

**The Whistleblower: An Important
Person in Corporate Life?
An Answer from Comparative Law**

by

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The Whistleblower: An Important Person in Corporate Life? An Answer from Comparative Law

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Abstract

Whistleblowers draw attention to criminal or unethical behavior that can put at risk companies, managers and society. Their role is critical especially considering the failure of traditional corporate governance mechanisms such as legal audit, internal control, board supervision or other gatekeepers. In this paper, we review and discuss the legal environment for whistleblowers in France where the legislator passed the Sapin II law of 2016. The law intends to offer protection to individual whistleblowers directly related to the company. First, we discuss the law's main characteristics, scope and procedure. Then, we compare the French law to the legal environment for whistleblowers in the US, the UK and Canada.

In a firm, a whistleblower is an individual who draws attention to situations that breach criminal law or are unethical, in order to prevent such phenomena having serious repercussions for the entities and their managers.

Several authorities external to the firm already have a duty to reveal certain deviant situations of this kind,¹ but the laws concerning whistleblowers create a framework applicable to people who are internal to the firm or have close links with it. The main aim of this additional layer of vigilance is fighting corruption and fostering greater morality in business life, and many countries have adopted legislation relating to whistleblowers to further this aim.

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¹ For example, statutory auditors in France, and various authorities and regulators in other countries.

A number of major scandals have come to light recently thanks to whistleblowers, including the Mediator weight-loss drug scandal in France, and the Panama Papers and LuxLeaks international financial scandals. They have had the collective effect of raising awareness that whistleblowers need protection in their working lives.

In response, the French law-maker recently set out to construct a protective legal framework for whistleblowers through the In response, the French law-maker recently set out to construct a protective legal framework for whistleblowers through the “Sapin II” Law of 9 December 2016. This law introduced new obligations for certain types of firm, which must now have internal channels for reporting fraud or unethical conduct. The whistleblower has thus been given a major role in corporate governance and internal control.

The whistleblower’s value to society has long been acknowledged in many other countries. Sweden, in particular, developed legislation on the question a long while ago: its laws on the whistleblower appear to date back to the 18th century. More generally, the status of the whistleblower has a worldwide dimension, and the common factor in the relevant national laws is the aim to protect the whistleblower against any retaliation.

French legislation concerning the whistleblower (in the first section of the article) can usefully be compared with the legislation of other countries (in the second section).

The whistleblower in French law

In France, the legislative framework for whistleblowing is associated with necessary protection for the whistleblower.

Legislative framework for the whistleblower

France’s Sapin II Law “on transparency, anti-corruption and modernisation of economic life” introduced laws to protect whistleblowers, which are mainly applicable to private companies with at least 50 employees.²

This law also set up an obligation to prevent corruption and influence-peddling, incumbent on companies with at least 500 employees and annual sales revenues of over €100 million, or companies belonging to a group with at least 500 employees that has its parent company in France and annual consolidated sales revenues of over €100 million.³ To prevent corruption and influence-peddling, such companies are required to have an internal whistleblowing system for reporting situations or behaviours that are contrary to the company’s code of conduct.

France’s Law 2017-399 of 27 March 2017 on the duty of vigilance by parent companies and outsourcing firms also requires firms which, at two consecutive year-ends, have at least 5,000 employees directly and in subsidiaries whose registered offices are in France, or at least 10,000 employees directly and in subsidiaries whose registered offices are in and outside France, to set up a system for reporting and collecting information about the existence or materialisation of risks of serious breaches of human rights and fundamental freedoms, or damage to health and safety or the environment.

² Sapin II Law arts 6–15.

³ Sapin II Law art.17.

Prior to these recent legislative developments, French law already contained certain whistleblowing rules, particularly in credit institutions⁴ and portfolio management companies,⁵ intended to prevent market abuse.⁶ It was also possible to report suspicions of money laundering and financing terrorist activity.⁷

Public officials were also already under an obligation to inform the Public Prosecutor of any illegal activity (constituting offences classified as a *crime* or *délit*) of which they became aware in the course of their functions.⁸ The new measures introduced by the Sapin II Law do not actually place employees under such an obligation: whistleblowing is optional, subject to general obligations to report illegal activity that apply in certain fields.⁹

Finally, it is important to note that in France, when companies are required to have their financial statements audited by a statutory auditor,¹⁰ that auditor has a duty to reveal to the Public Prosecutor any illegal matter that has come to his/her knowledge while performing his/her functions.¹¹ A statutory auditor who deliberately refrains from reporting such offences is liable to criminal sanctions (a prison sentence of up to five years and a fine of up to €75k)¹² for the offence of failing to fulfil their duty (*délit d'omission*).

In recent years, individual whistleblowers have revealed a number of frauds including the Enron, WorldCom, LuxLeaks, SwissLeaks, WikiLeaks, Snowden/NSA, Mediator and Panama Papers affairs.

This article focuses on the whistleblower protection regime contained in arts 6 to 15 of the Sapin II Law. However, the two sets of whistleblowing rules contained in the law¹³ can be combined together.¹⁴

Definition and scope of application

The whistleblower is defined by art.6 of the Sapin II Law¹⁵ in deliberately fairly broad terms:

“An individual who reveals or reports, disinterestedly and in good faith, an offence [*crime* or *délit*], a serious and evident breach of an international commitment that has been properly ratified or approved by France, of a unilateral act by an international organisation made on the grounds of such a commitment, of the law or of regulations, or a threat or serious prejudice for the general interest of which he/she has personal knowledge.”

⁴ M.A. Hermitte, “Le lanceur d’alerte, héros des sociétés scientifiques et techniques?” in Actes du colloque *Héroïsme et droit*, Université de Limoges, avril 2013 (RERDH, Dalloz, coll. Thèmes et commentaires, 2014), p.135.

⁵ F. Chateauraynaud and D. Tornay, *Les sombres précurseurs, une sociologie pragmatique de l’alerte et du risque* (Paris: EHESS, 1999).

⁶ M. Brochier, “Les mesures de lutte contre la corruption de la loi Sapin II à la lumière des règles anglo-saxonnes” (2017) 17 B.R.D.A. 21.

⁷ V. de Senneville, “Les lanceurs d’alerte de plus en plus nombreux dans les entreprises”, *Les Echos*, 21 November 2017.

⁸ Code of Criminal Procedure art.40: “Any established authority, public official or civil servant who, in the exercise of his functions, learns of an offence [*crime* or *délit*], is required to inform the Public Prosecutor thereof without delay and to transmit to the Prosecutor any information, reports or documents relating thereto.”

⁹ France’s Criminal Code arts 434-1 and following.

¹⁰ For instance, *Sociétés à responsabilité limitée* that exceed two of the following three thresholds: balance sheet total of €1,550,000; annual sales (excluding taxes) of €3,100,000 HT; 50 employees; and the SA (*Société anonyme*).

¹¹ France’s Commercial Code art.823-12.

¹² France’s Commercial Code art.820-7-1.

¹³ Respectively, Sapin II Law arts 6-15 and art.17.

¹⁴ Recommendation on the internal alert system by Agence Française Anticorruption.

¹⁵ Law 2016-1691 and organic law 2016-1690 of 9 December 2016.

The Sapin II Law set out to define detailed procedures for whistleblowers.¹⁶ It is important at this stage to note that when the ordinary law and the organic law were submitted for scrutiny to the French Constitutional Council, the Council partly rejected the measures for protection of whistleblowers¹⁷ (see below).

Regarding the scope of application inside firms, art.8 of the Sapin II Law requires companies with at least 50 employees to set up appropriate procedures for whistleblowing by personnel members or external and occasional co-workers.¹⁸ This clearly means the procedures are open to employees, but the concept of “external and occasional” co-workers¹⁹ who are also concerned has been defined neither by the law, nor by parliamentary debate.

In a decision of 8 December 2016,²⁰ the Constitutional Council observed that the legislator

“intended to restrict the scope of application of article 8 solely to whistleblowers reporting information concerning the body that employs them or the body for which they are working in a professional context”,

but gave no further details.

France’s Defender of Rights (presented in more detail below) considers that this expression covers interns, temporary staff, sub-contractors’ employees and service providers.²¹ Transparency International France also recommends that the whistleblowing procedure should be generally available “to business partners, subcontractors, suppliers and customers”, in order to increase its efficiency²². A fairly broad interpretation of “external and occasional co-workers” is thus currently in use.

The individual whistleblower

Only an individual (never a legal entity) can be considered as a whistleblower in the system set up by the Sapin II Law. Legal entities²³ can always alert the authorities to wrongdoings, but such whistleblowing would be “outside the framework” and they do not benefit from special protection under the law. This is notably the situation of unions, which are often observers of deviant corporate behaviour and could thus very well act as whistleblowers, even if their action is not protected by the Sapin II Law.

Whistleblowers must act disinterestedly,²⁴ which means they must not derive any benefit from their disclosures, which must not be made in return for any payment.

¹⁶ Sapin II Law 6–15, clarified by Decree 2017-564 of 19 April 2017 on the procedures for the responding to reports by whistleblowers in public or private legal entities, or state administrations.

¹⁷ Cons. const. 8 déc. 2016, n° 2016-740 DC: loi organique relative à la compétence du Défenseur des droits pour l’orientation et la protection des lanceurs d’alerte (organic law on the competence of the Defender of Rights regarding the direction and protection of whistleblowers); Cons. Const. 8 déc. 2016, n° 2016-741 DC: loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (law on transparency, anti-corruption and modernisation of economic life).

¹⁸ Sapin II Law art.8.

¹⁹ Sapin II Law art.8 and Decree 2017-564 of 19 April 2017 art.6, cited earlier.

²⁰ Cons. Const. 8 déc. 2016, n° 2016-741 DC.

²¹ *Guide Orientation et protection des lanceurs d’alerte* (Juillet 2017), p.11.

²² Transparency International France, *Dispositif anticorruption de la loi Sapin II* (2017), p.22.

²³ Including unions and associations.

²⁴ Sapin II Law art.6.

A whistleblower must also act in good faith, and not out of personal motivations of revenge or retaliation. This “good faith” criterion is assessed on a case-by-case basis. A person making allegations he/she knows to be false is not acting in “good faith” and could be prosecuted under the law against the makers of false accusations.²⁵

Behaviour that justifies whistleblowing

The range of activity concerned is fairly broad, and also covers the firm’s trade secrets.

First, activity that can give rise to whistleblowing must involve a certain degree of seriousness, corresponding to offences classified as *crimes* or *délits*; more minor offences classified as *contraventions* are excluded.²⁶ It is thus up to the whistleblower to assess the appropriate classification; no advance consultation procedure exists if he/she has a doubt as to whether the wrongdoings observed constitute a *délit* or a *crime*. This might lead the potential whistleblower to decide against alerting the authorities, given the risk of falling outside the scope of application of the protective law.

A serious, evident violation of international commitments also falls within the range of wrongdoing that can be reported. If the international commitment concerned has been properly ratified by France, failure to apply it can give rise to whistleblowing.²⁷

In fairly general terms, the law concerns “a serious threat or prejudice to the general interest”.²⁸ The concept of the general interest includes public order and the public interest.

Whistleblowers cannot be held criminally liable for disclosing information that violates a secret protected by the law, provided that the disclosure is necessary and proportional to preservation of the interests at issue, and follows the proper procedures.²⁹ This provision is now enshrined in French criminal law.³⁰

However, any facts, information or documents of any nature or form that are covered by the laws on national official secrets, medical confidentiality or lawyer-client privilege are excluded from the whistleblowing laws.³¹

Apart from information relating to these three kinds of absolute secrecy (official secrets, medical confidentiality or lawyer-client privilege), the principle is that a whistleblower cannot be held criminally liable for revealing other types of secrets (such as tax or banking secrets).

The whistleblower must be able to prove that he/she has personal knowledge of the information reported, meaning that he/she must have had direct access to the information in question.³² This point must be verified by the judges in each

²⁵ *Dénonciations calomnieuses*: France’s Criminal Code art.226-10.

²⁶ *Contraventions* are the least serious group of offences and are handled by police tribunals.

²⁷ CEDH, 18 oct. 2011, *Sosinowska*, n° 10247/09; CEDH, 12 févr. 2008, *Guja c/Moldavie*, n° 14277/04, AJDA 2008, 978, chron. J.-F. Flauss.

²⁸ Sapin II Law art.6.

²⁹ Sapin II Law art.7.

³⁰ France’s Criminal Code art.122-9.

³¹ Sapin II Law art.6.

³² Appendix to the recommendation by the Agence Française Anticorruption, regarding internal whistleblowing procedures.

case. The aim is to eliminate “second-hand whistleblowers” who repeat information that has already been divulged.³³

The whistleblowing procedure

The Sapin II Law sets out a strictly defined procedure³⁴ for whistleblowing. As noted earlier, this only applies to whistleblowers reporting information about the organisation that employs them or for which they work occasionally. It does not apply to whistleblowers who are totally “external” to the firm and have no work-related link with it.³⁵

The first stage is alerting the direct or indirect superior, the employer, or a person designated by the employer, to the facts arousing concern. If the person informed fails to respond to this alert within a reasonable period, the second stage is notifying the legal, administrative or professional authorities.

Finally, if after three months there has been no response from these bodies, the whistleblower can “go public”. However, in the event of serious, imminent danger or a risk of irreversible damage, the whistleblower can opt to begin directly at the second or third stage.

The existence of these channels for whistleblowing by workers is explained by the need to regulate such action. Firms are required to set up a procedure for employees to report problematic situations. Guaranteed anonymity for whistleblowers is one way to prevent cover-ups, but it can also have the undesirable effect of removing the sense of responsibility and leading to false reports.

Information that could identify the whistleblower cannot be divulged without the person’s consent, except to the legal authorities. Information that could identify the person accused by a whistleblower cannot be divulged, except to the legal authorities, until it is established that the alert is well founded.

Breaches of these confidentiality rules are punishable by criminal sanctions.³⁶ A criminal sanction is also applicable for obstructing the passing-on of information revealed by a whistleblower.³⁷

This whistleblowing procedure was scrutinised by France’s Constitutional Council. For the first time since the enactment of the NRE (New Economic Regulations) Law of 15 May 2001,³⁸ the Constitutional Council was requested to undertake a preliminary inspection of a law before its enactment. This request came from the President of the Senate, more than 60 senators, more than 60 members of parliament, and finally the Prime Minister. In its decision issued on 8 December 2016,³⁹ the Council rejected some 30 provisions. Nonetheless, most of the measures contained in the bill of law were adopted (particularly the measures

³³ In French, *lanceurs d’alerte par procuration*: Rapp. Sénat n° 712, p.48.

³⁴ Loi Sapin II art.8; J.P. Foegel and S. Slama, “Refus de transmission d’une QPC sur la protection des fonctionnaires lanceurs d’alerte”, *Rev. droits de l’homme*, 14 mars 2014, p.13.

³⁵ Cons. constit. Décision n° 2016-740 et 2016-741 DC 8 décembre 2016.

³⁶ Sapin II Law art.9: “Divulging confidential information defined in 1 is punishable by a prison sentence of up to two years and a fine of up to €30,000.”

³⁷ Sapin II Law art.13: “Any person who obstructs, in any way whatsoever, the passing on of a report to the people and organisations mentioned in the first two paragraphs of I of article 8 is punishable by a prison sentence of up to one year and a fine of up to €15,000.”

³⁸ A. Lecourt, “Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite loi ‘Sapin 2’”, *RTD Com.* 2017, p.101.

³⁹ Decision n° 2016-741 DC of 8 December 2016.

concerning the obligation to set up a compliance system,⁴⁰ the creation of a French anti-corruption agency⁴¹ and the introduction of a public interest legal settlement named the *convention judiciaire d'intérêt public*, which can be considered equivalent to a Deferred Prosecution Agreement⁴²).

The senators requesting the Constitutional Council's analysis argued that the new law's definition of the whistleblower was too vague, and that since the exemption from criminal liability explained earlier depended on that definition, this resulted in violation of the principle of legality of offences and penalties of art.34 of the Constitution, of the principle of equality, and the principle of proportionality of sanctions.⁴³ The Constitutional Council did not concur; on the contrary, it approved those provisions, considering that the definition of whistleblowers was sufficiently clear.

More specifically, the issue was that the definition of the whistleblower laid down in the law (art.6) seemed to cover a broader scope than the scope of the whistleblowing procedure required by the law (art.8), since this definition is not restricted to employees of the organisation, while the whistleblowing procedure is internal to the firm. The persons requesting the preliminary analysis argued that these articles were inconsistent and lacked intelligibility.

The Council considered that the general definition of whistleblowers

“should apply not only to cases stipulated in article 8, but also, where relevant, to other whistleblowing procedures introduced by the legislator, beyond the work environment”⁴⁴.

It therefore took the view that the legislator's use in art.6 of a more general definition of the whistleblower, which was not confined to employees of the organisation or people working with it, did not have the effect of making the disputed provisions unintelligible. Consequently, the Council decided that the articles under discussion were in conformity with the French Constitution.

Protection of the whistleblower

The procedure

The need to protect whistleblowers from potential negative reactions by their firm has become apparent, and retaliatory measures by the employer towards the employee are forbidden. For example, no one can be eliminated from a recruitment procedure, or refused an internship or training session, and no employee can be sanctioned, dismissed or subjected to direct or indirect discrimination. This concerns pay, profit-sharing or share awards, training, outplacement, assignments, qualification, classification, promotion, transfers and contract renewals. Any action taken in respect of a whistleblower in disregard of these rules will be declared null and void.⁴⁵

⁴⁰ Sapin II Law art.17.

⁴¹ Sapin II Law arts 1-5.

⁴² Sapin II Law art.22.

⁴³ *Commentary by the Constitutional Council on Decisions n° 2016-740 DC et n° 2016-741 DC of 8 December 2016*, p.4.

⁴⁴ Decision n° 2016-741 DC of 8 December 2016 at [7].

⁴⁵ France's Labour Code art.L.1132-4.

However, this protection is conditional on compliance with the defined whistleblowing procedure.⁴⁶ In the event of a dispute over any retaliatory measure by the employer, the employer must prove that his decision is justified by objective factors that are unrelated to the disclosures made by the whistleblower.⁴⁷ The whistleblower, meanwhile, must simply present factual evidence that supports the presumption that he/she followed the procedure set out by the law.

If the whistleblower's work contract is terminated after he/she has revealed problems, the employee can take the case to the employment tribunal in summary proceedings,⁴⁸ as set out in the Sapin II Law.⁴⁹

All these measures taken together now form a common core of rules applicable to whistleblowers, particularly concerning their protection against any retaliation for their disclosures.⁵⁰ This new protection can be assessed in the light of past European court rulings in such matters.

The European Court of Human Rights has already examined the issue, in a case that led to a landmark ruling⁵¹ about protection of whistleblowers. The case concerned a Mr Guja, head of the press department of the Moldovan Prosecutor General's office, who alerted his superior to the existence of letters suggesting that the Deputy Speaker of Parliament, Mr Vadim Misin, had put pressure illegally on the Prosecutor General's office to show leniency towards police officers accused of violence and abuse of power. After several months had passed with no response, Mr Guja released the letters to the press. In his view they were not confidential, and by disclosing them he was advancing the fight against corruption to enhance the image of the Prosecutor General's office. Yet after doing so, he was dismissed.

Mr Guja brought an action against the Prosecutor General's office seeking reinstatement,⁵² but when this was unsuccessful he took the matter to the European Court of Human Rights to have his dismissal overturned. The court judged that the disclosures to the press were justifiable since in this case a high-level politician had sought to influence ongoing criminal proceedings, and without the disclosures, that information would not have been public knowledge, although it is of crucial importance for citizens of a democratic society.

The court also considered that Mr Guja had acted in good faith, and that the sanction of dismissal applied—the harshest penalty possible—had negative repercussions both for his own career and for other members of the Prosecutor General's office, since there was a risk that they might be discouraged from revealing other instances of misconduct.

The court thus found that the interference with Mr Guja's right to freedom of expression was not "necessary in a democratic society", and concluded that art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms had been violated. This landmark ruling gave official recognition to a status and protection for the whistleblower.

⁴⁶ Sapin II Law art.10(I)(1°); Labour Code art.L.1132-3-3 revised.

⁴⁷ Sapin II Law art.10(I)(2°); Labour Code art.L.1132-3-3 revised.

⁴⁸ The "référé" procedure for urgent cases.

⁴⁹ Sapin II Law art.12.

⁵⁰ "Le statut du lanceur d'alerte créé par la loi Sapin II, Loi n° 2016-1691 et loi organique n° 2016-1690 du 9 décembre 2016", *Liaisons sociales*, 2 January 2017.

⁵¹ *Cuja v Moldova* (14277/04), 12 February 2008 ECtHR.

⁵² On the grounds of art.10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

A whistleblower does not make revelations for money, and yet in certain circumstances, such as reporting information to the tax authorities, whistleblowers may be paid. This is common practice in the United States (see below),⁵³ contributing to the citizenship approach the country wants to develop in individuals. According to a European regulation,⁵⁴ Member States can provide financial incentives for anyone supplying useful information about market abuses.

Finally, note that the AMF⁵⁵ and the ACPR⁵⁶ are required to have procedures in place so that they can be informed of any breach of obligations defined by European regulations or the Monetary and Financial Code, or the general regulations of the AMF, which are monitored by both of these authorities.⁵⁷

The role of the Defender of Rights

France's *Défenseur des droits*, or Defender of Rights, is an independent government authority in charge of ensuring that rights and freedoms are protected and equality is promoted⁵⁸. This institution has succeeded the Mediator of the Republic, the Defender of Children, the High Authority for fighting discriminations and promoting equality (HALDE) and the national Commission for Ethics and Security (CNDS). Its missions and powers are defined by organic law 2011-333 and ordinary law 2011-334 of 29 March 2011.⁵⁹

Originally, the Defender of Rights had four major missions:

1. to fight discrimination, both direct and indirect, prohibited by law or by an international commitment properly ratified or approved by France, and to promote equality;
2. to defend rights and freedoms within the framework of relations with state administrations, local authorities, public establishments and organisations invested with a public service mission;
3. to defend and promote the best interests and rights of children enshrined in the law or in an international commitment properly ratified or approved by France;
4. to ensure that the people exercising security activities on the territory of the French Republic do so ethically.

The organic law of 9 December 2016 introduced a new mission concerning the rules regarding the whistleblower. This law's sole article stipulates that the Defender of Rights is now in charge of directing any whistleblower to the competent authorities and keeping watch over the whistleblower's rights and freedoms.

The Constitutional Council logically validated this new competence for the Defender of Rights,⁶⁰ noting that its role of watchdog for rights and freedoms enabled it "to help anyone who considers themselves the victim of discrimination to identify the appropriate procedures for their case". Consequently the organic

⁵³ The Dodd-Frank Act of 2010 allows the Securities and Exchange Commission to reward whistleblowers.

⁵⁴ Regulation 596/2014.

⁵⁵ Autorité des marchés financiers, the French financial market regulator.

⁵⁶ Autorité de contrôle prudentiel et de résolutions, the French Prudential Supervision and Resolution Authority.

⁵⁷ Sapin II Law art.16, C. mon. Fin art L.634-1 nouveau.

⁵⁸ French Constitution art.71-1.

⁵⁹ Fiche de synthèse n°12 : Le Défenseur des droits, Assemblée Nationale.

⁶⁰ Decision n° 2016-741 DC of 8 December 2016 at [5].

law-maker, “considering that whistleblowers run the risk of discrimination against them by the organisation concerned by their revelations”, was perfectly at liberty

“to give the Defender of Rights responsibility for directing these people towards the competent authorities, by virtue of the law, to collect the information they have to report”.⁶¹

The Defender of Rights himself can set off an alert, or be contacted by any individual. However, one other mission attributed by the organic law was rejected by the Constitutional Council. The organic law’s sole article originally gave the Defender of Rights a final mission of providing financial aid for whistleblowers.

The purpose of this financial aid was to help a whistleblower to take legal action thanks to

“an advance against legal costs, and if he/she should encounter serious financial difficulties due to the disclosures made, temporary financial assistance”.⁶²

The proposed financial aid would clearly not have been as high as the amounts paid to whistleblowers in the United States (such as the \$104 million paid to Bradley Birkenfeld).⁶³ Nonetheless, it would have prevented a whistleblower from deciding against taking legal action owing to the financial difficulties such action could entail.

The Constitutional Council decided that the mission conferred on the Defender of Rights by art. 71-1 of the Constitution, i.e. ensuring that rights and freedoms are respected, did not include the mission of

“himself providing financial assistance, which could turn out to be necessary, to the people who may report information to him. As a result the organic lawmaker could not, without disregarding the limitations of the competence conferred on the Defender of Rights by the Constitution, allow this authority to give the persons concerned any financial aid or financial support”.⁶⁴

The Council thus rejected the provision about financial support for whistleblowers.

However, it should be noted that the Council acknowledged that financial assistance for whistleblowers “could turn out to be necessary”. This indicates that the question of financial support is not completely ruled out, and could be reintroduced via a different law.

Apart from the rejection of this provision, the Constitutional Council validated all the measures establishing a protected status for whistleblowers. This was a major step forward. It remains to be seen whether the application of these provisions in practice will give whistleblowers effective protection and eliminate certain types of abuse and corruption that can arise in firms.

⁶¹ Decision n° 2016-741 DC of 8 December 2016 at [5].

⁶² J. Bonnet, P.-Y. Gahdounet and D. Rousseau, “Chronique de jurisprudence constitutionnelle”, *Revue du droit public*, Janvier 2017, n° 1, p.175.

⁶³ L. Saunders and R. Sidel, “Whistleblower Gets \$104 Million”, *Wall Street Journal*, 11 September 2012.

⁶⁴ Decision n° 2016-740 DC of 8 December 2016 at [5].

The whistleblower in comparative law

The US laws on whistleblowing will be followed by a brief presentation of the corresponding laws in the UK and Canada.

Whistleblowing in the US

The prominence of whistleblowers in the US rose considerably after the mainstream media's acknowledgement, in 2002,⁶⁵ of the importance of several whistleblowers in high-profile corporate frauds.⁶⁶ The US provides a specific legal framework for whistleblowers and is often seen as the pioneer in providing a protective and financially rewarding environment for them.⁶⁷ Eligible whistleblowers may claim a monetary reward for reporting unlawful activities, creating a financial incentive for whistleblowing when individuals suspect illegal activity.

Therefore, in the US, the legal aspects of whistleblowing chiefly concern the protection of whistleblowers, and the question of whether and how they can be compensated for whistleblowing. Three major federal laws which have been enacted sequentially over time are relevant for understanding whistleblowing in the US: the False Claims Act, the Sarbanes-Oxley Act (SOX), and the Dodd-Frank Act. These laws are also completed by specific provisions with regard to whistleblowing in cases of tax fraud.

Before SOX—the False Claims Act

Before SOX, whistleblowing laws mainly concerned individuals reporting wrongdoing that cheated the Government. The False Claims Amendments Act of 1986⁶⁸ is a federal law which was adopted to protect the US Government from suppliers overcharging for the provision of goods or services. The original False Claims Act dated from the American Civil War, a period characterised by booming military forces requiring supplies of food, clothing and equipment from third parties.⁶⁹ Soldiers were encouraged to take action if they suspected that contractors were taking advantage of the Government. The law was initially passed on 2 March 1863 under President Lincoln's administration (and is also known as the Lincoln Law). It has been modified several times since then, in particular in 1986,⁷⁰ in 2008, and by the Patient Protection and Affordable Care Act of 2010.⁷¹ Citizens suspecting abuse (relators) by a supplier can initiate action (a *qui tam* action) against the supplier in the name of the Government and claim a reward of between 15 and 30 per cent of the resulting fine. Recently, Valeant Pharmaceuticals paid \$54 million to settle civil charges concerning its Salix unit, which used kickbacks

⁶⁵ R. Lacayo, A. Ripley and M. Sieger, "The whistleblowers – persons of the year", *Time Magazine*, 30 December 2002, pp.38–53.

⁶⁶ Sherron Watkins was recognised for her role in revealing the Enron corporate fraud, and Cynthia Cooper for her role in revealing the WorldCom fraud. The importance of a third whistleblower (Coleen Rowley) in a case involving the FBI was also recognised.

⁶⁷ D. Schultz and K. Harutyunyan, "Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia" (2015) 1 *International Comparative Jurisprudence* 87.

⁶⁸ False Claims Amendments Act 1986, Pub. L. No.99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§3729–3733 (1994)).

⁶⁹ E. Lippman and M. McMahon, "Professionalism and Politics in the Procurement Process: United States Civil War Early Years" (2017) 44 *Accounting Historian Journal* 63.

⁷⁰ 31 U.S.C. §§ 3729–3733 (1988).

⁷¹ Patient Protection and Affordable Care Act (2010) Pub. L. No.111-148, 124.

to compensate doctors in order to make them promote Salix products. This led to the submission of many fraudulent reimbursement claims to Medicare and Medicaid. The payment settles claims made by a physician and four former Salix employees under the False Claims Act.⁷² Evidence suggests that the US Government is able to collect a significant amount of funds under the False Claims Act. In 2016 alone, the Justice Department recovered \$4.7 billion from False Claims Act cases, making it the third-highest proceeds year in the False Claims Act's history.⁷³

However, unlike the SOX and Dodd-Frank Acts, the False Claims Act concerns whistleblowers who report misconduct that is detrimental to the US Government. It does not apply to whistleblowers whose revelations concern misconduct that is detrimental to other parties.

The SOX Act

After a series of high-profile corporate frauds among publicly listed firms in the US shortly after the turn of the 21st century,⁷⁴ the Sarbanes Oxley Act (SOX) was passed in 2002 to improve corporate governance and prevent future frauds.⁷⁵ This law addresses a number of important corporate governance topics including external auditing, the extent of financial disclosures, internal control, and the responsibility of preparers of financial information such as CEOs and CFOs. As a legislation package it has been subject to a number of criticisms, primarily relating to the costs it creates for public firms, especially smaller public firms.⁷⁶

Importantly, SOX introduced major rules for whistleblowers, attempting to make whistleblowing a key mechanism for enforcement of good corporate governance.⁷⁷ According to s.806 of SOX, whistleblowers can report suspected wrongdoing either internally or externally. Internal whistleblowing is made to

“a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)”.

Internal whistleblowing facilitates corrective steps from top management without creating negative publicity for the firm—but it also facilitates cover-ups if top management fails to address the revealed wrongdoings adequately. Sherron Watkins, the Enron whistleblower, initially contacted her top management, but

⁷² J. Stempel, “Valeant pays \$54 million to settle US kickback, fraud claims” (9 June 2016), *Reuters*, <https://www.reuters.com/article/us-valeant-lawsuit-whistleblower/valeant-pays-54-million-to-settle-u-s-kickback-fraud-claims-idUSKCN0YV2F1> [Accessed 21 February 2019].

⁷³ US Department of Justice, “Justice Department Recovers Over \$4.7 Billion From False Claims Act Cases in Fiscal Year 2016” (14 December 2016). See also US Department of Justice, 2010. “Two Johnson & Johnson Subsidiaries to Pay over \$81 Million to Resolve Allegations of Off-Label Promotion of Topamax Epilepsy Drug Approved by FDA Promoted for Psychiatric Uses” (29 April 2010).

⁷⁴ In addition to Enron and WorldCom such scandals include, for example, Waste Management, Adelphia, and Tyco International. For Enron, see, e.g., Report of investigation by the special investigative committee of the board of directors of Enron Corp (1 February 2002), <http://news.findlaw.com/wsj/docs/enron/sicreport/index.html> [Accessed 21 February 2019].

⁷⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

⁷⁶ Final Report of the Advisory Committee on Smaller Public Companies to the US Securities and Exchange Commission (23 April 2006), <https://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf> [Accessed 21 February 2019].

⁷⁷ T.M. Dworkin, “SOX and Whistleblowing” (2007) 105 *Michigan Law Review* 1757.

this did not prompt an appropriate response.⁷⁸ This is why whistleblowers often turn to the media to reveal illegal activities.⁷⁹

Yet, SOX does not protect whistleblowers who contact the media.⁸⁰ For a whistleblower reporting suspected illegal activities externally, protection is only provided when such reports are made specifically to a Federal regulatory or law enforcement agency, or any Member of Congress (or any committee of Congress).

To protect whistleblowers against retaliation from their employers, s.806(a) of SOX states that firms cannot “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against” anyone who reports misconduct internally to a person with authority to investigate and stop wrongful activities.⁸¹ Therefore, employees have the right to file a civil suit against their employers under the provisions of s.806 within 180 days (later reduced to 90 days by an amendment) of the retaliatory action.⁸²

Another important provision of SOX is the requirement that public firms create procedures for employees to file internal whistleblower complaints anonymously, in order to ensure confidentiality for any whistleblowing employees. Section 301 of SOX requires audit committees to establish procedures for reviewing complaints about potentially inappropriate auditing and accounting practices. Such provisions are generally detailed in firms’ codes of ethics.⁸³

Despite the increased protection offered to whistleblowers, SOX still has several shortcomings. Whistleblowing is a risky activity. In 2016 in the US, 53 per cent of employees reporting internal misconduct faced some retaliation in the workplace.⁸⁴ The actual protection offered to whistleblowers is reduced by the administrative complexity of the legislation, and the short time period allowed for whistleblowers to file a civil suit against their employers after retaliation. In addition, given the risks taken by employees engaging in whistleblowing,⁸⁵ the absence of a reward system for whistleblowers limits the effectiveness of SOX.⁸⁶

The Dodd-Frank Act

After the 2008–09 global financial crisis, which was triggered by the subprime real estate market in the US and soon had major spillover effects on the financial system and both domestic and foreign economies,⁸⁷ a new series of corporate

⁷⁸ M. Swartz and S. Watkins, *Power Failure: The Inside Story of the Collapse of Enron* (London: Currency Doubleday, 2003).

⁷⁹ E.S. Callahan and T.M. Dworkin, “Who blows the whistle to the media, and why: Organizational characteristics of media whistleblowers” (1994) 32 *American Business Law Journal* 151.

⁸⁰ See 18 U.S.C. §1514A (Supp. II 2002).

⁸¹ Sarbanes-Oxley Act of 2002 §806(a), 18 U.S.C. §1514A (Supp. n 2002).

⁸² Sarbanes-Oxley Act §806, 18 U.S.C. §1514A. The amendment was made by Senators Grassley and Leahy. See Richard E. Moberly, “Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win” (2007) 49 *Wm. & Mary L. Rev.* 65, <http://scholarship.law.wm.edu/wmlr/vol49/iss1/3> [Accessed 21 February 2019].

⁸³ C.C. Verschoor, “Will Sarbanes-Oxley Improve Ethics?” (2004) 85 *Strategic Finance* 15.

⁸⁴ ECI (Ethics & Compliance Initiative), “Global business ethics survey: Measuring risk and promoting workplace integrity” (Ethics Research Center, 2016).

⁸⁵ G. Sinzdak, “An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements” (2016) 96 *California Law Review* 1633.

⁸⁶ Dworkin, “SOX and Whistleblowing” (2007) 105 *Michigan Law Review* 1757.

⁸⁷ D. Allen and R. Faff, “The Global Financial Crisis: Some Attributes and Responses” (2012) 52 *Accounting & Finance* 1.

scandals were revealed.⁸⁸ The Dodd-Frank Wall Street Reform and Consumer Protection Act⁸⁹ was enacted in 2010 to address several factors that were believed to have caused (or exacerbated) the financial crisis.⁹⁰

Some whistleblowers were publicly identified during the financial crisis and became well-known names. One example is Harry Markopolos, who had repeatedly informed the SEC about his suspicions of the \$64 billion Bernard Madoff Ponzi Scheme, and became a prominent figure in whistleblowing.⁹¹ His story highlights several shortcomings of the pre-Dodd-Frank laws as regards the effectiveness of whistleblowing, and put considerable pressure on the SEC.⁹²

In particular, the Dodd-Frank Act contains several provisions intended to reinforce the role of whistleblowers in the fight against corporate fraud. Probably the biggest change for whistleblowers was the fact that the Dodd-Frank Act allows financial rewards from the SEC for whistleblowing.⁹³

The Act amended the Securities and Exchange Act of 1934 by adding a new section, s.21F, “Securities Whistleblower Incentives and Protection”, which led to the creation of the SEC Office of the Whistleblower.⁹⁴ The SEC website states:

“Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that the Commission shall pay awards to eligible whistleblowers who voluntarily provides [*sic*] the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over \$1 million.”⁹⁵

A whistleblower is defined by the Dodd-Frank Act as

“any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission”.⁹⁶

According to s.21F(b)(1), if the SEC considers that one or more whistleblowers are eligible to receive an award, the amount should comprise between 10 and 30 per cent of the funds collected as monetary sanctions in the action or related actions against the wrongdoer. The amount awarded to whistleblowers within this 10–30 per cent range is at the discretion of the SEC.⁹⁷ From 2012 to 2016, the SEC Award programme for whistleblowers paid over \$100 million to whistleblowers. Between

⁸⁸ Such scandals involved in particular banks such as Citigroup and AIG. Major events were also the bankruptcy of Lehman Brothers which filed for Chapter 11 on 15 September 2008 following liquidity issues, and the Madoff Ponzi Scheme scandal.

⁸⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, Pub. L. No. 111-203, 124 Stat. 1376.

⁹⁰ The provisions of the Dodd-Frank Act include, for instance, the creation of the Financial Stability Oversight Council and the Office of Financial Research, additional derivatives regulation, new regulation on credit rating agencies, and additional rules aiming at improving consumer protection.

⁹¹ US Securities and Exchange Commission, 2009. “Investigation of failure of the SEC to uncover Bernard Madoff’s Ponzi scheme – public version” (2009), <https://www.sec.gov/news/studies/2009/oig-509.pdf> [Accessed 21 February 2019]. The 477-page long report cites the name of Markopolos 318 times, which illustrates the importance of the role of whistleblowers. See also E.W. Bright, “Letters to the editor – it isn’t surprising that SEC missed Madoff’s scam”, *Wall Street Journal*, 23 December 2008, p.A12.

⁹² H. Markopolos, *No One Would Listen: A True Financial Thriller* (Hoboken, NJ: John Wiley & Sons, 2010).

⁹³ M.H. Hurwitz and J. Kovacs, “An Overview of the SEC’s Whistleblower Award Program” (2016) 21 *Fordham Journal of Corporate & Financial Law* 531.

⁹⁴ Securities Exchange Act of 1934 §21F, 15 U.S.C §78u-6 (2012).

⁹⁵ See SEC, “Office of the Whistleblower”, <https://www.sec.gov/whistleblower> [Accessed 21 February 2019].

⁹⁶ 15 U.S.C. §78u-6(a)(6).

⁹⁷ 15 U.S.C. §78u-6(c)(1)(B).

the programme's inception in 2012 and the end of 2016, the Office received approximately 14,000 whistleblower disclosures, and financial rewards had been given to 33 individuals, the largest individual amount exceeding \$30 million.⁹⁸ Despite the large number of disclosures made, only a small number of individuals received financial rewards.

Rule 21F-3 states that to be able to claim a reward, whistleblowers must satisfy four requirements⁹⁹: (1) the information must have been given to the SEC voluntarily; (2) the information must be original; (3) the information must have led to a successful action by the SEC, a federal court or administrative action; and (4) the monetary sanctions imposed by the SEC must exceed \$1 million.

The Dodd-Frank Act also expanded the protection in place for whistleblowers. The fact that it reiterated the need to protect whistleblowers from retaliation probably suggests that the SOX provisions were somehow ineffective. Building on the protection that already existed in the SOX, the Dodd-Frank Act provided whistleblowers with a longer statute of limitations, the ability to file suits directly in federal court, and the possibility of larger back pay awards.¹⁰⁰ As the SEC explains:

“The Dodd-Frank Act also expressly prohibits retaliation by employers against whistleblowers and provides them with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act.”¹⁰¹

In 2017, the Dodd-Frank protection for internal whistleblowers was called into question. It was argued that whistleblowers reporting securities frauds internally rather than directly to the SEC may not be protected by the Dodd-Frank Act.¹⁰² The US Court Appeals for the Ninth Circuit finally concluded, in *Somers v Digital Reality*, that internal whistleblowers were also protected by the Dodd-Frank Act.¹⁰³

The Internal Revenue Services

Whistleblowers in the US may also seek financial rewards from the Internal Revenue Services (IRS) in cases involving tax fraud.¹⁰⁴ Since the 19th century, the IRS has allowed payments to whistleblowers who assist the IRS in detecting tax fraud, taken out of the proceeds collected.¹⁰⁵

More precisely, the IRS Whistleblower Office

“pays money to people who blow the whistle on persons who fail to pay the tax that they owe. If the IRS uses information provided by the whistleblower,

⁹⁸ Securities and Exchange Commission, “SEC Whistleblowers Program Surpasses \$100 Million in Awards” (30 August 2016), <https://www.sec.gov/news/pressrelease/2016-173.html> [Accessed 21 February 2019].

⁹⁹ 17 C.F.R. § 240.21F-3(a).

¹⁰⁰ M.M. O'Malley, “Whistleblower Protections, Retaliation issues, and Investigative Issues Arising Under the Sarbanes-Oxley and the Dodd-Frank Act”, American Bar Association Annual Meeting Section of Labor and Employment Law: Cutting Edge Issues in Investigations (Chicago, Illinois: 31 July 2015).

¹⁰¹ See <https://www.sec.gov/whistleblower/retaliation> [Accessed 21 February 2019].

¹⁰² D. Michaels, “Supreme Court Questions Whether Dodd-Frank Protects All Whistleblowers”, *Wall Street Journal*, 28 November 2017.

¹⁰³ United States Court of Appeals for the Ninth Circuit: *Paul Somers v Digital Reality Trust Inc*, No.15-17352 DC. No 3:14-cv-05180-EM.

¹⁰⁴ J.M. Pacella, “Bounties for Bad Behavior: Rewarding Culpable Whistleblowers under the Dodd-Frank Act and Internal Revenue Code” (2015) 17 *University of Pennsylvania Journal of Business Law* 345.

¹⁰⁵ Pacella, “Bounties for Bad Behavior” (2015) 17 *University of Pennsylvania Journal of Business Law* 345.

it can award the whistleblower up to 30 percent of the additional tax, penalty and other amounts it collects”.¹⁰⁶

The current IRS bounty programme offers whistleblowers who help the organisation to collect unpaid taxes a financial reward ranging between 15 and 30 per cent of the collected amounts.¹⁰⁷ Rewards may be paid to whistleblowers who themselves have been convicted of offences.¹⁰⁸

The effectiveness of whistleblowing laws in the US

Despite the US federal legislation protecting whistleblowers, there seems to be some evidence of a disconnection between the theoretical protection of whistleblowers and the harsh reality often faced by whistleblowers.¹⁰⁹ Some firms continue to retaliate against their whistleblowers, suggesting that existing US laws are not necessarily well enforced. In the Wells Fargo fake accounts scandal in 2017, in which, to charge additional fees, the bank created accounts without its clients’ consent, employees who reported the misconduct were the subject of retaliatory action by top managers.¹¹⁰

The whistleblower in the United Kingdom and Canada

Whistleblowing in the UK

Since 1988, the UK has had a fairly formal law establishing a status for whistleblowers¹¹¹ in the public and private sectors: the Public Interest Disclosure Act (PIDA), enacted on 29 June 1998.¹¹² The aim of this law is to protect whistleblowers who are employees of the organisation concerned. It also requires British firms to adopt internal procedures to facilitate whistleblowing.

The PIDA was adopted in the 1980s, a period when the UK had seen several large-scale disasters and financial scandals.¹¹³ The authorities considered that these catastrophes could have been avoided if the organisations concerned had had a clearly defined system of rules for whistleblowing.

The Act introduced strict procedures for whistleblowing, notably setting out a list of situations that could give rise to disclosure.¹¹⁴

¹⁰⁶ See <https://www.irs.gov/compliance/whistleblower-informant-award> [Accessed 21 February 2019].

¹⁰⁷ 26 U.S.C. §7623(a).

¹⁰⁸ D. Kocieniewski, “Whistle-Blower Awarded \$104 Million by I.R.S”, *New York Times*, 11 September 2012.

¹⁰⁹ Michaels, “Supreme Court Questions Whether Dodd-Frank Protects All Whistleblowers”, *Wall Street Journal*, 28 November 2017.

¹¹⁰ See https://ig.ft.com/special-reports/whistleblowers/?utm_content=Whistleblowers&utm_source=Marketing_email [Accessed 21 February 2019].

¹¹¹ F. Chaltiel, “A la recherche d’un statut pour les lanceurs d’alerte”, *Petites Affiches*, n° 049 (9 March 2017).

¹¹² See <https://www.legislation.gov.uk/ukpga/1998/23/contents> [Accessed 21 February 2019].

¹¹³ Examples include (1) the sinking of a ferry off Zeebrugge in 1987 in which 193 people died; (2) the Piper Alpha oil rig explosion in the North Sea in 1988, which killed 160; and (3) the collapse of the Maxwell group in 1991 involving a £440 million pension fraud.

¹¹⁴ The Employment Rights Act (ERA) of 1996 states the following:

“In this Part a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

- a) That a criminal offence has been committed, is being committed or is likely to be committed,
- b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- c) That a miscarriage of justice has occurred, is occurring or is likely to occur,
- d) That the health or safety of any individual has been, is being or is likely to be endangered,

The first such situation is when a criminal offence has been committed, is being committed or is likely to be committed.

Another example is when a person has failed, is failing or is likely to fail to comply with a legal obligation incumbent upon them.

An employee may also reveal a miscarriage of justice that has occurred, is occurring or is likely to occur.

The alarm may also be raised when any individual's health or safety has been, is being, or is likely to be endangered. The risk must be clearly established and not solely potential in nature.

Another situation for disclosure is when damage has been, is being, or is likely to be caused to the environment. This is a major issue for firms, especially with the rise of CSR.¹¹⁵

Finally, the employee can report any information tending to show that one of the above five situations has been, is being or is likely to be deliberately concealed.

To qualify for protection under the law, a whistleblower in the UK must have "reasonable belief" in the legitimacy of the concerns expressed. The courts require an employee to reveal facts, not merely feelings or resentments.

British courts hand out harsh punishments to employers who block whistleblowing procedures. The employee thus obtains reparation founded on the principle of moral and financial prejudice.¹¹⁶

Whistleblowing in Canada

In Canada, the law that took effect on 15 April 2007¹¹⁷ applies to almost all of the federal public sector, comprising 400,000 workers,¹¹⁸ and gives public sector whistleblowers protection against retaliation.

The introduction to this Act states that the public sector is a national institution that is essential to the operation of Canadian parliamentary democracy. With the aim of increasing public trust in the integrity of public servants and building a positive image of public institutions, a whistleblowing procedure was set up, with protection for the whistleblowers themselves.

Recently enacted legislation in Quebec highlights the problems commonly encountered when considering whistleblowers. In November 2016 the Quebec press ran the headline:

"The Québécois party is demanding protection for journalists' sources revealing government scandals, which is not part of the bill of law filed by the liberals."

In a question and answer session, Nicole Léger, a Member of the National Assembly, argued that:

- e) That the environment has been, is being or is likely to be damaged,
- f) That information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

¹¹⁵ Corporate social responsibility.

¹¹⁶ The damages awarded vary between £500 and £25,000. Punitive "aggravated damages" of up to £24,000 may also be awarded. The financial prejudice takes into consideration the whistleblower's age and chances of finding another job in the event of dismissal. A decision of 17 August 2011 awarded one 53-year-old whistleblower damages of £1,210,453.

¹¹⁷ The Public Servants Disclosure Protection Act.

¹¹⁸ Including all Ministries, parent Crown Corporations, and the Royal Canadian Mounted Police.

“Allowing public disclosure is opening a further door to bring the truth to light, even though that truth may be disturbing. Why is the minister not doing everything possible to encourage revelations and protect whistleblowers?”

Quebec’s Bill 87,¹¹⁹ entitled “An Act to facilitate the disclosure of wrongdoings within public bodies” was controversial. The journalists’ association, *Fédération professionnelle des journalistes du Québec*, objected to much of it, on the grounds that it would provide a further obstacle for any whistleblower wanting to talk to the media.

The Federation explained to the parliamentary commission that “this bill of law, far from simplifying matters for whistleblowers, places the burden of proof on their shoulders”, since to reveal wrongdoings to the public a whistleblower would be required by the law to prove that the acts in question represent a “serious risk for the health or safety of a person, or for the environment”.¹²⁰ Also, before going to the press, a public sector worker would have to “communicate this information to the police or the commissioner” of the Permanent Anticorruption Unit UPAC.¹²¹

Conclusion

Many paradoxes and ambiguities remain regarding the status of the whistleblower, whose necessity to society is now recognised in many countries. Although the various laws for whistleblowing appear to encourage disclosures, they remain strictly regulated.

In France, for example, there are several conditions for becoming a whistleblower as defined by the Sapin II Law (notably, information must be reported disinterestedly and in good faith by an individual who has personal knowledge of the facts). Otherwise, the protective status provided for whistleblowers will not apply. The fear of not qualifying for that status could discourage a person from whistleblowing.

The recent creation of several whistleblowing procedures in France (art.6 and following of the Sapin II Law; art.17 of the Sapin II Law and art.1 of the law on the duty of vigilance by parent companies and outsourcing firms) obliges firms to have several channels for reporting misconduct, either separately or connected in a single set of whistleblowing rules, in addition to the rules that may apply by virtue of foreign regulations.

Despite these practical difficulties, France’s Sapin II Law indicates a clear ambition to protect whistleblowers, and thereby increase the efficiency of anti-corruption action, particularly inside firms. This determination deserves to be highlighted and encouraged.

It remains to be seen whether this law will be followed by any actual increase in whistleblowing, and whether the information reported will receive an appropriate response, particularly inside firms.

¹¹⁹ Bill 87 art.6.

¹²⁰ Quoted in Chatiel, “A la recherche d’un statut pour les lanceurs d’alerte”, *Petites Affiches*, n° 049 (9 March 2017), p.4.

¹²¹ The commissioner’s mission is to ensure the co-ordination of anti-corruption action in public sector contracting. He exercises the duties conferred by Quebec’s Anti-corruption Act, with the independence granted by the same act.