Proceedings

THE DEFENDER OF RIGHTS' EUROPEAN MEETINGS

Protecting whistleblowers: a European challenge

Paris | 3 December 2019

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Proceedings

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Foreword

Since December 2016, the Defender of Rights has been the independent administrative authority responsible for orientation and protection of whistleblowers. As such, it means to play its role to the full in the European Directive of whistleblowers' transposition into French law.

On 3 December 2019, with three years of expertise to its credit and after issuing repeated warnings on the weaknesses of the French system, the Defender of Rights held the first European Colloquium on this subject, bringing together whistleblowers, sociologists, legal experts, practitioners and public authorities from a dozen European countries. The event provided valuable insight with regard to improving the effectiveness of whistleblower protection in the context of the upcoming transposition of Directive 2019/1937 of 23 October 2019 on protection of persons who report breaches of Union law.

Above all, the Defender of Rights calls for preservation of the progress resulting from Law no.2016-1691 of 9 December 2016, known as Sapin II, in particular its broad definition of whistleblower including non-work-related individuals, and the more inclusive scope of alerts. It also recommends that the Government not content itself with a strict transposition of the Directive, but go further, clarifying the role of legal persons (NGOs and trade unions) in whistleblowing procedures, and including a special whistleblowing mechanism at national level relating to questions of national security and military secrecy.

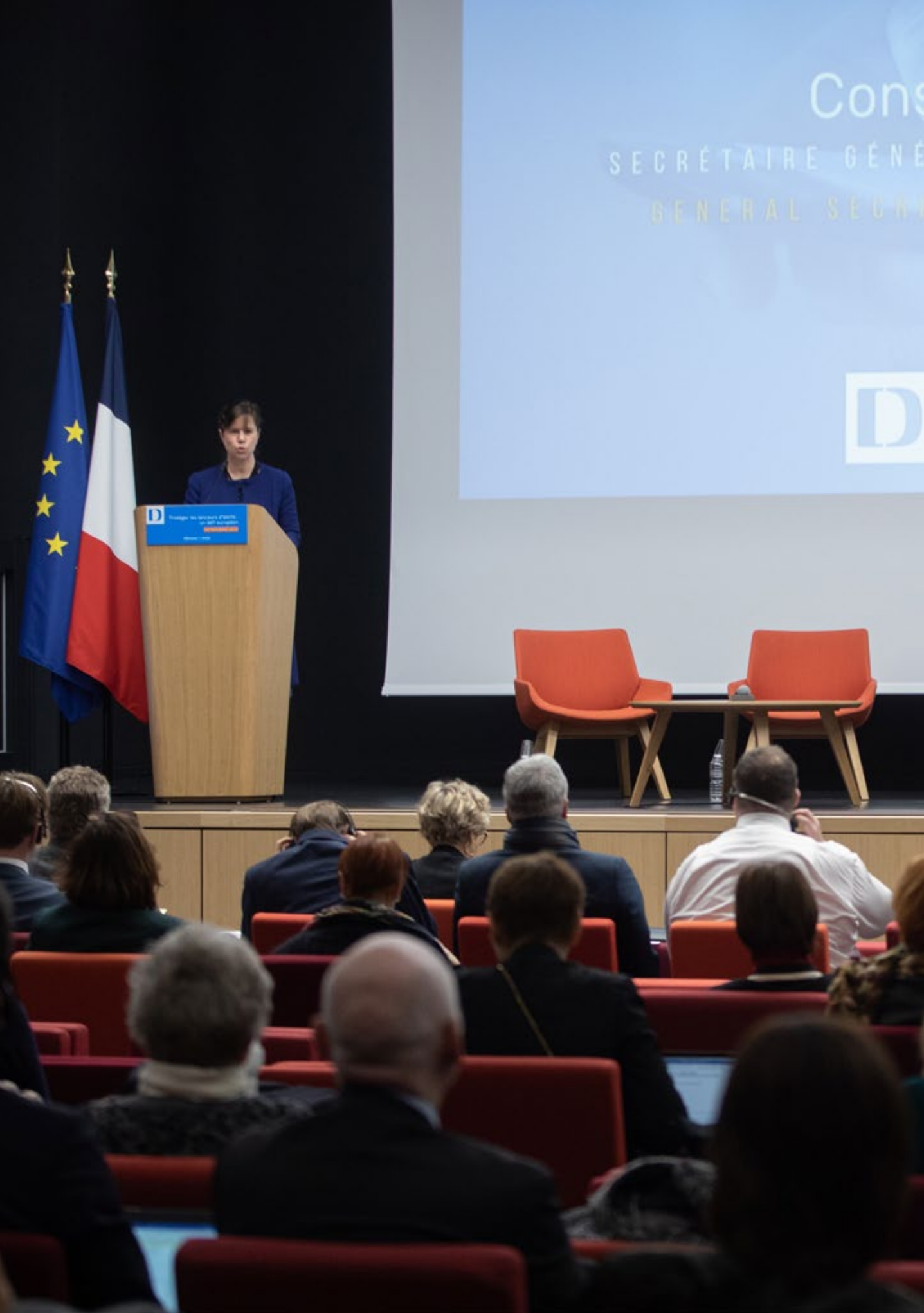
It also hopes that the transposition will provide an opportunity to establish clear, operational legislation on the subject, accessible to everyone. In particular, it will be necessary to harmonise protection regimes and reporting mechanisms, and clarify coordination of the regime for protection of whistleblowers with the regime for protection of trade union representatives. It will also be necessary to ensure that the law is better known and inform citizens of their new rights in clear public fashion.

In substance, in order to provide whistleblowers with maximum protection, special provisions will have to be included, designed to better mitigate the feelings of isolation and solitude expressed by whistleblowers themselves. To do so, it is important that the institution responsible for their protection can provide them with the necessary assistance, lending them financial support if required via the relaxation or extension of existing provisions, guaranteeing that their identity will remain confidential throughout the procedure, and enabling action to be taken upstream of reprisals through development of legal mechanisms. The role played by NGOs and trade unions called upon to lend their assistance to whistleblowers will also have to be clarified.

Major human and financial resources are essential to the implementation of these recommendations.

As regards the reports themselves, improvement of their follow-up and processing is of key importance, in particular by designating external authorities for each field, competent to take responsibility for processing reports and keeping whistleblowers informed. Such bodies will have to enjoy the independence required to process alerts with neutrality and impartiality. Finally, it will be necessary to ensure compliance with the legislation, in particular by stepping up monitoring of compliance with effective implementation of report collection procedures and making regular assessments of mechanisms.

The Defender of Rights will be organising legal workshops bringing together all stakeholders, with a view to developing legally viable technical proposals.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Contents

A human issue

CONTRIBUTION BY IRÈNE FRACHON

A respiratory phycisian at Brest teaching hospital, Irène Frachon blew the whistle on the dangers of the drug Mediator in early 2007, exposing the industrial policy of the pharmaceutical company Servier as well as the failings of the health authorities. In June 2010, she published a book entitled “Mediator 150 mg, how many deaths?”, with Editions Dialogues.

The scandal broke out in November 2010 and culminated in a major six-month trial that opened on 23 September 2019. A compensation process was set up in July 2011 under the French National Office for the Compensation of Medical Accidents (ONIAM), and so far more than 3,700 victims have been acknowledged.

"I THINK OF MYSELF AS A WHISTLEBLOWER."

On 12 June 2010, I was forwarded an email that had been circulating very widely between all the experts at the Medicines Agency, also involving a number of pharmaceutical industry leaders, particularly Servier. This email was being shared between the Agency’s in-house experts, the chairs of the Medicines Agency’s various executive committees and the medicine regulators. It levelled scathing criticism against the publication of a book, a few days previously, entitled “Mediator 150 mg, how many deaths?”. Various methods of insinuation, retaliation and reprisal in my regard were mentioned extensively in these emails which, of course, had not been addressed to me. I was particularly struck on reading the words of one of my critics: “She regards herself as a whistleblower apparently speaking out about irregularities, which are evidently both imaginary and defamatory”.

I was unfamiliar with the term ‘whistleblower’, so I looked it up on Wikipedia. I read that this was the English translation for the already widely developed French concept, ‘lanceur d’alerte’. I confess that I was completely unaware of this notion at the time. And yet I could relate to all the questions, all the difficulties and all the ethical considerations, which I had been grappling with for several years already. I had been voicing and defending this report since early 2007, and here we were now three years later. In this definition, I was intrigued by the subtle differences between the terms. The notion of ‘whistleblower’ typically refers to the moment when we speak out, when we seek to bring to the attention of the courts, of public opinion, what we consider to be a possible crime; whereas a ‘lanceur d’alerte’ (literally, issuer of an alert) perhaps takes action a little earlier in the process of disclosure, by lifting the lid on a potential risk for populations or public health, or the general interest when the concern is not related to health.

These emails, which were forwarded to me to warn me of what happened on 12 June 2010, arrived against a very particular backdrop. A few days earlier, the book I had published had just been censored by the courts following a case referral from the pharmaceutical company, especially the subtitle “how many deaths?”. My loyal publishers republished it by lodging an appeal against this sanction imposed by the Brest Regional Court, an appeal that was eventually won. The atmosphere was therefore far from cheerful.

The disclosure, through the book’s publication, had followed the issuing of a report: in the medical context, this is a pharmacovigilance measure, which is even a forensic requirement.

In February 2007, I noticed that patients were suffering from very serious cardiac and pulmonary illnesses, possibly connected with exposure to a diabetes drug, Mediator. I conducted a pharmacovigilance investigation which doubled up almost as a police investigation, since I found out that the company marketing this medicine – an amphetamine derivative – was lying about its nature so as to keep suspicions of toxicity at bay. It is now being addressed before the Paris court.

I therefore began by "issuing" the required pharmacovigilance alerts via administrative declarations. In this respect, being a whistleblower is a requirement for a doctor or any healthcare professional. This culminated in the drug being withdrawn at the end of 2009, after three years – an abnormally long time – and after encountering widespread resistance. The process becomes less common for a doctor when it comes to speaking out. This medicine was withdrawn without any feedback or questions of any sort – on the problems or on the consequences, perhaps much greater than we might have imagined. A bit like if a car manufacturer withdrew a whole batch because of a braking defect, without warning everyone who had bought that car. I was left feeling profoundly shocked. I knew, from my experience working in Brest, that there had been a great many victims in Brest. I didn't see why there wouldn't be as many – if not more unfortunately – across the rest of France, who were completely oblivious to it, who were perhaps at risk regarding the diagnosis, and who could also claim compensation. What's more, I was also able to identify behaviour that appeared to me to be what I later called "pharma-crime" Not troubling a pharmaceutical company over extremely dangerous practices is of course a danger for the future too.

For all those reasons, I asked myself what I should do.

As a doctor, we are not authorised to cite Article 40[1], as we are not like other civil servants since we are bound by medical secrecy. We don't have the option of contacting a public prosecutor, if we are not ourselves a victim of a side effect, for example. This meant that the identity of the patients, the potential victims, had to be revealed. Leaving the victims to fend for themselves risked turning violently against them, since I had already seen this happen in a previous tragedy linked to the same type of product, by the same pharmaceutical company, Servier – appetite suppressants that were withdrawn in the '90s, called Isoméride and Pondéral. It still struck me how dangerous it is to expose these patients to this potential judicial violence and it seemed to me that another way had to be found, to give them more arguments. In these types of proceedings, it is up to the client, to the victim, to demonstrate the evidence, both of the defectiveness of the products and the link with the health complications manifested. The burden of proof is extraordinarily heavy and cannot generally prevail – or only with great difficulty. This is the situation I had to set right.

I had journalist friends who told me they could run articles, investigations, special reports in national weeklies, etc. That all struck me as difficult too, as it would mean I wouldn't have complete control over the information, which was complex and technical. Any wrong move could potentially be very dangerous. In the end, the idea came to me of publishing a strictly fact-based, chronological, concrete account, referenced for each theme. Over the last three years, the investigation into these medicines had culminated in a number of scientific publications. All of this was grounded in evidence-based medicine, as any proper journalistic investigation must be, not least to avoid convictions for defamation. I sought advice from a lawyer who had handled big public health cases, and who confirmed the legitimacy of a fact-based account which, whilst not overtly pointing the finger, did so between the lines. This was the publication of

[1] Refers to Article 40 of the French Code of Criminal Procedure: "*The State prosecutor receives complaints and disclosures and decides how to deal with them, in accordance with the provisions of article 40-1. Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a crime or offence, is obliged to notify the State prosecutor thereof at the earliest possible opportunity and to transmit to this prosecutor any relevant information, statements or documents.*"

the book "Mediator, 150 mg", with the name of this medicine. The fundamental question (raised in the sub-title "how many deaths?") was how many victims of this medicine were there? At the time, I didn't have the answer. The book was withdrawn from bookshops exactly 48 hours after hitting the shelves. As soon its publication was announced on Amazon, the court enforcement officers arrived at the publisher's for emergency interim proceedings to censor the title, and therefore the book. Everything had already been printed.

Let me come back to the 12 June 2010 emails. The situation was desperate, since the book was pulled and there was no way – even by republishing it – of breaking the story, for all sorts of technical publishing reasons. The Medicines Agency had ties with the pharmaceutical companies, and the news was also very grim from the Ministry of Health, at the time headed up by Roselyne Bachelot, who sided with the Agency and considered that I had to deal with Servier on my own. This is where the whistleblower, who is not aware they are one obviously (otherwise they are no longer a whistleblower but a watchdog or an analyst), finds themselves in a complicated situation. We had anticipated this somewhat, and already had openings in the national press before the book was censored. There were leading interviews in Le Parisien, Le Magazine de la Santé, a programme on France Inter with Isabelle Giordano, and all that thanks to the press officer my local Brest-based publisher hired and who understood that this was a book fighting a cause.

Thanks to these interviews, the case caught the attention of an MP, Gérard Bapt, who got in touch. There is no doubt that it was the efforts of this MP – who was very committed to health issues and head of the health mission at the French National Assembly – which brought this alert to the public's attention. Gérard Bapt, a trained cardiologist, read the book. He was in a position to demand clarifications and documents from the Agency, which I didn't have access to.

Discussions went on throughout the summer of 2010 and, eventually, the Medicines Agency was forced to ask for the number of human victims from the Health Insurance Fund which, with its enormous database, had the resources to make such an estimation.

The press conference held on 16 November 2010 laid bare the awful toll that this medicine had taken – since we were talking about hundreds of deaths. This sparked the scandal we are familiar with today.

The drug was withdrawn at the end of 2009, the scandal erupted at the end of 2010 and it wasn't until a decade later that a major trial finally began on 23 September 2019. To date [3 December 2019], the verdict has still not been given, and all of the questions surrounding this disclosure are being fiercely debated in court.

Over this past decade, after issuing the alert, I've had to continue voicing and defending it in order to manage and defend the compensation of the thousands of victims. This has been extraordinarily difficult, and it still is to this day. I hope that, because I was violently intimidated by the pharmaceutical company when the book came out, denigrated and attacked by the Medicines Agency, which isn't a crime today, that this will be an aggravating circumstance when it comes to the verdict. I continue to find that particularly inadmissible, especially coming from the health authorities.

To conclude, the trial is due to conclude at the end of April [2020]. The stakes appear enormous, as it is perhaps in the way it will be written, and in the example set by the penalty, I hope, that we will have a before and an after Mediator, and that we will be able to say that there are red lines that cannot be crossed when it comes to harming the general interest, the health of our populations. And as incredible as it might appear, this is still looking far from certain today.

A democratic, political and social issue

CONTRIBUTION BY FRANCIS CHATEAURAYNAUD

Francis Chateauraynaud is a sociologist and research director at the School of Advanced Studies in the Social Sciences (EHESS) in Paris where he heads up the Pragmatic and Reflexive Sociology Group (GSPR).

Bearing primarily on environmental and technological controversies, collective action and political conflict, his work introduced the concept of 'lanceur d'alerte' in French (literally 'issuer of an alert'), in the mid-1990s, to make a distinction with the term 'dénonciateur'. Both terms are translated as 'whistleblower' in English. He is the author of various studies and publications, particularly addressing the issue of alerts and whistleblowers.

"AN ETHICAL ALERT IS A PLEONASM"

Between 1995 and 1998, I took part in a research programme with the French National Centre for Scientific Research (CNRS)[2] on a project called "The prophets of doom", which sought to understand the adoption of minority or atypical stances in the field of risks and disasters. It was in this context that, in January 1996, I met the toxicologist Henri Pézerat, to whose memory I pay tribute, who waged a decades-long battle against asbestos. We know that the repeated alerts about the dangers of asbestos, which began back at the turn of the 20th century, eventually unleashed a health scandal, involving tens of thousands of deaths and consequences that are still being felt today. For Pézerat, the expression "prophet of doom" immediately struck as too pejorative. What name can be given to those people who take action very early on regarding a health, environmental or technological problem for example, when they are not followed up on and have little chance of being heard?

In the international literature, I had come across the term 'whistleblower', which has been in use in the United States for a very long time, and has legal implications. Its translation into French, verifiable at the time on the basis of Canadian law, was the word 'dénonciateur'. But this term was no more appropriate than 'prophète de malheur' (prophet of doom) to describe the situation in France at the time, which was marked by health crises, the emergence of new risks and the battle around the precautionary principle. This was above all about alerts contributing to the emergence of a raft of controversial issues, and calling into question the conventional expert assessment models – especially after the contaminated blood affair. The people sounding the alarm in this instance, what were they ultimately doing? They were issuing or defending alerts – defending in the sense that this process may go on for a very long time, as was precisely the case for Henri Pézerat. Irène Frachon with the Mediator case can also attest to that.

At the time, I didn't think that the notion of whistleblower, which had an analytical function above all, would be taken up by so many stakeholders and institutions.

There have since been two laws, in 2013 and 2016, there's something about it in the media almost every day, with prominent figures the likes of Edward Snowden, there's a national whistleblower centre (Maison des lanceurs d'alerte), a national committee for ethics and alerts in public health and the environment (cnDAspe), a book fair for whistleblowers... And there's a trial on the drug Mediator, which should set new precedent in terms of health security. Incidentally, the Defender of Rights has been tasked under the Sapin II legislation with watching over the fate of whistleblowers. And now we have this European directive which will have to be transposed.

What is a whistleblower? There's a good twenty or so definitions out there. As a sociologist, I have endeavoured to consider the notion as encapsulating two opposing ideas: on the one hand, you have the person who sees an impending danger or hazard, but is uncertain about how it will happen and what its consequences will be; and on the other, you have the person who speaks out against practices and activities that should be codified or supervised, and the abusive use of which is jeopardising a common good, a general interest or a common value. This opposition is analysed in an entry of the *Dictionnaire critique et interdisciplinaire de la participation*[3], which contains hundreds of articles on concepts and themes to do with participatory democracy and the public's participation in assessments, touching on governance, controversies and citizen conferences among other subjects. Accordingly, there is an entry on whistleblowers. When this expression refers to someone who sees an impending problem and reports it to the authorities, collective stakeholders or the media, the challenge lies in the reversibility of a process: avoiding the worst, we might say. The question of evidence is evidently not the same when making public incriminating evidence on past actions – or failures to act. This is no longer about alerting but disclosing, or more technically, uncovering. The two cases are often confused, and over time the two concepts have overlapped or become muddled.

Let us remember the "mad cow disease" scandal: vets, researchers and physicians all working together finally characterised the transmission route of a strange illness, a spongiform encephalopathy (TSE), mad cow disease, to humans in the form of a new variant of Creutzfeldt-Jakob disease. Networks of stakeholders, ranging from farmers to researchers studying the prions, pieced together the evidence through extensive cross-checking, tracing the cause all the way back to the famous meat and bone meal in the cow's feed, which enabled them to put together the report. It was eventually issued by the British Government. This health scandal had a lasting impact on emerging risk management and assessment measures and systems, especially in Europe.

As such, when the whistleblower is defined as an individual, we are completely missing the point, and forgetting the lessons of recent history. All sorts of entities - individuals, groups, institutions, and even, in some cases, certain animals and plants – as sensitive beings, any entity capable of perceiving problematic signs and sending out a signal, can be a whistleblower. Of course, humans have an instrumental role to play in the reporting process. From this point of view, referring to an "ethical report" is a pleonasm. A report is for the attention of others, it is ethical by definition. By issuing a report, you are not only being "discerning" but also "showing concern", and even if there are controversial points, uncertainties, on receiving the message we should take action, or at the very least show vigilance. This "us" may be of variable geometry. Today, when the IPCC[4] maintains that the climate scenarios are increasingly bleak, the "us" is assumed to represent the whole of humanity, since it is cited on behalf
of the UN. But we also know that there are huge differences between the national and regional entities lumped together in this "us".

[3] https://www.dicopart.fr

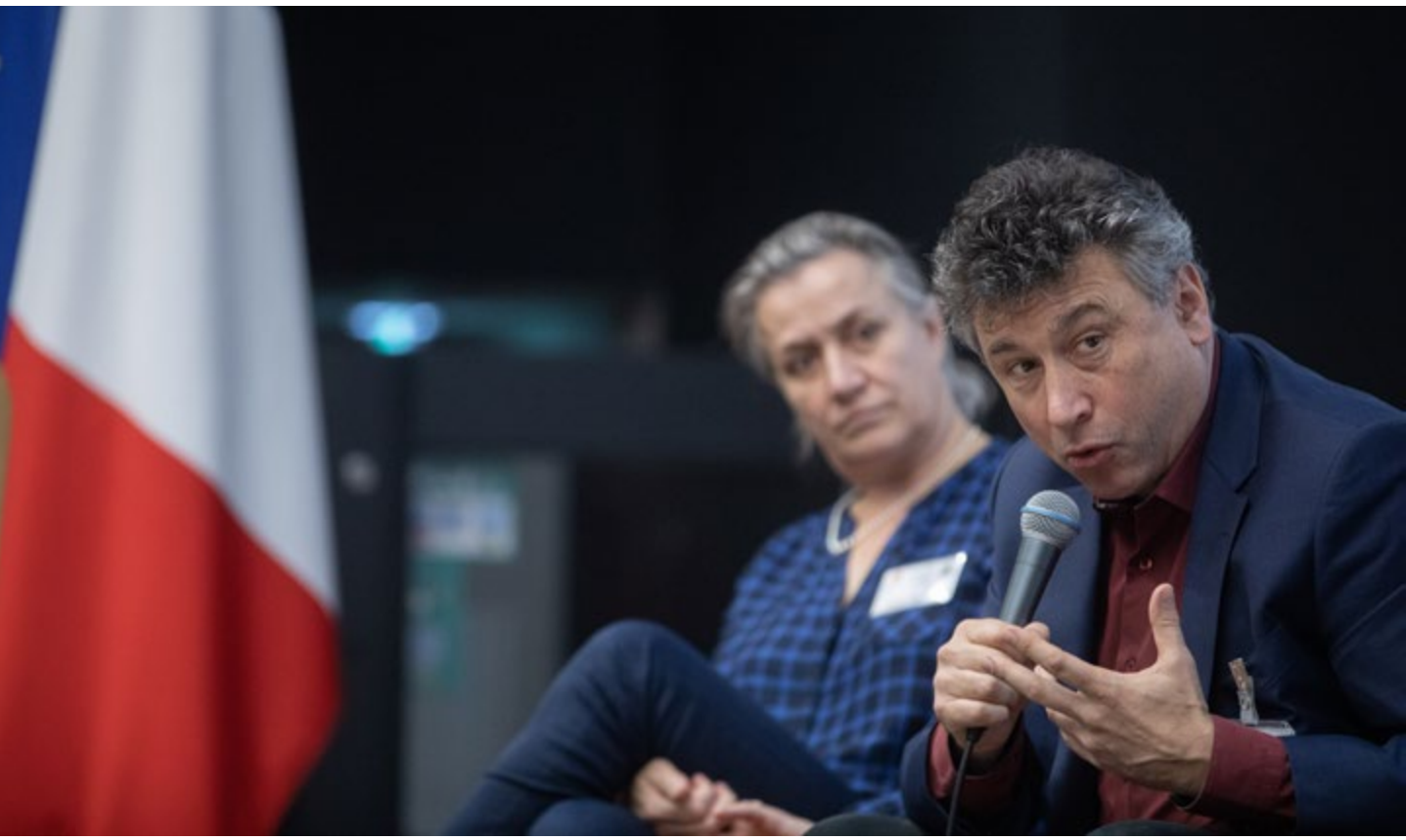
[4] Intergovernmental Panel on Climate Change.

In every reporting process, when faced with early warning signs or disturbing information, the recurring question is often: who should act first, who is legitimate to lead the process? Reporting it immediately in the media is not always effective, as counter-report mechanisms, especially via controversies, can scramble the signals. In any case, a report is above all about taking action, and it is important to remember that the expression 'whistle-blower' is made up of two distinct terms: the report on which the 'whistle' is blown may take on public proportions that go far beyond the 'blower's' own experience. This means that individuals and groups must be protected, but the alerts themselves must be protected too, by giving serious consideration to the problems or causes the whistleblowers are exposing or defending.

Accordingly, a good, straightforward definition of blowing the whistle is to spark a process of mobilisation. One of the key thinkers for grasping issues of public concern is the US pragmatic philosopher John Dewey. How do public problems come about? How, also, do communities come about which, through their comparative deliberations and actions, change the way in which citizenship is exercised and put the idea of democracy into practice? Democracy is a continual process involving discussion, questioning, mobilisation and reconsideration of the way in which we frame the problems that arise over time. Among the pragmatic maxims is the notion of investigation. This is not limited to police investigations, which sometimes take on a pejorative meaning – especially in a world grappling with the implications of surveillance. It also extends to collective research, open science in the making, to participatory investigations. Alerts lead to collective inquiries and, as such, always have something to teach us. Even false alerts can inform about the ways we examine, assess and probe reality. From this point of view, science is simply an organised, rationalised, formalised way of conducting investigations, with methods that should be accessible to everyone.

Accordingly, at the same time as a process of mobilisation, the report leads to a process of investigation, aimed at establishing tangible evidence or more clearly characterising what is known and what remains unknown, uncertain or debatable. The whole challenge of the legal frameworks and rules is to enable these processes to reach their conclusion, without being prevented or diverted by dishonest attempts to influence decisions or conflicts of interest. Even though the process may conclude that the report lacks purpose or basis, we will still have learned something about the environments, practices, networks, worlds and how to conduct the investigation in those places. I therefore defend a radically open processing of any kind of report, especially since false alerts are a way for us to verify our verification ability. This is absolutely fundamental. You are testing your own ability to appraise and investigate, and this creates collective supports. Obviously there are alerts that appear false or poorly orchestrated from the start, and which prove to be serious and shift the course of things suddenly, sometimes with a delay incurring liabilities. Once again, the idea is to sound the alarm before it's too late. A real "issuer of alerts" is therefore someone who takes action at the earliest possible opportunity. If you issue a report on the effects of the Iraq war in 2008 or 2009, it's already too late!

The second version of someone who issues reports is similar to the English concept of 'whistleblower', which is now widely used and refers more to the act of speaking out against fraud, unlawful practices, corruption or abuses of power. This definition has been brought to Europe by groups working more particularly on economic and financial crime. It has ended up becoming the predominant term, and it is clearly seen in the 2013 Blandin Act and 2016 Sapin Act. If we dig a little deeper, we learn that the American whistleblower also has a long political history. The two concepts need to be regarded by learning to distinguish the processes.



Because the consequences are different, depending on whether you are issuing a report (a 'lanceur d'alerte'), who takes early action, or you are a whistleblower, who takes action after the fact, once the damage has already been done. Above all, the burden of proof is not the same and I would like this aspect to be worked on in the transposition of the directive that I have read through more than once. This is a point that must absolutely be clarified. The 2013 Blandin Act incorporated the idea of uncertainty and the necessary opening up of research, associated with the proper interpretation of the precautionary principle. If the burden of proof is placed on someone issuing a report who only has clues, some of the facts or pieces of the puzzle, thereby requiring them to provide proof of what they are announcing, they will be put in a very difficult situation. In many areas, it takes years to build evidence, even for scientists: you need controversies, studies, to check, cross-check, argue, publish and compare experiments and data. It's a very long process. So we need bodies, an institutional ecosystem, groups of investigators and above all guarantees of independence when conclusions are drawn and weigh in on decisions. This is where the role of the Ethics Committee, the Defender of Rights, but also National Whistleblower Center (Maison de Lanceurs d'Alerte), as well as many other bodies formed based on the subjects at issue, comes in. What's important is to be able to receive reports and examine them by taking into consideration the necessary distinction between the issuers and the reports, and above all by keeping a close eye out for efforts to influence decisions or conflicts of interest which undermine the expert appraisal and assessment processes.

An environmental and health issue

CONTRIBUTION BY MARIE-CHRISTINE BLANDIN

Marie-Christine Blandin is a pro-environment politician. Senator in 2001 and member of the Parliamentary Office for Assessing Scientific and Technological Choices, she has co-chaired the biodiversity and GMO groups of the Grenelle Environment Forum. Author of the report on household pollutants, she has played an active part in the senatorial investigation committees on asbestos, managing the flu pandemic and Mediator. She is the author of the 2013 legislation on "the independence of health and environmental appraisal and protection of whistleblowers" and has been appointed Chair of the national committee for ethics and reports in public health and the environment (cnDAspe).

"REPORTS CAN ONLY BE MADE AND DEFENDED IF THEIR ISSUERS ARE PROTECTED BY THE RIGHT TO EXPRESS THEIR VIEWS."

Concerning the environment, the question of the relevance of protecting whistleblowers can only be broached after recalling, on the one hand, the emergence of environmental protection in law and, on the other, the close connections between the environment and health, and especially the interdependency between humans and ecosystems. Before the institutional texts, there was such intellectual output as the publications of the Club of Rome, as well as grassroots movements. One book, Rachel Carson's *Silent Spring*, was an effective report, which eventually led to DDT being banned in the US. She personally suffered the consequences.

In France, the 1995 Barnier Act transcribed the commitments of the Earth Summit, with the indication: "*The lack of certainty should not delay the adoption of effective and proportionate measures aimed at preventing a risk of serious and irreversible damage to the environment*".

If we admit that the law and standards reflect the certainties of the time and that the institutions apply them, then the indication "lack of certainty" opens the door to other issuers of messages and to their consideration. This indication introduces into the public sphere - no stranger to the concept of danger and prevention - the new indications of "risk" and "requirement to act even without proof".

A decade later, the environmental charter, despite the disapproval of the French national academy of sciences, became the preamble to the Constitution and enshrined the precautionary principle. After Article 1, which confirms the right to live in a balanced environment that does not harm our health, comes the sentence: "Anyone is entitled to play a part in protecting and enhancing the environment". We might consider that a whistleblower is playing a part, in a specific albeit necessary way, in this protection.

Finally, the 2009 Grenelle legislation mentions the necessary involvement of all the stakeholders in the report, and proposes an account on the relevance of a High Authority for the protection of whistleblowers, ethics and expert assessment. This High Authority, proposed in the 2013 legislation, would end up being reduced to a mere Commission, before being stripped of its mission to monitor report messages through the 2016 legislation, and eventually deprived of any direct links with citizens in favour of MPs or associations which, as legal persons, would be without protection from the law.

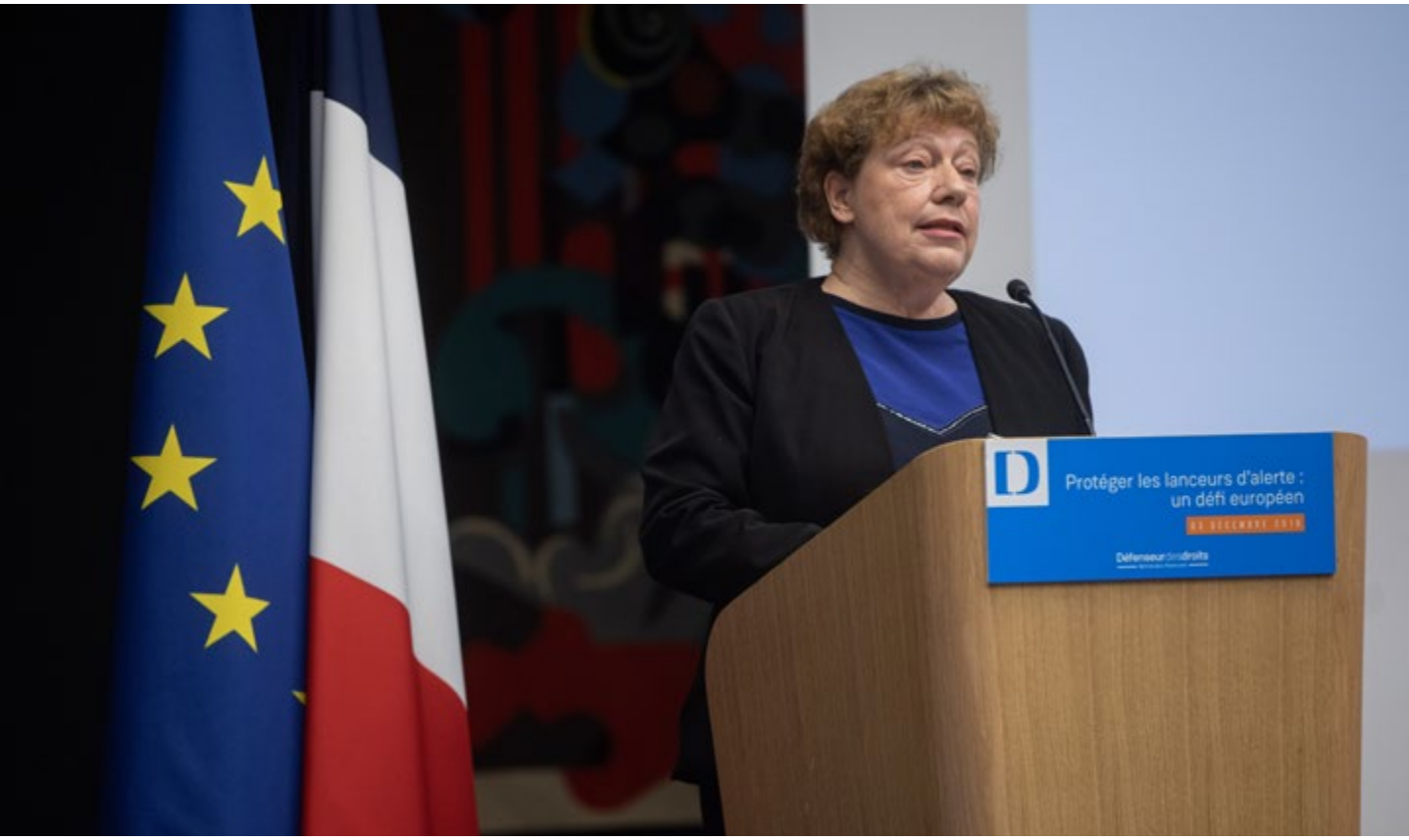
The administrative implementation of the Environmental Code is based on designated areas, indicators, inventories, watchdogs and even outreach bodies. Flood-risk areas, thresholds, flood alert levels for a river, the Air Quality Observatory, list of endangered species... provision has been made for all these, but the official safety net cannot provide all-round protection. It is an employee that has just sounded the alarm about the 400 litres of acid dumped into the River Fensch by ArcelorMittal.

Farmers are the ones proving that, after pesticides, not all bees die, but they are no longer able to communicate or find the hive. The climate protests are being led by our youth. The links between health and the environment come down to common sense for the small child who suggests changing the aquarium's water when their goldfish begins to look unwell, but the same cannot be said of the Ministry of Health. And it's only in the name of multidisciplinarity that, since 2004, national health and environment plans have been drawn up. Unfortunately, the shift to an environmentally- and health-minded culture is proving difficult. The inspectors' reports on the latest plan deliver a distressing verdict. The epidemiologist William Dab had this to say: "Seldom does a public policy fail at such a level".

The European Union and WHO hold ministerial conferences every five years. The last one addressed the environmental determinants of ill-health, and found that 1.5 million deaths could be avoided every year, attributable to air pollution, water unfit for drinking, hazardous chemicals, polluted acid waste and climate change. But these statements are not widely acted upon. Just as the emergency crews and funeral homes sounded the alarm about the heatwave of 2003, so whistleblowers are lifting the lid on environmental contamination, new diseases, suspicious deaths, delayed effects, the effects of low exposure over long periods, emerging signs and even experts' conflicts of interest. Sea Shepherd is speaking out about the fact that our oceans are dying, and L214 is exposing prohibited practices in slaughterhouses, which ought to be under the official authorities' scrutiny. Asbestos, agricultural GMOs, the Minamata Bay community which suffered mercury poisoning, Mediator... the system always plays out the same way.

Initially, the authorities are blind to the problem, citizens sound the alarm but their pleas are not heard. Then, the authorities minimise the problem or make reprehensible choices. For asbestos, a standing committee bringing together manufacturers and physicians was set up, and use of the carcinogenic product was extended. For Mediator, the professionals sent Servier's representative to the drug monitoring commission. For agricultural GMOs, the presentation of an alarming study was removed from an international symposium. At the same time, whistleblowers' lives are fraught with problems. Colleagues and managers put pressure on both Irène Frachon and Christian Vélot, on account of his publications on GMOs. Researchers' funding dries up – as happened to Robert Bellé from Roscoff (Brittany), who demonstrated the pathogenic effect glyphosate has on sea urchins.

Next, lawsuits are filed, such as against Pierre Meneton, who alerted about the effects salt has on our health. Layoffs are announced – as happened to André Cicolella, who was the first to raise the alarm about cases of hazardous glycol ethers.



Finally, the scandal breaks out publicly, the wounded, the dead, the distressed are counted, sentences are handed out and public compensation budgets are passed, but identifying the culprits and holding them to account is an uphill struggle.

A few legislative improvements are passed. But none of this makes the suffering, the costs, the bitterness go away - lives remain destroyed for the victims and upended for all those who dared to say what the system was refusing to.

For the few brave ones whose sincere indignation drives them to come forward and dare to appear disloyal to the institution, how many have stayed quiet for fear of retaliation, loss of respect – if not loss of employment? The employees making the PIP breast implants said after the scandal that they knew.

Today, they are out of work. If they'd had the assurance of fully-fledged whistleblower protection, how many women would have been protected from these adulterated implants?

To conclude, reports can only be made and defended if their issuers are protected by the right to express their views, which has, alas, become a derogation in the trade secrets legislation[5]. Environment, and therefore health, reports, cannot be lumped in with the Sapin Act, which manages capital flight but not mercury leaks. They must be treated as an altruistic societal contribution, which plays a part in careful monitoring, enriches knowledge and qualifies public decisions, guiding them towards a more desirable future.

[5] ACT no.2018-670 of 30 July 2018 on the protection of trade secrets.

An economic and financial issue

CONTRIBUTION BY CHARLES DUCHAINE

Charles Duchaine is a judge. An investigating judge at Aurillac Regional Court, then Bastia Regional Court before being appointed Vice-Chair in charge of the Economic and Financial branch between 1999 and 2004, he has also been appointed Vice-Chair in charge of investigations at Marseille Regional Court and coordinator of the specialised inter-regional court with special responsibility over economic and financial cases. Named head of the Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) in 2014, on 30 January 2017 he was appointed Chief Inspector of Justice, hired out to the Minister of Economy and Finance to lead the French Anti-Corruption Agency.

"THE FINANCIAL STAKES ARE BY NO MEANS INSIGNIFICANT, SINCE A REPORT CAN END A SITUATION AT A COST FOR A COMPANY, OR WHICH INCURS THE COMPANY'S LIABILITY AS REGARDS THIRD PARTIES."

The stakes are what we risk, what we have to gain and lose. From an anti-corruption point of view, I ask myself what can be lost or gained in economic and financial terms by claiming to protect whistleblowers. Whistleblowers evidently address economic and financial concerns, but it would be a mistake to think that the only fallout from corruption is economic and financial. Unfortunately, the fight against corruption must also, directly or indirectly, address a host of other issues. While the financial consequences of corrupt people's greed and the resulting squandering of public resources are obvious, these also have an impact on the objectiveness of scientific research, the competence of officials recruited by public authorities, the quality of work and services performed for the community, the quality of care administered in hospitals, the security of listed facilities, environmental protection, citizens' trust in their institutions and, ultimately, on our own survival and that of democracy.

Where do whistleblowers come in regarding the anti-corruption system? This system, as defined by Article 17 of the December 2016 legislation on transparency, the fight against corruption and modernisation of economic life, comprises a set of eight measures and procedures aimed at preventing and detecting integrity violations within an entity, which could be a large corporation or a government authority. Briefly, part of our Agency's remit involves ensuring that these measures are effectively implemented, and by "effectively" I don't simply mean putting on an outward appearance of that being the case, but checking that they are effectively rolled out across the occupations of the authority in question or the company.

Of these measures, risk mapping, which forms the basis of the anti-corruption system, identifies the risks of integrity violation existing in an entity and their score in terms of occurrence, i.e. how likely they are to occur, and their impact. Various measures aimed at preventing and detecting corruption underpin this risk mapping. These preventive measures include the adoption of a code of conduct which defines and illustrates the different types of behaviour likely to characterise these offences and thus to be prohibited, training of the most exposed staff and managers within the company, assessment of the situation regarding customers or tier-1 vendors and intermediaries, as well as oversight and assessment of measures implemented under the anti-corruption system, which means an audit of its reality and effectiveness.

With respect to detection measures, Article 17 provides for the organisation of internal and external accountancy auditing procedures as well as the implementation of an internal reporting system aimed at collecting reports made by employees concerning the existence of practices or situations that run counter to the corporate code of conduct.

Regarding whistleblowers, the French Anti-Corruption Agency is tasked with checking that the tools are in place, and that they are indeed available not just to company staff but also to its partners. Reports are therefore a key detection measure, in that they enable an entity whose preventive system has not been able to stop offences from occurring to minimise the duration and impact of the corruption that might be committed in-house. On the basis of ex-post processing of reports, the risk mapping process can also be rounded off, corrective measures adapted accordingly and, more generally, the system for preventing and detecting instances of corruption updated.

To ensure that integrity violations come to light, the lawmaker has in fact made provision for several mechanisms according to which the report is aimed at reporting a crime or offence altruistically and in good faith – this is Article 8 of the law – by providing the whistleblower with specific protection against the discrimination they might endure, or that it is aimed at uncovering a breach of the entity's anti-corruption code of conduct – this is what we mentioned earlier, and is enshrined in paragraph II, Article 17.

Alongside police investigations and self-reporting, which are encouraged by the Act of 9 December 2016 – not least via the introduction of a sort of plea bargain (the judicial agreement of public interest) – whistleblowers are the surest way of exposing covert crimes, particularly economic crimes. This obviously applies to corruption, but also all types of economic and financial crime, which tend to be rampant yet concealed.

The resources allocated to police investigations are pretty meagre. In its Observation to the government (référé) dated 12 December 2018, the Cour des comptes (supreme body for financial control) found that, in light of both the qualitative and quantitative development in terms of offences, the organisation and resources allocated by the Ministries of the Interior and Justice to combating economic and financial crime laid bare weaknesses which "partly explained the partial and late nature of the criminal response". The Cour advocated better use of the resources existing in the two budgetary missions concerned, in the choice of cases and their processing, and adoption of a more selective approach that more closely addresses the effectiveness and time limit of criminal responses.

The fact is that our statistics-driven society of the past few years has largely fuelled certain behaviours to the detriment of effectiveness.

As such, the processing of cases which give rise to visible protests immediately breaching the peace and leading to official observations, reports or complaints is given systematic precedence over the processing of cases, which are usually much more serious, but are out of public view.

In a nutshell, the desire to improve the clearance rate of crimes and offences recorded, to an ever greater extent, and which could cast doubt in voters' minds over the authorities' ability to keep the peace, leads to the focus being put on visible crimes with no interest being paid, unprompted at any rate, to invisible ones which, known to no one but their perpetrators, obviously do not end up lengthening the list of unsolved offences.

What's more, I am not mentioning the lack of sufficient collective determination either, which alone could determine the resources, and the essentially secret nature of crimes violating the duty of integrity, making their detection and bringing to justice uncertain. Even though self-reporting is encouraged by the introduction of the judicial agreement of public interest, it is hardly more effective, since businesses do not tend to voluntarily throw themselves into the lion's jaws by confessing their crimes to the Public Prosecutor's office.

Why don't they? Because they do not fear the courts, because they know that the time that has passed will reduce the sentence and that reticence and lies are not punished.

Only the threat of foreign lawsuits or the fear of a whistleblower taking action – in a word, the fear of a trial or a disclosure – can convince businesses of the need to go of their own volition to their national court to try and wipe clean their corrupt deeds.

It is important to protect whistleblowers, but this is undoubtedly not enough. With respect to combating organised crime, it has long been acknowledged that gaining inside knowledge of the criminal activity was a challenge from the outside, and that, to do so, infiltration or handling of informants was necessary. The principle of systemic, deep-rooted corruption is that whoever eats the cake drops crumbs and that those who pick them up therefore have no interest in ratting them out. The system has been designed to last.

If we want to crack down effectively against corruption, we need to exploit the weaknesses of those who, by being in the system themselves, are the best placed to expose it. The police, tax and customs authorities all have their informants, all of whom are likely to receive payment. Why does the anti-corruption system not remunerate its whistleblowers? This is a question that needs to be asked. In some countries, it does. We will not restore any kind of balance in relations with the United States if we are not capable of leading the way in prosecutions. Yet leaders in prosecutions are the ones who obtain the intelligence first. By financially rewarding whistleblowers, United States will maintain the upper hand.

An economic and financial issue

CONTRIBUTION BY PATRICK MOULETTE

Patrick Moulette is head of the Anti-Corruption Division within the Directorate for Financial and Enterprise Affairs at the OECD (Organisation for Economic Co-operation and Development). After a career at the French Ministry of Finance's Treasury Directorate, he joined the OECD in 1991 as a member of the Secretariat and then as Executive Secretary of the FATF (Financial Action Task Force), an international body tasked with protecting the global financial system from money laundering and terrorist financing.

"WITHOUT EFFECTIVE LEGAL PROTECTION AGAINST RETALIATION, WHISTLEBLOWERS REMAIN SILENT."

The OECD is primarily known for its reports on the economy, environment and educational performance of different countries, but perhaps not well enough for its Convention on Combating Bribery of Foreign Public Officials. Against this backdrop, protection for whistleblowers is a core aspect of the fight against corruption.

How can corruption offences be detected? With great difficulty. Whistleblowers are a major potential source of information that is still not sufficiently leveraged. In reality, where they have effective protection, they can report suspected economic and financial fraud in general, not just in cases of corruption. By this I mean suspected fraud that would not be uncovered by internal investigations or sources, particularly within companies.

Why protect whistleblowers? There are major risks across the board. In the sphere of corruption, one example is the Odebrecht scandal, a sprawling corruption case affecting every single Latin American country – but particularly Colombia. A whistleblower, manager of the "Ruta del Sol II" project, Jorge Enrique Piziano, and his son, were found dead, poisoned by cyanide after the corruption report he had made in this case.

Typically, without effective legal protection against retaliation, whistleblowers remain silent. In a 2017 poll among more than 28,000 people across the European Union, 81% of respondents had not reported the instances of corruption they had witnessed.

Regarding the economic and financial aspects, what is at stake for businesses? What is their financial interest in setting up a protected reporting framework? Quite simply, if there were protected internal reporting mechanisms, this would help businesses to learn about embezzlements earlier and perhaps then reduce the loss of corruption-earned profits.

This is the best-case scenario. Businesses who receive internal reports may also take advantage of the option of reporting them of their own accord to the judicial authorities at an earlier stage. And in some countries, take action such that the case is brought to a swifter close, which generally gives rise to lesser sentences.

There are also financial implications for the judicial authorities, which are not insignificant in some countries. In the US, for example, an account by the Securities and Exchange Commission[6] (SEC) notes that monetary sanctions ordered based on intelligence obtained from whistleblowers stand at USD 2bn in 2019. This is a significant financial figure.

What are the potential financial implications of making a report for whistleblowers? Today, only three countries, having signed the OECD convention, grant financial rewards to whistleblowers. These payments can encourage them to report wrongdoing, but also provide them with financial assistance to cover living or legal expenses in the event of retaliation. These countries are Korea, the United States and Lithuania.

In Korea, between 2012 and 2016 the Anti-Corruption and Civil Rights Commission paid out the equivalent of USD 9.4m for reports of corruption cases. In the US, the figures are of a completely different magnitude as the legal basis is the Dodd-Frank Act[7], which is well-known to specialists. This authorises the SEC to grant monetary rewards and encourages it to compensate and reward people disclosing information of their own accord to the Commission who meet the requisite terms. Since the programme launched in 2011, the SEC has paid out more than USD 387m to 67 whistleblowers.

It is important to point out the wide disparity between States having signed the OECD Anti-Bribery Convention, in terms of protection for whistleblowers. Across several countries, whistleblowers are only afforded partial protection, with the law prohibiting workplace harassment and unfair dismissal for example. In some countries, protection is only applicable to some sectors. The public or financial sectors for example. In addition to the OECD Convention, there are other multilateral anti-corruption agreements. All of these instruments recognise the importance of protecting whistleblowers, but the protection standards vary from one country to another.

This is where progress needs to be made. There have been breakthroughs, including the new European Union Directive and the G20 principles for the effective protection of whistleblowers, but there is still a long way to go to harmonise standards at global level.

Some figures to conclude: out of the 44 member countries of the working group, which signed the OECD Convention, and the 19 member countries of the G20, 16 have no form of legal protection. In 6 of the 32 countries that provide whistleblower protection, this is limited to public sector employees. Only 2% of cross-border corruption cases that have been solved or closed were detected following reports by whistleblowers. Much, therefore, remains to be done in this respect.

[6] Federal US authority for financial market regulation and supervision.

[7] The "Dodd-Frank Act" is a US framework act, passed in 2010 while Barack Obama was President, in the wake of the global banking and financial crisis (2007-2008). It entails a sweeping reform across the banking and financial sector, in terms of consumer protection as well as corporate governance.

Presentation of European systems

CONTRIBUTION BY KIM LOYENS

Dr Kim Loyens is assistant professor at Utrecht University School of Governance (Netherlands). She has conducted extensive research particularly on whistleblowers; inter-organisational cooperation in policy delivery; street-level decision-making in the fight against labour exploitation; and trafficking in human beings by police officers and inspectors. Her work has been published in a book entitled Administration and Society, Innovation, International Journal of Public Administration, Journal of Business Ethics, Regulation (*Administration et Société, Innovation, Journal International de l'Administration Publique, Journal de l'Ethique Commerciale, Régulation*). Her research has also been published in works on street-level bureaucracy and regulation.

She is presenting a study conducted in 2017 and 2018, commissioned by the Dutch Whistleblowers Authority, comparing their external reporting system with other comparable agencies worldwide, which combine prevention missions concerning whistleblowers – advice, investigations and protection – and whistleblowing policies. You can find the study here: https://www.mdpi.com/2076-3387/8/3/30; https://www.uu.nl/en/news/coherent-approach-dutch-whistleblowers-authority-internationally-unique

"CONFIDENTIALITY IS THE MOST SYNONYMOUS WITH PREVENTION OF RETALIATION"

The European Directive has a far-reaching scope. The second part of the Directive forms the cornerstone of our study; it is aimed at the organisation of protection for whistleblowers. It does not provide for a single whistleblower protection model; each country must therefore work out how it is going to organise the model itself.

Who can make a report? Most of the countries we have analysed, both within and outside the EU, have a fairly broad scope – anyone can issue a report and be protected.

That said, in the majority of countries, a work relationship is necessary to secure protection. In some countries, Belgium for example, the scope is limited to the public sector. Protection should therefore be extended to other sectors. Moreover, a number of experts have raised a concern about the reporting authorities, and the European Directive does not address this concern regarding agencies that want to protect whistleblowers and suffer retaliation.

How should protection for whistleblowers be organised? In our study, we included not only NGOs but also reporting authorities. We found that some governmental protection agencies, such as in the Netherlands, performed activities and missions which, in other countries, would be carried out by NGOs trying to fill in the gaps.

We also looked at conflicts of interest in our study. In the Netherlands, for example, the advice given by agencies has been criticised for not being neutral enough. This is why in other countries, like Belgium, the advice stage stops as soon as the investigation begins. This means there is only a pre-advice stage: the person is told about the procedures, the pros and cons of reporting. As soon as the investigation begins, they are then referred to other bodies, sometimes NGOs, which will monitor and keep advising the person. The governmental agency steps back at this point.

Another conflict of interest may arise when different types of investigations begin at the same time. There may be one on a wrongdoing, and another on the retaliation suffered by the whistleblower. In many countries, these two types of investigation are kept separate. But some countries refuse to do things this way, on the grounds that these investigations are objectively connected, and should not be separated. Countries that do conduct the investigations separately explain that a higher degree of neutrality is called for when investigating wrongdoing only if it bears on retaliation. This is not how I see it, as in most countries, when we are looking for protection, we have to go to the courts. So there is little point in having an investigation into the retaliation conducted by a body that is not regarded as neutral. It would be better – particularly when retaliation is at issue – for a neutral body to conduct the investigation, so as to furnish the court with evidence that the retaliation really took place against the person.

In some countries, training programmes are organised on how to implement internal reporting procedures, as well as on how judges should handle whistleblower cases. There is particularly an NGO that trains judges. These judges must have a certificate before being able to handle whistleblower cases. Judges who have received training have a completely different perception to other judges.

Are we capable of providing effective protection? Can these specific courts really make a difference for whistleblowers? Retaliation is one of the main risks for whistleblowers. As a result, preventing it would, in an ideal world, be the best possible protection for the whistleblower. But prohibiting retaliation is not enough. The best solution would therefore be to enable the whistleblower to return to their former position after suffering retaliation. In most countries, whistleblowers must go to the courts, but they can draw on the investigation carried out by these reporting bodies. Some countries have also introduced alternative solutions that bring short-term aid to whistleblowers, because of their immediate effect. During proceedings before the courts, five or six years can often go by when nothing happens, when the whistleblower's position is not reinstated. Provisional reinstatement can take place immediately, but there are other options, such as mediation or the person's voluntary transfer. The whistleblower might not necessarily wish to return to their former position, as relations with their colleagues have broken down.

So confidentiality is the most synonymous with prevention of retaliation. To conclude, I will cite one of the respondents to the survey: "The best protection you can offer a whistleblower is to keep their name secret. The law on whistleblowers is only a necessary judicial safety net in situations where everything is going wrong, but it can provide real protection." And the European Directive lays down penalties for people who violate the confidentiality duty as regards whistleblowers.

What systems are there in Europe?

ITALY BY LAURA VALLI

Laura Valli is senior advisor at the Italian Anticorruption Authority, based in Rome. After graduating in law from the University of Bologna, she initially worked as a judge and prosecutor in Italy for ten years. She then moved to Washington (United States), where she worked at the World Bank Group as a senior investigator and ethics officer for 16 years.

"IN ITALY, THERE IS STILL A LOT OF RESISTANCE REGARDING THE VERY NOTION OF WHISTLEBLOWER ACROSS GOVERNMENT."

The notion of whistleblower, as an anti-corruption tool, was introduced in Italy by the 2012 anti-corruption legislation. This law only provided for whistleblower protection in the public sector. The 2017 law strengthened the protection provided for in the 2012 law, and also extended it to the private sector.

Italy has a good, fairly broad definition of what can be considered a whistleblower. But this needs to include jobseekers and volunteers, as stipulated by the directive. With respect to protected disclosure, the Italian definition is also fairly broad. It lays down a notion of public interest, which is not invalidated by a concomitant private interest. Good faith is not a legal requirement. This is also a notion that the European Directive takes into account.

As regards reporting bodies, there are several in Italy. Whistleblowers can either reach out to ANAC, which is Italy's central independent anti-corruption authority, or to the anti-corruption officer of each government department. They can also go directly to the judicial authority. There is still no protection for reports to the media.

In terms of retaliation, the law only mentions organisational measures as possible retaliation measures. This limits retaliation to official action and organisational measures of the government department. But the aim is to expand this definition, in keeping with the directive, to include any action causing harm to the whistleblower. The burden of proof is on the employer, in the private and public sectors alike. The employer must therefore prove that the retaliation measures observed are unrelated to the disclosure. This is a very important measure.

At ANAC, because we are an administrative agency, we are authorised to enforce monetary sanctions against the perpetrator of measures or deeds representing a form of retaliation, or against the anti-corruption officer of a government department that had not duly and effectively acted upon a report, or had failed to set up an action mechanism.

As regards the private sector, protection is limited to companies with compliance programmes in place. This is quite distinctive as it is not compulsory, and is limited to these companies only for now.

But with the European Directive, we will have to extend it to all companies with more than 50 employees.

What are the figures at ANAC at the end of 2019? ANAC received twice as many reports in 2018 as it did in 2019. The number is going up exponentially. By way of comparison, the local anti-corruption office received much fewer reports than ANAC. This begs the following question: why do employees trust a central authority more than a local mechanism? This is one of the observations we can make.

What's more, there is still a lot of resistance regarding the very notion of whistleblower across government. Many people tend to think that this is part of Italy's cultural heritage, and tend to prefer "shooting the messenger". From their point of view, the problem is the whistleblower and not the malpractice he or she has reported.

What does ANAC do and what will it do in the future? The main purpose is to provide training in the public sector and training in schools in liaison with the Ministry of Public Education.

To conclude, history has shown us that whistleblowers are an anti-corruption tool. The European Directive broadens the notion of whistleblowing, which it considers to be the expression of a human right to freedom of expression and freedom of information. I believe this is what we need. We need to bear in mind the fact that whistleblowing presents an ethical dimension and a political dimension. This notion is changing, from protection for disgruntled employees all the way to the dissemination of information to the public. We need to adapt along with this change through a cultural shift where the notion of a report is something positive, and which strengthens the idea that our democracies are fundamentally accountable to citizens.

What systems are there in Europe?

THE UNITED KINGDOM BY ELIZABETH GARDINER

Elizabeth Gardiner joined Protect, the UK's main whistleblowing charity, as Legal Officer in July 2018, becoming Acting Chief Executive in December 2019. She also draws on her expertise to inform the charity's policy, and runs training programmes for employers. Before retraining as a solicitor in social law, she worked as a policy officer and in Parliament.

"WE ARE BEGINNING TO SEE SOME CHANGES, BUT THEY ARE SLOW COMING, AND THERE ARE STILL MANY GAPS IN THE LAW."

Protect has been an active charity for 25 years. It was set up in the wake of a string of scandals in the UK. It has a twofold role: providing free legal and confidential advice to some 3,000 workers a year, and training employers in improving practices. Its predecessor, Public Concern at Work, played a part in bringing about one of the very first pieces of legislation on whistleblowers, dubbed the "Public Interest Disclosure Act", in 1998. More than twenty years later, this Act is very much in need of reform. I'm going to spend a bit of time telling you about our current legislation as well as some significant changes that have occurred in the UK since 1998.

In Great Britain, with very similar provisions in Northern Ireland, we therefore have this "Public Interest Disclosure Act", which defines six major categories of wrongdoing: a criminal offence, the breach of a legal obligation (very broad category), a miscarriage of justice, a danger to health and safety, damage to the environment and concealment of information tending to show any of the above five matters.

In the UK, a worker can benefit from protection if s/he makes the disclosure by following the appropriate procedure, and this protection will differ depending on whether the disclosure is made to the worker's employer, a regulatory body or the press. For the first case, there is a test to undertake. But you do not have to contact your employer first. When someone discloses a matter of concern, they must reasonably believe that the disclosure tends to show that one of the categories of concern is engaged. The further you go, the more complicated the test becomes. If you disclose your concern to the press, the reasonable belief criterion must apply in all circumstances, unless it has to do with a particularly serious matter.

In the UK, protection does not live fully up to its name. There is a remedy option if you suffer a loss, i.e. a disadvantage of any sort, or if you have been sacked for raising concerns. This is therefore a very personal right, concerning employment, which provides a remedy in the event of wrongdoing. It is worth noting that the law asks nothing of employers or regulatory bodies.

Changes have taken place since this legislation came into force. The first is that the criterion concerning public interest has been amended.

Initially, the Act called for good faith. The whistleblower had to demonstrate his or her good faith. But this was found to be fraught with difficulty, both in terms of the employer, which tried to discredit the whistleblower, and for the courts, which spent a long time considering the whistleblower's motives. So this criterion has since been abolished. Public interest has taken its place. This is not easy to prove. With respect to the UK, it involves considering the number of people affected, the gravity of the concern, if the misconduct is deliberate, and its perpetrator's identity.

Another change that has taken place in the UK is the extension of the protection scope. The law provides a fairly broad definition of the term "worker", but many categories – even though they relate to the world of work – are still excluded, particularly the self-employed, volunteers and non-executive directors for example. This has been offset, in a piecemeal manner, by Parliament, and various charities, and scandals – in the health service in particular – have widened the scope, such that jobseekers are now covered in the healthcare sector, but not elsewhere.

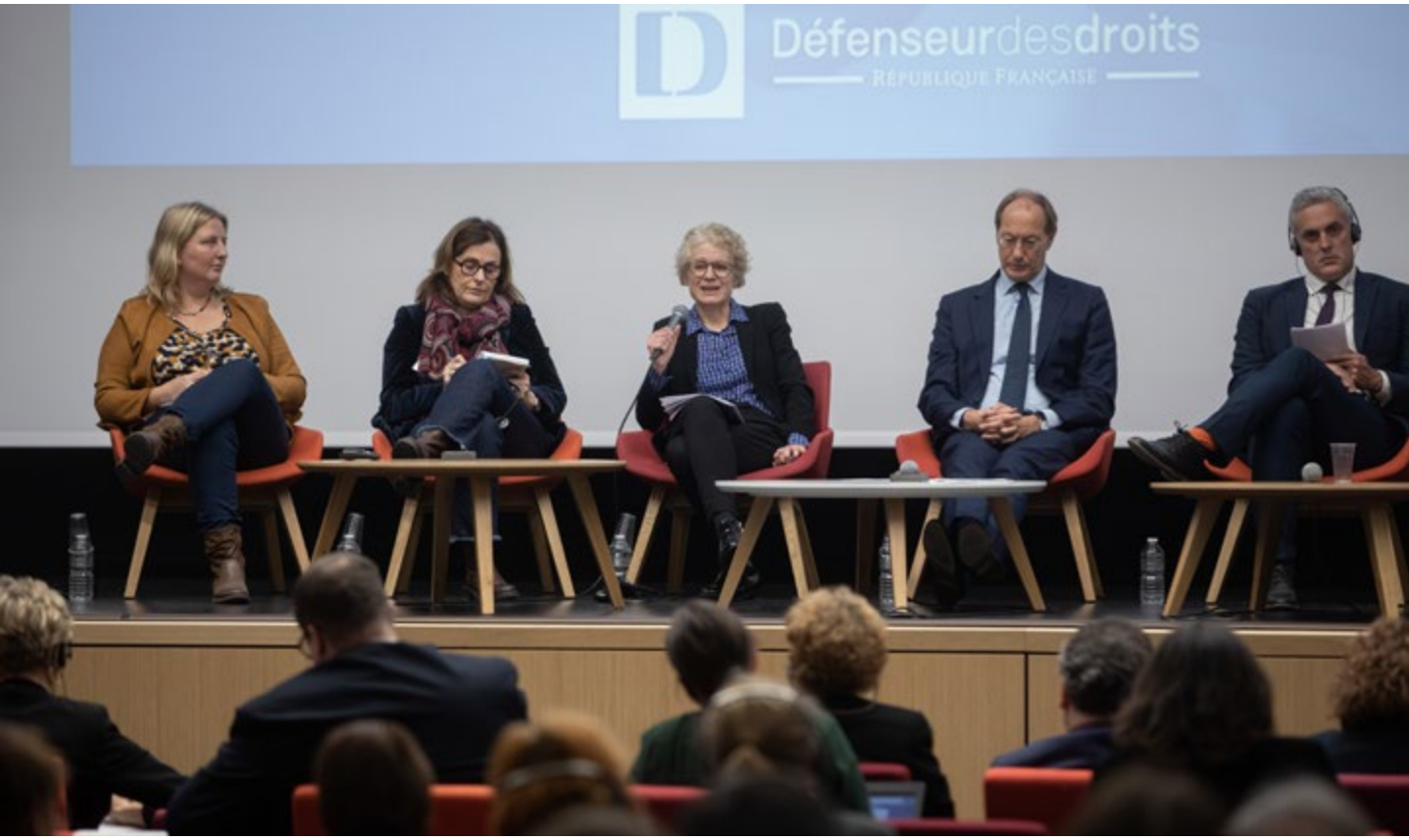
A point about human rights. We recently got involved in a case that went all the way to the Supreme Court. A district judge had spoken out about concerns relating to health and safety at her court, but the inferior court decided she was not a worker and therefore was not entitled to whistleblower protection. Eventually, the Supreme Court declared that a district judge should benefit from the human right to freedom of expression, and that it would be discriminatory not to afford her protection. The law must now be interpreted to include judges, but it is difficult to know who else could be covered by similar arguments.

Accordingly, employers were not initially held to the slightest account in this regard.

There were no reporting channels, nor obligation even for the employer to follow up on reports. And the law was unclear as to whether employers should be accountable solely for the conduct of a whistleblower's superiors in the latter's regard, or for the conduct of his or her colleagues too. If a whistleblower is intimated by colleagues, should the employer be held to account? Once again, the courts have replied in the affirmative, and superiors can also be held personally accountable for harm suffered.

We are beginning to see some changes, but they are slow coming, and there are still many gaps in the law. In other areas, regulatory bodies are making changes. The British Government has drawn up a list of more than 90 people you can report malpractice to. It is very difficult for someone to know who is competent to take up the matter. And the regulatory bodies have very different processes for managing and assisting whistleblowers. Some are only interested in the facts reported, while others believe they also have a duty to protect whistleblowers. Two sectors, in the UK, stand out in the way they are developing change in this area: the financial sector and the healthcare sector. Regulatory bodies now have rules to follow and expectations as regards employers. They conduct monitoring and investigations, and the financial conduct authorities can fine employers who mistreat whistleblowers.

To end, which way is the UK heading now? At Protect, we have decided to draft our own bill as a contribution to updating the legislation. To do that, we are drawing inspiration from best practices worldwide and taking the best points from the European Directive to prepare a new piece of legislation, which we will present to the Government after the elections.



We are asking people to consider the issue and tell us which are the key areas, in their view, that we should develop or to which the protection scope should be widened, so that many more people are covered by the law. We want applicable standards for businesses to be drawn up with input from employers and regulatory bodies. In order to ensure adequate protection, we want employers to be required to protect whistleblowers from harm, rather than leaving individuals to have to find a solution on their own when things have already taken a turn for the worse.

Finally, we suggest creating the position of an independent commissioner for whistleblowers, who could investigate when an employer or a regulatory body either does not take the report seriously, or has failed to prevent the whistleblower from suffering retaliation.

Whatever the UK's future within or outside the European Union, we remain fully committed to ensuring that the UK aligns with the very best practices worldwide.

What systems are there in Europe?

THE NETHERLANDS BY WILBERT TOMESEN

Wilbert Tomesen has chaired the Dutch Whistleblowers Authority since July 2018. From 2011 to 2018, he was a member and deputy chair of the Dutch Data Protection Authority. Prior to 2011, he worked as principal state counsel at several Dutch courts, as well as prosecutor at Aruba, in the Dutch West Indies.

"I CALL ON ALL MEMBER STATES TO ENACT LEGISLATION MEETING THE HIGHEST POSSIBLE STANDARDS"

The European Directive is a great opportunity for our countries to improve protection for whistleblowers and to contribute to the integrity of our society.

As regards the system in force in the Netherlands, similarities can already be observed with the Directive, even if further change is required. The Netherlands has had specific legislation on whistleblowers for more than three years, passed in the summer of 2016. The most important provision in this legislation is legal protection for whistleblowers. In the public or private sector, anyone who reports potential wrongdoing in good faith should not suffer retaliation.

In the Netherlands, every employer of a public or private organisation with over 50 employees must implement secure internal reporting channels for whistleblowers. One year after this requirement came into force, half of employers in the Netherlands have fulfilled it. This requirement is also upheld in the European Directive.

Moreover, the current legislation entitles employees to confidential advice, from a legal advisor, prior to any report. On our website, we have published a practical guide this year – which is also available in English.

In the Netherlands, the reporting system comprises three stages. Individuals must make an internal report within their organisation first, before being able to contact the external authorities, such as the public ministry. Finally, they take their report to the Dutch Whistleblowers Authority. But this system is poised to change. Whistleblowers will be entitled to contact the dedicated authorities directly, whereas this is something they cannot currently do.

What are the missions of this Authority? We were behind the legislation on whistleblowers passed three years ago. We are an independent public body. We have three main tasks. First, we give whistleblowers confidential advice. We investigate malpractice, cases of retaliation and, naturally, we try to promote integrity. This range of missions – advice, investigations and prevention – places us, in the Netherlands at any rate, centre-stage when it comes to whistleblowers and integrity.

One of the reasons why we commend this directive is that, across all of the EU Member States, the idea is that specific State authorities will be designated to protect whistleblowers and investigate their reports. Indeed, we hope to see other centralised structures come about in Member States over the next two years.

This directive advocates international cooperation. To strengthen this, we created a network, which we have called NEIWA[8], and which has already met on two occasions. During the second meeting, in Paris, we welcomed new members. We began with seven, we now have 14, and we hope that even more will join us in the future. We have published a joint statement which asks all EU Member States to be ambitious and we, as alert authorities, will do the preparatory work and protect whistleblowers who report wrongdoing. Personally, I call on all Member States to enact legislation meeting the highest possible standards to ensure the best possible protection for whistleblowers.

There is another possible improvement I should like to highlight: the financial assistance that the directive promises whistleblowers. Based on our experience in the Netherlands, when whistleblowers encounter problems, these are always partly financial. In my country, the Ministries of the Interior and Justice and MPs are putting this part of the directive into practice. But this financial assistance should not be seen as a reward. It is a way of providing whistleblowers with financial support and the legal aid they need. This is society's responsibility, for it is money well spent in my opinion. Our countries have already organised this type of financial assistance, and it works, we also need to do it in the Netherlands.

We need to learn from each other.

[8] Network of European Integrity and Whistleblowing Authorities.

What systems are there in Europe?

FRANCE BY SÉBASTIEN DENAJA

Sébastien Denaja is a doctor of public law. Since 2019, he has been a lecturer in public law at the University of Toulouse 1 – Capitole and member of the Maurice Hauriou Institute. From 2012 to 2017 he was a Hérault *département* MP. As a member of the Laws Committee, he was particularly the rapporteur for the Act on substantive gender equality (2014) and the Act on transparency, the fight against corruption and modernisation of economic life (2016). He has been the author of amendments establishing the legal status of whistleblowers and the proposal for organic legislation on the competence of the Defender of Rights to guide and protect whistleblowers.

"WHISTLEBLOWERS ARE OFTEN INDIVIDUALS IN AN EXTREMELY VULNERABLE STATE MENTALLY AND MATERIALLY SPEAKING."

The background to the drafting of the Act on transparency, the fight against corruption and modernisation of economic life, promulgated on 9 December 2016, is important. This was after the Charlie Hebdo terror attacks. The Government and Parliamentary majority were wondering how to engage directly with French citizens on the matter of trust, which had been eroded. I am one of those who believed that more was needed in terms of the 2013 legislation and the laws that followed on the transparency of public life, the Act for the fight against tax fraud and avoidance, which created the French Financial Prosecution Office (PNF). This movement chimed with minister Michel Sapin's determination to finish his own work, dating back some two decades by now, with the so-called "Sapin I" Act on corruption prevention and the transparency of economic life and public procedures.

This little anecdote aside, the backdrop and the facts were grim. 23 years after the Sapin I Act, our country still had a long way to go in rooting out corruption. France was drawing recurring criticism from the specialist international institutions, which was entirely justified in light of what was the Corruption Prevention Service at the time – only four people, and no conviction of legal persons for corruption.

This is why the so-called "Sapin II" bill is first and foremost a cross-cutting text. An Act which created the French Anti-Corruption Agency, has regulated lobbying, further empowered financial judges and financial prosecution offices, and endeavoured to improve the situation for whistleblowers. The bill contained almost nothing on whistleblowers initially – other than elements concerning their protection in the financial sector.

This is why I wished to seize this opportunity to suggest a common pillar of whistleblower rights, and thereby try to bring together everything that was scattered across incomplete, sector-specific texts in a bid to pave the way to more effective protection for whistleblowers. Of course, the question of whether this protection should be sector-specific or, on the contrary, part of a single system, is still under debate.

We could never have drafted this text without the help of the Conseil d'État report submitted to the Prime Minister, in the thick of the parliamentary discussions, or the help

of nonprofits like Transparency France & International, which had made significant headway on the subject. This was a very difficult text to write – it took several attempts. And even that wasn't enough to end up with a satisfactory text on all accounts.

The aim was to define what a whistleblower was and to address the question of how the report is dealt with. To define the general philosophy, we drew inspiration from the work of the Conseil d'État, which talked about "ethical reports". This is where the notion of general interest comes in, for at the time the inclination was that these would not be remunerated people.

Within this definition, each term addresses this general philosophy. "An individual", for we didn't want to start looking at the collective implications of a report – even if new synergies with the trade unions could be envisaged for example. "Altruistically", because the French MPs did not want to broach the idea of remuneration at the time. "In good faith", a term to be used with all the flexibility that must be given to this legal expression.

The scope of the report is extremely wide. It can apply to any offence, crime, violation of a national or international text, so European by definition, as well as harm or a threat to the general interest. This covers everything: the environment, loss for government finances, health threats, etc. Conciliation with protected secrets exists, as does exemption from criminal liability for the whistleblower who, in good faith, reveals a secret in certain areas. Making obstruction of disclosure an offence is also a key element in the protection offered to whistleblowers. Finally, protection of the identity of whistleblowers, protection against retaliation, with fast-tracked judicial proceedings in particular, emergency interim proceedings for labour disputes and the ajustement of the burden of proof – which thus no longer lies with the whistleblower but with the structure s/he is in.

Regarding reports, there is still room for substantial improvement in the text, even if we have managed to relax what the Conseil d'État proposed along with the different reporting channels: the comments are often mistaken in that respect. There is a great deal of flexibility, in fact. In the law we have defined an ideal procedure with, first of all, an internal channel, so as not to undermine the authority of supervisors, and then an external channel. But it is quite possible to go through the external channel directly under some circumstances. The authorities and businesses are obliged to set up internal reporting procedures.

We also wanted practical support to be given to whistleblowers, and this is why we had made provision for financial support. I was disappointed that the Constitutional Council quashed this provision. This is a crucial aspect which the authorities will have to reconsider, as whistleblowers are often individuals in an extremely vulnerable state mentally and materially speaking.

Lastly, who was going to protect whistleblowers had to be determined. The Government was in favour of setting up a new independent authority. In line with the recommendations of the Conseil d'État and Transparency in particular, we preferred to entrust this mission to the Defender of Rights.

Today, I am among those who do not regret that choice. The Defender of Rights is the highest constitutional independent authority in the institutional landscape of independent authorities in France, the most trusted authority by citizens as well as, perhaps, the first whistleblower – especially were the Government not to give it the requisite support for taking action. The lawmaker thus sought to entrust this protection to the soundest, most firmly established authority in the French institutional landscape, because we were also at the end of a five-year term, and the authority – itself deprived of resources no doubt – was under major threat.

What systems are there in Europe?

CONTRIBUTION BY VIRGINIE ROZIÈRE

Virginie Rozière is a former Member of the European Parliament. Committed to the question of whistleblower protection at European level, she was appointed European Parliament rapporteur on the draft directive, for which she oversaw and concluded negotiations in April 2019. She did not stand for a second term and is now an elected member of Occitania's Regional Council. She continues to work with public bodies and NGOs in monitoring the transposition of the European Directive on the Protection of Whistleblowers.

"THE DIFFERENCES BETWEEN EUROPEAN LEGAL CULTURES HAVE GIVEN RISE TO MUCH DEBATE, IN PARTICULAR ON THE NOTION OF "GOOD FAITH" AND THE DEFINITION OF AN ALERT."

As French rapporteur for the European Directive on the protection of people who report breaches of Union law, I had the opportunity to work on development of better whistleblower protection in Europe. The mission brought me up against a number of challenges. The first was to obtain agreement to the principle of a European Directive. At first, the European Commission didn't make things easy for us. It took the combination of a context with several tax avoidance scandals such as the LuxLeaks scandal. Antoine Deltour and Raphaël Halet were emblematic figures and played a part in mobilising public opinion, as the very embodiments of what might become of whistleblowers: acting in the general interest and getting dragged before the courts.

We were also helped on our way by the adoption of the Trade Secrets Directive just as the LuxLeaks scandal was breaking.

Trade secrets, which were considered as a means of incriminating Deltour and Halet during their trial. The attention that was already being paid to the case crystallised, became increasingly focused, and finally mobilised public opinion, the MEPs that we were, and, of course, NGOs on the question.

As a result, the European Commission ended up by agreeing to hear a number of arguments. The evolution of certain Member States, and of France with the work carried out around the Sapin II Act, certainly contributed to this. So conditions were finally right to obtain a proposal for a directive a year before the end of the mandate. Given the time available, we had to work under pressure, which played a part in shaping the end result.

The second challenge was to combine extremely different situations and cultures around the question of whistleblower protection. To start with, relatively few national frameworks existed. At the beginning of the mandate, in 2014, only 6 countries had any kind of protection in place. But the subject led to action being taken in various countries and we saw significant developments take place, in particular in France, Italy and the Netherlands.

The differences between European legal cultures have given rise to much debate, in particular on the notion of "good faith" and the definition of a report. On this latter point, we wanted to adopt the most protective terms possible while reaching a compromise. For example, obtaining a proposal of a horizontal directive rather than an accumulation of sectoral measures was our key concern when confronted with a European Commission which argued that there was no legal basis in European treaties. The European Parliament's determination to obtain the most comprehensive framework possible finally prevailed after a series of heated exchanges between the lawyers and academic experts put into play by the various institutions concerned. But the adoption of a horizontal approach raised a new question: that of its scope of application. As we're dependent on the European Union's competences as defined in the treaties, we've obtained a scope of application that differs from those in place in certain States. We had a lengthy debate on the inclusion of such social aspects as worker protection law in the scope of application, which was not included in the end. As we've drawn up non-regression clauses, we hope that the scope of application that will be adopted in the various transpositions will be as wide as possible.

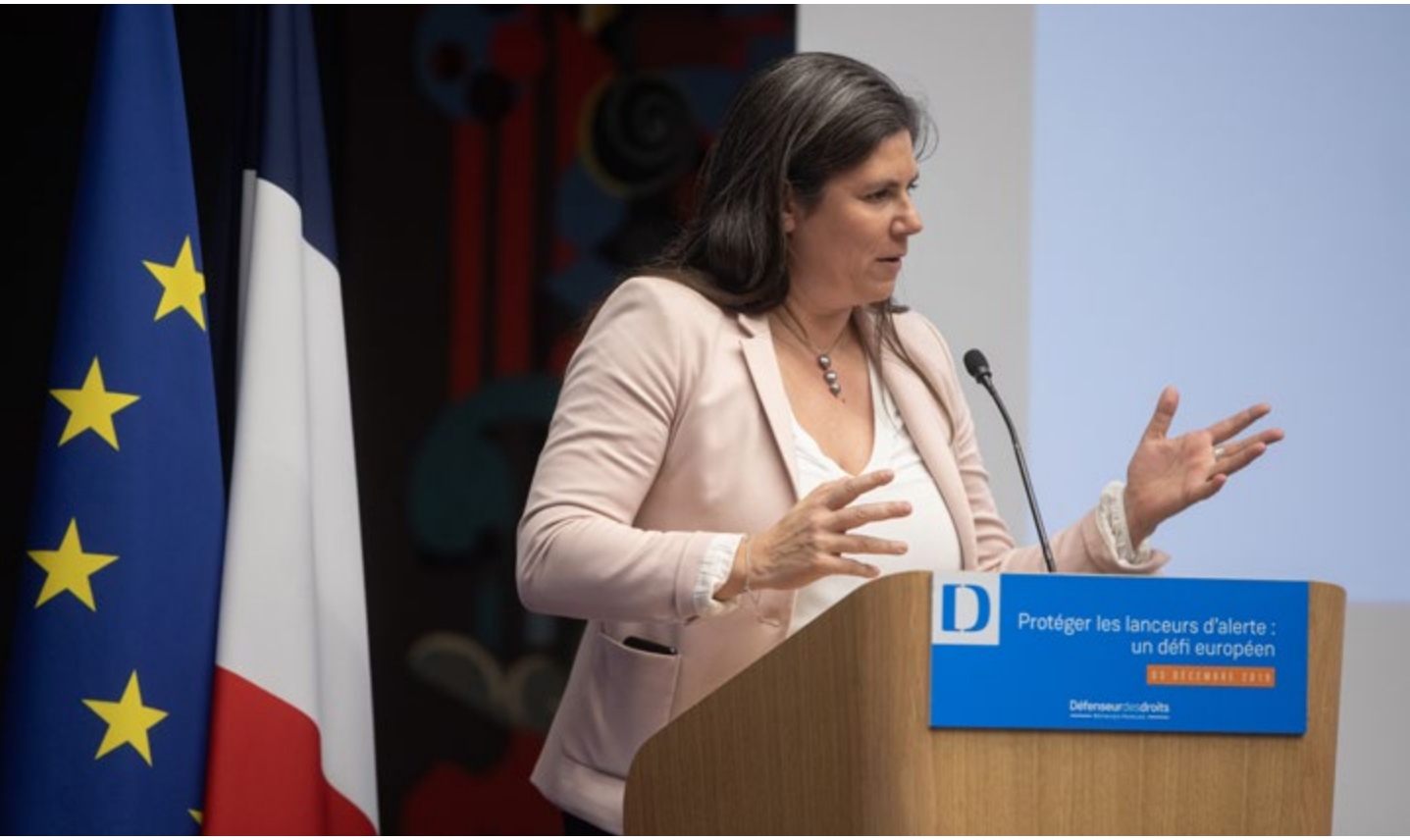
In addition to the material scope of application, the personal scope of application was also discussed, in view of whistleblowers' differing personal situations. In effect, in the Directive there must be an economic link – not necessarily a direct one – with the organisation called into question, in order to be protected. Here too, its transposition may enable wider action of the personal scope of application.

The conditions for initiating protection also constituted a major challenge. The Directive adopts a tiered approach, according to the channels through which a report is issued – internal to the organisation, external via an independent authority, or public via the press, for example.

Yet distinguishing reporting channels means creating potentially restrictive conditions under which whistleblowers may be afforded protection. I initially proposed the abolition of any prioritisation of channels, rather than any form of strict prioritisation allowing for exceptions. For if the legitimacy of not complying with any prioritisation of channels is only assessed at the end of proceedings, via the judge, protection is only afforded once proceedings have been concluded. It will therefore have been refused throughout the time during which the whistleblower should have been protected. The compromise that was found, following a fierce tussle with the Council, is similar to the system in force in the Netherlands. It results in there being no prioritisation between channels internal to the organisation and external channels via an independent authority. Prioritisation is maintained with regard to use of public channels, but with presumption of the whistleblower's good faith. So now there's the a priori benefit of protection, even in cases of public revelation, which may be withdrawn later if it's shown not to have been legitimate, if conditions for exception were not met.

The European Commission played its role of facilitator and enabled a compromise to be reached that will constitute an interesting starting point for further improvement. Such will be the case for the 18 Member States that as yet have no protection, and which will have to provide it. It will also be an opportunity for harmonising the systems of various States that already provide protection.

Of course, the Directive doesn't solve everything, in particular questions of States' internal organisation as regards methods of collection of reports, whistleblower protection and processing of alerts. It's difficult for a European text to put forward a single framework with any level of detail on questions that remain essentially within the competence of Member States. Obviously, we're well aware that the scope remains completely open and will be of crucial importance to the effectiveness of the protection provided.



Of course, the reality of protection depends on the legal bases that can be provided in order to define the framework, but there's also a practical aspect, enabling whistleblowers to have access to information, know their rights and be provided with the right guidance and advice, and the way in which we're able to guarantee them that their reports are properly processed.

In this respect, I think that the work carried out by the Defender of Rights is a guarantee that these fundamental issues will be taken into full account. In the two years that lie ahead of us for transposition of the Directive, it will be on the basis of this work that France and all European States will, I hope, be able to provide protection to whistleblowers that meets the goals we've set.

Opportunities provided by the European Directive

CONTRIBUTION BY ANTOINE DELTOUR

A former auditor at PricewaterhouseCoopers (PwC), Antoine Deltour blew the whistle on tax avoidance practices implemented in Luxembourg. The financial scandal broke in November 2014, and was dubbed "LuxLeaks". It raised the question of tax justice within the European Union by revealing the content of several hundred advantageous tax agreements concluded by audit firms with Luxembourg's tax authorities on behalf of international multinationals.

Antoine Deltour was prosecuted in Luxembourg for "domestic theft, violation of professional confidentiality, violation of business secrets and laundering of acquired data" and sentenced in first instance to 12 months' imprisonment suspended, and then, upon appeal, to 6 months' imprisonment suspended and a 1,500-euro fine. He was finally acquitted by Luxembourg's Court of Cassation and recognised as a whistleblower in 2018.

Now a member of the Board of Directors of the non-profit whistleblower centre (Maison des Lanceurs d'Alerte), Antoine Deltour continues to work for the recognition and protection of whistleblowers.

"TAX OPTIMISATION SIMPLY CONSISTS OF EXPLOITING ALL THE LOOPHOLES IN THE LEGISLATION."

As it stands today, not all European States protect whistleblowers in the same way or in the same situations. I experienced this for myself as a whistleblower in the LuxLeaks case. I had to face lengthy legal proceedings in Luxembourg, which ended with my acquittal on all charges to do with the report, but only after an appeal hearing, cassation and a second appeal. If they'd taken place in France prior to enactment of the Sapin II Act, these long, stressful and expensive proceedings would have taken very much the same course. After the Sapin II legislation, the fight would've been easier.

Luxembourg had a law that protected whistleblowers, but it didn't cover my case. If I won in the end, it was only by application of the European Court of Human Rights' case law, in other words, of supranational law. Whence the need today to reinforce protection in order to harmonise European States' regimes.

The European Directive's interest and advantages are of particular importance to me. For example, in future, whistleblowers will benefit from independent advice provided free of charge. This may not be much in itself, but it may stop them taking pointless risks. The Directive also provides for whistleblowers' exemption from criminal liability, which would've been of major benefit in my case.

And finally, it reverses the burden of proof in the event of retaliation and also provides for full compensation for harm suffered. This is all very good news for future whistleblowers in Europe.

What then are the European text's limitations? First of all, there's its definition of whistleblower, which is much inferior to the definition provided by the Sapin II Act. The Directive aims to prevent breaches of European law. This implies that citizens must know what comes under European and international law. A distinction also has to be made between what comes under the law and what does not exist in law. Here, the very role played by the whistleblower comes into question. For example, in the LuxLeaks case, I blew the whistle on tax avoidance behaviours that did not constitute an actual breach of the law. Tax optimisation simply consists of exploiting all the loopholes in the legislation. I very much hope that, in the future, whistleblowers report cases of general interest, concerning practices that haven't yet been covered by the legislature, precisely in order to change the law and correct imperfections in legal and regulatory frameworks.

For example, when a substance proves to be dangerous, a whistleblower has to report the danger of using it before its use becomes illegal.

Society needs to provide protection for whistleblowers who report things that are not necessarily offences.

The main challenge in transposing the Directive is the extension of the strong protection it affords to all threats and serious harm to the general interest in accordance with a wider definition, such as that provided by the Sapin II Act.

I should also like to emphasise another challenge in its transposition – the absolute necessity of excluding all conditions on the acquisition of documents. In order to copy the LuxLeaks documents and communicate them to a journalist, I had to break a number of criminal laws. I was prosecuted for theft and fraudulent access to and use of an IT system. Do these breaches of criminal law justify prosecution or not? The Directive provides no explicit answer to this question, in particular by stipulating that acquisition of information constitutes a separate criminal offence. Great care must therefore be taken during its transposition in order to ensure that conditions under which whistleblowers can access protection are not too restrictive.

The opportunities provided by the European Directive

CONTRIBUTION BY LAURENT MAUDUIT

Laurent Mauduit is an investigative journalist specialising in economic affairs and social and economic policy. After spending many years working in the Libération and Le Monde newsrooms, he cofounded the Mediapart information website in 2008, for which he still works today. Laurent Mauduit is also an author and has published some fifteen works and essays. The latest, published in 2018, is entitled *La Caste*. Enquête sur cette haute fonction publique qui a pris le pouvoir.

"IT'S THANKS TO WHISTLEBLOWERS THAT JOURNALISTS HAVE GOT TO KNOW ABOUT ALL MAJOR CASES OF FRAUD AND IRREGULARITIES."

In my profession as a journalist, the notion of "right to know" underpins the freedom of the press. It's not a journalist's privilege but a major right of all citizens: there can be no strong democracy without well-informed citizens. Freedom of the press has now brought whistleblowers' revelations into public debate. From this standpoint, I'd like to tell you of my worries and hopes alike.

My main worry is that one or other of the two pillars constituted by freedom of the press and whistleblower protection may be showing signs of weakening. As far as freedom of the press is concerned, I have the feeling that we're living in a period of historical regression after having lived for so long in a period of consensus. Yet, as Camille Desmoulins put it, "the press is the watchdog of democracy".

In the first major progressive law on the press, enacted in 1881 and still governing its operation, the spirit of liberality endures. It is summarised by Article 1: "Printing houses and bookshops are free". And yet I have the deep-seated feeling that this consensus is cracking, that a whole series of bills and threats are impacting the freedom of the press. There was the law on fake news, the attempted raid on Mediapart, journalists being summoned to appear before the Directorate-General of Internal Security (DGSI), and the trade secrets law. With this law we saw a reversal of the philosophy espoused by the law of 1881, which enacted a principle of freedom and transparency and punishes any eventual abuses. Now it is opacity that prevails, and the law provides for possible exceptions.

How truly pernicious the trade secrets law is was made clear by the "Implant Files" case. Requests made by journalists from Le Monde who were working on an investigation concerning major public health questions were objected to by the Commission for Access to Administrative Documents (CADA) in the name of trade secrecy, even though the enterprise concerned was a public company.

This provision is all the more damaging in that it impacts journalism focusing on companies. Such reporting is already largely muzzled in France, unlike the UK, which has a press specialising in financial investigative journalism. Trade secrecy has therefore been added to the constraints in a world where the press is already highly restricted.

How truly pernicious the trade secrets law is was made clear by the "Implant Files" case. Requests made by journalists from Le Monde who were working on an investigation concerning major public health questions were objected to by the Commission for Access to Administrative Documents (CADA) in the name of trade secrecy, even though the enterprise concerned was a public company.
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Nonetheless, I welcome the European Directive with considerable satisfaction. It is highly progressive overall and, in France at least, it provides a counterpoint to what we are currently experiencing as regards freedom of the press. In order to carry out investigations in certain sectors, journalists must have whistleblowers to turn to. For example, how do you carry out a journalistic investigation of a bank? It can't be done without a whistleblower. Only the CEO possesses all the information. Counterpowers are weak and aren't informed until long after decisions have been made.

It's thanks to whistleblowers that journalists have got to know about all major cases of fraud and irregularities. I spent years writing about French financial life in Libération, and a long time at Le Monde, where I headed the Companies Department. Over the course of eight years, I provided countless details of serious irregularities committed by banks, which, each and every time, led to whistleblowers being sacked.

One of the most emblematic such cases resulted in the highest ever fine imposed by the Financial Markets Authority (AMF): 35 million euros, which has just been reduced to 20 million euros by the Conseil d'État (highest administrative court in France). Nonetheless, the whistleblower concerned was sacked. Yesterday, I wrote a column about a particularly serious case concerning the same bank; once again the whistleblower was sacked. I'm well aware that the Sapin II Act has resulted in progress being made in France. These days, the Financial Markets Authority keeps a register of whistleblowers, which has certainly had a protective effect as whistleblowers can now avail themselves of certificates delivered by the AMF. But it's clear that progress is still very slow.

As a journalist, I pay close attention to work and debate on the European Directive's transposition. I'm hoping for a good transposition, one that will maintain the Directive's major advances, safeguard the progress resulting from the Sapin II Act, and incorporate the Council of Europe's recommendations. Once again, citizens' fundamental right to knowledge is at stake. As Victor Hugo said, in a fine speech he made to the Constituent Assembly on 11 September 1848: "*The principle of freedom of the press is no less essential and no less sacred than the principle of universal suffrage. They are two sides of the same coin. These two principles are inseparable and complement each other. Freedom of the press, alongside universal suffrage, means freedom of thought for everyone, which implies enlightened government for all. Undermining one is tantamount to undermining the other*". It would be good if nobody forgot that.

Guaranteeing optimal protection and fostering ethical reports

CONTRIBUTION BY MARTIN JEFFLÉN

Martin Jefflén has been the President of Eurocadres since 2013, one of the six multisectoral social partners recognised at European Union level. As such, he represents European executives in all branches of industry, public and private services and administrative services. Martin Jefflén previously held successive posts as advisor, democracy secretary and international secretary at the Swedish trade union Unionen, in the TCO Confederation. He was also elected President of the UNI Europa Federation's "Professionals & Managers" group, and worked as international secretary and organisation secretary at the Swedish Federation for LGBTQI Rights.

"EACH EXTRA CRITERION THAT A WHISTLEBLOWER HAS TO MEET IN ORDER TO BE ABLE TO BENEFIT FROM PROTECTION DECREASES THE LIKELIHOOD OF THEIR BEING ABLE TO BENEFIT FROM IT."

Eurocadres is a European trade union that represents some 6 million executives. As such, we take part in the EU's intersectoral social dialogue by negotiating with employers. We've been active in the field of whistleblower protection since 2013, and the Trade Secrets Directive has led us to take action with regard to legal protection of whistleblowers in the European Union. The executives who make up our membership are often the first to discover wrongdoings that need to be reported in the public interest. We therefore need to find a balance between professional ethics, corporate social responsibility and questions of compliance, while maintaining key performance indicators and ensuring achievement of project goals.

When whistleblower protection became the most debated part of the trade secrets directive in 2014-2015, we wanted to make sure that civil societies and trade unions remained active, in particular with regard to the question of whistleblower protection. We therefore took the initiative of creating a platform, whistleblowerprotection.eu, bringing together some 90 trade unions and NGOs. Since then, we've advocated for people to make the very most of the European Directive on whistleblower protection.

It's a good Directive that's also been significantly improved by negotiations between Council, Commission and Parliament.

In particular, we've done our utmost to guarantee the right to approach the competent authorities directly, without having to make a prior internal report.

What are our main recommendations regarding the transposition procedure? First of all, each extra criterion that a whistleblower has to meet in order to be able to benefit from protection decreases the likelihood of their being able to benefit from it. The Directive aims to ensure that more reports are made so that European legislation can be better applied. It's therefore essential to ensure that whistleblowers really feel safe enough to make a report. This is why we must ensure that national legislation becomes fully horizontal, that it isn't divided up into different thematic areas, as is the case with the Directive as it stands at present. The directive must be complete, covering a wide range of areas, and also comprehensible so that citizens understand it.

The Directive is based on application of Community law. Hence, it only covers reports relating to Community law. The first thing to include during its transposition, of course, is national legislation. France is one step ahead on this point, thanks to the Sapin II Act. In this sense, the non-regression clause is one of the Directive's positive aspects. It prevents any lowering of protection standards in a Member State, which might make use of the Directive's implementation as a pretext for doing so. No one stands to gain by making sure that European legislation alone grants protection to whistleblowers. This would make the law dangerous for whistleblowers, giving them a false sense of security.

Another question on which France is one step ahead, as regards the question of the material scope of application, is that of the public interest. The Sapin II Act also includes reporting in the public interest. This is one of the most important things to introduce in all Member States during the Directive's transposition, so as to ensure that it's in line with the European Council's recommendations.

As regards trade union interests, if we don't obtain fully horizontal implementation, we would at least like to see inclusion of working conditions, non-discrimination, and health and safety at work. The Directive covers a great many areas, including animal welfare and public health. Let's take the example of public health. If you sound an alert on the safety of patients, they are at risk of being harmed because staff make mistakes. But staff make mistakes because they are heavily overworked and because the Work Time Directive is not being complied with. So you can issue a report on public health, but you get no protection on the subject of health and safety at work. This gap needs to be filled.

Another aspect of the material scope of application is the general exception made for national security, which doesn't come under the EU's competence. We must therefore ensure that, for certain national security questions, national legislation includes national confidentiality, with special notification procedures.

As a trade union, we obviously want to ensure that we're able to represent our members, and that they can come to us for advice. National legislation must make it clear that approaching a trade union isn't the same thing as publishing on Facebook. Why bring up such a simple example? Because approaching a trade union isn't the same thing as making an internal report in the company or organisation concerned. Nor is it an external report, as it isn't made to the competent authorities. And then there's the last option – alerting the public. This needs to be clarified. The right to approach a trade union must be granted and must not be understood as a public report.

The right to go and see a trade union must be granted. As trade unions, we must also ensure, in particular during setup of internal reporting channels, that we have a tried and trusted social partner fully committed to dealing with them.

Because of the special reporting procedure provided for by the Directive, use of such reporting channels is also a criterion. National legislation needs to be clarified on this point. For example, if you approach one of your directors or your company's human resources manager, you can't lose your protection simply because you've used the wrong channel. Reporting might also be made mandatory. And once this is the case, protection should be granted.

We dealt with a case having to do with acquisition of documents. And it's Member States' job to settle such problems, which implies criminal liability for obtainment of documents. The Directive stipulates that national law must define whether or not this incurs criminal liability and it's essential to make sure that obtainment of documents is included. If you don't have the information in your possession, you can't disclose it. Obtainment of documents is an integral part of the reporting process.

Three final aspects. First of all, in two places, the Directive speaks of "reasonable belief", in other words, belief that what has been reported is true.

This is similar to a "test of good faith". At the same time, if you have reason to believe that your "alert" comes within the Directive's scope of application, you're covered by the Directive. Whatever definition is adopted, reasonable belief must be similar to what a colleague – in other words a comparable individual, not an expert – would believe if he or she was in the same situation.

Secondly, a word on the burden of proof in the event of retaliation. There's an excellent article in the Directive that concerns reversal of the burden of proof following retaliation. Nonetheless, we must ensure that the recital, which is clearer than the article itself, prevails in national implementation.

Finally, there's the question of cultural change. Changing a culture is never easy. We must make sure that we have the funding required for our mission of information. In this respect, it should be borne in mind that transparency and responsibility are never free of charge.

Guaranteeing optimal protection and fostering ethical alerts

CONTRIBUTION BY MARIE TERRACOL

Marie Terracol is coordinator of the Ethical Whistleblowing Programme implemented by Transparency International, a global movement with over 100 divisions across the world committed to combating corruption. She coordinates Transparency International's work on advocating improvement of protection of whistleblowers across the world, so that they can report corruption and other wrongdoings in complete safety. She is the author of Transparency International's *Guide to Best Practices* with regard to legislation on whistleblower protection, published in 2018.

"THE EU'S MEMBER STATES MUST NOT SIMPLY TRANSPOSE THE DIRECTIVE, THEY MUST ALSO GO BEYOND ITS PROVISIONS."

In the United States, a procedure for the impeachment of the President was recently opened following a whistleblower's report on abuse of power for personal advantage. This is a very serious matter, and I imagine that most of us would agree that it's in the general interest to reveal possible abuses of power by a Head of State. However, as it stands at present in most EU countries, the whistleblower would not be protected. Nor would he be protected by the newly adopted European Directive. If there had been a similar case in Europe, we'd have known nothing about it as the whistleblower wouldn't have made a report for fear of reprisals and because there were no adequate reporting channels available to him.

In order to guarantee truly effective protection of whistleblowers who defend the general interest, and encourage ethical reports, the EU's Member States must not simply transpose the directive, they must also go beyond its provisions.

The EU Directive is a very good instrument, an excellent starting point. It establishes robust minimum standards. We've welcomed it at Transparency International as an innovative legislative text.

- It applies to public and private sectors alike in the same way, which is important.
- It not only protects reports of illegal activities, but also those that go against the aim and purpose of existing rules. This includes abusive practices that don't seem illegal, such as those revealed by Antoine Deltour in the LuxLeaks case.

- It takes no account of the whistleblower's reasons for making a report, and rightly so. The focus must be on the report's content, not on the reason why the whistleblower came forward, which, in France, might mean removing the altruism requirement.
- The Directive protects whistleblowers' identities in most cases, with clearly defined exceptions. It also protects anonymous whistleblowers.
- The Directive provides for several different reporting possibilities: in addition to making an internal report to their organisation, whistleblowers can also approach the competent authorities directly. This is a step forward for whistleblower protection in France and the Netherlands, for example. Finally, in certain circumstances, they can make public revelations.
- The Directive establishes the obligation to follow up whistleblowers' reports and keep them informed. This is a major encouragement to ethical reports. After all, whistleblowers won't come forward if nothing happens afterwards. In addition to fear of reprisals and not knowing who to make their report to, one of the main reasons for individuals deciding to keep quiet is that they think that reporting won't change anything. And unfortunately, that's often true.

All these constituents, and much else in the Directive's content, are essential to definition of a sound legal framework for ethical reports, and Member States should ensure that these provisions take full effect when they transpose the Directive. Nevertheless, this won't be enough to protect ALL whistleblowers who speak out in the general interest. To remedy this, Member States must go further. In particular, national legislation on whistleblower protection must have a much wider scope of application.

Widening the material scope of application

The American whistleblower in my example wouldn't be protected in Europe due the Directive's fragmented and limited scope of application (a result of the EU's limited competences). The Directive only protects whistleblowers who report breaches of Community law in certain areas. A whistleblower who reports breaches of Community law in areas other than those listed in the Directive, or breaches of "simple" national legislation, isn't protected by the directive. Transposing the Directive as it stands would therefore create inequalities and legal uncertainty. Not knowing whether or not they are protected, individuals with knowledge of breaches that might harm the general interest might decide to keep their mouths shut. As a result, their organisations, the authorities and the public may remain ignorant of wrongdoings harmful to their interests.

Transparency International therefore recommends that, when they transpose the Directive, European States adopt a horizontal approach and cover as wide a scope of wrongdoings as possible, so that all cases of reporting are covered and all whistleblowers are protected. The Directive certainly specifies that a country may adopt legislation with a wider scope of application, and the European Commission encourages them to go beyond the Directive. There's therefore no excuse for not doing so.

French citizens may think that none of this applies to them, as the scope of application is already quite wide in France. That's true, but only if we avoid the pitfall of creating a second parallel protection regime, with a system in which people can approach the authorities directly without having to prove their altruistic motives alongside a system for all other cases. Of course, that would create absurd levels of complexity and uncertainty, and is therefore a path to steer clear of.

Designating a national authority responsible for whistleblower protection

Adopting a law on whistleblower protection is only a first step. In countries where legislation has already been in existence for several years, we've observed that, in order to provide whistleblowers with effective protection and encourage ethical reports, the law must be properly implemented and applied. This requires a national authority responsible for overseeing its implementation and application. Such authority might be a new body specially created for the occasion. However, countries may simply extend the competences of an existing authority, such as the Defender of Rights in France, for example. The authority concerned must be independent and possess the powers and resources required to operate effectively. In terms of competence:

- It should provide whistleblowers with free advice and support.
- It should ensure that whistleblowers' reports are communicated to the competent authorities so that they can take all necessary measures.
- It should receive, investigate and process complaints concerning retaliation and inappropriate follow-up of reports.
- It should keep a close eye on and examine the operation of laws and policies governing whistleblowing, including in companies and public institutions, in particular via collection and publication of data.
- It should raise the general public's awareness so as to encourage whistleblowers' take-up of protection. If people don't know that a law or a system exists, they won't come forward.

In conclusion, European countries have until December 2021 to transpose the European Directive. This provides them with an excellent opportunity to bring their national legal framework into compliance with international standards and best practices. In order to do this, they shouldn't simply comply with the Directive's provisions, but improve on progress made by going beyond what it provides for.

Transparency International has published a report containing a series of recommendations aimed at filling gaps and reinforcing the whistleblower protection provided by the Directive during the transposition procedure: Transparency International, *Building on the EU Directive for Whistleblower Protection: Analysis and Recommendations (2019)*:

www.transparency.org/whatwedo/publication/building_on_the_eu_directive_for_whistleblower_protection

Guaranteeing optimal protection and fostering ethical alerts

CONTRIBUTION BY JACQUES TESTART

Jacques Testart is co-founder and Honorary President of the Sciences Citoyennes association, and a member of the Maison des Lanceurs d'Alerte (France). After training as an agronomist and biologist and taking a Doctorate in Science, he became a researcher at INRA and teacher/researcher (University Paris 7), and then Director of Research at INSERM. Jacques Testart has devoted himself to problems of natural and artificial procreation among animals and humans. Responsible for the first "surrogate mothers" among bovines (1972), and then, with his biomedical team, for France's first successful in-vitro human fertilisations (1982), human embryo cryopreservation (1986), and IVF with spermatozoid injection (1994).

A word on the Maison des Lanceurs d'Alerte. First proposed by Sciences Citoyennes and Amnesty International France in 2009, France's non-profit whistleblower centre was finally created by 17 associations and trade unions in October 2018, with a view to assisting whistleblowers in their procedures and mitigating their often dramatic isolation. The aim is to provide whistleblowers with legal, psychological, financial and media support. It ensures reports are followed up and advocates improvement of legislation on whistleblowers, who act on behalf of the general interest.

The Maison des Lanceurs' d'Alerte currently has 2 to 3 employees, who are assisted by several dozen volunteers, above all in legal and psychological areas of competence. Our first assessment, following 13 months of activity: 97 files were received, a third of which concerned matters unrelated to work.

We were very well received by the public at large and there appears to be general satisfaction on the part of whistleblowers.

What is the current situation as regards whistleblowers? The Sapin II Act enacted in 2016, along with creation of the Maison des Lanceurs d'Alerte and wide media coverage of a number of reports, have certainly improved their situation in 2019. But there's still much to be done in order to ensure real protection and effective consideration of all reports. We want to continue this movement, in particular by drawing on the European Directive of October 2019, but also on the Council of Europe's Resolution 2300 of 1 October, and requesting the incorporation of a number of their proposals into French legislation.

As regards the integration of recent European proposals, the Maison des Lanceurs d'Alerte is responsible for the open letter to Emmanuel Macron on the status of whistleblowers sent on 7 November 2019, a letter co-signed by 54 NGOs echoing the European Directive of 23 October 2019, which owes a great deal to the trade unions and NGOs that rallied to the cause. The demands contained in the letter include adjustment of the burden of proof, provision of legal assistance, retaliatory sanctions, and creation of a whistleblower support fund to be provisioned by fines. We also request the right of asylum for threatened whistleblowers, and reinforcement of the Defender of Rights' missions and resources.

The Maison des Lanceurs d'Alerte believes that some of the recent fundamental European provisions amending the Sapin II Act are absolutely essential. Chief among them is the definition of whistleblower as a natural or legal person. This provision is necessary to ensure that vulnerable, isolated individuals do not suffer too much exposure.

On its side, the European Directive institutes a two-tier procedure rather than the three-tier version in the Sapin II Act, so enabling whistleblowers to sound the alert internally or directly to the competent authorities, such as the Defender of Rights in France, before any revelation to civil society. Let's avoid the wall of the hierarchy in companies and administrations, along with unsecured systems. If we do, we'll be able to open up numerous reporting procedures that are often discouraged.

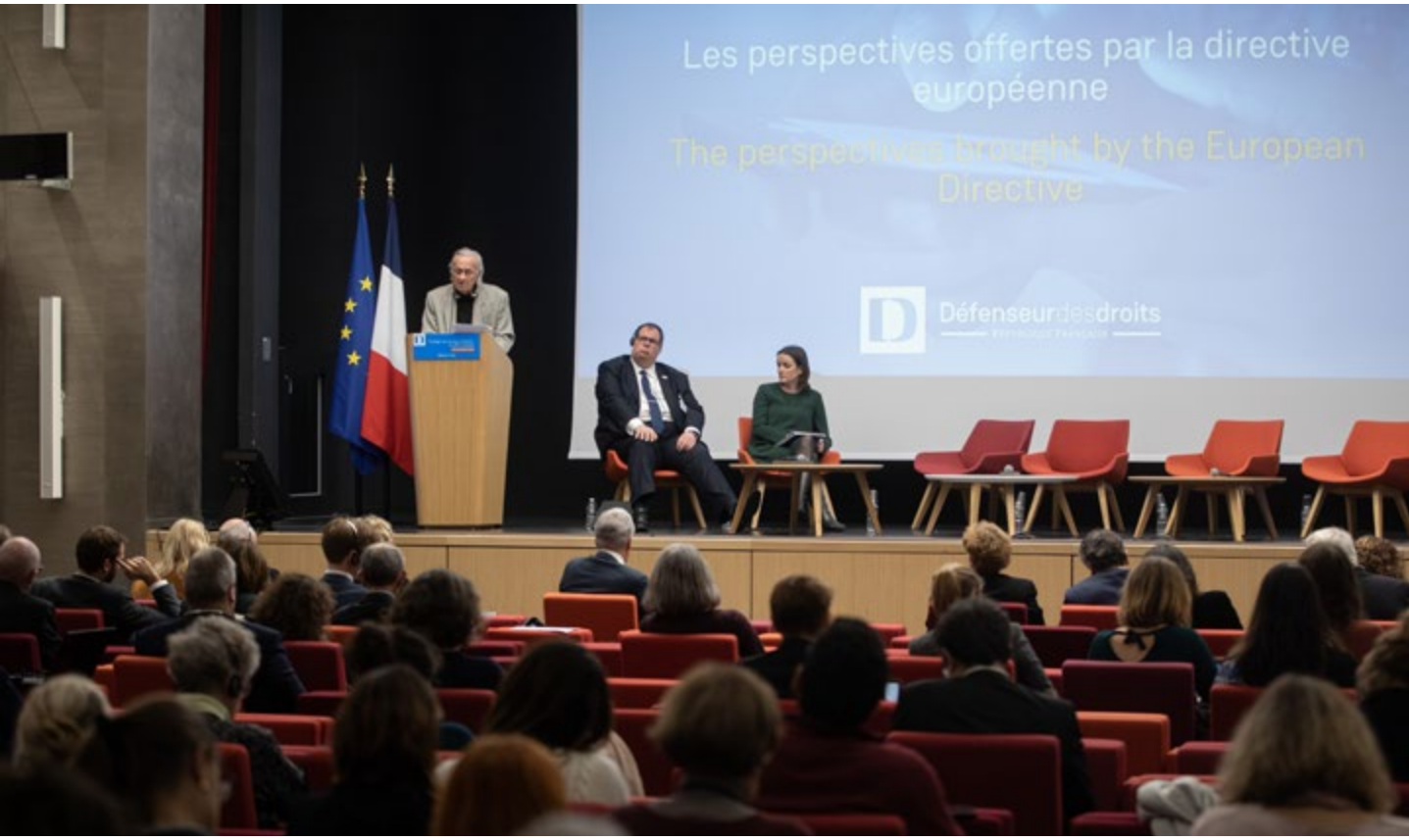
The European Directive also clarifies conditions for recognition as a whistleblower, setting aside such subjective criteria as having altruistic motives and personal knowledge of the facts revealed, preferring good faith and compliance with the procedure in their stead. By doing so, we avoid legal interpretations, which are often unfavourable to whistleblowers.

In addition, the Council of Europe's recommendation advocates the role of a facilitator, which might be an NGO providing assistance to the whistleblower, including outside the professional context. The Maison des Lanceurs d'Alerte, which already performs this function, would like its role to be recognised, along with that played by the associations and trade unions that have brought whistleblowers out of the shadows.

Of course, there are provisions in French law that need to be preserved. For example; although the 2019 European texts situate whistleblowers in the professional context alone, the Sapin II Act provides a wider definition of alerts that threaten the general interest. Its definition must be kept, whatever area a report concerns.

The most important but also sorely neglected question is the monitoring of reports. One of the Blandin Act's key recommendations was lost in 2016; it related to the processing and monitoring of reports, to be carried out by a dedicated Independent High Authority with possible referrals to health and environmental agencies. The Blandin Act bears on health and the environment, while the more recent texts address new reports in the economic field, which above all seek to combat corruption and fraud and aim to ensure transparency.

When the environment and health are in danger, vigilance is more than just a legal requirement. Scientific appraisal of reports is therefore just as important as whistleblower protection, as we've seen when there have been reports warning of the dramatic effects of chemical substances and medicines. Such monitoring requires implementation of an exemplary appraisal procedure, including the adversarial process and multidisciplinarity, often in order to dismantle official appraisals and reduce conflicts of interest that have led to situations justifying reporting.



In 2008, because the monitoring of scientifico-technical reports is indissociable from their expert assessment, the Sciences Citoyennes association had proposed the creation of an independent High Authority for Expert Assessment and Alerts, with the power to oversee the way in which authorised agencies carry out expert assessments. Reporting is in the public interest and is more than simply denouncinging illegal practices. Creation of a High Authority for Expert Assessment and Alerts, or the allocation of such function to a body such as the National Commission on Ethics and Alerts, provided with real independence and full investigatory resources, would express an all too often trivialised precautionary principle, and would also enable scientific defence of whistleblowers to be based on democratically established evidence.

And finally, there's one more, as yet unexplored, field that merits attention: upstream research, when whistleblowers worry about the ethical or anthropological consequences of work that is nonetheless encouraged by institutions, even before it is completed. Hence, assuming that his about-turn did not come too late, was Oppenheimer a whistleblower when he was worried about the risks to humanity posed by development of the atomic bomb? And would he be defended today, how and by whom would his report be appraised?

Guaranteeing optimal protection and fostering ethical alerts

CONTRIBUTION BY SYLVAIN WASERMAN

Sylvain Waserman is a French Member of Parliament (MoDem), Vice-President of the National Assembly and Vice-President of the French Delegation to the Council of Europe Parliamentary Assembly – CEPA (which brings together parliamentarians from the Council of Europe's 47 countries). It is in this context that, in January 2018, he obtained the signatures of 50 parliamentarians from a variety of political and national groups in order to draft a study report on effective protection of whistleblowers in Europe – a report adopted on 1 October 2019.

"PROTECTION IS PROBABLY TO WHISTLEBLOWERS WHAT FREEDOM IS TO THE PRESS."

I'm convinced that whistleblower protection has become a true democratic marker. Dissemination of reports is no longer a major obstacle. However, it's because they find it difficult to identify the risks they're exposed to that whistleblowers need greater protection on the part of States. In the context of the report presented to the Council of Europe, we organised an event entitled "48 Heures Chrono : Lanceurs d'alerte" (48 hours by the clock: Whistleblowers) in which we collected the various viewpoints expressed by 130 experts, whistleblowers, Edward Snowden in videoconference, journalists, political jurists, etc., with a view to raising the question of the "next step" as regards the law.

This report's first conclusion is that European law on the subject is not stabilised. Each one of us, civil society as a whole, has a role to play in developing such law. 13 proposals came from it; including the proposal to define independent authorities' exact objectives and prerogatives. I must stress the importance of a network of European authorities, such as the Defender of Rights in France, in terms of democratic sharing of case law, as well as the possibility of transferring a report to a legal person. Whistleblowers' isolation is all too real and proposals on the burden of proof are important, in particular against gag orders, as is the possibility of creating legal defence funds, provisioned by fines imposed on organisations that don't follow the rules. As far as I can see, two subjects are yet to be covered by the law and should be given greater thought: the right of asylum and military secrecy.

Such organisations as the Maison des Lanceurs d'Alerte exist in order to facilitate the essential emergence of a whistleblower ecosystem in civil society.

The report ends with a self-assessment grid so that each member of the Council of Europe Parliamentary Assembly can assess their national law in the light of its performance as regards whistleblower protection. It's a subject central to democracy, and one that each and every member of parliament must take fully to heart.

The time for the Directive's transposition is fast approaching. It's a democratic opportunity that must not be missed. And during the transposition, the vision that we must promote as legislators, three years after the advances achieved by the Sapin II Act, is to accord whistleblowers their rightful place in our democratic models, in order to construct a robust democratic edifice. Democracy will be all the stronger for it in its fight against large-scale corruption, serious environmental damage and infringements of civil liberties, in particular in the digital field. Our democracy will be all the stronger if we grant whistleblowers their legitimate place in our society. Protection is probably to whistleblowers what freedom is to the press. In both cases, it is for the Rule of Law to guarantee protection of freedom.

In a society where many of our fellow citizens have doubts about our democratic system, it's essential to restore trust, and whistleblower protection is of key importance if we are to do so. Therefore, when we transpose the Directive, we must adopt a stance that is both ambitious and audacious, one that strives to ensure perpetuation of a robust democratic edifice, in which whistleblowers are nothing less than cornerstones. Our work will have to be precise, accurate and meticulous as the law on the subject is complex and there are a great many pitfalls to be avoided. Protection isn't a blank cheque.

Recognition of whistleblower status is a question that must be raised at the very beginning of the procedure in order to know whether or not an individual can legitimately benefit from it. Whistleblower status is by no means self-proclaimed, and the law must be precise in order to minimise risk.

As I see it, we therefore have a dual challenge as legislators. The first is to lead the way with regard to whistleblower protection and the second is to have the humility to acknowledge that we have little legislative objectivity and little precedent to draw on.

In this field, perhaps more than any other, it is essential to forge ahead in collaboration with civil society. We have an opportunity to create an ecosystem with an associative sector of wide competence, able to provide invaluable opinions to guide this legislative endeavour on its way. It will have to be given its rightful place.

We have a real challenge to meet collectively – that of making the democratic marker of whistleblower protection emblematic of France's democratic model, so creating momentum at European level.

Guaranteeing optimal protection and fostering ethical alerts

CONTRIBUTION BY ZETA GEORGIADOU

Zeta Georgiadou has been Deputy Head of the "Fundamental Rights Policy" Unit at the European Commission's Directorate-General for Justice and Consumers since 2016.

After working at the EU Court of Justice, first as a lawyer linguist and then as an advisor at the former President of the Court's Office, she worked at the European Commission in the fields of asylum, citizenship and freedom of movement within the EU.

"IT'S IN ALL COUNTRIES' INTEREST TO PROTECT WHISTLEBLOWERS."

The fact that the Directive was adopted in record time testifies to the strong political determination at European level to grant whistleblowers high and coherent levels of protection. It should be borne in mind that the European Parliament and the Council agreed on the final text in less than a year after presentation of the Commission's proposal. A result that owes a great deal to the action taken by citizens and NGOs.

With adoption of the Directive, the European Union has become a leading light in whistleblower protection at global level. Whereas whistleblowers have so far been exposed to unequal, fragmented and even non-existent protection depending on country, the European Directive provides essential harmonisation that will replace the existing legislative patchwork.

We are delighted that the Council of Europe Parliamentary Assembly is encouraging its Member States that are not members of the European Union to draw inspiration from the Directive in order to adopt or modernise their legislation. We are also pleased to note the Assembly's invitation to the Committee of Ministers to make a start on preparations for negotiating a convention inspired by the European Directive.

At present, the Commission's main priority is to lend its support to Member States' transposition of the new rules. To this end, we're going to create a group composed of experts representing the national authorities that will be responsible for the transposition. The group will enable its experts to discuss any problems that emerge at national level and will act as a platform for exchange of experience and expertise, with a view to sharing best practices and correcting bad ones.

As we've already heard, a number of Member States, including France, have already enacted horizontal legislation, which they now have the opportunity to improve. Even though they may be familiar with the concept of a protection mechanism, most Member States only have sectoral protection. They will now have to adopt new legislative machinery and introduce new notions into their legal systems.

As for us, we'll seek to ensure that the Directive's various concepts are properly understood and interpreted, and implemented in all 27 Member States. Our main goal is to prevent incomplete, incorrect or delayed transpositions that might result in infringement proceedings against Member States before the European Union Court of Justice. We'll also aim to maximise the effectiveness of the Directive's rules in practice. There are various measures and strategies that Member States can implement in order to activate all the levers that might contribute to effective protection on the ground.

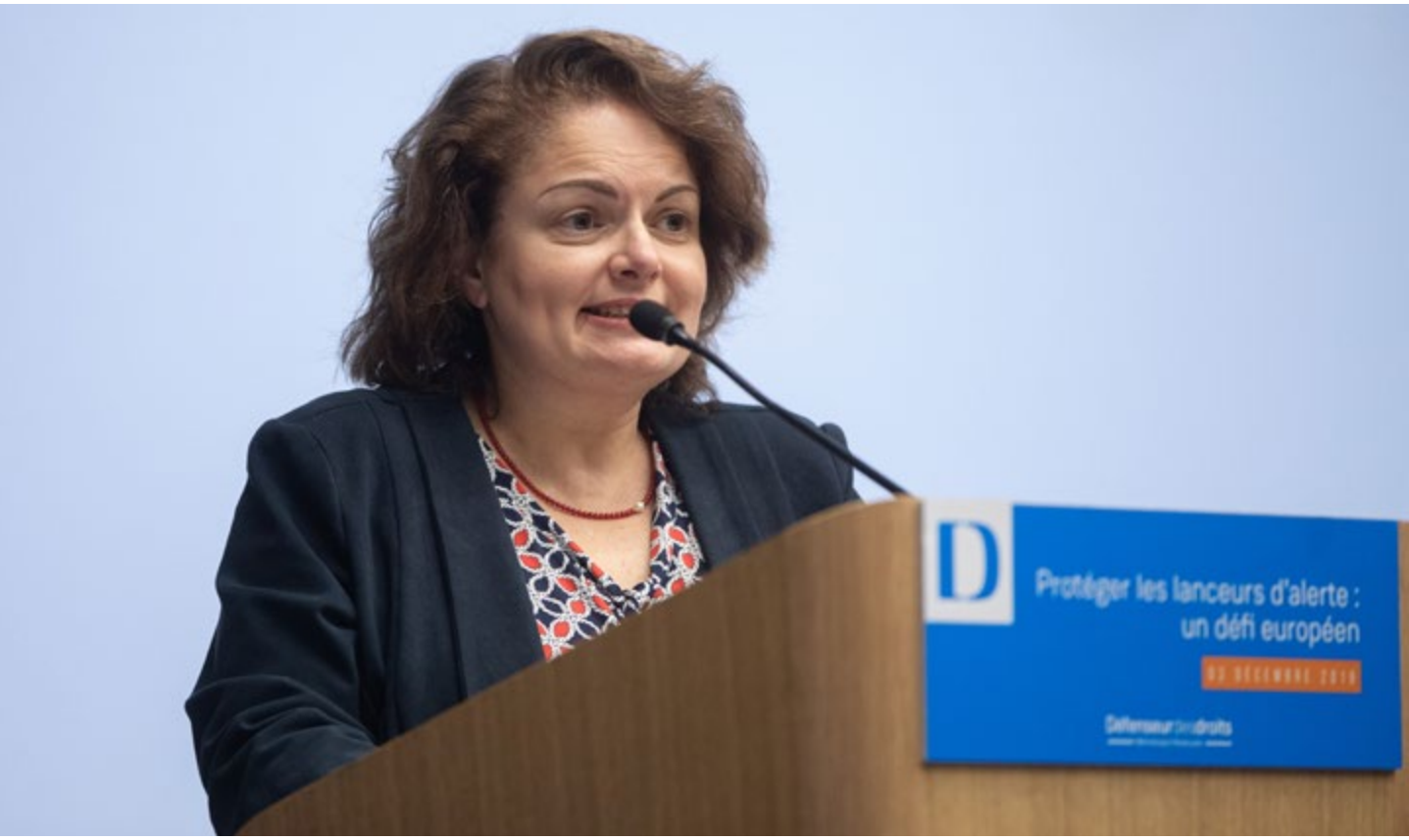
The Commission's communication, published in April 2018 at the same time as the proposed directive, and the Directive itself highlight a whole range of measures and best practices; in particular, during transposition, we encourage Member States to consider extending the scope of application of the Directive's rules to other areas and, in general, to guarantee a coherent, comprehensive framework at national level. In compliance with the subsidiarity principle, the Directive establishes whistleblower protection measures covering application of Union law in specific areas. But ultimately, it's in the interest of all countries to protect those who report breaches of national law and threats to the public interest at national level.

In the context of the transposition, thought must be given to the role and competences to be assigned to national mediators in accordance with their mandates, in particular in order to assist whistleblowers, via provision of guidance, support and advisory services, for example, by investigating allegations of retaliation or allegations of the public authorities failing to follow up reports.

As a next step, after the Directive's transposition, targeted measures might be considered and adapted with a view to activating all the levers contributing to effective protection on the ground. Through provision of guidelines and best practice guides to companies and industrial concerns, for example. Provision of support measures to companies might also be considered, medium-sized companies in particular, which might have need of financial or practical assistance in implementing and managing whistleblowing channels.

Given the essential role that the Directive assigns to social partners, I should like to stress the need to provide trade union representatives and works council members with adequate training. It's also crucial for journalists to be trained, so that they can reassure whistleblowers that contact them: even if their identity is exposed, they'll be protected from retaliation. The training of judges and legal practitioners is of particular importance, as it ensures effective implementation of the Directive.

More generally speaking, the Commission encourages Member States, once they've enacted the laws transposing the Directive, to consider organising awareness-raising and information campaigns targeting the public at large. Such campaigns should provide general information on available reporting channels and protection, and also promote a positive perception of whistleblowers as individuals who act in the public interest and through loyalty to their organisations and society as a whole.



Such campaigns would also further reassure and encourage potential whistleblowers, and promote a genuine culture of transparency.

In conclusion, I should like to quote Article 2 of the Treaty on the European Union, which enshrines the values on which the Union is founded. They are the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.

Effective protection of whistleblowers helps guarantee the protection of all these fundamental values, and so deserves unreserved commitment and collective effort on the part of the European Union's institutions, Member States and stakeholders.

As for us, we'll be more than happy to assist and support transposition procedures, with a view to ensuring that the Directive comes into full effect.

Contribution by Jacques Toubon

Defender of Rights

The whole of Europe is represented in this room, and that bodes very well for the rest of our mission. I welcome the members of the NEIWA network, who met for the first time in The Hague at the end of May at the instigation of our Dutch counterpart. Then the second meeting took place yesterday in Paris. Its goal was to ensure that the institutions responsible for whistleblower protection in Europe agree on the common recommendations made on the subject we're focusing on here, the transposition of the Directive. Today, it's a done deal, and, as the 14 current members of NEIWA, we're very proud of having adopted the Paris Declaration, which aims to commit our respective countries' public decision-makers to action.

Through this common Declaration, we join forces to recommend that all the European Union's Member States make use of all the options offered by the Directive to provide for a system to protect whistleblowers everywhere, in all countries, accessible to all, highly protective, and, as was stated at the end of our discussions, backed up by adequate resources.

Ten countries already have fully-fledged protection regimes, including France, since the law of 9 December 2016, the so-called Sapin II Act, has implemented a general whistleblower protection regime essentially based on a wide definition of whistleblower and a tiered reporting procedure, as the Conseil d'État (highest administrative court in France) had proposed in a report communicated to the Government in spring 2016.

In the law, there's a prohibition of professional retaliation, along with an innovative and absolutely crucial mechanism of criminal non-liability for having revealed a secret protected by Article 109 of the Criminal Procedure Code, a professional secret for example.

Nonetheless, France still appears to be in midstream. Everyone agrees that the Sapin II Act hasn't had all the effects that were expected of it. As Defender of Rights, and being responsible for guiding whistleblowers and ensuring protection of their rights and freedoms, I soon realised that, taking account of the multifold difficulties in interpreting the text and as the applicable legal regimes had not been harmonised or coordinated, people likely to come forward as whistleblowers had a hard time determining whether or not they complied with all the rules set by the law enabling them to benefit from the protection regime resulting from it.

Such uncertainty is even more of a deterrent for whistleblowers – usually men or women acting on their own – in that the regime has not been accompanied by any action on the Government's part aiming to spread knowledge of the system beyond the small circle of those in the know and interested parties. I published a guide on the Internet, which is pretty much the only instruction manual on the law of 9 December 2016 currently in existence. Lack of knowledge was so widespread that, in the course of 3 years, I only received 240 referrals – relatively few in view of the breadth of the subject.

In a good many cases I had to act as educator and explain what conditions had to be met in order for the facts reported to qualify as an alert. Many complainants didn't know that the whistleblower protection regime does not apply when, for example, they are in personal conflict with their employer, or, broadly speaking, when the altruistic character of their report has not been established. This is one of the reasons why, in public law, I advocate abolition of the subjective criterion of altruistic motive after the Directive's transposition.

Some complainants, supposed whistleblowers, are helpless faced with the complexity of the law. Others, for example, report facts they have no personal knowledge of, as a preventive measure, contrary to what the law requires; that's the other subjective criterion – "personal knowledge of the facts reported" – that should be called into question. Faced with this situation of uncertainty, we've often advised complainants to proceed with caution.

I have repeatedly requested the public authorities to amend the legislation concerned, in order to make it clearer, more accessible, and ultimately, more operational. Among other things, I've alerted the Government to the deficiencies and imbalances in the law and, in April 2018, presented an opinion before Parliament on the difficulties created by the combination with the law on trade secrets.

Thanks to the efforts made by our parliamentarians, above all by a number of members of the Committee on Legal Affairs, the Community Directive was published in the European Union's Official Journal on 26 November, providing a great opportunity for each and every member of the Union to create or improve an exemplary whistleblower protection regime by the end of 2021. This is an opportunity for France, which could finally cross the stream without turning back.

A number of points seem to me to be essential for an effective transposition.

I believe it is necessary to approach this transposition with a great deal of ambition. Even though the Sapin II Act brought about advances that must be preserved, in particular its wide scope, wider than in many other European countries' legislations and in the Directive itself, the transposition calls for a complete overhaul of the French system, not simply a series of minor modifications.

Firstly, its overhaul must seek to make the regime a great deal clearer, and I speak from experience and as the operator of the present system. A regime with a great deal more clarity in order to keep whistleblowers safe when they step forward and do away with the dissuasive effect of any uncertainties. This can only come about by harmonisation of existing protection regimes.

Secondly, the transposition must be the result of interministerial collaboration, in order to better ensure that the final text is as coherent as possible; it must not be overseen by the Ministry of Finance alone, as the Ministry of Justice is also the Ministry of Law and Freedoms.

Third precept, the transposition must aim to break the isolation whistleblowers all too often find themselves in, including after the report has been made. To ensure this, as the Directive invites us to do, the regime must provide for an authority capable not only of monitoring whistleblowers, informing them, guiding them and protecting them against any reprisals or retaliatory measures they might be subjected to, but also of following up reports made via the various channels and making sure that reports are properly processed at the appropriate level. Such authority, which it is incumbent upon the public authorities to determine, must be assigned substantial competences, with special, strong powers of intervention based on mediation, which therefore go beyond the simple context of combating discrimination. Naturally, it's up to the Government to choose this authority as it sees fit. The Defender of Rights is one possibility.

On condition that it still remains the Defender of Rights, in other words independent and impartial, including in this area. It's this independence and impartiality that can give it its strength but which may also impose considerable limitations. We can't be both judge and jury. If we're automatically on the whistleblower's side, we're no longer the Defender of Rights, as, by definition, we'll no longer be impartial.

It will in no case be possible to have real protection, follow-up of reports or processing of reports unless there is an authority with the relevant capacities.

Finally, given the size of the task, the public authorities must take the time required to carry out the work involved in transposition. Such work should be carried out in close collaboration with all bodies active in the defence of whistleblowers. In this regard, I've undertaken to organise legal workshops bringing together experts, witnesses and associations, which would act as forums for exchange aiming to produce recommendations that might be communicated to the Government and Parliamentary Assemblies.

The European Commission has announced the creation of a participative platform along with an expert group that will act as interface between governments and the Commission. The Defender of Rights will continue its mission of defending whistleblowers' rights with the same determination, and will make full use of all the opportunities for improvement provided by the Directive in order to propose implementation of a more protective and effective system.

To conclude, our present law contains advances and inadequacies alike. The Directive provides France and other European Union members with bases for decisive, irreversible progress. A patient, interministerial method of transposition should enable achievement of the most ambitious law possible, and so serve truth, guarantee freedoms, freedom of expression in particular, and fully re-establish the trust that has already been partly restored. It's now up to the Government, members of parliament and senators to act, with the support of civil society.

Contribution by Nicole Belloubet

Minister of Justice, Keeper of the Seals

As a member of the Government, and also in a personal capacity, I believe that whistleblower protection is one of the most important challenges that contemporary democracies have to meet. An important challenge because it's a matter of transparency and truth, and therefore of justice.

The reports made by individuals now referred to as whistleblowers serve to highlight facts, and therefore truths, that would otherwise have remained hidden. By blowing the whistle, such individuals play a key role in revelation and prevention of offences harmful to the public interest, doing so in a variety of areas, including public health, the environment, integrity, and economic and financial affairs. Acting in all our interests, whistleblowers report via channels inside and external to an organisation, revealing serious violations of the law in the widest sense of the term, and major risks that threaten the public interest. By so doing, they contribute to better information of citizens and, in general, to the proper operation of democracy.

I'm therefore of the same opinion as the Council of Europe's Parliamentary Assembly, which, in its resolution of 1 October 2019, stated that "whistleblowers play an essential role in any open, transparent democracy". The Council of Europe added that "the recognition that is granted them and the effectiveness of their protection in law and in practice against all types of retaliation constitute real democratic markers".

However, although there seems to be ever greater consensus on this subject in France and at European level, the road that has led us to the present situation, with all its advantages and inadequacies, has by no means been an easy one. As you know, the concept of "the right to notify" made its first appearance in 19th-century American legislation with the adoption in 1863 of the False Claims Act, also known as the Lincoln Law, a federal law which, for the first time, set the principle of provision of legal protection to individuals who helped reveal fraudulent use of public money. But the rest of the world had to wait a long time for dissemination of the concept and assertion of the legal protection that might be provided to such whistleblowers.

It wasn't until 1982 that the International Labour Organisation established the principle of prohibition of termination without just cause for an employee who had lodged a complaint before the courts or taken action before a competent administrative authority to report violations on the part of their employer or the administration. And in Europe, it was not until 2014 that the Council of Europe really started to tackle the question and came up with a definition of the notion – which was not legally binding, incidentally. The definition covers "any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector".

As we know today, France pioneered such protection at national level. This being so, French positive law was one of the sources that inspired European work, which led to the proposed Directive on whistleblower

protection in the European Union. France was determined to live up to its international commitments, in particular the United Nations Convention against Corruption, which, in its Article 33, requires that States Parties ensure whistleblower protection. But it should be understood that France's adaptation of its legal framework was carried out in fits and starts, initiated by high-profile cases that led the French legislature to adopt various sectoral provisions designed to protect individuals who made reports in good faith.

These sectoral provisions included the adoption of the law of December 2011, which instituted protection for individuals who had helped reveal facts calling the safety of medicines and health products in general into question. The law followed on from the so-called Mediator case.

Another landmark legislative initiative followed the so-called Cahuzac case, with enactment of the law of 11 October 2013 bearing on transparency in public life and providing protection for whistleblowers reporting conflict of interest situations. Hence, French legislation on ethical reports initially was developed bit by bit, in fragmented fashion. In this respect, it was already the subject of criticism highlighting the lack of coherence, clarity and accessibility of mechanisms in force. As a result, the Conseil d'État (highest administrative court) was asked to draw up an assessment in 2015. Its findings served as a basis for development of the procedures later introduced by the Sapin II Act of 9 December 2016. The system instituted by the Sapin II Act is itself partly the result of the consequences of the LuxLeaks case, symbolised by Antoine Deltour.

Determined to be a pioneer in a subject of such importance, France used the 2016 law to provide itself with a comprehensive, coherent and harmonised general regime for protection of whistleblowers. So it was that the Sapin II Act first of all introduced a broad definition of whistleblower into positive law. It then went on to create a common foundation, based on secure, tiered procedures enabling whistleblowers to issue their reports; in this context a central role, key to ensuring the effectiveness of all its provisions, was entrusted to the Defender of Rights, which can receive reports and direct whistleblowers to the authorities competent to receive and process their reports.

In this respect, I also note that, in July 2017, the Defender published a guide to orientation and protection of whistleblowers, an initiative much to be commended.

As regards their protection, French law now provides whistleblowers with at least three protective mechanisms. They're protected against any possible retaliation on the part of their employers, at least in theory. They can't be excluded from recruitment procedures, access to internships or training courses, or be sanctioned, dismissed or subjected to discriminatory measures, in particular with regard to remuneration and promotion. Their identities are also kept confidential. The law stipulates that the report collection procedures implemented must ensure that a whistleblower's identity remains confidential. And finally, whistleblowers are granted criminal non-liability, as the law provides for criminal immunity for whistleblowers when they infringe legally protected trade secrets when such revelations are necessary and proportionate to the protection of French interests.

Therefore, we cannot but be satisfied to note that this very comprehensive French law helped inspire the Directive on protection of persons who report breaches of Union law, which was recently published in the European Union's Official Journal of 26 November 2019. I should like to emphasise at this point that France took a very active part in negotiating the Directive, strongly advocating a wide scope of application and high levels of protection. Of course, as is the case with all European legislation, the text is the result of compromise.

It's not for France to impose its wishes on the European Union's 27 other Member States, and it's not the European vision that I intend to promote. Whatever the case, France was one of the countries most committed to rapid completion of the text. On one hand, the Ministry of Justice's experts assisted the Commission in drafting the proposal for a directive in 2017. On the other, the French

authorities that participated took a flexible approach in order to ensure that, despite major legal constraints, negotiations resulted in a single instrument with a wide scope of application that also covered a number of tax issues. Finally, in collaboration with its partners in the Council, France proposed further alternative possibilities, worked to clarify the text wherever necessary, and held numerous discussions with the text's rapporteur at the European Parliament.

This is why I'm so pleased to see the text's adoption and its recent publication in the Official Journal. Where did the Directive's essentials come from? What does it say? Initially, its adoption resulted from the shared finding that the protection granted to whistleblowers in many European Union Member States is still fragmented and inadequate. That's why we first decided that a common text needed to be drawn up. Where it does exist, sectoral protection is usually limited to the fight against corruption and only concerns the public sector. Yet unequal protection of whistleblowers within the European Union can only harm the conditions for fair competition that are necessary to proper operation of the single market. The inadequacy of national legislations within the European Union seemed likely to foster the appearance of dangerous products on domestic markets and carry risks to public health and transport safety, the consequences of which might extend well beyond national borders.

In contrast, it appeared that harmonised protective legislation would most probably have beneficial effects in many areas, including the fight against pollution, consideration of the environmental issues involved in business activities, public health, etc.

It was in this context that, on 23 April 2018, the European Commission presented a proposal for a directive designed to set minimum standards for whistleblower protection in Member States. Its negotiation provided France with an opportunity to reassert its commitment to effective protection of individuals who, usually acting on their own, have the courage to report breaches of the law harmful to the general interest.

The French Government was necessarily involved in the Directive's drafting and negotiation, spurred by a determination to ensure that whistleblowers were provided with maximum protection, while instituting a mechanism that was legally sound and proportionate to the different levels of the seriousness of the reports made. This was the dual ambition we pursued: maximum protection and, at the same time, a tiered, legally sound mechanism.

As you've said, the transposition period is set at two years. In France, work on the transposition will necessarily take the form of modifications to the current regime with a view to bringing it into compliance with the Directive's provisions, which, in certain areas, diverge from the provisions of the Sapin II Act. We shall therefore have to review the Sapin II text in order to take account of the points in question included in the European Directive. By way of example, while the Sapin II Act provides a very wide definition of the types of offences that can be reported, the Directive focuses on breaches of EuropeanUnion law in a specific range of sectors: public procurement, financial services, domestic market, environment, nuclear power and public health. Quite a broad range all in all, but limited nonetheless. This is a discordance that we shall have to give thought to, perhaps with a view to sticking with our own scope.

Conversely, the scope of persons protected by the European Directive is wider than in French law. Furthermore, in addition to whistleblowers who meet the Directive's definition, the European text also provides protection to third parties who aren't at the origin of the report. Hence, the Directive enshrines the notion of facilitator, defined as a "natural person who assists a reporting person in the reporting process in a work-related context". The Directive also grants protection to third parties connected with whistleblowers who might be subjected to retaliation in the context of their work, colleagues or relatives.

It'll therefore be necessary to rework the French text to bring it into compliance with the European Directive. Work on transposing the Directive should start in the very near future. When the time is right, we shall bring in stakeholders involved in currently existing whistleblower protection systems.

I've taken note of the four precepts touched upon by the Defender of Rights. No minimum transposition. That's not our intention.

Interministerial work, the Ministry of Justice should play its role to the full, you can count on me, the Ministry of Justice is the Ministry of the Law. Third precept: break whistleblowers' isolation. The Defender of Rights highlights the creation of an authority taking responsibility for whistleblowers and for dealing with their reports. When the Law of 2016 was enacted, the Constitutional Council was required to rule on the Defender of Rights' role and found that it wasn't within the Defender of Rights' competence to provide whistleblowers with financial help, a provision originally included in the law but finally removed as a result.

Lastly, the final precept, taking one's time and adopting a patient, interministerial transposition method. In the two years to come, we have enough time and patience to do the work required by the European text. It will be essential to take stock of the situation through a systematic but pragmatic approach to deficiencies and areas for improvement identified in the present regime. In this respect, the work carried out by the European Colloquium [of 3 December 2019] organised by the Defender of Rights will be invaluable in helping us to make progress, providing a highly practical and very proactive analysis.

Rest assured, I shall give careful consideration to the avenues for thought that have been outlined during today's meeting.

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