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The new French Whistleblowing law

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What's new and who is impacted?

- ✓ 2 new laws adopted on 21 March 2022 (transposition of the 2019/1937 EU Whistleblowing Directive)
- ✓ Entry into force : **1st September 2022**
- ✓ 3 decrees are expected before the summer which will provide further information on :
 - how to set up/update internal whistleblowing systems
 - which public authorities can receive whistleblowing reports and how they must be handled
 - how the French Human Rights Advocate (Défenseur des Droits) will handle whistleblowing reports it receives
- ✓ Impacts all private and public entities based in France as all employees and co-contractors can claim whistleblower status
- ✓ Those employing 50 staff are required to implement a whistleblowing policy after consultation of their works council
- ✓ Entities with less than 50 staff but who have given access to their France-based staff to their Group whistleblowing line will also be impacted

How do the new French laws differ from the EU Directive ?

- ✓ Covers all violations of French law and regulations (not only violations of EU Law)
- ✓ Includes work-place related grievances
- ✓ Anonymous whistleblowing reports are allowed

Who can claim whistle-blower status?

- ✓ Any person who, in good faith and without direct financial compensation, reports information relating to a crime or misdemeanour, a threat or damage contrary to public interest, a violation (which no longer needs to be serious or obvious) or attempted dissimulation of a violation of an international engagement duly ratified or approved by France, an unilateral act of an international organization taken on the basis of such engagement, European law or of the law or regulation

- ✓ « *Good faith* » : no definition included in the law. According to current French case law, a report is considered to be made in « *bad faith* » if the employee knew the facts reported were untrue. However, the fact that the allegations made proved to be unfounded is not sufficient to constitute « *bad faith* ». Moreover, the report must be made honestly and loyally and without malicious intent.

- NB/ The EU Directive defines « *good faith* » as « having had reasonable grounds to believe that the facts reported were true at the time the report was made ».

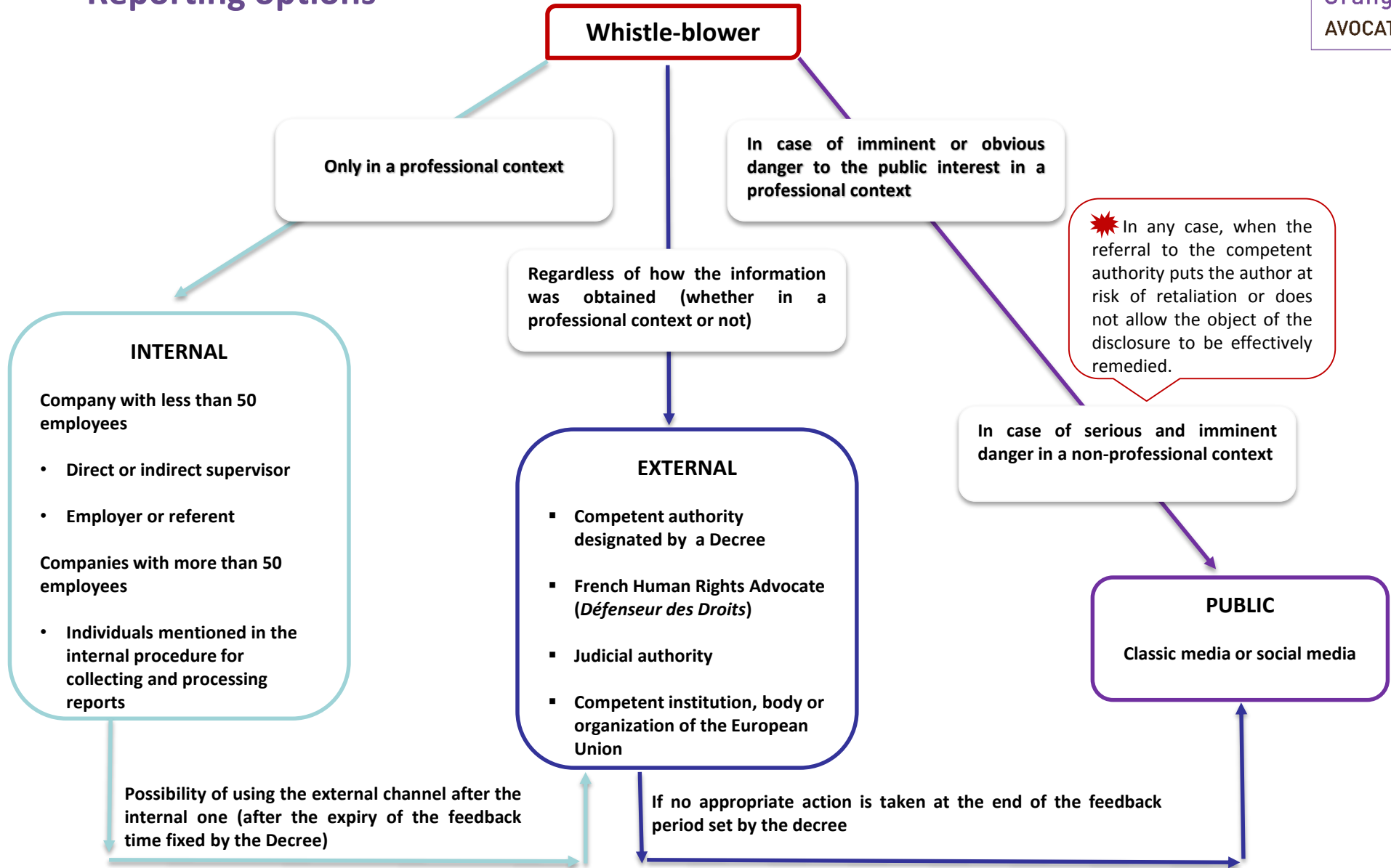
Who can claim whistle-blower status?

- ✓ If the person obtained such information via a professional relationship (i.e. job candidates, employees, ex-employees, outside and occasional staff, shareholders and board members, business partners and their staff), **they no longer need to have to personal knowledge** thereof. Also, they **can report events that have occurred but also which are very likely to occur**
- ✓ Information relating to national security, doctor/patient confidentiality, judicial enquiries, investigations and deliberations as well covered by legal privilege cannot be included in a whistleblowing report

Who can claim whistle-blower status?

- ✓ Third parties, including non-profit organizations or trade unions, who have assisted a whistle-blower (“facilitators”) but also persons who have a relationship with a whistle-blower and who could face retaliation (family members, work colleagues) as well as the legal entities owned or with whom the whistle-blower has a professional relationship also benefit from the same protection
- ✓ Whistle-blowers can contact the French “Defender of Rights” government agency (*Défenseur des Droits*) to obtain official recognition of their whistle-blower status
- ✓ To be able to claim whistle-blower status, they must have reported the information according to the different options provided by the law

Reporting options



What protection applies?

- ✓ Nullity of retaliation measures (15 measures are listed including termination of business relationships, damage to reputation, disciplinary sanctions, changes in working hours and negative performance reviews)
- ✓ Express procedure before the Employment Tribunals for employees claiming retaliatory termination
- ✓ Immunity from civil prosecution in case of disclosure of confidential information when such disclosure was deemed necessary and proportionate to the protection of the interests at stake
- ✓ Immunity from criminal prosecution :
 - in case of disclosure of confidential information when such disclosure was deemed necessary and proportionate to the protection of the interests at stake
 - if a whistle-blower takes documents or any other support without permission so long as knowledge of such documents/support was obtained legally

What protection applies?

- ✓ In case of legal proceedings against whistle-blowers or when a whistle-blower initiates legal proceedings on the basis of retaliation, the judge can order the other party to advance funds covering the whistle-blower's expected legal costs and/or deterioration in the whistle-blower's financial situation
- ❑ NB/ It is possible to sanction an employee who holds whistle-blower status BUT the employer must be able to prove that the sanction is justified on objective grounds totally separate from any intent to sanction an employee for having exercised their right to report unlawful acts or conduct

What is the cost of non-compliance?

- ✓ Breach of confidentiality of the whistle-blower's identity, of the person(s) accused, of third parties mentioned, the information collected by all persons having received the report : **up to 2 years' imprisonment and 30 000€**
- ✓ Obstruction to a whistleblowing report: **up to 1 year's imprisonment and 15 000 €**
- ✓ Fine in case of abusive litigation against a whistle-blower: **60 000 €**
- ✓ Publication of court decisions in the press
- ✓ Financing of the whistle-blower's employee training account up to 5000€

What can we expect to be in the decree on internal whistleblowing systems?

- ✓ It is likely that many of the current provisions contained in the decree dated 19th April 2017 and the CNIL (French Data Protection Agency) July 2019 Reference document will be confirmed
- ✓ + the provisions set out in the EU Directive : 7 days for acknowledgment of receipt/3 months to provide feedback on report and measures taken

□ Group Whistleblowing Systems

- ✓ The Commission Expert Group on the EU Directive stated during their meeting of June 14 2021 that each legal entity with 50 or more workers is required to set up its own channels and procedures for internal reporting, even where such legal entities belong to a group of companies
- ✓ The future decree will clarify if:
 - a local reference person will need to be named in each legal entity
 - if the whistle-blower's express approval is necessary for the report to be shared and/or handled at Group level
 - If all follow-up measures and feedback must be handled at local level

Are there any unresolved issues?

- ❑ Coherence with existing legal framework
- ✓ There remains some uncertainty on how the new laws will be applied with regards already existing whistleblowing requirements and namely :
 - article 17 of the anti-corruption “Sapin II” Law (reporting mechanism with regards violation of anti-corruption Code of Conduct)
 - the Parent Company Duty of Care/Due Diligence Law (reporting mechanism with regards serious violations of human rights, health and safety and the environment)
 - various provisions of the French Labour Code on sexual harassment, bullying, discrimination and the rights of works councils
- ❑ NB/ The new law provides that employees reporting sexual harassment or bullying benefit from whistle-blower protection even if they did not report via the company’s whistleblowing policy (e.g. via the works council)

Our recommended action plan

1. Carry out a “health check” of your existing whistleblowing system to identify what will need to be updated
2. Check that your whistleblowing system is “GDPR- compliant” (information to staff, collection and storage of personal data, archiving rules)
3. Check that you will be able to respect the new whistleblowing response time constraint and confidentiality requirements : this may require drafting an internal investigation procedure and training additional, namely HR, staff
4. See how you can make your internal whistleblowing system more attractive to staff to limit external reporting

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