

- [Home](#)
- [Newsletter](#)
- [Editorial Team](#)
- [Contact](#)
- [Subscribe to the link](#)
- [Search the link](#)

## Article 1428. Whistleblowing under French law

Country : FRANCE  
 Category : Privacy  
 Date : 11-MAY-07

Traditionally, France has had little tolerance for "whistleblowing". Despite the government's negative stance toward public acts of denunciation, as a result of certain whistleblowing provisions contained in the 2002 Sarbanes-Oxley Act ("SOX") that apply to US companies and their EU affiliates, the French authorities have had to adopt a less hostile position.

SOX requires companies that are listed on a US stock exchange to establish procedures that facilitate and encourage confidential disclosure of accounting and/or auditing irregularities on the part of employees in a manner that insulates a "whistleblower" from any negative treatment resulting from such disclosures.

In May 2005, the French Data Protection Authority ("CNIL") initially refused to authorize two hotline procedures submitted by French subsidiaries of several US companies in order to comply with SOX. The CNIL stated that the proposed reporting systems were disproportionate to the desired results and deemed the whistleblower procedures incompatible with French data protection law. The CNIL considered the risk of improper accusations to be too high and preferred implementing procedures that the CNIL believed were capable of attaining the same goal but did not entail the act of "whistleblowing", a practice looked upon with great disfavor by the French authorities.

The Libourne Court of First Instance, in its ruling dated 15 September 2005, took the same anti-whistleblowing perspective as the CNIL and ordered the BSN Glass Pack company to withdraw the ethics guidelines contained in their hotline systems. The decision was justified on the concern that the hotline system, as implemented, encouraged anonymous reporting of a wide-range of misconduct that exceeded the obligations put forward in SOX and did not insulate against interference with employees' rights.

In light of the incompatibility between French law and SOX, the CNIL initiated negotiations with the Stock Exchange Commission (the US SOX authority) and various EU data protection authorities, in an attempt to set-up guidelines concerning the application of SOX in compliance with French law. As a result of the negotiations, CNIL guidelines were adopted on 10 November 2005 that list the conditions that must be met in order to implement whistleblowing systems in France. On 8 December 2005, the CNIL adopted decision n°2005-305 that calls for systems such as ethics hotlines that are in conformance with the established CNIL guidelines and that simplify the reporting duties.

The recent decision of the Lyons Court of First Instance (dated 19 September 2006) whereby the judge referred to the guidelines established by the CNIL marks an important step in the creation of a legal framework for whistleblowing systems in France.

The basis for the decision involved Bayer Cropscience, a company that wanted to create a "program of legal conformity and professional responsibility" as part of the company's policy. The program included an anonymous hotline that provided employees with a means for reporting wrongful acts. The CGT, a French trade union, believed the program abridged employees' rights and brought an action against Bayer Cropscience. Following a decision by the labour administration, Bayer modified a large portion of the program. The Court, however, determined that no provision in the French labour code prohibits employers from adopting ethical rules or codes of conduct so long as restrictions on individual rights remain proportionate.

As for the validity of the whistleblowing system, the Court referred to the CNIL's authorization from 8 December 2005 and found that the system complied with the CNIL authorization because the act of reporting was option, a condition required in order to respect the employees' freedom. It was also held that the purpose of the whistleblowing system to prevent fraudulent accounting practices was legitimate. Additionally, the Court ensured that the reporting system maintained the whistleblower's anonymity and that any individuals that were incriminated had access to their personal information and the right to modify their personal data.

The whistleblowing system, as implemented, was deemed to be compliant with French law, with the exception of a provision that was held to be unenforceable. The program compelled whistleblowers to report the acts to the company's legal department before reporting to any other authority. The requirement that the employee report first to the employer before involving any judicial authorities was considered a contradiction to the principles of civil and criminal procedure, which require any individual who is summoned because she/he might have information to appear and to provide evidence.

The decision of the Lyons Court of First Instance as well as the CNIL guidelines and the CNIL authorization represent the beginning of a legal framework established for whistleblowing systems. One should also refer to Article 29 of the Data Protection Working Party.

Companies that are required to comply with SOX may now operate with a guideline concerning the validity of whistleblowing systems under French law and the conditions that must be implemented in order to comply with both US and French laws.

URL 1 :

URL 2 :

Reference Email : [slipovetsky@kahnlaw.com](mailto:slipovetsky@kahnlaw.com); [fperbost@kahnlaw.com](mailto:fperbost@kahnlaw.com)

Author : Sabine LIPOVETSKY

Firm : Kahn & Associés

© 2003 Stephan LE GOUEFF, All rights reserved. Editor in Chief, [Editor@the-link.lu](mailto:Editor@the-link.lu), Luxembourg.  
 This site is best viewed at a screen resolution of 1024 x 768  
 Site designed and powered by ERIN S.A