

Protection of the Whistleblower - Reporting of External Disclosure Procedure

6 November 2023

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REVISION LOG

VERSION	DATE ISSUED	DETAILS
1.00	6 November 2023	Protection of the Whistleblower – Reporting of External Disclosure Procedure

DEFINITIONS

TERM	DEFINITION
Act	The Protection of the Whistleblower Act, Chapter 527 of the Laws of Malta. ¹
Authority or MFSA	The Malta Financial Services Authority established in terms of Chapter 330 of the Laws of Malta. ²
Detrimental Action	Includes: <ul style="list-style-type: none">a. action causing injury, loss or damage; and, orb. victimisation, intimidation or harassment; and, orc. occupational detriment; and, ord. prosecution under Article 101 of the Criminal Code relating to calumnious accusations; and, ore. civil or criminal proceedings or disciplinary proceedings.
Employee	Means: <ul style="list-style-type: none">a. any person who has entered or works under a contract of service with an employer. This includes contractors or subcontractors who either perform work, supply a service, perform any work or else supply services;b. any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person including an outworker, but excluding any work or service performed in a

¹ <https://legislation.mt/eli/cap/527/eng>

² <https://legislation.mt/eli/cap/330/eng/pdf>

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- professional capacity to which an obligation of professional secrecy applies;
 - c. any person in employment in the public administration, including as a member of a disciplined force;
 - d. any former employee;
 - e. any person who is or was seconded to an employer;
 - f. any volunteer in terms of article 2(1) of the Voluntary Organisations Act even when such work or service is not regulated by a specific contract of service;
 - g. any prospective candidate for employment only where information concerning improper practices has been acquired during the recruitment process or other pre-contractual negotiations; or
 - h. shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, and paid or unpaid trainees.

Employer

Means any natural person, legal organisation or statutory body within the public or private sector who either:

- a. enters into a contract of service with an employee;
- b. employs or engages or permits any other person in any manner to assist in the carrying on or conducting of his business; or
- c. who seeks to employ other persons;

and shall include a voluntary organisation in relation to volunteers who render services to such voluntary organisation on a voluntary basis or otherwise.

External Disclosure	Means a disclosure made to the relevant Authority as per the First Schedule of the Act, and in accordance with Section 3 of Part III of the Act.
Internal Disclosure	Means a disclosure made internally to the Whistleblowing Reporting Officer within the organisation of the Employer, in accordance with Section 2 of Part III of the Act.
Improper Practice	<p>Means an action or a series of actions whereby:</p> <ul style="list-style-type: none"> a. a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; b. an endangerment of health and safety of an individual has occurred; c. a damage to the environment has been committed, is being committed or is likely to be committed; d. a corrupt practice has occurred, is likely to occur or to have occurred; e. a criminal offence has been committed, is being committed or is likely to be committed; f. a miscarriage of justice has occurred, is occurring or is likely to occur; g. bribery has occurred, is occurring or is likely to occur or to have occurred; h. a person has failed, is failing or is likely to fail to comply with any legal obligation on public procurement to which he is subject; i. a person has failed, is failing or is likely to fail to comply with laws on financial services, products and markets, and prevention of money laundering and terrorist financing; j. a person has failed, is failing or is likely to fail to comply with product safety and compliance law;

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- k. a person has failed, is failing or is likely to fail in ensuring transport safety;
 - l. a person has failed, is failing or is likely to fail in ensuring radiation protection and nuclear safety;
 - m. a person has failed, is failing or likely to fail in ensuring a food and feed safety, animal health and welfare;
 - n. a person has failed, is failing or is likely to fail to comply with any legal obligation on consumer protection to which he is subject;
 - o. a person has failed, is failing or is likely to fail to comply with any legal obligation on protection of privacy and personal data, and security of network and information systems to which he is subject;
 - p. a breach affecting the financial interests of the European Union;
 - q. a breach relating to the internal market as referred to in the Treaty on the Functioning of the European Union; or
 - r. information tending to show deliberate concealment of any matter falling within any one of the above.

Occupational Detriment

Means any direct or indirect act or omission which occurs in a work-related context, which is prompted by internal or external disclosures or by Public Disclosures, and which causes or may cause unjustified detriment to the whistleblower and may include:

- a. suspension, lay-off, dismissal or equivalent measures;
- b. demotion or withholding of promotion;
- c. transfer of duties, change of location of place of work, reduction in wages, change in working hours;

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- d. withholding of training;
 - e. a negative performance assessment or employment reference;
 - f. imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
 - g. coercion, intimidation, harassment or ostracism;
 - h. discrimination, disadvantageous or unfair treatment;
 - i. failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he would be offered permanent employment;
 - j. failure to renew, or early termination of, a temporary employment contract;
 - k. harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
 - l. blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that this person will not, in the future, find employment in the sector or industry;
 - m. early termination or cancellation of a contract for goods or services;
 - n. cancellation of a licence or permit;
 - o. psychiatric or medical referrals;
 - p. being subjected to any disciplinary action including for breach of ethics or confidentiality;
 - q. being subjected to a term or condition of employment or retirement which is
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	<p>altered or kept altered to his disadvantage;</p> <p>Provided that, this shall not apply where the action is taken where the direct or indirect act or omission is administratively or commercially justifiable for organizational reasons.</p>
Protected Disclosure	Means an internal disclosure or an external disclosure of information, made in writing or in any format which may be prescribed.
Public Disclosure	Means a Public Disclosure made in accordance with Section 4 of Chapter 527 of the laws of Malta.
Whistleblower	Means any employee who makes a disclosure to a whistleblowing reports unit whether it qualifies as a protected disclosure or not under the Act.
Whistleblowing Reporting Officer or "WRO"	Means such officer within an employer charged with carrying out the functions designated by Article 12 of the Act.
Whistleblowing Reporting Unit or "WRU"	Means such office within an authority empowered to carry out the functions listed in Article 17 of the Act. The WRU at the MFSA is held within the Enforcement Function.

1. Introduction

The Authority is one of the competent authorities empowered by the Act to receive External Disclosures in relation to the following matters, in line with the First Schedule of the Act:

- the business of credit and financial institutions;
- the business of insurance and the activities of insurance intermediaries;
- the provision of investment services and collective investment schemes;
- pensions and retirement funds;
- regulated markets;
- central securities depositories;
- the provision of company services;
- the carrying out of trustee business either in a professional or a personal capacity;
- the provision of virtual financial services; and
- such other areas of activity or services as may be placed from time to time under the supervisory and regulatory competence of MFSA.

(‘Remit of the MFSA’)

This Reporting of External Disclosures Procedure (‘Procedure’) describes the procedure to be followed by an Employee, who wishes to lodge an External Disclosure with the Authority, on the Employer or an Employee of his Employer, if the subject-matter falls within the Remit of the MFSA.

1.1 Scope

The overall purpose of this Procedure is to ensure that the public is well informed and educated of the faculty which is provided by the Authority when it comes to the reporting of any Improper Practice. The contents of the Procedure aim to better guide any Employee who seeks to report the wrongdoing of his respective Employer or an Employee of his Employer to the Authority and to outline the relevant procedures to be adhered to.

2. Legal/Operational framework

This Procedure is to be read in conjunction with the Act which outlines the relevant legal boundaries and Remit of the MFSA. This Procedure is being devised in view of the obligations imposed on the Authority as per Article 17 of the Act.

3. The MFSA as the Competent Authority

The Act, specifically in the First Schedule, lists down the competent authorities which are vested with the power to receive External Disclosures depending on the respective remit which falls under the respective Authority. The MFSA is the Authority in charge of assessing External Disclosures if such disclosure relates to one or more of the matters included in the Remit of the MFSA (as defined under section 1 above).

It is important to note that any other matter which does not fall within the Remit of the MFSA (such as employment matters) are not to be disclosed to the MFSA, and the Whistleblower needs to ensure that the disclosure is made to the relevant and respective Authority as per the First Schedule of the Act.

Moreover, it is also important to highlight the fact that, in those cases which fall within the Remit of the MFSA and thus render the Authority as the competent authority to address the case, the MFSA does not have the power to offer redress for any Detrimental Action which the Whistleblower might have suffered. Therefore, if a Whistleblower claims to have suffered Detrimental Action, they have the right to seek redress by means of the legal avenues available to him, as further detailed in section 4 hereunder.

4. How is the Whistleblower Protected?

The protection which is afforded to the Whistleblower emanates from the Act itself. When the Whistleblower files an External Disclosure, certain protections take effect, namely:

- The identity of the Whistleblower is kept anonymous throughout the investigation, unless the Whistleblower gives written consent for it to be divulged; and
- The External Disclosure made to the Authority is also kept confidential regarding their origin, and any investigation conducted by the Authority will be conducted in such a manner as to protect the identity of the Whistleblower, and these cannot be divulged unless the Whistleblower provides written consent.

Aside from this, the Whistleblower is also afforded a high level of protection which emanates from the law if their identity is somehow revealed and consequentially their respective Employer takes disciplinary action against the Whistleblower for having reported the breach(es).

Having said this, there is no automatic sanction for the Employer's action/s provided by the law, and so, as already briefly mentioned above, the Whistleblower will have to seek legal representation if they believe that he suffered Detrimental Action, and either:

- file an application to the First Hall, Civil Court for an order requiring the person who has taken the Detrimental Action to either remedy that action, or else for an injunction to be issued, as per Article 7 of the [Act](#); or
- bring their claim before the Industrial Tribunal and have their rights asserted if the matter concerns employment issues, as per [Chapter 452 of the Laws of Malta](#)³; or
- lodge a [complaint](#) to the office of the Ombudsman within a period of six (6) months from date of disciplinary action for the office of the Ombudsman to conduct their investigation in the matter, as per Article 14 of [Chapter 385 of the Laws of Malta](#).

5. External Reporting Procedure

The Authority aims to assess the reports it receives in an efficient and timely manner. To this end, the Authority is hereby detailing the steps which would need to be carried out by the Whistleblower when lodging an External Disclosure and by the WRU established by the Authority, when it assesses the External Disclosure received, in line with its powers under the Act.

5.1 Manner in which an External Disclosure may be reported

The Authority provides a number of ways how an External Disclosure may be reported. The Whistleblower wishing to report an Improper Practice may do so as follows:

- **Orally** - by either phoning the Authority on +356 21441155, or else through other voice messaging systems; or
- **In writing** - through the form provided on the MFSA [website](#). This form needs to be duly filled in and signed. Once finalised, the form needs to be sent to the MFSA via email on whistleblowing@mfsa.mt or by post to the MFSA's address at *Triq l-Imdina, Zone 1, Central Business District, Birkirkara, Malta*, addressed to the WHISTLEBLOWING REPORTS UNIT; or
- **By means of a physical meeting** - A Whistleblower may request a physical meeting with the WRU at the MFSA.

³ Article 75 of the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta

5.2 Contents of the Whistleblowing Report

Since there are three possible ways of reporting an Improper Practice, it is pertinent to address what happens in each scenario:

- i. If the Whistleblower opts to submit the Improper Practice through a **written report**, then the Whistleblower must populate the said written report [here](#) and submit it to the WRU;
- ii. If the Improper Practice is reported **orally**, and therefore through dedicated voice systems, then the Whistleblower shall provide detailed information on the Improper Practice being reported, similar to the information required in the Whistleblowing External Reporting Form; and
- iii. If a **meeting** is set up with the WRU in order for the Whistleblower to report any Improper Practice, the information which shall be required shall be the same as that which is required on the Whistleblowing External Reporting Form.

In order for the WRU to move forward with the report in an efficient and timely manner, some mandatory information would need to be included in the External Disclosure, namely:

- The person or entity subject to the External Disclosure;
- Details of the suspected Improper Practice;
- Who is involved in the suspected Improper Practice;
- Details of how long the Improper Practice has been going on;
- Where this is happening; and
- Provide any supporting documents or evidence in respect of such report as evidence of the contents being disclosed.

It is not encouraged that Whistleblowers proactively obtain any more information from any third-party source, as this could potentially lead to a violation of the law.

5.3 Acknowledgement by the WRU within the Authority

When the External Disclosure reaches the Authority, WRU shall promptly, and in any event within seven (7) days of receipt of the External Disclosure, acknowledge receipt unless the Whistleblower explicitly requests otherwise or if the Authority reasonably believes that acknowledging receipt of the External Disclosure shall jeopardise the protection of the Whistleblower's identity.

The WRU operating within the MFSA is under a strict obligation to maintain confidentiality regarding the details outlined in the External Disclosure. This duty prevents the WRU from

sharing the contents of the External Disclosure with other divisions, including fellow Enforcement Officials, within the Authority, unless certain conditions are met. The WRU can consider communication with other functions within the MFSA or seeking legal assistance if it deems it necessary or suitable in the public interest for further investigation. In these situations, only essential factual information pertaining to the case is shared, while the identity of the Whistleblower remains completely confidential without exception.

5.4 The Authority may request clarification or additional information from the Whistleblower

In those cases where the WRU feels that the External Disclosure made is too vague, needs more clarification, or is otherwise insufficient for the disclosure to escalate further, the WRU may contact and request from the Whistleblower further information on the matter, given that the External Disclosure was not made anonymously. In those cases where the External Disclosure was made anonymously and further details are required but cannot be attained, such disclosure shall be logged into the Authority's internal database and archived.

To this end, the WRU may request the Whistleblower to attend meetings, request any witnesses indicated in the External Disclosure to give statements, collect additional information on the organisation or individuals involved in the alleged Improper Practice and carry out any other checks that it may deem necessary.

5.5 Relationship between the Whistleblower and the Person/Entity subject of the External Disclosure

It is first and foremost paramount for WRU to determine the type of relationship between the Whistleblower and the individual or entity who is subject of the External Disclosure. This is an important step as it will determine whether both parties fall within the respective definitions of Employee and Employer, as requested by the Act.

If the relationship between the Whistleblower and the person/entity subject of the External Disclosure is not that of either an "Employee – Employer" **or** "Employee – Employee of the Employer" type of relationship, then this test will not be satisfied and the MFSA will not be able to go ahead with assessing and investigating the External Disclosure received. Following this, the Whistleblower will be informed, in a timely manner, that the matter does not satisfy the criteria under the Whistleblower Act.

If the relationship is established to be of a type that satisfies one of the two above mentioned relationships, then the MFSA will be able to take the matter a step forward and assess the type of action disclosed in the External Disclosure.

5.6 Action(s) Disclosed should constitute an Improper Practice

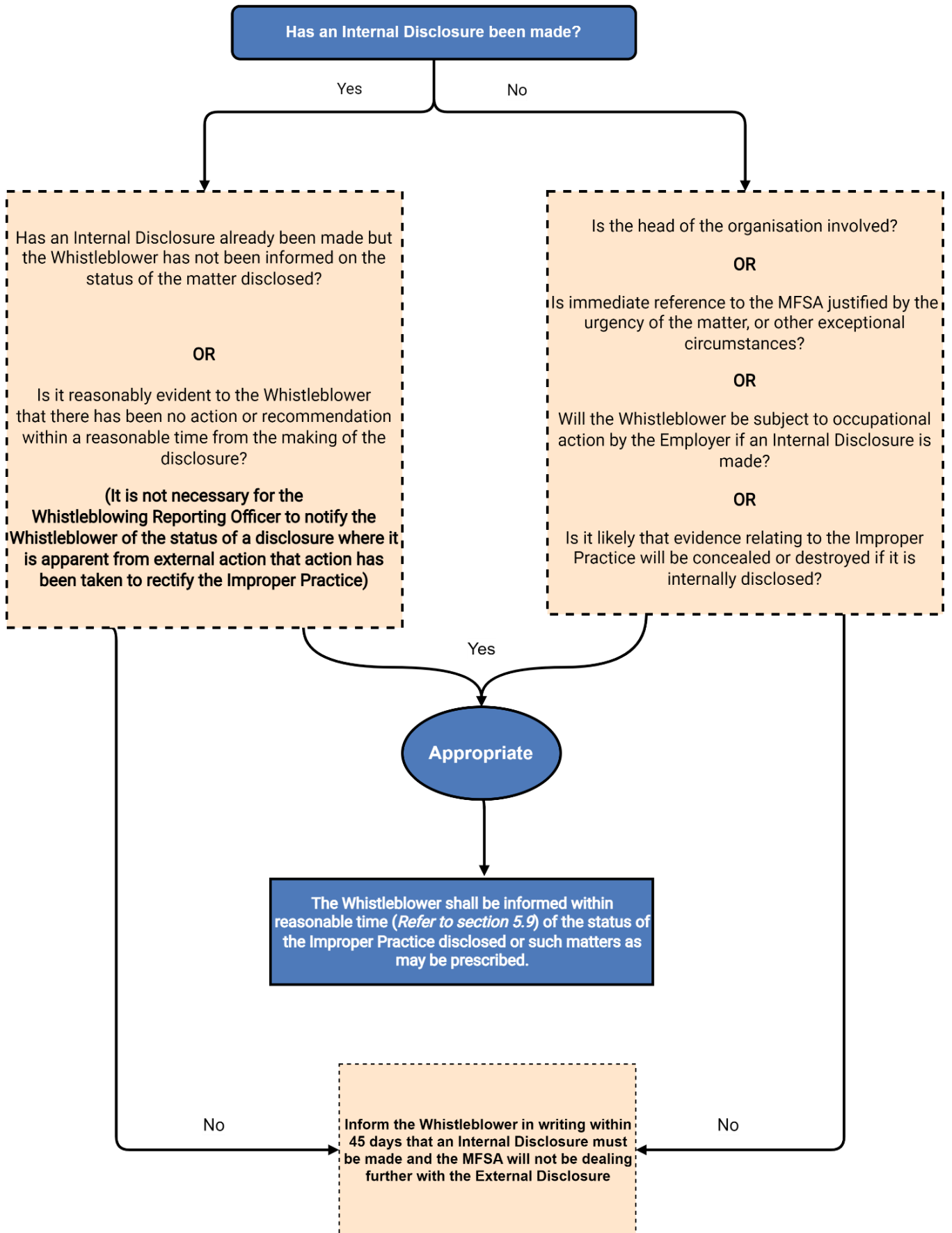
The next step which will be carried out by the WRU is to determine whether the action being disclosed in the External Disclosure, constitutes an Improper Practice as defined under the Act. This means that every disclosure which is made to the Authority must fall within the proper definition of what constitutes an Improper Practice as defined under the Definitions Section in this Procedure, for the Authority to proceed.

Moreover, it is important to keep in mind that the Improper Practice being disclosed, needs to be in relation to a matter which falls under the Remit of the MFSA (as defined under Section 1 above). If the matter does not fall within such remit, the Whistleblower is to refer to the First Schedule of the Act to make sure that the External Disclosure is lodged with the proper competent Authority. Moreover, minor or trivial matters are not to be considered as Improper Practices.

5.7 Determining the Suitability for the Disclosure to be made Externally

The next step would be for the Authority to establish whether an External Disclosure merits further investigation or not. This is done by determining a series of questions to properly assess whether it should move forward with the External Disclosure.

The below flow chart depicts the process of how WRU determines whether the External Disclosure presented is appropriate or not:



In those cases where it is determined that the External Disclosure presented is appropriate, the WRU shall determine whether it is reasonable and whether it is within the confines provided at law for the Whistleblower to report the disclosure to the MFSA by having regard to certain factors which may appertain to the case at hand, namely:

- the seriousness of the alleged Improper Practice/s;
- whether the Improper Practice is continuing or else is likely to occur in the future;
- whether the External Disclosure is made in breach of a duty of confidentiality owed by the Employer to any other person;
- where an Internal Disclosure has been previously made, any action which the Employer has taken or might reasonably be expected to have taken as a result of the previous disclosure; and
- whether in making the External Disclosure to the MFSA, the Employee complied with the available Internal Disclosure Procedures of his Employer.

Moreover, if the Authority determines that the External Disclosure was not properly made because an Internal Disclosure should have been lodged first, the MFSA shall, within forty-five days, notify the Whistleblower in writing that an Internal Disclosure must be made and that the MFSA will not be dealing further with the External Disclosure received.

5.8 The Intention and Nature of the Information

Once the WRU determines that the External Disclosure has been duly lodged and hence merits further investigation, the WRU will assess whether the External Disclosure lodged qualifies as a Protected Disclosure. In determining whether the External Disclosure qualifies as a Protected Disclosure, several positive determinations must be made, namely the following:

- The Whistleblower must have disclosed his identity; and
- The Whistleblower must reasonably believe that the information and any allegation being made is substantially true at the time of the disclosure and that such information fell within the scope of the Act; and
- The Whistleblower reasonably believes that the information tends to show an Improper Practice committed by the Employer/Employee of the Employer; and
- The information provided is not protected by legal privilege; and
- An Internal Disclosure or a Public Disclosure has already been made or at least an attempt thereto has been made (unless otherwise allowed by the Act).

Therefore, if the above determinations are satisfied, then Whistleblower's disclosure shall qualify as a Protected Disclosure. Once an External Disclosure is qualified as a Protected Disclosure, the Whistleblower is afforded the below protections:

- protection against the disclosure of the identity or information that identifies or may lead to identification of the Whistleblower, unless the latter consents; and
- protection against Detrimental Action.

On the other hand, when the External Disclosure does not qualify as a Protected Disclosure, the Whistleblower is not afforded the above protections.

Furthermore, it is predominantly important to note that:

- any disclosure of information given wherein the Whistleblower knows or ought to have known is false is not protected;
- knowingly providing false information tantamount to a criminal offence in terms of the Act;
- where the Whistleblower was perpetrator or accomplice in the Improper Practice which constitutes a criminal offence, there is no protection against criminal prosecution; and
- no immunity against disciplinary or civil proceedings or liability arising as a consequence of the Whistleblower's action will be granted.

This being said, the protection afforded to the Whistleblower shall not be prejudiced on the basis only that:

- the Whistleblower making the External Disclosure was in good faith, but mistaken by the level of the importance of the External Disclosure;
- the perceived threat to the public interest on which the External Disclosure was based, has not materialised; or
- the Whistleblower did not fully respect the procedural requirements of the Act or of any regulations or guidelines issued under this Act.

Moreover, anonymous disclosures, although not considered as Protected Disclosures, can still be made. If the MFSA receives an anonymous disclosure, it may still process it and take it into consideration when determining whether an Improper Practice has taken place or otherwise.

5.9 Duty of the MFSA to provide Feedback to the Whistleblower

In those cases where it is established that the External Disclosure is appropriate, the WRU is then obliged to provide feedback to the Whistleblower within a reasonable timeframe. The reasonable timeframe which is provided for by the Act itself is that of three (3) months from the acknowledgement of the receipt of the External Disclosure as detailed in Section 5.3 above. In the case that no acknowledgement is sent to the Whistleblower, then the period of three (3) months within which the Authority is to provide feedback to the Whistleblower will start to run from the expiry of the seven (7) day period after the External Disclosure is made.

However, the Act also provides that in the instance of duly justified cases, the period within which the MFSA is to provide feedback to the Whistleblower shall not exceed six (6) months. The Authority is also duty bound to communicate the outcome of the investigations which were triggered by the Whistleblower's External Report to the Whistleblower.

Moreover, the MFSA is also obliged to transmit, in due time, the information contained in the External Disclosure to institutions, bodies, offices or agencies of the European Union as appropriate for further investigation, where provided for under law.

5.10 Referral of External Disclosures to the Police or Other Competent Authorities

For an External Disclosure to be referred to the Police or for guidance to be given to the Whistleblower to refer the issue to another Authority which is competent to deal with the disclosure, the External Disclosure must have qualified as a Protected Disclosure.

Referral to another competent authority established under the First Schedule of the Act shall be made when the MFSA believes that the information disclosed can be better investigated by another Authority since the matter relates to one or more of the matters included under the First Schedule of the Act (kindly refer to Appendix A for a list of other competent authorities and their respective remits).

On the other hand, referral to the Police is made when the Improper Practice constitutes a crime or a contravention under the applicable law.

When the MFSA makes a referral to the Police or any other competent authorities listed in Appendix A:

- The identity of the Whistleblower should not be disclosed except where they have given their written consent to provide it;
- A Protected Disclosure that is referred to the police or another competent authority remains a Protected Disclosure;
- Disclosure of referrals must be made within 30 days from receipt; and
- The Whistleblower is to be immediately informed in writing of the referral made.

5.11 Public Disclosures as a Possible Alternative

By virtue of Article 18A of the Act, the Whistleblower can also opt to make a Public Disclosure. Before resorting to this provision of the law, however, the Whistleblower should keep in mind that a Public Disclosure does not necessarily constitute a Protected Disclosure and would only be considered so if an Internal Disclosure and an External Disclosure are first made as per the same Act and no appropriate action was taken in response to the report within the established timeframes.

The Act does provide an exception to this, however, a Public Disclosure would still be protected if the Whistleblower has reasonable grounds to believe that:

- The breach may constitute an imminent or manifest danger to the public interest, such as when there is an emergency situation or a risk of irreversible damage; or
- In the case of external reporting, there is a risk of retaliation or there is low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.

The Act further stipulates that this provision in Article 18A shall not apply in those cases where a person directly discloses information to the press pursuant to specific national law establishing a system of protection relating to freedom of expression and information.⁴

⁴ Public disclosures are still protected by virtue of Article 41 of the Constitution of Malta, detailing the protection of freedom of expression, however the protections contained in the Protection of the Whistleblower Act and in the Constitution are not the same, and neither are the procedures which appertain to them.

6. Checklist

The following is a summary of the criteria which need to be satisfied under this Procedure:

- The Whistleblower is an Employee of a public or private organisation.

- Action(s) complained of is, has been, or is likely to be committed by the Whistleblower's Employer or Employee of the Employer.

- Action(s) complained of constitute an Improper Practice falling under the remit of the MFSA.

- Appropriate to make an External Disclosure in the circumstances.

- Disclosure qualifies to be considered as a Protected Disclosure.

- Subject matter of the disclosure falls within the remit of the MFSA.

- An Internal Disclosure or a Public Disclosure has already been made or at least an attempt thereto has been made (unless otherwise allowed by the Act).

- The information provided is not protected by legal privilege.

Reference is hereby being made to Appendix B which is a flow chart of the whole process which needs to be undertaken in line with the contents of this document.

Appendix A – List of other Competent Authorities prescribed to receive External Disclosures

Authority	Matters
Auditor General	Failure to observe laws, rules and regulations relating to public finance and misuse of public resource
Commissioner for Revenue	Income tax, corporation tax, capital gains tax, stamp duties, national insurance contributions, value added tax or “revenue acts” as defined in the Commissioner for Revenue Act.
Commissioner for Voluntary Organisations	Activities of voluntary organization
Financial Intelligence Analysis Unit	Money laundering or financing of terrorism in terms of the PMLA
Ombudsman	<ul style="list-style-type: none"> • Conduct involving substantial risk to public health, safety or to the environment that would if proved, constitute a criminal offence • All matters which constitute improper practices and which are not designated to be disclosed to any other authority
Permanent Commission against Corruption	Corrupt practices

Appendix B - Flow diagram

