Globethics Repository



Does the law of 21 March 2022 really improve the protection of academic whistle-blowers?

This page was generated automatically upon download from the Globethics Repository. More information on Globethics see https://www.globethics.net. Data and content policy of Globethics Repository see https://repository.globethics.net/pages/policy.

Item Type	Book chapter
Authors	ALBERTON, GHISLAINE
DOI	10.58863/20.500.12424/4307057
Publisher	Globethics Publications
Rights	2024 Globethics Publications;Attribution-NonCommercial-NoDerivatives 4.0 International
Download date	2026-11-19 22:09:43
Item License	http://creativecommons.org/licenses/by-nc-nd/4.0/
Link to Item	http://hdl.handle.net/20.500.12424/4307057

10

DOES THE LAW OF 21 MARCH 2022 REALLY IMPROVE THE PROTECTION OF ACADEMIC WHISTLE-BLOWERS?

Ghislaine Alberton

1. Introduction

"The man that first notices an act of this kind shall report it… And if the informer be a free man, he shall win a reputation for virtue, but for vice if he fail to inform; and if he be a slave, as a reward for informing it will be right that he should be set free, by the State offering his price to his master, whereas he shall be punished by death if he fail to give information." [*] (Plato, Laws 11.913d-914a, transl. Bury) used this story to sketch the figure of the person who, since 1863, has been known in the

[*] Ghislaine Alberton is Tenured Professor of Public Law at the University of Pau and Pays de l'Adour (UPPA), Faculty 2EI Bayonne, scientific integrity adviser.
How to quote this chapter: Alberton, Ghislaine, "Does the Law of 21 March 2022 really improve the protection of accademic whistle-blowers?", in: Bergadaà, Michelle, and Peixoto, Paulo (Eds.), *The New Boundaries of Academic Integrity*, Geneva: Globethics Publications, 2024, pp. 209-228. DOI: 10.58863/20.500.12424/4307057 © Globethics Publications. CC BY-NC-ND 4.0 International. Visit: https://globethics.net/publications

United States as a "whistle-blower" and, since the end of the 1990s, in France as a *lanceur d'alerte* (Chateauraynaud & Torny, 1999).

As an ancient practice, "the ethical notification has therefore certainly been raised to prominence in our democracy". And, because it "represents a democratic and civic safeguard in our States governed by the rule of law, it should not only be the domain of heroes. It must become a safe, risk-free, and easy move" (Council of State, 2016, p. 11).[68] This is precisely what the new law of 21 March (No. 2022-401), which aims to improve whistle-blower protection aspires to achieve by modifying the whistle-blowing procedure created by Law No. 2016-1691 of 9 December 2016 on transparency, anti–corruption, and the modernization of economic life, known as the Sapin II law. Indeed, in the words of the parliamentary information report of 7 July 2021 "on the evaluation of the impact" of this law of 2016, "Whistle-blowers are in a paradoxical position regarding their status: while this law encourages them to make reports by asserting the existence of a real shield for their authors, the protection and support of whistle-blowers remain very weak in practice, thus exposing them to very great difficulties". In other words, "the French status of whistle-blowers had not yet reached maturity", so many imperfections were present in their protection regime (National Assembly, 2021[69]).

Faced with the need to transpose EU Directive 2019/1937 of 23 October 2019, which only concerns "persons who report breaches of Union law", French legislators have "over-transposed" its requirements by extending compliance to the French whistle-blowing regime. Their goal is very clear: to make this new law "a reference framework at

[68] All translations from Council of State (2016) are ours.

[69] All translations from National Assembly (2021) are ours.

the European level for the protection of whistle-blowers" (Waserman, 2021[70]).

But does this law really deliver on the promise of its title? Does it really improve the legal protection afforded to whistle-blowers from 1 September 2022 (the date it came into force)? That is precisely the question that this study aims to answer, taking the academic research community as its expert "lab".

From the outset, the task is difficult. Indeed, while the scope of the protection newly granted to whistle-blowers has been dramatically expanded, it is still necessary to meet many conditions to benefit from it, as before, even though they have been renewed.

2. Renewal of the Conditions of Protection

Since 2016, the conditions of protection have governed both the definition of a whistle-blower and the procedure that must be followed in order to benefit from effective legal protection. And specifically to strengthen this protection, the law aimed to clarify the former and simplify the latter.

2.1. A clearer definition of whistle-blower?

Article 6 of the 2016 law provided a definition of whistle-blowers that the law of 21 March 2022 rewrites from both an organic and a material perspective.

> - From an organic perspective, a whistle-blower is now "a natural person who reports or discloses certain information without direct financial consideration and in good faith" (see below).[71]

Thus, on the one hand, the requirement that there be no direct financial consideration has replaced the obligation to act in a disinterested

[70] All translations from Waserman (2021) are ours.

[71] All translations from the 2016 and 2022 laws are ours.

manner, which Report 4325 considered to be a "source of legal uncertainty" and therefore "in itself a major deterrent" (National Assembly, 2021, p. 141). This is because, in the broad sense, the disinterestedness criterion made it possible to exclude from the definition of whistle-blower, and therefore from any legal protection, a person who wished, for instance, to make a report concerning their employer, even though they were already engaged in a dispute with it for another reason,[72] or to make a report concerning a professional competitor. Indeed, in these cases, individuals could be considered as "benefiting" from the consequences of an accusation that might appear to be made not so much in the general interest as for their own ends. That is why, from now on, only financial interest is targeted... provided, however, that it refers to "direct financial consideration", which excludes from the outset any prospect of compensation for a whistle-blower. Conversely, the rule in the United States in no way prohibits whistle-blowers from receiving financial support (see below).

On the other hand, the requirement of "good faith" is fully maintained, because right from the beginning, the judge adopted an inclusive definition, considering that "bad faith can only result from the knowledge by the person concerned of the falsity of the facts they are denouncing and not from the mere reason that the facts denounced are not established".[73]

Finally, the whistle-blower is no longer required to have personal knowledge of the facts they are reporting, except in one case: "when this information was not obtained in the course of their

[72] See not. CA (Court of Appeal notification) Nancy 31 October 2018 no. 16/02824.

[73] Cas. soc. (Court of Cassation, Chamber for Social and Labour Matters) 8 July 2020 no. 18-13593 (our translation). See also CAA (Administrative Court of Appeal) Nantes 1 June 2021 no. 19-NT03158.

professional activities". Consequently, in a strictly professional context, whistle-blowers now have the ability to denounce facts that have been reported to them. This explains why the law of 21 March extends the organic scope of application of the Sapin II law beyond direct whistle-blowers by targeting their "acquaintances" more widely. Indeed, according to its new Article 6-1, the law now applies to "facilitators, understood as any non-profit legal person under private law [specifically a trade union or an association, or any natural person who helps a whistle-blower to make a report]". As a result, all "persons in contact with a whistle-blower [in concrete terms, their colleagues and relatives] who are at risk [in turn and by a domino effect] of being subject to retaliation in the context of their professional activities by their employer, their client, or the recipient of their services" are now protected. This is certainly reassuring for potential whistle-blowers, who are now assured of not being as isolated as they were under the 2016 law.

Thus defined, is this organic scope of application intended to apply to the scientific research community? Undoubtedly yes, if we take the definition resulting from law no. 2020-1674 of 24 December 2020 on research programming (LPR) and its implementing decree no. 2021-1572 of 3 December 2021. These texts refer to "staff" as well as "students in the context of training in and through research" of "public institutions contributing to the public research service" and "recognized public-interest foundations whose main activity is public research".[74]

All staff of these institutions and foundations are therefore potentially whistle-blowers within the meaning of the Sapin II law, whether they are researchers themselves or contribute to scientific activity, in particular by contributing to research work (documentalists, librarians, etc.) or by supervising it (members of administrative and management bodies);

[74] The former include all public higher education and/or research institutions, while the latter (listed on the Ministry's website) are represented by the Institut Curie and the Instituts Pasteur (of Paris and Lille), among others.

whether they are covered by civil service law or general labour law; whether they are permanent or contract workers (permanent or fixed-term contracts) or even temporary employees; and whether they are active or retired (Serre et al., 2023). The Sapin II law also applies to all students enrolled in a doctorate or even a master's degree, as soon as they start writing a thesis.

But the people thus identified still need to "report or disclose information" that falls within the scope of the Sapin II law.

- On the material level, the scope of application of this law is also strictly defined, although it has been extended since 2016.

According to its new Article 6, the reporting may now concern "information relating to a crime, an offence, a threat or harm to the general interest, a breach or an attempt to conceal a breach of an international commitment duly ratified or approved by France, a unilateral act of an international organization taken on the basis of such a commitment, European Union law, or a law or regulation".

That article is teeming with new possibilities. However, what should have led to an increase in the number of events that can be reported, according to the explanatory memorandum (Waserman, 2021), turns out to be "a source of uncertainty and therefore of legal insecurity", upon analysis and in the opinion of the Council of State itself (Council of State, 2021, pp. 3–5).

First, this information may relate to a breach (which no longer needs to be "serious and obvious" as in 2016) of a European or national act[75] and even to an "attempt to conceal" such a breach, which, in view of the vagueness of the term, could constitute, in its opinion, "risks of abuse of the protection procedure".

[75] For example, concerning a decree: Cas. soc. 19 January 2022, no. 20.10057.

Second, and most importantly, the information may relate to "a crime, an offence, a threat, or harm to the public interest", without the requirement, as in 2016, that the crime or offence be "serious". The question had indeed arisen as to when a breach becomes "serious".[76] Once again, what appears to be a move towards simplification is in fact a source of new complexities: indeed, how can a "simple" threat or "simple" harm to the general interest be legally identified without its constituting a crime or an offence, and therefore a criminal offence? While these certainly represent such a harm or threat, the reverse is not necessarily true. This could apply to any situation which, although in compliance with the law, turns out to have undesirable or even harmful consequences.[77] It is easy to understand how subjective such an assessment is and the resulting risks of legal uncertainty. These risks are increased by the following question, which remains unanswered: is the general interest considered to be exclusively the interest of everyone (e.g., the protection of public safety, health, or the environment) or, more broadly, can it be the interest of a class of persons united by the same interests? In other words, can a group's interest be recognized as being of general interest or is only the interest of everyone likely to be recognized as being in the general interest?

The question is far from trivial;[78] to demonstrate this point, we need only take the academic world as an example. Does a breach of the integrity that characterizes this community fall within the scope of the amended Sapin II law? Undoubtedly, if it constitutes an offence.

---

[76] For example, CA Paris 4 January 2022, no. 19/10423, and CA Versailles, 16 February 2022, no. 19/02029.

[77] On this distinction, see CE (Council of State), 31 March 2017, no. 392316 concerning the malfunctioning of the system for processing reported offences (STIC) file.

[78] Thus, the Court of Appeal of Amiens was able to investigate whether the goal pursued by an employee L.A. was 'far from the general interest *or the company's interest,*' 9 January 2020 no. 18/00584.

For instance, this is true of counterfeiting,[79] which is punishable by three years' imprisonment and a fine of €300,000.

But what about plagiarism, which is commonly considered to constitute "academic fraud"? Would it not be possible to consider that it represents a harm (if it is proven) and therefore a (potential) threat to the general interest of the scientific community? And if the answer is no, could it not still be considered as a "breach of the law" (the LPR of 24 December 2020) and/or "of the regulation" (the decree of 5 December 2021)? Is this enough to demonstrate the highly subjective and therefore random nature of what is included in the meaning of those words? Is it necessary to recall that the granting of the legal protection newly granted by the Sapin II law depends precisely on that meaning?

And this is only the tip of the iceberg, as this protection is also conditional on strict compliance with the reporting procedure provided for by the law. However, if this procedure (governed by Article 8 of the Sapin II law) is in turn amended, with the aim (or the hope) of simplifying it, the question again arises of whether this is not tantamount to a poisoned chalice.

2.2 A simplified reporting procedure?

Initially, the law set out a hierarchy of reporting channels in three stages: first, an internal report by the whistle-blower within their company or administration; then, if the internal channel fails to act within a reasonable time (which has not yet been determined), an external report to an administrative or judicial authority or a professional body; and finally, "if the external channel fails to act" or "in the event of serious and imminent danger or of a risk of irreversible damage", a report that is "made public".

---

[79] Articles L.335-2 and 3 of the *Code de la propriété intellectuelle* (Intellectual Property Code).

By unduly exposing the whistle-blower to internal retaliation and encouraging them to favour public disclosure, which often excludes any legal protection,[80] the new law abandons any idea of a hierarchy between these three channels of whistle-blowing.

Consequently, first, the whistle-blower is now free to choose between internal and external whistle-blowing; the latter is possible "either after making an internal report or immediately".

As a result, whistle-blowers may opt either (new Article 8-I) for "an internal report addressed to their hierarchical superior, their employer, or an adviser designated by the latter" or (new Article 8-II) for "an external report addressed to the Human Rights Defender,[81] the judicial authority, an EU body" or any other "competent authority" chosen from a list to be drawn up by decree by the Council of State.[82] The legislator's ambition is therefore perfectly clear: to establish "clarified internal and external reporting channels, the choice of which is free" (Waserman, 2021, p. 5). But can we be positive it really is?

Article 8-I specifies that internal whistle-blowing "may in particular be used when the persons concerned consider that the situation can be remedied efficiently by this means and that they are not exposing themselves to a risk of retaliation". While the intention is commendable, it leaves open the question of how whistle-blowers can be assured of what,

---

[80] Report 4325 (National Assembly, 2021) also considered this hierarchical system to be 'counterproductive' (p. 142).

[81] In 2016, the role of the Defender was merely to 'direct the whistle-blower to the appropriate reporting body'. From now on, the Defender can receive and process a report themselves. This new role is regulated by organic law no. 2022-400 of 21 March 2022 'aimed at strengthening the role of the Human Rights Defender in the area of whistle-blowing'.

[82] According to Article 8-II, 'these authorities shall be chosen from among the administrative authorities [independent or otherwise, GA], independent public authorities, professional orders, and legal persons entrusted with a public service mission'. To date, this decree has still not been adopted.

by definition, they cannot control, namely the effective handling of their whistle-blowing and, still more, the reactions (positive or negative) that it might generate within their company or administration. Could this freedom not actually convince them to consistently favour external reporting? But more questions need to be answered.

Secondly, public disclosure remains authorized. But although, as in the case of the Sapin II law, it is only possible to resort to it if certain conditions are met, these conditions are less stringent. It is therefore by no means certain that the new system will gain in clarity or safety. According to the new Article 8-III of the Sapin II law, any whistle-blower "may publicly disclose information" in three cases:

1. First, "after making an external report without any appropriate measure having been taken in response to this report at the end of the feedback period set by decree". *A priori,* the first situation seems relatively objective, since it is conditioned by the expiry of certain deadlines that are already set by the transposed EU Directive.[83]

2. Then, in the second case, "in the event of imminent or obvious danger to the public interest, in particular where there is an emergency situation or a risk of irreversible harm". It can be seen immediately that this second hypothesis is more subjective, and therefore it is a source of uncertainty and legal insecurity. Indeed, it is easy to imagine the problems of characterization that will be involved in identifying each such situation in the absence of any legislative definition... But, in reality, is it even necessary to worry about this?

[83] Seven days to acknowledge receipt of the report and three to six months to process it.

3. In fact, there is a third and final case in which one may resort to public disclosure: "where referral to one of the external authorities would expose the author to a risk of retaliation or would not be efficient to remedy the situation disclosed, owing to the particular circumstances of the case, in particular if evidence can be concealed or destroyed or if the author of the report has serious grounds for believing that the authority may have a conflict of interest, be in collusion with the perpetrator, or be implicated in those facts".

Is it still necessary to know exactly what the second case covers, given that the new Sapin II law simply allows public disclosure for purely subjective reasons that it is up to the whistle-blower alone to assess?

Although, here again, the stated aim is very clear, namely to "secure the conditions for disclosure in the media, which should only be made as a last resort or for the most serious facts" (National Assembly, 2021, p. 143), once again, this is open to doubt. The fact is that these three cases presage a dramatic increase in the use of public reporting and thus, in return, an increased risk of legal insecurity for everyone who, in the end and most often at the end of a very long dispute, will not be able to benefit from the expected protection because they do not meet the required legislative conditions.

Like all whistle-blowers, those who denounce breaches of scientific integrity will not escape the rule. We can therefore assume that they will prefer in all cases to report internally to the adviser designated by the administration, that is, either, in view of the law mentioned, the whistle-blower adviser (created by the Sapin II law of 9 December 2016) or, in view of the breach reported, the scientific integrity adviser (since the decree of 3 December 2021). Moreover, it is not impossible

that these two advisers will seek each other's assistance in investigating such reporting.[84]

All in all, therefore, strict compliance with these procedural requirements is essential, because, even supposing that a person actually meets the organic and material definition set out in the new law, it is only if they follow the reporting procedure strictly that they will be recognized as a whistle-blower and, consequently, will benefit from effective legal protection.[85] It therefore remains to define the scope of the law, since the law of 21 March 2022 has set itself the second aim of extending it.

3. Extending the Scope of Protection

Since 2016, protection has been provided at both the professional and the criminal level, and the law of 21 March 2022 intends to perfect the former and fine-tune the latter.

3.1. Perfecting professional protection?

The aim here is to protect whistle-blowers against any retaliation they might be subjected to within their company or administration as a result of reporting. While the new law extends the list of such measures, it also reinforces the "right to confidentiality" that whistle-blowers have enjoyed since 2016, a right that is specifically intended to protect them from the possibility of retaliation by their employer.

In 2016, the legislator ruled out the idea of anonymous reporting, which was generally considered to be equivalent to a denunciation, or even an accusation, motivated not by concern for the general interest

[84] On this issue, see Serre et al. (2023, p. 76).

[85] See, in particular, TA (Administrative Court) Bordeaux 30 April 2019 no. 1704873 (grant), and CA Lyon 24 October 2019 no. 19/00554 (refusal).

but by an intent to harm. Although the preference for confidentiality was confirmed in 2022, the law no longer completely rules out anonymity. According to the new Article 7-1 of the Sapin II law, "when a report or public disclosure has been made anonymously, a whistle-blower whose identity is subsequently revealed shall benefit from the same protections". One might wonder whether in this way the law is encouraging whistle-blowers to remain anonymous. Indeed, if the person's identity were to be revealed, they would then obtain the status of whistle-blower and would therefore benefit from the same protection as any other whistle-blower. And, when you think of it, isn't anonymity actually the best protection against retaliation?

In any case, according to the Sapin II law, the principle still favours reporting by named persons. Its new Article 9 "guarantees strict confidentiality of the identity of the authors of the report", understood as a prohibition on "disclosing elements that could identify the whistle-blower", unless "the whistle-blower's consent" is obtained.[86] This acquired right to confidentiality is coupled with a penal guarantee relating to the obligation of professional secrecy. Again according to Article 9, "disclosing these confidential elements is punishable by three years imprisonment and a fine of €300,000".

While confidentiality is certainly likely to protect a whistle-blower from any prospect of "retaliation" by their employer, the law nevertheless takes care to ensure effective protection against any retaliatory action that might be taken nonetheless.

While the 2016 law described in detail the situation for private law employees, giving, in its Article 10, a lengthy list of all the retaliatory measures that could not be taken against them, it merely stated laconically that "no public employee may be sanctioned or be the subject of a

[86] According to Article 9, 'they may, however, be communicated to the judicial authority if the persons responsible for collecting or processing the reports are required to report the facts to it. The whistle-blower is then informed thereof'.

discriminatory measure, whether direct or indirect, for making a report".

Following the recommendations made by the Council of State in its opinion (2016, p. 10), the new law now aligns the situation for all employees. Indeed, the new Article 10-1-II of the Sapin II law provides that "people to whom the *Labour Code* or the *General Civil Service Code* is applicable may not be subject [...] to retaliations, nor to threats or attempts to resort to such measures, particularly in the following forms". This is followed by a motley collection of 15 points (which are, moreover, only indicative) ranging from recruitment to dismissal or redundancy, including suspensions, demotions, refusal of promotion, and other sanctions, not forgetting coercion, intimidation, harassment, ostracism, discrimination, and even "abusive referral to psychiatric or medical treatment".

But obviously, since prohibiting such measures does not mean that they will not actually occur, the new Article 10-1-II takes the precaution of stipulating, as the 2016 law already did, that "any act or decision taken in disregard of this article shall be null and void". This means that any whistle-blower who is subject to any of these measures has an acquired right to refer the matter to a judge (administrative or judicial, depending on their professional status), who will declare such acts null and void, usually accompanied by an order for damages against the employer and, in the case of suspension or dismissal, an obligation to reinstate.[87] What is more, this will be the case whenever the employer fails to prove that "the decision was duly justified" (Article 10-1-III), which is undeniably an additional guarantee for the whistle-blower: the reversal of the burden of proof. It is not up to the whistle-blower to prove that they have

[87] See not. CPH (Conciliation Board) Lyon, 17 April 2019, *JCP.A* 2019 no. 40, p. 2269, and TA Bordeaux, 30 April 2019, no. 1704873.

been the subject of a retaliatory measure, but up to their employer to prove that they were not.[88]

However, even if the retaliatory measure is ultimately cancelled, it has nonetheless produced its effects, at least temporarily, which most often take the form of deprivation of some or all pay.

This explains why, in a real innovation, the new Article 14-1 of the Sapin II law provides that the external reporting authorities (assuming, of course, that they are seized of the matter, see above) "may grant people who have made reports under the conditions provided for by law temporary financial assistance if they consider that their situation has seriously deteriorated as a result of whistle-blowing". It is important to recall that this provision does not in the least conflict with the statement that a whistle-blower may not benefit from "any direct financial compensation" (Article 6), since it is not a matter of paying them a salary, but of compensating for the financial loss resulting from a retaliatory measure taken against them.

One final issue needs to be tackled: what tangible financial resources will be allocated to these authorities to ensure that these measures are really effective?

While there is no denying the protection of whistle-blowers is strengthened in professional terms, we may wonder if it is also strengthened in criminal terms?

3.2. Fine-tuning protection in the criminal jurisdiction?

This kind of protection has two strongly complementary sides. The first is a real criminal bulwark protecting whistle-blowers from any legal proceedings aimed at obstructing the exercise of the right to report problems, while the second gives them, where appropriate, very broad criminal immunity designed to protect them from all (or almost all) legal convictions.

---

[88] See most recently CA Paris, 13 April 2022, no. 18/13252.

As early as 2016, the Sapin II law sought to protect whistle-blowers against any action that would seek to obstruct the right to notify. This is because, as a result of their reporting, the whistle-blower is exposed in return to the institution of legal proceedings, known as "gagging", because their sole aim is to silence them. There is no doubt this threat of legal proceedings, hanging over whistle-blowers like the sword of Damocles, is an issue, as it is likely to dissuade potential whistle-blowers from making a report. The 2016 law therefore created a new criminal offence, commonly known as "whistle-blowing obstruction", the provisions of which were strengthened in 2022.

The new Article 13 of the Sapin II law provides first of all, as before, that "anyone who obstructs, in any way whatsoever, internal and/or external whistle-blowing, shall be punishable by one year's imprisonment and a fine of €15,000". And, in order to better dissuade any attempt to do so, it is much more repressive than the 2016 law in its following provisions.

On the one hand, whereas Article 13 initially referred only to "defamation claims against a whistle-blower", it now refers to any "proceedings against a whistle-blower on account of information reported or disclosed". As a result, all "gagging" procedures, whatever their purpose (defamation, slander, theft, concealment, violation of professional and/or business secrecy, etc.) are now targeted.

On the other hand, Article 13 also provides that when such proceedings are initiated, "the amount of the civil fine that may be imposed" by the criminal or civil courts "in the event of an abusive or dilatory action is increased to €60,000". Compared to common law (€15,000) and the 2016 law (which set the amount at €30,000), this is a highly dissuasive fine designed to show that the complaint in question is in fact subject to an aggravating circumstance: targeting a whistle-blower, whose status is now protected by law.

However, the possibility that such proceedings will be initiated is not ruled out, so the Sapin II law, as early as 2016, strove to reinforce the protection that was newly recognized by granting whistle-blowers real criminal immunity.

Article 7 of the Sapin II law had in fact inserted a new Article 122-9 into the Criminal Code, whereby "someone who violates a secret protected by law is not criminally liable, provided that such disclosure is necessary and proportionate to the protection of the interests in question and that it occurs in compliance with the conditions provided for by law". In practice, at that time, criminal immunity was limited to the violation of professional and business secrecy.[89] As a result, and as criticized by parliamentary report 4325 denounced (National Assembly, 2021, p. 151), these provisions did not confer immunity on them should they "remove the documents necessary to make a report, photocopy them or reproduce the information content on another medium, or even download them". On the contrary, they were then prosecuted for theft and/or receiving stolen goods.[90]

This is precisely what the law of 21 March was intended to remedy. Article 6 of the act supplements Article 122-9 of the *Criminal Code* by inserting the following paragraph: "A whistle-blower who removes, diverts, or conceals documents or any other medium containing information of which they have lawful knowledge and which they report or disclose under the conditions provided for by law shall not be held criminally liable."

Let us make this clear: the new Article 122-9 is not intended to give whistle-blowers a blank cheque, as they must have had "lawful knowledge" of the information they are reporting. "We are not entering

---

[89] According to Article 6-II, information covered by the secrets related to national defence and judicial investigation, as well as by medical and legal professional secrecy, remains 'excluded from the whistle-blowing regime'.

[90] See not. Court of Cassation, Social Chamber, 3 March 2021, no. 19.87125.

a society of surveillance of everyone by everyone. The idea is merely to enable the whistle-blower to prove a fact they have lawful knowledge of. Indeed, no one has the right to bug their boss's office to find out if there is anything to be learned in order to blow the whistle."[91] Nor can anyone break into a slaughterhouse to alert the public to the conditions in which animals are kept. On the other hand, if you are shown a report proving that a factory is dumping mercury into a river, you have the right to take it away to prove these facts (Waserman, 2021).

This means that the new Sapin II law strives to strike a fair balance between the criminal immunity enjoyed by whistle-blowers and the preservation of the rights and freedoms of their employers, which its new Article 10-1 summarizes in these terms: "people who have reported or disclosed information under the conditions provided for by this law benefit from the exemption from liability provided for in Article 122-9 of the Criminal Code".

However, there is one final question: the nature of the evidence. How, in concrete terms, will whistle-blowers manage to demonstrate the lawfulness of their information when their employers will try to prove the opposite? In this area, there is no reversal of the burden of proof...

4. Conclusion

The stronger protection mechanism can only encourage potential whistle-blowers to report, in particular and for our purposes, any breach of scientific integrity. However, there are two reservations:

On the one hand, it should not be forgotten that the very granting of this protection depends on strict compliance with the organic, material, and procedural requirements imposed by the law. Yet, we have noted that uncertainties are rife surrounding some of these requirements.

[91] See not. Cas. Soc. 4 November 2020 no. 18.15669.

On the other hand, and most importantly, we must realize that this protection is pointless if it is not applied in real life. Admittedly, this seems tautologous, but it takes on its full meaning once it is explained that, according to the Report 4325 (National Assembly, 2021, p. 151), "the Ministry of Justice has indicated that no conviction has been handed down to date for disclosing the identity of a whistle-blower or obstructing a whistle-blower, despite the creation of specific offences since the law of 9 December 2016".

This means that only the application of the law by our courts will allow us to make sure that the law of 21 March 2022 has actually kept its promise (Waserman, 2021, pp. 4–5) to "build a clear, coherent, complete and effective whistle-blower protection system and [...] to give whistle-blowers their rightful place in our democracy": that of guardians of the compliance to public integrity.

References

Chateauraynaud, F., & Torny, D. (1999). *Les sombres précurseurs, une sociologie pragmatique de l'alerte et du risque.* Éditions de l'EHESS.

Council of State. (2016). *Le droit d'alerte : signaler, traiter, protéger.* Étude du 25 février 2016. La Documentation française.

Council of State. (2021). *Avis sur une proposition de loi visant à améliorer la protection des lanceurs d'alerte.* Extrait du Registre des Délibérations, session of 4 November 2021. https://www.assemblee-nationale.fr/dyn/15/textes/l15b4398_avis-conseil-etat.pdf

National Assembly. (2021). *Rapport d'information n° 4325, 15e législature.* Presented by R. Gauvain & O. Marleix.

https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b4325_rapport-information

Plato. (427 – 348 BC). Laws 11.913d-914a (trans. R. G. Bury). Harvard University Press, 1967/1968. Available from Perseus Digital Library: https://www.perseus.tufts.edu/hopper/text?doc=plat.+laws+1.624a.

Serre, A., Léger, M., Mossery, R., Theret, N., & Chollet, D. (2023). *Traitement des signalements relatifs à l'intégrité scientifique : manuel de procédures, Version 2.* Association RESINT (Réseau Intégrité Scientifique).

Waserman, S. (2021). *Rapport fait au nom de la Commission Mixte Paritaire.* AN no. 4979, Sénat no. 424.