The compliance policy can result from collaboration with the French Anticorruption Agency (AFA).

The AFA published in the (French) Official Journal recommendations on the compliance policy including recommendations on the internal alert mechanism (December 2017).

Even if the compliance policy is a duty mostly concerning compagnies, the Municipality of Paris had decided to implement the reporting procedure as part of the compliance policy.

[228] For civil servants, disputes are judged by the Administrative Tribunal; for employees and agents employed under private law, the Labour Court is the competent court. It should be noted that Article 12 of the Sapin Act expressly introduced the jurisdiction of the Labour Court in the event of termination of the employment contract following the notification of an alert (Article 12 of the Sapin Act, "In the event of termination of the employment contract following the notification of an alert within the meaning of Article 6, the employee may refer the matter to the Labour Court under the conditions provided for in Chapter V of Title V of Book IV of Part I of the Labour Code").

Authorities responsible for the protection of whistleblowers in the broad sense (guidance, support)

A. The Human Rights Defender

The Human Rights Defender is an independent administrative authority of constitutional status[229] created in 2011[230] by the abolition of four independent administrative authorities from which it has regained competences, namely the defence of the rights of users of public services, the defence and promotion of the rights of the child, the fight against discrimination and the promotion of equality, and the respect of the deontology of security professionals.

The Sapin 2 law has given a new competence to the Defender of Rights, that of the orientation of whistleblowers. It is therefore one among the auxiliary "channels" of french the alerte system. Indeed, **Article 8 IV of the** Sapin Law stipulates that any person may address his report to the Human Rights Defender who will direct him to the appropriate body to collect his report.

At the same time, the legislator adopted an **organic law No. 2016-1690** empowering it to effectively exercise the new competence of "guidance and protection of whistleblowers"[231].

1. Orientation competence

According to the Organic Law, the role of the Human Rights Defender is "to refer to the competent authorities any person reporting an alert in accordance with the conditions laid down by law and to monitor the rights and freedoms of this person" (single article of the Organic Law). The creation of a single portal is envisaged (following the proposal of the Council of State in this respect) allowing the initiator to know the steps to be followed from the beginning of the alert until the processing of the facts at the origin of the alert[232].

In concrete terms, the 'orientation' of the whistleblower presupposes an objective legal analysis of the correspondence of the facts to the definition given by Article 6 of the Sapin 2 law. This qualification is made by a dedicated department of the Institution. In addition, the Human Rights Defender **verifies that the whistleblower has respected the internal channel** and recommends that he or she refers the matter to his or her hierarchical authorities when this has not been done. As it had been pointed out during our interview, the objective for the Defender of Rights is that the whistle-blower is not left without any help because he has gone too far. For those who have done so and have not received an answer through the internal channel, **the Defender of Rights makes inquiries with the authorities that may be seized,** while strictly maintains the required confidentiality.

Thus, **"guidance" overlaps with "protection" in the** sense that a well-oriented, i.e., well-advised person is a well-protected person because he or she knows his or her rights and their limits.

The orientation can also consist of the advice of the whistle-blower **to contact the Human Rights Defender himself within the** framework of the authority's other competences (e.g. child protection, discrimination at work etc.). In such a case, the Defender of Rights is an “external authority” (2nd step of reporting).

[229] Article 71-1 of the French Constitution of 4 October 1958

[230] Constitutional revision of 23 July 2008; Organic Law No. 2011-333 of 29 March 2011 on the Human Rights Defender.

[231] Organic Law No. 2016-1690 of 9 December 2016 on the competence of the Human Rights Defender for the guidance and protection of whistleblowers has entrusted the Human Rights Defender with the role of helping all whistleblowers to find their way through all stages of their procedures and to monitor their rights and freedoms.

[232] Jacques Toubon, "Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, the whistle-blowers. What legal protection? LGDJ, 2017, p. 411.

The institutional website dedicated to the orientation of whistleblowers[233] and the above-mentioned orientation guide specify that the author of an alert must send his reporting in writing by following the ***double envelope*** procedure (inner envelope "alert notification under the Act of 9 December 2016"; outer envelope showing the authority's mailing address). It is thus stressed that the strict confidentiality of the reporter, the persons concerned and the information collected is provided for by law and that its violation is punishable.

2. Protection competence

"Persons who have referred a matter to the Human Rights Defender may not be subjected to retaliation or reprisals on this ground. "(single article of the organic law). The Defender must therefore also ensure compliance with this provision[234].

Consequently, the "protection" competence of the Institution consists of the power to **establish the person's rights** when it is established that the person is harmed/discriminated against as a result of the alert; In view of its competence and know-how in the field of combating discrimination, the department of the Institution dealing with discrimination issues will use **the investigative powers of** the Human Rights Defender and will launch an **investigation in** order to gather evidence from the employer of the absence of a link between the unfavourable decision and the report (according to the burden of proof required by the Sapin 2 Act). It is therefore necessary to **search for a concordance between the sanction and the alert**.

Since the Sapin 2 law provides for the **nullity of the retaliatory measures,** the Defender of Rights will try to restore the whistle-blower and to cancel the measures either by means of **mediation in order** to avoid litigation or by **supporting the work of the judge** with the results of the investigation (of the Institution) in case of litigation.

Protection also consists of the **self-referral ("auto-saisine") of the Defender of Rights in the** areas for which he is competent, e.g. warning about child abuse.

Limitations

Despite the fact that this reform can be considered as a real step forward, it should be noted, as did the Defender of Rights,[235] that there are certain elements that allow this statement to be balanced:

- The organic law makes it clear that the Human Rights Defender will not be the "public defender" of whistleblowers[236]. In turn, the Defender of Rights, in the orientation guide published to set up the new mission, states that he **is neither the authority that will deal with the alert, nor the authority that will carry out the necessary checks to verify the veracity of the alert, nor the authority that will be able to stop the disturbances that caused the alert**[237].
- **It is not clear from the legislature and the implementing decrees whether the Defender of Rights is one of the external authorities** (channel 2). The future law transposing the new Directive should specify the place of the Institution in the national legal landscape. The interview **have** revealed that the interpretation of the texts according to which the Defender is **one of the authorities of the external channel could have been adopted, but the institution**

[233] https://www.defenseurdesdroits.fr/fr/lanceurs-dalerte
[234] ibidem
[235] J. Toubon, "Independent reading of a legislative innovation. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, *the whistle-blowers. What legal protection? What limits?* LGDJ, 2017, pp. 397-414 and elements from our interview with the Institution in July 2019.
[236] Sole article of the organic law "[...] "It may neither be seized nor take up, within the scope of its powers mentioned in 5° of the same article 4, disputes that do not fall within the situations provided for by the law. "» ; [...] ».
[237] Defender's Guide "Orientation and protection of whistleblowers", July 2017, p. 3.

has not allowed itself to go in this direction to date. It may be seen as a "**pivotal authority**" , as the CNDSA was before the Sapin 2 law. For the Human Rights Defender, the external channel is a body which intervene in order to put an end to the dysfunctions, the facts of the alert (e.g. the hierarchical authority, the supervisory authority, the Prefect and the judge); the Defender of Rights thus intervenes only as a **moral authority**, which addresses the Prefect or the hierarchical authority of the establishment, asking him to take the necessary measures to put an end to the facts of the alert.

- The decree of 19 April 2017 relating to the procedures for collecting alerts does not specify how the implementation of this system is linked to the new mission of the Defender of Rights with the implementation of these procedures. Moreover, this same decree **does not oblige the actors** to whom the obligation to set up the system is addressed to **ensure a minimum information of** the Defender of Rights neither on the procedures set up, nor on the follow-up of the reports made[238]. Therefore, although the Defender of Rights would have liked to set up the single portal for the guidance of whistleblowers, proposed by the Council of State,[239] its implementation was not facilitated by the government.
- Neither the Sapin law, nor the organic law relating to the new competence of guidance of the Defender of Rights' whistleblowers, nor the decree of 19 April 2017 relating to reporting procedures clarify **the link between** its new guidance mission and the obligation to refer to the Public Prosecutor the facts brought to its attention, as provided for in **Article 40 of the Code of Criminal Procedure**. The fact that it is obliged to guarantee strict confidentiality of the information submitted to it, as required by Article 9 of the Sapin Law, does not facilitate the relationship between these provisions[240].
- The relationship between the obligation of confidentiality in the processing of a report by the Defender of Rights and his obligation to protect a **vulnerable person** (e.g. a child, an elderly person) is not clear in the concrete case of imminent danger of which he will become aware[241].
- Even if the objective of "protecting" whistleblowers was the main objective of the legislator in involving the Defender of Rights in the mechanism, "**this new competence results exclusively from the effect of attracting the alert in the field of discrimination**"[242]. However, the cases of persons who are victims of reprisals or retaliation, such as those based on article 6 ter A of the Act of 13 July 1983 (public servants), L. 1132-3-3 Labour Code (private sector employees) or those based on specific schemes (intelligence officers, military) would be dealt with - in any case - within the framework of the already existing mission of the Human Rights Defender relating to the fight against discrimination.

[238] J. Toubon, "Independent reading of a legislative innovation. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, *the whistle-blowers. What legal protection? What limits?* LGDJ, 2017, p. 413.
[239] Council of State, Study, *op.cit.* Proposal No. 9 p. 15
[240] Jacques Toubon, "Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, *the whistle-blowers. What legal protection?* LGDJ, 2017, p. 414.
[241] Jacques Toubon, "Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, *the whistle-blowers. What legal protection?* LGDJ, 2017, p. 414.
[242] Jacques Toubon, "Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, *the whistle-blowers. What legal protection?* LGDJ, 2017, p. 412.

- **The financial support** and compensation for whistleblowers that had initially been provided for by the organic legislator was **repealed by the French constitutional judge**[243]. It should be noted that the repeal of this competence was welcomed by the Defender of Rights, who considered it a "distortion" of his constitutional vocation[244]. Doctrine, for its part, sees this as a weakening of the intervention of the Defender of Rights in the protection of whistleblowers[245].

Thus, the **new role of** the Defender of Rights in the protection of whistleblowers is important compared perhaps to other countries but remains **reserved**[246] and **its effectiveness is limited** by a nebulous articulation of this timid new mission with other obligations to which it is bound (art. 40 CPP, confidentiality, protection of vulnerable persons, external authority?).

However, it can be seen as an **auxiliary external channel for the whistleblower who** cannot refer the matter to the hierarchical superior or a compliance officer. It can also be used in cases where the superior does not inspire confidence in his or her ability to deal with the alert, or where he or she is himself or herself the subject of an alert[247].

B. French Anti-Corruption Agency (AFA)

Even if the protection system for whistleblowers is part of a law on the fight against corruption, which also establishes the “Agence Française Anticorruption” (AFA) as an[248] agency for the prevention and detection of acts of corruption, the latter has no **specific competence in the protection of whistleblowers**. Its role in this respect is limited to recommendations and verification[249] by preventive controls of the implementation of internal measures; thus, as part of the "anti-corruption plan" that large companies and EPICs are obliged to implement, an internal alert system must also be implement. Thus, the Sapin law provides for the implementation of "An internal alert system designed to collect reports from employees concerning the existence of conduct or situations contrary to the company's Code of Conduct;"; it is **one of the eight compliance procedures provided for in Article 17- II of the Sapin Act**, addressed to companies with at least 500 employees or a turnover of more than €100 million and to EPICs with at least 500 employees or belonging to a public group with at least 500 cents employees and a turnover of more than €100 million.

[243] Constitutional Council, decision No. 2016-740 DC of 8 December 2016, cons. 5 "... the organic legislator could not, without disregarding the limits of the competence conferred on the Defender of Rights by the Constitution, provide that this authority could grant financial aid or financial assistance to the interested parties".

[244] Jacques Toubon, "Lecture indépendante d'une innovation législative. La création du dispositif de protection des lanceurs d'alerte ", in M. Disant and D. Pollet-Panoussis, *the whistle-blowers. What legal protection? What limits?,* LGDJ, 2017, pp. 404 -409

[245] O. Leclerc, *Protéger les lanceurs d'alerte, La démocratie technique à l'épreuve de la loi,* LGDJ, 2017, p. 69 ("L'efficacité du soutien apporté par le Défenseur des droits se trouve ainsi singulièrement amoindée"); Florence Chaltiel Terral, *Les lanceurs d'alerte,* Dalloz, 2018, p. 84; S. Dyens, " Le lanceur d'alerte dans la loi ''Sapin 3'' : un renforcement en trompe-œil ", in *Anticorruption, La loi Sapin 2 en application,* Dalloz, coll. Grand Angle, pp. 17-27 (article published in *AJCT,* March 2017, pp. 127 et seq.), spec. pp.

[246] In this sense, Florence Chaltiel Terral, *Les lanceurs d'alerte,* Dalloz, 2018, p. 84.

[247] Eric Alt, " De nouvelles protections pour les lanceurs d'alerte - A propos de la loi n° 2016-1691 du 9 décembre 2016 ", *JCP G,* n°4, 23 January 2017, doctr. 90, p. 6.

[248] The AFA replaces the Central Service for the Prevention of Corruption, created by the law of 29 January 1993

[249] Christophe Rolland, « Création de l’Agence française anticorruption par la loi ‘’Sapin 2’’ » : quels moyens pour quelle action ? », in *Anticorruption. La loi Sapin 2 en application*, Dalloz Grand Angle, 2018, pp. 11-16

In this context, it can therefore be seen that the implementation of a reporting procedure **is part of the companies' *compliance* policy** and it is within this framework that the AFA will monitor its existence and contribute to the prevention of corruption[250].

The AFA recommendations, published in the Official Journal, provide details on the implementation of internal alerting[251]. However, it should be stressed that this "internal alert system" provided for in Article 17-II-2° is different from the protection system for whistleblowers introduced by Articles 6 to 16 of the same law: Article 17-II-2° concerns a compliance measure, Articles 6 to 16 concerns the "general" protection system for whistleblowers. We learn from the AFA's recommendations that the two can be articulated[252].

C. National Commission on Ethics and Health and Environment Alerts

Annexe Alert –Environment Health

D. High Authority for the Transparency of Public Life

Independent administrative authority responsible for promoting the integrity and exemplarity of public officials - created by the laws of 11 October 2013.

Any report of active or passive corruption, breach of trust, embezzlement of public funds, illegal taking of interests or slipping by public officials controlled by the HATVP may be sent by mail to the postal address of the authority or by e-mail or to the authority's postal address.

E. Prudential supervisory and resolution authority

The Prudential supervisory authority is an independent administrative authority, created for the supervision of banks and insurance companies. An alerting system applicable to these sectors has been introduced by law n°2016-1691 of 9 December 2016.

Any report of non-compliance with the regulations it supervises must be sent in writing and by post to the authority's address.

[250] For a criticism of the "compliance penalty" consisting - among other things - in the setting up of an internal alert system, see Emmanuel Breen, La "peine de mise en conformité" in the Sapin II bill: the clothing is beautiful, but it has been reversed, *JCP G*, n° 23, 6 June 2016, 651

[251] Opinion on the recommendations of the French Anti-Corruption Agency to help legal persons governed by public and private law to prevent and detect acts of corruption, trading in influence, bribery, misappropriation of public funds and favouritism, JORF n°0298 of 22 December 2017

[252] *Ibidem*, [" (...) 3. Possible articulation with the legal system applicable to whistleblowers The internal whistleblowing system differs from the procedures to be implemented for the protection of whistleblowers pursuant to articles 6 to 16 of Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life (3), and the alert and collection mechanism for alerts on the existence or occurrence of risks provided for by Law No 2017-399 of 27 March 2017 on the duty of vigilance of parent companies and ordering companies.
Insofar as the internal alert system includes alerts on the facts and risks provided for in the abovementioned legislative provisions, it is possible to set up a single technical system for collecting these alerts in accordance with those provisions. In this context, the legal regime for whistleblowers requires ensuring that their rights are protected, in particular the strict confidentiality of their identity, but also the facts covered by the alert and the persons concerned by the alert. It is also necessary to open up the possibility of reporting to external and occasional employees.
If, in the context of the establishment of a single technical collection system, organisations are not in a position to discriminate between alerts issued under the different alert systems, the legal regime for whistleblowers may be extended to all alerts. »

F. The Financial Markets Authority

The Financial Markets Authority ("*Autorité des Marchés Financiers*", AMF) is an independent public authority created for the protection of investors and the supervision of financial markets. An alerting system applicable to the financial sector has been introduced by law n°2016-1691 of 9 December 2016. Any report of a breach of the regulations it supervises may be sent to the AMF electronically, by post or by telephone.

Annex

Ethical alert in sectors
health and environment

In order to generalize the status of the whistleblower and harmonize his protection, the Sapin law modified article L. 1351-1 of the Public Health Code on the protection of whistleblowers in terms of public health and the environment (art. 15 Sapin law) but retained the specific texts relating to whistleblowing in these sectors. Therefore, if in terms of status and protection *stricto sensu* (e.g. prohibition of retaliation measures, guarantee of confidentiality etc. see general report above) the protection of the whistleblower is found in the Sapin law, in terms of procedure and competent authorities the health and environmental alert depends on the specific rules introduced by law n°2013-316 of 16 April 2013 (called "Blandin law") still in force.
These are mainly the obligation to keep a "health-environment alert register" and the existence of a National Commission on Ethics and Alerts about Health and Environment (“Commission nationale Déontologie et Alertes en santé et environnement”, CNDASPE[253]).
However, despite the existence of two portals allowing online declaration of alerts in these sectors, it has to be noted that, actually, internal alerts are (also) the preferred path to follow in the health and environment sectors, since the CNDASPE cannot be directly contacted (except in cases of serious and imminent danger) and, in any case, as a last resort after the Prefect and other competent authorities; in addition, an individual cannot file an alert to the CNDASPE alone; he must be accompanied by the persons specified by the Blandin law (see further on).
Thus, if the doctrine asserts the existence of a duty (and not a right of alert) in these specific sectors, it can be seen that its effective expression is not ensured.

A. The normative framework

The current texts relating to whistleblowing in the health and environment sector are as follows[254]:

- Law n° 2013-316 of 16 April 2013 on the independence of health and environmental expertise and the protection of whistleblowers (articles 8-10).
- Articles L4133-1 to 5 of the Labour Code on the procedure for the right of alert of employees and the CHSCT[255] in matters of public health and the environment.
- Articles D4133-1 to 3 of the Labour Code on the conditions of the right to alert in matters of public health and the environment.
- Decree No. 2014-324 of 11 March 2014 on the exercise of the right to alert in matters of public health and the environment in the company.
- Decree No. 2014-1628 of 26 December 2014 establishing the list of public institutions and bodies that keep a register of public health and environmental alerts.
- Decree No. 2014-1629 of 26 December 2014 on the composition and functioning of the National Commission on Ethics and Warnings in Public Health and the Environment.
- Decree No. 2016-523 of 27 April 2016 on the establishment of the National Public Health Agency.

[253] Also met "cnDAspe"
[254] For a centralization of the main texts (to which we added others that we thought were relevant): https://www.legifrance.gouv.fr/affichSarde.do?reprise=true&page=1&idSarde=SARDOBJT000000027325406&ordre=null&nature=null&g=ls
[255] Health, Safety and Working Conditions Committee (CHSCT)

- Decree No. 2016-1842 of 26 December 2016 on the French Biodiversity Agency.
- Order of 10 October 2016 appointing to the National Commission on Ethics and Warnings in Public Health and the Environment.
- Order of 20 January 2017 appointing the president and vice-president of the National Commission on Ethics and Public Health and Environmental Alerts.
- Order of 3 May 2019 appointing the President and Vice-President of the National Commission on Ethics and Public Health and Environmental Alerts.
- Rules of Procedure of the National Commission on Ethics and Warnings in Public Health and the Environment - 14 February 2019.
- "Guidelines for alert management", adopted by the CNDASPE, 26 October 2017
- "From reporting to alert: CNDASPE assessment criteria", 24 April 2018.

In addition to these provisions, there are also those relating to the protection of whistleblowers as they result from the Sapin law.

B. A *duty to* alert and not a *right*: a doctrinal

According to the Labour Code as amended by the Blandin Act, any worker who considers, in good faith, that the products or manufacturing processes used or implemented by the (private or public) body, employing him, pose a serious risk to public health or the environment immediately notifies his employer (art. L4133-1, art. D4133-1). Employee representatives on the Social and Economic Committee (formerly CHSCT[256]) also have an immediate right to alert the employer. These are the provisions adopted in 2013 in addition to the provisions already in place for CHSCT representatives to alert in the event of serious and imminent danger (art. L. 4131-1 and L. 4131-3 of the Labour Code).
Even though the law[257], the study by the Council of State on ethical alert (2016)[258] and official websites refer to a *right* and not to a *duty* to alert - in general as well as in the specific sectors of health and the environment -, the doctrine states that"... despite the commented law which is expressed only in terms of right and not duty, such a duty exists in positive law"[259].
The arguments supporting such a position are several: the presentation of the Blandin Act[260] makes it possible to read this Act as an application of the Environmental Charter (Articles 2 and 3[261]) backed by the French Constitution[262]; the constitutional judge also stated, on the basis of Articles 1 and 4 of the Charter, in a decision of 8 April 2011 that "everyone is bound by an obligation of vigilance with regard to environmental damage that could result from their activity"; the “Court de Cassation”[263] had not

[256] Previously known as CHSCT (Committee on Health, Safety and Working Conditions); we will use both terms
[257] Labour Code L. 4133-1 et seq. and D4133-1 et seq.: "Chapter III - Right to alert in matters of public health and the environment
[258] Conseil d'Etat, Le droit d'alerte : signaler, traiter, protéger, (Study 2016), *op.cit.*, p. 35
[259] Mireille Bacache, « Risque grave pour la santé - Protection du lanceur d'alerte - Déontologie de l'expertise Commission », *RTD Civ*. 2013, p. 689 et seq.; Camille Colas, "Le caractère inachevé du régime d'alerte éthique en droit de l'environnement", in M. Disant, D. Pollet-Panoussis, *op.cit.*, 2017, LGDJ, p.201-202
[260] "the protection of alerts provides a framework for the application of two articles of the Environmental Charter backed by the French Constitution", namely Article 2 and Article 3 (Explanatory Memorandum[of the Blandin Act], p. 5), quoted by Mireille Bacache, *op.cit*., pp. 689 et seq;
[261] Environmental Charter, Constitutional Act No. 2005-205 of 1 March 2005 on the Environmental Charter (JORF No. 0051 of 2 March 2005 page 3697)
Article 2. Everyone has a duty to participate in the preservation and improvement of the environment.
Article 3. Every person must, under the conditions defined by law, prevent any damage that he may cause to the environment or, failing that, limit its consequences.
[262] Camille Colas, "Le caractère inachevé du régime d'alerte éthique en droit de l'environnement", in M. Disant, D. Pollet-Panoussis, *Les lanceurs d'alerte, op.cit.*, 2017, LGDJ, p.201-202
[263] Cass, Soc. 21 Jan. 2009, n° 07-41.935; quoted by Mireille Bacache, *op.cit., RTD Civ*. 2013 p.689 et seq.

hesitated (already in 2009) to reason in terms of duty for the employee with regard to alerts relating to the employee's health or life".

In addition, Professor Bacache supports this qualification on the basis of Article 1382 of the Civil Code (general liability clause) by stating that "refraining from reporting of a risk to health or to the environment constitutes, on the basis of Article 1382, either a lack of vigilance or a precautionary fault, depending on the nature of the risk not reported, proven or uncertain."»[264].

There would therefore be an obligation to alert in the fields of health and the environment that would affect three categories of employees[265]: the worker, the employee representative at the CHSCT and the union representative. The obligation of the first two would result from the Labour Code, that of the union representative from case law[266]. The expression "immediately alert the employer" contained in Art. L. 4133-1§1 of the Labour Code, "implies a right but also a duty" for Professor Teyssié as well.

Moreover, following the adoption of the Sapin law, there could be a general (and not specific) duty of alert, based on the argument of whistleblowers as guardians of the general interest[267]; the whistleblower in this matter can thus be seen as a new figure of citizenship[268].

C. The obligation to keep a register of public health and environmental alerts

Regardless of these considerations, the law requires that a register of alerts must be kept in this regard. This obligation applies to employers as well as to private and public bodies active in these areas, which have been specified by Decree.

a. By employers

The Labour Code provides for the obligation of any employer to set up[269] a special register where health and environmental alerts will be recorded (L.4133-1 para. 2, D4133-1 Labour Code). Employee representatives on the Social and Economic Committee must have access to it (D.4133-3 of the Labour Code).

The alert recorded in the special register must be dated and signed and must indicate:

- products or manufacturing processes used or implemented by the company which the worker considers in good faith to present a serious risk to public health or to the environment (when the alert is issued by the employee representative, the criterion of good faith is excluded)
- if necessary, the potential consequences for public health or the environment,

[264] Mireille Bacache, *op.cit.*, p.689 et seq.

[265] Camille Colas, "Le caractère inachevé du régime d'alerte éthique en droit de l'environnement", in M. Disant, D. Pollet-Panoussis, *Les lanceurs d'alerte*, *op.cit.*, 2017, LGDJ, p.202

[266] TGI Troyes, 10 March 2004, req. N°01/01621, cited by Camille Colas, "Le caractère inachevé du régime d'alerte éthique en droit de l'environnement", in M. Disant, D. Pollet-Panoussis, *Les lanceurs d'alerte*, *op.cit.*, 2017, LGDJ, p.202

[267] Camille Colas, "Le caractère inachevé du régime d'alerte éthique en droit de l'environnement", in M. Disant, D. Pollet-Panoussis, *Les lanceurs d'alerte, op.cit.*, 2017, LGDJ, p.204-205

[268] Marianne Moliner-Dubost, "La citoyenneté environnementale", *AJDA*, 2016 p.646 et seq.

[269] Example of the consideration of the obligation by the "Centre Interdepartmental de gestion de la grande couronne de la Région Ile-de-France" clearly disseminates the model register and the different stages of the right of alert in terms of public health and the environment:
https://www.cigversailles.fr/content/le-droit-d%E2%80%99mati%C3%A8re-de-santé%C3%A9-publique-et-d%E2%80%99environnement :
v. also Ministry of Public Service "The applicable health and safety rules":
https://www.fonction-publique.gouv.fr/files/files/publications/coll_human_resources/SST_livret3.pdf

- any other information relevant to the assessment of the recorded alert (D. 4133-1, D4133-2, Labour Code).

b. By public institutions and bodies with expertise or research activities in the field of health or the environment

Article 3 of the law of 16 April 2013 creates the obligation to keep an alert register and the follow-up given to it for certain private and public bodies with expertise or research activities in the field of health or the environment.

The decree of 26 November 2014 established the list of these bodies as follows:

Marine Protected Areas Agency (AAMP).

Biomedicine Agency (ABM).

Environment and Energy Management Agency (ADEME).

National Agency for Radioactive Waste Management (ANDRA).

Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail (ANSES).

Agence nationale de sécurité du médicament et des produits de santé (ANSM).

Bureau of Geological and Mining Research (BRGM).

Centre d'études et d'expertise sur les risques, l'environnement, la mobilité et l'aménagement (CEREMA).

Centre for International Cooperation in Agricultural Research for Development (CIRAD).

Centre national de la recherche scientifique (CNRS).

Scientific and Technical Centre for Building (CSTB).

Conservatory of coastal areas and lake shores.

Commissariat à l'énergie atomique et aux énergies alternatives (CEA) with regard to its activities related to life sciences.

National Veterinary School of Alfort (ENVA).

Toulouse National Veterinary School (ENVT).

National School of Veterinary Medicine, Food and Agriculture Nantes-Atlantique (ONIRIS).

School of Advanced Studies in Public Health (EHESP).

IFP Energies nouvelles (IFPEN).

French Research Institute for the Exploitation of the Sea (IFREMER).

Institut français des sciences et technologies des transports, de l'aménagement et des réseaux (IFSTTAR).

National Cancer Institute (CNIB).

Institut national de l'environnement industriel et des risques (INERIS).

Institut national de la recherche agronomique (INRA).

National Institute of Health and Medical Research (INSERM).

National Institute of Blood Transfusion (INTS).

Health monitoring institute (InVS).

Research Institute for Development (IRD).

Institute for Radiation Protection and Nuclear Safety (IRSN).

Institut national de recherche en sciences et technologies pour l'environnement et l'agriculture (IRSTEA).

Institute of Life Sciences and Industries and Environment (AgroParisTech).

Central Laboratory of the Police Prefecture (LCPP).

National Metrology and Testing Laboratory (LNE).

Météo-France.

National Museum of Natural History (MNHN).
Office national de la chasse et de la faune sauvage (ONCFS).
National Office for Water and Aquatic Environments (ONEMA).
VetAgro Sup - Institute of Higher Education and Research in Food, Animal Health, Agricultural and Environmental Sciences.
According to article 3 of the decree of 26 November 2014, the implementation of the obligation for these bodies to keep the register depended on the publication of criteria to ensure the admissibility of alerts by the National Commission on Ethics and Alerts in Public Health and the Environment (CNDASPE), a document that was published on 24 April 2018 (From reporting to alert: criteria for assessing issued by the CNDASPE).
This register may be shared (art. 2 of the decree of 26 Dec. 2014) and must be kept under the responsibility of the body concerned (or, in the event of sharing, the one designated as responsible by agreement). The CNDASPE and the supervisory of the aforementioned bodies must be informed annually, or at their request, of the content of the alert register.

D. Competent authorities to receive a "health - environment" alert

Despite the existence of a Special Commission (CNDASPE), it should be noted that to date, the health and environment alert is surrounded by a certain uncertainty and in all cases by a multitude of actors; employer is always the first to contact (in the professional context). It is also surprising that the CNDASPE refers the potential whistleblower to the Human Rights Defender ("Défenseur des droits"), who makes no reference to the CNADSPE in his orientation guide[270]. The Ministry of Health has been developing since 2017 an online portal for reporting (in some cases) and for directing (in others) health alerts, without referring the potential whistleblower to the CNDASPE.
In terms of procedure and in an effort to simplify, it is a matter for a potential whistleblower in its sectors to address the alert:

- *For an employee*:

first internally, i.e. to the employer[271] or to the "alert referent" and, after three months of waiting time without a reply, to the Prefect, the Director General of the Regional Health Agency, or the professional body concerned[272]; only in the absence of response may the CNDASPE be contacted to take up automatically, if it considers it necessary ; in this case, the CNDASPE take the necessary steps to inform the competent authorities (no investigation power);

- *For a legal person (company, association, trade union) or a natural person such as a local resident, consumer or user*

[270] Human Rights Defender, Orientation Guide, *op. cit*. p. 24
[271] The Labour Code makes the employer the first competent authority to receive and remedy a health and environmental alert of which it has been informed following a report from a member or representative of his staff. It is also required to disseminate information on the risk incurred and measures taken to all staff (L. 4141-1 of the Labour Code). The employer is required to examine the situation and inform the employee and the employee representative of the action taken; in the absence of this information or in the event of a discrepancy between the employer and the employee or the employee representative, the matter may be referred to the Prefect (L. 4133-3 and 4133-4 Labour Code).
[272] Recommendation of the Human Rights Defender, taken over by the CNDASPE (for lack of legal precision)

the public prosecutor and the administration concerned (DREAL[273], ARS[274], DIRECCT[275], DRAAF[276]) and, after a three-month period of absence of response, to the CNDASPE.

In any case, the CNDASPE website makes it clear through several reminders that the Human Rights Defender is the primary referral authority for the whistleblower. In addition, it is recommended that reports should be multiplied to several authorities simultaneously[277].

Below are detailed the two authorities offering an online portal for reporting on public health and environment fields.

a. The Ministry of Health (for individuals, health professionals or other professionals)

The Ministry of Health is responsible for informing and receiving reports of "**undesirable health events**". This means any unwanted and unusual event affecting health, related to the handling or consumption of a product (medicine, cosmetic product, food product, cleaning product, DIY product, tattoo, food supplement), of a psychoactive substance or of everyday life or occurring during handling or consumption, even if it is already known in the leaflet or instructions for use, as well as for any event occurring during an act of care (doctor, pharmacist, midwife, nurse, medico-social structure).

Through a portal set up on its website, the Ministry of Health can be contacted by

- an individual (person concerned, relative, carer, representative, institution -mayor, school director-, users' association);
- a health professional or employee of a health or medico-social institution;
- another professional (company, operating body, manufacturer, importer, authorised representative).

Referral to the Ministry of Health is a prerequisite for referral to the National Commission on Ethics and Alerts in Public Health and the Environment.

The portal alerts-health.gouv.fr

Since March 2017, the Ministry of Health has opened a portal Signalement-sante.gouv.fr in[278] order to strengthen health safety and simplify the health reporting process.

The site seems - at first glance - easy to use, containing three sub-portals addressed to each of the natural or legal persons likely to use it (individuals, health professionals, other professionals), who are then conducted in a multitude of cases likely to be reported; vocabulary is adapted to their profile and skills.

After one year of use, the portal was the subject of a positive assessment[279] presented by the Ministry[280] while considering several avenues for improvement both in terms of functionalities and of its promotion and popularization (e.g. gradually expanding its scope to cover the entire field of health security, creating a user account, etc.).

[273] Regional Directorates of Environment, Planning and Housing
[274] Regional Health Agencies
[275] Regional Directorates of Enterprise, Competition, Consumer Affairs, Labour and Employment
[276] Regional Directorate for Food, Agriculture and Forestry) is responsible for anomalies in food and agricultural activities
[277] https://www.alerte-sante-environnement-deontologie.fr/faq/article/que-faire-en-pratique-pour-deposer-une-alerte
[278] https://signalement.social-sante.gouv.fr/psig_ihm_users/index.html#/home
[279] Ministry of Health, First Evaluation of the Adverse Health Event Reporting Portal, June 2018, 65p. https://solidarites-sante.gouv.fr/IMG/pdf/premiere_evaluation_of_the_Report_Portal_June2018.pdf
[280] https://solidarites-sante.gouv.fr/soins-et-maladies/signalement-sante-gouv-fr/article/premiere-evaluation-du-portail-de-signalement-des-evenements-sanitaires

However, following our use of this portal and the reading of the report, some points have to be highlighted:

- When a reporting is to be made, the questionnaire allows the process to continue in a number of cases (drug/vaccine, medical equipment/device, substance of daily life, cosmetic product, etc.). In many other cases, the portal simply informs the person of the type of authority to which he or she should be directed without providing the contact details or other practical "concrete" information necessary for a natural person wishing to issue an alert.

Thus, for example, in a number of health-related reports (blood donation or transfusion, radiotherapy session, gamete donation, artificial insemination, fertility preservation, etc.) the portal invites you to contact the doctor who "has taken charge of you... so that he can report your event to the Biomedicine Agency" or informs that "To make your report, please contact a health professional (doctor, pharmacist, dietician, etc.) who will make this report. "».

It should be noted that the official assessment of the portal by the Ministry shows a low level of awareness by health professionals (unlike users)[281]. Rather than offering abstract advice, the portal should orient the user towards functional sites where an alert can actually be made, such as https://pro.anses.fr/nutrivigilance/ (which offers postal contact details and online reporting of adverse reactions that may be related to the consumption of food supplements or certain food products).

- The lack of information and the disparity of information in return for their alert has been criticised by users; the lack of harmonisation of procedures for processing alerts between regions and between similar structures is also reflected in the report[282].
- A general remark regarding ethical alert also emerges: that of the difficult management (especially in terms of staff) of reporting in the face of the popularisation of ethical alert. The issues of "sorting" and "misuse" of alert portals by users are thus raised[283]. The balance that must be found will be complex, all the more so as the culture of internal warning will - in principle - be made more flexible by the directive on the protection of whistleblowers.

b. National Commission on Ethics and Alerts in Public Health and the Environment

The Blandin Act creates a specialised Commission for public health and environmental reporting. However, only by reading its title, somebody can understand the limits of its protective potential for whistleblowers in these sectors; it is therefore not excepted from criticism[284] and remains in any case far from the work that would suggest the creation of a "high authority of expertise"[285].

Creation

[281] e.g. Ministry of Health, First Evaluation of the Adverse Health Event Reporting Portal, June 2018, (*op.cit.*), p. 24, 49

[282] Ministry of Health, First Evaluation of the Adverse Health Event Reporting Portal, June 2018, (*op.cit.*), pp. 54, 55

[283] E. g. p. 44 (from the 2018 balance sheet, *op. cit*.)

[284] Malo Depincé, "Le lanceur d'alerte en droit de l'environnement", in M.C. Sordino, *Lanceurs d'alerte : innovation juridique ou symptôme social ? op.cit.*, pp. 71-88, spec. 85-88 (criticises the centralized Jacobin character of the Commission, which seems to favour the confidentiality of debates over a transparent procedure whose risks in times of crisis are mentioned by the author)

[285] F. G. Trébulle, « Alertes et expertise en matière de santé et d'environnement », Environnement 2013, Etude 21, cité par Malo Depincé, « Le lanceur d'alerte en droit de l'environnement », in M.C. Sordino, *Lanceurs d'alerte : innovation juridique ou symptôme social ?, op.cit.*, p. 85

The CNDASPE is an independent Commission, created by the law of 16 April 2013 on the independence of expertise in health and environment and the protection of whistleblowers. It is responsible for ensuring that ethical rules apply to scientific and technical expertise and to procedures processing alerts in the fields of public health and environment.
Its composition and functioning are specified by the decree of 26 December 2014 but it was not officially installed until 26 January 2017. It has 22 full members and 11 alternates, all **volunteers**, appointed by ministerial order for four years.
To date, it has received only a very small number of alerts (four)[286].

Competent authority of last resort or in case of serious and imminent danger

The CNDASPE is considered as the national competent authority for health and environmental alerts. It was created with a view to "centralising alert registration procedures" in these areas, which finally seems to be done by the Ministry of Health[287]. A more careful reading of the positive law and the CNDASPE's website also shows that it is by no means the first and only authority to be called upon for an alert in these fields.
The Commission's website, which was put online very recently (April 2019), explains that there are many reporting steps to follow for the three different whistleblower profiles (1. Employee or collaborator of a company or community, 2. Resident, consumer or user, 3. Association, trade union or other legal entity). In all three cases, the report to the CNDASPE should only be made in the second or third place and in the absence of a response after a period of three months following the report to a competent authority (such as DREAL[288], ARS[289], DIRECCTE[290], DRAAF [291]etc.).
The CNDASPE website also demonstrates the pivotal role of the Human Rights Defender in guiding whistleblowers. However, the difficulty of the Human Rights Defender in centralising the bodies competent to collect reports due to a lack of obligation by the decree of 19 April 2017 has already been mentioned above.
Only in the event of a serious and imminent danger to health and the environment or in the presence of a risk of irreversible damage to living environments or human health, a report may be sent directly to the person concerned.
However, even in this case (as in all others), the Commission **recommends that simultaneous alerts should be issued** to different authorities, including the CNDASPE[292] ("*You may report an alert to the cnDAspe by following the procedure* described (...) *It should be noted, however, that several alerts on*

[286] https://www.alerte-sante-environnement-deontologie.fr/travaux/signalements/
[287] *supra* and *infra*
[288] Regional Directorate for Environment, Development and Housing) is competent with regard to industrial risks and environmental pollution
[289] Regional health agency, to be notified, for example, in the event of a risk of pollution of drinking water resources.
[290] Regional Directorate of Enterprise, Competition, Consumer Affairs, Labour and Employment) is responsible for anomalies or breaches of regulations concerning consumer products or occupational health and safety.
[291] Regional Directorate for Food, Agriculture and Forestry) is responsible for anomalies in food and agricultural activities
[292] "In case of emergency, i.e. in case of serious and imminent danger or presence of a risk of irreversible damage to the living environment or health of persons, the report may be directly transmitted to the Human Rights Defender, the judicial authority, the competent administration as well as the CNDASPE or a professional order concerned, or even made public. ", source https://www.alerte-sante-environnement-deontologie.fr/deposer-une-alerte/article/conditions-pour-deposer-une-alerte-et-beneficier-de-la-protection-du-lanceur-d ;

the same subject to different authorities may be useful. "It should be noted that several alerts on the same subject to different authorities may be useful. "»[293]) .

Referral to a court

An individual cannot refer directly to the CNDASPE, unless an alert leads the CNDASPE to act of its own motion, which is the Commission's competence.

The principle is that of a referral by one of the persons specified by article 14 of the law of 16 April 2013:

1° A member of the Government, a deputy or a senator;

2° A consumer protection association approved pursuant to Article L. 811-1 of the Consumer Code;

3° An environmental protection association approved pursuant to Article L. 141-1 of the Environmental Code;

4° An association with an activity in the field of health quality and patient care approved pursuant to Article L. 1114-1 of the Public Health Code;

5° A trade union organization of employees representative at the national level or an interprofessional organization of employers;

6° The national body of the order of a profession in the health or environment sectors;

7° An establishment or a public body having an expertise or research activity in the field of health or the environment.

The CNDASPE explains on its website the elements that must be filled in by [294] the online reporting declaration "Submit an alert".

Following the referral, the CNDASPE may[295]:

- Or ask the competent local authorities to complete the file,
- Either refer the matter to the competent ministers for further investigation,
- Either close the "pending" file because doubts exist but the elements of the file do not justify referring it to the competent authorities; in this case the file will be reactivated, if new or similar alerts reach the Commission,
- Either close the file without further action either because it does not fall within the authority's competence or because the documents do not justify referral to the competent authorities.

The CNDASPE is therefore not an authority that has the competence to stop a health and environmental risk and does not have the investigative competence as initially envisaged neither[296]. It is simply the institutional relay point for alerting in these sectors. However, it has other skills of an ethical nature.

Competencies

The law of 16 April 2013 (Blandin law) provided for six areas of activity for which the CNDASPE would be responsible. The law of 9 December 2016 (Sapin law) repealed two of them (definition of the criteria that constitute the admissibility of an alert and transmission of alerts to the competent authorities). The Commission is thus marginalized insofar as it "retains only prerogatives related to the ethics of scientific and technical expertise in the fields of health and of the environment"[297].

[293] https://www.alerte-sante-environnement-deontologie.fr/faq/article/que-faire-en-pratique-pour-deposer-une-alerte

[294] https://www.alerte-sante-environnement-deontologie.fr/deposer-une-alerte/Dossier

[295] https://www.alerte-sante-environnement-deontologie.fr/deposer-une-alerte/article/suivi-de-l-alerte

[296] Invoked by O. Leclerc, *op. cit.,* p. 66

[297] O. Leclerc, *op.cit.*, p. 67

The four areas of action of the CNDASPE are nowadays (art. 2 Blandine Law):

"· the ethics of scientific and technical expertise in the fields of health and the environment;

· good practices within its field of competence concerning the dialogue mechanisms on scientific and technical expertise procedures between scientific bodies and civil society as well as related ethical rules, for which it makes recommendations;

· the implementation of registration procedures and the examination of alerts by these institutions and public bodies, which send an annual report to the CNDASPE;

· the processing of alerts it may need to know about "»[298].

The Commission must also draw up an annual report which it sends to Parliament and to the Government. To date, two activity reports (2017 and 2018) have been published[299].

[298] CNDASPE, Annual Report 2018, p. 3

[299] https://www.alerte-sante-environnement-deontologie.fr/travaux/rapports-annuels/

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