

LEGAL FINANCIAL SECURITY HEAD OFFICE | GROUP DISPUTE RESOLUTION

SAPIN II LAW – BASICS

WHISTLEBLOWING

LEGAL

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BNP PARIBAS

The bank
for a changing
world

CONTENTS

0		The importance of whistleblowing and protecting whistleblowers	p3
1		Whistleblowing: Best International Standards	p6
2		The Sapin II Law	p8
3		Implementing the whistleblowing procedure	p9



*Whistleblowers are neither dissidents seeking to radically oppose a community, nor supporters of civil disobedience claiming a "counterlegitimacy". Nor are they informers or sycophants acting in their own interests, or slanderers seeking to cause harm or hold others up to "public opprobrium": according to the French Conseil d'Etat, whistleblowers are the new symbol of vigilant citizens.**

THE IMPORTANCE OF WHISTLEBLOWING AND PROTECTING WHISTLEBLOWERS

Whistleblowing is a cornerstone of transparency and of the fight against corruption.

1 Public concern

Whistleblowers report a concern on acts and omissions that represent a threat or harm to the public interest.

2 Prevention and detection

Whistleblower can act as an early warning to prevent damage as well as detect wrongdoing that may otherwise remain hidden.

Employees and people in contact with an organisation in their work-related activities are in privileged position *vis-à-vis* access to information and are often the first to witness that something is wrong and, therefore, are in a better position to inform those who can address the problem.

3 Protecting whistleblowers

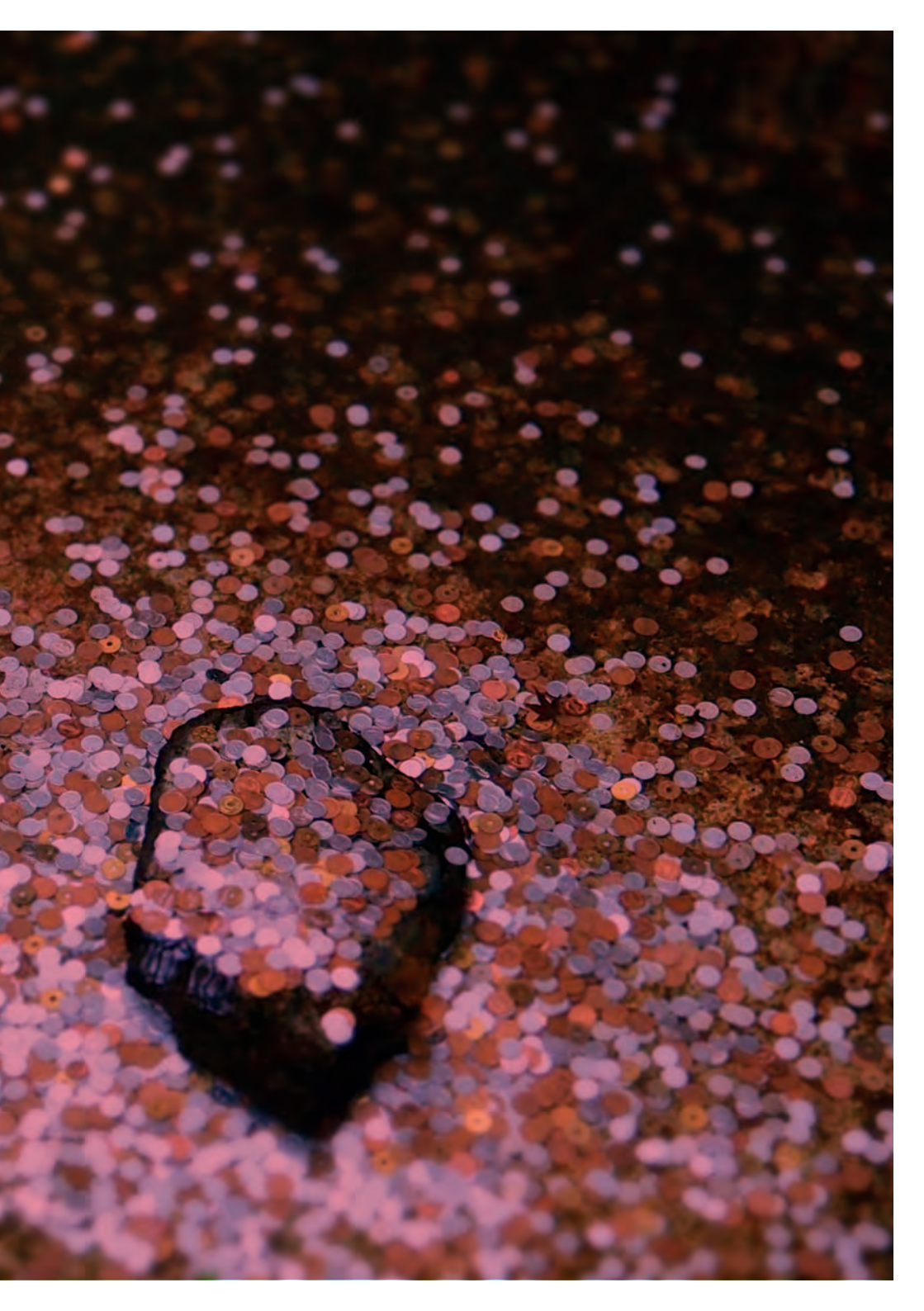
Discouraging whistleblowers from reporting their concerns or suspicions to their employer or to the appropriate authorities for fear of reprisals and the perceived lack of follow-up given to such warnings, may result in failure to protect the public interest. Protecting whistleblowers is thus crucial.

* " Whistleblowing: reporting, handling and protecting ", Conseil d'Etat (2016)



WITH THE SAPIN II LAW, FRANCE BECAME ONE OF THE MOST PROTECTIVE COUNTRIES FOR WHISTLEBLOWERS

The Sapin II Law introduced a legal protection for all whistleblowers, complying with the best international standards: prevention, protection, confidentiality, reversed burden of proof.



WHISTLEBLOWING : BEST INTERNATIONAL STANDARDS

Alerts may have serious impacts on organisations, as well as on individuals (both whistleblowers and individuals targeted in alerts). While whistleblowers protection is meant to offer a safe alternative to silence and to encourage protection of the public interest, it should also offer protection to the employer and individuals targeted by the alert, considering risks of criminal offences (slander, breach of secrecy and confidentiality...). Therefore, it appeared necessary to define certain common principles in order to help countries to balance the interests of the employers -who have to manage and run their organisations- with the need to ensure that the public is protected from danger or harm*.

1 Subjective criteria: motives

Public concern

Reporting or disclosing information on acts and omissions that represent a threat or harm to the public interest.

Good faith

Disclosing in good faith, with an honest belief that the information offered at the time of the disclosure is true.

Selflessness

Reporting in order to prevent or cease illegality, wrongdoing, damages or dangers, without seeking remuneration, promotion, revenge or other personal interests.

Direct knowledge of the information disclosed

Relaying rumours may lead to false information and damage reputations.

2 Objective criteria: alerts features

Alerts must:

- Address a serious, imminent, substantial risk.
- Be commensurated, in terms of (i) channels of reporting (internal alert first), and (ii) information disclosed (alerts often breach a secret).
- Be reported to those who can address the concerns.

PUBLIC INTEREST

Threats or harm to public interest include (non-exhaustive list)

Corruption and criminal activities.

Violations of the law and administrative regulations

Abuse of authority / public position

Risks to public health, food standards and safety

Risks to the environment

Gross mismanagement of public bodies

Gross waste of public funds (particularly those of charitable foundations).

GOOD FAITH AND SELFLESSNESS

Even where an individual may have reasonable and honest grounds to believe that the information is true and there is a serious problem, whistleblowers are rarely in a position to know the full picture, and may be mistaken. If whistleblowers disclose in good faith, they should still benefit from legal protection.

However, if someone deliberately and knowingly reports or discloses false information, or if an act is motivated by a personal grievance or the expectation of personal advantage-including pecuniary gain- it should not justify a protection.

* Council of Europe, European Court of Human rights, Transparency International

3 Scope of application

- ❑ **Broad subject matter**

Disclosing wrongdoing including criminal offences, breaches of legal obligation, danger.

- ❑ **Broad coverage**

Employees ,as well as people in contact with an organisation in their work-related activities: part-time workers, trainees, consultants, etc.

4 Disclosures procedures

As a general rule, the following channels should be encouraged as a first step:

- ❑ **Internal reporting**

- ❑ **External reporting** : easy external reporting, in particular to regulatory bodies, law enforcement bodies.

Disclosure to the public- media or Parliament for example- should come as a last resort.

5 Protection

- ❑ **Confidentiality**

Whistleblowers should be entitled to have the confidentiality of their identity preserved.

- ❑ **Protection against retaliation under any form**

- ❑ **Reversed burden of proof**

- ❑ **No sanctions for honest error**

THE SAPIN II LAW

New wide definition of whistleblower

A whistleblower is an individual, who signals (internally) or reveals (externally), selflessly and in good faith, facts that he/she became personally aware of, and which constitute:

- ❑ A crime or offence, or any other violation of law or regulation.
- ❑ A serious and clear violation of an international treaty to which France is party.
- ❑ A threat or serious harm to the public interest.

The whistleblower protected by the Sapin II Law is an individual: corporates, NGOs, and associations are not protected by the Law.

Professionals of information- such as journalists- do not appear to fall within the Sapin II Law's definition of whistleblowers.

Limits

A person is not protected as a whistleblower if he/she:

- ❑ Does not meet the legal conditions mentioned above, and/or

- ❑ Reports facts, information or documents protected by:
 - ↳ defence secrecy
 - ↳ medical secrecy
 - ↳ attorney-client privilege.

Speak-up: a 3 stages escalation process

INTERNAL ALERT

The whistleblower should raise the alert with his/her line managers (direct or indirect), employer or the person designated by the employer for that purpose.

AUTHORITIES

Failing a response from the employer within a reasonable time period, the whistleblower may alert the relevant administrative or judicial authority, or the professional authorities.

PUBLIC

If the alert is still not addressed within 3 months, the whistleblower can disclose it to the public.

Where there is a serious and imminent threat or risk of irreversible damage, the whistleblower may bring the alert directly to the attention of the administrative or judicial authority, or to the professional authorities. The whistleblower may also alert the public directly.

DÉFENSEUR DES DROITS

Le Défenseur des droits (the French ombudsman for human rights) may help whistleblowers to contact the competent authority. However, *le Défenseur des droits* cannot handle alerts.

IMPLEMENTING THE WHISTLEBLOWING PROCEDURE

New whistleblowing mechanisms

The Sapin II Law introduces two alerts mechanisms, which may be addressed in one set-up:

- Large French companies* must implement an internal set-up to report any breach of the Code of conduct to fight corruption.
- French companies employing at least 50 employees must implement internal procedures to protect whistleblowers: employees, as well as external or occasional staff (e.g trainees, consultants, contractors, temporary workers).

AT A FIRST GLANCE

9 Dec. 2016

The Sapin II Law is enacted

01 Jun. 2017

Implementation of the anti-corruption compliance program

Dec. 2017

The French Anti-corruption Agency's (AFA) guidelines are published.

Jan. 2018

The whistleblowing procedures must be implemented

* All French based companies which employ at least 500 employees, or are part of a group employing at least 500 employees, with a parent company incorporated in France, and with a gross annual revenue or consolidated revenues of over EUR 100 million.



Signal internal procedures

According to the Sapin II Law, the internal whistleblowing procedure has to specify:

- **The recipient of the disclosure**
 Direct or indirect line manager, the employer or the person designated by the employer to that purpose (a referent).
- **The ways to report an alert**
 There is no obligation to set up a hotline or any other electronic process.
- **The measures taken by the employer to**
 - L **Inform**
 - (i) the whistleblower about the way in which his/her disclosure will be addressed, including prospective timing.
 - (ii) the person(s) referred to in the disclosure about the closure of the investigation and the disclosure admissibility.
 - L **Guarantee the confidentiality** of the whistleblower; the reported facts, the person(s) referred to in the disclosure, etc.
 - L **Ensure the destruction of the alert file** after a two-month period if the investigation is not conclusive, or at the end of proceedings.
- **Wide communication on the alert set-up.**

GOOD TO KNOW

AMF and ACPR

have implemented their own whistleblowing channels, in order to enable direct reporting to them.

AFA

According to the AFA's guidelines, alerts related to corruption may be submitted directly to the AFA, which will in turn refer the case to the Public Prosecutor.

ANONYMOUS ALERTS

While the law does not encourage anonymous alerts, the AFA refers to anonymous reports, which should be addressed by the companies's policies (AFA's guidelines).

Protection

The Sapin II Law offers a robust protection for whistleblowers.

❑ Criminal liability of the whistleblower

Cannot be sought for disclosing a secret protected by law, as long as legal conditions are met, and that disclosing the information was necessary and commensurate to the interests at stake.

❑ Protection against any retaliation

Whistleblowers must not be subject to discriminatory measures or any retaliation by an employer. Any such actions will be null and void under French labor Law.

❑ Reversed burden of proof

❑ Confidentiality

The identity of the whistleblowers is confidential (except, under certain circumstances to the judicial authority, and with his/her consent). Similar protection for individuals targeted by the alert. In addition, data enabling his/her identification should be destroyed or archived (after redaction) 2 months after the end of investigations, or at the end of proceedings.

❑ Interference

Preventing someone from raising a concern is a criminal offence punishable by up to one year of imprisonment and a fine of up to EUR 15,000 (the legal entity itself may face a fine of up to five times this amount, i.e. EUR 75,000).



HAVE A LOOK TO THE
WHISTLEBLOWERS'S
PROTECTION RESTRICTIONS

The whistleblower's liability will be triggered for any abusive reports (whistleblowing made in bad faith, or in order to harm).

Training

The AFA recommends that employees particularly exposed to the risk of corruption, follow specific trainings on whistleblowing and the internal alert set up.

PLEASE READ

- 1 Jean-Laurent Bonnafé's anti-corruption Statement (January 2018).
- 1 The "Code of conduct: fighting corruption", incorporated into the Group Code of conduct (January 2018).
- 1 Compliance policies.

All these documents are available on the BNP Paribas Echonet or website.

- 1 Sapin II Basics, available on GDR > LFS > LEGAL portal.



- 1 The AFA Guidelines and other useful documents are available on the AFA website.

ANY QUESTIONS?

Happy to help, please contact us.

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