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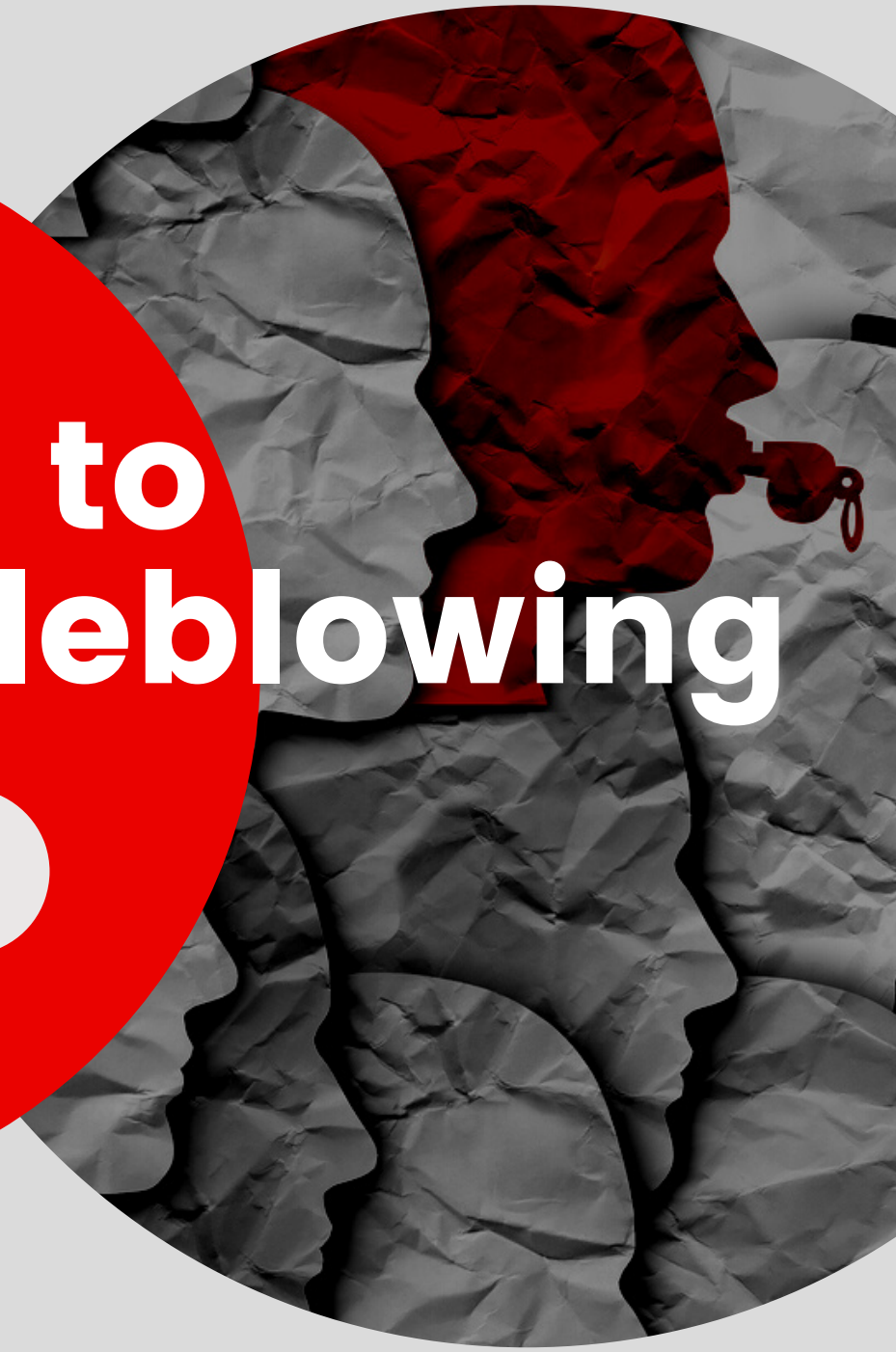

Guide to Whistleblowing

Malta

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Legal basis for whistleblowing

1. Which body of rules govern the status of whistleblowers?

The legal framework governing the status of whistleblowers in Malta is set out in the Protection of the Whistleblower Act (Chapter 527 – the Act). Originally promulgated on 15 September 2013 by Act VIII of 2013, the Act protects a whistleblower from action an employer may pursue in retaliation for a protected disclosure and is intended to encourage persons to disclose any improper practice witnessed in a work-related context. Maltese law has, therefore, made provisions for whistleblowing procedures since 2013.

Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (the Directive) was adopted by the European Parliament and the Council on 23 October 2019. As a member state of the EU, Malta has transposed the provisions of the Directive, which recognises the key role of the whistleblower in safeguarding the welfare of society. The Act was revised pursuant to Act LXVII of 2021 (passed by the House of Representatives on 14 December 2021 – the Amending Act) to come in line with the Directive. In doing so, the Maltese legislature has been largely faithful to the text of the Directive. The amendments introduced by the Amending Act came into effect on 18 December 2021.

Implementation of the whistleblowing procedure

2. Which companies must implement a whistleblowing procedure?

The Act imposes an obligation to establish formal channels and procedures for internal reporting on every employer, as defined in the Second Schedule to the Act.

Previously, the list of subject-persons (ie, employers) was limited to a few entities within the private sector meeting at least two of the following criteria: more than 250 employees; a total balance sheet exceeding €43,000,000; and/or annual turnover exceeding €50,000,000.

In terms of the Act (as amended), the term "employer" now covers any entity within the private sector having 50 or more employees. This obligation may apply to entities with fewer than 50 employees where this is considered necessary following an appropriate assessment of the level of risk arising from their activities, such as those involved in environmental and public health.

The obligation to establish internal reporting channels and procedures does not apply to entities falling within the scope of the Union acts referred to in Parts I(B) and II of the Annex to the Directive (applicable through a schedule to the Act).

Examples include companies in the financial services sector and sectors susceptible to money laundering and terrorist financing, which are, regardless of their size, already required to have an internal reporting system under separate legislation.

3. Is it possible to set up a whistleblowing procedure at a Group level, covering all subsidiaries?

The obligation to establish internal reporting channels and procedures applies to every company with 50 or more employees, even when such companies belong to a group of companies. Notwithstanding this:

- the Act allows medium-sized entities employing between 50 and 249 persons to share resources concerning the receipt of reports and any investigation to be carried out; and
- maintaining or creating centralised whistleblowing functions within a group is not prohibited, provided that internal reporting channels and procedures are also available at the subsidiary level.

This is in line with guidance provided by the European Commission on the interpretation of the Directive.

4. Is there a specific sanction if whistleblowing procedures are absent within the Company?

The Act does not provide for a specific sanction if a covered entity fails to establish internal reporting channels and procedures. That said, the importance of having channels and procedures to facilitate internal reporting cannot be overstated. This enables companies to address issues internally and minimise the risk that their reputation or interests are harmed by exposure to competent authorities or the public.

5. Are the employee representative bodies involved in the implementation of this system?

There is no legal requirement (whether in the Act or local employment legislation) for an employer to inform or consult with employee representative bodies on its internal reporting channels and procedures.

Aside from the above, the Act recognises the right of employees to consult with their representatives or trade unions (without suffering any unjustified detrimental action for doing so), the autonomy of those social partners, and their right to conclude collective agreements, which remain unaffected by this Act.

6. What are the publicity measures of the whistleblowing procedure within the company?

The company must publish:

- clear and easily accessible information about the existence of the internal procedures; and
- adequate information on how the internal procedures may be used. This information is to be published widely and republished at regular intervals (the Act does not define any specific periods).

The company must also provide clear and easily accessible information regarding the procedures for reporting externally.

7. Should employers manage the reporting channel itself or can it be outsourced?

In theory, the Directive states that the reporting channel may

be operated internally or externally by a third party. The Act requires the employer to designate an officer from within the company (whistleblowing reporting officer – WRO), who may or not be the same person receiving reports, to follow up on reports.

8. What are the obligations of the employer regarding the protection of data collected related to the whistleblowing procedure?

As part of his or her functions, the WRO is required to keep records of every report received. In doing so, the WRO must comply with the duty of confidentiality (ie, the WRO cannot reveal any information that identifies or may lead to the identification of the whistleblower, not even as ordered by a court, unless they have obtained the express consent of the whistleblower).

The WRO must also abide by the data-processing principles enshrined within Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons concerning the processing of personal data and on the free movement of such data (the GDPR) and local data protection legislation. In particular, the employer must be able to justify each processing activity in respect of a whistleblowing process, while retaining only the personal data contained in the reports that is strictly necessary – the data minimisation principle. Accordingly, personal data that is clearly not relevant for the handling of a specific report must not be collected or, if accidentally collected, must be deleted immediately.

9. What precautions should be taken when setting up a whistleblowing procedure?

When drafting a whistleblowing policy, employers should ensure that the whistleblowing procedure guarantees the impartial and confidential treatment of reports. It must also ensure that the whistleblowing procedure is operated securely and prevents access to reports by non-authorised staff members.

The obligation to adhere to the principle of data protection by design and default means that the whistleblowing procedure itself must be designed to be GDPR-compliant from the start. The employer would need to have a privacy notice that covers any processing of personal data carried out in connection with the whistleblowing procedure. Any processing of personal data carried out in the context of the obligation to establish a whistleblowing procedure under the Act must be documented to demonstrate compliance with the GDPR – the accountability principle.

Scope of the whistleblowing procedure

10. What precautions should be taken when setting up a whistleblowing procedure?

Broadly speaking, information on improper practices would be considered a protected disclosure and would fall within the scope of the Act. Such information (including reasonable suspicions) would relate to actual or potential improper practices that occurred or are very likely to occur in the organisation the whistleblower works in or has worked in, or one with which the whistleblower is or was in contact through their work, and about attempts to conceal such improper practices.

The list of improper practices provided by the Act includes:

- failure to comply with any applicable legal obligation;
- danger or risk thereof to the health or safety of any individual;
- damage or risk thereof to the environment;
- the occurrence or potential occurrence of any corrupt practice;
- the commission or potential commission of any criminal offence;
- miscarriages of justice;
- bribery;
- breaches of EU legislation that concern areas such as transport safety, consumer protection, protection of privacy and personal data, and security of network and information systems, among others;
- breaches affecting the financial interests of the EU; and
- breaches relating to the internal market (eg, breaches of competition and state aid rules).

Disclosure of information protected by legal and medical professional privilege is not a protected disclosure under the Act.

11. Are there special whistleblowing procedures applicable to specific economic sectors or professional areas?

Sector-specific rules on reporting may be found in legislation relating to the financial services sector. Professionals or institutions carrying out a relevant activity or financial business may be subject to rules on reporting knowledge or suspicions of money laundering or the funding of terrorism.

Reports relating to the activities of persons operating within certain sectors are received and processed by the regulator, as set out in a schedule to the Act. For example:

- the Financial Intelligence Analysis Unit is the authority responsible for the receipt of reports from any employee of a natural or legal person, subject to the Prevention of Money Laundering Act (Chap. 373 of the laws of Malta – the PMLA) or the Prevention of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01 – the PMLFTRs), of improper practices linked to the PMLA/PMLFTRs; and
- the Malta Financial Services Authority (the MFSA) is the authority in Malta responsible for the receipt of reports from any employee of a person or company that provides the business of credit and financial institutions, the business of insurance and the activities of insurance intermediaries, the provision of investment services and collective investment schemes, pensions and retirement funds, regulated markets, central securities depositories, the carrying out of trustee business either in a professional or a personal capacity, and any other areas of activity or services as may be under the supervisory and regulatory competence of the MFSA.

Where specific rules on the reporting of improper practices or breaches are provided for in sector-specific legislation, those laws will apply and the provisions of the Act will apply to the extent that a matter is not expressly regulated by that legislation.

Identification of the whistleblower

12. What is the legal definition of a whistleblower?

The term "whistleblower" is defined as any employee (as defined in question 13 below) who makes a disclosure to the WRO, whether it qualifies as a protected disclosure or not. The prohibition of detrimental action and the disclosure of identifying information apply only with respect to a whistleblower who makes a protected disclosure under the Act.

13. Who can be a whistleblower?

A whistleblower is an employee, who is (a) any person who has entered into or works under a contract of service with an employer, and includes a contractor or sub-contractor who performs work or supplies a service or undertakes to perform work or supply services, and (b) any person who has undertaken to execute any work or service for, and under the immediate direction and control of another person, including a remote worker, but excluding work or services performed by professionals bound by professional secrecy. It also extends to, *inter alia*:

- former workers;
- seconded workers;
- candidates for employment;
- shareholders and persons belonging to the administrative, management or supervisory body of the company; and
- trainees.

14. Are there requirements to fulfil to be considered as a whistleblower?

It is understood that a whistleblower is a natural person who discloses information acquired in a work-related context. The requirements for a whistleblower to be protected under the Act are explained in question 22.

15. Are anonymous alerts admissible?

The general rule under the Act is that anonymous disclosures are not protected disclosures (which are allowed by the Directive). However, if following a public disclosure that was made anonymously, the identity of the whistleblower is discovered and they suffer retaliation, that disclosure could be a protected disclosure if it satisfies the conditions established in the Act (please see question 22).

The WRO may receive and process any anonymous disclosures and may take them into account when determining whether an improper action has occurred.

16. Does the whistleblower have to be a direct witness of the violation that they are whistleblowing on?

In principle, no. However, the disclosure of the whistleblower should be based on reasonable suspicions of potential improper practices and attempts to conceal such practices.

Processing of the whistleblowing procedure

17. What are the terms and conditions of the whistleblowing procedure?

Entities in the private sector are free to establish their own procedure, provided it complies with the minimum requirements in the Act.

To do so, reporting channels must enable persons to report in writing or orally (ie, by telephone or through other voice-messaging systems and, upon request by the whistleblower, through a physical meeting within a reasonable timeframe). The reporting channels must be designed and operated securely so that the identity of the whistleblower and any third party mentioned in the disclosure remains confidential and access must be limited to authorised staff members.

The employer must designate an impartial WRO, who is responsible for following up on reports received (including assessing the accuracy of the allegations made in a report and, where relevant, addressing the improper practice reported). The functions of the WRO include maintaining communication with the whistleblower, asking for further information from and providing feedback to the whistleblower as necessary, and keeping a record of every report.

There are also certain minimum applicable timeframes, namely:

- the receipt of all reports must be acknowledged within seven days; and
- the WRO must provide feedback to the whistleblower on the progress made in following up on the report within a reasonable time, which must not exceed three months from the acknowledgement of receipt.

In carrying out his or her functions, the WRO must comply with the GDPR and local data protection legislation. The Act also specifies how the record-keeping of an oral disclosure can be made.

18. Is there a hierarchy between the different reporting channels?

As a principle, whistleblowers are encouraged to first report to their employer through the internal reporting channels, where these are available and can reasonably be expected to work. As stated in the Directive, the idea is that the relevant information swiftly reaches those closest to the source of the problem and most able to investigate and with powers to remedy it, where possible. In certain circumstances, a whistleblower can disclose information to a competent authority or the public – see question 22.

19. Should the employer inform external authorities about the whistleblowing? If so, in what circumstances?

The investigation of whistleblowing cases is handled internally but if an internal disclosure leads to the detection of improper practices that constitute a crime or contravention under any applicable law, the WRO may refer the report to the police for investigation. However, the WRO is not legally obliged to do so if the subject of the report received has been rectified.

There are only specific crimes (namely, crimes against the state) which, under Maltese law, an individual must report to the authorities if he or she becomes aware that they are about to be committed.

20. Can the whistleblower be sanctioned if the facts, once verified, are not confirmed or are not constitutive of an infringement?

The Act protects the whistleblower even if they are mistaken on the import of the information disclosed, provided the

disclosure was made in good faith and was based on a reasonable suspicion.

The protections afforded under the Act do not apply to an employee who knowingly discloses information they know or ought to reasonably know is false. The Act further allows any person or company (excluding the employer or officers or shareholders of the same, in the case of a company) prejudiced by the disclosure of such false information to pursue any legal action or remedy available under any other law in respect of such prejudice, provided that the identity of the whistleblower has been obtained or otherwise revealed under the provisions of the Act.

Providing false information is also an offence that can lead to imprisonment under article 101 of the Criminal Code (Chapter 9 of the laws of Malta).

21. What are the sanctions if there is obstruction of the whistleblower?

The Act provides for penalties applicable to any person who tries to compel any other person to abstain from doing any act that the other person has a right to do under the Act, wrongfully and without legal authority, through the following acts:

- using (or threatening to use) violence against the person, their family members or property;
- persistently following the person from place to place;
- watching or approaching the person's home; or
- depriving the person or somehow hindering them in the use of any of their belongings.

Such conduct is an offence and is punishable by imprisonment for up to one year or a fine of not less than €500 and not more than €5,000. Where as a result of his or her conduct the person convicted has achieved his or her aim, imprisonment will increase by one or two degrees and the fine can range from €1,500 to €10,000.

Whistleblower Protection

22. What procedure must the whistleblower follow to receive protection?

A whistleblower is entitled to protection when making a protected disclosure, defined as an internal disclosure, an external disclosure, or public disclosure of information made under the applicable provisions of the Act. The Act protects a whistleblower acting in good faith, who has reasonable grounds to believe that the information on improper practices is true at the time of the disclosure and that such information falls within the scope of the Act.

An internal disclosure must be made in the manner set out by the whistleblowing procedure established by the employer. However, an employee may – (i) in the absence of a whistleblowing procedure or (ii) if they have reasonable grounds to believe that the WRO is not the appropriate person to whom the disclosure may be made – speak to the head or deputy head of the company, who shall be deemed to be the WRO. By way of clarification on (ii), this will be the case where the WRO is or may be involved in the alleged improper practice; or the WRO is related to or associated with a person who is or may be involved in the alleged improper practice.

An external disclosure will only be protected if the employee has made or attempted to make an internal disclosure first. Alternatively, an employee can make an external disclosure directly to the whistleblowing reports unit of the competent authority:

- where they have reasonable grounds to believe that the head or deputy head of the company is or may be involved in the alleged improper practice;
- where justified because of the urgency of the matter or other exceptional circumstances;
- where they will be subjected to an occupational detriment by the company if they make an internal disclosure;
- where it is likely that evidence relating to the improper practice will be concealed or destroyed if they make an internal disclosure; or
- where, notwithstanding an internal disclosure, they have not been updated on the status of the matter or it is reasonably evident that nothing was done on the matter.

The entities prescribed to receive external disclosures are listed in a schedule to the Act. In considering whether to disclose information externally, an employee should be guided by the factors listed in article 16(2) of the Act.

Where, despite having gone through the process of internal and external disclosure, no appropriate remedial action is taken, the employee can resort to public disclosure. This is further restricted to the situations specified in article 18A of the Act, such as where there is an imminent or manifest danger to the public interest.

23. What is the scope of the protection?

The Act prohibits subjecting a whistleblower to detrimental action after they have made a protected disclosure. The term "detrimental action" includes action causing injury, loss or damage, victimisation, intimidation or harassment, or professional detriment such as dismissal, suspension or demotion, if connected with a disclosure. Additionally, a whistleblower who makes a protected disclosure is not liable for judicial or disciplinary proceedings. This does not apply if the whistleblower was the perpetrator or an accomplice in the improper practice reported, and it constitutes a crime or contravention under any applicable law. Even in this case, the whistleblower may benefit from a limitation of liability, mitigation or exemption of punishment; however, this is a decision left to the court hearing the case against the whistleblower.

Protection against detrimental action also extends to a facilitator, a person who assists the whistleblower in the reporting process. Third persons (eg, colleagues or relatives) as well as any legal entities the whistleblower owns, works for or is otherwise connected with in a work-related context are (where relevant) likewise protected against detrimental action.

The identity of the whistleblower cannot be revealed, not even under a court order, unless the whistleblower gives express consent. While the Directive allows the disclosure of the identity of the whistleblower where necessary and a proportionate obligation under EU or national law, the Act states that this protection "shall not be subject to any exceptions" (article 6(4)).

The Act also provides for the legal action a whistleblower may take if they believe that they have been or will be discriminated against because of a protected disclosure. The whistleblower

may ask the court for an order requiring the employer to remedy the discrimination and award compensation, or take any action the court considers appropriate. The court may also grant interim relief.

Furthermore, the rights and remedies provided for in the Act cannot be waived or limited by any agreement between an employer and an employee. Any provision intended to prevent the creation or continuation of any proceedings under the Act, or which has the effect of discouraging a protected disclosure, will be void in terms of the Act.

24. What are the support measures attached to the status of whistleblower?

In addition to the protection mentioned in question 23, the Act provides that the following support measures are available to the whistleblower:

- comprehensive and independent information and advice, easily accessible to the public and free of charge, on the procedures and remedies available, on protection against discrimination, and on the rights of the accused;
- effective assistance from competent authorities involved in their protection; and
- legal aid in criminal and cross-border civil proceedings under Directive (EU) 2016/1919 and Directive 2008/52/EC.

25. What are the risks for the whistleblower if there is abusive reporting or non-compliance with the procedure?

A whistleblower who knowingly discloses false information is not protected under the Act and is guilty of a criminal offence, as explained in question 20.

A whistleblower who does not comply with the procedure (as outlined in question 22) will not benefit from the protection afforded by the Act.

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