

**NEW WHISTLEBLOWER
PROTECTION FRAMEWORK:**

**What does it mean for
companies?**



INTRODUCTION

In Europe, the protection of whistleblowers largely depended on national legislation. Consequently, on 23 October 2019, the European Union adopted [Directive \(EU\) 2019/1937](#) on the protection of persons who report breaches of Union law.

While Luxembourg had already recognised that whistleblowers can play an important role in uncovering illegal activities detrimental to the public interest, a high level of protection for whistleblowers has been introduced previously in national law.

However, Member States now have to complete or adapt their frameworks to transpose the directive into national law by December 17, 2021 for the provisions relating to the internal reporting channels for legal entities in the private sector with at least 250 employees, respectively December 17, 2023 for the provisions relating to the internal reporting channels of legal entities in the private sector with 50 to 249 employees.

The new rules provided for by the directive must be understood as minimum requirements applicable throughout the EU and aimed at guaranteeing increased protection for whistleblowers, whether they are in a direct or indirect employment relationship with the disputed entity.

The directive thus provides for the establishment of reporting channels, followed by considerable protection for whistleblowers against a number of behaviours or decisions that could result in retaliation.

The [bill of law n° 7945](#) to transpose the directive in question into Luxembourg law has been tabled on the 10th of January 2022 in the Chamber of deputies.

PERSONAL SCOPE

Who can be a whistleblower?

According to the directive, **any person working in the private or public sector who has obtained information about violations of European Union law in a professional context** can be a whistleblower.

This includes

- self-employed persons,
- shareholders and members of the administrative, management or supervisory body of a company, including non-executive members,
- paid or unpaid volunteers or trainees.

The concept of whistleblower therefore also applies to workers with atypical employment relationships, including part-time and fixed-term workers, as well as to persons with an employment contract or an employment relationship with a temporary agency.

In addition, any person working under the supervision and direction of contractors, subcontractors and suppliers can be a whistleblower.

Finally, it should be noted that a person who reports or publicly discloses information about violations obtained in the context of **an employment relationship that no longer exists** can also be a whistleblower.

The same applies to a person whose **employment relationship has not yet started** and where information about violations was obtained during the recruitment process or during pre-contractual negotiations.

MATERIAL SCOPE

What can be reported?

The violations of European Union law that can be reported fall within the scope of European Union acts and are listed in the [annex](#) to the directive.

The [bill of law n° 7945](#) to transpose the directive into Luxembourg law extends the material scope to national law.

Thus, whistleblowers will benefit from the protection framework for reporting any breaches of national law.



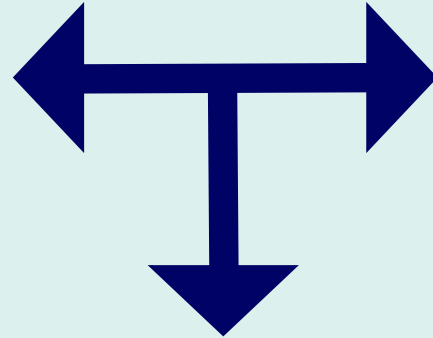
THE THREE-LAYERED REPORTING STRUCTURE

INTERNAL CHANNEL

Implemented by legal entities in the private and public sectors with at least 50 employees.

In the private sector, exceptions may be made to impose the obligation to set up an internal channel on entities with fewer than 50 employees.

In the public sector, exceptions may be made to exempt municipalities with fewer than 10,000 inhabitants.



EXTERNAL CHANNEL

The bill of law n° 7945 to transpose the directive into Luxembourg law provides for a list of several competent authorities, including ITM, ILR, CSSF, etc.

PUBLIC DISCLOSURE

- When no appropriate action has been taken through internal or external channels.
- When action cannot be reasonably expected from internal or external reporting.
- When there is a significant risk of retaliation.
- In the event of imminent or manifest danger to the public interest.

INTERNAL REPORTING CHANNEL

What obligations for companies?

All businesses with 50 or more employees will need to set up an internal reporting channel and ensure a follow-up.

- The channel can be managed in-house or provided by a third party.
- The channel must be managed securely and guarantee the confidentiality of the whistleblower.
- The channel must be able to be used by workers and other persons in contact with the company.
- The channel must allow for written and/or oral reporting, by phone, voicemail, or allow a physical meeting on demand.

Note that companies employing between 50 and 249 workers can share resources to manage reports and conduct investigations.

- The follow-up must be carried out by an impartial person or service.
- Follow-up must be diligent, including in the event of anonymous reporting.
- An acknowledgment of receipt must be sent within 7 days of the report.
- Feedback must be provided within 3 months from the acknowledgment of receipt.

To encourage internal reporting first, companies will need to increase the effectiveness, visibility and use of their internal channels. Indeed, a failing internal reporting system can lead to protected public disclosure. Clear and easily accessible information regarding external reporting procedures must also be made available.

THE WHISTLEBLOWER

What is he protected against?

The whistleblower, insofar as he has well-founded reasons to believe that the reporting or public disclosure of information about a possible violation of EU law is necessary, benefits from the safeguards foreseen by the directive.

Any harm suffered by the whistleblower as a result of a report or public disclosure is presumed to constitute retaliation. As under Luxembourg law, the burden of proof will be on the employer, who will have to prove that he is not acting in retaliation against the whistleblower.

Note that the whistleblower shall not be liable for obtaining the information, except if it constitutes a criminal offense. In addition, reporting or disclosing elements of trade secrets is considered lawful when they form part of information about a violation of EU law.

Forms of retaliation, their threat or attempt can take the following forms:

- suspension, lay-off, dismissal
- reduction in wages, change in working hours
- demotion or withholding of promotion
- failure to convert a CDD into a CDI
- transfer of duties, change of location of place of work
- withholding of training
- coercion, intimidation, harassment or ostracism
- negative assessment or employment reference
- discrimination, disadvantageous or unfair treatment
- psychiatric or medical referrals
- harm, including to the person's reputation e.g. in social media
- blacklisting on the basis of an informal or formal agreement

SANCTIONS

For a private or public entity?

Member States must provide for effective, proportionate and dissuasive sanctions against natural or legal persons **who hinder or attempt to hinder reporting, retaliate against whistleblowers** or persons enjoying the same protection, bring abusive proceedings against whistleblowers, or fail to respect their obligation to keep the identity of whistleblowers confidential.

For whistleblowers?

Member States must provide for effective, proportionate and dissuasive sanctions to be applied to whistleblowers **where it is established that they have knowingly reported or publicly disclosed false information**. National law should also provide for compensation measures for damages resulting from such alerts or public disclosures in accordance with national law. A private or public law entity could therefore take legal action against the person who reported or publicly disclosed false information in order to obtain compensation for the damage suffered.

CONTACTS

Ella Gredie
Adviser
Legal and Social Affairs
ella.gredie@fedil.lu
Tel: +352 43 53 66 611

Philippe Heck
Adviser
Legal and Social Affairs
philippe.heck@fedil.lu
Tel: +352 43 53 66 609

