A Setting the Scene

Question 1

The main national legal instrument introduced to implement Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter “GDPR”)1 in Malta is the Data Protection Act 2018 (hereinafter “DPA”),2 which repealed and replaced the Data Protection Act of 20013 which was the legislation that transposed Directive 95/46/EC.4 Subsidiary legislation has also been passed under the main Act, for example the Data Protection (Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties) Regulations,5 transposing Directive (EU) 2016/680.6

Restrictions

Regulations enacted under article 5 DPA state that any restrictions to the rights of the data subject referred to in article 23 GDPR only apply where such restrictions are a necessary

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2 Chapter 586, Laws of Malta.
3 Chapter 440, Laws of Malta.
5 S.L. 586.08.
measure required for the interests listed therein,\textsuperscript{7} and provide for broadly formulated safeguards including retention periods.\textsuperscript{8}

**Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes**

Article 9 GDPR provides that processing of defined ‘special categories of personal data’ is allowed if such processing ‘is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with article 89(1) GDPR based on Union or Member State law (...).’\textsuperscript{9} The DPA provides that the controller must consult with, and obtain prior authorisation from, the Information and Data Protection Commissioner (hereinafter “IDPC”)

where the controller intends to process in the public interest:

a. genetic data, biometric data or data concerning health for statistical or research purposes; or

b. special categories of data in relation to the management of social care services and systems, including for the purposes of quality control, management information and the general national supervision and monitoring of such services and systems:

Provided that, where genetic data, biometric data or data concerning health are required to be processed for research purposes, the Commissioner shall consult a research ethics committee or of an institution recognised by the Commissioner for the purposes of this article.\textsuperscript{10}

The research ethics committee consulted by the IDPC is the University Research Ethics Committee’s sub-committee on data protection (hereinafter “UREC-DP”).\textsuperscript{11} It is doubtful that this national law satisfies the description provided by the GDPR (that the law must ‘be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject’). In effect, the requirement of a law is replaced by a requirement of prior authorisation; and arguably it is envisaged that the Commissioner, having consulted UREC-DP, will ensure that there is proportionality, respect of the essence of the right to data protection, etc. prior to granting authorisation.

\textsuperscript{7} S.L. 586.09 Restriction of the Data Protection (Obligations and Rights) Regulations, regulation 4(a)-(i).
\textsuperscript{8} Ibid, regulations 5-7.
\textsuperscript{9} Art. 9(2)(j) GDPR.
\textsuperscript{10} Art. 7 DPA.
\textsuperscript{11} Webpage: www.um.edu.mt/urec. All webpages referred to were visited on 31 January 2020.
Article 6 DPA provides that (subject to appropriate safeguards for the rights and freedoms of the data subject) controllers and processors may derogate from the provisions of the GDPR relating to the right of access,\(^{12}\) the right to rectification,\(^{13}\) the right to restriction of processing\(^{14}\) and the right to object\(^{15}\) to the processing of personal data for scientific or historical research purposes or official statistics.\(^{16}\) Controllers and processors may also derogate from the aforementioned provisions and additionally from the GDPR provisions relating to the notification obligation regarding the rectification or erasure of personal data or restriction of processing,\(^{17}\) and the right to data portability\(^{18}\) for the processing of personal data for archiving purposes in the public interest. In both instances such derogations are allowed ‘in so far as the exercise of the rights set out in those Articles: (a) is likely to render impossible or seriously impair the achievement of those purposes; and (b) the data controller reasonably believes that such derogations are necessary for the fulfilment of those purposes.’ Where such data processing serves at the same time another purpose, the derogations apply only to processing for the purposes referred to in the said article. This national provision is an implementation of the exemptions allowed in article 89(2) and (3) GDPR, transposed in terms which closely follow those of the GDPR.

**Processing of the national identification number**

Article 8 DPA provides that an identity document\(^{19}\) may only be processed when such processing is ‘clearly justified having regard to the purpose of the processing and – (a) the importance of a secure identification; or (b) any other valid reason as may be provided by law: Provided that the national identity number or any other identifier of general application shall be used only under appropriate safeguards for the rights and freedoms of the data subject pursuant to the Regulation.’ This is clearly an implementing provision of article 87 GDPR. The terminology of the GDPR is closely followed and the local implementation does not add anything of substance thereto. In practice, in Malta it is not uncommon for

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12 Art. 15 GDPR.
13 Art. 16 GDPR.
14 Art. 18 GDPR.
15 Art. 21 GDPR.
16 ‘Official statistics’ is a term defined in the legislation as ‘information collected, analysed and produced for the benefit of the society to characterize collective phenomena in a considered population and produced by the National Statistics Office as provided for by law, or by other national authorities as designated by Eurostat following recommendation by the National Statistics Office.’
17 Art. 19 GDPR.
18 Art. 20 GDPR.
19 ‘Identity document’ is defined as a legally valid identity document as provided in the Identity Card and Other Identity Documents Act (chapter 258 of the Laws of Malta).
national identity numbers to be collected and processed and such is often done without regard to strict necessity requirements.\(^{20}\)

**Processing and freedom of expression and information**

Article 9(1) DPA provides that ‘personal data processed for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression, shall be exempt from compliance with the provisions of the GDPR specified in sub-article (2) where, having regard to the importance of the right of freedom of expression and information in a democratic society, compliance with any of the provisions as specified in sub-article (2) would be incompatible with such processing purposes: Provided that when reconciling the right to the protection of personal data with the right to freedom of expression and information, the controller shall ensure that the processing is proportionate, necessary and justified for reasons of substantial public interest.’

Article 9(2) DPA is an implementation of article 85(2) GDPR. This includes exemptions from chapters II (principles relating to processing) (but no exemption from article 9 GDPR, processing of special categories of personal data), III (rights of the data subject), IV (controller and processor) and VII (co-operation and consistency). Specific articles of the GDPR are cited in the national law, omitting those articles or sub-articles where exemptions would be unwarranted or inapplicable to the data processing envisaged; for e.g. it is not unreasonable to exclude the right to rectification provided for in article 16 GDPR from the list of articles compliance with which may be exempted in the situations envisaged by article 85 GDPR and article 9 DPA. The national legislation of Malta does not provide for exemptions from GDPR chapters V (transfers of personal data to third countries or international organisations), VI (independent supervisory authorities) and IX (specific data processing situations). This assessment of the exemptions ‘necessary to reconcile the right to the protection of personal data with the freedom of expression and information’ (article 85(2) GDPR) does not appear to be problematic.

Article 9(2) DPA excludes article 9 GDPR from the list of articles from which exemption is granted where personal data are processed ‘for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression’ where compliance with any of the said provisions (specified in sub-article (2)) would be incompatible with such processing purposes. Is this potentially problematic, e.g. reporting that a politician who campaigns for criminalisation of homosexuality turns out to be gay? Article 9(2)(g) GDPR could provide the appropriate legal base, but then that should be ‘on the basis of Union

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\(^{20}\) This practice is generally uncontroversial in Malta and as a result documentary evidence to support this claim is not available.
or Member State law’, where reference would, in this author’s opinion, need to be made to the Media and Defamation Act.\textsuperscript{21}

**Transborder Data Transfers**

Article 10 DPA provides that in the absence of an adequacy decision pursuant to article 45(3) GDPR, the Minister responsible for data protection may, following consultation with the IDPC, by regulations set limits to the transfer of specific categories of personal data to a third country or an international organisation for important reasons of public interest. This appears to be an implementation of article 49(5) GDPR. Rather than actually implement the option, the DPA allows for such possible future implementation by subsidiary legislation.

**The Information and Data Protection Commissioner (IDPC)**

The office of the Information and Data Protection Commissioner (hereinafter “IDPC”) is set up under article 11 DPA. In implementation of article 58(1)(f) GDPR, the national law provides that in the exercise of the investigative powers pursuant to article 58 GDPR, or any other law, the Commissioner may request the assistance of the executive police in order to enter and search any premises.\textsuperscript{22} The national law further provides that in the event of joint operations with supervisory authorities of one or more other Member States, the IDPC may, where appropriate, ‘confer powers, including investigative powers, on the seconding supervisory authority’s members or staff: Provided that such powers are exercised under the guidance and in the presence of the IDPC.’\textsuperscript{23} This provision appears to be implementing article 62(3) GDPR.

**Question 2**

Unlike the EU Charter of Fundamental Rights (hereinafter “Charter”), our national legal order does not distinguish between the right to respect for private life and the right to data protection.

Article 32\textsuperscript{24} of the Constitution of Malta provides:

\textsuperscript{21} Media and Defamation Act 2018, chapter 579, Laws of Malta.
\textsuperscript{22} Art. 16(1) DPA.
\textsuperscript{23} Art. 16(2) DPA. Under national law, ‘Commissioner’ means the Information and Data Protection Commissioner appointed under article 11 and includes any officer or employee of the Commissioner authorised by him in that behalf.
\textsuperscript{24} Which, while entrenched, is at the same time declared by art. 46 to be non-justiciable, unlike the rest of the provisions in Chapter IV of the Constitution, which are declared to be justiciable.
Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

a. life, liberty, security of the person, the enjoyment of property and the protection of the law;

b. freedom of conscience, of expression and of peaceful assembly and association; and

c. respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.  

This pre-ambular set of limitations is reflected in specific provisions legitimising derogation in the case of each right (except for protection from inhuman or degrading treatment), such as by a provision of law which is ‘reasonably required in the interest of public safety, public order, public morality or decency, public health or the protection of the rights and freedoms of others’. Several provisions speak both of ‘reasonably required’ and ‘reasonably justifiable in a democratic society’. The standard is substantially similar to that of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter “ECHR”).

Article 38 of the Constitution of Malta refers in a very limited fashion to the fundamental right of bodily and spatial privacy (‘no person shall be subjected to the search of his person or his property or the entry by others on his premises’) without any trace of a reference to modern concerns regarding for example informational and communications privacy.

The protection of fundamental rights in Malta is enhanced by the ECHR, as incorporated into Maltese law by virtue of the European Convention Act, which extended the same right of action to the new rights derived therefrom.  

There is no tangible evidence regarding the manner in which the Charter right to data protection may have influenced the interpretation of national law.

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25 Emphasis added.
26 Chapter 319, Laws of Malta.
Nevertheless, article 8 of the Charter was quoted in the judgment of Dr Jeffrey Pullicino Orlando v the Information and Data Protection Commissioner. This case concerned the sharing on the blog ‘Running Commentary: Daphne Caruana Galizia’s Notebook’, of articles including pictures of the claimant, a public figure (formerly a member of the national Parliament, later the Chairman on the Malta Council for Science and Technology), in public but not while exercising his official functions, and disclosing elements of his private life, for e.g. at a restaurant or at the airport with his partner. The right to privacy, as well as the right to data protection, and the rights relating to freedom of expression and journalistic freedoms were all mentioned in this judgment. The Hon. Mr Justice Anthony Ellul, the judge in the case, was not concerned with distinguishing the right to privacy from the right to data protection, but he did note that the definition of ‘personal data’ in terms of article 2 of the DPA 2001 is a wide one, and therefore also includes information regarding the geographical position of a person at a particular time.

Referring to the Lindqvist case, the judge explicitly considered the collection of this data and its uploading and sharing on Daphne Caruana Galizia’s blog to be an instance of ‘processing’ of personal data. The fact that that information concerned matters that happened in public did not change the fact that processing of personal data had occurred. Quoting article 8 of the Charter, the judge proceeded to consider the appropriate balance of the fundamental rights to privacy and to freedom of expression. Case-law of the European Court of Human Rights (hereinafter “ECtHR”) was referred to and quoted. Overturning an earlier decision of the IDPC, the judge ruled that although the claimant was photographed in public places, nevertheless the publication of that information on-line amounted to processing of personal data, and concluded that the claimant’s rights had in fact been breached as a public interest in sharing that private information had not been made out.

28 Court of Appeal (Civil, Inferior), 30 April 2019.
30 Court of Appeal (Civil, Inferior), 30 April 2019, at para. 14.
B The Reception of Substantive GDPR Provisions in the National Legal Order

Question 3

In Maltapost p.l.c. vs Information and Data Protection Commissioner,\(^\text{32}\) the Maltese Court of Appeal (Inferior Competence) annulled a decision of the Information and Data Protection Appeals Tribunal\(^\text{33}\) and confirmed the original decision of the IDPC. Referring to the ‘European Document Retention Guide 2013’,\(^\text{34}\) as well as to the 2010 Guidelines published by the Office of the EDPS,\(^\text{35}\) the Court ruled that the IDPC was right to establish that CCTV footage should, as a general rule, be deleted after a maximum period of seven (7) days. It also agreed that the IDPC was correct to establish a maximum retention period of twenty (20) days for a high-risk area in view of the special circumstances and the nature of work carried out in that area. The judgement interprets the former national Data Protection Act, which transposed Directive 95/46 and has now been repealed and replaced by the GDPR and the DPA.

Question 4

To the best of this author’s knowledge, there have been no such interpretations handed down by our national courts.

Question 5

To the best of this author’s knowledge there is to date no evidence of any debate or decision at national level regarding the validity of personal data as ‘counter-performance’ for the provision of digital content. However this author submits that personal data could be considered as a ‘lawful consideration’ in terms of s.966(d) of the Maltese Civil Code,\(^\text{36}\) and thus the validity of the contract would be upheld by a court of law.\(^\text{37}\)

\(^{32}\) Court of Appeal (Inferior competence), Appeal number 26/2017, 5 October 2018.

\(^{33}\) Set up under art. 24 DPA.


\(^{36}\) Civil Code, chapter 16 of the Laws of Malta.

\(^{37}\) Civil Code s.987: ‘An obligation without a consideration, or founded on a false or an unlawful consideration, shall have no effect’; Civil Code s.988. ‘The agreement shall, nevertheless, be valid, if it is made to appear
Question 6

No; Malta has not introduced legislative measures to ensure the right not to be subject to automated decision-making, including profiling, does not apply in certain situations, pursuant to article 22(2)(b) GDPR.

Question 7

In Malta there has been considerable controversy surrounding the decision to allow the request for erasure of certain on-line (criminal) court judgments from the public record.\textsuperscript{38}

The request was made to the court registrar who is the Courts’ data controller. The Malta IT Law Association (hereinafter “MITLA”) expressed concern, stating that: ‘The application of the right to be forgotten with respect to public records needs transparent, justifiable rules.’\textsuperscript{39}

It was reported in the local press that the Justice Minister had reported in Parliament that a total of 176 requests for court judgements to be removed from the public domain had been filed; of those, 112 judgements were made anonymous, meaning that the personal details of individuals were removed; 41 requests were rejected; one request was invalid; and another 22 requests were under consideration. One request was made in 2014; 21 requests in 2017; 121 requests in 2018; and 33 requests in 2019.\textsuperscript{40}

Question 8

Malta has not introduced a law pursuant to article 85(2) GDPR beyond that described in the response to Question 1 above, i.e. article 9 DPA.


C  **Domestic Enforcement of Data Protection Law**

**Question 9**

The relevant public authority is the IDPC.\(^41\)

The Commissioner is appointed by the Prime Minister after consultation with the Leader of the Opposition, to perform the duties of supervisory authority for the purposes of chapter VI of the GDPR.\(^42\) The IDPC is responsible for monitoring and enforcing the application of the provisions of the DPA and the GDPR, in order to protect the fundamental rights and freedoms of natural persons in relation to processing of personal data and to facilitate the free flow of personal data between Malta and any other Member State.\(^43\) The DPA also provides a list of disqualifications to hold office as Commissioner, for e.g. if s/he is a Minister or a Member of the House of Representatives, or a judge or magistrate of the courts of justice.\(^44\) The IDPC must have the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform his or her duties and exercise his or her powers in accordance with article 53(2) GDPR.\(^45\)

In the exercise of his tasks and powers, the Commissioner acts with complete independence and is free from external influence, whether direct or indirect, and must neither seek nor take instructions or direction from any person or entity.\(^46\) Any officers or employees of the Commissioner are chosen by the Commissioner and are subject to his exclusive direction.\(^47\)

The IDPC has a separate and distinct legal personality and is capable of entering into contracts, of acquiring, holding and disposing of any kind of property for the purposes of his tasks and powers, of suing and being sued, and of doing all such things and entering into all such transactions as are incidental or conducive to the effective performance of his tasks and exercise of his powers.\(^48\)

The tenure of office of the IDPC is of five years and he is eligible for reappointment on the expiration of his term of office.\(^49\) The Commissioner may not be removed from his office except by the Prime Minister upon an address of the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying

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\(^{42}\) Art. 11(1) DPA.

\(^{43}\) Art. 11(2) DPA.

\(^{44}\) Art. 11(3) DPA.

\(^{45}\) Art. 11(4) DPA.

\(^{46}\) Art. 12(1) DPA.

\(^{47}\) Art. 12(3) DPA.

\(^{48}\) Art. 13(1) DPA.

\(^{49}\) Art. 14(1) DPA.
for such removal on the ground of proved inability to perform the duties of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.  

The Commissioner performs the duties assigned to him under the DPA and the GDPR and the functions assigned to him under the Freedom of Information Act and any other law. S/he has the power to institute civil judicial proceedings in cases where the provisions of the DPA or the GDPR have been or are about to be violated. The IDPC may seek the advice of, and may consult with, any other competent authority in the exercise of his/her functions under the DPA and the GDPR.  

It has been reported that, for the period 25 May 2018 to 28 January 2019, in Malta, over one hundred (100) personal data breaches were notified to the IDPC, with seventeen (17) GDPR fines being imposed by the same. Per capita, the Maltese figures are significant.

**Question 10**

The Office of the IDPC informed the author that all complaints received by the Office are investigated and that the degree of investigation may depend on the nature of the case, but as such no ‘selective to be effective’ approach is taken.

**Question 11**

On 18 February 2019 the IDPC issued a decision to the Lands Authority after concluding an investigation of a data breach, that was brought to his attention by the media. The findings of the investigation established that the online application platform available on the Authority’s web portal lacked the necessary technical and organisational measures to ensure the security of processing. The Lands Authority was found to have infringed the provisions of article 32 GDPR and, in terms of article 21 DPA was served with an administrative fine of 5,000 euro. The level of the fine was stated to have been reached

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50 Art. 14(2) DPA.  
51 Chapter 496, Laws of Malta.  
52 Art. 15(1) DPA.  
53 Art. 15(2) DPA.  
54 Art. 15(3) DPA.  
56 Meeting at the Office of the IDPC held on 23 May 2019.  
after the Commissioner took into account the circumstances set out under article 83(2) GDPR. The temporary ban imposed on the Authority’s web portal was lifted. It was stated that the Lands Authority offered their full and unrestricted collaboration to the IDPC during the course of the entire investigation.  

Article 21 DPA implements article 83(7) GDPR and provides that the IDPC may impose an administrative fine on a public authority or body of up to 25,000 euro for each violation and additionally 25 euro for each day during which such violation persists, which fine shall be determined and imposed by the IDPC in accordance with the procedure stipulated in article 26 DPA, for an infringement under article 83(4) GDPR.

The fine that the IDPC may impose on a public authority or body for an infringement of article 83(5) or (6) GDPR (in accordance with the same procedure under article 26 DPA) must not exceed 50,000 euro for each violation and additionally 50 euro for each day during which such violation persists. Administrative fines on a public authority or body are to be imposed by the IDPC after giving due regard to the circumstances of the case pursuant to article 83(2) GDPR.

Further to the GDPR, article 22 DPA provides that any person who – (a) knowingly provides false information to the IDPC when so requested by the IDPC pursuant to his investigative powers under article 58 GDPR, or any other law; or (b) does not comply with any lawful request pursuant to an investigation by the IDPC – shall be guilty of an offence and shall, upon conviction, be liable to a fine (multa) of not less than one thousand, two hundred and fifty euro (1,250) euro and not more than fifty thousand (50,000) euro, or to imprisonment for six months, or to both such fine (multa) and imprisonment.

**Question 12**

Malta’s legal system awards damages for intangible harm in some areas, most notably in cases dealing with human rights, defamation and intellectual property law. Save for a recently introduced exception, the right of the plaintiff in an ordinary tort action to recover damages for intangible harm is not acknowledged by statute in Malta. When awarding damages for intangible harm (termed ‘moral damages’ in the Maltese legal system), and in the absence of concrete evidence to calculate *damnum emergens* and/or

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59 See Act XXXII of 2018, article 15 (discussed below).

60 Actual damages sustained.
*lucrum cessans*, the Maltese courts tend to use their discretion *arbitrio boni viri* in establishing the amount of compensation to be awarded.

**Civil damages**

In Malta the courts have traditionally affirmed that moral damages are not awarded in an ordinary action for civil damages under the law of tort or quasi-tort, but admitted this possibility under human rights law. However, this traditional position has been contested and challenged as this means that moral damages may be awarded against the State in a case brought before the Civil Court, First Hall (in its Constitutional jurisdiction), and potentially appealed before the Constitutional Court, but not in a case brought against a private individual (or the State) before the (ordinary) Civil Courts (First Hall, and potentially appealed before the Court of Appeal.) While the argument has been made for the horizontal effects of fundamental human rights (understood not as ‘holding individuals responsible for human rights violations’ but as ‘keeping human rights principles in mind when judicially interpreting private law’), this is not uncontroversial.

In *Busuttil v Muscat*, the Civil Court held that the aesthetic facial injury suffered by the applicant due to medical negligence violated the value of psycho-physical integrity which it held was protected by the Constitution of Malta, the ECHR and article 3 of the Charter (‘Everyone has the right to respect for his or her physical and mental integrity.’) Holding that the ordinary law must be interpreted in a manner that is ‘constitutionally compliant’, the Civil Court interpreted the Civil Code in this light. In particular, the Court focused on Articles 1033 and 1045 of the Civil Code:

> Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission

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61 Ceased/lost profits; losses of future earnings arising from any permanent incapacity, total or partial.

62 ‘According to the judgment of a fair man.’


64 Under art. 46 Constitution of Malta.

65 Cf. article 46(2) proviso, Constitution of Malta.

66 Zammit, 2018, p. 36.


68 Linda Busuttil illum Cordina et. v. Dr Josie Muscat et. Civil Court (First Hall), 30 November 2010.
constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.\(^{69}\)

The damage which is to be made good (\(\ldots\)) shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.\(^{70}\)

The Court held that the words ‘any damage’ and ‘actual loss’ were broad enough to encompass damage to psycho-physical integrity as a justification for a compensatory damages award to the victim. It then proceeded, arbitrio boni viri, to compensate plaintiff by awarding 5,000 euro in damages, which were stated by the court to be non-patrimonial (that is to say, ‘moral’) in character.

However, the Court of Appeal in Fenech & Others v Malta Drydocks\(^ {71}\) and subsequent cases\(^ {72}\) did not follow the same approach to human rights envisaged in Busuttil v Muscat, which itself was revoked on appeal.\(^ {73}\) In the latter judgment, the Court of Appeal reiterated the orthodox position, simultaneously affirming the non-compensability of moral damage in the context of ordinary civil liability litigation and the adequacy and sufficiency of the compensation thus granted, even understood as an ordinary remedy for a human rights violation.

Harm to the patrimony (civil damages) in Malta is quantified, where *lucrum cessans* damages are concerned, by means of the orthodox multiplier/multiplicand formula.\(^ {74}\) In the aforementioned judgments, it appeared to be the settled position of the Maltese courts that moral damages, provided they were expressed in terms of the categories of compensable patrimonial damages, were rendered indirectly compensable. This usually required the individual judge to interpret the applicable heads of damage flexibly enough, to incorporate or exclude particular forms of non-patrimonial damage according to his or her sense of what was required to achieve a *restitutio in integrum*\(^ {75}\) in the case at hand and by relying

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71 Court of Appeal, 3 December 2010, Writ Number 1427/1997.
73 Linda Busuttil et. v. Dr Josie Muscat u Tania Spiteri, delivered by the Court of Appeal on 27 June 2014, Writ Number 2429/1998/1.
75 ‘Full restitution’, that is that an injured party is, through the awarding of damages, restored to the state which would have prevailed had no injury been sustained.
on the court’s discretion to adapt its damages awards to the particular circumstances of the case before it under article 1045(2) Civil Code:

The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.

The developing status quo was dramatically impacted by Brincat and others v Malta, a case which concerned ship-yard repair workers who were exposed to asbestos for a number of decades beginning in the 1950s to the early 2000s which led to them suffering from asbestos related conditions. The ECtHR held that the non-compensability of moral damage in the context of ordinary civil liability litigation (for damages arising out of tort or contractual liability) meant that access to a human rights remedy could no longer be denied whenever an alleged victim of a human rights violation sued the Government for compensation of moral damages. The ECtHR ordered the payment of non-pecuniary (‘moral’) damages to the applicants/victims.

A further development occurred in the case of Agius v the Attorney General et, which concerned the death of an inmate at Malta’s main prison resulting from an incorrect administration of methadone to a drug addict. In this case, following the case being tried before the Civil Court and the Court of Appeal, a Constitutional case was filed. On appeal, the Constitutional Court held that since Articles 1045 and 1046 of the Civil Code fall under the sub-title ‘Of Torts and Quasi-Torts’, it is clear that any prohibition of the award of moral or non-patrimonial damages could only apply to actions in tort or quasi-tort. The Constitutional Court’s classification of the action in this case as originating from a breach of a contractual and/or legal (ex lege) relationship does evoke an uncomfortable future scenario in which non-patrimonial damage will only be compensated if the underlying relationship can be construed as contractual or legal, and not if it is understood as tortious.

As aforementioned, in 2018 the Civil Code underwent some amendments, including the addition of a proviso to article 1045(1), which provides that ‘in the case of damages arising from a criminal offence, other than an involuntary offence, (…) the damage to be
made good shall also include any *moral harm and, or psychological harm* caused to the claimant.  

Zammit opines that this recent enactment, while introducing the explicit right of the plaintiff in an ordinary action in tort to recover moral and/or psychological damages (within the parameters set out therein), may have (possibly, unintended) consequences insofar as the proviso may be interpreted to mean that moral and/or psychological damages may now only be (expressly) awarded within the limits contemplated in the said proviso, but not in all cases, for e.g. where the harm is caused by an involuntary offence; thus foreclosing potential further judicial developments particularly in light of the effects of judgments by the Constitutional Court awarding moral damages in, for example, the asbestosis cases.

**Other specific branches of Maltese law**

An award of damages may be regulated by a specific branch of Maltese law outside the ambit of the Civil Code; namely: human rights cases, the Media and Defamation Act, the Enforcement of Intellectual Property Rights (Regulation) Act, the Consumer Affairs Act, the Promises of Marriage Law, and, of course, the DPA. For example, in proceedings instituted under the Media and Defamation Act, the Court may order the defendant to pay a sum not exceeding eleven thousand, six hundred and forty euro (11,640 euro) by way of *moral damages* in addition to actual damages; in actions for slander the maximum amount to be awarded by way of moral damages is five thousand euro (5,000 euro).

**Intellectual Property law**

In intellectual property cases, a court that concludes that the defendant has knowingly engaged in infringing activity will order the payment of damages to the rightholder ‘commensurate with the actual prejudice suffered by the said rightholder as a result of the infringement’:

> In setting the amount of damages due, the Court *shall* take into account all relevant aspects, including all the negative economic consequences that may have been suffered by the injured party including lost profits, as well as any unfair profits made by the infringer and, *where it deems appropriate*, other

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81 Added by Act XXXII.2018.15.
83 Chapter 579 Laws of Malta.
84 Chapter 488 Laws of Malta.
85 Chapter 378 Laws of Malta.
86 Chapter 5 Laws of Malta.
elements such as the *moral prejudice* caused to the rightholder by the infringement:
Provided that instead of the above method of calculation of damages, the Court may, *where it so considers appropriate*, choose to apply an alternative method of calculation involving the setting of a lump sum of damages payable which shall include elements such as at least the amount of royalties or fees which would have been due had the infringer requested authorisation to use the intellectual right in question.\(^{87}\) (emphasis added by author)

Therefore, the Court has the discretion to award damages on an *arbitrio boni viri* basis under both article 12(2) and article 12(2) proviso (quoted above). It is unclear under which of these methods the Court has wider discretionary powers; in particular whether moral prejudice and/or similar elements are precluded from being included in the lump sum that can be awarded by the Court under the proviso to article 12(2).\(^{88}\)

Article 12(2) is one of the few instances in Maltese law where moral prejudice is explicitly taken into consideration when liquidating damages. One of the first IP judgments to award damages invoking moral prejudice explicitly is the case Air Malta P.L.C. vs Efly Company Limited.\(^{89}\) However, this was done on an *arbitrio boni viri* basis and therefore no explanation of the methods of calculation in question were entertained by the Court.

In the case Av. Dottor Antoine Camilleri noe (acting as special mandatory for and on behalf of Bacardi & Company Limited) vs Patrick Cellars Limited,\(^{90}\) the court – in a case concerning the ‘exhaustion of rights’/ trademark infringement by importing/commercialising goods in Malta which were not destined for the EU/EEA market – liquidated the damages caused to Bacardi, in terms of article 12, in the amount of fifty-two thousand six hundred and fifty (52,650) euro in damages, including thirty thousand euro (30,000) euro in other damages (particularly ‘moral damages’, which include reputational damage). The Court stated that it was applying article 12(2) proviso and, having taken into consideration all the aspects of the case, awarding *arbitrio boni viri* the global amount of 30,000 euro in other damages.

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89 Air Malta PLC (C-2685) vs Efly Company Limited (C-46370) – 30 March 2010 – First Hall, Civil Court.
In Av. Dottor Antoine Camilleri noe (acting as special mandatory for and on behalf of Nando’s Limited) vs Mirale and Lamare Limited, the court awarded ten thousand euro (10,000 euro), with interest running from the date of the filing of the case, in moral damages calculated on the basis of *arbitrio boni viri* for the breach of rights suffered.

The onus of conducting an assessment *arbitrio boni viri* is placed upon the judge as the learned professional capable of delivering an amount based on equity. The author has been unable to trace any judgment of our courts which specifies in further detail how damages for ‘moral prejudice’ are calculated/quantified/liquidated in terms of article 12, since in the case-law identified no further deliberations were specifically entertained by the Courts on this point.

**Data Protection law**

Article 30(1) DPA states: ‘Without prejudice to any other remedy available to him (…), a data subject may, where he believes that his rights under the GDPR or this Act have been infringed (…) by sworn application filed before the First Hall of the Civil Court, institute an action for an effective judicial remedy against the controller or processor concerned. (2) A data subject may also, by sworn application filed before the First Hall of the Civil Court, institute an action for damages against the controller or processor who processes personal data in contravention of the provisions of the GDPR or this Act.’

The DPA also explicitly provides in article 30(3) that ‘If in determining an action [for damages] the court finds that the controller or processor is liable for the damage caused pursuant to Article 82 of the [GDPR], the court shall determine the amount of damages, including, but not limited to, moral damages as the court may determine, due to the data subject.’

There are so far no decided cases awarding damages for intangible harm in the area of data protection law.

**Question 13**

Malta has to the best of this author’s knowledge not introduced any legislative measures intended to facilitate representative actions pursuant to article 80 GDPR. Neither have any such representative actions been brought in practice.

A ‘representative action’, defined as ‘proceedings that are brought on behalf of a number of class members by a representative body’, is possible according to the provisions of the Collective Proceedings Act, enacted in 2012 – but only with regard to an infringement

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91 Civil Court, First Hall, 13 June 2019 (Application No. 853/2017).
92 Emphasis added.
93 Laws of Malta, chapter 520.
of the Acts listed in Schedule A of the Act, i.e. the Competition Act, and articles 101 or 102 TFEU, the Consumer Affairs Act and the Product Safety Act. In a representative action, the Court shall approve a registered consumer association or a ‘constituted body’ to act as a class representative according to the terms of article 12(1) of the Act. In this author’s opinion, the DPA and the GDPR should be brought within the purview of this Act.

MITLA has reacted to certain developments at the local level, for example with regard to the government’s announced plans to introduce public, smart CCTV surveillance cameras (with facial recognition technology) in selected locations in Malta to address “ant-social behaviour” hotspots. MITLA has also pronounced itself on the matter of the erasure of criminal court judgements from the publicly accessible online judgments database. This author believes that in principle MITLA should qualify to bring a representative action in terms of Article 80(1) GDPR.

**Question 14**

Malta has recently established a new authority – the Malta Digital Innovation Authority – to regulate innovative technologies. However the scope of this authority is limited to certifying the functionality of ‘innovative technology arrangements’ and does not extend to dealing with complaints relating to data protection. Any data protection issues in the application of any innovative technology arrangement would need to be referred to the Office of the IDPC.

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94 Laws of Malta, chapter 379.
95 Laws of Malta, chapter 378.
96 Laws of Malta, chapter 427.
97 MITLA is registered as a Voluntary Organisation (VO/1166) in terms of art. 3 of the Voluntary Organisations Act 2007 (Act No, XXII of 2007), Malta.
99 See above response to question 7.
100 Established by the Malta Digital Innovation Authority Act, chapter 591 Laws of Malta, mdia.gov.mt.
Cooperation between the Office of the IDPC and other regulators has to date been informal and on an *ad hoc* basis.\(^{101}\)

### D Data Processing for National Security Purposes

**Question 15**

In Malta communications data is retained according to the provisions of S.L. 586.01 Processing of Personal Data (Electronic Communications Sector) Regulations. Article 19(1) states that ‘Data retained under this Part shall be disclosed only to the Police or to the Security Service, as the case may be, where such data is required for the purpose of the investigation, detection or prosecution of serious crime.’

The closest to a definition of the Security Service of Malta is that found in article 3 of the Security Service Act,\(^ {102}\) as follows:

1. There shall continue to be a Security Service … under the authority of the Minister.
2. The function of the Service shall be to protect national security and, in particular, against threats from organised crime, espionage, terrorism and sabotage, the activities of agents of foreign powers and against actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
3. It shall also be the function of the Service to act in the interests of – (a) the economic well-being of Malta; and (b) public safety, in particular, the prevention or detection of serious crime.

Subsidiary legislation 586.09 Restriction of the Data Protection (Obligations and Rights) Regulations, article 4(4), provides: ‘Any restriction to the rights of the data subject referred to in article 23 GDPR shall only apply where such restrictions are a necessary measure required:(a) for the safeguarding and maintaining of *national security*, public security, defence and the international relations of Malta; …’\(^ {103}\)

It is unclear whether our national authorities accept the application of the Charter to data retention for national security purposes as the issue has never really been a controversial matter in this country.

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\(^{101}\) Discussion/interview held at the Office of the IDPC on 23 May 2019.

\(^{102}\) Chapter 391, Laws of Malta.

\(^{103}\) Emphasis added.