European Journal of Risk Regulation (2024), **15**, 403–415
doi:10.1017/err.2023.14

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

One Size Fits All? Handling Public Health and Environmental Risks in French Whistleblowing Legislation

Olivier Leclerc

Centre de théorie et analyse du droit (CTAD UMR 7074), CNRS, Université Paris Nanterre, Ecole normale supérieure, Paris, France
Email: olivier.leclerc@cnrs.fr

Abstract

French whistleblower legislation establishes a unified legal regime for the treatment of reports and for the protection of whistleblowers. Drawing on French whistleblower law, recently amended by the transposition of Directive 2019/1937 of 23 October 2019, this article examines whether the specific features of whistleblowing in relation to public health and environmental risks are adequately addressed by this unified regime. The article identifies four key factors for the effective handling of whistleblowing relating to public health and the environment: (1) the possibility of protecting whistleblowers who report facts gathered outside the workplace; (2) the possibility of protecting legal persons as whistleblowers; (3) the possibility of carrying out in-depth investigations to characterise the reality of the risks reported; and (4) the possibility of archiving whistleblowing in order to detect weak signals of risks over the long term. In these four areas, the article provides a nuanced diagnosis of the situation in French law and offers suggestions for improvement.

Keywords: environment; public health; risks; whistleblowing

I. Introduction

The adoption of whistleblower legislation in the USA and in several European countries[1] was primarily intended to protect whistleblowers from retaliation. Remarkably, Directive 2019/1937 of 23 October 2019 on the protection of persons who report violations of European Union (EU) law[2] addresses both the protection afforded to whistleblowers

[1] D Lewis (ed), *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research?* (Cheltenham, Edward Elgar 2010); B Fasterling, "Whistleblower protection: a comparative law perspective" in AJ Brown, D Lewis, R Moberly and W Vandekerckhove (eds), *International Handbook on Whistleblowing Research* (Cheltenham, Edward Elgar 2014); OECD, *Committing to Effective Whistleblower Protection* (Paris, Éditions OCDE 2016); G Thüsing and G Forst (eds), *Whistleblowing – A Comparative Study* (Berlin, Springer 2016); CR Apaza and Y Chang (eds), *Whistleblowing in the World: Government Policy, Mass Media and the Law* (London, Palgrave Macmillan 2017); D Skupień, *Towards a Better Protection of Workplace Whistleblowers in the Visegrad Countries, France and Slovenia* (Lodz, Lodz University Press 2021).

[2] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L305/17; V Abazi, "The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?" (2020) 49 Industrial Law Journal 640; D Lewis, "The EU Directive on the Protection of Whistleblowers: A Missed Opportunity to Establish International Best Practices?" (2020) 9 E-Journal of International and Comparative Labour Studies 1; V Abazi, "Whistleblowing in the European Union" (2021) 58 Common Market Law Review 813; A Van Waeyenberge and Z Davies, "The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System" (2021) 12 European Journal of Risk Regulation 236.

and the procedures for receiving and handling whistleblowing reports. In all matters falling within its material scope – breaches of EU legislation ranging from infringements of internal market rules and financial offences to public security, public health, the environment and consumer protection (Article 2) – the Directive requires Member States to protect whistleblowers against retaliation and to set up internal and external procedures for the collection and processing of reports.

In all of these situations, a uniform whistleblower protection regime is needed: there would be no reason to protect whistleblowers from retaliation differently depending on the nature of the information they report. But a more nuanced assessment might be warranted with regard to the handling of reports, given that the nature of the facts reported by whistleblowers may differ greatly. While the characteristics of the wrongdoing have been shown to influence the decision to speak out,[3] the question of whether the same procedure is appropriate for collecting and processing all types of reports remains unresolved. Indeed, when a report relates to an infringement of the law (crime, offence, violation of the law or regulations), the fact reported may or may not exist; in many cases, investigations must be carried out to verify its existence, and then a decision must be taken to ensure that it ceases and, if necessary, to punish the perpetrator. For this purpose, the recipient of the report is generally vested with investigative powers to establish the reality of the fact reported, whether it is an employer or, *a fortiori*, a public prosecutor. In contrast, in the case of risks to public health and the environment, the situation is not so clear cut. A report may point to a known danger (eg exposure to asbestos fibres) but also an uncertain risk (eg exposure to a pesticide that may adversely affect public health). In the latter case, the aim cannot be simply to stop and punish unlawful behaviour. Rather, it is necessary to undertake investigations to document the existence of the purported risk and possibly take temporary precautionary steps. In this area, whistleblowing and expertise are inextricably intertwined. These specific features of reports on risks to public health and the environment may require adapting the procedures for collecting and processing reports provided for in the Directive of 23 October 2019, and possibly going beyond its provisions.

French whistleblowing law offers an appropriate terrain for such a reflection. The first reason for this is that France has experienced the difficulty of bringing together the reporting of violations of the law and the reporting of health and environmental risks in a unified legal framework. The drafting of French legislation indeed resulted from two developments, initially distinct, then converging.[4] One of them offered protection against reprisals to whistleblowers who reported corruption,[5] conflicts of interest[6] and crimes or offences more generally.[7] The other one provided protection for people who reported the existence of risks caused by medicines or cosmetics,[8] and later more broadly for those who disclosed serious risks to public health or the environment.[9] This legislation

[3] JP Near, MT Rehg, JR Van Scotter and MP Miceli, "Does Type of Wrongdoing Affect the Whistle-Blowing Process?" (2004) 14 Business Ethics Quarterly 219; AK Vadera, RV Aguilera and BB Caza, "Making Sense of Whistle-Blowing's Antecedents: Learning from Research on Identity and Ethics Programs" (2009) 19 Business Ethics Quarterly 553, 564; M Somers and JC Casal, "Type of Wrongdoing and Whistle-blowing: Further Evidence that Type of Wrongdoing Affects the Whistle-blowing Process" (2011) 40 Public Personnel Management 151; SN Robinson, JC Robertson and MB Curtis, "The effects of contextual and wrongdoing attributes on organizational employees' whistleblowing intentions following fraud" (2012) 106 Journal of Business Ethics 213.

[4] O Leclerc, *Protéger les lanceurs d'alerte. La démocratie technique à l'épreuve de la loi* (Paris, Lextenso 2017).

[5] *Loi* n° 2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption.

[6] *Loi* n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique.

[7] *Loi* n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière.

[8] *Loi* n° 2011-2012 du 29 décembre 2011 relative au renforcement de la sécurité sanitaire du médicament et des produits de santé.

[9] *Loi* n° 2013-316 du 16 avril 2013 relative à l'indépendance de l'expertise en matière de santé et d'environnement et à la protection des lanceurs d'alerte.

had the merit of covering a fairly wide range of protected disclosures. However, its fragmented approach and the small yet real differences that existed from one regime to the next attracted criticism. Following this criticism, a law was adopted on 9 December 2016, known as the Sapin 2 law, which aimed to harmonise the legislation.[10] It is the law of 2016 that was amended to transpose the Directive of 23 October 2019 into French law. Although this law was generally regarded in France as providing substantial protection for whistleblowers, as compared to many other European countries, it nevertheless did not comply with the requirements of the Directive in all respects. Modification was therefore inevitable. Interestingly – and that is a further reason for examining French whistleblowing law – the choice was made to proceed with an ambitious transposition, going far beyond the requirements of the Directive on certain key issues, in particular with regard to risks to public health and the environment.[11] This resulted in the adoption of Law 2022-401 of 21 March 2022,[12] which came into force on 1 September 2022 and was later supplemented by Decree 2022-1284 of 3 October 2022.

The Sapin 2 law of 2016, amended in 2022, offers a striking illustration of the difficulties encountered in France in reconciling the reporting of breaches of the law with that of risks. While the law of 2016, touted as a "law on transparency, the fight against corruption and the modernisation of economic life", was essentially designed with a view to report *violations* of the law, its adoption quickly raised the question of whether the whistleblowing legislation was still suitable to handle reports concerning *risks* to public health and the environment. First, the Sapin 2 law repealed most of the provisions protecting whistleblowers reporting these matters, including the emblematic Article 1 of the law of 16 April 2013, which provided that "[a]ny natural or legal person has the right to make public or to disseminate in good faith information concerning a fact, data or action, when the lack of knowledge of this fact, data or action appears to him to pose a serious risk to public health or the environment". Furthermore, the 2016 law stripped part of its prerogatives from the National Commission on Ethics and Alerts in Public Health and the Environment,[13] which had been created by the law of 16 April 2013 to oversee the ethics of expert agencies and to receive alerts in the fields of public health and the environment.[14] Moreover, the newly adopted definition of a whistleblower no longer mentioned the reporting of a risk to public health or the environment. According to the law passed on 9 December 2016, supplemented by the law of 21 March 2022 that included a reference to a violation of EU law, a whistleblower is defined as a natural person who reports, under certain conditions to which we will return, either:

> information relating to a crime, an offence, a threat or harm to the general interest, a violation or an attempt to conceal a violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organisation taken on the basis of such a commitment, of the law of the European Union, of the law or of the regulations. (Article 6)

Despite the removal of an express reference to risks to public health and the environment in the amended Sapin 2 law, it has been widely accepted that serious risks to public health

[10] *Loi* n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

[11] The Directive does not protect whistleblowers who report on working conditions and health and safety at work (Abazi, supra, note 2, 646).

[12] *Loi* n° 2022-401 du 21 mars 2022 visant à améliorer la protection des lanceurs d'alerte.

[13] Commission nationale de la déontologie et des alertes en santé publique et environnement (cnDAspe).

[14] The 2016 law removed the prerogative given to this commission by the 2013 law to define the criteria on which the admissibility of an alert is based and to refer a report to the competent ministers, who were then responsible for informing the commission of the follow-up action taken and explaining the reasons for their decisions.

or the environment were in fact included under the heading of "threat or harm to the public interest". If there were any ambiguity in this respect, it is removed by the Directive of 23 October 2019. The fact that the Directive includes in its material scope the protection of the environment (Article 2, v) and public health (Article 2, viii) thus removes any possible doubt about the meaning of the reference to a threat or harm to the general interest in the Sapin 2 law, which must be interpreted in the light of EU law. It is worth noting, moreover, that the law of 21 March 2022 significantly amended the definition of whistleblowers provided for by the law of 9 December 2016, in addition to the aforementioned addition of violations of EU law among the protected disclosures. Whereas the law of 2016 referred to "a threat or *serious* harm to the general interest" (emphasis added), the law of 2022 deletes the reference to the seriousness of the threat, as it was feared that this condition would be too subjective and raise difficulties of interpretation. Furthermore, the material scope of application of the Sapin 2 law was broadened to include not only the violation of a legal norm but also an attempt to conceal such violation.

Yet, while it is acknowledged that health and environmental risks still fall within the scope of French whistleblowing legislation, the law of 9 December 2016, which as a whole represents a clear improvement, has, however, deteriorated the quality of the protection afforded to whistleblowers on certain specific points, without the law of 21 March 2022 reversing this situation. The weakening of whistleblowing on public health and environmental risks reflects deep political disagreements in France about what reports should be protected and how. While a broad consensus emerged on the need to protect whistleblowers reporting corruption or financial wrongdoing, the possibility of reporting health and environmental risks was met with significant reluctance by some political forces represented in Parliament, who feared that such reporting would expose companies to what was perceived as unwarranted environmental activism.[15] These concerns, which were made explicit in the discussions in Parliament, diverted attention from the requirements for proper reporting on health and environmental risks. Hence, we may ask, in adopting a uniform whistleblowing regime, has French legislation sufficiently addressed the particularities of the matters to which whistleblowers refer when they report a risk? Is a "one-size-fits-all" approach adequate in terms of receiving and handling alerts?

This article addresses this question by analysing the legal regime for whistleblowing that has been established in French law, with a particular focus on reports concerning public health and environmental risks. The article identifies four elements that are particularly necessary to ensure the effective handling of reports involving these matters. These four elements alone may not be sufficient to ensure appropriate handling of whistleblowing; moreover, they are also relevant for handling alerts other than those of risks to public health and the environment. However, the experience of the French National Commission on Ethics and Alerts in Public Health and the Environment,[16] which has received and handled more than 200 reports of risks to public health and the environment since 2017, has proven that these features are of crucial importance when it comes to public health and environmental risks. Indeed, the circumstances in which a large number of these reports occur point to the need for an alert system capable of receiving reports

[15] The Sapin 2 law was carried by the Minister of the Economy, with the support of the Conseil d'Etat (Conseil d'Etat, *Le droit d'alerte: signaler, traiter, protéger* [Paris, La Documentation française 2016]), and could draw on international conventions on corruption (Council of Europe, *Criminal Law Convention on Corruption*, 1999, Art 22; *Civil Law Convention on Corruption*, 1999, Art 9). In contrast, the law of 16 April 2013 on the independence of expertise in health and environmental matters and the protection of whistleblowers resulted from a motion by Green MPs, with a minority in Parliament and much fewer institutional and symbolic resources. See Leclerc, supra, note 4.

[16] The work carried out by the cnDAspe is described in its annual reports, which have been published every year since 2017. This information is complemented by observations made by the author, who has been serving as an appointed member of the National Commission since December 2020.

from ordinary citizens, at times brought together in legal entities, of carrying out in-depth investigations and expert appraisals and of collecting weak risk signals. These features are discussed in Sections II–V. Section II notes the importance of allowing reports to be lodged about information that has not been obtained in the course of professional activity. Section III shows the benefits of establishing effective protection for legal persons as whistleblowers. Section IV underlines the extent of the human, material and financial resources needed to deal with reports properly. Section V discusses the conditions under which the information gathered can be archived and processed in order to identify weak signals on emerging risks. On all of these grounds, the article discusses the extent to which French legislation on whistleblowing allows for adequate handling of risks to public health and the environment. Section VI concludes with a contrasting assessment of the current state of French law and outlines avenues for improvement.

II. Enabling whistleblowing outside the workplace

A first condition that a whistleblowing system would have to meet if it were to be adapted to the reporting of public health and environmental risks is that it would have to allow for the reporting of events discovered outside the workplace. Ayers and Kaplan have argued for a broad conception of professional communities, stressing the need for employees to be able to report wrongdoing by consultants outside the company's workforce.[17] In the case of public health and environmental risks, the link between whistleblowing and professional activity needs to be relaxed even further. Indeed, in this field, reports are very often made by consumers, users of a service, dwellers suffering from pollution or citizens witnessing unauthorised dumping of toxic waste or suspecting a potentially higher-than-normal prevalence of cancer cases in a given area.[18] It is not uncommon that the citizens should have formed an association or a more informal grouping. In such cases, when the alert is given by local residents or consumers, the information has not, by hypothesis, been obtained in a professional context. Therefore, the protection of these whistleblowers would not be guaranteed if it were conditional on their being employees or civil servants and having obtained the information in the workplace.

Yet it is just such a restrictive approach that is advocated by the Committee of Ministers of the Council of Europe, which "recommends that member states have a normative, institutional and judicial framework to protect persons who, *in the context of their working relations*, report or reveal information concerning threats or harm to the public interest".[19] The European Court of Human Rights has also found that the existence of a relationship of subordination between a whistleblower and their employer, and the resulting duty of loyalty, reserve and discretion, is "a special feature of the concept of whistleblowing".[20] This approach echoes Jubb's view that loyalty to the organisation in which they operate is pivotal to the character of the whistleblower.[21] This restrictive stance may be understandable if one considers that the persons most in need of protection against retaliation are

[17] S Ayers and SE Kaplan, "Wrongdoing by Consultants: An Examination of Employees' Reporting Intentions" (2005) 146 Journal of Business Ethics 787. See also A Dyck, A Morse and L Zingales, "Who Blows the Whistle on Corporate Fraud?" (2010) LXV The Journal of Finance 2213; J Etienne, "Different ways of blowing the whistle: Explaining variations in decentralized enforcement in the UK and France" (2015) 9 Regulation & Governance 309; B Culiberg and KK Mihelič, "The Evolution of Whistleblowing Studies: A Critical Review and Research Agenda" (2017) 146 Journal of Business Ethics 787, 788.

[18] The annual report of the National Commission on Ethics and Alerts in Public Health and the Environment indicates that a significant proportion of the information reported was obtained outside a professional setting: see cnDAspe, *Rapport annuel 2020*, p 19 et sqq.

[19] CM/Rec (2014) 7 (emphasis added).

[20] *Halet v. Luxembourg* App no 21884/18 (ECtHR, 11 May 2021).

[21] PB Jubb, "Whistleblowing: A Restrictive Definition and Interpretation" (1999) 21 Journal of Business Ethics 77.

indeed those who are subject to a power of direction and sanction exercised by a hierarchical authority, as is the case of persons bound by a contract of employment or by a statutory civil service regime.[22] Directive 2019/1937 of 23 October 2019 has not much improved the situation for whistleblowers outside a professional organisation. Article 4 states that its provisions apply to "whistleblowers working in the private or public sector who have obtained information about violations in a professional context". However, this argument is clouded by the fact that the Directive adopts such a broad conception of the professional framework that it goes far beyond the sphere of the exercise of hierarchical power. Indeed, in its Article 4 the Directive specifies that the persons entitled to make a report via an internal reporting channel, and who are thus protected against retaliation, should not be limited to those bound by a contract of employment or a statutory relationship, but should also include shareholders and members of the management body of a company including non-executive members, as well as trainees, or any person working under the supervision and direction of contractors, subcontractors and suppliers. In addition, persons who disclose information obtained in the context of an employment relationship after the end of their employment contract or before the formation of the contract of employment in the context of a hiring procedure are also protected.

As to whether the protection of whistleblowers should only benefit employees and civil servants, the law of 9 December 2016, in its initial version, was ambiguous. On the one hand, the law made whistleblower status conditional on reporting facts of which the whistleblower had "personal knowledge". No reference was made, in the definition of whistleblowers, to obtaining information in the workplace. But, on the other hand, the law made the protection of whistleblowers conditional on compliance with the procedures set out in Article 8, which demanded that the report be made first to a superior.[23] This procedural requirement would therefore limit the protection of the law to persons in a professional setting where an internal reporting channel must be in place. This apparent inconsistency led to the law being challenged on the grounds that it was contrary to the constitutional objective of the accessibility and intelligibility of the law. The French Constitutional Court refused this argument, however, and ruled that the legal definition of whistleblowers "is intended to apply not only to the cases provided for in Article 8, but also, where appropriate, to other [ie possible future] whistleblowing procedures decided by the law, outside the professional framework". This ruling therefore leaves the door open for the protection of whistleblowers reporting facts obtained outside the professional context, but it confirms that no such protection is provided under the Sapin 2 law of 2016.

In this regard, the law of 21 March 2022, transposing Directive 2019/1937, introduces a dramatic change. It now provides that whistleblowers may choose to report internally (in companies with more than fifty employees and a large number of public administrations) or to address a competent authority through an external reporting channel. Thus, while the protection of whistleblowers remains conditional on compliance with the reporting procedures provided for by the law and while the Directive encourages internal reporting,[24] whistleblowers working in a professional capacity are no longer obliged to report first to their line manager. Logically, if a whistleblower chooses to report through an internal reporting channel, the information must have been "obtained in the course of

[22] M Fodder, J Lewis and J Bowers, "Whistleblowing Detriment and the Employment Field: Has the Court of Appeal Taken a Wrong Turn?" (2020) 49 Industrial Law Journal 397.

[23] However, pursuant to Art 8 of the Sapin 2 law, in the event of serious and imminent danger or in the presence of a risk of irreversible damage, the alert could be made public directly. After the transposition of the Directive, the public disclosure of a report remains conditional on having first been reported through an internal or external reporting channel (see Directive 2019/1937, Art 15).

[24] "Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation": Directive 2019/1937 of 23 October 2019, Art 7.2.

their professional activities". Indeed, as the report is made within a private or public entity, it is necessary that the information concerns this entity and that it has the capacity to process it. Conversely, when a report is directed to an external reporting channel, the information need not have been obtained in the course of a professional activity. The effect of allowing whistleblowers to choose whether to use an internal or external reporting channel is debatable. The factors that determine the use of one or the other of these reporting channels have been extensively studied, in a variety of organisational settings.[25] The change introduced in the French legislation, following the possibility given by the Directive to establish the use of internal and external channels as an alternative,[26] hinges on the premise widely defended by non-governmental organisations supporting whistleblowers – although some studies suggest the opposite[27] – that an obligation to report through an internal channel increases the risk of retaliation against whistleblowers where the supervisor is associated with or chooses to cover up the reported misconduct, and ultimately discourages reporting.

As a consequence of these changes in the French legislation, residents, consumers, users and citizens raising concerns about a risk to public health or the environment now have the option of turning to a competent authority designated by the decree of 3 October 2022. Provided that they comply with the conditions set out in the amended Sapin 2 law (reporting "without direct compensation and in good faith") and that they abide by the procedural conditions of external reporting, they benefit from the protection against reprisals provided for by the law. As a further consequence of this change, and pursuant to the provision of the Directive (Article 19), the law of 21 March 2022 no longer limits the list of prohibited retaliatory measures to those related to a work situation (dismissal, disciplinary measures, demotion or withholding of promotion, etc.), but includes a wider range of sanctions that have bearing outside the work sphere: damage to a person's reputation, early termination or cancellation of a contract for goods or services, cancellation of a contract for goods or services, etc. (Article 10-1 of the amended Sapin 2 law).

III. Protecting legal entities as whistleblowers

As reports of risks to public health and the environment are frequently made by associations and more informal "collectives", the law of 16 April 2013 conferred adequate protection upon both natural and legal persons as possible whistleblowers. The law of 9 December 2016 reversed this provision and granted protection only to natural persons.

[25] See Culiberg and Mihelič, supra, note 17, 797. Authors suggest that intentions of lower-level employees to blow the whistle are higher when the reporting channel is administered externally than when it is administered internally (J Gao, R Greenberf and B Wong-On-Wing, "Whistleblowing Intentions of Lower-Level Employees: The Effect of Reporting Channel, Bystanders, and Wrongdoer Power Status" (2015) 126 Journal of Business Ethics 85). This effect is nevertheless disputed. Lobel maintains that, from a behavioural perspective, people ordinarily prefer to confront illegal activities within their organisation rather than stepping outside the organisation to report it (O Lobel, "Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems" (2012) 54 South Texas Law Review 37, 42). Near and Miceli suggest that the greater the dependence of the organisation on the wrongdoing, the less likely that internal whistleblowing will be effective and the more likely that external whistleblowing will be effective (JP Near and MP Miceli, "Effective Whistle-Blowing" (1985) 20 Academy of Management Review 679, 697). Based on a study carried out in Germany, Kölbel and Herold state that the decision to report externally is strongly dependent on the failure of the initial internal report (R Kölbel and N Herold, "Whistle-Blowing from the Perspective of General Strain Theory" (2019) 40 Deviant Behavior 139).

[26] Despite the opposition expressed by France during the legislative process (Abazi, supra, note 2, 649).

[27] Near and Miceli, supra, note 25; TM Dworkin and MS Baucus, "Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes" (1998) 17 Journal of Business Ethics 1281; JR Mesmer-Magnus and C Viswesvaran, "Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation" (2005) 62 Journal of Business Ethics 277, 282.

This step backwards was to be regretted, since one effective way of protecting whistleblowers is to allow them to step behind a legal entity that makes the disclosure on their behalf and hopefully has the legal competence and financial resources to deal with possible reprisals.[28] Recognising the status of whistleblower for a legal person is therefore of undisputed interest.

In this respect, the Directive has allowed only very limited progress. Indeed, it defines a reporting person as "a natural person" (Article 5), and, similarly, when extending protection against retaliation to so-called "facilitators", the Directive defines them as "a natural person who assists a reporting person in the reporting process in a work-related context, and whose assistance should be confidential" (Article 5). Only marginally does the Directive grant protection to legal persons: legal entities owned by a whistleblower, for which they work or with which they are connected in a business context, are afforded indirect protection (Article 4.4.c).

In transposing the Directive, however, the French Parliament followed a recommendation by associations supporting whistleblowers and took a more protective stance towards legal persons, deciding that facilitators can be not only natural persons, as the Directive provides, but also non-profit legal persons under private law (Sapin 2 law amended, Article 6-1). This wording – the reference in the law to non-profit legal persons rather than to legal persons in general, as proposed in an earlier version of the bill – reflects the fear of some members of the Parliament that a market could emerge in which economic operators would trade in the support of whistleblowers and offer, against payment, to help them to lodge a report. This fear was perhaps ill-founded, since in France the law expressly provides that whistleblowers are only protected if they act "without direct financial compensation". Unlike in the USA,[29] and with only rare exceptions,[30] whistleblowers in France would not be permitted to claim a fraction of the sums recovered by the State, through tax proceedings or fines, following the disclosure of unlawful facts. In France, the absence of financial compensation for whistleblowing has always been seen as a condition for the legitimacy of whistleblowing procedures.[31] Since whistleblowing remains an act without financial compensation, the risk of a whistleblower support market developing in France remains rather hypothetical.

Under these conditions, local residents' or consumers' associations raising public health and environmental concerns can be deemed "facilitators" and so protected against retaliatory measures. This development is certainly to be welcomed and might facilitate whistleblowing in the field of public health and environmental risks. However, it has two important limitations. On the one hand, groups of people assisting whistleblowers need to be aware of the importance of setting themselves up as legal entities in order to benefit

[28] On the support that non-governmental organisations provide to whistleblowers in various countries, see K Loyens and W Vandekerckhove, "Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements" (2018) 8 Administrative Sciences 30.

[29] Y Feldman and O Lobel, "The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality" (2010) 88 Texas Law Review 1151; A Westbrook, "Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act?" (2018) 75 Washington and Lee Law Review 1097; E Amir, A Lazar, and S Levi, "The Deterrent Effect of Whistleblowing on Tax Collections" (2018) 75 European Accounting Review 939; T Nyreröd and G Spagnolo, "Myths and Numbers on Whistleblower Rewards" (2021) 15 Regulation & Governance 82.

[30] The 2017 Finance Act of 29 December 2016 (Art 109) allows the tax administration to compensate any person outside the public administration who has provided it with information leading to the discovery of certain tax offences. The amount of compensation awarded is decided by the tax administration after examination of the role of the informant and the fiscal interest of the information provided for the State. Significantly, the persons who communicate such information are not described by French law as whistleblowers (*lanceurs d'alerte*) but as "tax informants" (*aviseurs fiscaux*).

[31] See D Lochak, "La dénonciation, stade suprême ou perversion de la démocratie?" in *L'Etat de droit. Mélanges en l'honneur de Guy Braibant* (Paris, Dalloz 1996) p 451.

from the protection provided by the law to facilitators. If, on the other hand, they were to choose, as is often the case, to set up more informal organisations, such as "collectives" or "coordinations", only the individual protection extended to the facilitators would be open to them. Yet in any case the protection of legal persons remains indirect, since they are protected as "facilitators" and not as whistleblowers per se. Consequently, an association created to campaign against a public health or environmental risk would not be able to blow the whistle on its own, without a natural person agreeing to raise an alert individually, with all of the risks of reprisal that this move entails. Although it is certainly a step forward that health and environmental associations enjoy appropriate protection as facilitators, recent legislative developments have still not succeeded in restoring the situation created by the 2013 law that recognised, in the field of health and environmental risks, legal entities as possible whistleblowers.

IV. Giving authorities the means to handle the reports received

In the field of public health and the environment, it is essential that the alerts received give rise to investigations to ascertain the existence of the risk reported and that appropriate measures are implemented to prevent or remove exposure to these risks. It is therefore crucial that the addressee of an alert has a real investigative capacity and the necessary skills to deal with the alert.

With regards to reporting to internal channels, the reception and processing of health and environmental reports are governed by occupational health and risk-prevention law. Thus, the law of 16 April 2013 affords both employees and their elected representatives the right to report. Reports concerning a serious risk to health or the environment caused by the products or manufacturing processes used or implemented by a company must be recorded in a special register and be investigated by the employer jointly with the elected representatives.[32] The employer must also inform the reporting person, whether an employee or a representative, of the action they intend to take on it. If these are found to be inappropriate, the reporting person may refer the matter to the prefect, the representative of the State in the department.

As regards the external reporting channel, the decree of 3 October 2022 provides a list of the competent authorities responsible for receiving and processing reports. In the field of environmental damage, external reporting may be directed to a body of civil servants responsible for advising the government and inspecting services (the Inspectorate-General for the Environment and Sustainable Development; IGEDD). In the field of public health, no fewer than sixteen external authorities are identified by the decree, some of which are public expertise agencies,[33] others public agencies responsible for specific public policies[34] or for compensating victims,[35] specialised research organisations,[36] service inspection authorities[37] and professional institutions responsible for monitoring health professionals.[38]

A first obvious difficulty is the fragmentation of the authorities entitled to receive external reports in the fields of public health and the environment. Although the National Commission on Ethics and Alerts in Public Health and the Environment

[32] Labour Code, Arts L. 4133-1 and L. 4133-2; Decree no. 2014-324 of 11 March 2014.

[33] Agence nationale chargée de la sécurité sanitaire de l'alimentation, de l'environnement et du travail (ANSES).

[34] Agence nationale de santé publique (Santé publique France); Haute Autorité de santé (HAS); Etablissement français du sang (EFS).

[35] Comité d'indemnisation des victimes des essais nucléaires (CIVEN).

[36] Institut national de la santé et de la recherche médicale (INSERM).

[37] Inspection générale des affaires sociales (IGAS).

[38] National Councils of the professional orders of several medical professions, including physicians, masseur-physiotherapists, midwives, pharmacists, nurses, dental surgeons, chiropodists and veterinarians.

(cnDAspe) covers all of these matters and has unique experience in dealing with alerts in these areas, it was not designated as an external authority in the decree of October 2022, and the choice was made instead to entrust this competence to various authorities with heterogeneous functions. This decision reflects the difficulty for this Commission to find its place among the institutions in charge of risk assessment and management. Created by the law of 16 April 2013 referred to above and hampered by the political opposition it encountered from the outset,[39] the Commission's prerogatives have been continuously challenged, against a background in which the institutions responsible for the assessment and management of health and environmental risks in France are already fragmented. The identification of a number of external authorities to receive reports in these areas only makes things worse, and there is a serious risk that whistleblowers may not find their way through this complicated maze.[40] In an attempt to limit this risk, the law of 21 March 2022 therefore entrusts the Defender of Rights with the role of helping whistleblowers to choose the most appropriate external authority to receive their report.

A second difficulty lies in the way in which protected disclosures are distributed between the competent authorities. While the competence of the cnDAspe covers both public health and the environment, the new legislation splits the two areas and directs alerts concerning the environment to other authorities than those competent for public health reports. This choice amounts to foregoing the means to deal with environmental health, a matter that is nevertheless the subject of assertive public policies both in the EU[41] and in France[42] and that might thereby be weakened.

A third difficulty concerns the means available to the external authorities designated in the decree of 3 October 2022 to enable them to take effective action on the reports received. The Directive requires that "Member States shall designate the authorities competent to receive, give feedback and follow up on reports, and shall provide them with adequate resources" (Article 11). Yet the external authorities listed in the decree to receive alerts on public health and the environment have very heterogeneous investigative powers. While general inspectorates have the power to obtain documents or conduct hearings, this is very much not the case for expertise or research bodies. Similarly, the professional bodies responsible for monitoring health professionals have disciplinary powers over their members that are lacking to expertise and research bodies, or even general inspectorates, which can only refer matters to the ministers. In any case, few of the authorities listed in the decree have experience in collecting and processing alerts: their core competence lies instead in expertise, research, administrative control and management of specific public health policies. Consequently, the handling of reports is a new prerogative for these authorities, which will require a new internal organisation, sufficient resources in terms of staff and IT support and enhanced investigation capacities. The scale

[39] See supra, note 14.

[40] The decree of 3 October 2022 designates fifty-one external authorities in twenty-three categories (Public procurement; Financial services, products and markets and prevention of money laundering and terrorist financing; Product safety and conformity; Transport safety; Environmental protection; Radiation and nuclear safety; Food safety; Public health; Consumer protection; Protection of privacy and personal data, security of networks and information systems; Violations affecting the financial interests of the European Union; Violations relating to the internal market; Activities conducted by the Ministry of Defence; Public statistics; Agriculture; National education and higher education; Individual and collective labour relations and working conditions; Employment and vocational training; Culture; Rights and freedoms in relations with State administrations, regional and local authorities, public establishments and bodies entrusted with a public service mission; Best interests and rights of children; Discrimination; Ethics of persons engaged in security activities). Depending on the subject matter of the alert, the reporting person has to choose the most appropriate external reporting channel.

[41] European Union, 7th Environment Action Programme (EAP), 2020.

[42] France draws up a National Environmental Health Plan (PNSE) every five years, which is enshrined in the Public Health Code. The 4th National Environmental Health Plan covers the period 2021–2025.

of the resources that would be required to handle alerts properly has been rightly noted by the deputy, Cécile Muschotti. In a parliamentary report, she outlined a proposal for a position of Defender of the Environment and Future Generations (DDEGF) modelled on the Defender of Rights, who would have strong investigative powers in the area of environmental offences. Yet this suggestion was not followed up in the transposition of the Directive of 23 October 2019.[43] On the contrary, the task of receiving and processing alerts has been added to the existing burden of heterogeneous authorities with fixed budgetary resources. There is therefore a legitimate fear that the resources necessary for the proper handling of alerts are not available, or at least that there will be contrasting treatment from one external authority to another. There is also reason to fear that the limitation of available budgets will render largely nugatory the possibility, opened up by the 2019 Directive (Article 20) and taken up by French law, for external authorities to provide whistleblowers with financial assistance and support, including psychological support.[44]

V. Collecting weak risk signals

Where a risk, whether known or unknown, has occurred, the damage to public health and the environment is evident. But in some cases the reported risks are themselves uncertain. The fact that the information transmitted is not fully established does not disqualify it from being a protected disclosure. The requirement of good faith, set out in the Sapin 2 law as a condition of benefitting from whistleblower protection, means that the whistleblower may have legitimately believed that the facts reported were correct, even if it appears in retrospect that this was not the case. Whistleblower protection is only excluded if it is proven that the whistleblower had knowledge of the inaccuracy of the facts reported, a proof that is de facto difficult to provide. Hence, there is a need to conduct an investigation upon receipt of a whistleblower's report in order to confirm or deny the risk reported.

In the field of public health and the environment, detecting early warnings is key,[45] and whistleblowers have an important role to play.[46] From this point of view, although the primary objective of health and environmental alert systems is to identify and terminate current exposure to risks, they also offer a significant opportunity to use the information so gathered as a means of assessing weak signals that may eventually lead to the characterisation of as-yet unknown risks. Given the time scales over which risks materialise – some risks become apparent after several decades or even have intergenerational effects (as in the case of diethylstilbestrol)[47] – it is crucial that the information being collected is kept over the long term.

[43] Following the transposition of the Directive of 23 October 2019 into French law by the law of 21 March 2022, a bill has been tabled in Parliament for the creation of a Defender of the Environment: Proposition de loi constitutionnelle visant à créer un Défenseur de l'environnement, Assemblée nationale, no. 698, 13 December 2022. However, the political conditions for the bill, which comes from a minority parliamentary group, to be adopted have not yet been met.

[44] Loyens and Vandekerckhove, supra, note 28, 41.

[45] P Harremoës et al, *Late Lessons from Early Warnings: The Precautionary Principle 1896–2000* (Copenhagen, European Environment Agency, 2001); P Dąbrowska-Kłosińska, "Electronic Systems of Information Exchange as a Key Tool in EU Health Crisis and Disaster Management" (2019) 10 European Journal of Risk Regulation 652; C Robinson et al, "Achieving a High Level of Protection from Pesticides in Europe: Problems with the Current Risk Assessment Procedure and Solutions" (2020) 11 European Journal of Risk Regulation 450.

[46] V Abazi, "Truth Distancing? Whistleblowing as Remedy to Censorship during COVID-19" (2020) 11 European Journal of Risk Regulation 375.

[47] AL Herbst, H Ulfelder and DC Poskanzer, "Adenocarcinoma of the Vagina – Association of Maternal Stilbestrol Therapy with Tumor Appearance in Young Women" (1971) 284 New England Journal of Medicine 878.

Yet the 2019 Directive requires that recipients of alerts "keep records of every report received, in compliance with the confidentiality requirements . . . . Reports shall be stored for no longer than it is necessary and proportionate in order to comply with the requirements imposed by this Directive, or other requirements imposed by Union or national law" (Article 18). Following the directive, the law of 21 March 2022 provides that the information reported should be kept only for "the time strictly necessary and proportionate for their processing and for the protection of the authors, the persons concerned and any third parties mentioned in the report, taking into account the time needed for any further investigations". However, the law goes further than the Directive requires. After consultation with stakeholders and in particular at the request of the National Commission on Ethics and Alerts in Public Health and the Environment, the rapporteur for the bill in Parliament amended the text to allow that "[d]ata relating to alerts may, however, be kept beyond this period, provided that the natural persons concerned are neither identified nor identifiable" (Article 9 III of the amended Sapin 2 Act).

French law thus allows for the conservation of information collected through whistleblowing, and hence for the conservation of weak signals that may be indicators of possible risks to public health or the environment. The possibility thus granted by the law to preserve weak risk signals should make it possible to put in place more robust risk assessment procedures, based on relevant information collected cumulatively over time from different reports. However, the question remains as to the conditions under which the external authorities competent to receive reports through external reporting channels concerning public health and the environment are able to archive these data over the long term and ensure their statistical processing in order to highlight possible correlations requiring further investigation of a possible risk. Clearly, the external authorities designated by the decree of 3 October 2022 do not have the material and human resources, nor the organisational culture, to ensure effective processing of weak risk signals. It is therefore desirable that public health and environmental alerts be transmitted to a single authority, which would be responsible for centralising them, archiving them and exploring the data thus collected in order to identify risks that the external authorities to which the report was initially sent would not have been able to identify.

VI. Conclusion

Building on the experience gained by the National Commission on Ethics and Alerts in Public Health and the Environment, this article identifies four conditions that are proving to be crucial to ensuring appropriate treatment of public health and environmental risks: (1) it is necessary to protect not only whistleblowers who report information they have come across in the course of their work, but also those who report information gathered outside their professional activity; (2) it is necessary to protect legal entities as whistleblowers in order to reduce the risk of retaliation against whistleblowers as individuals; (3) authorities setting up external reporting channels must have appropriate human, IT and financial resources to ensure effective processing of the alerts received, which implies *inter alia* that they should have the capacity to carry out effective investigations in order to establish the facts about the risks reported; and (4) there is a need to collect, keep records of and ensure effective processing of weak signals in order to highlight downstream risks that may go under the radar at the time of reporting but are confirmed in the medium or long term. These four elements are hardly the only conditions for appropriate handling of whistleblowing: secured and confidential reporting channels, proper information on the existence of reporting channels and, of course, adequate protections for whistleblowers against reprisals are all equally important aspects. Moreover, they may also be relevant for the processing of alerts on issues other than public health and environmental risks.

However, the four features highlighted above are most critical to properly addressing two distinctive characteristics of reports on risks to public health and the environment. On the one hand, these reports are most often brought forward by ordinary citizens (local residents, customers, users of services), possibly constituted in legal entities (eg associations), rather than by employees or civil servants in the context of their professional activities. On the other hand, given the uncertainty that may impact health and environmental risks, the authorities receiving the reports must have access to appropriate investigation techniques and expertise, as well as the possibility of keeping track of weak risk signals. If the four conditions identified in this article are not met, the ability of states to ensure effective handling of health and environmental alerts could be seriously undermined. They therefore constitute a relevant yardstick against which to assess the relevance of the health and environmental alert systems put in place by the Member States on the occasion of the transposition of Directive 2019/1937 of 23 October 2019.

As regards French law, the legislation resulting from the transposition of the 2019 Directive undeniably allows for better consideration of the specificities of handling public health and environmental alerts: it disconnects the alert from the obtaining of information in a professional setting; it protects health and environmental organisations as "facilitators"; and it allows the conservation and processing of information over a period compatible with the timeframes in which certain risks materialise. However, with regards to the handling of alerts, the legislation certainly needs to be strengthened. Most external competent authorities do not have a culture of handling alerts and do not have sufficient resources either to carry out the necessary investigations or to detect weak risk signals. In this respect, there is a striking contrast between the modest resources available to external authorities for dealing with public health and environmental alerts and the much more substantial resources available to external authorities for receiving alerts about breaches of law and regulations, such as the French Anti-Corruption Agency in the field of anti-corruption or the Defender of Rights in the field of anti-discrimination. The effective handling of alerts on public health and the environment therefore requires a strengthening of the investigative powers of the external authorities responsible for receiving these alerts so that they can obtain additional information to assess the reality of the risks brought to their attention. The link between reporting and expertise, which was at the heart of the law of 16 April 2013 and was to a large extent undone by the Sapin 2 law of 9 December 2016, must be clearly reaffirmed and coupled with real and effective legal investigative powers.

Acknowledgments. The author wishes to thank the anonymous reviewer for their generous time and attention and their very helpful comments.

Competing interests. The author is a member of the Commission nationale de la déontologie et des alertes en matière de santé publique et d'environnement (cnDAspe). He is writing in his capacity as a researcher; he does not represent this Commission, nor does he speak on its behalf.

Cite this article: O Leclerc (2024). "One Size Fits All? Handling Public Health and Environmental Risks in French Whistleblowing Legislation". *European Journal of Risk Regulation* **15**, 403–415. https://doi.org/10.1017/err.2023.14