

MINISTRY OF JUSTICE AND PUBLIC ORDER

OFFICE OF THE LAW COMMISSIONER

Protection of Whistleblowers: Guide for Employees



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A. Introduction

On February 4, 2022, the Protection of Persons who Report Breaches of Union and National Law, Law of 2022 (Law 6(I)/2022, as amended) (“**Law**”) entered into force. The Law aims to establish an effective and strong legal framework for the protection of those employees in the public or private sector who disclose information which came into their possession or attention in the workplace and are related to specific breaches of European Union law and/or national law.

The Law encourages and enables employees to submit complaints (“reports”) of potential breaches through secure procedures, in a confidential setting. At the same time, the Law prohibits any retaliation either by their superiors or colleagues and provides for strong support measures.

The purpose of this Guide is to explain the basic provisions of the Law and to inform employees of their rights and obligations.

In particular, the Guide first elaborates on who can submit reports (i.e. who can disclose information), what the content of the report should be (i.e. the kind of breaches the disclosed information should relate to), and where to disclose such information. Thereafter, the Guide analyzes some additional conditions that need to be met for a person to enjoy the protection of the Law, the measures of protection enjoyed by the person, as well as the consequences of violating the provisions of the Law.

B. Who can submit reports?

A person may submit a “report” to a competent person or may make a “public disclosure” in relation to information obtained in the workplace, from which it appears that another natural or legal person has breached certain legal obligations. The person that submits such a report is considered a “whistleblower” or, as referred to in the Law, a “reporting person”.

“Report” is the submission of information/complaint by the whistleblower (either anonymously or by giving his/her name) to a competent person in relation to potential breaches.

“Public Disclosure” means the making of information on breaches available to the public, under the conditions set by the Law (see section E below).

Whistleblowers can be:

- employees in the private, public or wider public sector;
- self-employed persons;
- company shareholders;
- persons belonging to the administrative, management or supervisory body of an undertaking;
- volunteers;
- paid or unpaid trainees;
- persons working under the supervision and direction of tenderers, subcontractors and suppliers;
- persons who obtained the information in the workplace but no longer work or provide their services to the specific employer;
- persons who obtained information on breaches during the recruitment process or other pre-contractual negotiations or before the commencement of employment.

The Law further protects persons who did not make a report or a public disclosure themselves, but who are associated with whistleblowers and fall into one of the following categories:

- “facilitators”, meaning persons who assist a whistleblower in the reporting process in the workplace and whose assistance is confidential;
- persons connected with the whistleblower, such as colleagues or relatives by blood or kinship up to fourth degree (i.e. parents, siblings, uncles, aunts and first cousins);
- legal persons that the whistleblower owns, works for or is otherwise connected.

C. Content of the report

The content of the report or public disclosure must relate to breaches of either national law or European Union (EU) law.

Breaches of national rules may relate to:

- commission of a criminal offense (e.g. offences of corruption);
- breach of a lawful obligation imposed to a person by the laws or regulations of the Republic;
- breaches which put or may put in danger the safety or health of any person;
- breaches which cause or may cause damage to the environment.

A report for breaches of EU law may relate to the following EU sectors:

- public procurement;
- financial services, products and markets;
- money laundering;
- terrorist financing;
- product safety;
- transport safety;
- protection of the environment;
- protection from radiation and nuclear safety;
- food and feed safety, animal health and welfare;
- public health;
- consumer protection;
- protection of privacy and personal data and security of network and information systems;
- safeguarding the financial interests of the Union;
- competition and state aid rules;
- corporate tax or arrangements for the purpose of obtaining a tax advantage.

Finally, it is worth noting that the Law does not cover:

- reports of breaches of the procurement rules involving defense or security aspects unless they are covered by the relevant acts of the Union;
- reports of breaches of rules of certain acts issued by the EU in the sectors of financial services, products, markets and the prevention of money

laundering and terrorist financing, transport security, and environmental protection, providing for special rules when reporting breaches (see Part II of the Annex to the Law).

D. Submission of report

1. How is the report submitted?

To enjoy the protection of the Law, the whistleblower can submit the report by giving his/her name. In the case of an anonymous report, the Law also protects persons who submitted the report anonymously but were subsequently identified.

The report may be submitted orally, in writing, by telephone or in person. From the moment the report is submitted, the whistleblower must be informed of the actions taken to investigate the report and to address the breach. Within 7 days of submitting the report, the whistleblower must be given an acknowledgment that the report has been received. Moreover, the whistleblower must be informed of the actions that have been taken within 3 months from the submission of the report. In this context, the whistleblower may be asked to clarify the information reported or to provide additional information, to facilitate the investigation.

In any case, the persons who receive and handle the reports are obliged to act in full confidentiality, protecting the identity of the whistleblower.

2. Where is the report submitted?

The whistleblower can submit the report either internally, i.e. within his or her workplace (“internal report”), or externally, to a national authority responsible for investigating the specific act (“external report”).

“Internal report” means the submission of information by the whistleblower, anonymously or by giving his/her name, to a department or person(s) designated by the employer as responsible for receiving and investigating complaints.

“External report” means the submission of information by the whistleblower, anonymously or by giving his/her name, to a “competent authority” which receives complaints or is responsible for the supervision and/or the investigation of any possible breach of acts found in the complaint.

2.1. Submission of an internal report

All legal entities of the public sector (e.g. public services, semi-governmental organizations, offices of independent authorities), and legal entities of the private sector, employing more than 50 employees (e.g. companies, industries, etc.), are required to establish “channels”, that is they must designate channels/mechanisms for receiving the reports. They should also establish internal procedures for the submission and investigation of reports, as well as for safeguarding the identity of both the whistleblower and any person involved in the report.

It is the responsibility of the employers to inform their employees of the procedures in place and of the person or department designated as competent for receiving internal reports.

2.2. Submission of an external report

The external report is submitted to authorities that already receive complaints, grievances, information or have the responsibility to supervise and/or investigate breaches regarding acts covered by the Law. In other words, depending on the type of breach, the report should be forwarded to the relevant competent authority.

For instance, if the report relates to:

- corruption offences, the competent authority may be the Police, or the Office of the Attorney-General, or the Independent Authority against Corruption,
- personal data protection, the competent authority may be the Commissioner for Personal Data Protection.

These authorities have an obligation to establish mechanisms for receiving such external reports. That is, they should designate members of their staff as

responsible for receiving and handling external reports in full confidentiality. In the event where a whistleblower submits an external report to an authority that is not competent to investigate the complaint, then the authority which received the report should refer it to the competent authority and inform the whistleblower accordingly.

Employers must provide information to their employees about the procedures for submitting external reports to the relevant authorities.

2.3. Relationship between internal and external reports

Whistleblowers are encouraged to use the internal mechanisms that exist in their workplace to submit reports, so that the employer can take immediate action.

However, it is acknowledged that this is not always possible or desirable. There are cases where a whistleblower will prefer to directly contact persons outside their workplace; and for that reason, the Law leaves the choice between internal and external reports to the whistleblower. That is, the whistleblower can submit his/her report internally and in case the breach is not effectively addressed, then he/she can submit a report to a “competent authority”, or directly submit it to a “competent authority”.

If, for example, a person working in a Ministry has information that his/her colleague has committed the offence of bribery, then he/she has two options. The first option is to contact the person(s) or department of the Ministry that has been designated as responsible for receiving internal reports.

The second option is to contact directly the competent authority and submit an external report. In this case, and since the possible breach relates to corruption, the competent authority could be the Police or the Independent Authority against Corruption.

It should be noted that if a whistleblower submits both an internal and an external report, he/she should inform the internal reporting channel accordingly, and the internal reporting procedures should be terminated.

Furthermore, in case the whistleblower submits an external report to more than one competent authorities at the same time, he/she should inform them to that effect, so that the competent authorities can coordinate with each other in handling the reported breach.

E. Public disclosure

The use of internal and external reporting mechanisms ensures that the identities of the whistleblower and the persons concerned remain confidential. This reduces the chances of a whistleblower being subjected to any retaliatory conduct or a person being accused of something without first having the merits of the complaint assessed.

However, it is recognized that under strict conditions a whistleblower can make a public disclosure, that is to disclose information to the press, mass media or social media.

The Law, although it allows for public disclosure, sets strict conditions which must be met in order for a whistleblower to be able to benefit from the protection of the Law.

Specifically:

- (a) the whistleblower must have submitted either an internal or external report, but no action has been taken within 3 months from the submission of the report; or
- (b) the whistleblower has reasonable grounds to believe that-
 - i. the public interest or public health is threatened by an imminent or manifest danger or a risk of irreversible damage or there is another serious emergency situation, or
 - ii. in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed due to the particular circumstances of the case, 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.

It should be noted that if a person makes a false or misleading public disclosure against another person (either by naming that person or whose identity may be easily deduced), then the latter may initiate an action for defamation.

F. When is a whistleblower protected?

A whistleblower is protected by the provisions of the Law when all the following conditions are met:

1. the whistleblower falls into the categories of persons referred to in section B of this Guide and has collected the information in the context of his/her work-related environment,
2. the information concerns breaches of national or EU legislation referred to in section C of this Guide,
3. the whistleblower had reasonable grounds to believe that the information concerning breaches reported was true at the time of the report,
4. the report was submitted internally through the internal reporting channels or externally to a competent authority (see section D), or the person made a public disclosure under the conditions set by the Law (see section E),
5. the information must not have been given in violation of the rules of protection of classified information, legal or medical professional privilege, secrecy of judicial deliberations and the rules on criminal procedure, or access to and disclosure of it would not constitute a criminal offence.

G. How is a whistleblower protected?

Whistleblowers who submit reports under the provisions of the Law are automatically protected from a range of actions that could be characterized as retaliation, while at the same time enjoy important measures of protection.

The Law expressly prohibits the waiving of the rights and protections afforded to whistleblowers, either through an agreement, a term of employment or a policy applicable to the work environment. Any such term shall be void *ab initio*.

1. Protection from retaliation

The organization where the whistleblower works is prohibited from any of the following acts or omissions in response to the employee's report:

- suspension, lay-off, dismissal or equivalent measures;
- demotion or withholding of promotion;
- transfer of duties, change of location of place of work;
- reduction in wages, change in working hours;
- withholding of training;
- a negative performance assessment or a negative employment reference;
- imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
- coercion, intimidation, harassment or ostracism;
- discrimination, disadvantageous or unfair treatment;
- failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he/ she would be offered permanent employment;
- failure to renew, or early termination of, a temporary employment contract;
- harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;

- blacklisting on the basis of a sector or industry -wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
- early termination or cancellation of a contract for goods or services;
- cancellation of a license or permit;
- psychiatric or medical referrals;
- unilateral detrimental change of working conditions, that is any act or omission or the behavior, in general, of an employer or any other person, who is competent or responsible for the determination or the change of the working conditions, which causes direct or indirect, material or moral, damage to the worker or offends, in any way, his/her personality or his/her dignity.

It is noted that, in the event that retaliation of any kind was imposed against the whistleblower, then he/she can ask his/her employer to restore the situation to the state it was in before the retaliation. The employer can refuse to take actions for reinstatement only in the event that this is objectively impossible or becomes disproportionately burdensome (as for example in the event that the company does not operate due to a suspension of its operations or in the event of a change in economic conditions), **but not** when these events occurred as a result of the employer's actions (such as when, due to the dismissal of the whistleblower, a new employee was immediately hired to fill the vacated position of the whistleblower, so that the latter was considered redundant).

Failure to take corrective measures by the employer is considered an aggravating factor in the imposition of the penalty, in the event of a violation of the Law (see point H, below).

2. Judicial measures to remove retaliatory conduct and to claim compensation

In the event that a whistleblower suffers any retaliatory conduct or harm, he or she may request from a competent court (Industrial Disputes Tribunal or District Court or Administrative Court, as the case may be), to remove any

retaliation and may claim compensation. At the same time, the competent court may issue temporary/interim protection measures, pending the lengthy court proceedings, in order to prevent or end retaliation.

The whistleblower must prove that he/she submitted a report or made a public disclosure and that he/she suffered harm as a result of doing so, such as being fired, or demoted, or having a disciplinary investigation initiated against him/her. Then, a **rebuttable presumption** is created that the harm is the result of retaliation because of the report. Therefore, it is up to the other person (i.e. the employer) to prove that the measure that caused the harm did not constitute retaliatory action but was based on duly justified reasons unrelated to the submission of the report.

If the Court decides that the whistleblower has suffered any retaliation and/or harm due to retaliatory conduct, it will award damages covering both the material damage and any moral or physical harm suffered. At the same time, any retaliatory conduct suffered by the whistleblower is considered void *ab initio*. In fact, if a person was fired due to submitting a report and wishes to return to his/her workplace, then the Industrial Disputes Tribunal can order his/her re-employment.

3. Protection from any civil liability

In some cases, and in order to support his/her report, the whistleblower may need to share information, data, documents, for which some restriction applies, e.g. for reasons of confidentiality, or personal data protection. If the whistleblower has reasonable grounds to believe that the disclosure of this information was necessary to reveal the breach, then he/she will not be considered to have violated these restrictions and therefore will not be subject to any civil liability.

In addition, the whistleblower who submitted a report in accordance with the provisions of the Law, has no liability in relation to civil proceedings such as actions for defamation, infringement of intellectual property rights, violation of the obligation to maintain confidentiality, violation of the rules for the

protection of personal data, disclosure of trade secrets, or for claims for compensation under private, public or collective labor law.

In fact, in the event that such a case is initiated against him/her, the whistleblower has the right to claim that he/she submitted a report or made a public disclosure in accordance with the provisions of the Law and request the dismissal of the action.

Exception: This protection does not extend, however, to cases where obtaining or accessing such information constitutes a criminal offence. Therefore, the whistleblower can be prosecuted if, by sharing the information, he or she commits a criminal offense.

4. Witness in criminal proceedings

Depending on the nature of the content of the report and the seriousness of the case, criminal proceedings may be initiated against a person named in the report.

In such a case, it is possible that the whistleblower will need to testify as a witness before the Court to facilitate the establishment of the charge. The Law provides that in such cases, whistleblowers enjoy protection measures aimed mainly at preserving their anonymity, such as, for example, to testify in the absence of the accused, to give the testimony through closed circuit television, to have his testimony videotaped. In fact, depending on the case, whistleblowers can also be included in the Protection of Witnesses and Collaborators of Justice Scheme.

Leniency measures in case of cooperation with prosecuting authorities for corruption offences

In addition to the above, and subject to certain conditions, the Law provides for more favorable treatment of persons who have committed or participated in the commission of corruption offences, but have substantially cooperated with the prosecuting authorities. In particular, two cases of favorable treatment are foreseen:

Case A:

For a whistleblower who:

- committed or participated in the commission of a corruption offence involving the bribery of a public servant or official; and
- was convicted of the above offence on his/her own admission; and
- cooperated with prosecuting authorities substantially and a criminal prosecution was initiated against a public servant or official due to this cooperation:

the maximum penalty that may be imposed by the Court is half of the maximum penalty provided for in the relevant law.

Case B:

For a civil servant or official who:

- committed or participated in the commission of a corruption offence; and
- was convicted of the above offence on his/her own admission; and
- cooperated with prosecuting authorities substantially and a criminal prosecution was initiated against a public servant or official holding a higher position than him/her, due to this cooperation; and
- transferred to the public any financial benefit obtained from the corruption offence:

the maximum penalty that can be imposed by the court is half of the maximum penalty provided for in the relevant law.

H. What are the consequences of violating the Law?

1. Violation against whistleblowers

Actions against whistleblowers may result in the initiation of legal proceedings by whistleblowers seeking compensation for any harm they may have suffered. At the same time, however, depending on the seriousness of the violation, they can also lead to the establishment of a criminal offense.

Specifically, as the Law provides, a person who obstructs the submission of a report or engages in retaliation against a whistleblower or initiates malicious proceedings against such a person or reveals the identity of a whistleblower, is guilty of a criminal offense and, in case of conviction, is subject to imprisonment not exceeding three (3) years or a fine not exceeding thirty thousand euros (€30,000) or both.

2. Violation by whistleblowers

As already explained in the previous sections of this Guide, the Law creates a strong legal framework for the protection of persons who submit reports in accordance with the prescribed procedures and conditions.

In order to avoid any abuse of the Law, but also to protect the rights of persons who may suffer harm due to malicious or non-existent reports, the Law provides for severe penalties while at the same time guaranteeing the right of these persons to compensation, in case they have suffered damage from false or misleading reports or false or misleading public disclosures.

Moreover, the Law provides that a person who knowingly makes false reports or false public disclosures is guilty of a criminal offense and, upon conviction, is liable to imprisonment for a term not exceeding three (3) years or to a fine not exceeding thirty thousand euros (€30,000) or both penalties.