TRANSPARENCY INTERNATIONAL LUXEMBOURG

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Providing an Alternative to Silence:

Towards Greater Protection and Support for Whistleblowers in the EU

Country Report: Luxembourg

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I. Introduction

The Grand-Duchy of Luxembourg is an independent landlocked country with a small surface of some 2.600 square kilometers and an overall population of some 537.000 people among which some 44,5% are of foreign origin. Its main industry providing for roughly one third of its direct economic activity is its financial services sector.

It is organized as constitutional monarchy based on the civil law system as introduced by Napoleon Bonaparte in 1804 and subsequent years when the Grand-Duchy of Luxembourg was part of the French empire. The administrative languages of the country are Luxemburgish, French and German[1i].

The small size of the country and close-knit community made it possible for the country to work for a long time without certain formal legislation that today are considered as being the backbone of a free democracy including a comprehensive freedom of information and whistleblower protection legislation.

While Transparency International Luxembourg as well as other civil society organizations are still lobbying and fighting for certain legislations to be enacted, as among others a comprehensive freedom of information legislation, Parliament has enacted a short one-stop whistleblower protection legislation in 2011.

This legislation can and should be amended so as to reflect modern standards of whistleblower protection. However its mere existence is an important step in the right direction.

The whistleblower protection legislation is completed under Luxembourg Law by general provisions including law of tort, recent obstruction of justice legislation and balanced by provisions on slander and libel as well as law of tort.

Other noteworthy pieces of legislation have in this context been defeated. This is the case most notably on draft legislation on anonymous witness statements in Court.

Secondary issues seem today more important than an outright amendment of the existing legislation. Such secondary issues relate to awareness raising within the general population and relevant actors as well as a positive promotion of the existing legislation.

The whistleblowing protection legislation has not been used to this date in a Court of law, reflecting either that nobody cared to blow the whistle or that no entity retaliated against a whistleblower. It must be suspected that the former is closer to the truth. The small size of the country has as a consequence that fewer cases may emerge.

[1] The sole national language is Luxemburgish. Laws are written in French.

II. Description and assessment of whistleblowing protection laws

Whistleblowing protection has been formally enacted by a law of 13 February 2011 strengthening the means to fight against corruption and amending :

1) the labor law code,
2) the amended law of 16 April 1979 determining civil servants' status,
3) the amended law of 24 December 1985 determining local civil servants' status,
4) the code of criminal procedure law, and
5) the criminal code[ii]

The law of 13 February 2011 (hereafter whistleblowing legislation or whistleblowing protection legislation) is not dedicated solely to whistleblowing protection but does include provisions on the fight against corruption amending corruption offences and criminal procedural rules. Relevant to whistleblowing protection are sections A, B, C and to a lesser extent D of the law. While the whistleblowing protection legislation amends preexisting codes of laws or statutes, it is a standalone and comprehensive legislation providing whistleblowing protection. It can therefore be considered as a one-stop legislation covering both the public and private sector although obviously the relevant provisions have, by way of the whistleblowing protection legislation, been inserted in the relevant statutes and codes of law.

The codes of law and statutes which have been amended as per the whistleblowing protection legislation are mainly labor law as well as the law determining the status of civil servants and local civil servants. To a lesser extent, the criminal procedural rules have been changed to reflect changes in other legislations relating to whistleblowing protection. Whistleblowing protection is therefore seen only as a matter of employment without broader implications.

There are today no other provisions under Luxembourg law relating to whistleblowing protection except of course general provisions that may apply indirectly to whistleblowing protection, whistleblowing protection being but a specific case of a more general situation of one person "blowing the whistle" and thereby making known an improper behaviour that may constitute a criminal offence.

Indeed Luxembourg law in general authorizes any person to file a criminal complaint or inform, in the case of employment[2], its employer of any fact relevant to criminal offences[3] or wrongdoing[4] having been committed.

In such a case, Luxembourg law would not authorize the employer or any other entity to retaliate against the person who has filed a complaint or informed the employer of any wrongdoing.

[2] whether as civil servant or as labour law employee
[3] in which case the employer may be informed or a criminal complaint may or must be filed, depending on the nature of the employment
[4] in which case the employer will be informed

These general rules are kept in check by denunciations or complaints that can be considered as having being filed wrongfully inclusive of negligently or that are constitutive of libel/slander[iii].

As such, a complaint is considered to be slanderous if, directed against a private person[5], the relevant facts prove not to be a criminal offence and are rejected as such by a court of law. If directed against a public person, a complaint is considered slanderous if the relevant facts cannot be proven.

Any wrongful retaliation gives rise to damages covering the actual loss suffered[iv]. Luxembourg law doesn't know the concept of 'punitive damages'.

Luxembourg law has made it an obligation for civil servants or anybody of authority becoming aware of a criminal offence as a result of their duty to denounce these facts to the public prosecutor's office[v]. It should be noted here that for reasons unknown to Transparency International Luxembourg and probably engrained in culture, this provision has rarely been applied and there are only a few cases known where civil servants have actually denounced facts that they became aware off in the course of their job.

Parliament has also recently enacted a law[vi] on obstruction of justice that makes it a criminal offence not to report a criminal offence of a certain nature[6], including corruption offences, whose consequences can still be limited or a criminal offence, if its authors are likely to commit further offences[7]. It is likewise a criminal offence to destroy, alter or tamper physical evidence of such crimes.

It should be noted that there is no general obligation for private individuals to denounce criminal offences known to them.

The scope of the existing whistleblowing protection legislation covers a set of criminal offenses that can be summarized as relating to corruption, illegal influence peddling or illegal taking of interest[8][vii].

In terms of provisions, the whistleblowing protection legislation provides mainly and in essence for the following :

- In terms of civil servants and local civil servants, the legislation simply provides that civil servants having denounced facts according to the general provision of the criminal procedural law, whereby they have to denounce facts they became aware off during the execution of their job, cannot suffer any negative influence (financial or otherwise) as a result thereof. The same would apply if they would testify in a Court of law to such facts.

[5] as opposed to public person

[6] criminal offences entailing an imprisonment of more than 5 years ("crime" in French as opposed to "délit" or "contravention")

[7] There are exceptions to this reporting obligation. They include most notably certain family members of the criminals and people that are covered by professional secrecy rules.

[8] « prise illegal d'intérêts », « corruption », « trafic d'influence », « actes d'intimidation commis contre les personnes exerçant une fonction publique », « corruption privée »

The provision is worded in such a way that it applies strictly in the relation of civil servants towards their employer and vice-versa.

- The whistleblowing protection legislation is worded in a similar way towards private labor law employees although they are and have never been under an obligation to denounce facts of criminal nature[9]. The legislation therefore provides that no employee may suffer any negative influence (financial or otherwise) for having refused in good faith (thereby covering situations where the employee erroneously believed the fact to be of the given nature) to participate or for having signaled such facts to his employer, the public prosecutor's office or other authorities having jurisdiction (notably regulatory bodies in regulated sectors[10]) or for having testified in a Court of law to such facts. The provision provides that any employee fired as a consequence will have to be reinstated. Most importantly the provision changes the burden of proof rule in such a way that if it may be assumed that the employee is victim of an adverse reaction of its employer, the employer has the burden of proof to justify that the negative influence on the employee does not stem from a retaliation against the whistleblowing action.

- The amendments of the criminal procedural code provide an extension of the civil servants obligation to denounce facts criminal in nature to persons that are not civil servants but that are acting in execution of a public service regardless of the provisions governing the person's employment. This extension then covers all sorts of contractual agreements, i.a. consultants, contractors, trainees, etc. The other most important provision that has been changed is a criminal procedural law which enables Luxembourg ONGs to be approved by the Government in order to file criminal complaints and by extension other actions in the fight against corruption. Such a provision existed previously for specific offences relating to the protection of children and sexual abuse. These provisions have now been extended to corruption matters and assimilated offences. Transparency International Luxembourg has requested and received such approval and is now entitled to file criminal complaints in Luxembourg in cases relating to corruption or assimilated offences. It is the first ONG in Luxembourg to receive such an approval ever.

While the legislation is a huge step forward it lacks certain key elements:

- It lacks a definition of whistleblowing or of a whistleblower that is sufficiently broad to encompass all situations. It must however be noted that the definitions may, to a certain extent, be inferred from the wording of the law and the way the protection is supposed to work.
- It is limited to private and public (i.e. civil servants) labor law. Whistleblowing is seen as a mere employment issue.
- More importantly the legislation does not permit the whistleblower to file a complaint to third party bodies that are not the employer, the public prosecutor's office[11] or the Court.

[9] except those covered by the newer law on obstruction of justice (cf. supra)
[10] It may be assumed that this would f.i. apply to a denunciation to the regulatory authority of the banking industry.
[11] or an entity that has jurisdiction

It doesn't likewise allow access to the press in cases where there is no follow-up[12]. Transparency International Luxembourg had requested and the Luxembourg government had accepted to extend the protection to whistleblowers that would file complaints with third party bodies, such as TI's ALAC. This led to a government amendment of the draft legislation which has been refused subsequently by the parliamentary commission on legal matters. Transparency International Luxembourg had been invited to an exchange of views with the relevant parliamentary commission but no consensus could be reached on this subject.

- There is no independent (other than the Courts or the Public Prosecutor as the case may be) agency or otherwise receiving or investigating complaints of retaliation or improper investigations.
- The Government has also opted not to provide incentives of any kind to whistleblowers. TI Luxembourg shares this view.
- There is no review mechanism of the legislation or its application in law or in fact.

[12] Notwithstanding the protection of the press' information sources.

In summary:

Complete title of law or regulation: law of 13 February 2011 strengthening the means to fight against corruption and amending :

1) the labor law code,
2) the amended law of 16 April 1979 determining civil servants' status,
3) the amended law of 24 December 1985 determining local civil servants' status,
4) the code of criminal procedure law, and
5) the criminal code[viii]

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	The definition needs to be inferred from the context, the protection granted and the wording of the law. This however is common practice under civil law. TI Luxembourg takes the view that the concept of whistleblowing should be extended, under certain conditions to whistleblowing outside of the restricted circle of employer, public prosecutor (or authority having jurisdiction) and Court of law and to situations not covered by private or public labour law. The scope of offences covered matches international obligations (corruption, illegal influence peddling or illegal taking of interest).
Broad definition of whistleblower			X	The definition needs to be inferred from the context, the protection granted and the wording of the law. This however is common practice under civil law. TI Luxembourg takes the view that the concept of whistleblowing should be extended, under certain conditions to whistleblowing outside of the restricted circle of employer, public prosecutor (or authority having jurisdiction) and Court of law and to situations not covered by private or public labour law.
Broad definition of retribution protection	X			The specific whistleblower protection legislation covers all adverse influence in the employment context. General law covers all losses suffered, provided the loss is suffered in a causal relation to a tort.
Internal reporting mechanism			X	The whistleblower is entitled to first reach out to his employer. No formal internal mechanism have been set up.

External reporting mechanism			X	The external reporting mechanisms are limited to the authority having jurisdiction (inclusive of the public prosecutor's office) and the Court of law. Other external mechanisms could have been provided, a.o. an independent third party and the press.
Whistleblower participation			X	The whistleblower may remain involved if he so chooses. In the case of a criminal complaint, the whistleblower will be heard as witness.
Rewards system		X		
Protection of confidentiality		X		No protection is granted as per the law. The public prosecutor may however open an investigation on its own initiative without involving the whistleblower. This is however at the discretion of the public prosecutor.
Anonymous reports accepted		X		The law remains silent on this aspect. However the public prosecutor's office may open an investigation at its own initiative which then includes the possibility of anonymous reports.
No sanctions for misguided reporting			X	Although the law doesn't specify, reporting to the authority having jurisdiction remains governed by slander and libel provisions and thereby by bona fide reporting.
Whistleblower complaints authority		X		
Genuine day in court	X			
Full range of remedies	X			
Penalties for retaliation		X		No penalties other than reinstatement of a fired employee and payment of damages for loss suffered.
Involvement of multiple actors		X		

It should be noted that while there is a specific legislation on whistleblowing protection, other laws or lack thereof have a certain impact on how the whistleblower protection needs to be considered in the context of Luxembourg law.

- Luxembourg law does have a strong protection of the press's sources[ix] in such a way that no kind of investigation including judicial investigations can pierce the protection of an informant to the press except if certain grave criminal offences have been committed. It

should however also be noted that the press in Luxembourg is largely dependent on political parties and is largely financed by the government. There is hardly any independent and impartial press. There is no investigative press in Luxembourg at all.

- Luxembourg also introduced draft legislation on victims' rights, protection of witnesses and anonymous witness statements in Court[x]. Such legislation has been withdrawn in relation to anonymous witness statements[13][xi] and there is currently no attempt or political will to reintroduce anonymous witness statements in Court proceedings[xii].

- Finally Luxembourg law lacks a comprehensive and standalone freedom of information legislation. There are freedom of information provisions in specific statutes relating to specific matters[14][xiii]. There is however no global overarching legislation covering all matters. While this does not mean that entities and in particular ONGs approved according to the aforesaid provisions cannot request certain information, even in Court, Luxembourg law would need an overarching and comprehensive freedom of information legislation. Draft legislation had been introduced by a parliamentarian in 2000[xiv] and is still formerly on the dock. There has however, up to a very recent date, been no political will to push this draft legislation or any other comprehensive freedom of information legislation forward. This seems to have change recently as a result of a national scandal which has given cause to a public parliamentary debate not only on the specifics of the scandal but also on some more general issues as the freedom of information legislation.

[13] By way of an amendment of the draft legislation, that covered more generally the victims' rights.

[14] This is the case f.i. in respect to environmental issues (cf. law of 25 November 2005 on access of information in environmental matters)

III. Perceptions and political will

Perception of whistleblowing and political will to promote and defend it seems to be the weakest point in Luxembourg whistleblowing protection legislation. The small size of the country and its inability to defend itself during times of crisis[15] and war[16] and in particular as a result of its overrun by the German forces in World War II has led to a very negative perception on denunciation in general. Even today the terminology of "denunciation" is very ill seen and many institutions, public and private, refuse to use the terminology when dealing with whistleblowing. Denunciation is thus badly seen and badly perceived not only by politicians but also by the general public at large.

There is no adequate terminology for whistleblowing or blowing the whistle in any of the three administrative languages.

This together with the fact that Luxembourg as a very small country, tight-knit community and a very high per capita income[xv] has led to a situation where the general public may be largely unaware of how corruption or assimilated offences are part of business life and how it operates. It is obvious in such a country that corruption does not take the form of pity corruption. It rather takes a more subtle form of corruption or traffic of influence in large scale operations.

Transparency International Luxembourg does not believe that whistleblowing at this high level would entail a negative perception by the general public or the media and large parts of private and public sector. Rather the difficulty lies in the difficult promotion of the concept of whistleblower protection and the nature of corruption in the Grand-Duchy of Luxembourg. A whistleblower would, under these circumstances, need to be part of the middle management with certain sophistication, degree of education and access to information and people. The potential to backfire on the individual is enormous as the business community are few, is close and tight-knit. There is realistically no satisfactory legislative protection which can be provided for this kind of whistleblowing mitigating the risk in such a small country. It is then not so much the general public, the media, private or public sector but rather the business and political community which would perceive very negatively any whistleblowing out of their own center.

The question as to political will in relation to whistleblowing protection is difficult to answer.

Luxembourg has undertaken, as a result of international obligations, to provide whistleblowing protection. It therefore has enacted the law of 13 February 2011. Nevertheless Transparency International Luxembourg feels that willingness and political will to further the whistleblowing protection in not shared by all politicians, be it by amending the existing legislation or be it by raising awareness and creating centers of competence within public institutions required to deal with this kind of offences.

[15] a small country also means little political influence on an international level and few means of persuasion

[16] a small country also means a very small army

There has been and there is no will to provide incentive for whistleblowing protection. Transparency International Luxembourg shares this view of the government. This will not be culturally and historically acceptable under the given circumstances.

In a recent national "case", possibly suggesting corruption and use of illegal threats between real estate promoters and government members, an unknown third party has leaked recorded audio tracks of an 'interview' with one of the implied real estate promoters to the press.

The public prosecutor's office has opened, under its own initiative, a preliminary investigation into the corruption/use of threats matter, reporting back to Parliament.

Although the party that has leaked the audio track remains unknown, it is not likely that this unknown party is employed by either the government or one of the other implied parties. Whistleblower protection legislation is therefore not applicable. One of the real estate promoters has since filed a criminal complaint for slander/libel against this third party.

Within the public and later parliamentary debate nobody took offence at the lack of whistleblower protection or commended the unknown third party for having brought the information to light.

During the Expert Meeting Transparency International Luxembourg organized on 26 September 2013, Mrs. Octavie Modert, Ministry of Justice explicitly stated during her presentation that the fight against corruption was important to the Government[17] and we are then inclined to believe that the next step will come some day. However, as a result of the elections held on 20 October 2013, Luxembourg has currently no government and Transparency International Luxembourg will continue its advocacy with the new Ministry of Justice to be appointed.

[17] http://www.gouvernement.lu/salle_presse/communiques/2013/09-septembre/27-modert-transparency/index.html and http://www.paperjam.lu/communique-de-presse/fr/octavie-modert-participe-une-table-ronde-sur-la-protection-des-donneurs-d-alerte-de-la-corruption

IV. Strengths, weaknesses and recommendations

The main strength of the whistleblowing protection legislation is its existence and thereby the political acceptance of whistleblowing protection and whistleblowing in general. Both the Government and ONGs as Transparency International Luxembourg need to actively promote the legislation and intensify awareness raising.

The main weaknesses of the legislation are the lack of possibility to denounce facts to third parties and the press.

The main weakness of the system however remains the closed-knit community and tied business and political circles. This is a given in small countries and cannot be changed by way of legislation but would require small successive steps in changing the culture and political context of the country.

Transparency International Luxembourg would recommend an amendment of the existing legislation so as to allow whistleblowers access to independent and impartial third parties as well as to the press under certain conditions.

Transparency International Luxembourg also recommends active promotion of the existing legislation, the concept and most importantly its need to the public in general and also to broad categories and federations of employers.

V. References and sources

[i] Loi du 24 février 1984 sur le régime des langues.
http://www.legilux.public.lu/leg/a/archives/1984/0016/a016.pdf#page=6
[ii] Loi du 13 février 2011 renforçant les moyens de lutte contre la corruption et portant modification
1) du Code du Travail,
2) de la loi modifiée du 16 avril 1979 fixant le statut des fonctionnaires de l'Etat,
3) de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux,
4) du Code d'instruction criminelle, et
5) du Code pénal.
[iii] articles 443 to 452 of the Criminal Code
[iv] articles 1382 to 1384 of the Civil Code
[v] article 23 of the Code d'Instruction Criminelle (criminal procedural rules)
[vi] Loi du 10 juillet 2011 portant incrimination des entraves é l'exercice de la justice et portant modification du Code pénal et du Code d'instruction criminelle
[vii] Articles 245 to 252, 310 and 310-1 of the Criminal Code
[viii] Loi du 13 février 2011 renforçant les moyens de lutte contre la corruption et portant modification
1) du Code du Travail,
2) de la loi modifiée du 16 avril 1979 fixant le statut des fonctionnaires de l'Etat,
3) de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux,
4) du Code d'instruction criminelle, et
5) du Code pénal.
[ix] Texte coordonné du 30 avril 2010 de la loi du 8 juin 2004 sur la liberté d'expression dans les médias
[x] Projet de loi renforçant le droit des victimes d'infractions pénales et améliorant la protection des témoins, N°5156
[xi] Loi du 6 octobre 2009 renforçant le droit des victimes d'infractions pénales et portant modification
– du Code d'instruction criminelle,
– du Code pénal,
– de la loi modifiée du 12 mars 1984 relative à l'indemnisation de certaines victimes de dommages corporels résultant d'une infraction et à la répression de l'insolvabilité frauduleuse,
– de la loi modifiée du 16 juillet 1986 relative à certains modes d'exécution des peines privatives de liberté,
– de la loi modifiée du 10 août 1992 relative à la protection de la jeunesse.
[xii] Projet de loi renforçant le droit des victimes d'infractions pénales et améliorant la protection des témoins, N°5156A
[xiii] 25 novembre 2005. – Loi concernant l'accès du public à l'information en matière d'environnement
[xiv] Proposition de loi concernant la liberté d'accès à l'information, N°4676 par M. Alex Bodry, 20 June 2000
[xv] CIA World Factbook https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html