

## WHISTLEBLOWING SPECIAL SERIES – N°2

### Which entities must set up internal whistleblowing channels and at which level?

*The new law transposing Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law (the “Whistleblower Protection Act”) is now in force!*

*It has 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 implementing the Whistleblower Protection Act, we have identified 4 main topics and the necessary practical steps that should be undertaken to ensure compliance. We will present each of these topics through a dedicated newsletter to be published every week.*

*In this second edition, we will see more precisely which companies fall within the scope of the obligation to set up internal whistleblowing channels and procedures and whether channels established at group level meet the legal requirements.*

#### How to calculate the threshold of 50+ workers?

As a reminder, companies having at least 50 employees must set up internal whistleblowing channels and procedures, allowing employees to report breaches of the law.

The method to calculate whether the threshold of 50 is reached is the same than to determine whether a company meets the threshold to set up a staff delegation.

This means that:

- Apprentices are not taken into account
- Part-time employees working at least 16 hours per week count as one employee
- For part-time employees working less than 16 hours per week, the total working hours are added, then divided by 40 hours (or the conventional working time within the company)
- Fixed-term employees are calculated on a pro rata basis of their time of presence within the company over the 12 preceding months (excluding those replacing an absent employee).

#### In a nutshell

- ✓ Threshold calculation: the 50-worker threshold follows the same methodology as for the staff delegation.
- ✓ Reference period: Setting up an internal reporting scheme becomes mandatory once the 50+ threshold is reached over 12 months.
- ✓ Local whistleblowing scheme required: Each Luxembourg company with 50+ employees must have its own local scheme in place. Group channels can be offered additionally but it is not sufficient!
- ✓ Resource pooling for mid-size businesses: Companies with less than 250 employees may share resources for the report receipt and investigation.

#### Is the obligation applicable as soon as the company reaches the 50+ threshold?

No. When based on the computation method stated above, a company determines that it has at least 50 employees, it is not required to set up internal whistleblowing channel as of Day 1. The obligation exists when the 50+ threshold is reached over a period of 12 successive months.

**Is it required to aggregate the number of employees within the group to calculate the threshold?**

No. As per the law, the 50+ threshold is to be assessed per legal entity. Even if separate legal entities form together a “social and economic unit” (i.e. they have close economic links and there is a community of workers sharing same interests and having a similar social status), it is not required to take into account the total number of employees of the entities forming this “social and economic unit”. If none of the legal entities meets the threshold, there is no obligation to establish an internal whistleblowing scheme, although they may decide to set up a central scheme on a voluntary basis.

**When a whistleblowing scheme is already available within the group, is it sufficient for the Luxembourg entity to give access to this scheme to its employees ?**

No. Each legal entity reaching the 50+ threshold must have its own local whistleblowing channel, and giving access only to a central channel at group level is not compliant with the law. In the EU Commission’s position, proximity of the channel to the workers of the employing entity is a guarantee of the channel’s efficiency. It is however possible to give access to the group’s channel in addition to the local one, in which case the reporting person may freely decide to use either option.

Furthermore, the law grants the possibility for companies to outsource the management of their whistleblowing channels to external service providers. This possibility only refers to third parties; therefore, outsourcing the management of the whistleblowing scheme to another group entity is not permitted.

While the outsourcing of the management of the whistleblowing scheme to another group entity is not permitted, the EU Commission considers that it is however possible to use the group’s services to carry out the investigation on the reported breaches. This requires providing clear information to the whistleblower that access to their report may be given to specific persons at group level for the purpose of the investigation, and the whistleblower should have the right to object and request investigations at local level. In any case, follow-up measures and feedback to the reporting person shall remain at the level of the Luxembourg entity.

**Is it possible to pool resources to manage the whistleblowing channels?**

Yes, the law grants the possibility to pool resources for the receipt of reports and any investigation to be carried out, but only for medium-sized companies of less than 250 employees.

Such pooling may be organized for companies belonging to the same group (provided they all have less than 250 employees), but also for companies having no links with each other. In any case, each company remains responsible for the confidentiality obligations, to give feedback to the reporting person and to address the breaches, if established.

*In our next edition, we will discuss the requirements that must be complied with and specific points to be considered and decided upon when designing an internal whistleblowing scheme.  
In the meantime, our team is at your disposal for any further information.*

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