

FUTURE LEGISLATIVE FRAMEWORK ON THE PROTECTION OF WHISTLEBLOWERS IN LUXEMBOURG

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Almost 3 years ago, on 23 October 2019, the European Union (EU) adopted **Directive (EU) 2019/1937** aiming to unify within its territory the **protection of whistleblowers**, i.e. persons reporting violations of EU law, by **introducing minimum rules and guarantees**. Whereas Luxembourg had already recognized the role of whistleblowers in uncovering illegal activities, this is an opportunity to fall in line with the case law of the European Court of Human Rights and to **introduce a real status for whistleblowers**.

In order to comply with its obligation to transpose this directive into national law, Luxembourg tabled a bill last January. The bill aims to establish **a new legislative framework** for the protection of whistleblowers in the Grand Duchy by imposing in particular **new obligations on employers**.

The whistleblower is guided by his conscience and his will not to remain silent and not to let illegal facts of which he has knowledge pass. The premise of this legislation is therefore to **protect whistleblowers from all forms of reprisals** that could deter or intimidate them in their **professional environment**. The directive and the bill are therefore clearly aimed at **regulating the freedom of expression** of whistleblowers.

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1) WHO IS AFFECTED ?

All companies with employees and/or self-employed persons will be affected, as will the public sector and associations.

More specifically, anyone working in the private or public sector will thus be covered and can be a whistleblower: employees, self-employed persons, civil servants, temporary workers, part-time or fixed-term contract workers, shareholders and managers, paid or unpaid trainees, volunteers and anyone working under the supervision and direction of contractors, subcontractors and suppliers.

The capacity of whistleblower may also be applied to all persons who have previously held any of the aforementioned positions and those whose employment contracts have ended or have not yet begun.

This protection will also extend to facilitators (natural persons who assist a whistleblower) such as colleagues, trade unions, or the staff delegation as well as to third parties who are connected to the whistleblower and who are also at risk of retaliation in a professional context.

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2) WHAT OFFENCES ARE COVERED ?

Whereas the Directive targets only certain specific violations of EU law, Luxembourg has opted to extend the protection of whistleblowers **to all violations of the law.**

The whistleblower will thus be able to report **any breach of national or EU law** provided that the points below are met:

- The information reported must have been obtained **without fail** in a **professional context**;
- The report must be made **through an appropriate channel**;
- The whistleblower must be **acting in good faith**;
- The subject of the whistleblowing must be an **act or an omission** which is either **unlawful** or **runs counter to the object or purpose of directly applicable provisions of national or European law**, provided that the consequence is a disturbance of the public interest.

3) HOW TO WHISTLEBLOW ?

The bill establishes a **right**, not an obligation, to **whistleblow**.

To this end, hierarchical reporting channels must be set up so that the whistleblower can use the most appropriate one for the illegal situation he or she encounters.

There are **three reporting channels**: internal, external and public disclosure.

> INTERNAL

In the first instance and when it is **possible to remedy the violation effectively internally without the risk of retaliation**, the whistleblower should use the **internal channel**. Internal reporting is actually the preferred channel because it is the least intrusive and also because, as a matter of principle, it is internally that it will be easier to resolve the problems.



What are the employer's obligations? All companies with at least 50 employees are required to set up an internal reporting channel.

Exceptions may be made to impose this requirement on **private sector entities** with fewer than 50 employees.

The bill nonetheless postpones this requirement until 17 December 2023 for entities **with between 50 and 249 employees**.

It should be noted that for the calculation of the threshold, reference is made to the rules applicable to staff delegations.

In practice:

- The employer will be required to **verify the facts brought to its attention**;
- The channel may be managed **internally or externally**, in a secure manner, and must guarantee the confidentiality of the whistleblower;
- For entities with 50 to 249 employees, it will be possible to share resources, i.e. to organize a **common service**, for example within a group of companies;
- The channel should allow for written and/or oral reporting, by telephone, voice message or meeting upon request;
- The **staff delegation** must be **involved** in the procedure without fail;
- The matter should be followed up by an **impartial** person or department;
- The whistleblower should receive an acknowledgement of receipt **within 7 days** of reporting;
- The whistleblower should be assured of follow-up of the case and **get feedback** within a reasonable period not exceeding **3 months**.

> EXTERNAL

Secondly, when it is not possible to remedy the violation effectively internally without the risk of reprisals, the whistleblower may use the **external channel**, i.e. the oral or written **communication of information on violations to various competent authorities**, in particular the Inspectorate of Labour and Mines, the Luxembourg Inland Revenue, the Commission for the Supervision of the Financial Sector (CSSF), or the National Data Protection Commission. A list of these authorities is included in the bill.

> PUBLIC

Finally, in order to avoid abusive or malicious reporting that could have irreversible repercussions on a private or public entity, there is **public disclosure** as a last resort. This may be used :

- Where no **appropriate measure has been taken** through internal or external channels;
- Where **action cannot reasonably be expected** from internal or external reporting;
- Where there is a **significant risk of retaliation**;
- Where there is **imminent or obvious danger** to the public interest.

4) WHAT IS THE WHISTLEBLOWER PROTECTED AGAINST?

The protection of whistleblowers is a matter of **public policy** and includes the **confidentiality of their identity** when implementing whistleblowing procedures, which cannot be revealed without their express consent, except for public disclosure. Furthermore, the whistleblower will be **protected against any form of reprisals and will not be held liable**.



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To benefit from this protection, the whistleblower must act **in good faith** and **have reasonable grounds** for believing that the information reported was **true** and **its disclosure necessary** and **within the scope of the law**.

Conversely, an employee who is malicious or uses fanciful or abusive information will not get any protection. Similarly, protection should not apply to those who report information that is already fully known in the public domain. On the other hand, those who report in good faith **will be protected even if the information turns out to be inaccurate**.

The directive and the bill do however not address the issue of **anonymous whistleblowers**. Only the competent authorities will therefore be able to decide how to deal with such cases. If the identity of this person is finally disclosed, however, he or she will nevertheless benefit from the same protection.

Any harm to the whistleblower as a result of reporting or public disclosure will constitute an act of reprisals. Forms of reprisals, threats or attempts to retaliate include, but are not limited to, the following:

- Suspension, lay-off, dismissal;
- Modification of the employment contract: reduction of salary, modification of working hours, transfer of duties, change of place of work;
- Demotion or refusal of promotion;
- Suspension of training;
- Coercion, intimidation, harassment, discrimination, disadvantageous or unfair treatment;
- Negative performance evaluation;
- Besmirching to the person's reputation, for example on the social media;
- Etc.

It should be noted that **the good faith of the whistleblower is presumed**. If a decision affecting the worker is taken by the employer, the burden will be on the employer to prove that he or she did not act in retaliation against the whistleblower.

5) CAN SANCTIONS BE APPLIED?

> AGAINST THE EMPLOYER

The Directive requires Member States to **implement effective, proportionate and dissuasive sanctions**. Luxembourg has thus decided to introduce **administrative sanctions ranging from €1,500 to €250,000**, or even €500,000 in the event of a repeat offence in the following cases:

- Failure to put in place an internal whistleblowing procedure in accordance with the requirements;
- Obstructing or attempting to obstruct a disclosure;
- Refusal to provide the requested information or provision of incomplete or false information;
- Violation of the confidentiality enjoyed by whistleblowers;
- Refusal to remedy the violation.

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Furthermore, any retaliatory measures that may take place will be “**null and void**”. Finally, in the event that nullity is not requested, it will be possible to claim damages.

> AGAINST THE WHISTLEBLOWER

Sanctions may also be taken against the whistleblower, particularly in the event of **failure to respect the hierarchy of reports, public disclosure of false information or reporting in bad faith**.

Accordingly, **in criminal terms**, the bill provides that a whistleblower acting in bad faith may be subject to a prison sentence of between three days and three months and a fine of between €1,500 and €50,000. Slandering denunciation may also be invoked in this situation, subjecting the whistleblower to a prison sentence of between 15 days and 6 months and a fine of between €251 and €10,000.

In the event of public disclosure and if specific persons are targeted, insult, slander or defamation may also be considered.

In disciplinary terms, the employer may use its disciplinary powers since the whistleblower will not be protected, provided that the misconduct committed is sufficiently serious to justify the sanction imposed.

Finally, **in civil terms**, Luxembourgish law provides for compensation measures for damages resulting from such whistleblowing or public disclosure in accordance with national law. A private or public law entity will therefore be able to take legal action against the person having reported or publicly disclosed false information in order to obtain compensation for the damage suffered.



CONCLUSION

This forthcoming legislation therefore **brings new responsibilities to bear on companies**. Although we are still only at the draft stage, it seems sensible for employers to familiarize themselves with their new obligations.

Companies will therefore have to **ensure that their internal reporting channels are properly visible** to avoid information being brought to the attention of the Luxembourg authorities or the public. A faulty internal reporting system could potentially be detrimental to you, in fact!

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