



# Protecting Whistleblowers in Malta

*A call for reform to protect truth-sayers and capture wrong-doers.*

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**Repubbika** is a voluntary association registered in Malta in terms of the Voluntary Organisations Act to promote civil rights, democratic life, the rule of law, free speech, personal freedoms, social inclusion, environmental conservation, economic sustainability and equality of access, by means of active participation in the national discourse and related educational, social and charitable initiatives.

Repubbika promotes the adoption of legislation that provides for the reuse for public and social utility of goods taken away by judicial action from the mafia and from people and organisations convicted for corruption. It also promotes the drawing up of strategies for non-violent resistance against the domination of the mafia in Malta and mafia infiltration within the community and institutions, promotes a culture of accountability for people of authority who abuse their power in breach of the obligations of their public function; and draws up non-violent strategies of resistance to corruption.

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The **Whistleblowing International Network (WIN)** is a leading centre of global civil society expertise and innovation in whistleblowing law and practice. Its network of non-profit membership organisations span 32 countries providing legal advice and practical support to whistleblowers and advocating to strengthen whistleblower protections nationally and internationally.

WIN's EU **Whistleblowing Monitor** was created to track the transposition of the EU Directive to protect whistleblowers across the 27 EU member states. It is supported by a team of voluntary country editors, including Repubbika, to monitor developments and ensure governments live up to their legal obligations to protect whistleblowers.

[www.whistleblowingnetwork.org](http://www.whistleblowingnetwork.org)

[www.whistleblowingmonitor.eu](http://www.whistleblowingmonitor.eu)

## Foreword

Since its adoption in 2013, Malta's Protection of the Whistleblower Act has only been used once, despite the fact that since its inception multiple corruption scandals have come to public awareness.

When Joseph Cauchi accused the husband of Giovanna Debono, member of parliament and Minister for Gozo until 2013, of misappropriation of public funds, he became the only witness ever granted protection under the Whistleblower Protection Act. Cauchi testified that Anthony Debono devised a works-for-votes system to carry out private works for his wife's constituents when he ran the Construction Maintenance Unit within his wife's department at the Gozo Ministry. Despite Cauchi reporting to the police that he was paid under a system of false invoicing so that private works could be financed by the ministerial budget,<sup>1</sup> the credibility of the evidence he provided as a protected witness was discounted at trial. On acquitting Anthony Debono the Court commented that "the accused could have been spared the serious criminal charges brought against him had the police carried out proper investigations."

Even more problematic than the rare use of the Protection of the Whistleblower Act, is the fact that it was not used to protect Cauchi in the first place. Instead, the law was seemingly perverted to serve a politically motivated purpose to persecute an Opposition politician.

In contrast, we refer to the publicly known case of Jonathan Ferris whose application to the Maltese authorities for protection under the law was denied on the basis that he had "failed to act in line with the dispositions of Protection of the Whistleblower Act."<sup>2</sup>

Jonathan Ferris claimed to have come across evidence of corruption "reaching the very top" of the Maltese government when he worked as an investigator at Malta's Financial Intelligence Analysis Unit. However, as he argued in multiple judicial protests, Ferris was denied any meaningful means of having his case for protection heard at all.<sup>3</sup>

There was also the case of Maria Efimova who escaped Malta in fear for her life after she voluntarily testified in a magisterial inquiry into wrongdoing at Pilatus Bank where she worked, which was first publicly exposed by the journalist Daphne Caruana Galizia. Instead of granting her whistleblower protection, the Maltese authorities sought the extradition of Ms Efimova on the back of complaints made against her by the employer she exposed. Malta's request for extradition was rejected by the courts in Greece after Ms Efimova handed herself in to the Greek authorities.<sup>4</sup>

On balance, Malta's record for protecting whistleblowers and applying the whistleblower protection legislation in order to act on public and private sector wrongdoing is abysmally poor. In fact it has shown no evidence of success whatsoever.

Furthermore, as in the case of Jonathan Ferris, whistleblowers are warned that any information they may reveal as part of their application for protection can and would be used against them in the application of confidentiality or official secrecy laws.<sup>5</sup>

As the deadline to implement the measures required by the 2019 EU Directive approached, Repubblika called on the Maltese authorities to open consultations to discuss changes in the law that would help achieve the law's declared objectives.<sup>6</sup> Despite repeated requests, these have been ignored.

<sup>1</sup>Vella, Matthew. *Anthony Debono's defence claims 'private' works fell within CMU's remit*, maltatoday, 19 May 2015. Accessed online on 11 June 2022: [https://www.maltatoday.com.mt/news/court\\_and\\_police/53137/live\\_compilation\\_of\\_evidence\\_against\\_anthony\\_debono#.YqRjoOxBxQK](https://www.maltatoday.com.mt/news/court_and_police/53137/live_compilation_of_evidence_against_anthony_debono#.YqRjoOxBxQK)

<sup>2</sup>Jonathan Ferris will not be given whistleblower protection, Times of Malta, 24 March 2018, Accessed online on 18 April 2022: <https://timesofmalta.com/articles/view/jonathan-ferris-will-not-be-given-whistleblower-protection.674310>

<sup>3</sup>See Jonathan Ferris vs. *Prim Ministru et*, Protest fil-Qorti Ċivili Prim'Awla, quoted in Delia, M. *The eighth task of Asterix*, in *Truth Be Told*, 9 March 2018, Accessed online on 18 April 2022: <https://manueldelia.com/2018/03/the-twelfth-task-asterix/>.

<sup>4</sup>Farrugia, C. *Pilatus whistleblower Efimova will not be extradited*. *Times of Malta*, 14 June 2018. Accessed online on 18 April 2022: <https://timesofmalta.com/articles/view/pilatus-whistleblower-efimova-will-not-be-extradited.681745>.

<sup>5</sup>TMID Editorial: *Rule of law or bare-faced threats?* *The Malta Independent*, 19 February 2018. Accessed online on 18 April 2022: <https://www.independent.com.mt/articles/2018-02-19/newspaper-leader/TMID-Editorial-Rule-of-law-or-bare-faced-threats-6736185014>.

<sup>6</sup>Repubblika renews its call for effective consultation on revisions to the whistleblower protection law. Repubblika PR 90/2021. 22 October 2021. Accessed online on 18 April 2022: <https://repubblika.org/press-release/repubblika-renews-its-call-for-effective-consultation-on-revisions-to-the-whistleblower-protection-law/>



## A note from WIN

We are delighted to support the work of civil society to strengthen whistleblower protections in Malta, not only on paper but in practice. The cases cited in this latest Report from Repubblika reveal how easy it can be to undermine the purpose of a whistleblowing law, if it is little understood by those who are meant to implement it. Such cases are not unique to Malta, but sadly common in environments where whistleblower protections are not welcomed by powerful actors whose conduct may come under increased scrutiny if they actually worked.

Subverters of the law can range from those who clearly have something to hide because they themselves are involved in wrongdoing, to those who want to avoid the embarrassment of having to explain their failures. These reactions miss the point. Whistleblower protection laws are meant to increase the free flow of information for institutional and democratic accountability. They are a back-up for when our systems of governance are not working; they provide some reassurance to citizens that when they speak up in the interests of others, to stop harm to their institutions and communities, that the law will back them up. If we continue to sacrifice the well-being of individuals who are brave enough to speak up we all suffer the consequences. Cynicism sets in which means the next time someone comes across wrongdoing they decide not to say anything at all.

Repubblika is helping WIN track Malta's progress in transposing the 2019 EU Directive on whistleblowing – see the EU Whistleblowing Monitor. This report by Repubblika is a major contribution to the process. With the support of Tom Devine, WIN Trustee and Legal Director of the Government Accountability Project, WIN is developing a compliance tool based on the standards of the EU Directive and emerging international best practice principles to help civil society evaluate draft laws in their country. We are delighted that Repubblika has used the first iteration of this tool to review and analyse the proposed law in Malta.

We invite the Maltese authorities to review this Report carefully, to take its recommendations seriously and to act now.

## Summary findings

On 15 November 2021, Malta's Parliament adopted amendments to the Protection of the Whistleblower Act (herein PWA) to transpose the 2019 EU Directive on whistleblowing into national law. The new law replaces its previous 2013 version and improves compliance with the Directive's minimum standard requirements.

In light of concerns of the approach of the government to whistleblowers and the transposition of the Directive, Repubblika reached out to the Whistleblowing International Network (WIN) for support. WIN is currently developing a best practice compliance standard which incorporates the Directive's requirements. The Network provided a first iteration of this standard. The standard is being finalised by leading whistleblower protection experts in the WIN network to benchmark transposition legislation against 20 key criteria.

Against this, Malta has improved its legal framework, with the 2013 law meeting only 8 of the 20 best practice criteria to now scoring 13.5 with the new transposition law. This is positive. However, the government has seemingly ignored several key requirements of the Directive and - most seriously - made no attempt to address the core issue and fundamental flaw at the heart of both the original legislation and the law now as it has been amended, the extent of the influence of government on whether a potential witness is granted whistleblower status.

The failure of Malta to address this fundamental flaw in the legal framework has led to whistleblower protection experts labelling the transposition law a "trojan horse." Furthermore, it seems clear that any whistleblowers who are perceived as hostile to the government's interests will not be able to rely on this new law to protect them.

The analysis included in this report aims to provide a detailed comparison of the new whistleblower protection law in Malta against the EU Directive. We acknowledge improvements to the Maltese legal framework while highlighting persistent weaknesses. We set out key recommendations as we make a fresh call for public consultations on this important subject.

We believe it is essential to start discussions right away on what should

be changed to improve the new law. Strong whistleblower protection is an essential tool to fight corruption, ensure democratic accountability, and protect the rule of law.

This analysis is structured to highlight which elements of the Maltese transposition of the Protection of Whistleblowers Act (hereinafter the "PWA") are Substantially Compliant, Partially Compliant, or Not Compliant with the EU Directive and international best practice principles.

Our main findings are below with detailed analysis provided later in the Report. The findings are based on the current version of WIN's evaluation tool which is currently in development.

## Substantial compliance

- Scope of coverage: The PWA covers laws falling within EU authority, but does not cover national security disclosures, as it is excluded from EU competence. *We argue, however, that domestic legislation should cover all areas of national, as well as EU law, and other harms to public interest. This is essential to avoid for complex parallel systems.*
- Protection for those associated with or assisting the whistleblower.
- Reliable identity protection. *We propose that protection must be extended to transfer of cases to other offices with any competence to protect whistleblowers.*
- Protection against full scope of harassment.
- Shielding whistleblowers from gagging orders which restrict or dissuade protected disclosure.
- Right to a genuine day in court.
- 'Make whole' compensation and interim relief (to cover all consequences of any reprisal, during and after any lawsuit.)
- Personal accountability for a broad range of retaliation.
- Whistleblower enfranchisement.
- Education and outreach (the obligation for institutions to prominently post whistleblower rights at the workplace and on the organisation's website to educate and create transparency).

## Partial compliance

- Protection for non-employees who report work-related information - the legislation protects all connected to the organization's mission, except for suppliers or contractors.
- 'Merits test' to qualify for protection. *We will show how the law may threaten whistleblowers by putting their motives on trial for any alleged inaccuracy that can be challenged.*
- Requirement for the installation of institutional whistleblower channels. *We highlight how the law does not provide the necessary infrastructure needed for credible and functional operations, and doesn't introduce requirements for independence from conflict of interest.*

## Noncompliance

- Broad whistleblowing disclosure rights with no loopholes. *We demonstrate how the law does not protect workers blowing the whistle as part of their professional responsibilities. There is no protection for internal disclosures which forces whistleblowers to bypass normal authority channels controlled by the government.*
- Realistic standards to prove violation of rights. *We argue that the burden of proof must be reversed such that once a prima facie case is set out by a whistleblower, the evidentiary burden shifts to the employer to show that any action taken was independently fair and unrelated to the disclosure. The law, as it stands, enables employers to justify retaliation against whistleblowers, thus denying whistleblowers protection of the law.*
- Coverage for legal fees and costs.
- Transparency. *We will show how the Directive's requirement to create transparency through annual reports has been excluded.*

## Recommendations

Based on these findings, we recommend that Malta:

- Adopts urgent amendments to ensure a robust whistleblower protection framework that provides legal safeguards for potential whistleblowers and witnesses. This will require substantial and substantive reform to the existing legislation.
- Establishes an independent and well-resourced, agency to oversee the whistleblowing framework and receive whistleblower reports without any risk of interference from actors who may be negatively implicated by the information reported and free of any real or perceived conflict of interest.<sup>7</sup>
- Adopts a best practice template for the protection of whistleblowers that satisfies all requirements of the EU Directive as well as meets international best practice standards including those reflected in the 2014 recommendation<sup>8</sup> and subsequent draft resolutions of the Council of Europe, of which Malta is a member, as well as the jurisprudence of the European Court of Human Rights in its application of Article 10 of the Convention.
- Draws up effective reporting incentives to overcome the manifest chilling effect that currently prevents whistleblowers from coming forward, with a focused effort to recruit civilians in a national effort to combat corruption and financial crime.

<sup>7</sup> Such an agency should seek to join and participate in the Network of European Integrity and Whistleblowing Authorities NEIWA. For more details see: <https://www.huisvoorklokkenuiders.nl/samenwerking/internationaal/europees-netwerk>

<sup>8</sup> <https://www.coe.int/en/web/cdcj/activities/protecting-whistleblowers>



## Malta's record for protecting whistleblowers

Malta has had Whistleblower protection legislation since 2014.<sup>9</sup> That law was amended in 2021<sup>10</sup> to bring the national framework in line with the EU Directive (2019/1937) on the protection of persons reporting on breaches of EU law.<sup>11</sup>

However, during this time Malta has been notoriously ineffective in protecting whistleblowers. This paper will highlight departures of Malta's legislation from the EU Directive in force. It will also discuss how the law fails as a tool to protect people who report wrongdoings of the Maltese government and other institutions.

On balance, Malta's record in protecting whistleblowers and in applying the utility of whistleblower protection legislation to act on public and private sector wrongdoing is abysmally poor, showing no evidence of success whatsoever.

The most prominent cause of Malta's failure to apply the law - and use it as a tool to reach the objective of fighting corruption - is that the law empowers appointees of government ministers, reporting directly to them, to make the decision of whether to grant whistleblower protection. In such a structure, witnesses of wrongdoing are at the mercy of persons who are not independent of those they may expose.

Furthermore, as in the case of Jonathan Ferris, whistleblowers are threatened that any information they may reveal as part of their application for protection can and will be used against them in any application of confidentiality or official secrecy laws.<sup>12</sup>

As the deadline to implement the measures required by the 2019 EU Directive approached, Repubblika called on the Maltese authorities

on multiple occasions to open consultations to discuss changes in the law that would help achieve the law's declared objectives.<sup>13</sup> These were ignored.

Having a proper whistleblower protection framework is a crucial tool in any meaningful fight against corruption. This Report provides an analysis of the transposition standards for compliance with the European Directive and sets out recommendations to be discussed as we make a fresh call for public consultations on this important subject.

## Malta's Compliance with EU Directive 2019/1937

The EU Directive on whistleblowing was a landmark consensus for global best practice protection of those who speak up to challenge government or corporate illegality and abuses of power that betray the public trust. However, the scope of its impact depends on national transposition laws to apply its standards in each Member State's national laws.

Simplified, this means that each EU Member State needs to transpose the EU Directive before the official deadline, but can choose its own methods for the implementation. Failure to comply with the Directive's standards in transposition laws not only will shrink its relevance but could be counterproductive by creating a chilling effect and increased retaliation due to confusion about the boundaries of rights.

The Directive is remarkably clear in its mandate and guidance for implementation. The twenty criteria for compliance with the Directive listed below, apply its requirements to the primary components of whistleblower laws.

<sup>9</sup> *Protection of the Whistleblower Act* (Cap. 527), Laws of Malta. <https://legislation.mt/eli/cap/527/eng>

<sup>10</sup> Act No. LXVII of 2021, *An Act to Amend the Protection of the Whistleblower Act*, Cap. 527, Government Gazette No. 20,753, 18 December, 2021. <https://legislation.mt/eli/act/2021/67>

<sup>11</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305/17. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=en>

<sup>12</sup> *TMID Editorial: Rule of law or bare-faced threats? The Malta Independent*, 19 February 2018. Accessed online on 18 April 2022: <https://www.independent.com.mt/articles/2018-02-19/newspaper-leader/TMID-Editorial-Rule-of-law-or-bare-faced-threats-6736185014>.

<sup>13</sup> *Repubblika renews its call for effective consultation on revisions to the whistleblower protection law*. Repubblika PR 90/2021. 22 October 2021. Accessed online on 18 April 2022: <https://repubblika.org/press-release/repubblika-renews-its-call-for-effective-consultation-on-revisions-to-the-whistleblower-protection-law/>

## Non-Regression & more favourable clause

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The Directive also has a baseline premise: Transposition shall under no circumstances constitute grounds for a reduction in the protection already afforded nationally. (Art.25.)

The present evaluation of compliance applies the following standards:

- **Substantial compliance:** Literal application of Directive language that does not require more than regulatory action for immaterial omissions or distinctions that do not undermine the Directive's objective.
- **Partial compliance:** The law recognizes and complies with the Directive in principle, but it does not include the Directive's specific requirements for effective whistleblower rights.
- **Noncompliance:** The law does not recognize or explicitly within its text an attempt to comply Directive requirements.

## Summary analysis

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On 15 November 2021, Bill 249, the Protection of the Whistleblower (Amendment) Act was introduced in Malta for consideration. It amends the 2013 Protection of the Whistleblower Act (herein the "principal law.") Providing half credit for partial compliance, the new law meets 13.5 of 20 criteria for compliance with the Directive. For clarity the Directive and its entirely faithful transposition would not alone address structural weaknesses already existing in the 2013 law.

The basis for this conclusion and recommendations are discussed below. On balance, the new legislation is a meaningful improvement over current law, improving Malta's rights from 8/20 to 13.5/20 of the best practice criteria.



While the legislation is sophisticated, it is like a train with all the bells and whistles but a defective, dangerous engine. Four fundamental conceptual flaws prevent the legislation from providing realistic rights:

- 1** The scope of the law only protects whistleblowers who follow procedures for reports to formal whistleblowing units, rather than normal organizational communications of protected information. This means the rights only cover the tip, rather than the iceberg, of protected information.
- 2** The new private and public whistleblower units do not include any of the structural guarantees for independent channels free from conflict of interest with access to organizational leadership. These are necessary for the units to be safe and credible, and for whistleblowing to make a difference. In recent years, the government controlled the authority channels that were responsible for the disclosures of Whistleblowers. As a result, accusations from whistleblowers - when people had the courage to publish them - were discredited as false facts. Combined with the first flaw, the legislation may be a barrier to getting whistleblower protection into the right hands for responsible exercise of authority, the EU Directive's primary objective.
- 3** The EU Directive burdens employers with providing proof when acting against employees who reveal any wrongdoing within their organisation. A loophole in the definitions, however, shifts this burden on to the witness, favouring the employer over the Whistleblower. Instead of guaranteeing unconditional security in such a precarious situation, a Whistleblower's revelation will only be protected if they can prove any kind of retaliation against them. Furthermore, the Maltese law offers additional protection for employers who can retaliate against a whistleblower if their action "is justifiable for administrative or organizational reasons". As these justifications can be easily laid out as a sufficient proof, Whistleblowers will hardly have a chance to win a legal battle against their employers under these conditions and the law will be largely irrelevant if that qualifier is not removed from the legislation.
- 4** The legislation ignores the Directive's requirements for transparency of its impact, as well as a national review every three years. Reforms introduced by stealth that are not carefully monitored for results are highly unlikely to make a difference.

## 1 Scope of coverage

Comprehensive horizontal rights harmonized to include the same standards for breaches of EU Directive and national laws.<sup>14</sup>

Inherently the Directive cannot be comprehensive, because of limitations on its authority. The EU has different competences for every scope of law and can therefore only expand its laws to a certain point. For example, Member States retain authority over national security, [Article 3(2)], and the Directive would not cover breaches of national laws outside the policy fields addressed in the Directive. These significant legal gaps create vulnerability for parallel vertical systems that are incompatible, duplicative, or contradictory.

An example: If a whistleblower from within the Armed Forces of Malta wants to report sexual assault of migrants, the EU Directive does not provide for the protection of this person as the context may be claimed to be a matter of national security and therefore strictly a matter of national competence. Whether any protection may exist for a witness in such a case or not, there would be two parallel systems under Maltese law for identical situations - one arising in areas of EU competence and one arising in areas that are not.

Dual “vertical” rules would have a disastrous effect, creating a dysfunctional administrative process and thwarting the Directive’s purpose to encourage reports. Both employers and employees would have to learn different rules depending on subject matter that may only be decided after independent legal decisions. Dual systems would mean

legislating two different laws and doubling administrative burdens by requiring separate channels, training, procedures, and record systems. Most significant, dual systems inherently create uncertainty for whistleblowers whether they have rights for any given report. That uncertainty will create a severe chilling effect.

The Directive permits (Rec., para. 24), and the European Commission encourages, Member States to adopt laws with uniform rules for whistleblowing against breaches both of EU and national laws.<sup>15</sup> A responsible, functional transposition of the Directive requires that Member States enact or modify provisions of existing national whistleblower laws harmonized for consistency with the Directive. Unequal rights may be unjustifiable under constitutional and human right to equality before the law.<sup>16</sup>

**Assessment:** Substantial compliance. The legislation does not make any distinctions between EU or national legal obligations. Indeed, the definitions in Section 2(iv)(a) define “improper practice” to include failure “to comply with any legal obligation.” That broad standard is echoed throughout references to specific forms of misconduct listed in the Directive.

**Recommendation:** While the legislation does not draw distinctions between EU and national breaches, for effective communications it would be helpful to clarify explicitly that protection applies without distinction for disclosures of EU, national and cross-border breaches.

<sup>14</sup> The best practices for compliance with the EU Directive reflect Article (Art.) and Recital (Rec.) references. As with any policy, the drafters could not consider all potential contexts and scenarios. As a result, the criteria also include factors not directly referenced but necessary to achieve the legislative intent.

<sup>15</sup> See [https://ec.europa.eu/info/sites/info/files/placeholder\\_10.pdf](https://ec.europa.eu/info/sites/info/files/placeholder_10.pdf)

<sup>16</sup> See <https://verfassungsblog.de/ungleicher-schutz-fur-whistleblower/>

## 2 Broad whistleblowing disclosure rights with no loopholes

Protected speech, which includes internal (within the institution), external (to competent authorities) reports, and public disclosures,<sup>17</sup> should cover any lawful communication of information protected by the Act. Informal oral or written disclosures, context, or audience outside of specific legislative or national security restrictions should be involved without any exceptions. The Directive does not include any such loopholes. [Art. 5 (3-5)] It explicitly permits protected speech to be oral or written. [Arts. 9(2) and 12(2)]

A first principle is that the freedom to blow the whistle publicly should be protected, if necessary, as the only way to prevent or address serious misconduct. The Directive protects immediate public disclosure when the whistleblower has reasonable grounds to believe that disclosures internally or externally to authorities would result in retaliation, even with little prospect of success due to collusion or destruction of evidence; or when there is an imminent threat to the public interest such as an emergency or irreversible damage, the Whistleblower can speak out under the protection of the directive. (Art. 15 (1)).

Under these circumstances, the whistleblower may go directly to elected officials, commercial or social media, civil society organisations or victims. Otherwise, it is necessary to make reports through internal (Arts. 7) or external competent authority channels<sup>18</sup> (Arts. 10-12), whichever the whistleblower chooses (Art. 10), for a minimum of three months before “going public.” (Art. 15)

Public disclosure rights are qualified even further because the restrictions shall not apply to disclosure of information to the press protected under specific national freedom of expression and information provisions (Art. 15 (2)). Moreover, the Recital clarifies that the Directive also protects public freedom of expression as interpreted

by the European Court of Human Rights. (Rec., paras. 31, 45) which has a high presumption in favour of disclosure.

Any restriction on that right must be prescribed by law and have a legitimate aim necessary in a democratic society [ECHR Art. 10 (2)]. It emphasizes the importance of whistleblowers as media sources, explaining that role “is crucial for safeguarding the ‘watchdog’ role of investigative journalism in democratic societies (Id., para. 46). Finally, those seeking to block public disclosures must pass certain tests. On a case-by-case basis, the restriction must be justified as reasonable or in the public interest.

It also is essential to specify that disclosures in the course of job duties are protected. The reason for this is the overwhelming volume of communications of protected information and subsequent retaliation which is done through “duty speech”. This term refers to the responsibilities of Whistleblowers to report duties to supervisors or competent authorities as part of organisational checks and balances. Examples include auditors, investigators, compliance officers, or any others routinely trying to address problems by communicating protected information to a supervisor. The duty speech or also called the “step outside” doctrine only protects workers who “step outside” their typical job duties to report about illegal or unusual actions.

The Directive creates detailed guidance for reports to institutional channels but does not oblige whistleblowers to use them. The definition for a protected internal report – “oral or written communication of information on breaches within a legal entity in the private or public sector” - does not include any exceptions. [Art. 5(4)]

The Recital also makes clear that the Directive is intended to cover reports that are required as part of professional responsibilities. This scenario can mean reporting information directly to the government as part of professional responsibilities. (Rec., para. 62) The Recital indirectly includes the reason why protection for duty speech is essential

<sup>17</sup> The Directive references whistleblowing through institutional channels as a “report,” and to the public as a “disclosure.”

<sup>18</sup> National laws may specify that “competent authorities” include the courts. (Rec., para. 64)



20 Best Practice Criteria

for the Directive's objectives: *"For the effective detection and prevention of breaches of Union law, it is vital that the relevant information reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible."* (Id., para. 47)

**Assessment:** Non-compliance. Consistent with EU Directive standards, sections 7 and 14 of the legislation permit freedom to choose between internal or external channels for an initial disclosure, with an option for public whistleblowing consistent with the Directive's prerequisites.

Unfortunately, the legislation imposes a fundamental violation of the Directive that will severely curtail the flow of whistleblowing information. Unlike the Directive's unqualified audiences for internal reports, section 10 of the bill amends the 2013 principal bill with new articles 9(1) and 12(3) that restrict protection to those who follow the employer's procedures for making reports.

That means an organization can impose any arbitrary restrictions on format, timing, or any other qualifiers on protected communications. It also means that most of the information the Directive seeks to protect will remain unprotected for internal disclosures. Employees will proceed at their own risk for normal duty speech communications pursuant to professional responsibilities, meaning they will have to bypass normal organizational channels to avoid waiving their rights.

**Recommendation:** To protect the most common, highest volume communications of whistleblowing information, consistent with the Directive, the law must be upgraded to protect any internal communication of information that would be protected for an external or public disclosure. That is the standard in the EU Directive and in the law's definition of "disclosure," but it is not the standard for protection.

### 3 Wide subject matter scope within EU competencies

Sectoral laws leave arbitrary restrictions on accountability, and inherently create a chilling uncertainty for would-be whistleblowers on whether they are protected. The Directive's scope is comprehensive for activities subject to European Union authority.

The Directive gives whistleblower rights to report actual or potential "breaches" of EU laws, which covers the entire scope of activity under EU authority, from commerce to the environment to public health and safety. (Art. 2, Annex)

The term "breaches" is far broader than mere illegality. It also includes "abusive practices", which means acts or omissions which do not appear to be unlawful in formal terms "but defeat the object or the purpose" of the law." (Art. 5(1)[ii], Rec., para. 42)

Unlike the United States, it provides equal whistleblowing rights for violations of occupational safety and labour laws. Although not specified in the text, the Recital, at para. 21, specifies: "Workers and their representatives are entitled, under that Directive, to raise issues with the competent authority if they consider that the measures taken, and the means employed, by the employer are inadequate for the purposes of ensuring safety and health."

The Directive does not protect violations of secrecy requirements for classified information, judicial proceedings, criminal procedure, or legal and medical professional privilege. (Art. 3(3)) Global best practices limit those exceptions to secrecy categories applied legitimately for which there is clear advance notice, such as markings on a document. Other professionals can make protected reports, "provided that reporting that information is necessary for the purposes of revealing a breach falling within the scope of this Directive." (Rec., para. 27)

## 20 Best Practice Criteria

**Assessment:** Substantial compliance. The definitions section mirrors the subject matter categories in the Directive.

**Recommendation:** While sufficient for EU compliance, for accountability the national security loophole in article 3 should be closed or modified. National security issues are outside the scope of EU competence, but the omission shields secrecy for the common forms of corruption often with the highest stakes.

## 4 Protection for those associated with or assisting the whistleblower

The law should cover all common scenarios that could have a chilling effect. This is necessary to shield those who assist or associate with the whistleblower who acts as the final messenger for a disclosure. It “takes a village” to blow the whistle responsibly and effectively. Representative scenarios include individuals who are perceived as associated with or ‘assisting whistleblowers.’

Guilt by association is unacceptable, because isolation is fatal for job survival and to truly make a difference. Those who assist whistleblowers are essential to provide supporting knowledge and evidence for a “reasonable belief” and qualify for protection after providing a responsible report or disclosure. Corroboration and supporting evidence are prerequisites for the most significant impact. Protecting only the final messenger will create a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out.

In addition to whistleblowers, the Directive protects facilitators who assist in the report [Art. 4(4)(a)]; and connected persons such as colleagues or relatives (Art. 4(4)(b)). As a result, worker representatives such as unions are covered as well. (Rec., paras. 21, 41)

**Assessment:** Substantial compliance. Section 3 of the legislation creates a new article 4(3) that protects facilitators (defined in section 2 as those who assist the whistleblower), as well as “third persons who are connected with the reported persons and who could suffer retaliation in a work-related context, such as colleagues or relatives.” Article 19 of the current law already bans and imposes accountability for non-workplace harassment, such as violence, property damage, following and surveillance.

20 Best Practice Criteria

## 5 Protection for non-employees who report work-related information

Whistleblower laws and policies should protect all connected with activities relevant to the organisation's mission, such as contractors or shareholders. To shield against blacklisting, the law must cover applicants. Former employees need protection, because in addition to blacklisting, retaliation is possible through cancellation of medical and other insurance benefits or pensions.

In addition to all public or private employees, the Directive protects virtually anyone performing services for the institution (Rec., paras. 38-42) such as job applicants [Art. 4(3)]; former employees (Art. 4(2); part-time employees and volunteers. (Rec., para. 40)

Regardless of the formal employment status, coverage for reprisals should extend to all who could be affected by secondary retaliation.

The Directive also protects contractors and suppliers who could lose licences and contracts or face boycotts (Art. 4(1)(d), Rec., para. 42); civil society organisations or other non-workplace entities that act as facilitators for the reporting person [Art. 4(4)(a)]; shareholders [Art. 4(1)(c)]; self-employed [Art. 4(1)(b)]; and even the legal person (corporation, NGO or other legal entity) where the whistleblower owns, works at or is connected with. [Art. 4(4)(c)]

This provision creates an indirect corporations/NGO whistleblower protection law, beyond merely an employment right. When an employee blows the whistle, their institution is protected from associated retaliation. Any organisational chief who reports protected information automatically incurs anti-retaliation protection for that leader's organisation.

**Assessment:** Partial compliance. The section 2 definition for "employee" includes shareholders and management, and new article 4(3) protects the corporation where the whistleblower works. However, neither current law nor the legislation protects suppliers or contractors.

**Recommendation:** There is no public policy basis to expose suppliers or contractors to retaliation for the same disclosures protected if made by an employee. Coverage should be extended to those institutions and their employees.



## 6 Reliable identity protection

To maximise the flow of information necessary for accountability, reliable protected channels must be available for those who choose to protect their identities. Otherwise, there will be a severe chilling effect.

The concept covers both anonymous disclosures, in which no one knows the identity of the whistleblower, and confidential communications, in which identity must be safeguarded by the institutional audience.

Confidentiality must go beyond a promise not to reveal a name without consent, which should be written. Confidentiality should also extend to restrictions on disclosure of 'identifying information.' Often when only a few are aware of certain facts, that information is easily traceable back to the source. Moreover, almost no whistleblower can be guaranteed absolute confidentiality because testimony or identification of the person may be mandatory for civil or criminal proceedings, or essential investigative developments. When exposure is non-discretionary, a best practice confidentiality policy provides for timely advance notice to whistleblowers that their lawfully required exposure is imminent.

The Directive Recital and text repeatedly emphasize the priority requirement for confidentiality in addressing reports. (Arts. 9(1)(a), 11(2)(b), 16 and 22; Rec. paras. 53, 76, 84-5)

The protection extends to identifying information. [Art. 16(1)] Confidentiality cannot be breached unless obliged by national or Union law. (Art. 16(2); Rec. para. 82) In that event, as a rule the whistleblower is entitled to advance notice and explanation. [Art. 16(3)] In the event of a conflict, the Directive's confidentiality rights prevail over European Union data protection laws. (Rec., paras. 84-5) Each nation must provide penalties for confidentiality breaches. [Art. 23(1)(d)] While Member nations have discretion whether to act on anonymous reports, anti-reprisal protections apply to any whistleblower subsequently identified. [Art. 6(3)]

Member states have discretion whether to act on misconduct alleged in anonymous reports. However, whistleblowers who are identified have all the Directive's anti-retaliation rights. (Art. 6(2); Rec., para. 34)

**Assessment:** Substantial compliance. In principle Malta has one of the world's best confidentiality rights, primarily based on its pre-existing law. Article 6 of the 2013 PWA bans internal whistleblower offices from releasing identities or identifying information without express consent. Article 6(4) is clear that there are no exceptions, even for a court order. However, under article 6 there is no requirement that the confidentiality protections travel with the evidence when the whistleblower unit transfers the case to another office for investigation. By contrast, under article 18 external authorities not only are bound to the same restrictions, but the confidentiality protections remain binding on subsequent offices brought into the case.

In section 10 the EU legislation modifies article 12 of the principal law to require that internal channels safeguard the security of evidence provided by whistleblowers but does not close the confidentiality loophole. In section 9 the legislation substitutes article 11(3) to close a loophole excluding anonymous whistleblowers from protection against retaliation. Under the legislation they have the same rights as other whistleblowers if their identity is discovered.

**Recommendation:** The legislation should be modified to extend confidentiality restrictions to all internal offices that become aware of the whistleblower's identity.

## 7 Protection against full scope of harassment

The forms of harassment a whistleblower can suffer are limited only by the imagination. As a result, it is necessary to ban any prejudicial discrimination taken because of the whistleblowing, whether active (e.g., termination) or passive (e.g., a refusal to promote or a failure to provide training).

Recommended, threatened, and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations, as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees. In non-employment contexts, laws should protect whistleblowers against a wide range of possible harassment, including violence and threats to property; provide immunity from civil liability, such as defamation claims or breach of contract lawsuits; and safeguard against the most chilling form of retaliation -- criminal prosecution.

The Directive’s text definition of retaliation is all-encompassing, to include acts or omissions prompted by a protected report “which causes or may cause unjustified detriment to the reporting person” [Art. 5(11)]<sup>19</sup>

It prohibits “any” form of retaliation, “including threats of retaliation and attempts of retaliation.” It illustrates the ban by highlighting fifteen common active and passive common reprisals, from employment-based harassment to psychiatric and medical referrals, or cancellation of contracts and licenses. (Art. 19) If the whistleblower reasonably believes disclosure is necessary to reveal misconduct, the Directive provides an affirmative defence against civil and criminal liability for gathering evidence unless accompanied by an independent crime, and immunity from criminal or civil liability for disclosure. [Arts. 21(3) and 21(7)]; Rec., Paras. 92, 97) The Directive’s shield overrides liability under European Union trade secrets laws. (Rec., para. 98)

**Assessment:** Substantial compliance. Definitions for “occupational detriment” in the 2013 PWA and the EU legislation have a comprehensive list for individual forms of retaliation. The list illustrates an overall reprisal ban in the EU legislation section on definitions for “occupational detriment,” which includes any action “which causes or may cause unjustified detriment to the whistleblower....” Article 4(1) of the current law provides immunity against civil or criminal liability for blowing the whistle.

## 8 Shielding whistleblower rights from gag orders

Any whistleblower law or policy must include a ban on “gag orders” resulting from any rules, policies or nondisclosure agreements that would otherwise override rights in the whistleblower law and impose prior restraint on speech. This principle also covers supremacy of the whistleblower statutes over conflicting laws.

Article 24 is unequivocal that “the rights and remedies provided for under this Directive cannot be waived or limited by any agreement, policy, form, or condition of employment, including a pre-dispute arbitration agreement.” The Directive’s civil and criminal liability shield applies to breaches of Nondisclosure Agreements. (Art. 21(2); Rec., para. 91)<sup>20</sup>

**Assessment:** Substantial compliance. The EU legislation did not need to modify articles 3 and 21 of the 2013 law, which bans any restraints on speech from cancelling statutory protection, whether another law, rule, contract, agreement, or condition of employment.

<sup>19</sup> The Recital, para. 87, explains “reporting persons should be protected against any form of retaliation, whether direct or indirect, taken, encouraged or tolerated by their employer or customer or recipient of services and by persons working for or acting on behalf of the latter, including colleagues and managers in the same organisation or in other organisations with which the reporting person is in contact in the context of his or her work-related activities.”

<sup>20</sup> The liability shield does not protect knowingly false statements.

20 Best Practice Criteria

## 9 Right to a genuine day in court

The setting to adjudicate a whistleblower's rights must be free from institutionalised conflict of interest and operate under due process rules that provide a fair day in court.

This criterion requires administrative remedies and judicial due process rights, the same as those available for citizens generally who are aggrieved by the illegality or abuse of power evidenced in the whistleblower's disclosure. The elements include low-cost administrative remedies for those who cannot afford judicial due process, the right to a day in court with witnesses and to confront accusers, objective and balanced rules of procedure, reasonable deadlines, and timely decisions.

In Article 21 the Directive requires, but does not specify the nature of, "necessary measures" to protect against retaliation. However, the Recital consistently presumes judicial interpretations and decisions of the Directive's provisions. (Recital, paras. 38, 42, 90 and 92) Further, there is appellate judicial review for all enforcement decisions by competent administrative authorities, including action on whistleblowing reports. (Rec., para. 103)

**Assessment:** Substantial compliance. Article 7 of the 2013 law already provides direct access to court.



## 10 “Merits test” to qualify for protection

The legal standards for entitlement to protection and the amount of evidence required to prove retaliation are the basic tests a whistleblower must pass for the law to provide relief against retaliation.

The gatekeeper word is “reasonable” for the Directive’s free speech rights and protections. The Directive protects those who have a “reasonable suspicion,” even if a mistaken suspicion without evidence, of a past, ongoing or potential future breach. (Art. 5(2), Rec. paras. 32, 43)

Whistleblowers can make public reports immediately if they have “reasonable grounds to believe” it is necessary due to an emergency, fear of retaliation or a bad faith response by internal and external channels. [Art. 15(b)]

Whistleblowers “shall not incur liability of any kind” if they “ha[ve] reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive.” [Art. 21(7)] In short, the Directive only protects “reasonable” actions.

The Recital clarifies this basic boundary for protection, and controlling the principle means sincerely believing the report or disclosure’s accuracy. “[R]eporting persons should have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the matters reported by them are true.” The Directive’s intent also is clear that motives, commonly probed through a “good faith” test, are not a relevant factor as a prerequisite for protection (Art. 21(7), although inherently they are relevant to assess credibility. (Rec., para. 32)

**Assessment:** Partial compliance. Section 7 of the legislation amends Article 9(1) of the 2013 law so that the test is “reasonable grounds to believe” the truth of an allegation, rather than “reasonable suspicion.” These should be equivalent. Article 4(2) of the 2013 law already provided that “good faith” but mistaken disclosures are eligible for protection.

Unfortunately, the EU legislation does not modify Articles 9(2)-(4) of the 2013 statute, which repeatedly threaten whistleblowers with civil and criminal liability, including imprisonment, for intentionally false statements. That misconduct already is liable, and the detailed threats create an unnecessary chilling effect. The remaining, repeated references to intent and good faith also mean that the whistleblower’s motives will be put on trial for any alleged inaccuracy that can be challenged. That violates the Directive’s cornerstone principle. The Directive, in article 23(2) and Recital paragraph 102, instead use the term “knowingly false,” which does not put the whistleblower’s motives on trial.

**Recommendation:** The reference to good faith mistakes in current law should be deleted, to be replaced by mistakes despite a reasonable suspicion. Further, “knowingly” false statements should substitute for “intentionally” false statements and be subject to independent civil and criminal liability without repeating the threats.

## 11 Realistic standards to prove violations of rights

Once it is established that a reporting person is entitled to protection, burdens of proof govern how much evidence is needed to prove a violation. This makes the issue of unsurpassed significance for whether the whistleblower has a fair chance for justice. If the requirement for evidence is too high, the rules effectively are rigged. The definitions and boundaries for rights and even a fair day in court will not matter if the bar is an unrealistic burden.

That is not the case for the Directive, which is a global pacesetter for this criterion. Consistent with global standards, the Directive has a dual or “reverse burden of proof.” If the whistleblower establishes that “he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure.”

The burden then shifts to the employer to prove that the action was based on duly justified grounds. [Art. 21(5)] The Recital provides the specific burden for the employer’s responsibility - “to demonstrate that the action was not linked in any way to the reporting or the public disclosure.” (Rec., para. 93) In other words, it is not enough that the primary reason for an action was non-retaliatory. The independent justification must not be contaminated “in any way” by reprisal. Partially retaliatory actions violate the Directive.

**Assessment:** Noncompliance. Superficially the legislation reflects the Directive’s text. Section 6 creates a new article 7(4) that includes a presumption of retaliation if a whistleblower engages in protected speech and suffers a detriment. Then it is the employer’s burden to prove an action was not based on protected speech. The text needs to be clarified, however, to incorporate the Recital requirement for complete independence – that the detrimental action is not “linked in any way” to the action. “Based on” can mean “justified.”

In other words, it would be enough that the employer “could have” taken an action on grounds apart from whistleblowing, rather than it “would have.”

A qualifier in the definitions fully exploits the vulnerability to a “could have” defence and creates an almost insurmountable obstacle that must be removed for the burdens of proof to be enforceable. The section 2 definition of “occupational detriment” states the concept does not apply “where the direct or indirect act or omission is justifiable for administrative or organizational reasons.”

This means there is no “detriment” enabling a claim if any valid organizational excuse exists, independent of retaliation. The definition directly contradicts the Directive’s burdens of proof and renders them irrelevant to defeat a claim. The whistleblower will not have a valid claim of detriment to challenge as retaliatory. Until this limitation is removed, the law does not comply with the Directive’s standards for burden of proof and makes it unrealistic for whistleblowers to win when they assert their rights.

## 12 “Make whole” compensation

The parallel bottom lines for a remedial statute’s effectiveness are whether it achieves justice by: (1) helping the victim to obtain adequate redress; and (2) holding the wrongdoer accountable.

If whistleblowers prevail, relief must be sufficiently comprehensive to cover all the direct, indirect and future consequences of the reprisal. They should be “made whole.” Otherwise, the whistleblower may “lose by winning.” Make whole relief may include the payment of damages for medical bills, indirect financial consequences, and intangibles, such as pain and suffering, therapy for emotional distress, or loss of reputation. In non-employment contexts, it could require relocation, restoration of a contract or licence, or withdrawal of litigation.

The Directive does not specify minimum specific requirements but does mandate that “remedies and full compensation are provided for damage” caused by retaliation. [Art. 21(8)]

While not mandatory, the Directive makes it an available option for Member States to provide “financial assistance and support measures, including psychological support, for reporting persons in the framework of legal proceedings” [Art. 20(2)]

Despite approving a full range of financial and personal relief for the direct and indirect effects of retaliation, the Directive does not require Member States to modify pre-existing national laws on remedies. (art. 21(8); Rec., para. 94)

**Assessment:** Substantial compliance. Article 8 of the 2013 law provides that whistleblowers whose rights are violated “have a right to compensation for any damage caused.” Article 7(3)(a) states that compensation includes “moral costs.”

**Recommendation:** To assure that the whistleblower is “made whole,” the language in current article 18 should be clarified to read that aggrieved whistleblowers “have a right to compensation that eliminates any damage caused.” The current language could be interpreted as not all-inclusive.

## 13 Interim relief

Anti-reprisal mechanisms that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be no more than postulate vindication for unemployed, blacklisted whistleblowers who went bankrupt while they waited to win. Injunctive or interim relief must therefore be available following a preliminary determination. Timely provision of interim relief also prevents unnecessary protracted litigation.

Without it, employers have little to lose by dragging out lawsuits and appeals indefinitely. Until a contrary final decision, harassment or delays by employers can succeed both in depriving the whistleblower of income and in sustaining a chilling effect in the workplace. If the whistleblower is reinstated while the substantive case proceeds, the employer’s best interest is more likely to “stop the bleeding” by resolving the dispute on fair terms. Few other criteria have more impact on whether a whistleblower law makes a difference compared to the effectiveness of interim relief.

In accordance with national law, the Directive requires Member States to provide “interim relief pending the resolution of legal proceedings.” (Art. 21(5)) The Recital reinforces the explanation why. “Of particular importance for reporting persons are interim remedies pending the resolution of legal proceedings that can be protracted... [Dismissal] might be difficult to reverse after the lapse of lengthy periods and ... can ruin the individual financially, a perspective which can seriously discourage potential whistleblowers.” (Rec., para. 96)

**Assessment:** Substantial compliance. Articles 7(2)-(3) of current law give the courts authority to order full interim relief, including damages.



## 14 Coverage for legal fees and costs

A prerequisite for viable rights is legal aid to pursue claims, or reimbursement of attorney fees and litigation costs for whistleblowers who substantially prevail. Otherwise, they could not afford to assert their rights.

In accordance with national law, remedies should include legal fees. (Rec., para. 94) The Directive also requires that nations provide “legal aid in further proceedings and legal counselling or other legal assistance.” (Article 20(1)(c); Rec., para. 99) Those providing the legal assistance are protected from retaliation for defending the whistleblower. (Rec., para. 89)

**Assessment:** Noncompliance. The EU legislation does not modify Article 7(8) of the 2013 law, which excuses whistleblowers from court filing costs but is silent on attorney fees. There is no provision either in the 2013 law or the legislation to provide legal aid. Unless fees and other litigation costs can be recovered through another law, this means that many unemployed whistleblowers will not be able to afford asserting their rights. The financial barrier is especially significant, because the law does not include a low-cost, informal administrative remedy.

**Recommendation:** the legislation should be expanded to explicitly provide attorney fees and all costs from the lawsuit to whistleblowers who obtain relief. If this right already is covered in other statutes, for clarity there should be an explicit provision or reference to that relief within the new whistleblower legislation.

## 15 Personal accountability for reprisals

To deter repetitive violations, those responsible for whistleblower reprisals should be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they will not get away with it, and they may be likely to be rewarded for trying. The most effective option to prevent retaliation is personal liability for those found responsible for violations.

The Directive requires accountability for a broad range of misconduct, including hindering reports or disclosures, retaliation, vexatious litigation, and confidentiality breaches. The penalties must be “effective, proportionate and dissuasive.” [Art. 23(1)] The penalties sanction legal or natural persons. That includes personal liability, which the Recital supports as an effective deterrent. (Rec., para. 88)

**Assessment:** Substantial compliance. Article 19 of the 2013 law already imposes liability of fines and imprisonment for engaging in retaliation.

**Recommendation:** While in compliance with the Directive, in practice it has been extremely rare for those who retaliate to receive criminal sanctions or imprisonment. A more realistic accountability measure would empower courts to impose employment discipline on the wrongdoer.

## 16 Institutional whistleblower channels

The Directive includes a new structural dimension for whistleblowing reports. Private institutions with over 50 workers [Arts. 8(1) and 8(3)], and public employers in municipalities with over 10,000 inhabitants and 50 workers [Arts. 8(9) and 11(1)] must have official whistleblower channels to receive and follow through on reports, as well as to share advice on anti-retaliation rights. The whistleblower office can be staffed by a third-party contractor.<sup>21</sup>

These institutions could be a valuable new paradigm that institutionalizes legitimacy and focused organisational responses to whistleblowing reports. Without careful controls, however, they could be a weapon to identify, discredit and retaliate against dissenters for bad faith organisational leaders. Even worse, ombudsmen and staff of remedial agencies repeatedly have faced retaliation themselves for helping whistleblowers.

As a result, the Directive has basic controls for establishment and structure of whistleblower offices. The private sector internal channels must be staffed by an “impartial person” or department [Art. 9(1)(c)]; and comply with the Directive’s confidentiality requirements. [Art. 9(1)(a)] The Recital indicates that the channel should be independent and free from conflict of interest (such as a chief auditor or board member), and report directly to the organisational chief. (Rec., para. 56)

The requirements are similar but more detailed for channels at external government authorities. Like private institutions, the government channels must be staffed by independent and autonomous staff or offices [Art. 11(2)(a)] and must comply with confidentiality requirements [Arts. 12(1)(a) and (3)]. Unlike the staff at private sector whistleblower channels, those at government authorities must undergo mandatory training on handling reports. [Art. 12(5)] This qualifies them for their duty to advise whistleblowers on the opportunities and procedures for reports, as well as advice on anti-retaliation rights. [Arts. 13(a) and (f)].

**Assessment:** Partial compliance. Section 10 of the EU legislation substitutes a new article 12 to the 2013 law that requires companies to set up internal channels, comply with confidentiality rules and maintain secure case files. Section 13 substitutes a new article 17 that requires competent agencies to create whistleblowing Reporting Units for external disclosures. Unfortunately, while the provisions have an impressive list of duties, there is no infrastructure for credible, functional operations. Neither internal nor external whistleblower channels have requirements for independence from conflict of interest, or access to the organization chief. The only compliance with EU requirements is for training of staff in external whistleblowing Reporting Units.

**Recommendation:** The legislation should be expanded to incorporate the EU requirements for impartiality, independence, freedom from conflict of interest and a reporting channel to the organizational chief. Without these controls, the offices will not have legitimacy. Combined with the lack of protection of whistleblowing information for “duty speech” through normal channels, this could be highly counterproductive and an administrative nightmare by channelling all protected speech into these uncontrolled units.

<sup>21</sup> While permissible, in most cases third party contractors are undesirable audiences, because they do not have specialized expertise or hands-on familiarity with the organisation. However, the Recital also explains that the third party could be a trade union or other employee organisation, which also would avoid financial conflicts of interest. (Rec., para. 54)

## 17 Whistleblower enfranchisement

The corollary to a legitimate structure is whistleblower enfranchisement to maximise the channel's legitimacy and impact. The whistleblower who raised an issue should be enfranchised in the process by receiving progress reports, contributing to the record, and being informed of the results. While whistleblowers are reporting parties rather than investigators or finders of fact, they are typically the most knowledgeable, concerned witnesses in the process.

For internal, or private sector, reporting channels, the Directive requires confirmed receipt of the report within seven days (Art. 9(1)(b)); diligent follow-up (Art. 9(1)(d)); and feedback within three months. (Art. 9(1)(f)) Again the standards are more detailed for external, or government channels. They must confirm receipt within seven days (Art. 11(2)(b)); provide mandatory procedures to maintain contact and receive additional evidence from the whistleblower, (Art. 12(4)(c)); provide feedback within three to six months (Art. 11(2)(d)); and tell the whistleblower the investigation's outcome. [Art. 11(2)(e)]

**Assessment:** Substantial compliance. Section 11 of the EU legislation creates a new article 13(1) requiring compliance with the Directive's schedule for receipt and feedback, also included in the requirements for external whistleblowing Reporting Units.

**Recommendation:** While not required for compliance with the Directive, internal and external channels will be more credible and effective if feedback to the whistleblower includes an opportunity to comment on case reports' draft findings.

## 18 Education and outreach

Rights will be irrelevant unless both whistleblowers and those whom they accuse of misconduct are aware of, understand and respect them. Society's knowledge of and cultural acceptance for whistleblower rights is as significant to minimize retaliation as legal language.

The Directive requires institutions to prominently post its rights at the workplace and on the organisation's website. (Rec., para. 59) Each competent government authority must maintain easily identifiable, accessible website guidance for public guidance to potential whistleblowers on the full scope of Directive rights both for protection and reporting, relevant procedures, and confidentiality protection. (Art. 13, Rec., para. 89)

Independent of whistleblower channels, the Directive requires a nationalized information or administrative agency to provide clear, comprehensive guidance on rights and remedies for reports and public disclosures, as well as assistance before remedial agencies assessing their rights. Where provided by national law, the support agency should not only be an information resource but assist in advocacy and certify whether the person qualifies as a legally protected whistleblower. (Art. 20(1))

**Assessment:** Substantial compliance. Section 10 of the legislation replaces current article 12 to comply with the Directive's guidance requirements. Section 13(b) of the legislation amends article 17 to require that the external WRU provide website publication and personal counselling for the Directive's rights and responsibilities.



## 19 Transparency

Transparency is the most effective resource to meet the difficult challenge for whistleblowers to overcome ingrained bias and receive societal solidarity through cultural acceptance. The magic word to achieve solidarity is “results.” Citizens will enthusiastically rally behind whistleblowers as the vehicles for consequences that make their lives better by preventing accidents, improving public health, and imposing accountability that effectively attacks corruption and abuses of power.

The Directive reinforces public awareness and support by requiring every Member State to provide an annual report containing – “1) the number of reports received by the competent authorities; 2) the number of investigations and proceedings initiated as a result of such reports and their outcome; and 3) if ascertained, the estimated financial damage and the amounts recovered following investigations and proceedings, related to the breaches reported.” (Art. 27(2))

**Assessment:** Noncompliance. The legislation completely ignores this requirement of the Directive.

**Recommendation:** The legislation should be expanded to comply with the Directive’s transparency requirements. Communicating this data on the public record is essential to earn public awareness and support for the law, as well as to track its effectiveness.

## 20 Review

It is extremely rare for institutions to get anything right the first time, and the birth of rights is no exception. Effective rights require a steady process of learning lessons to correct mistakes, as well as keeping pace with new, creative forms of misconduct and retaliation. To illustrate, the United States passed the world’s first national whistleblower law in 1978, and the 117th U.S. Congress is now preparing the fifth generation for those rights.

The Directive requires several layers of review. Competent authorities must review channels for effectiveness, at a minimum of every three years and make appropriate modifications. (Art. 14) Member States must submit to the Commission “all relevant information regarding the implementation and application of this Directive,” which will provide the basis for public reports to the European Parliament within four years on the Directive’s impact, and recommendations within six years for modifications. [Arts. 27(1), (3) and (4)]

**Assessment:** Noncompliance Section 13(b) of the legislation creates a new article 10(7) that requires WRU’s to assess the effectiveness of their procedures every three years. There is no corresponding requirement for an overall assessment of the law’s record for submission to the EU.

**Recommendation:** The legislation should be expanded for review of the law, not just individual WRU self-assessments. The latter are no substitute for the Directive’s requirements.

**Malta: Scoresheet**

	<b>Best practice criteria</b>	<b>Score</b>
1	Comprehensive horizontal rights harmonized to include the same standards for breaches of EU Directive and national laws.	Substantial compliance
2	Broad whistleblowing disclosure rights with no loopholes.	Noncompliance
3	Wide subject matter scope within EU competencies.	Substantial compliance
4	Protection for those associated with or assisting the whistleblower.	Substantial compliance
5	Protection for non-employees who report work-related information.	Partial compliance
6	Reliable identity protection.	Substantial compliance
7	Protection against full scope of harassment.	Substantial compliance
8	Shielding whistleblower rights from gag orders.	Substantial compliance
9	Right to a genuine day in court.	Substantial compliance
10	'Merits test' to qualify for protection.	Partial compliance
11	Realistic standards to prove violations of rights.	Noncompliance
12	'Make whole' compensation.	Substantial compliance
13	Interim relief.	Substantial compliance
14	Coverage for legal fees and costs.	Noncompliance
15	Personal accountability for reprisals.	Substantial compliance
16	Institutional whistleblower channels.	Partial compliance
17	Whistleblower enfranchisement.	Substantial compliance
18	Education and outreach.	Substantial compliance
19	Transparency.	Noncompliance
20	Review.	Noncompliance

**Compliance Score: 13.5/20**

CASE STUDY

## EU Whistleblowing Monitor

### Whistleblower Protection law driven by civil society: The French Case<sup>22</sup>

On 16 February 2022, the French parliament passed a new law on the protection of whistleblowers. This law, which implements EU Directive on the protection of reporting persons, goes further than the minimal standard set by the Directive to include international best practices, making it the most ambitious transposition in the European Union at the present time.

#### Background

One of the specificities of the new law resides in the fact that it did not originate from a government initiative. The law was indeed introduced by a member of parliament (Sylvain Waserman) in strong collaboration with civil society (30 organisations gathered around Maison des Lanceurs d'Alerte, a French whistleblowing NGO). Civil society and Mr Waserman started work on whistleblower protection in the context of the Parliamentary Assembly of the Council of Europe's 2019 Report on the protection of whistleblowers,<sup>23</sup> which encourages member states to go further than the minimum standards set out by the Directive and include international best practice principles for whistleblower protection.

Both civil society and Mr Waserman then worked on drafting provisions of the law and advocated together, trying to convince the government, independent bodies (DDD, CNCDH) and other MPs that transposition should be, not only quick and thorough, but should also go beyond the required provisions of the Directive and meet these international best practices.

On 17 November 2021, the law was unanimously adopted during its first reading in the National Assembly. From December 2021 to end of January 2022, the French Senate tried to strike down the more progressive provisions of the law, but finally gave up in the face of the strong united voice and mobilization of civil society

#### A broad scope of protection for whistleblowers and NGOs

The law, which formally passed on 16 February 2022, is characterized by its particularly broad scope of application in contrast with laws in other countries. Articles 1 and 2 of the Act specify that not only are employees protected, but also any natural person who reveals or reports violations of the law or international commitments, or indeed any threat to the public interest. The definition of whistleblowing in France's current legal framework under the 'Sapin 2' law - already considered the broadest in the world - has been maintained, even though the Directive only applies to persons who (1) disclose or report information on violations of EU law; and (2) where there is a work-based relationship.

Similarly, while the Directive only requires protection of natural persons who facilitate or assist whistleblowers as well as related third persons and entities that the whistleblower owns, "the Waserman law" also applies to any NGO that acts as a facilitator. This means that those who assist whistleblowers by offering them support, and in particular legal support, are offered the same level of protection.

<sup>22</sup> This chapter is written by Jean-Philippe Foehle, PhD candidate and researcher on whistleblowing legislation and Country Editor for the EU Whistleblowing Monitor. First published in the EU Whistleblowing Monitor. Accessed online on 18 April 2022: <https://whistleblowingmonitor.eu/blog.php>

<sup>23</sup> Parliamentary Assembly of the Council of Europe, *Improving the protection of whistle-blowers all over Europe*, Resolution 2300 (2019). Accessed online on 18 April 2022: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28150>.



Finally, whilst in most other jurisdictions, military personnel are excluded from whistleblower protection, in France they will now be afforded the same level of protection as other civil servants, so long as they do not disclose information that may harm national security.

### Robust protection standards

The new law also sets out mechanisms of protection that go far beyond the Directive's minimum standards.

### Anti-SLAPP provision

Firstly, the new law provides financial aid for whistleblowers who are victims of SLAPPs – or 'Strategic Litigation Against Public Participation'. These lawsuits are intended to intimidate persons and prevent them from speaking up. In these cases, or in situations of retaliation in an employment context, such as dismissal, layoff, etc., whistleblowers may be granted financial assistance. Article 5 of the law states that, where a whistleblower can make a prima facie case that they have been victimized, or subjected to a SLAPP suit, they make an application to a judge, who has the power to force the organization to provide substantial funding to cover legal fees and, where relevant, funding to cover their living expenses where their financial situation has deteriorated. In addition to that, regulators are required to provide financial and psychological assistance. The judge can also require the organization to provide the whistleblower up to 5000 euros to help them pay their vocational training fees.

### Immunities from criminal liability

Secondly, whilst the Directive provides that whistleblowers shall not incur liability in respect of the acquisition of, or access to, the information which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence, the new French law goes further. It provides wider immunity for whistleblowers

who cannot be sentenced for any offenses committed to gather proof that a breach or harm to the public interest has occurred, if they became aware of it "in a lawful manner."

To use the example provided by Mr Wasserman, "no one has the right to put microphones in the office of his boss to find out if there is something to be found and blow the whistle, but" if a whistleblower is shown a "report proving that a factory discharges mercury into a river, he/she has the right to steal it to prove the facts of which he/she has lawful knowledge."

### Sanctions and provision of assistance

The Wasserman law strengthens existing sanctions against those who retaliate against whistleblowers, whilst reinforcing the French ombudsman's ability to assist whistleblowers.

Whilst the Directive provides for effective, proportionate, and dissuasive penalties applicable to natural or legal persons retaliating against the whistleblower - without specifying which ones – the new law imposes criminal sanctions on those who retaliate: a sentence of three years of imprisonment and a fine of 45,000 euros can be ordered against those who victimize or discriminate against a whistleblower. In addition to this, judges may impose 60,000-euro fines on companies who take a SLAPP action against a whistleblower. Whistleblowers can also use class actions against their employer when they are discriminated or victimized.

Finally, the French Ombudsman - 'Défenseur des Droits' - has had its powers to assist whistleblowers strengthened. It can make investigations, file third-party interventions, and make recommendations. It can also certify that the whistleblower meets the criteria to be protected, to help him/her access the various support measures and services now available.

## Inhibiting Malta's Ombudsman

The Maltese law that purports to protect whistleblowers, even as amended, cannot in practice work in most cases as the entity identified to receive external disclosure is prevented by other legislation from fulfilling that responsibility.

The Ombudsman has commented on this in the office's report of 2019 where it lamented on the consequences of the failure of the authorities to consult the Ombudsman on legislative initiatives that would have an impact on its operations.

The following is our translation of an extract from the Ombudsplan for 2020.<sup>24</sup>

### “NEGATIVE CONSEQUENCES DUE TO LACK OF CONSULTATION

On the other hand, an example of the negative consequences that the Ombudsman Institution may suffer for lack of consultation is the way in which the Ombudsman was involved as a prescribed authority to receive external disclosure when the Act on the Protection of the Whistleblower Act (Chapter 527 of the Laws of Malta) was first adopted. It entered into force on 15 September 2013.

Pursuant to Articles 16 and 17 of that Act, the Ombudsman as the authority to investigate external disclosure of protected information in the circumstances set out in the Act, shall set up a Unit to receive and process this information.

The Ombudsman, as a prescribed authority receiving external disclosure, receives reports involving:

1. conduct on a substantial risk to public health and safety or the environment, which, if proven, would constitute a criminal offense; and
2. any other matter which constitutes improper practices, and which is not intended to be reported to any other authority.

This Unit, set up by the Ombudsman within his Office to process reports on disclosure of information, serves as a filter to determine whether the disclosure received should be referred for further investigation by the Office of the Ombudsman or by some other authority or not.

### DIFFICULT SITUATION

This development may put the Office of the Ombudsman in a difficult situation because the functions it is expected to perform

<sup>24</sup> Uffiċju tal-Ombudsman Parlamentari, *Ombudsplan 2020*, September 2019. Accessed online on 18 April 2022: [https://ombudsman.org.mt/wp-content/uploads/2019/10/Ombudsplan-2020\\_WEB.pdf](https://ombudsman.org.mt/wp-content/uploads/2019/10/Ombudsplan-2020_WEB.pdf)

under the Whistleblower Protection Act are extraneous to those he is called upon to exercise under the Ombudsman Act. Suffice it to say that under the Law on the Protection of Informants, the Ombudsman is given the function of investigating private entities when their function in the Ombudsman Act is expressly limited to acts of public administration.

Therefore, the broad powers of inquiry and access to the relative documentation granted to the Ombudsman under the Ombudsman Act are limited to the general public administration and to the public sector in general. It does not appear that the Ombudsman and the Unit set up by him to investigate reports of disclosure of information can exercise these powers in the exercise of their functions under this Act.

The question also arises whether officials in the Ombudsman's Office can be prosecuted before the Court under the Whistleblower Act. It appears that while the Ombudsman and each member of his Office cannot be summoned to testify in court and in any other proceedings of a judicial nature in connection with information obtained during inquiries, it does not appear that these the same officers are thus protected in respect of information which they have acquired in the exercise of their functions under the Informer Protection Act. This Office had to deal with such a situation before the Courts last year.

Above all, there is a question of principle regarding the intrinsic nature of the Ombudsman Institution under Maltese law which seems to have been ignored when the Whistleblower Protection Act was approved. Both the Constitution and the Ombudsman Act explicitly state that the Ombudsman is an institution whose function is to investigate any action taken by him or on behalf of the Government or an authority, body, or other person for whom the Ombudsman Act applies, provided that such action is taken in the performance of their administrative functions.

(...)

The Ombudsman should have the power to interview and request written explanations from officials and authorities, and moreover, pay particular attention and protection to whistle-blowers within the public sector.

#### COMMENT

The 1995 Act, as amended, gives the Ombudsman and the Commissioners working in their office very broad powers to conduct their inquiries, in full knowledge of the relevant facts and in compliance with the principles governing due process. The Act has several articles covering all the powers that the Ombudsman should have, in accordance with this Principle, to exercise their functions properly.

They have the right to summon witnesses and hear them under oath and demand that they be produced in documents and anything else they deem necessary for the investigation.

These powers are so broad and categorical that even the principle of a right that an authority may refuse to provide information or produce documents because this may be detrimental to the public interest does not apply to investigations by this authority.

This is except in exceptional cases where the Prime Minister certifies that such evidence could affect the security, defence of Malta, would be seriously detrimental to the national economy, involves the disclosure of proceedings and discussions in Cabinet or prejudice criminal offense investigations.

The Act imposes severe penalties, from fines to imprisonment, for those who refuse to comply with the summons and orders of the Ombudsman and Commissioners. It does not, however,

provide for procedural rules as to how this process to the detriment of the authority of the Ombudsman should be conducted expeditiously and confidently, before a competent Tribunal, preferably at the request of the Ombudsman or a Commissioner. It is important that any challenge to the authority of the Ombudsman's Office is sanctionable and enforceable in an effective and expeditious manner.

The Ombudsman Act does not explicitly provide for the protection of whistle-blowers within the public sector. There seems to be room for amendment in this regard. The protection of the whistle-blower in the public sector is reserved in terms of the Whistleblower Protection Act (Cap 527 of the Laws of Malta) to the External Disclosure Whistleblowing Unit within the Government of Malta. This means that while the Office of the Ombudsman has jurisdiction to investigate a complaint of maladministration submitted to them by a whistleblower, it cannot extend the protection that the Whistleblower Act provides for protected disclosure under Whistleblower Protection Act. The Ombudsman will then in that case, as a rule, address the complainant to seek the protection which may be afforded to him under that Act.”

The changes made to the Whistleblower Protection Act in 2021 should have been an opportunity to address this serious flaw in the law. However, the Ombudsman was again not consulted about the changes despite the public remarks published in 2019. The following is our translation of remarks made by the Ombudsman in his Ombudsplan for 2021.<sup>25</sup>

“No consultation from the Government

The same cannot be said for the Government's consultation with the Ombudsman and the Office in drafting the bill which will eventually be submitted to the House of Representatives.

Inexplicably this was simply non-existent. After the Government indicated a reaction adopting and implementing the recommendations of the Venice Commission in its First Opinion, the Office requested on several occasions a copy of the bill which was to be brought before the House of Representatives.

The Ombudsman had no response to these requests. Requests that were made again even with the Clerk of this House after tabling the First Reading of the Bill. The Ombudsman only became aware of the amendments proposed by the Government to implement the recommendations of the Venice Commission when the draft was published. A publication made a few days before the debate took place. The Ombudsman would be failing if he did not record his disappointment at this complete failure of consultation. This is to prevent such incidents from happening again.”

<sup>25</sup> Uffiċju tal-Ombudsman, *Ombudsplan 2021*, September 2020. Accessed online on 18 April 2022: <https://ombudsman.org.mt/wp-content/uploads/2020/09/Ombudsplan-2021.pdf>.



## Our aspirations

Malta has a poor record of law enforcement of crimes, particularly financial crimes connected to bribery and corruption. This is both a public sector challenge (corruption involving government ministers and senior public officials) and a private sector challenge (crimes connected to Malta's financial services, gaming, and other industries).


Malta also has a poor press freedom record and an element of that is the risk to whistleblowers when providing information to journalists that would expose wrongdoing.

Given the very public experiences of Jonathan Ferris and Maria Efimova, it is likely that potential witnesses of wrongdoing have remained and will continue to remain silent - preferring to cover up crimes rather than expose them and risk retaliation.

The weaknesses of the legislative framework, as well as a political and administrative culture which appears hostile to whistleblowers, risks contributing to a culture of impunity, which can be exploited by criminals.

To summarise again, Repubblika and the wider whistleblowing protection community want to see Malta:

- ▶ ***Adopt a robust Whistleblower protection framework that provides legal safeguards for potential witnesses. This will require substantial and substantive changes to existing legislation that will ensure, inter alia:***
  - Protection of whistleblowers even when they breach their employer's procedures on restricting or disclosing information;
  - Equal protection of soldiers, police officers, and other members of disciplinary forces on the same terms as any other civil servant;
  - Extending protection to suppliers and external contractors;
  - Improvements to the protection of the whistleblower's confidentiality;
  - Resolution of ambiguities that risk punishing whistleblowers if the information they supply does not prove correct;
  - Protection of whistleblowers from retribution and confirming that it is for their employer to prove that any action they took against the whistleblower's interests was not an act of retribution;
  - Compensation to whistleblowers that covers all costs they have suffered;
  - Payment of all the whistleblower's legal fees;
  - Appropriate punishment for employers who inflict reprisals on whistleblowers;
  - Availability of an impartial and independent external receiving unit for private sector reports from whistleblowers that is effective and compliant with all other legal requirements;
  - The opportunity for whistleblowers to comment on findings by a receiving unit on their report;
  - Transparent reporting of reports filed by whistleblowers and the consequential action taken;
  - Periodic review of the effectiveness of the legislative framework.

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- ▶ ***Provide a robust, independent, well-resourced, receiving agency or agencies for whistleblower reports that acts without any suggestion of interference from actors who may be negatively affected by the evidence provided by a whistleblower and free of any appearance of conflict of interest.***
  - ▶ ***Adopt a best practice framework for the protection of whistleblowers that satisfies all requirements of the EU Directive but also meets international best practice standards as recommended in the relevant Council of Europe resolution.***
  - ▶ ***Draw up effective incentives to overcome the manifest chilling effect that currently prevents any whistleblowers from coming forward with a focused effort to recruit civilians in a national effort to combat corruption and financial crime.***

To meet these aspirations, it will be necessary for the Maltese government, law enforcement and prosecution services, MPs, representatives of business bodies, trade unions, and professional associations - particularly the Istitut tal-?urnalisti Maltin [The Institute of Maltese Journalists]- to come together in an open dialogue to draw up a legislative package, and an actionable plan.

Apart from being a basic and fundamental right of persons who expose wrongdoing to not suffer negative consequences for having done so, it is also vital for our communities that potential witnesses of wrongdoing live up to their civic duty and are able act in a way that prevents any risk of harm from continuing, and ensures democratic accountability prevails.

As such, we renew our call on the Maltese authorities - addressed specifically to the Ministry of Justice of the government of Malta and to the two parties in Malta's Parliament - to commence, at the earliest available opportunity, discussions to adopt reforms which might, for the first time to date, yield the only result that matters - the successful prosecution of those who commit corruption related offences and other criminality, whose impunity can only be interrupted with the assistance of whistleblowers.