

Providing an Alternative to Silence:

**Towards Greater Protection and Support for
Whistleblowers in the EU**

COUNTRY REPORT: MALTA

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at www.transparency.org.

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Providing an Alternative to Silence: Toward Greater Protection and Support for Whistleblowers in the EU.

Country Report Malta

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1. Executive Summary

The small island Republic of Malta, EU member since 2004, has introduced whistleblowing legislation in the revised Employment and Industrial Relations Act (EIRA of 2002). Its Article 28 is titled “Victimisation.” Under this provision victimisation of employees who report illegal or corrupt activities of their employer or their representatives are illegal. Victimisation cases would be heard by the Industrial Tribunal with a chairperson sitting alone, Art 30 (3) EIRA. If so requested and satisfied with the merit of a claim, according to 30 (2) EIRA the Industrial Tribunal would be free to take such measures as it may deem fit and would normally order the payment of compensation for losses and damages sustained by the aggrieved party as a consequence of the illegal victimisation. At the same time, the Department of Industrial and Employment Relations would be in a position to institute criminal proceedings against an alleged perpetrator.

Victimisation therefore includes at least the infliction of losses and damages to an employee in relation with the reporting of illegal employer behaviour to competent authorities. Published cases of victimisation have not been found in the course of research for this study.

There is also an Ombudsman working under the Ombudsman Act of 1995, who under Sec. 13 of that law has the power to investigate in his own discretion, or, after a complaint to him and if he so chooses, most actions by most public bodies in their administrative functions, as specified in Schedule 2 of the Act. If in the course of an investigation, a complaint is discovered to have been warranted, the Ombudsman is

called to inform the head of the department or administration concerned of his findings and recommendations and if reasonable reactions do not follow within reasonable time, the Ombudsman may inform the Prime Minister of the Republic and afterwards the Parliament.

Since at least 2006, Parliament and public have further discussed the issue of whistleblowing. This eventually led to a 2010 proposal by the ruling Nationalist Party of an Act „Protection of the Whistleblower.“ The Bill has been due for a second reading in Parliament in October 2012 which elapsed. Numerous public statements in favour of the Bill from the Government side since its presentation seem insufficient, to have it actually voted on. Numerous candidly critical statement from the Parliamentary Opposition have not led to an opposition proposal. In the meantime, however, general budget issues and the next elections have taken centre stage and the Bill is almost certainly shelved until more serious political will arises.

This country report analyses the current legal status quo as well as the proposal for its merits. The 2010 Government draft profits from a broad definition of whistleblowers in both the public and the private sectors, even including volunteers in volunteer organisations. The protected disclosure needs to be based on good faith and reasonable belief in the truth of the reported information. This information needs to qualify as tending to show a defined „improper practice.“ For a disclosure to be protected, it may not be made for personal gain. The proposal calls for the function of an internal “whistleblowing reporting officer” to be installed by every employer, public or private. On a second tier, whistleblowers from the private sector may report to a handful of specified public bodies, whistleblowers from the public sector report to Corporate Governance Committee within the Cabinet Office. These office will establish “whistleblowing units”, but each only for specific subject matters and reasons.

Under this proposal retribution for whistleblowing is not permitted, except for measure which are „justifiable on the basis of performance“; or, „administratively or commercially justifiable.“ Also, confidentiality is largely under the discretion of the receiving officers. Anonymous reports may be investigated but they are not considered “protected disclosures.” Fines for any breach of the Protection of the Whistleblower Act reach up to 1,200 € and/or 3 months of incarceration.

2. Compilation, description and assessment of relevant laws

Maltese law is based on Roman Law principles, yet influenced by other legal systems, in particular by English Common Law. Thus much of Maltese commercial law has British roots, while financial services and large parts of administrative regulations are now based on European Union directives.

Malta had been a British Colony for more than one and a half centuries, and only became a Republic in 1974. Thus the laws of the Public Service were also based on British principles. A new Public Administration Act (2009) now accompanies a consolidated private sector Employment and Industrial Relations Act (2002). Both are obviously relevant for the subject of whistleblower protection.

The current Prime Minister¹ has been in office since 2004, standing for early re-election in March 2013. Nationalist (conservative) Party Governments have continuously been in power for about 20 years. In 2006 the Tonio Borg², then Home Affairs Minister, declared a specific law on whistleblowing to be “not indispensable”, because there were “enough laws giving immunity to whoever exposes corruption and other crimes” in Malta.³

2.1. The 2002 EIRA anti-victimisation legislation

The one retrievable Maltese law specifically referring to persons who expose alleged illegal or corrupt activities is the Employment and Industrial Relations Act (EIRA) of 2002. Under the title “victimisation” its section 28 stipulates the following:

28. It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.

Clearly this rule does not suggest to effect immunity (e.g. from prosecution). In itself it cannot even shield from any sort of behaviour, though possibly sanction it retroactively. The sanctioned behaviour is termed “victimisation.”

While the Act has a comprehensive section for definitions, the term “victimisation” is left undefined. Article 29, immediately following within the same section, bears the title “harassment.” Some of the harassment under Art. 29 is defined as a behaviour which brings someone else into the position of a “victim” by offending, humiliating or intimidating him or her sexually. While Art 28 and 29 are set up separately under different titles, and should not be confused, both speak of victims. Since harassment under Art. 29 is one particular activity which produces victims in the work space, a victimisation under Art. 28 cannot be less or narrower than the activities sanctioned

¹ Dr. Lawrence Gonzi of the Nationalist Party (Christian Democrats / Conservatives)

² Later to become Foreign Minister and at the time of writing of this study designated EU Commissioner for Health and Consumer Affairs

³ Quoted in MaltaToday from a Parliamentary Answer in Issue 338, of 30 April 2006:
<http://www.maltatoday.com.mt/2006/04/30/t5.html>

under Art. 29. It may therefore be assumed that acts constitute victimisation if they reach or surpass the threshold of discriminating against a person by (generally) offending, humiliating or intimidating him or her.

Either act of victimisation is treated as an offence according to EIRA Art. 32. The maximum fine is € 2,329.37 and/or up imprisonment for up to six months. According to the Maltese Ministry of Justice these sanctions prevail over other sanctions for victimisation under the criminal code.⁴ The Ministry stresses that a breach of Art 28 in itself “is first and foremost a criminal offence.” Criminal proceedings would be instituted by the Department of Industrial and Employment Relations.

Harassment and victimisation are sanctioned equally under EIRA, however in these cases the EIRA is subsidiary to other laws which may impose heavier sanctions, such as the Criminal Code.

However, victimisation under Art. 28 is only sanctioned, if it is effectuated

- for the “victim” having made a complaint to the lawful authorities or
- for the “victim” having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act [EIRA], or
- for the “victim” having disclosed information, confidential or otherwise, to a designated public regulating body,
- regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer’s name and interests.

As to the first alternative, the most relevant authority to complain to is the Malta Ombudsman, including its sub-section “Malta University Ombudsman.” The first alternative therefore sanctions mainly retaliation for addressing the Ombudsman and other complaint bodies. It is probably lawful (in the sense of “not illegal,” not per se prohibited) to make a complaint to any public authority. However, making a complaint to the police or investigative bodies would arguably fall under the third alternative. The second alternative will only be relevant for specific breaches of labour relations.

The third alternative explicitly refers to illegal or corrupt activities as object of reports. Prima facie it provides a broad definition of whistleblowing subject matter, because it simply requires

- the disclosure of information;
- regarding activities;
- committed by the employer or someone acting for him;
- alleged to be illegal or corrupt;
- if this information is provided to a designated public body;
- but regardless whether this information is confidential, or not.

At a closer look, this means, that acts of persons who are not employer (who usually is a legal person) or one of its organs (acting in name and interest), cannot be subject of a protected disclosure. Acts of colleagues are usually not protected object of a disclosure. The stipulation needs to be construed in such a way that it suffices if these acting persons usually have a role to act in the name and interest of the employer. Acts to be disclosed will usually not be committed in the (true) interest of the employer. Therefore the

⁴ In a written reply to a number of questions posed to the Minister by the author of this study, sent by the Ministry Policy Co-Ordinator, on Dec. 6, 2012.

stipulation would be void if understood to comprise only acts in the interest of the employer.

However, the context of the law, Employment and Industrial Relations, as well as the available procedures at the Industrial Tribunal, let it seem convincing that even complaints under the first alternative of the law need to be related to employment issues.

Under alternative (3) disclosures are only protected if they are made to the designated public body. Private bodies (e.g. the media) are clearly excluded, but probably also those bodies which are not designated as recipients for this particular type of information – which places a heavy burden on potential whistleblowers.

After having decided to complain, having made a complaint and thereupon feeling victimised by the employer, other rights notwithstanding, a person may then lodge a complaint to the Industrial Tribunal. This “Industrial Tribunal,” according to EIRA Art 73 (2a) and (4) eventually will be an advocate of no less than seven years of experience appointed by the Minister of Justice after consultation with the Malta Council for Social and Economic Development. After hearing the complaint, the Industrial Tribunal would be free to carry out „any investigations as it shall deem fit“ (Art 30 (1)).

In the ideal case – that is

- if a complaint has been lodged for victimisation within the four months period after the act stipulated in Art 30 (1) and
- the case has been investigated “as deemed fit” by the Industrial Tribunal,
- the experienced advocate acting as Chairperson of the Tribunal may or may not decide that the employee’s rights were breached in such a way that he or she was “victimised.” If they were breached by the employer, there may be sanctions of a fine up to 2,329.87 € and/or 6 months incarceration.

Unfortunately, as the microscopic Permanent Commission against Corruption, the generic investigator in Malta, who in the 25 years of its existence has confirmed but one suspicion of corruption, there have been few complaints of victimisation under Art. 28. In the words of the Ministry: “Since 2002, the Industrial Tribunal has never heard and decided any cases alleging a breach of article 28 as such.”⁵ However, while the Ministry assumes the issue could be resolved by raising awareness of the existing legislation and institutions, above remarks ought to suffice to prove that the citizens are likely aware of the general tone and effectiveness of this legal infrastructure, which forbids whistleblowing.

Summing up, the claim of “immunity” for whistleblowers made by the former Maltese Minister for Home Affairs seems unsustainable under the current legislation. Art. 28 may be relevant for persons in labour relations, specifically employees complaining about contraventions of the Employment and Industrial Relations Act itself; to some extent also for complaints to public bodies about the illegal or corrupt behaviour of their employers and/or employer representatives. While there are no (other) incentives for such complaints and no protections against retaliation, in view of the maximum fine of 2,329,87 € sanctions of victimisation are marginal. Effectively, there is neither procedure nor protection potential whistleblowers could rely on. Consequentially, no information is available on any Industrial Tribunal decisions regarding an allegedly victimised employee under EIRA Art 28.

⁵ In same Dec. 6, 2012 reply of the Ministry of Justice.

2.2 The 2009 Public Administration Act

The Public Administration Act of 2009 indirectly confirms the universal applicability of EIRA Art. 28 in its own Articles 31 and 33.

According to Art 31 (1) Public Administration Act, a „Public Service Commission“ is tasked to ensure within the limits of its powers under articles 33 and 34 of that Act, that

- no public officer is *victimised*;
- *for making any report* to his superior, to the Commission, or to another relevant authority;
- *about any breach* of the Code of Ethics or *of any other provision* of this or *any other Act*.

This provision shows that

- public officers are permitted if not encouraged to report illegal and unethical acts
- to the relevant authorities, their superiors, or the Public Service Commission.

If public officers decide to make such a report, they should not be victimised for it, and the Public Service Commission should ensure that victimisation does not happen.

In relation to Art 28 EIRA this provision seems both special and subsidiary. Special, because it only applies to public officers; subsidiary, because it does not limit what public officers may do or expect under Art 28 EIRA, but additionally provides (only) public officers with a legal instrument for the prevention of victimisation. Recourse to Art 28 EIRA still seems possible. What is “illegal” under Art 28 EIRA is even to be prevented in the Public Administration by Art 31 (1) – within the limits of Art 33 and 34 Public Administration Act.

Art 31 (2) goes even further by stipulating an obligation of the Public Service Commission to give recommendations for redress to the Prime Minister, in case the Public Service Commission was unable to prevent victimisation or provide redress of its own device.

Art 33 (3) of the Public Administration Act limits the remit to matters which *have not* been assigned to the Industrial Tribunal. Since claims of (actual) victimisation *have* been assigned to the Industrial Tribunals, there is no competition between the EIRA and the Public Administration Act, or the Industrial Tribunal and the Public Service Commission for that matter. However, according to Art. 33 (3), further, the Public Service Commission may investigate any actual or likely victimisation, when a formal complaint has not (yet) been lodged. It may also follow up on the decisions of the Industrial Tribunal and thus facilitate their enforcement. For the purpose of its functions (hearing and investigating complaints, acting where no formal complaint has been lodged) the Commission has powers partially like that of a Court (summoning parties, taking oaths, requesting documents) and like the police (entering premises).

The Public Administration Act therefore constitutes an additional potential element for the protection of public officers as whistleblowers. It does not in itself provide additional or special rules on the act of whistleblowing as such.

2.3. Other existing laws

In many legal systems administrative laws, especially acts relating to health, safety and the environment, contain a duty or a right to report, and from time to time protections for

those thus charged. One Maltese example of such regulations is the Occupational Health and Safety Authority Act⁶ Its Article 13 stipulates in sub-article 7

13 (7) Workers and the workers' representatives may not be placed at a disadvantage because of any activity taken pursuant to any matter relating to the protection of occupational health and safety .

It seems that this rule is not supported by any reporting procedures. On the contrary, the preceding clauses clearly reduce workers to a passive role. Neither are there sanctions, nor a body or authority responsible for ensuring protection.

This should be seen as a gap, which a (new) law on whistleblowing should fix. The Ministry confirms that there are no provision granting immunity to whistleblowers in Maltese Labour Law. However, such provisions should be expected in Criminal Law. Apart from dubious rules regarding a pardon, there seems to be another gap. The “pardon” (for “crown witnesses”) has recently been discussed publicly, when the Prime Minister granted his Pardon to a witness (and allegedly participant) of corruption and procurement fraud (ENEMALTA). It has been questioned how far such a pardon goes (certainly no further than specific criminal sanction and not civil law damages), and whether such a pardon should be granted by the President or by Parliament rather than the Prime Minister – of a Government whose Minister might also be involved in the alleged dealings.

2.4. The 2010 NP Draft Bill⁷ “Protection of the Whistleblower”⁸

Despite its declared dispensability, in 2010 the governing Nationalist Party introduced a proposal for a Bill “Protection of the Whistleblower” and promised to enact it with priority.⁹ On several occasions, the Labour opposition, has vowed to promote effective legal protection for whistleblowers by way of a new law¹⁰ – thereby incidentally declaring the existing law to be ineffective¹¹ and the Government draft to be unacceptable.¹² While these mutual intentions have been debated and reiterated on several occasions, they seem to preclude collaboration on the issue. The most recent media reports raise doubt about any further steps before the next elections, which need to be called before October 2013.¹³

⁶ CAP. 424, LN 36 (2003)

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=18311&l=1>

⁷ The 30 bi-lingual pages of this 2010 draft of a Bill N. 58 have been made available for download at the Archives of the Maltese Department of Information: <http://www.doi-archived.gov.mt/en/bills/2010/Bill%2058.pdf>

⁸ The title in Maltese is "(DWAR IL-PROTEZZJONI TA' MIN JIŻVELA INFORMAZZJONI LI TKUN PROTETTA can literally be translated about as follows: „on the protections of those who disclose information to be protected“)

⁹ As declared 2010 by the Prime Minister in several public statements, as reported in Malta Today of 21 September 2010 „VIDEO | Government moving to enact Whistleblowers Act - Lawrence Gonzi“

¹⁰ with news reports dating back at least to 2006, the last one being recorded on 27 Oct. 2012:in Malta Today „Joseph Muscat promises whistleblower act“

¹¹ so, explicitly, Hon. Helena Dalli (shadow minister for public administration) in a 02 Sept. 2009 Malta Star article: „Urgent need for Whistleblower and Disclosure Acts“

¹² Former Labour Prime Minister Alfred Sant is quoted in a Malta Today headline of 28 Nov. 2010 „Whistleblower's Act is 'Bullshit'“

¹³ Art.22 states clearly that the Act will not have retroactive applicability – which has occasionally been presumed as one reason for continuous postponement. However, the Prime Minister at one point declared, the Law would be fully retroactive, so that this point may still be fluent, in Malta Today, 30

The aim of the 2010 draft,¹⁴ was to provide procedures for employees in the private and the public sector for disclosing information regarding improper practices by their employers or other employees of their employers, and to protect employees who make said disclosures from detrimental action.

In the notable absence of any other drafts, the Bill “Protection of the Whistleblower” can be tested against its promise

- to provide procedures for employees for disclosing information regarding improper practices in their workplace; and
- to protect those who make such disclosures,

and then, in how much this complies with TI benchmarks. The draft contains an Art 2 (3) excluding the “disciplined forces” and the “Secret Service” from its applicability until the Minister of Justice has set up rules to which extent the Bill may be applicable.

2.4.1. Procedures for Disclosure

Part III of the Bill deals with disclosures, starting in Section I with the definition of a protected disclosure. Sections 2 and 3 provide routes for internal and external disclosures.

As for the internal disclosures, Part III, Section 2, Art. 12 obliges every employer, completely independent of size or form to identify at least one person within the organisation, to whom a protected disclosure may be made. The draft refers to this person as the “whistleblowing reporting officer.” Internal procedures, which every employer, according to the Act, must have in operation, must state how the whistleblowing reporting officer receives information about improper practices and then deals with it, so that the purpose of the Act is met.

According to Art 12 (2) information about the existence of the internal procedures, and adequate information on how to use the procedures must be published widely within the organisation and must be republished at regular intervals.

Art 12 (3) establishes that internal disclosures are a protected disclosure only if they are made substantially in the manner established by the employer’s internal procedures. Additionally, according to Art. 11 anonymous disclosures are not protected. Still, if the whistleblowing reporting officer decides to receive such a report, as he may under Art 11 (2) his regular obligations apply – including the protection of the identity of the whistleblower according to Art. 6.

Art. 14 provides a secondary internal reporting channel to the head or deputy head of the organisation, if the prescribed reporting procedures do not exist, have not been published, or for specific reasons it seems inappropriate to report to the internal reporting officer.

Art. 15 incidentally defines (external) disclosures to certain public institutions as protected, if the whistleblowers has previously made the same disclosure internally, or has previously attempted to do so.

Art. 16 provides exception for cases in which a whistleblower may address the external institution directly. If the whistleblower reasonably believes

- the head of the organisation to be involved in the improper practice,

Sept. 2010, PM unveils Whistleblowers Act, announces anti-corruption 'special investigator', <http://www.maltatoday.com.mt/en/newsdetails/news/national/PM-unveils-Whistleblowers-Act-announces-anti-corruption-special-investigator>

¹⁴ according to its introduction as well as its “Objects and Reasons” stated at the end of the draft

- the urgency or other exceptional circumstances justified the immediate reference to the external body;
- that he will be subjected to an occupational detriment by his employer if he makes an internal disclosure;
- that in case of an internal disclosure evidence may be concealed or destroyed;
- after an internal disclosure in a lack of action, or a lack of information on the employer's part.

Routing external disclosures from the public sector is simple: there is only one address: the Corporate Governance Committee within the Cabinet Office. For disclosures from the private sector there are five such public institutions enumerated exhaustively in the Schedule to the Bill. They each have their own exclusive remit in subject matter, but one of them, the Ombudsman may be approached with anything that has not been assigned to one of the other institutions. While the subject matter description for some of them may arguably be abstract enough to send prospective whistleblowers into limbo, it is clear enough that the three financial regulators listed are the recipients for disclosures with a financial background, whereas the Permanent Commission Against Corruption is certainly tasked with corruption issues – and the Ombudsman with everything else. Fortunately, according to Art. 18, one agency may refer a disclosure to the more appropriate one, without risking the status of protection.

If the external recipient deems an external disclosure to be inappropriate, according to Art 16 (4) it has to inform both the whistleblower and the internal whistleblowing reporting officer of the necessity to make an internal disclosure.

Finally, internal rules or private agreements, according to Art 21, will be void, if they attempt to derogate the protections granted under this Act, or gag the potential whistleblower.

2.4.2. Protection from Detrimental Action

Part II of the draft protects from detrimental action, essentially by prohibiting it. Part IV¹⁵ sanctions the prohibition.

Starting with the latter, while the act contains a number of obligations and prohibits, Part IV, Art 19, defines it as an offence to compel another person to do or to abstain from any act which the other person has a legal right to do or to abstain from doing under this Act. If there is a no legal justification for compelling the other and if this is done using enumerated forms of violence, including stalking and trespassing, this person is guilty of an offence and liable to pay a fine not exceeding € 1,200 (one thousand two hundred!) and/or a maximum of three months in prison – unless punishable more severely under any other law. Such other, stricter law could be the Employment and Industrial Relations Act, which sets up penalties twice as high, albeit for a differently defined offence.

So, if the sanctions seem to have a rather narrow applicability and arguably correspondingly narrow added value, what about the rules regarding the prohibition of detrimental action? Art 3 straightforwardly prohibits any person to be subjected to detrimental action on account of having made a protected disclosure. Importantly this

¹⁵ This Part is titled „Offences and Penalties“ and consists only of Art. 19

shall be so despite any other rules or laws restricting the disclosure of information. The only exceptions shall be the ones in the (draft) Act.

Art. 4 is difficult to understand, because, on the hand, it grants immunity to whistleblowers from any civil, criminal or disciplinary proceedings for having made a protected disclosure, whilst on the other, this shall only be so „notwithstanding the provisions of the Criminal Code or any other law. This clause therefor cannot be understood as a broad grant of immunity but rather as the opposite: the whistleblower needs to be aware that he or she remains fully liable for anything under any law, except that he cannot be persecuted for the protected disclosure as such – if then it is made in a protected way.

This is further clarified in Art. 5, according to which a whistleblower who has become a perpetrator or involved as an accomplice to the “improper practice” (which is obviously a much broader construct than an act alone) will be subject to criminal proceedings. Art 5 (2) explicitly states that there is no immunity from liability arising from own conduct.

Similarly, under Art 6 (1) the receiving side of the disclosures (whistleblowing reporting officers or whistleblowing units) theoretically may not disclose information which may lead to the identification of the whistleblower, UNLESS

- the whistleblower consented in writing; or
- the receiving side REASONABLY BELIEVES THAT DISCLOSURE OF THE IDENTITY OF THE PERSON MAKING THE DISCLOSURE
 - IS ESSENTIAL TO THE EFFECTIVE INVESTIGATION,
 - IS ESSENTIAL TO PREVENT SERIOUS PUBLIC RISKS,
 - IS ESSENTIAL HAVING REGARD TO THE PRINCIPLES OF NATURAL JUSTICE;
 - IS NECESSARY FOR THE PROSECUTION OF THOSE RESPONSIBLE FOR AN IMPROPER PRACTICE:

While these cases literally and objectively may be relatively rare, and while they need to be construed narrowly – as exceptions; the requirement merely of a “reasonable belief” means effectively that there are no bounds for the disclosure of the identity in any case and at any time.

However, the communication, internally or with other public or private institutions, is restricted under Art 6 (2) and (3). Typically any communication will only be permitted, once the investigations have been concluded. If heeded, this will protect the identity of the whistleblower to some extent, while it may be complicating some investigations.

Art. 7 grants a full day in Court, Art 7 (6) even waives registry fees for the person who reasonably believes to be subject of detrimental action. While Art. 7 only mentions orders and injunctions against the person who caused the detrimental action (will that ever be the employer?), there is nor reason to assume other charges under regular civil procedures to be precluded. Insofar Art 8 only states the obvious: anyone who may have suffered detrimental action as a result of making a protected disclosure, may claim compensation for any damage caused. This clause clearly lays the burden of proof for all facts justifying the claim upon the whistleblower, in particular for the causation of the damage and that the detrimental action was a result of making a protected disclosure.

Finally, Part 1 of the Bill contains mainly definitions, some straightforward, some a bit surprising. “According to Art. 2, occupational detriment, for example, is defined in such

a way, that it strongly influences the function of “whistleblower protection.” Thus being suspended, demoted or dismissed is not a detriment in the sense of the Bill if “administratively or commercially justifiable for organisational reasons.” Same for transfers and promotions. Similarly, being refused a reference or being provided with an adverse reference is not considered a detriment, as long as it is “justifiable on the basis of performance.”

2.5. The 2012 Partit Laburista Views

The Parliamentary opposition formed by the Labour Party¹⁶ has called for effective whistleblower protection at least since 2006. The latest such call was voiced by the current Party Leader, Joseph Muscat, in a statement of 28 October 2012, emphasising the intent to quench political corruption by such measures, at a time when Malta was irritated by the demission of its EU Commissioner, John Dalli. The causa Dalli does not seem fit as a test for appropriate whistleblower legislation, because at the time of writing of this study, it is still extraordinarily unclear, who set out to corrupt whom for which purpose, and who caused whom to interfere by which means and to which final aim. On top of that, the Labour opposition has not come public with its own proposal. Therefore neither testing nor benchmarking is possible. However, the Dalli intricacies may serve to set up a list of minimum requirements and desiderata for a democratic political culture to counter political corruption and restore trust in democratic governance:

- a personally accounted for, conclusive, continuously updated list of lobbying contacts of political deciders (Parliament, Government, Administration) on the international (EU, UN etc.), national and regional level, which needs to be publicly available (e.g. on the internet);
- a similar list of all their extra sources of income (if any);
- a list of all known active parties and/or their associations or lobbyists who are possibly affected by pending legislation, accounted for by the head of the administration or other public service;
- a moderated forum to discuss information on these lists publicly or privately (risk communication, or non-escalated “whistleblowing”) with the purpose of making publicly accounted for suggestions to make alterations/amendments/deletions or re-interpretations to these lists;
- a prohibition to earn income in markets affected by the political decision making upon leaving the public office and for a reasonable time afterwards (e.g. four years); this prohibition should include contracts through middlemen as well as indirect rewards such as for public speaking, book contracts etc.
- therefore also a duty to lay open assets before during and after holding public office, as well as to lay open non-public sources of income for a certain period of time after leaving public office;
- a Freedom of Information Act and a Freedom of Information infrastructure facilitating the reciprocal information rights of the public;
- a duty of heads of governments, Parliamentary groups and administrations to react upon receipt of information regarding the respective duties;
- fair and effective reporting channels if relevant information or input into these systems may not have been used in a fully compliant manner. These channels need to include by-passes in a tiered system modelled after the tiers of the UK Public Interest Disclosure Act,

¹⁶ Malti Partit Laburista

which eventually facilitates external reporting wherever it may make a difference, including to the media.

3. Perceptions and political will

The current situation is viewed as ambiguous. While some contest the need for more whistleblower protection, others are frustrated with the practical lack of any substantial protection under the current legal practice. Regarding popular attitudes to whistleblowing legislation an opinion reported in *The Times of Malta* of Friday, April 18, 2008,¹⁷ titled “Deterring corruption” may be taken as representative: “Almost 70 per cent of those who voted in this week's online poll at timesofmalta.com believe that a Whistleblower Act will deter corruption and abuse, and I guess any other illegal act. Unfortunately, this is an ingenuous interpretation of reality. Laws do not ensure deterrence. Only the court sentences and penalties would. Being consciously illegal in their acts does not discourage criminals. Stricter laws may force them to exercise more caution and diligence.”

Generally and for obvious reasons, whistleblowing cannot be observed on a regular basis in Malta. Four recent prominent cases may be worth mentioning, all of which would be considered atypical internationally. A 2012 case involved alleged conflicts of interest and undeclared business interests of the Maltese member of the OLAF supervisory board. The 72-year old whistleblower was arrested and his assets frozen for about 48 hours. A 2013 case quickly led to a Prime Ministerial Pardon for a person involved in alleged energy procurement corruption. Then there is the former auditor of the Environmental Protection Agency, who was eventually left without staff and virtually without budget after criticising zoning and building permits. Finally a Nationalist Back Bencher frequently made the headlines in 2012 reminding the Government (and his own Party) of promises, all concerning Good Governance, Party Financing and Anti-Corruption. He was denied the opportunity to challenge the coming elections on a Nationalist Party ticket, while his substantial complaints never received a satisfactory response.

Under the strict two-party system and with a governing party in power for about twenty years, many seem to suspect that corruption is rife and unavoidable,¹⁸ even in the Justice system, but in any case in Party Politics.¹⁹ There have been 13 indicted cases of corruption in the Ministry of Transportation.²⁰ Many politicians have been accused of corruption – rhetorically – habitually not in Courts.²¹ However the Permanent Commission against Corruption, established 1988, has experienced but a small, yet further dwindling number of reports and hence investigations.²² Former EU Commissioner Dalli was cleared of such allegations years ago and once again believes to be a victim of entrapment as he was forced to resign from the Commission. GRECO has criticised anti-corruption policies and institutions in Malta, and in particular party

¹⁷ by George Caruana

¹⁸ Matthew Vella, online editor of *Malta Today*, in “Corruption in Malta unavoidable – blame business and politics,” 15 Feb 2012

¹⁹ Hon. Dr. Helena Dalli “Political connections rule over meritocracy” quoted in the *Times of Malta*, 24 March 2011

²⁰ “13 accused of bribery at Austin Gatt’s Ministry”, *Malta Star* 29 Oct 2012

²¹ In “Institutional corruption vs corruption”, *The Times of Malta*, Friday, August 3, 2007, <http://www.timesofmalta.com/articles/view/20070803/opinion/institutional-corruption-vs-corruption.9274>

ex-Trade Union leader Michael Seychell writes “despite rampant corruption involving millions of liri during the 1970s and 1980s, the only person accused of corruption was a whistleblower who had himself informed the police he had to bribe a minister to obtain an import licence!”

²² one per year of late, with a total of about 400 in all the years and supposedly less than a handful of confirmed corruption cases.

financing. A prominent politician of the governing Nationalist party insists on the resignation of the Minister of Transportation and has requested to see the Party finances.²³ These are alleged to be doted by entities profiting from successful public tenders.²⁴

The Prime Minister has explicitly shifted²⁵ his support towards more effective legislation.²⁶ His Government's proposal has been tabled since 2010. However, invisible powers seem to keep it from being voted on. The Parliamentary opposition (Labour) has made a promise for effective whistleblower protection as a measure to counter political corruption.²⁷

A major public criticism against the Government proposal is the fact that it hasn't been enacted in years.²⁸ However it is also rightly feared that the new proposal could act as a trap for whistleblowers. In fact, while some of the clauses in the Act are quite promising, others are forbidding. Those who have read the proposal carefully, in spite of its title, would come to doubt whether the intention of the law was actually the protection of whistleblowing (or whistleblowers) – or rather to protect information from whistleblowers.

The proposed law takes a commendably neutral approach at “whistleblowing” by using the Maltese word for disclosure (“vela”) and to disclose (jiżvela). Others have argued that in Maltese there is the word denunzjatur for whistleblower and denunzja for whistleblowing, or akkużatur and akkuża.²⁹ Without explanation or translation, it will seem obvious to the English reader that neither accusing (or complaining) nor denouncing fit what is meant by the term “whistleblowing.” If these words are used in spite, it shows a lack of understanding for the necessary contribution of whistleblowing.

Unfortunately, the intention of the draft law are as ambiguous and difficult to analyse as the diverse interest in the Dalli Saga.

As a footnote, it should be noted that a rather early whistleblower was of Maltese origin: Stanley Adams who reported Roche vitamin price fixing schemes to the European Economic Community.³⁰ Swiss authorities arrested him as a spy. His wife committed suicide, when she was told that her husband could face a 20-year jail term for industrial espionage. After serving a few months in a Swiss prison it took him more than 10 years in European Courts to eventually get some compensation.

4. Strengths, weaknesses and recommendations

Even the current legal situation in Malta has some strong and even commendable elements. Illegal and corrupt behaviour can be reported internally or to the authorities and victimisation is illegal. Generally all employees should benefit from this rule (EIRA

²³ Franco Debono quoted in Malta Star „They want war, they will have it.“ 03 Nov. 2012

²⁴ Wild allegations of a „donors“ list fueled by cash donations and the idea that only donations from non-members and only above 10.000 € per donation should ever be published.

²⁵ „shifted“ in so far as the current law had just been passed by the previous Nationalist Party Government in 2002, and the Home Affairs Minister of the current Prime Minister had declared in 2006, that more whistleblowing protection was dispensable.

²⁶ Lawrence Gonzi 2010

²⁷ Joseph Muscat, Oct. 2012

²⁸ crystallised in comments by the third largest Maltese party, Alternativa Demokratika

²⁹ Fr. Edmund Teuma in a letter to The Times of Malta, 5 Aug. 2008

³⁰ His fate and the lessons learned were represented in some detail by the former Novartis Chief Ethics Officer and UNGC chief executive Klaus M. Leisinger in his book „Whistleblowing und Corporate Reputation Management, Hampp, München, 2003“

Art 28). Even a National Ombudsman exists. However, victimisation is only illegal, if the victim can prove that the victimising acts have been performed for reason of his/her reporting. There is also a clear lack of guidance in procedures – which can only be guessed. More should be expected of the Public Service Commissions –obviously exclusively applicable to members of the public service. Here, the Commission can get active and investigate even before a formal report or complaint has been made. There is a direct route for recommendations to the Prime Minister. However, sanctions under the current law cannot be taken seriously. Unfortunately they shall be halved according to the proposal of separate Whistleblowing Law (maximum fine 1,200 €, three months prison).

Again, this draft bill (proposed in 2010) excels in its broad definition of whistleblowing and who is included. It also offers to other countries the worthy obligation for every employer to name a “whistleblowing reporting officer” and to publish rules of procedure. Some limited form of external reporting also exists. Unfortunately, the draft effectively permits any sort of “victimisation” as long as there are other good reasons for it. It also permits making the identity of the whistleblower public, as long as the receiving officer “reasonably believed” in the necessity to do so. This and the quasi non-existent sanctions for breaches put the draft in serious doubt. In the end, this draft improves some aspects of the current situation, actually the ones that are already acceptable or better, but worsens other aspects in a way that renders the whole exercise useless. Most individual Transparency International benchmarks are clearly missed, the overall grade would be a clear “fail.” This much said, it seems even more deplorable that the Labour opposition, while promising to enact a Whistleblowing Act once in Government, has not yet published its own proposal. The hesitation of the Nationalist Government to enact (its own) proposal might serve the good cause of whistleblowing better than a future Labour Government actually enacting a law qualified by its senior leadership as clearly defective.³¹

SWOT I (current law)

Strengths <ul style="list-style-type: none"> • EIRA anti-victimisation clause applies to public and private sector alike. • Public Service Commission with far reaching powers in informal procedures. 	Weaknesses <ul style="list-style-type: none"> • no credible protection of whistleblower; • unclear, or non-existent procedures.
Opportunities <ul style="list-style-type: none"> • Political will declared by both parties on numerous occasions; • Upcoming elections may bring renewed enthusiasm for an improved proposal; • Freedom of Information Act should also be in preparation stage; 	Threats <ul style="list-style-type: none"> • Small community may render idea of anonymity illusionary; • Small agencies (one or two professional staff) effective ? • Professional Secrecy Act of 1994 far reaching and setting the tone; • Media sources not protected in case

³¹ cf. Alfred Sant as in fn. 12 above

<ul style="list-style-type: none"> Prominent cases of corruption, money laundering and nepotism may be frustrating enough to induce change. 	<p>of “national interest;”</p> <ul style="list-style-type: none"> strong party loyalties in two-party system.
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SWOT II (PN Draft)

Strengths <ul style="list-style-type: none"> broad definition of whistleblowers; Strong message in need to define “whistleblowing reporting officer” for every employer. 	Weaknesses <ul style="list-style-type: none"> no credible protection of confidentiality; no effective protection at all.
Opportunities <ul style="list-style-type: none"> Political will declared by both major parties on numerous occasions; Upcoming elections may bring renewed enthusiasm for an improved proposal; Prominent cases of corruption, money laundering and nepotism may be frustrating enough to induce change. 	Threats <ul style="list-style-type: none"> both major Parties seem reluctant to present anything to be voted on; 100% burden of proof with whistleblower; any protection whatsoever ONLY, if whistleblower can show that disclosure followed all internal rules and the law; sanctioning limits may send all the wrong signals.

5. References and Sources

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<http://justiceservices.gov.mt/>

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Media:

<http://www.independent.com.mt>

www.maltastar.com.mt

6. Charts

A view of the current situation in regard to whistleblowing under Maltese Employment and Industrial Relations Act (2002)

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	disclosing alleged illegal or corrupt activities being committed (or breach of EIRA)
Broad definition of whistleblower			X	any person ... having disclosed information ... regarding activities by ... or in the interest ... of his employer ...
Broad definition of retribution protection			X	„unlawful to victimise“
Internal reporting mechanism		X		no specific procedures
External reporting mechanism		X		seems to address primarily complaints to “designated public bodies,” however, no provisions, e.g. to “designate” public body
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted		X		
No sanctions for misguided reporting		X		unclear
Whistleblower complaints authority			X	Ombudsman exists, but unclear if Ombudsman is a „designated body,” or what constitutes a what constitutes a „designated body
Genuine day in court	X			Under general procedures only
Full range of remedies			X	Under general procedures only
Penalties for retaliation			X	Under general procedures only
Involvement of multiple actors			X	Under general procedures only

Proposal: „IL-PROTEZZJONI TA’ MIN JIŻ VELA INFORMAZZJONI LI TKUN PROTETTA | (THE PROTECTION OF THE WHISTLEBLOWER ACT, 2010 PL Proposal)

	Yes	No	Partial	Notes
Broad definition of whistleblowing	X			Part III Sec.. 1 Art 9. Protected disclosure based on good faith and reasonable belief in truth of information and that it tends to show „improper practice“ (defined); but not for personal gain.
Broad definition of whistleblower	X			definition includes former employees, contractors and their employees and volunteers in Volunteer Organisations
Broad definition of retribution protection		X		exception for measure which are „justifiable on the basis of performance“; or, „administratively or commercially justifiable“
Internal reporting mechanism	X			Internal „Whistleblowing Reporting Officers“ and „Whistleblowing Units“
External reporting mechanism			X	To a small number of agencies and the ombudsman for specific subject matters and reasons
Whistleblower			X	Certain duties to inform whistleblower form a minimal basis for

participation				external whistleblowing
Rewards system		X		
Protection of confidentiality		X		Art. 6 Unless receiving officer reasonably believes that identity disclosure is essential for investigations, to prevent serious risks or in regard to natural justice... or the disclosure is necessary for the prosecution ...
Anonymous reports accepted			X	Art. 11; accepted, and duties of „whistleblowing reporting officer persist“ but disclosure not considered „protected disclosure“
No sanctions for misguided reporting			X	Knowingly false reporting punishable under Art 101 Criminal Code (Part III, Sec. 1, Art 9 (3) of the draft)
Whistleblower complaints authority			X	Dedicated internal and external reporting destinations, but not a separate authority for whistleblowing
Genuine day in court	X			Court with preliminary and final measures, against the acting person - to stop detrimental action, Art. 7; and against those who caused damage (e.g. the employer) for full compensation of any damaged caused (Art. 8)
Full range of remedies	X			Industrial Tribunal and informal complaints handling, First Hall for preliminary and final legal measures; then Court of Instance;
Penalties for retaliation			X	up to 1.200 € and/or three months in prison (other sanctions under different laws notwithstanding)
Involvement of multiple actors			X	By way of a broad definition of whistleblowers

7. Annex 1 (Legal Material)

A. Employment and Industrial Relations Act (EIRA 2002)

28. It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.

29. (1) It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

(2) It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by: (...)

30. (1) A person who alleges that the employer is in breach of, or that the conditions of employment are in breach of articles 26, 27, 28 or 29, may within four months of the alleged breach, lodge a complaint to the Industrial Tribunal and the Industrial Tribunal shall hear such complaint and carry out any investigations as it shall deem fit.

31. Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.

32. Any person contravening the provisions of articles 28 and 29 shall be guilty of an offence and shall be liable on conviction to a fine (multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

B. Public Administration Act

31. (1) The Public Service Commission shall ensure, in so far as its powers under articles 33 and 34 of this Act (as extended to the public service under article 30) permit, that no public officer is victimised for making any report to his superior, to the Commission or to another relevant authority about any breach of the Code of Ethics or of any other provision of this or any other Act.

(2) Where the Public Service Commission finds that a public officer has been victimised as aforesaid in a manner that it is unable to prevent or redress, it shall make a report to the Prime Minister or to other authorities recommending such measures to redress the situation as it considers appropriate.

32. In addition to its functions under any other law the Public Service Commission shall act as a Merit Protection Commission (in this Title referred to as the “Commission”) for the purposes of this Act.

33. (1) Subject to subarticle (3), the functions of the Commission shall be:

(a) to audit the appointment of employees of government agencies and government entities to verify that these are made in accordance with article 21;

(b) to monitor and suggest amendments to directives and guidelines on employment matters issued by the Principal Permanent Secretary in relation to agencies and government entities, as well as the application of such directives and guidelines; and

(c) unless otherwise catered for in the legislation, Order or instrument setting up the government entity, agency, board or commission or any other similar organisation or body, to inquire into reports that the directives issued by the Principal Permanent Secretary have not been adhered to.

(2) In performing its functions in virtue of paragraph (a) of subarticle (1) the Commission shall operate through after-the-event scrutiny and shall not subject any agency or government entity to any requirement to obtain the Commission’s clearance or approval in advance of making appointments or taking decisions, except as a temporary measure in cases where the Commission —

(a) finds that the provisions of this Act have been, or are likely to be, breached; and

(b) is of the view that such a measure is necessary to prevent further breaches of this Act until such time as the Commission is able to conclude any investigations and take corrective measures.

(3) The Commission shall not hear and investigate complaints on matters which are assigned exclusively by any other law to any other body or to the jurisdiction of the Industrial Tribunal referred to in the Employment and Industrial Relations Act, and if any such complaints are made to the Commission it shall refer the complainants to the Tribunal; but in relation to such matters the Commission may—

(a) on its own initiative inquire into and investigate any cases with respect to which no formal complaints have been raised; and

(b) follow up a decision or award of the Industrial Tribunal with a view to taking additional remedial action under paragraph

(c) of subarticle (4) and subarticle (5) of article 33 of this Act.

(4) The Commission shall regulate its own procedure in the discharge of its functions under this Act.

34. (1) For the purposes of its functions under this Act the Commission may:

(a) carry out such inspections and investigations as it may deem necessary;

(b) summon any person to appear before it and give evidence on oath;

(c) request in writing the production of information, documents or files in the custody of any public employee for the purpose of examining the same or making copies thereof; and

(d) enter the premises of any agency or government entity, subject to compliance with any legal requirements placed by any law on the police for the same purposes.

(2) Article 6 of the Inquiries Act shall apply to the investigations undertaken by the Commission and any summons or requests it may make in pursuit thereof.

(3) Without prejudice to subarticles (4) and (5) and article 34, the Commission’s findings may be used in evidence in any civil cause that may be filed by the injured party but, notwithstanding any other law, the members of the Commission cannot be called to give evidence.

(4) The Commission shall make a report to the Prime Minister following every investigation under this Act, and where it finds that an employment decision has been made otherwise than in conformity with the a) annul the decision in question;

(b) issue such directives as it may consider necessary to redress the situation; and

(c) recommend the taking of such disciplinary or criminal action as it may consider appropriate in the circumstances.

(5) Without prejudice to any disciplinary or criminal action that may be taken in accordance with paragraph (c) of subarticle (4), where an employee of a government agency or government entity has made an employment decision that is not in conformity with the provisions of this Act the Commission may remove the employee from his position and/or interdict him from appointment or re-appointment for a maximum period of five years.

(6) Notwithstanding the provisions of any other law, the decisions taken and directives issued by the Commission under paragraphs (a) and (b) of subarticle (4) and under subarticle (5) shall be binding on the organisation to which they apply, and the board of directors or head of the organisation as applicable shall ensure that the Commission's decisions and directives are complied with.

(7) The Commission shall, as soon as possible after the conclusion of each year of its activity, make an annual report to the Prime Minister about its workings during the said year, and the Prime Minister shall, as soon as possible after he has received the said report, lay it on the Table of the House of Representatives.

C. Draft Bill “Protection of the Whistleblower”

The 30 bi-lingual pages of this draft Bill have been made available for download at:

<http://www.doi-archived.gov.mt/en/bills/2010/Bill%2058.pdf>

also: Government Gazette of Malta No. 18,654 of 08 Oct 2010