

# Understanding the Implications of the new Whistleblowing Act

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# INTRODUCTION



# What is a whistleblowing procedure?

- Provides a safe channel for “whistleblowers” that become aware of and wish to report breaches of law in various ways
- Frances Haughen, Julian Assange, Edward Snowden...

# What is retaliation?

The principle: a whistleblower may not be subjected to 'detrimental action' on account of having made a protected disclosure...

“DETRIMENTAL ACTION...”

“OCCUPATIONAL DETRIMENT...”

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# Background (EU)

- Proposal for a European directive on whistleblowing had been under construction since 2016
- Twofold objective:
  1. Impose that every Member State has put in place whistleblower protection;
  2. Encourage harmonisation of whistleblower protection, and, consequently, the 'modus operandi' of investigations
- The EU Whistleblowing Directive was adopted in October 2019 and published in the Official Journal in November 2019
- Member states had until mid-December 2021 to transpose... but adoption has been slow!

# The EU Whistleblowing Monitor

## Transposed so far:

- Cyprus, Denmark, France, Latvia, Lithuania, Portugal, Sweden, Malta

## Delayed:

- Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Romania, Slovakia, Slovenia, Spain, the Netherlands

## Not started:

- Hungary

More information: <https://www.whistleblowingmonitor.eu/about>



# Background (Malta)

- Protection of the Whistleblower Act (Cap. 527) – 2013
- Amended in December 2021 to comply with the Directive
- Prior to the amendments, law applied only to government ministries, VOs raising more than €500K annually, and large companies with a minimum of 250 employees or very high threshold balance sheets / annual turnovers
- **Today, the entities that are subject to the Act are as follows...**





# Second Schedule of the Act

- (1) Each ministry of the Government of Malta;
- (2) Any organisation within the private sector with fifty (50) or more workers or where following an appropriate risk assessment taking into account the nature of the activities of the organisation and the ensuing level of risk for, in particular the environment and public health may require an organisation in the private sector with fewer than fifty (50) workers to establish an internal disclosure channel and procedure in accordance with Section 2 of Part III.
- (3) Any voluntary organisation which annually raises more than five hundred thousand euro (€500,000) from public collections and other donations.

Reference must also be made to the Third Schedule...

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# Third Schedule of the Act

- This in turn refers to the Annex of the Directive which “**shall be applicable in its entirety as the Third Schedule to this Act**”;
- The Annex provides a list of certain employers in various areas (mainly those in financial services) **to which the 50+ employee threshold does not apply.**

# SALIENT ASPECTS OF THE LAW

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# The Whistleblower

Our law refers to, “Employee”

- Not the usual definition of employee. Refer to the definition of “Employee” in the Act

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# “Improper Practices”

Some examples:

- A person **has failed, is failing or is likely to fail** to comply with any legal obligation;
- The environment has been, is being, or is likely to be damaged;
- A corrupt practice has occurred, is likely to occur or has occurred;
- A criminal offence has been committed, is being committed or is likely to be committed;
- A person has failed, is failing or is likely to fail to comply with any legal obligation on protection of privacy and personal data...

and others! Refer to the definition of “improper practice” in the Act.

An interesting proviso in Article 2, “**Provided that, in the interpretation of this definition, due account shall be given to the de minimis rule so that very minor or trivial matters shall not fall under the provisions of this Act**”.



# Protected Disclosures

- A “disclosure” would be deemed a “**protected disclosure**” if the whistleblower:
  1. had reasonable grounds to believe that the information was true and in-scope; AND
  2. disclosed:
    - internally in accordance with article 12 of the Act;
    - externally in accordance with article 16 of the Act; or
    - made a public disclosure in accordance with article 18A of the Act

Interesting sub-article 9(2), “The protections conferred by this article do not apply to an employee who knowingly discloses information **which he knows or ought to reasonably know is false**”.

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# Internal Disclosures (1)

## What is an internal disclosure?

- Every employer shall have in operation internal procedures for receiving and dealing with information about improper practice committed within or by that organisation
- The Act provides a minimum as to what those procedures should comprise in operation internal procedures for receiving and dealing with information about improper practice committed within or by that organisation

# Internal Disclosures (2)

## Building an internal whistleblowing channel

- The employer is to create channels for receiving the reports **in writing or orally, or both**
- The employer must entertain a **meeting** with the whistleblower if this is requested
- The channels created must be **secure** channels that prevent the leakage of confidential information
- Only **authorised staff members** shall have access to the whistleblowing report / investigation
- A **Whistleblowing Reporting Officer (WRO)** must be appointed
- The employer must ensure that these procedures and more are drawn up in the form of robust, GDPR-compliant policies, and **effectively** brought to the attention of prospective whistleblowers





# Internal Disclosures (3)

## Building an internal whistleblowing channel (continued)

- The WRO
  - Can be in-house or outsourced
    - Can the WRO be your in-house legal counsel?
  - Shall be expected to lead the investigation
  - Shall be expected to liaise with the whistleblower
  - Must **follow-up** the reports made and provide **feedback** to the whistleblower
  - Must educate himself on the rules imposed by the Act, such as the following...



# Internal Disclosures (4)

## Building an internal whistleblowing channel (continued)

- Timings
  - The WRO shall acknowledge receipt of an internal disclosure within 7 days of receipt and provide feedback within a reasonable time, not exceeding 3 months from the acknowledgment of receipt.
- Confidentiality
  - The WRO must not disclose information that identifies or may lead to the identification of the whistleblower unless the whistleblower expressly consents in writing to the disclosure of that information.



# Internal Disclosures (5)

## Building an internal whistleblowing channel (continued)

- For the purposes of impartiality, disclosures are not to be made to heads / deputy heads of the organisation unless:
  - (a) the organisation has no internal procedures in place;
  - (b) the reporting person believes that the WRO himself may be involved; OR
  - (c) the reporting person believes that the WRO is, by reason of conflict of interest, not a person to whom it is appropriate to make the disclosure
- This should be stipulated in an organisation's policies.

# External Disclosures (1)

## What is an external disclosure?

- The First Schedule of the Act comprises a list of whistleblowing reports units pertaining to the Government
- This applies to the private sector
- “**Except as provided in this Part**, an external disclosure shall only be protected if an internal disclosure in accordance with Section 2 of this Part has already been made or attempted to be made”
- An external disclosure may be made if the whistleblower believes on reasonable grounds that:
  - (a) the head of the organisation may be involved in the alleged improper practice;
  - (b) such is justified by the urgency of the matter, or some other exceptional circumstances;
  - (c) he will be subjected to an occupational detriment if he makes an internal disclosure;
  - (d) it is likely that evidence relating to the improper practice will be concealed / destroyed if he makes an internal disclosure; OR
  - (e) that although an internal disclosure has previously been made, the whistleblower has not been informed on its status or it is reasonably evident to the whistleblower that there has been no action / recommended action on the matter within a reasonable timeframe

# External Disclosures (2)

## You made an external disclosure. What next?

- The authority concerned must within 45 days consider and reach a conclusion as to whether it is appropriate for the disclosure to be made externally, taking into consideration factors, such as:
  - (a) the seriousness of the alleged improper practice;
  - (b) whether the improper practice is continuing or is likely to occur in the future;
  - (c) whether the reporting person adhered to the internal reporting procedures of his employer.
- If the authority concludes that a disclosure should not have been made externally, then it must notify the whistleblower within 45 days that an internal disclosure must be made.

# Whistleblowing Reports Units (1)

- Article 17 of the Act requires all authorities mentioned in the First Schedule to set up an 'independent' and 'autonomous' whistleblowing reports unit (WRU)
- Contrary to what is the case with internal disclosures, where the law does not delve into substantial detail, the law here gets into the specifics...

## Operation of WRU

The WRU must be designed / operated in a manner that:

- (a) ensures the, "completeness, integrity and confidentiality of the information" and "prevents access thereto by non-authorized staff members"
- (b) enables the durable storage of information [...] to allow further investigations to be carried out
- (c) enables the authority to acknowledge receipt of the external disclosure within 7 days
- (d) enables diligent follow-up
- (e) enables provision of feedback within a max period of 6 months (in "duly justified" cases. 3 months in normal cases)
- (f) enables disclosures in writing **AND** orally...

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# Whistleblowing Reports Units (2)

## Staff

The WRU shall designate staff members responsible for handling reports, in particular for:

- (a) providing any interested person with information on procedures for reporting;
- (b) receiving and following up reports; and
- (c) maintaining contact with the whistleblower.

Staff members are to receive specific training in the handling of reports.

## Website

The WRU shall publish on their websites in a separate, easily identifiable and accessible section, “at least” the information in Article 17(6), which includes:

- (a) Conditions for qualifying for protection under the Act;
- (b) Contact details of WRU;
- (c) Procedures involved in reporting;
- (d) Confidential regime applicable to reports;
- (e) Nature of the follow-up to be provided; and
- (f) Remedies and procedures for protection against retaliation and the availability of confidential advice for persons considering reporting.



# Whistleblowing Reports Units (3)

## **Review of procedures**

The WRU is required to review the authority's internal procedures for receiving disclosures and providing follow-ups at least once every 3 years.

## **Serious breaches**

Should the authority be experiencing a high in-flow of reports, the WRU may deal with reports of serious breaches as a matter of priority.

## **Passing on information to another authority**

Where the authority to whom the disclosure is made considers that the information disclosed can be better investigated by another authority, or, in the case of an improper practice which constitutes a crime / contravention by the police, said authority may, within not more than 30 days, refer this information to such other authority or police. In such a situation, the authority must notify the whistleblower in writing.





# Whistleblowing Reports Units (4)

- The First Schedule of the Act also makes reference to the “External Disclosure Whistleblowing Unit within the Government of Malta”
- This applies to the “public administration”, which the Act in turn defines as, “the Government of Malta including its ministries and departments, specialised units and the agencies, government entities, commissions and boards”
- The External Disclosure Whistleblowing Unit within the Government of Malta remains the Cabinet Office
- The Cabinet Office should abide by the same obligations as the WRUs

# Public Disclosures

## What is a public disclosure?

- “**Except as provided in this Part**, a public disclosure shall only be protected if an internal disclosure in accordance with Section 2 of this Part and an external disclosure in accordance with Section 3 of this Part has already been made, but no appropriate action was taken in response to the report within the [applicable] time-frames...”
- A public disclosure shall be deemed a protected disclosure if any 1 of the following conditions are fulfilled.... the whistleblower has reasonable grounds to believe that:
  - (a) the breach may constitute an imminent or manifest danger to the public interest, such as when there is an emergency situation or a risk of irreversible damage; OR
  - (b) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case.

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# Anonymous Disclosures

## What is an anonymous disclosure?

- Anonymous disclosures are not protected disclosures;
- The WRO **may** receive and process anonymous disclosures and **may** take that disclosure into consideration in determining whether improper practice has occurred.

However...

- Should the whistleblower subsequently be identified and suffer retaliation, that disclosure shall still be a protected disclosure provided that the disclosure satisfies the conditions established in article 9(1) of the Act.

# THANK YOU

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