

## **Whistleblowing and protection of whistleblowers**

A bill (n°7945) was recently submitted to the Chamber of Deputies in order to introduce into Luxembourg legislation a global legal framework for the reporting of illicit and illegal acts ("whistleblowing") and the protection of whistleblowers. This bill aims to transpose Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report violations of EU law.

Although the protection of whistleblowers is not a new concept in Luxembourg<sup>1</sup>, the bill aims to significantly broaden its scope of application. Indeed, reports triggering the legal protection will include all "*acts or omissions which are unlawful or which run counter to the object or purpose of directly applicable provisions of national or European law, provided that the consequence is a disturbance to the public interest*" (defined as "violations" in the draft bill).

This broad scope, which goes far beyond the requirements of the Directive, demonstrates the government's desire to encourage whistleblowing in all matters where information has been obtained in a professional context.

Under the bill n°7945, companies with at least 50 employees in all sectors will be obliged to set up internal reporting channels, while those granted whistleblower status will benefit from enhanced protection against all forms of reprisal:

### **1. New obligations for companies**

Private sector companies with 50 or more employees will be required to establish internal reporting channels and procedures for whistleblowers to communicate, orally or in writing, reasonable information or suspicions about actual or potential violations. Public sector entities will also be subject to this obligation, with no size requirement except for municipalities.

Entities that are not obliged to set up a procedure may do so, in which case the rules of the future law will apply.

The implementation of the internal reporting procedure will require the involvement of the staff delegation (prior consultation in companies with less than 150 employees, agreement of the delegation for others).

The text indicates that internal reporting should be the preferred channel; however, reporting may also be done externally, i.e. by informing the competent national authorities directly or, in specific cases, by public disclosure.

Both internal and external reporting channels will have to guarantee the confidentiality of the identity of the person doing the reporting and respect the applicable legislation regarding the processing of personal data. Specific rules will apply to the procedure for following up and investigating a report, particularly in terms of timing.

The company will be exposed to administrative sanctions (between EUR 1,500 and EUR 250,000) if it does not set up internal reporting and follow-up procedures, if it hinders a report, if it fails to cooperate with the authorities to which a report is referred, if it refuses to remedy the violation once established, or if it violates the confidentiality to which whistleblowers are entitled.

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<sup>1</sup> In particular, article L. 271-1 of the Labour Code provides that an employee may not be subject to reprisals for protesting against, opposing to or reporting a fact that he/she considers as constituting illegal taking of interest, bribery or influence peddling.

## 2. Status, protection and assistance to whistleblowers

### a. Status of the whistleblower

In order to be considered as a whistleblower and to benefit from the related protection, individuals (who may be employees, self-employed persons, members of management bodies, volunteers or trainees, or subcontractors or suppliers) must:

- have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the information reported on the violations is true and that the information falls within the scope of the law;
- have made an internal report, an external report or a public disclosure.

In order to determine whether the law applies, it will therefore be necessary to verify whether the person reporting and claiming its protection could legitimately believe that the law was applicable. Therefore, the law will also cover those who, in good faith, report facts which are lawful but which they could legitimately and reasonably believe to be unlawful, or who report information which subsequently turns out to be inaccurate.

### b. Whistleblower protection and assistance

If these conditions are met, the protection will apply. All forms of reprisals, including threats and attempts at reprisals, are prohibited. The notion of reprisal is defined by the text in a broad way to cover *"any direct or indirect act or omission that occurs in a professional context, prompted by an internal or external report or public disclosure, and which causes or may cause undue harm to the whistleblower"*.

The person who has suffered reprisals may ask the competent court to declare them null and void and to order their cessation. Alternatively, the individual may bring a legal action to obtain compensation for the damage suffered. The burden of proof will lie on the company that took the prejudicial measure; it will therefore have to establish that the reasons for the measure taken are totally unrelated to the report made by the individual concerned.

In addition, to support and assist whistleblowers, the bill provides for the introduction of a whistleblowing office, under the authority of the Ministry of Justice, whose tasks will include informing and assisting any person wishing to make a report, raising public awareness of the whistleblower protection legislation, and informing the competent authorities of breaches to the obligations to establish internal channels that come to its attention.

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The above provisions are still subject to change during the legislative process.

The new obligations will come into force on the 4th day after the publication of the law in the Official Journal, except for companies with between 50 and 249 employees, which will have a transition period until 17 December 2023 to set up internal reporting channels and procedures.

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*It is therefore important to start preparing for these new obligations. In this respect, Unalome Legal is organising a webinar (in English) on 26 April 2022 from 5pm to 6pm, dedicated to the draft laws on moral harassment and whistleblowers' protection. Marielle Stevenot and Elisabeth Franssen will take this opportunity to explain the new obligations that companies will have to comply with, and in particular the implementation of the internal reporting procedure. Registration to the webinar\* is through our website: [News & events — unalome \(unalome-legal.lu\)](#) or per e-mail: [info@unalome-legal.lu](mailto:info@unalome-legal.lu)*

\* Free event