The example of Article 40, paragraph 2 of the French Code of criminal procedure in the fight against corruption and bribery: a whistleblowing mechanism for civil servants that is a legal obligation and not a mere right.

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The example of Article 40, paragraph 2 of the French Code of criminal procedure in the fight against corruption and bribery: a whistleblowing mechanism for civil servants that is a legal obligation and not a mere right.

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Introduction

Whistleblowing, which emerged under the influence of US laws and international agreements, is a new concept for European countries. France was initially reluctant to establish effective whistleblower protections. Then, in recognition of its international commitments and in response to various political and financial scandals (Kerviel Affair, Cahuzac Affair), France adopted comprehensive reforms of public and economic life by laws passed from 2007 to 2016 (I). As such, beyond adopting the legislative changes called for in a number of European and international conventions, several measures should be considered to improve the legislation on whistleblowing in France, especially in the fight against national and transnational corruption (II).
I- Whistleblowing and the implementation in France of international and European conventions on combating corruption

A. The evaluation of the implementation in France of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Anti-Bribery Convention, which came into force in France on 29 September 2000, criminalizes bribery of foreign public officials in international business transactions. The OECD Working Group on Bribery is charged with monitoring the implementation and enforcement of the OECD Anti-Bribery Convention in member states. From 2000 to 2014, the OECD Working Group on Bribery evaluated the implementation in France of the OECD Convention and the 2009 Recommendation of the Council on Combating Bribery of Foreign Public Officials in International Business Transactions.

1. Reporting of suspected transnational bribery by whistleblowers in the private sector.

In the private sector, French law established in 2007 a special protection for whistleblowers who report acts of corruption. The Act of 2007 created Article 1161-1 of French Labor Code, which provides that:

“No employee may be punished, dismissed or subjected to any discriminatory measure, whether direct or indirect, in particular with respect to remuneration, training, transfer, assignments, qualifications, classification, professional promotion, or amendment or renewal of contract for having reported or disclosed in good faith, either to his/her employer or to the judicial or administrative authorities, acts of corruption of which he/she becomes aware in the exercise of his/her functions”.

In case of conflict between an employer and an employee, article 1161-1 of French Labor Code shifts the burden of proof: the employer must demonstrate before a judge that any adverse action taken against the employee has no relationship to that person's disclosures.

In 2012, the OECD Working Group on Bribery noted in Phase 3 that:

- “whistleblowers in the private sector were subject to various obligations of discretion and precaution which, in practice, tended to block reporting”.

It recommended that:

- “France considers introducing stronger protective measures for employees who report suspected bribery in order to encourage these employees to report without fear of retaliation in the form of dismissals (Recommendation 5), noting that:

- “The 2009 Recommendation calls on parties to the Convention to ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report, in good faith and on reasonable grounds, to the competent authorities, suspected acts of bribery of foreign public officials (Recommendation IX (iii))”.
The Act of 2007 was strengthened in 2013 by new provisions protecting whistleblowers reporting any crime or misdemeanor. The new law created Article L.1132-3-3 in the Labor Code, which protects an employee from any sanctions for making good faith allegations of criminal activities witnessed in the exercise of his job duties. This whistleblowing provision covers revelations made to the press, in addition to reports made to administrative and judicial authorities. Moreover, whistleblower protections are extended both to private and public-sector employees.

In some cases, whistleblowers should offer considerable help to investigators trying to identify and understand complex systems of fraud. The Law of December 6, 2013 expands the notion of self-reporting for certain corruption and influence trafficking offenses and allows for a reduction in punishment as a reward for reporting such offenses to authorities.

2. Reporting of suspected transnational bribery by whistleblowers in the public sector

Article 40, paragraph 1 of the French Code of Criminal Procedure (CPP) provides that:
- “The district prosecutor receives complaints and denunciations and decides how to deal with them, in accordance with the provisions of Article 40-1”.7

Article 40-1 of the CPP provides that:
- “Where he considers that facts brought to his attention in accordance with the provisions of Article 40 constitute an offence committed by a person whose identity and domicile are known, and for which there is no legal provision blocking the implementation of a public prosecution, the district prosecutor with territorial jurisdiction decides if it is appropriate: to initiate a prosecution; or to implement alternative proceedings to a prosecution, in accordance with the provisions of articles 41-1 or 41-2; or to close the case without taking any further action, where the particular circumstances linked to the commission of the offence justify this”.

Article 40, paragraph 2 of the Code of Criminal Procedure (CPP), provides that:
- “Any constituted authority, any public official or civil servant who, in the performance of his/her duties, becomes aware of a crime or misdemeanor must report it without delay to the General Prosecutor and must provide all relevant information, minutes and documents relating to the report”.9

In 2012, the OECD Working Group on Bribery remarked in Phase 3 that:

- “Application of this obligation appeared in practice to be weak or non-existent, as there was no visible sanction (apart from rarely applied disciplinary penalties) for non-compliance with this obligation”,10
- “In reality, application of the CPP provisions seems limited if not non-existent in certain exposed sectors, such as foreign affairs, defence, development assistance and export credits, even though some of these administrations were aware of cases of bribery, alleged or proven, in the exercise of their mission”.11

According to representatives of French public agencies, under-reporting of corruption was due to the risk of countercharges of slanderous reporting.12

But, the OECD Working Group on Bribery considered that:

- “This reflects a misunderstanding of the provisions of article 226-10 CP concerning defamation, according to which the intentional element of the offence lies not in the falsity of the allegation...
itself, but in the knowledge, on the day the allegation was made, that it was false. A report made in good faith pursuant to article 40 does not, then, fall within the scope of the law, as confirmed by the Court of Cassation (Cass. Crim., 14 December 2000, appeal no 86595)”.13

French representatives also mentioned as sources of difficulties that the Public Prosecutor’s Office had a policy not to open proceedings in the absence of sufficient evidence, and that the law did not clearly specify what was to be understood by “knowledge of an offence”. According to these representatives, this could explain why some public officials believed that this provision required public-sector employees and officials to report only proven acts of bribery.

These arguments didn’t convince the OECD Working Group on Bribery, which responded that:

- “The law however gives the judicial authority the exclusive power to determine the existence of an offence”.14

- “The biggest obstacle, however, (was) undoubtedly the tendency of public administrations to exercise broad powers of discretion in deciding whether to report to the judicial authorities facts brought to their attention - a tendency that apparently (had) its origin in the decision of the Court of Cassation cited above which, without relieving the agent of his/her personal obligation, (recognized) that the agent (was) part of a hierarchical organization, and that therefore the communication of criminal acts (could) be done not only by the official who discovered the offence but also by his/her superior”.15

- “During the review of the OECD in Phase 3, situations were confirmed where the administration had not reported matters to the prosecution, specifically within agencies responsible for official assistance...Jurisprudence, however, does not imply any transfer of responsibility that would give the hierarchical authority a power it does not have, i.e. to assess the appropriateness of the disclosure, as this is the prerogative of the criminal justice system. By proceeding in this way, there is a real risk that the law enforcement authorities will be deprived of important sources of detection”.16

Finally,” Considering that this obligation (article 40, paragraph 2 of the CPP) constitutes one of the keystones for the effectiveness of the criminal justice response to bribery in its international dimension”17, the OECD Working Group recommended that:

- “France takes appropriate measures to encourage reporting under article 40 CPP, by means of protocols for reporting bribery offences between the government sectors concerned and law enforcement authorities, protocols that should be accompanied by a clarification of the provisions of section 2 of article 40 CPP, and ongoing training for officials ”.18

- “France should regularly remind public officials of their obligation under the Code of Criminal procedure (CPP) as well as the disciplinary sanctions incurred in case of non-compliance (Recommendations 2 and 3)”.19

- “In the case of the personnel of the agencies responsible for development assistance (AFD) and export credits (COFACE), procedures should be established for alerting the Public Prosecutor’s Office to credible evidence of bribery of foreign public officials (Recommendation 4)”.20

In 2013, new actions were taken in France to implement the recommendations of the OECD dealing with the reporting of evidence of national and transnational bribery. Several significant reforms were passed in French law, including granting protection to all whistleblowers in the public and private sectors (2013), creating a National Financial Prosecutor (2013), ending individual instructions from the Minister of Justice to
prosecutors (2013), and granting anti-corruption organizations the right to bring civil party claims (2013).  

In 2014, despite these important measures, the OECD Working Group considered that France was still not in compliance with the Anti-Bribery Convention, because it had not implemented a significant number of the OECD’s recommendations made in Phase 3.  

For instance, the OECD Working Group pointed out that:  

- “No warning and reporting mechanism (had) been put in place in government agencies to enable comprehensive enforcement of the provisions of Article 40, paragraph 2 of the Code of Criminal Procedure. The interpretation of the modalities to report allegations of bribery, which (had) already been raised during Phase 3, (was) still an outstanding issue (Recommendations 11(b) and 11(c))”.  

Then, the OECD Working Group on Bribery asked France to intensify its actions to fight bribery of foreign public officials.  

B. The implementation of european legislation on the fight against corruption  

The Council of Europe has developed legal instruments dealing with criminalization of corruption in the public and private sectors, the conduct of public officials, and liability and compensation for damage caused by corruption. These instruments aim to improve the capacity of European states to fight corruption at the domestic and international levels. The Group of States against Corruption (GRECO) is charged with monitoring member states’ compliance with the Council of Europe’s anti-corruption standards. GRECO launched four evaluation rounds dealing with specific provisions of the Twenty Guiding Principles and associated provisions of the Criminal Law Convention.  

France - as member of the Council of Europe since 5 May 1949 - was examined in the fourth evaluation rounds.  

In September 2001, GRECO recommended in the first evaluation report on France that:  

- “France reminds government departments and all other public agencies of the existence and content of Article 40, paragraph 2 of the Code of Criminal Procedure and takes steps to facilitate its use without hindrance in corruption cases”.  

In the following compliance report adopted in October 2003, French authorities stated that:  

- “(i) Several initiatives had been taken at national level to draw attention to the importance of the duty to report crime stipulated in Article 40 (2) of the Code of Criminal Procedure and to its implementing requirements, particularly the fact that the official superior’s consent needed not be obtained”.  

- “(ii) Under partnership policies developed at local level with decentralized tiers of State authorities (customs, taxation and Directorate for Fair Trade, Consumer Affairs and Suppression of Fraud, in particular), public prosecution authorities were organizing regular meetings bringing together representatives of the departments concerned and members of the judicial service in order to impress upon them the machinery and implementing conditions of Article 40 (2) of the Code of Criminal Procedure”.  

GRECO concluded that its recommendation had been satisfactorily implemented.
Subsequent evaluation and compliance reports on France adopted by GRECO in the second, third and fourth evaluation rounds contained no developments where the effective application of Article 40, paragraph 2 of CPP was concerned.28

II- French reforms to improve the fight against bribery and the implementation of whistleblowing in French law

In 2015, the Conseil d’état was asked by French government to review French legislation on whistleblowing and to make amendments.29

In its report published in March 201630, the Conseil d’état examined provisions of Article 40, paragraph 2 of the CPP and explained that if civil servants, as custodians of public interest, were charged with the duty to alert the judicial authority on serious violations of French law (“Crimes” and “défts”), this obligation should be distinguished from the right to blow the whistle which covers the situation of a person who decides in conscience to alert his/her employer/ any public or judicial body/ the Media on breaches of Law or serious concerns of public interest.

The Conseil d’état did not answer to the question of whether that provision should be coupled with a penalty, essentially for two reasons: according to the Conseil d’état, whistleblowing should remain a right and article 40, paragraph 2 of CPP, which is a duty for civil servants, is not a mechanism of whistleblowing; in any case, alternative solutions such as monitoring or compliance programs should be preferred to penalties.

Following the report of the Conseil d’état, a new bill known as Sapin 2 on the fight against corruption and transparency in French economic life was adopted by government in March 2016. It should be adopted and come into force before the end of 2016.31

Beyond implementing a number of European Union directives into French Law, “Sapin 2” introduces legal protection for whistleblowers who report corruption-related matters, prohibiting acts of retaliation against them and providing for the possibility of payment of their legal costs.

Transparency International nonetheless remarked that:

- “The current draft creates several pre-conditions for any protection, including the proof that the whistleblower is motivated by public interest and that there is no intention of obtaining any personal advantage”.32

This seems to exclude the possibility for whistleblowers to receive a monetary reward for their disclosures.33

In the public sector, law n°2016-483 of 20 April 2016 regarding the deontology and rights and obligations of civil servants was published on 21 April 2016. The law includes several provisions, such as legal protection for civil servants who blow the whistle on conflicts of interests in the administration.34

As with the report of the Conseil d’état, “Sapin 2” - like the act of 6 December 2013 on the fight against tax evasion and large-scale economic and financial crime and the law n° 2016-483 of 20 April 2016 regarding the deontology and the rights and obligations of civil servants - also remains silent on the procedure for implementing Article 40, paragraph 2 of the CPP, especially on the question of whether that provision should be coupled with a
Similarly, the introduction in the act of 6 December 2013 and in the Act of 13 July 1983 of a general system of legal protection for public-sector employees who report, in good faith, an offence or a crime or a conflict of interest of which he or she has obtained knowledge in the exercise of his or her functions, should also encourage the reporting of the facts of this nature to the Public Prosecutor’s office, on the basis of Article 40, paragraph 2 of the CPP.

However, the observation made by legal practitioners on the weak application of Article L.1161-1 of the Employment Code, which protects private-sector employees who blow the whistle on corruption matters, shows that while this provision has the merit to exist, it is unfortunately ineffective.

Legal protection of public officials who blow the whistle during the course of their duties on corruption matters, which is an important reform, is not sufficient to ensure the application of Article 40, paragraph 2 of the CPP. Reform of the provisions of Article 40, paragraph 2 of the CPP is called for.

Legislator should work to build a coherent and efficient system for the reporting of criminal acts to the public prosecutor’s office. Clearly, the text of Article 40, paragraph 2 of the CPP, as drafted and applied today, no longer meets France's needs or its international commitments.

The text should be overhauled in order to provide a coherent and efficient mechanism for reporting that protects the rights of French citizens.

The scope of the article and the conditions for its implementation need to be clarified, and the question of whether that provision should be coupled with a penalty needs to be discussed.

The question of whether the reporting obligation under Article 40, paragraph 2 CPP in the public sector should be coupled - or not - with a penalty is a very delicate one and requires a change in legislation.

The Service Central de Prevention de la Corruption (SCPC) noted in its reports that one solution might be to extend the crime of failure to report crimes to the non-reporting of civil offences, thereby including probity abuses.

It must be noted that this would give the nature of a punishable obligation to whistleblowing but would likely generate a flow of cases to the Public prosecutors that they would have difficulty managing with their current, limited resources. Some practitioners raise the issue of the uselessness or danger of a criminal sanction in the absence of effective legal protection of public officials who blow the whistle. In criminal law, as in other matters, there is no perfect solution. Nevertheless, attaching a penalty to failure to report under Article 40, paragraph 2 CPP would at least have the merit of lifting, once and for all, any ambiguity on the mandatory nature of this provision. It would usefully complement the specific provision on protecting public-sector whistleblowers, created in Act of 13 July 1983 and modified by the Law of 6 December 2013 on the fight against tax fraud, and would probably provide effective protection against any retaliation by their superiors.
Conclusion

Despite recent legislative advances from 2013 to 2016, French law on whistleblowing is highly fragmented and the implementation of whistleblower protections presents a double difficulty. The first difficulty is that French law is split between the public and private sectors. The second difficulty comes from the fact that, in each of these sectors, whistleblowing mechanisms relate to specific areas: discrimination, sexual and psychological harassment, corruption, conflicts of interest, public health, environment, intelligence, etc. And in each of these sectors, whistleblowing is stymied by other rules, concepts, rights and duties provided for in other legislation: employment and data-protection law, general public service statutes, etc.

In the fight against corruption, OECD and GRECO have both recommended that France take appropriate measures to promote reporting by public officials under Article 40, paragraph 2 of the CPP. But France’s recent legislative initiatives to reform whistleblower protection in the French public sector, voted from 2013 to 2016, remain silent on the procedure for implementing Article 40, paragraph 2 of the CPP.

However, Sapin 2 which should come into force at the end of 2016 is:

- “a unique opportunity for France to join the ranks of the very few European countries which do have adequate protections for whistleblowers in place such as Ireland and the United Kingdom”,

and,

- “represents a notable and significant step forward in terms of France’s anti-corruption reform efforts, although it remains to be seen whether lawmakers will find the necessary resolve to achieve the ambitious goal that French Government set for the law: elevating France to the highest European and international standards and turning the fight against corruption into a competitive advantage for economy and business”.

Finally, it appears that the more the French whistleblowing system will be transparent and effective, the more employees and civil servants will be encouraged to report wrongdoing detected in the performance of their duties.

NOTES

1. The OECD Convention was signed on 17 December 1997 and the French government deposited its instrument of ratification with the OECD Secretary-General on 31 July 2000.
4. Ibid.
5. Ibid.
6. See Law No. 2013-1117 of 6 December 2013 on action against tax fraud and serious economic and financial crime which added a new article 40, paragraph 6 to the Code of Criminal Procedure which provides that: “The person who reports an offence or a crime committed in his company
or administrative department shall, if he so requests, be put in touch with the central anti-
corruption service [SCPC] when the offence reported falls within its area of competence". This
provision will be canceled by “Sapin 2” which replaces the SCPC by an “anti-corruption agency”.

7. See article 40, paragraph 1 of the CPP : https://www.legifrance.gouv.fr
8. See article 40-1 of the CPP : https://www.legifrance.gouv.fr
9. See article 40, paragraph 2 of the CPP : https://www.legifrance.gouv.fr
11. Ibid.
12. See article 226-10 of the French Criminal Code.
15. Ibid.
17. Ibid.
18. Ibid.
19. Ibid.
20. Ibid.
21. Law No. 2013-1117 of 6 December 2013 on action against tax fraud and serious economic and
financial crime added a new Article 40, paragraph 6 to the Code of Criminal Procedure which
provides that : “The person who reports an offence or a crime committed in his company or
administrative department shall, if he so requests, be put in touch with the central anti-
corruption service [SCPC] when the offence reported falls within its area of competence”.

22. See OECD report : “France : following up to the Phase 3, report and Recommendations”,
paragraph 13, p. 6, December 2014 ; L. Romanet, « L’article 40, alinéa 2 du CPP, instrument
(ETS 174), Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), Twenty
Guiding Principles against Corruption (Resolution (97), Recommendation on Codes of Conduct for
Public Officials (Recommendation No. R (2000)10), Recommendation on Common Rules against
Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec
24. GRECO’s First Evaluation Round (January 2000) dealt with the independence, specialization
and means available to national bodies engaged in the prevention and fight against corruption,
and the extent and scope of immunities. The Second Evaluation Round (January 2003) dealt with
the identification, seizure and confiscation of corruption proceeds ; public administration and
corruption (auditing systems ; conflicts of interest) ; the prevention of legal persons being used
as shields for corruption ; tax and financial legislation to counter corruption ; and links between
corruption, organized crime and money laundering. The Third Evaluation Round (January 2007)
dealt with the incriminations provided for in the Criminal Law Convention on Corruption (ETS
173), its Additional Protocol (ETS 191) and Guiding Principle 2 (GPC 2) ; and transparency of Party
Funding with reference to the Recommendation of the Committee of Ministers to member states
on common rules against corruption in the funding of political parties and electoral campaigns
of corruption in respect of Members of Parliament, Judges and Prosecutors : http://www.coe.int/
t/dghl/monitoring/greco/evaluations/intro_en.asp.
26. See GRECO compliance report on France, October 2003, p. 8, paragraph 34.
27. Ibid.
and 148) that : "French government tabled in 2013 a draft constitutional law reforming the
Conseil Supérieur de la Magistrature (CSM) (no. 815) which aimed at making the appointment of prosecutors subject to a favorable opinion from the Conseil Supérieur de la Magistrature (CSM). There was a political consensus on this point, with both Houses having adopted this measure at first reading (along with the provision making prosecutors subject to the disciplinary authority of the CSM). However, this draft law, which contained other less consensual points, did not pass. In March 2016, GRECO concluded in its compliance report on France that its recommendation on this point had not been implemented. On April 26, 2016, the draft constitutional law, amended by the Senate, was adopted by the two Houses of Parliament - The Senate and The National Assembly - in identical terms. The draft constitutional law will become final, pursuant to Article 89 of the Constitution, after approval by referendum or by Parliament in Congress.

29. The Conseil d’état advises the Government on the preparation of bills, ordinances and certain decrees. It also answers the Government’s queries on legal affairs and conducts studies upon the request of the Government or through its own initiative regarding administrative or public policy issues.


31. Text No. 4187 adopted by the Senate and sent to the National Assembly on 4 November 2016 for the final reading of the text: http://www.assemblee-nationale.fr/14/dossiers/transparence_lutte_corruption_economie.asp

32. According to leading whistleblower expert, Anna Myers from the Government Accountability Project in Washington and co-chair of WIN, an international network of whistleblowing organizations: “When whistleblowers disclose information in the public interest, they are doing us a service. It is up to us to demand the change that is needed and ensure that whistleblowers are not held personally liable for their public service action”. Cathy James from the charity Public Concern at Work in the United Kingdom, says: “It is very important that the law has a broad coverage, the narrow definitions and preconditions contained within this draft Law will doubtless undermine some of the innovative provisions it contains.”: http://blog.transparency.org/2016/06/20/new-whistleblower-protection-law-in-france-not-yet-fit-for-purpose

33. It must be noted that France remains uncomfortable with the idea of reporting misconduct in exchange for pecuniary gain. For a comparative study on this subject, see J. Schwartz-Mirallès, « Les récompenses financières des lanceurs d’alerte portent-elles atteinte aux droits fondamentaux ? Le cas du droit américain », in « La Revue des droits de l’homme » n° 10, 2016, revdh.revues.org


35. See Draft law No. 1252 which proposes to penalize non-compliance of Article 40, paragraph 2 of the Code of Criminal Procedure, made by Pierre Morel-A-Huissier (MP) and registered at the Presidency of the National Assembly on 16 July 2013: www.assemblee-nationale.fr/14/propositions/pion1252.asp

36. See Law No. 2013-1117 of 6 December 2013 on action against tax fraud and serious economic and financial crime which added a new Article 40 paragraph 6 to the Code of Criminal Procedure which provides that: “The person who reports an offence or a crime committed in his company or administrative department shall, if he so requests, be put in touch with the central anti-corruption service [SCPC] when the offence reported falls within its area of competence”.

37. See article 434-1 of the french Criminal Code.


ABSTRACTS

Whistleblowing, which emerged under the influence of US laws and international agreements, is a new concept for european countries. France was initially reluctant to establish effective whistleblower protections. Then, in recognition of its international commitments and in response to various political and financial scandals (Kerviel affair, Cahuzac affair), France adopted comprehensive reforms of its public and economic life by laws passed from 2007 to 2016. As such, beyond adopting the legislative changes called for in a number of european and international conventions, several measures should be considered to improve the legislation on whistleblowing in France, especially in the fight against national and transnational corruption. In the fight against corruption, OECD and GRECO have both recommended that France takes appropriate measures to promote reporting by public officials under article 40, paragraph 2 of the CPP. However, France’s recent legislative initiatives to reform whistleblower protection in the french public sector, voted from 2013 to 2016 (“Sapin 2”), remain silent on the procedure for implementing article 40, paragraph 2 of the CPP. Clearly, the text of article 40, paragraph 2 of the CPP, as drafted and applied today, no longer meets France’s needs or its international commitments. Legal protection of public officials who blow the whistle during the course of their duties on corruption matters is not sufficient to ensure the application of article 40, paragraph 2 of the CPP. The text should be overhauled in order to provide a coherent and efficient mechanism for reporting that protects the rights of french citizens. The scope of this article and the conditions for its implementation should be clarified, and the question of whether that provision should be coupled - or not - with a penalty should be discussed.

Le whistleblowing, qui a émergé sous l'influence des lois américaines et des conventions internationales, est un nouveau concept pour les pays européens. La France a d'abord été réticente à introduire une protection juridique des lanceurs d'alerte. Puis, en exécution de ses engagements internationaux et en réponse à divers scanda les de nature politique et financière (l'affaire « Kerviel », l'affaire « Cahuzac »), elle a fait des réformes en ce sens. Au-delà des modifications législatives adoptées dans le prolongement des conventions européennes et internationales, plusieurs mesures devraient être envisagées pour améliorer la législation sur ce point, en particulier dans la lutte contre la corruption nationale et transnationale. Dans leurs rapports d'évaluation respectifs du dispositif français de lutte contre la corruption, l'OCD et le GRECO ont tous deux recommandé que la France prenne des mesures appropriées pour permettre une application effective de l'article 40, paragraphe 2 du CPP. Cependant, les récentes lois françaises qui consacrent la protection des lanceurs d'alerte, notamment les lois votées en 2013 et en 2016 (« Sapin 2 »), demeurent silencieuses sur les modalités d'application de l'article 40, paragraphe 2 du CPP. De toute évidence, le texte de l'article 40, paragraphe 2, du CPP, tel qu'il est rédigé et appliqué aujourd'hui, ne répond plus aux besoins et aux engagements internationaux de la France. La protection juridique des agents publics qui signalent des faits criminels et délictuels constatés dans le cadre de leurs fonctions ne suffit pas à garantir l'application effective de l'article 40, paragraphe 2 du CPP. Ce dispositif devrait faire l'objet de
lignes directrices claires au sein de chaque administration concernée. Son champ d’application et les conditions de sa mise en œuvre devraient être précisés et la question de savoir si cette disposition doit être assortie d’une sanction - ou pas -, enfin traitée par les pouvoirs publics.

INDEX

**Keywords**: whistleblower, fight against corruption, OECD convention on combating bribery of foreign public officials in international business transactions, European legislation on the fight against corruption, the Group of States against Corruption (GRECO), French reforms, Sapin II, article 40 of the French code of criminal procedure, public official, prosecutor.

**Mots-clés**: lanceur d’alerte, lutte contre la corruption, convention de l’OCDE sur la lutte contre la corruption d’agents publics étrangers dans les transactions commerciales internationales, législation européenne relative à la lutte contre la corruption, GRECO, réformes françaises, Sapin II, article 40 du code de procédure pénale, agent public, procureur de la République.

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