

CRIMINAL ASPECT AND RELATED CONSIDERATIONS



Is a whistleblower immune from criminal proceedings?

- General Rule - Article 4 of Chapter 527 of the Laws of Malta
- *“Notwithstanding the provisions of the Criminal Code or of any other law, a whistleblower who makes a protected disclosure is not liable to any civil or criminal proceedings...”*

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Is this an absolute right?

The answer is NO.

- Article 5 margin note – “no immunity to whistleblower if he was the perpetrator or accomplice”.
- A whistleblower is vulnerable to criminal action if he took an active role as the perpetrator or accomplice in an improper practice which constitutes a crime or contravention.

Mitigating factors in relation to Criminal Prosecution:

- Art. 5(3)
- Art. 5(4)

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Mitigating Factor (1) - Art. 5(3)

- Prosecution's declaration in records of the proceedings
- Whistleblower satisfies the Court that his whistleblowing report helped the police

If these two conditions are satisfied the Court may:

- Diminish imprisonment by 1 or 2 degrees
- Diminish pecuniary penalty (fine) by 1/3 or 1/2.

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Mitigating Factor (1) – Art 5(3)

- Two provisos:
 1. Court may, after convicting the whistleblower, further reduce the punishment or completely exempt the whistleblower from punishment;
 2. In the latter case, the Court shall make a report to the President of Malta stating the reasons.
- This can be done after considering the circumstances of the case and after hearing all evidence.

Mitigating Factor (2) – Art. 5(4)

- The AG may, after consulting the Commissioner of Police and a judge who at the time of consultation is not a judge assigned to preside over criminal cases, issue a certificate in writing exempting a whistleblower from any criminal proceedings;
- “if in his individual judgement he is satisfied of the advisability to do so...”;
- This can be done unconditionally or under such conditions the AG deems fit;
- AG shall make a report to the President

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Are entities obliged to inform the police?

- Art. 13(3)
- Art. 18(1)

Both articles use the word "MAY" and thus, it is in their discretion whether to inform the police or not.

Art 18(1) provides that the whistleblower's identity shall not be disclosed except with prior consent, in writing.

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Practical Considerations

What practical measures can be taken to prevent and detect crime through whistleblowing reporting?

1. Raising awareness to ensure effectiveness of whistleblowing reporting frameworks;
2. Provide clear reporting channels;
3. Provide guidance and follow up;
4. Consider financial rewards;
5. Ensure criminal sanctions and civil suits do not deter reporting;
6. Ensure data protection legislation does not impede reporting.

*Source: OECD (2017), The Detection of Foreign Bribery, Chapter 2.
The Role of Whistleblowers and Whistleblower Protection*

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THANK YOU

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