

How will CYPRUS protect whistle – blowers

From new laws to secure, anonymous digital drop boxes

Participation of the Commissioner for Personal Data Protection at the International Panel Event about the new European Directive to protect Whistleblowers

10th February 2020

Speaking points:

PART I - Background

My Office is familiar with Whistleblowing practices and schemes since 2006, the date when Art. 29 Working Party issued the Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime.

The opinion provided guidance on how internal whistleblowing schemes could be implemented in compliance with the EU data protection rules enshrined in Directive 95/46/EC.

The lack of specific national legislation in comparison with the applicability of the Sarbanes-Oxley Act (SOX) as US Act of 2002, to European subsidiaries of US companies and to European companies listed in US stock markets have led to uncertainty as to the compatibility of whistleblowing schemes with EU data protection rules and the EU companies concerned were facing the risk of sanctions from EU DPAs if they failed to comply with EU data protection rules and at the same time they were facing the risk of sanctions from the US authorities if they fail to comply with the US rules.

Art.29 Opinion- main points:

Data protection rules are applicable in every step of the procedure of the whistleblowing scheme from the collection of the information procedure until the destruction.

Whistleblower and accused person are equally protected, basic principles application, data subjects' rights, no disclosure of the identity of the whistleblower to the person accused unless when the accusation proved to be false and maliciously made, security measures, retention periods etc.

Legislative Initiatives

My Office was consulted on several occasions for specific draft legislative proposals and bills aiming to support the fight against corruption in the public and private sector.

These initiatives, include the following draft Laws:

1. "The reporting of breaches Draft Law 2018" /competent Authority The Cyprus Securities and Exchange Commission (CySEC)
2. "The transparency in the process of public decision-making and other related issues Draft Law 2019" / competent Authority The Ministry of Justice and Public Order
3. A package consisting of three draft laws a) a draft bill on the Reporting of corruption acts (supplementary measures of protection and indulgence Law 2017 (initiative of The Ministry of Justice and Public Order and two initiatives prepared by two members of the House of Representatives. My Office submitted comments on the draft Bill before the competent Parliamentary Committee.

It is worth mentioning that none of the aforementioned initiatives has been enacted into Law. All of them are pending before the House of Representatives.

My Office's common positions in all of the above initiatives:

- There should be one comprehensive legislation instead of fragmented provisions in different legislations.
- The comprehensive legislation should be aligned with the proposed Directive.
- It should cover whistle-blows both in the public and the private sector.
- It should establish procedures, channels and mechanisms for the lawful submission, handling and monitoring of reported whistle-blows and for the protection of personal data.
- The whistleblower's identity should be protected but it should be subject to conditions.
- For example, a whistleblower's identity should be disclosed to regulatory or prosecuting authorities, when this is necessary for the performance of their duties.

PART II - State of Play

1. In the frame of the National Strategy Against Corruption a National anti- corruption action plan has been decided by the Council of Ministers. My Office appointed two Officers since June 2019, to participate in the activities and training programs envisaged in the action plan.

2. Directive (EU) 2019/1937 also known as the "Whistleblowing Directive" is now a reality. I believe that its transposition into national Law will be a challenge that we welcome and look forward to face.

PART III – Core provisions of the Directive

- Cyprus has to transpose the provisions of the Directive (EU) 2019/1937 into national legislation by December 2021.
- It is a very balanced and detailed legislation, which aims at harmonizing differences in existing national legislations and practices.
- It defines the whistle-blower or "reporting person" as a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities. **Art.5(7)**
- It applies to whistle-blowers working in the public and the private sector. **Art 4(1)**
- While it only applies to specific areas of EU Law, it allows MS to extend its scope to other areas of domestic Law. **Art.2(2)**
- It provides that, where whistleblowing is governed by other specific EU or national Laws, those rules apply as *lex specialis*. **Art.3(1)**
- It also allows MS to decide if competent authorities will be obliged to accept and follow up on anonymous whistles. This means, that in some MS, national legislations may provide that anonymous reports shall not be accepted nor examined. **Art.6(2)**
- It establishes procedures both for internal reporting (**Art.7, 8 & 9**) within an organization and for external reporting to competent authorities that will be defined by Law (**Art.10, 11 & 12**).
- Channels for internal and external reporting must be designed and set-up in accordance with the Directive. **Art.12**
- The protection of whistle-blowers is a core element of the Directive. I was pleased to see that positions in this regard, that my Office has previously taken and publicly expressed, found their way into the Directive. (**Art. 9(1)(a), 11(2)(b), 16, 22**)

- For example, the identity of the whistle-blower should not be disclosed to anyone without his/her consent, beyond the authorised staff competent to examine the reported issue (**Art.16(1)**). Yet, when there is a necessary and proportionate statutory obligation, his/ her identity should be disclosed to competent authorities, in the context of investigations or judicial proceedings. **Art.16(2)**
- Also, legislative provisions must be adopted for imposing dissuasive penalties to whistle-blowers, when it is established that they knowingly and maliciously reported or publicly disclosed false information. This is consistent with the Opinion of the Article 29 Working Party and the position that my Office has repeatedly taken in the past years. **Art.23**
- Other provisions of the Directive include conditions for the protection of whistle-blowers, the processing of personal data in accordance with the GDPR, necessary measures to prohibit any form of retaliation against whistle-blowers and measures to support them including psychological support. (**Art.19, 20, 21**)
- At the same time, there are measures for the protection of the persons concerned which include the right to effective remedy and fair trial, the presumption of innocence, the right of defence, the right to be heard and the right to access their file. Competent authorities should protect their identity during ongoing investigations. **Art.22**
- Another important feature of the Directive relates to public disclosures. Whistle blowers are justified to publicly disclose wrong-doings and still afford the protection provided by the Directive if they had reported these wrong-doings internally or externally but no action was taken or if there are grounds of public interest or, in the case of external reporting, there is a risk of retaliation. **Art.15**
- My Office is ready and committed to contribute to the adoption of the transposing legislation.