

WHISTLEBLOWING SPECIAL SERIES – N°1 Overview of the new law on the protection of whistleblowers in Luxembourg

On 2 May 2023, the Chamber of Deputies has adopted Bill n°7945 transposing Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law (the “Whistleblower Protection Act”). Although the legislative process is not entirely finalised, it is expected that the new law will enter into force in the coming weeks.*

The upcoming law will have a significant impact on Luxembourg companies, even for those which may already have a whistleblowing scheme in place at local or group level.

To assist companies in their process of implementation of the Whistleblower Protection Act, we have identified 4 main topics and the related practical steps that should be undertaken to ensure compliance. We will present each of these topics in a dedicated newsletter to be published every week.

We will start our special series with an overview of the main provisions impacting companies.

What is “whistleblowing” under the new law?

It is the fact for individuals to report information on (potential) breaches of the law, related to an organisation, of which they have become aware in the course of their professional activity.

The information can be reported internally, through the organisation’s reporting channel, or externally to public authorities, or, where specific conditions are met, disclosed publicly, e.g. to the press, social media, etc.

In a nutshell

- ✓ Companies with 50+ employees must set up internal whistleblowing channels and procedures or face significant sanctions for non-compliance!
- ✓ Already have a whistleblowing scheme in place? Make sure to assess its compliance with the new law and adapt it where necessary
- ✓ Implementation timeline:
 - 250+ employees: you just have 4 days from the publication of the law to comply !
 - 50-249 employees: you have until 17 Dec. 2023
- ✓ Retaliation against whistleblowers is strictly prohibited and subject to criminal sanctions

What does the Whistleblower Protection Act mean for Luxembourg companies?

Companies having at least 50 employees will be obliged to set up internal reporting channels and adequate procedures allowing individuals to report information on violations of the law.

Such reporting channels and procedures will need to be dealt with by competent and impartial designated persons or service. Outsourcing the receipt and management of report is possible, and smaller companies (up to 249 employees) may set up joint services. Reporting channels and procedures must also comply with specific requirements in terms of confidentiality / data security, management of the reports and follow up towards the reporting person.

Want to know more? Stay tuned for our next editions, we will provide more information on these specific requirements and how to set up your internal whistleblowing scheme!

* A second vote should take place in the coming months, or exemption thereof shall be granted with the agreement of the *Conseil d’Etat*.

What about companies already having a whistleblowing scheme in place?

Some companies are already subject to an obligation to have a whistleblowing scheme, e.g. in the financial sector. The Whistleblower Protection Act does not replace existing laws and regulations on this matter, but sets minimum standards that need to be complied with. More favourable provisions of existing schemes shall be maintained.

Who can be granted a protection under the Whistleblower Protection Act?

Any individual who is or has been in professional contact with an organisation, can be granted a protection as whistleblower, regardless of his/her status. This includes employees, public servants, freelancers, management or supervisory board members, volunteers, students, trainees, candidates, and even employees of clients and suppliers. The law also protects individuals who provide assistance to the whistleblower in making the report as well as to those who may be at risk of reprisals (e.g. colleagues, relatives...). Exceptions are however provided for those subject to certain professional secrecy (medical secrecy, professional secret between lawyers and clients, ...).

The protection is granted provided the whistleblower:

- has reasonable grounds to believe, in light of the circumstances and information available to him/her, that the information reported is true and falls within the scope of the law (good faith);
- has made an internal or external report, or a public disclosure in accordance with the law.

In what consists the protection of whistleblowers?

The protection of whistleblowers is twofold:

- (i) A clear prohibition of any form of reprisals. Legal remedies are available for the whistleblower and, where the conditions are met, include a presumption that the measure is retaliatory.
- (ii) An exclusion of any liability (notably from a civil and criminal point of view) for having disclosed information in breach of a legal or contractual confidentiality obligation, as well as for having obtained such information (unless such obtention constitutes an autonomous criminal offence).

What is the timing for implementation?

Towards companies having at least 250 employees, the law will enter into force on the 4th day after its publication in the *Journal Officiel*. This means that these companies are required to have appropriate internal whistleblowing channels and procedures in place by that time.

Companies having between 50 and 249 employees benefit from a transitory period until 17 December 2023 to comply.

Which sanctions could apply in case of failure to implement an internal reporting channel?

Companies which would fail to implement internal reporting channels and procedures complying with the legal requirements, would be liable to an administrative fine ranging from EUR 1,500 to EUR 250,000. The same would apply notably to those obstructing a report (including attempts to obstruct), breaching the confidentiality or refusing to remedy any breach of the law duly stated.

It should also be noted that taking retaliation measures against a whistleblower is considered a criminal offence, subject to a fine from EUR 1,250 to EUR 25,000.

In our next edition, we will help you determine whether your company falls in the scope of the law and whether any whistleblowing scheme set up at group level meets the new legal requirements. In the meantime, our team is at your disposal for any further information.

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