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## June 2023

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# 1. LEGISLATION | NOTABLE CASE LAW

## 1.1. Specific whistleblowing legislation

Apart from a few scattered references, there was no specific general legislation providing for whistleblower protection until May 2, 2023. Indeed, it was on May 2, 2023 that the Chamber of Deputies of the Grand Duchy of Luxembourg adopted Draft Law 7945 (only available in French [here](#)) ('the Draft Law') to transpose the Directive on the Protection of Persons who Report Breaches of Union Law (Directive (EU) 2019/1937) ('the Whistleblowing Directive') into Luxembourg law. Thereafter, on May 16, 2023 the Draft Law was enacted as Law of 16 May 2023 Transposing the Whistleblowing Directive (only available in French [here](#)) ('the Law'), following the decision on the dispensation of a second constitutional vote by the Council of State. The Law was published in the Official Gazette on May 17, 2023, and entered into force on the fourth day after its publication.

## 1.2. Sector-specific whistleblowing legislation

Despite the absence of a real legislative framework for the protection of whistleblowers, there were some specific provisions establishing the obligation for certain persons to report certain facts or acts and, at the same time, the protection measures they should enjoy:

- Law of 12 November 2004 on the fight against money laundering and terrorist financing transposing Directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering ('the AML/CFT Law'); and
- Law of 5 April 1993 on the financial sector, as amended ('the Financial Sector Law'). The Financial Sector Law is also supplemented by certain provisions, such as Article 8(2) of Law

of 23 December 2016 on Market Abuse, as amended.

### 1.3. Additional applicable legislation

The Luxembourg Labor Code (only available in French [here](#)) ('the Labor Code') also provides for certain cases in which the whistleblower must benefit from specific protection from any reprisals, for example the termination of the employment agreement:

- in terms of safety at work (Article L.312-7 (1) of the Labor Code);
- in matters of sexual harassment (Article L.245-5 (2) of the Labor Code), moral harassment (Article L.246-4 (2) of the Labor Code), and discrimination (Article L.241-8 of the Labor Code); and
- in matters of corruption (Articles L.271-1 and L.271-2 of the Labor Code).

The Luxembourg Criminal Code (only available in French [here](#)) ('the Criminal Code') also provides some provisions:

- Article 140 of the Criminal Code provides that any person having knowledge of a crime, which could in its effect be limited, or whose authors will commit other crimes, is required to inform the relevant authorities; and
- Article 23(2) of the Criminal Code specifies that any official agent, employee, or agent in charge of a public service mission has to report about any crime or offense of which they become aware during the execution of their missions.

### 1.4. Guidelines

Both the [Supervision Commission of the Financial Sector](#) ('CSSF') and the [Insurance Regulator](#) ('CAA') have defined guidelines for whistleblowing procedures:

- CSSF: the procedure is mentioned in [Circular CSSF 12/552 as amended](#); and
- CAA: a form is available on the CAA's website concerning the following provisions:
  - under Article 4(o) of the [Law of 7 December 2015 on the insurance sector, as amended](#); and
  - under Article 8-3 of the AML/CFT Law.

For both procedures, employees and former employees of a company under the supervision of the CSSF or the CAA may apply directly to the institution concerned. In such a case, the employee should first follow any internal procedure (as the case may be) or, otherwise, follow the procedure described by the relevant institution.

## 1.5. Case law

The case law in Luxembourg on the protection of whistleblowers is very limited, as only few decisions have provided some guidelines.

We can refer to the following decisions, which are based both on the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as amended by Protocols No. 11 and No. 14 and supplemented by Protocols No. 1, 4, 6, 7, 12, 13, and 16 ('European Convention on Human Rights'), but also on the decisions of the European Court of Human Rights which, since 2008, has issued numerous decisions on the present topic:

- Court of Appeal, Decision No. 117-17 of March 15, 2017;
- District Court of Luxembourg, Penal Chamber, Decision of June 29, 2016;
- Court of Cassation, Decision No. 3911 (only available in French [here](#)) and Decision No. 3912 (only available in French [here](#)) of January 11, 2018;
- Administrative Court, Decision No. 36947 of November 15, 2016;
- Administrative Court, Decision No. 36847 of November 15, 2016 (overturned in appeal); and
- Administrative Court, Decisions No. 40884, 40885, 41043, 41056, 41069, and 41073 (overturned in appeal) of September 29, 2020.

These various decisions are based in particular on Article 10 of the European Convention on Human Rights concerning the protection of freedom of expression, which every individual must have. In particular, it was pointed out that the exercise of this freedom, which includes, in particular, the freedom to receive or impart information, may not be subject to conditions, restrictions, or penalties prescribed by law unless they constitute measures necessary in a democratic society, in particular for the protection of the reputation or rights of others, to prevent the disclosure of confidential information. A balancing of the interests involved is therefore necessary. Consequently, the respective weight of the harm caused to a party by the disclosure in question and the interest of the public in obtaining the information concerned must be assessed, considering the principle of proportionality between the harm caused by the disclosure and the defense of the public interest.

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## 2. COMPETENT WHISTLEBLOWING AUTHORITY

Since the Law was passed, the following Luxembourg authorities (together, 'the Authorities') will be competent to deal with whistleblower reports (external reporting) and ensure the protection of whistleblowers:

- the CSSF;
- the CAA;
- the Luxembourg Competition Authority;
- the Registration Duties, Estates, and VAT Authority;
- the Labor and Mines Inspectorate;
- the National Commission for Data Protection ('CNPD');
- the Centre for Equal Treatment;
- the Ombudsman/External Control of Places Deprived of Liberty;
- the Ombudsman for Children and Youngsters;
- the Luxembourg Institute of Regulation;
- the Independent Luxembourg Audiovisual Authority;
- the Luxembourg Bar Association;
- the Chamber of Notaries of the Grand Duchy of Luxembourg;
- the Medical College;
- the Nature and Forest Agency;
- the Water Management Administration;
- the Air Navigation Administration;
- the National Service of the Mediator of Consumption;
- the Order of Architects and Consulting Engineers;
- the Order of Chartered Accountants;
- the Institute of Company Auditors; and
- the Direct Tax Administration.

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## 3. SCOPE OF WHISTLEBLOWER PROTECTION

### 3.1. How are whistleblowers protected?

According to the Law, whistleblower protection will include three aspects:

- protection of the whistleblower's identity and of persons associated with the whistleblowers (see the section on who is protected below);
- protection of the whistleblowers and those associated with them from retaliation; and
- limitation of their liability, provided that the report was made in good faith.

### 3.2. Who is protected?

Since the Law was passed, the following persons will be eligible for the specific protection of whistleblowers:

- workers, i.e., employees (on permanent and fixed-term contracts), temporary workers, and trainees;
- self-employed workers;
- shareholders and members of governance bodies (board of directors, board of managers, supervisory board, management board, and ad hoc committee);
- persons working under the supervision and direction of contractors, subcontractors, and suppliers; and
- civil servants.

This protection will be due to these persons whether they are the authors of the alert, whether they have facilitated an alert, or whether, although they are a third party in the alert procedure, their proximity to the author of the alert requires that they must be protected. It should be noted that this protection may also be extended to legal entities that are linked to the whistleblower.

### 3.3. Is protection limited to certain subject matters?

While the Whistleblowing Directive intended to limit the protection of whistleblowers to reports of violations of certain rules of European law, the Luxembourg legislator extended the scope of this protection. Indeed, the Luxembourg legislator has decided to extend this protection to all whistleblowers who report any violation of the rule of law, i.e., a violation of any legal provision currently in force on the territory of the Grand Duchy of Luxembourg. However, the initial requirement of the Whistleblowing Directive limiting the scope of application to information obtained in a professional context has been taken over *in extenso* by the Luxembourg legislator.

### 3.4. What kinds of reporting, disclosures, or actions are protected?

In accordance with the Whistleblowing Directive, the Law provides for three reporting channels.

#### Internal reporting

Individuals wishing to report should give preference to this channel of communication when the violation can be effectively remedied internally and if they believe there is no risk of retaliation.

#### External reporting

External reporting is the oral or written communication of information to the competent authorities about violations. External reporting can be used directly if the violation cannot be effectively remedied internally or if the individual believes there is a risk of retaliation.

Further, public disclosure as a channel of reporting should be used as a last resort either because internal and external reporting have been unsuccessful or because the whistleblower may legitimately believe that the violation they intend to report may pose an imminent or obvious danger to the public interest or that there is a risk of retaliation/that the violation is unlikely to be effectively remedied due to the particular circumstances of the case.

### 3.5. Is anonymous reporting protected?

While the Whistleblowing Directive expressly provides for the possibility of anonymous reporting, the Law is vague on this issue. Indeed, Article 7 of the Law provides that the entities, who must set up procedures to receive alerts, must follow up on alerts whose author is identified or identifiable. This wording would tend to show that anonymous alerts would be possible. However, the isolated nature of this wording (except for Article 4(2) of the Law) does not allow one to affirm that anonymous alerts would be properly processed.

### 3.6. What conditions or proof must whistleblowers satisfy or provide to qualify for protection?

To be granted whistleblower protection, a whistleblower will have to prove:

- the existence of a report or disclosure, notably by providing the acknowledgment of receipt that should be issued for any report; and
- good faith: the assessment of good faith will be subjectively assessed, whether it is the way in which the information that gave rise to the whistleblowing was obtained or the existence of a genuine violation of the rule of law; moreover, good faith will also be evaluated at the

level of the motivations of the author of the report who will have to have carried out their gesture with an altruistic goal and not of revenge.

No other criteria have been set in the Law, so the motivation of the whistleblower and the gravity of the facts will not be taken into consideration.

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## 4. MANAGEMENT OF INTERNAL WHISTLEBLOWING SCHEMES

### 4.1. What channels and follow-up procedures must be established?

#### General requirements

There will be no specificities in Luxembourg law since the Law merely reproduces the text of the Whistleblowing Directive. Regarding the internal reporting process, it is defined as the oral or written communication of information about violations within a legal entity in the private or public sector. Reporting may be done in writing or orally (telephone, voice mail, or individual interview with a specifically designated person). The three official languages of the Grand Duchy of Luxembourg must be accepted, and the company may decide to accept another language.

#### Hotlines

The Law does not include obligations to create hotlines as such. However, the Law does provide for the creation of a new administration, the 'Office of reporting.' This administration, placed under the authority of the Ministry of Justice, will have the following mission:

- to inform and assist in the process any person wishing to make an internal or external report, in particular by specifying the procedures to follow;
- to make the public aware of the legislation on the protection whistleblowers;
- inform the respective competent authorities of breaches of the obligations to set up internal reporting channels of which the office is aware; and
- to draw up recommendations.

### 4.2. With whom does the responsibility lie for the management of the scheme?

Each employer who is required by the Law to implement an internal reporting system must specifically designate individuals responsible for the system and for processing requests. The reporting channel may be managed internally by a person or department designated for this purpose or provided externally by a third party. No particular quality or qualification is required for this purpose.



However, in any cases, in the event of non-compliance, the employer will be solely liable for payment of administrative fines.

#### **4.3. Are there any prior notification, registration, and approval requirements?**

In accordance with the provisions of the Labor Code, the staff delegation must be involved in the setting up of any internal regulations. The case law considers that a whistleblowing procedure is to be qualified as internal regulation, so that the staff delegation must be involved.

Therefore:

- if less than 150 employees: consultation and opinion of the staff delegation; and
- if more than 150 employees: co-decision process to be put in place.

#### **4.4. What information must be provided to employees about a whistleblowing scheme?**

There is no provision in the Law that details these obligations. Thus, the employer will be free to determine how they wish to inform their employees, it being understood that in the presence of a staff delegation, the information of the employees can be done through the latter.

#### **4.5. Are there requirements or restrictions for the use of external service providers?**

Article 6(4) of the Law expressly provides that the reporting channels may be managed internally by a person or department designated for this purpose or provided externally by a third party. The safeguards and requirements referred to in Article 7 of the Law, on internal reporting procedures and follow-up, also apply to third parties mandated to manage the reporting channel on behalf of a legal entity in the sector.

#### **4.6. Are there requirements or restrictions for international/group organizations?**

The Law provides that entities that are obliged to set up an internal reporting system may pool their resources and thus, for example, organize a common service. This could be the case within a group of companies.

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## **5. PROCESSING OF WHISTLEBLOWING REPORTS**

## 5.1. Is there a duty of confidentiality in relation to whistleblowing reports?

In principle, the identity of the author of an alert must remain strictly confidential. This duty of confidentiality is imposed on all those who will be called upon to process the reports, whether in the context of an internal report (it should be noted that a company which, in its internal management of reports, breaches this confidentiality may be fined) or in the context of an external report to the competent authorities.

Therefore, the reporting procedures must be designed in such a way as to guarantee this confidentiality. Of course, such a duty does not extend to public disclosure, i.e., cases in which the individual decides to speak to the public. Indeed, in such a case, and except for specific provisions (e.g., protection of sources in the field of journalism), it will be up to the person making the report to ensure that their identity is not revealed (an anonymous report would therefore be perfectly conceivable).

Moreover, the obligation of confidentiality requires that the identity of the author of the alert cannot be revealed without their express consent.

However, in certain cases, it will be possible to disclose the identity of the author of the alert if, and only if, the latter is informed in advance and if appropriate safeguards have been taken.

The Law repeats the provisions of the Whistleblowing Directive on this point and leaves it to employers to determine the appropriate mechanisms and processes to ensure confidentiality.

## 5.2. Are there any record-keeping requirements?

Article 23(3) of the Law states that the legal entities of private and public law and the competent authorities shall archive all the alerts received, in compliance with the confidentiality requirements laid down in Article 22 of the Law. Alerts shall not be kept longer than is necessary and proportionate to comply with the requirements imposed by this law or other requirements imposed by directly applicable national or European law.

## 5.3. Does the accused person have to be informed when data concerning them is recorded?

In order to protect whistleblowers, the Law does not require that persons who would be cited as perpetrators or accomplices of violations of the rule of law in the context of an alert be informed of the existence of an alert against them.

## 5.4. How do data protection rules apply in relation to whistleblowing reports?

Both the Law and the Whistleblowing Directive lay down certain rules concerning the processing of personal data. Thus, Article 23 of the Law recalls that the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR') must be respected and clearly sets out certain rules concerning, in particular, the filing of alerts and the recording and transcription of oral statements. Moreover, Article 23 of the Law also specifies that obviously irrelevant data must not be collected, or else be deleted without delay.

The CNPD issued an opinion (only available in French [here](#)) on the Draft Law. The CNPD was very critical of the content of the Draft Law as it related to the processing of personal data and has recommended several amendments to the provisions of the Draft Law.

## 5.5. Are there any restrictions to data subject rights (e.g., rights to be informed, access, rectify, erase, etc.)?

The Law does not contain any particular restrictions or confer any particular rights with respect to the protection of personal data on the whistleblower, so that the whistleblower benefits from all the rights conferred by the GDPR.

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# 6. PENALTIES AND LEGAL RECOURSE

## 6.1. Penalties for breach of duties and/or retaliation

In case of proven breaches, the entity concerned may be subject to administrative fines of up to €250,000.

## 6.2. Other liability

In the event of unjustified retaliation by an employer or a contractor against a whistleblower, it will be exposed to three types of sanctions:

- on the criminal level: in certain circumstances, a penal qualification could be retained (e.g., an offense of obstruction carried out against a staff delegate who has raised an alarm);
- on the administrative level: the fact of sanctioning a whistleblower, as constituting an 'obstruction to reporting,' may be sanctioned, which is sanctioned by a fine of up to €250,000; and

- on the civil level: the person who has suffered the reprisal may request the nullity of the decision materializing the reprisal and/or ask for the award of damages.

### 6.3. Compensation for whistleblowers

A whistleblower who suffers damage as a result of retaliation will be able to claim compensation for their loss. In addition, if an employee has been subject to retaliation in the workplace, such as dismissal, they may request that the decision to retaliate be null and void and, in the event of dismissal, may request reinstatement.

### 6.4. Legal recourse for accused persons

A person, initially presumed to be a whistleblower, who is finally found responsible for disseminating false information, making a false report, or acting improperly is exposed to criminal sanctions (imprisonment for a period ranging from three days to three months, and a fine ranging from €1,500 to €50,000 and/or civil sanctions). Indeed, the entity that has suffered damages may seek compensation for the harm suffered before the competent court. Moreover, an entity may also seek the liability of a person who has used unfair or illicit means to obtain information.