

FRA

Thematic Legal Study on assessment of
data protection measures and relevant
institutions
Malta

Dr Therese Comodini Cachia
for OPHR (Malta)
Valletta, Malta
February 2009

DISCLAIMER: This thematic legal study was commissioned as background material for the comparative report on *Data protection in the European Union: the role of National Data Protection Authorities* by the European Union Agency for Fundamental Rights (FRA). It was prepared under contract by the FRA's research network FRALEX. The views expressed in this thematic legal study do not necessarily reflect the views or the official position of the FRA. This study is made publicly available for information purposes only and do not constitute legal advice or legal opinion.

Contents

Executive summary	3
1. Overview.....	8
2. Data Protection Authority	10
3. Compliance.....	19
4. Sanctions, Compensation and Legal Consequences	22
5. Rights Awareness.....	24
6. Analysis of deficiencies.....	24
7. Good practices	25
8. Miscellaneous	25

Executive summary

Overview

- [1]. Personal data is protected within the Maltese legal order through the right to privacy under the European Convention Act¹ and in particular through the Data Protection Act.² The Data Protection Act provides a regime which regulates the processing of personal data and of sensitive data bringing into being also the office of a Data Protection Commissioner.

Data Protection Authority

- [2]. The Commissioner is endowed with a number of functions amongst which the function of monitoring compliance, investigating on his/her own initiative or upon receipt of complaint the processing of data and advising in relation to legislation required in the field of data protection. In the exercise of his powers the Data Protection Commissioner is also given the right to request information and to enter premises, to seek rectifications, to order the taking of security measures in data processing systems, and to impose administrative fines where he/she finds a situation non compliant with the Data Protection Act.
- [3]. Two other important roles are also established by the Data Protection Act, these being the data controller and the personal data representative. The Data Controller is the person appointed by an entity who determines the processing of data, data categories and purposes for such processing. On the other hand, the personal data representative, although appointed by the entity processing the data itself, is to perform the independent function of ensuring that the rights of data subjects are being respected in the data processing proposed by the controller. Both roles are to be registered with the Office of the Data Protection Commissioner who keeps a public register of both data controllers and of personal data representatives.

¹ Chapter 319 of the Laws of Malta; www.mjha.gov.mt

² Chapter 440 of the Laws of Malta; www.mjha.gov.mt

- [4]. In carrying out its role, the Data Protection Commissioner is independent from any government alliances and enjoys a distinct legal personality. Moreover, although he/she is appointed by the Prime Minister after consultation with the Leader of the Opposition, he/she may only be removed from office for proved incapacity or misbehaviour and with a two thirds vote of all the members of the House of Representatives. In this respect he/she, therefore, enjoys security of tenure in a similar manner as judges.
- [5]. The processing of personal data through automated means enjoys a three tier review where the data subject or the person requested to process such data finds an objection to such processing. In this respect, at first it is the Commissioner who must deliver a ruling on a request for processing of data. Should either the data processor or the authority requesting such processing or the data subject disagree with a ruling, an appeal may be presented to the Data Protection Appeals Tribunal who will review the ruling of the Commissioner and after considering the circumstances of the case is to deliver its own decision. This is also subject to appeal, however only on a point of law, to the Court of Appeal in its inferior jurisdiction, who will review the circumstances of the case and the decisions already delivered and may either confirm, reform or revoke such decisions. This procedure has only been used in full once, in the Vodafone Malta Limited v. Data Protection Commissioner et proceedings decided by the Court of Appeal on 03/10/2007.³

Compliance

- [6]. Data subjects may request the Commissioner to investigate the use or processing of data in his/her respect and may also seek information on the data held in his/her respect. Moreover, data subjects may seek compensation for damages ensuing from non-compliance with the Data Protection Act through the civil courts. However, this is done at the initiative of the data subject and at his/hers expense.
- [7]. Compliance with the Data Protection Act and the work of the Office of the Data Protection Commissioner is difficult to analyse. Decisions and rulings of the Office of the Data Protection Commissioner are not made public and are not available on the official website, while the

³ Application 16/2006

latest full annual report made available for the year 2005 does not give sufficient details to allow any such analysis. It is likewise not possible to reach a conclusion with any certainty as to whether the Office of the Data Protection Commissioner is equipped with sufficient funding and staff. It can only be indicated that the published annual reports indicate that some years were worked at a deficit. It is however interesting to note that the Office of the Data Protection Commissioner does not entirely depend on government funding but also generates funding from notification procedures provided for in the Data Protection Act.

- [8]. The system can be said to be deficient with respect to raising awareness in the public about data protection; however, it can be said to produce a good practice in the work undertaken together with actors in different sectors that has led to the drafting of guidelines on data protection in these sectors.

Sanctions, Compensation and Legal Consequences

- [9]. Non-compliance with the provisions of the Data Protection Act may also give rise to criminal offences. In this respect non fulfilment of an order given by the Data Protection Commissioner and non compliance with security measures may lead to a conviction of a criminal offence. The sanction accompanying offences under the Data Protection Act is either the payment of a fine of approximately € 23,000 or to 6 months imprisonment or to both.
- [10]. Since the decisions, opinions and the full annual reports for the years 2006, 2007 and 2008 of the authority are not available, it is not possible to analyse the type of evidence being required by the authority in practice when considering a complaint before it or when a ruling is sought. An analysis of the sanctions, compensation and legal consequences may only be made on the basis of the Data Protection Act.
- [11]. On the other hand, the Act also provides for situations where the Commissioner may impose administrative fines. In this respect, where a controller fails to implement security measures in the processing of personal data the Commissioner may impose an administrative fine. Moreover, where the controller fails to comply, the Commissioner shall commence proceedings against him.

However these numbers are not available as the annual reports for at least the last 2 years have not been published. Any administrative fine so imposed is due as a civil debt and constitutes an executive title as if the fine had been ordered by a judgment of a court of civil jurisdiction⁴.

[12]. Yet for a data subject to obtain compensation for any unlawful processing of data that relates to him, the data subject must institute proceedings before the court exercising an action for damages against the controller. Moreover these proceedings must be commenced within a twelve months from the date when the data subject becomes aware of could have become aware of such a contravention⁵.

Rights Awareness

[13]. No studies or surveys on awareness regarding data protection law have been undertaken.

Analysis of deficiencies

[14]. The main deficiency identified is the lack of public awareness on data protection. In this respect, the lack of publicity about the outcome of the investigations carried out by the authority and about the work of the authority, including the restricted availability of the opinions and decisions concluded by the authority or the Appeals Tribunal are seen as deficiencies in the system of protection.

Good Practice

[15]. The author identifies as good practice the work undertaken by the Office of the Data Protection Commissioner in liaising with particular sectors in the drafting of guidelines promoting data protection within these sectors⁶.

⁴ Chapter 440 of the Laws of Malta, Data Protection Act, Article 42; www.mjha.gov.mt

⁵ Chapter 440 of the Laws of Malta, Data Protection Act, Article 46; www.mjha.gov.mt

⁶ www.dataprotection.gov.mt

Miscellaneous

[16]. Nothing to report further.

1. Overview

[17]. Personal data as such does not find protection under the right to privacy in Article 38 of the Constitution⁷. The protection of privacy therein mentioned is one which relates to property as such and seems to exclude the protection of personal data from the definition of property. The article itself states: “Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises.”

[18]. In this respect, therefore, personal data as a fundamental right only receives protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms as incorporated in the national law through Chapter 319 of the Laws of Malta⁸. Article 8 of the European Convention is thereby enforceable before national courts through its implementation in Chapter 319 of the Laws of Malta.

[19]. Moreover, Malta has signed the Convention for the Protection of Individual with regard to Automatic Processing of Personal Data⁹. Together with the deposit of the instrument of ratification which occurred on the 28th February 2003, Malta presented three declarations indicating the following:

- That the Convention will not apply to categories of automated personal data files processed by a natural person in the course of a purely personal activity and those personal data files processed for the purposes of public security, defence or State security (including the economic well being of the State when the processing operation relates to security matters.)
- That Malta will only comply with a request for information where the data subject adequately specifies his or her request.
- That the Office of the Commissioner for Data Protection is the designated Authority.

[20]. In so far as EU Directives are concerned, Malta has sought to implement Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and Directive 2002/58/EC of the European Parliament and of the Council

⁷ Constitution of Malta, Article 38; www.mjha.gov.mt

⁸ European Convention Act, Chapter 319 of the Laws of Malta; www.mjha.gov.mt

⁹ Council of Europe, Treaty 108, www.conventions.coe.int

concerning the processing of personal data and the protection of privacy in the electronic communications sector through the Data Protection Act¹⁰ and other subsidiary legislation promulgated in terms of the powers given to the Minister under the same Act.

[21]. The national law which specifically regulates data is the Data Protection Act, enacted in 2001 by Act XXVI¹¹ and later amended on a number of occasions.¹² The aim of this legislation is to make provision for the protection of individuals against the violation of their privacy by the processing of personal data and for matters connected therewith or ancillary thereto. It thereby establishes a regulated system in relation of data protection which is entrusted to the Office of the Data Protection Commissioner, also appointed under the same Act.

[22]. Other subsidiary legislation has also been enacted to regulate particular issues of data protection. Legal Notice 16 of 2003¹³ regulates the Processing of Personal Data (electronic communications sector) Regulations. Third Country (Data Protections Act) Regulations were promulgated by means of Legal Notice 154 of 2003¹⁴. Processing of Personal Data in relation to Minors is ad hoc regulated by Legal Notice 125 of 2004¹⁵, while the processing of personal data in the police sector is regulated by Legal Notice 142 of 2004¹⁶.

[23]. As such, the issue of data protection has not so far raised any debate in civil society. The only debate that was raised by the then two major telecommunication providers matured into court proceedings. The proceedings in question were decided by the Court of Appeal (in its inferior jurisdiction) on the 03.10.2007 in the names of Vodafone Malta Limited v. Commissioner of Data Protection et¹⁷. The case dealt with a request made by the Police Commissioner to the telecommunications service providers whereby they were asked to

¹⁰ Data Protection Act, Chapter 440 of the Laws of Malta; www.mjha.gov.mt

¹¹ Act XXVI of 2001; www.doi.gov.mt

¹² Chapter 440 of the Laws of Malta was amended by Act XXXI of 2002, Act IX of 2003, Legal Notice 181 of 2006, Legal Notice 186 of 2006 and Legal Notice 426 of 2007; www.doi.gov.mt

¹³ Legal Notice 16 of 2003 as amended by Legal Notice 153 of 2003, Legal Notice 522 of 2004, Legal notice 109 of 2005 and Legal Notice 198 of 2008; www.doi.gov.mt

¹⁴ Legal Notice 154 of 2003 as later amended by Legal Notice 162 of 2004; www.doi.gov.mt

¹⁵ Legal Notice 125 of 2004, Processing of Personal Data (Protection of Minors) Regulations, 2004; www.doi.gov.mt

¹⁶ Legal Notice 142 of 2004, Data Protection (Processing of Personal Data in the Police Sector) Regulations, 2004; www.doi.gov.mt

¹⁷ Vodafone Malta Limited v. Commissioner of Data Protection and the Commissioner of Police who was admitted to intervene in the proceedings by a decree of the Court of the 25th October 2006, Application Number 16/2006

indicate all persons who made use of their mobile phones in a certain locality on certain dates. This information was to be used by the Police in the investigation of arson. Upon receipt of this request the service providers asked the Data Protection Commissioner for a ruling, who in turn ordered the service providers to abide with the request. This ruling was appealed before the Data Protection Appeals Tribunal, which confirmed the ruling of the Commissioner arguing that such a request does not in any way infringe the privacy of the customers of the service providers. This decision was overturned and the Police order declared as being one which violates the privacy of individuals by the Court of Appeal. Yet even these proceedings did not raise any public debate beyond the ambit of those concerned in the proceedings.

2. Data Protection Authority

[24]. Data protection is entrusted to the Office of the Data Protection Commissioner¹⁸. The Data Protection Commissioner is appointed by the Prime Minister after consulting the Leader of the Opposition¹⁹. A person is not qualified to hold such office if he/she is a member of Parliament, a judge or magistrate, an office in the public service, a member of a local council or has a financial or other interest in any enterprise or activity which is likely to affect the discharge of his functions²⁰. In this respect however, persons who have been in the public service prior to being appointed in this office do qualify. Moreover, where a person is selected who may have a financial or other interest in an activity which may conflict with the functions of the office, the disqualification may be waived in his/her regard if he publishes a declaration to this effect in the Government Gazette.

[25]. As a structure, the Data Protection Commissioner is the first person upon who rests the responsibility of fulfilling all the functions assigned to him/her in respect of data protection and in carrying out such functions employs a number of persons of his/her own choice.

[26]. The Commissioner's decisions and rulings however are subject to the review of a Data Protection Appeals Tribunal. The Tribunal is composed of a Chairperson and two other members who are appointed by the Minister of Justice²¹ and whose main function is to hear appeals from persons who feel aggrieved by a decision of the Commissioner.

¹⁸ www.dataprotection.gov.mt

¹⁹ Chapter 440 of the Laws of Malta, Data Protection Act, Article 36(1); www.mjha.gov.mt

²⁰ Chapter 440 of the Laws of Malta, Data Protection Act, Article 36(2); www.mjha.gov.mt

²¹ Chapter 440 of the Laws of Malta, Data Protection Act, Article 48 et seq; www.mjha.gov.mt

In the event that the aggrieved person is unsatisfied with the decision of the Appeals Tribunal, that person may then avail himself/herself of an appeal before the Court of Appeal in its inferior jurisdiction²².

[27]. However, one is to note that the jurisdiction of the Appeals Tribunal and also of the Court of Appeal is limited in the following manner. An appeal may be presented to the Appeals Tribunal after a ruling given by the Commissioner on either of the following four grounds:

- That a material error as to the facts has been made;
- That there was a material procedural error;
- That an error of law has been made;
- That there was some material illegality, including unreasonableness or lack of proportionality.²³

On the other hand, an appeal from the decision of the Appeals Tribunal may only be presented to the Court of Appeal on a question/point of law²⁴.

[28]. The Office of the Data Protection Commissioner has a two-tier structure with the Commissioner being assisted by a technical unit consisting of persons dealing with technical aspect, persons dealing with legal issues and others dealing with compliance; and an administrative and clerical unit. This represents the current structure, however at present the office of Commissioner has been vacant for a number of weeks and it is expected to be filled by a retired public officer who has already been named by the Prime Minister. The office of the Commissioner became vacant in August 2008 when the previous Commissioner passed away. The office has remained vacant until the newly appointed person enters office. Agreement was reached on this new appointment by the Prime Minister and the Leader of Opposition only in December 2008.

[29]. The financing required by the Commissioner to exercise his functions are fixed by Parliament and are charged on the Consolidated Fund. Moreover if during the course of any financial year the sum so fixed is in the opinion of the Commissioner insufficient he/she may request Parliament to consider supplementary estimates prepared by him for the issue of more funding²⁵. The budget estimated for 2009 for the

²² Chapter 440 of the Laws of Malta, Data Protection Act, Article 51; www.mjha.gov.mt

²³ Chapter 440 of the Laws of Malta, Data Protection Act, Article 49(2); www.mjha.gov.mt

²⁴ Chapter 440 of the Laws of Malta, Data Protection Act, Article 51; www.mjha.gov.mt

²⁵ Chapter 440 of the Laws of Malta, Data Protection Act, Article 52; www.mjha.gov.mt

Office of the Data Protection is that of one hundred and forty thousand Euro (€ 140,000)²⁶.

[30]. Within this structure the Commissioner is entrusted with thirteen main functions expressly mentioned in Article 40 of the Data Protection Act²⁷. These are described as follows:

- “(a) to create and maintain a public register of all processing operations according to notifications submitted to him as specified in this Act;
- (b) to exercise control and, either of his own motion or at the request of a data subject, verify whether the processing is carried on in accordance with the provisions of this Act or regulations made thereunder;
- (c) to instruct the processor and controller to take such measures as may be necessary to ensure that the processing is in accordance with this Act or regulations made thereunder;
- (d) to receive reports and claims from data subjects or associations representing them on violations of this Act or regulations made thereunder, to take such remedial action as he deems necessary or as may be prescribed under this Act, and to inform such data subjects or associations of the outcome;
- (e) to issue such directions as may be required of him for the purposes of this Act;
- (f) to institute civil legal proceedings in cases where the provisions of this Act have been or are about to be violated and to refer to the competent public authority any criminal offence encountered in the course of or by reason of his functions;
- (g) to encourage the drawing up of suitable codes of conduct by the various sectors affected by the provisions of this Act and to ascertain that the provisions of such codes are in accordance with the provisions of this Act and for such purpose the Commissioner may seek the views of data subjects or their representatives;
- (h) to take such measures as may be necessary so as to bring to the knowledge of the general public the provisions of this Act and for such purpose to give advice to any person where it is required;
- (i) to order the blocking, erasure or destruction of data, to impose a temporary or definitive ban on processing, or to warn or admonish the controller;
- (j) to advise the Government on any legislative measures that are required to be taken to enable him carry out his functions appropriately;
- (k) to draw up annual reports of his activities at regular intervals, at least once a year, which reports shall be made public;

²⁶ <http://finance.gov.mt/image.aspx?site=MFIN&type=estimate&ref=580>

²⁷ Chapter 440 of the Laws of Malta, Data Protection Act, Article 40; www.mjha.gov.mt

(l) at the request of a data subject to verify that the processing of the personal data described in article 23 of this Act is compliant with the provisions of this Act or of any law as specified in subarticle (1) of the said article 23 and in such a case the data subject shall be informed accordingly; and

(m) to collaborate with supervisory authorities of other countries to the extent necessary for the performance of his duties, in particular by exchanging all useful information, in accordance with any convention to which Malta is a party or other any international obligation of Malta.”

[31]. Article 28 of Directive 95/46/EC obliges Member States to provide the designated authority, in this case the Office of the Data Protection Commissioner, with mainly the following functions:

- a. monitoring of the application within its territory of the provisions adopted pursuant to the Directive;
- b. consultation status in relation to the drawing up of administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data;
- c. investigative powers
- d. powers of intervention
- e. power to engage in legal proceedings in relation to violations of the national provisions
- f. hearing and determination of claims.

[32]. These functions have all been incorporated into the Data Protection Act and are particularly mentioned in Article 40 of the Act, which has already been quoted in full in paragraph 27 above. In this respect therefore all the powers mentioned in Article 28 of the Directive are duly given to the Commissioner.

[33]. Despite this however, the judgment of the Court of Appeal, as mentioned in paragraph 20 above, indicates that these powers fail to offer or at least in that case failed to offer effective data protection through the incorrect interpretation of the right to data protection of the individual and the incorrect application of the principle of proportionality between the right of the individual for protection and the limits that may be justified in the investigation of crime. Yet if

this can be seen as a failure, it is a failure not consequent to lack of powers but consequent to the application of such powers.

[34]. The limits of the functions assigned to the Commissioner are found in the limitations imposed on the applicability of the Act, whether in respect of territorial scope or nature of processing. In this respect, Articles 3, 4 and 5 of the Data Protection Act limit the application of the Act in the following manner:-

[35]. The Act protects only personal data which is processed, wholly or partly, by automated means and to such processing where even if not carried out by automated means the personal data forms part of a filing system or is intended to form part of a filing system²⁸. Moreover the protection of personal data also extends to the precession which is carried out in the context of the activities of an establishment of a controller in Malta or in a Maltese Embassy or High Commission abroad and also where the controller is established in a third country as long as the equipment used for processing is situated in Malta. Despite this, where the controller is established in a third country and the equipment used is situated in Malta but is only used for purposes of transit of information between a third country and another such country then the protection of data does not fall within the remit of the Commissioner.

[36]. In this respect where the processing of data is being carried out by means of equipment found in Malta but for the purpose of transiting that information between third countries, it seems that the data thereby processed falls outside the remit of the Commissioner thereby receiving no protection whatsoever.

[37]. Moreover, the Data Protection Act does not apply to the processing of personal data where such processing is undertaken by a natural person in the course of a purely personal activity and to processing operations concerning public security, defence, State security (including the economic well being of the State when the processing operation relates to security matters) and activities of the State in areas of criminal law²⁹. The latter exemption from the regulatory system of data protection, and that is the exclusion of the activities of the State in areas of criminal law would have constituted a flaw in the protection offered by the Act, had this not been rectified by the introduction of the Data Protection (Processing of Personal Data in the

²⁸ Chapter 440 of the Laws of Malta, Data Protection Act, Article 3; www.mjha.gov.mt

²⁹ Chapter 440 of the Laws of Malta, Data Protection Act, Article 5; www.mjha.gov.mt

Police Sector) Regulations, 2004³⁰. These regulations came into force on the 03.09. 2004³¹.

[38]. Despite this however, it is to be noted that the Minister of Justice³² may make provisions extending the application of the Data Protection Act, adding or derogating from the provisions of this exemption of applicability to enforce the provisions of any international obligation, convention or treaty relating to the protection of personal data to which Malta may be a party only with the concurrence of the Minister responsible for the Police.

[39]. There is no indication in the Annual Reports issued by the Commissioner³³ to indicate that the resources allocated to him are insufficient. However if one considers the annual accounts published for the year 2005³⁴, it is therein stated that the Office managed the year on a deficit. This could itself be seen as an indication that the resources are insufficient. However, one is to note that the Office of the Data Protection Commissioner does not depend financially only on the funds allocated to it by the Government, but also obtains funds from what is called ‘notification fees’ which represent fees paid by private individuals for registrations with the Authority and for other procedures. The last accounts published on the authority’s website indicate that during 2005 the authority received € 154,046.12 from the Government and € 141,942.69 from notification fees. Despite these figures however, it may be noted that there is little public awareness about the office of the Data Protection Commissioner with no NGOs working in this field.

[40]. The independence of the Commissioner is guaranteed in a number of ways in the Data Protection Act. Article 37 of the Act clearly indicates that ‘in the exercise of his functions under the Act the Commissioner shall act independently and shall not be subject to the direction or control of any other person or authority.’³⁵ Moreover the Commissioner also has a distinct legal personality³⁶.

³⁰ Legal Notice 142 of 2004, Data Protection (processing of Personal Data in the Police Sector) Regulations, 2004; www.doi.gov.mt

³¹ Legal Notice 399 of 2004, Commence Notice; www.doi.gov.mt

³² The Minister responsible under the Data Protection Act is the Minister for Investment, Industry and Information Technology

³³ www.dataprotection.gov.mt

³⁴ <http://www.dataprotection.gov.mt/dbfile.aspx/Annual%20Report%202005.pdf> These are the last annual accounts and annual report published by the Office of the Data Protection Commissioner. For the years 2006, 2007 and 2008 the Office of the Data Protection Commissioner has only forwarded by email abridged reports without the annual accounts.

³⁵ Chapter 440 of the Laws of Malta, Data Protection Act, Article 37; www.mjha.gov.mt

³⁶ Chapter 440 of the Laws of Malta, Data Protection Act, Article 38(1); www.mjha.gov.mt

[41]. The Commissioner is appointed for a term of five years and is also eligible for reappointment. His /Her independence is ensured by the procedure for removal whereby the Prime Minister may only remove an appointed Commissioner during a term upon an address of the House of Representatives supported by the votes of not least than two thirds of all the members thereof. Moreover the address requesting removal must indicate the ground of proved inability to perform the functions of the office whether these arise from infirmity of body or mind or other cause or of proved misbehaviour³⁷. In this manner therefore, the Commissioner is protected from removal in a similar manner as are the judges appointed in courts of law.

[42]. At the same time the objective impartiality of the Commissioner is also regulated in that during office a Commissioner is prohibited from carrying out any profession, business or trade or to hold an office of profit whatsoever, even if this is of a temporary nature. The only exception to this is the temporary appointment to judicial office on any international court or tribunal or any international adjudicating body and the appointment of examiner at a University³⁸.

[43]. There has been no public information nor any claim in judicial proceedings to indicate that difficulties have been encountered with respect to the independence or impartiality of the authority.

[44]. Article 40 of the Data Protection Act provides instances whereby the Commissioner is authorised or expected to act of his /her own motion without the necessity of receiving a complaint or request from a third party. In this respect, for example, he / she is authorised to exercise control by verifying whether the processing of data is being carried in accordance with the Act; or to instruct the processor and controller to take measures necessary to ensure compliance with the Act; or to institute civil legal proceedings in cases where there is a violation of the provisions of the Act; or to encourage the drawing up of suitable codes of conduct by various sectors affected by the Act.

[45]. In this respect, one may indicate that the authority has been proactive in the field of encouraging the drawing up of suitable codes of conduct. Codes of conduct in the form of Guidelines for the promotion of good practice have been developed by the authority together with the service providers in the field of insurance and banking. Moreover, such guidelines are being developed for the field of journalism and security especially focusing on the use of CCTVs³⁹. Another area that has been developed with the provision of guidelines

³⁷ Chapter 440 of the Laws of Malta, Data Protection Act, Article 39; www.mjha.gov.mt

³⁸ Chapter 440 of the Laws of Malta, Data Protection Act, Article 37(2); www.mjha.gov.mt

³⁹ <http://www.dataprotection.gov.mt/article.aspx?art=117>

is the guidance issued for schools in the processing of visual images in schools.

[46]. On the other hand, there is no indication that the authority has ever instituted civil proceedings against a person acting in violation of the provisions of the Act⁴⁰. The annual reports indicate that ex officio investigations and controls are undertaken by the authority either on a planned schedule or else also upon receipt of a complaint where from its investigation it results to the authority that the difficulty giving rise to the complaint applies to more than just the complainant.

[47]. In fulfilling its monitoring role the Commissioner is given the right both to access information and also to seek rectification⁴¹. In this respect the Commissioner is entitled to obtain upon request access to the personal data that is processed and also information about and documentation of the methods of processing and of the security related to this processing⁴². Moreover a person who does not comply with the request of the Commissioner may be found guilty of an offence in criminal proceedings⁴³. The right to monitor data protection through the right of the authority to access information is furthermore strengthened when one considers that the Commissioner is given the same powers to enter and search any premises as the executive police⁴⁴.

[48]. If upon receipt of the requested information the Commissioner concludes that the personal data is being processed or may be processed in an unlawful manner then he /she may issue an order of rectification. Should this not be abided with the Commissioner may then prohibit the controller of personal data from continuing to process the personal data in any manner other than to store it. Moreover where security measures as directed by the authority are not put in place, the Commissioner may also impose administrative fines⁴⁵.

[49]. It is also important to note that where a person provides untrue information to the Commissioner where the latter request information, that person upon being found guilty of an offence may upon

⁴⁰ The database provided by the Ministry of Justice in relation to the proceedings pending before the civil courts and the decisions delivered by these courts do not indicate any proceedings in the name of the authority as plaintiff. www.mjha.gov.mt

⁴¹ Chapter 440 of the Laws of Malta, Data Protection Act, Articles 41 and 42; www.mjha.gov.mt

⁴³ Chapter 440 of the Laws of Malta, Data Protection Act, Article 41(2); www.mjha.gov.mt

⁴⁴ Chapter 440 of the Laws of Malta, Data Protection Act, Article 41(5); www.mjha.gov.mt

⁴⁵ Chapter 440 of the Laws of Malta, Data Protection Act, Article 42; www.mjha.gov.mt

conviction be liable to a fine not exceeding €23,293.73 or to imprisonment for 6 months or to both such fine and imprisonment⁴⁶.

[50]. There is no information to indicate whether the authority is proactive in this field or otherwise as information in this respect is not published. Moreover the most recent full annual report published for the year 2005 does not indicate how the monitoring role of the authority was exercised. Nor do the abridged reports for the years 2006, 2007 and 2008 indicate this.

[51]. The decisions and opinions of the Commissioner are certainly not available to the public via a web site. In fact, a request for sight of such decisions and opinions has been forwarded to the authority, however this to date⁴⁷ this remains unanswered.

[52]. Since the decisions and opinions of the Commissioner are not available to the public, it is not possible to conclude whether the Opinions of the Working Party established under Article 29 of Directive 95/46/EC are considered binding, or at least represent a source of inspiration, for the interpretation by the data protection authority of the national legislation implementing the EU legislation on data protection. The only decision of which the author has sight is the decision reached by the Commissioner and the Appeals Tribunal in the case of Vodafone Malta Limited v. Commissioner for Data Protection et⁴⁸ and this does not refer to the opinions of the working party in any manner.

[53]. Article 54 of the Data Protection Act gives the Commissioner the role of advisor or consultant to the Minister when the latter prescribes regulations for the better carrying out of the provisions of the Act. Consequently, it seems that the advisory role of the Commissioner with respect to legislation is limited to that legislation which is enacted to better implement the provisions of the Data Protection Act.

[54]. This indicates that the Commissioner does not have an advisory role or at least a position of consultation in respect to other legislation which although it does not deal with data protection as such may have an impact on the protection of personal data. In a similar manner neither can one state that the Commissioner is given this role by Article 40 paragraph (j) which reads “to advise the Government on any legislative measures that are required to be taken to enable him carry out his functions appropriately;” since this function is limited to

⁴⁶ Chapter 440 of the Laws of Malta, Data Protection Act, Article 47; www.mjha.gov.mt

⁴⁷ Request sent by email on the official email address of the Office of the Data Protection Commissioner

⁴⁸ See paragraph 20 above

those measures which are enacted in relation to the functions of the Commissioner per se and not to any other legislative measure which may have an effect on the protection of personal data.

[55]. In article 40 paragraph (h) the Commissioner is given the function of taking such measures as are necessary so as to bring to the knowledge of the general public the protection offered by the Act. Moreover in this respect, he/ she is also authorised to advice any person where this is required. This function is primarily, if not exclusively, fulfilled through the website of the Office of the Data Protection Commissioner⁴⁹ and not through campaigns aimed at the public. Moreover the events organised in the years 2003 to 2005⁵⁰ seem to indicate that these target particular groups of society and more so the ones who process data rather than data subjects or members of the public.

3. Compliance

[56]. A controller⁵¹ is to notify the Commissioner before carrying out any automated processing operation intended to serve any purpose.⁵² Moreover the Commissioner is to maintain a register of processing operations notified to him/ her and each registration shall indicate the following details:

- a. the name and address of the data controller and of any other person authorised by him in that behalf;
- b. the purpose of the processing;
- c. a description of the category of data subject and of the data relating to them;
- d. the recipients to whom the data might be disclosed;
- e. proposed transfers of data to third countries.

Despite the obligation placed upon the controller, the Commissioner may give an exemption from notification where the categories of processing operations are unlikely to prejudice the rights of data subjects and in respect of which the Commissioner specifies the

⁴⁹ www.dataprotection.gov.mt

⁵⁰ Events for 2006 to 2008 are not indicated on the authority's website.

⁵¹ "controller" in terms of Article 2 of the Data Protection Act is defined as "a person who alone or jointly with others determines the purposes and means of the processing of personal data"

⁵² Chapter 440 of the Laws of Malta, Data Protection Act, article 29(1); www.mjha.gov.mt

purposes of the processing, the data being processed, the category of data subjects affected, the recipients to whom the data is to be disclosed and the length of time for which the data is to be stored⁵³.

[57]. However, different regulations apply for the processing of sensitive data which is defined in article 2 of the Act as “personal data that reveals race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union, health or sex life”. Although article 12 of the Act provides for a prohibition of the processing of sensitive data, yet articles 13 to 16 set the procedure for the processing of such data in the permitted circumstances. In general, sensitive personal data cannot be processed unless the data subject has either given his explicit consent to processing or has made the data public⁵⁴.

[58]. However, sensitive personal data may be processed if appropriate safeguards are adopted and the processing is necessary in order that the controller may comply with his /her duties under any law regulating the conditions of his employment; or the vital interests of the data subject or of some other person will be able to be protected and the data subject is physically or legally incapable of giving his consent; or legal claims will be able to be established, exercised or defended⁵⁵.

[59]. There are, however, three other areas within which the processing of sensitive data is also allowed. The first is the processing of data by a body of persons or entity not being a commercial body with political, philosophical, religious or trade union objects, who may process sensitive data concerning its members and of persons who by reason have regular contact with the entity provided this is done in the course of its legitimate activities and with appropriate guarantees. Moreover such sensitive personal data may only be provided to third parties where the data subject explicitly gives his/ her consent⁵⁶.

[60]. The second instance in which sensitive personal data may be processed refers to the processing of such data for health and hospital care purposes and where this is necessary for preventive medicine and the protection of public health, for medical diagnosis, health care or treatment or management of the health and hospital care services. In this respect, data may only be processed by a health care professional and under the obligation of professional secrecy.⁵⁷

⁵³ Chapter 440 of the Laws of Malta, Data Protection Act, Article 29(4); www.mjha.gov.mt

⁵⁴ Chapter 440 of the Laws of Malta, Data Protection Act, Article 12(2); www.mjha.gov.mt

⁵⁵ Chapter 440 of the Laws of Malta, Data Protection Act, Article 13; www.mjha.gov.mt

⁵⁶ Chapter 440 of the Laws of Malta, Data Protection Act, Article 14; www.mjha.gov.mt

⁵⁷ Chapter 440 of the Laws of Malta, Data Protection Act, Article 15; www.mjha.gov.mt

[61]. The third instance concerns the processing of sensitive data for research or statistical purposes. In this case the processing of data in the case of statistics needs to be approved by the Commissioner himself, while in the case of research this needs to be approved by the Commissioner on the advice of a research ethics committee of an institution recognised by the Commissioner for this purpose.⁵⁸ Moreover data relating to offences, criminal convictions and security measures may only be processed under the control of a public authority.

[62]. The only indirect evidence of compliance that can be obtained from the information published is that indicated in the accounts published by the authority wherein notification fees are quantified specifically. However, this does only provides an indication and does not in any manner reflect any official statistics of compliance.

[63]. The officer who may fit the description of a data protection officer with special expertise and special awareness raising role within the private and public organisations can be the personal data representative. The office of such person is described as one appointed by the controller of personal data and who shall independently ensure that the personal data is processed in a correct and lawful manner⁵⁹. Where an entity chooses to appoint a personal data representative the details of such a person are to be registered with the Commissioner who from then is to be notified of his/her removal and changes in appointment. By appointing a personal data representative the entity processing data need not notify the Commissioner of the processing of personal data.⁶⁰

[64]. The function of a personal data representative is described to be that of independently ensuring that the controller not only processes personal data in a lawful and correct manner, but also in line with good practice. Moreover where the representative identifies any inadequacies in the processing of data he must bring these to the attention of the controller and seek rectification. Should the controller fail to rectify the contravention the personal data representative is then obliged to notify the Commissioner of the situation⁶¹. Since with the appointment of the data representative the controller is not required to notify the Commissioner, it is then the data representative who is obliged to keep a register indicating the processing of data and all relevant information⁶². It is furthermore the duty of the personal data

⁵⁸ Chapter 440 of the Laws of Malta, Data Protection Act, Article 16; www.mjha.gov.mt

⁵⁹ Chapter 440 of the Laws of Malta, Data Protection Act, Article 2; www.mjha.gov.mt

⁶⁰ Chapter 440 of the Laws of Malta, Data Protection Act, article 30; www.mjha.gov.mt

⁶¹ Chapter 440 of the Laws of Malta, Data Protection Act, article 31; www.mjha.gov.mt

⁶² Chapter 440 of the Laws of Malta, Data Protection Act, article 32; www.mjha.gov.mt

representative to assist data subjects to exercise their rights in terms of the Act⁶³. The appointment of a data representative does not however exonerate data processors from any type of notification to the Commissioner. The processing of personal data that involves particular risks of improper interference with the rights of data subjects must be submitted for prior checking with the Commissioner whether there is a personal data representative appointed by the processing entity or not⁶⁴.

[65]. It is not possible to assess compliance in terms of whether the controllers of data or the personal data representatives are carrying out their tasks in line with the principles of data protection, as no such assessment seems to be published by the authority. However, one may note that the registers of data controllers and personal data representatives are public and a number of entities have in fact appointed a controller and a representative

4. Sanctions, Compensation and Legal Consequences

[66]. From the outset it may be stated that since the decisions, opinions and the full annual reports for the years 2006, 2007 and 2008 of the authority are not available it is not possible to analyse the type of evidence being required by the authority in practice. An analysis of the sanctions, compensation and legal consequences may only be made on the basis of the Data Protection Act. The only proceedings of which the author has had sight are those of Vodafone Malta Limited v. Commissioner of Data Protection et⁶⁵ and this since such proceedings were brought before the courts on appeal.

[67]. The Act provides a number of measures in which sanctions may be imposed varying from administrative fines which may be imposed by the Commissioner to criminal offences prosecuted before the criminal courts. The offences which are provided for in the Act consist of the following:

⁶³ Chapter 440 of the Laws of Malta, Data Protection Act, article 34; www.mjha.gov.mt

⁶⁴ Chapter 440 of the Laws of Malta, Data Protection Act, article 34; www.mjha.gov.mt

⁶⁵ See Paragraph 20 for details

- a. the offence of not complying with a lawful request of the Commissioner where the request is relevant to an investigation⁶⁶.
- b. the offence of providing untrue information to data subjects or to the Commissioner in the notification or upon the Commissioner's request for information;
- c. the offence of processing personal data in contravention of the Act;
- d. the offence of transferring personal data to a third country in a manner that is not compliant with Act;
- e. the offence of omitting to give notification to the Commissioner where this is required under the Act.⁶⁷

In these cases upon conviction the offender is liable to a fine not exceeding € 23,293.73 or to imprisonment for 6 months or to both the fine and imprisonment.

- [68]. On the other hand, the Act also provides for situations where the Commissioner may impose administrative fines. In this respect, where a controller fails to implement security measures in the processing of personal data the Commissioner may impose an administrative fine. Moreover, where the controller fails to comply, the Commissioner shall commence proceedings against him/ her. Any administrative fine so imposed is due as a civil debt and constitutes an executive title as if the fine had been ordered by a judgment of a court of civil jurisdiction⁶⁸.
- [69]. Yet for a data subject to obtain compensation for any unlawful processing of data that relates to him/ her, the data subject must institute proceedings before the court exercising an action for damages against the controller. Moreover, these proceedings must be commenced within a twelve months from the date when the data subject becomes aware of could have become aware of such a contravention⁶⁹.
- [70]. There is no indication what follow up activities could be in the situation of Malta as no information in this respect has been made

⁶⁶ Chapter 440 of the Laws of Malta, Data Protection Act, Article 41(2); www.mjha.gov.mt

⁶⁷ Chapter 440 of the Laws of Malta, Data Protection Act, Article 47; www.mjha.gov.mt

⁶⁸ Chapter 440 of the Laws of Malta, Data Protection Act, Article 42; www.mjha.gov.mt

⁶⁹ Chapter 440 of the Laws of Malta, Data Protection Act, Article 46; www.mjha.gov.mt

public. What is certain is that at any point in time the Commissioner may exercise any or all of the powers entrusted to him and impose the sanctions provided for in the Act against any person who is in violation of the Act.

[71]. Although the Act provides the Commissioner with ex officio powers, yet it is clear that compensation can only be obtained by the data subject if the data subject institutes proceedings before a court of law in his/her individual capacity. In this manner legal advice and representation is obtained privately from the data subject's lawyer of choice. On the other hand, sanctions such as administrative fines and criminal proceedings may be the consequence of ex officio investigations carried out by the Commissioner. However, there is no official information available to indicate the outcomes of either ex officio investigations or investigations upon the request of data subjects. However, in the latter instance the Act obliges the Commissioner and in cases where a personal data representative is appointed, then the obligation is placed upon the data representative, to advice data subjects on one's rights under the Act. Moreover all financial risk in legal procedures initiated by data subjects is carried out solely by the data subject and there are no public bodies who offer assistance or legal representation in this field.

[72]. There is no specific regulation of the collection and processing of data in the context of employment; in this respect, employers processing personal data are subject to the same general regulations. Neither are specific responsibilities assigned to trade unions.

5. Rights Awareness

[73]. No studies or surveys on awareness regarding data protection law have been undertaken.

6. Analysis of deficiencies

[74]. The main deficiency identified is the lack of public awareness on data protection. This may not necessarily stem only from a default of the authority but also from complacency of the public and lack of knowledge or value of one's right to privacy. However in this respect, the lack of publicity about the outcome of the investigations carried out by the authority and about the work of the authority, including the restricted availability of the opinions and decisions concluded by the

authority or the Appeals Tribunal are seen as deficiencies in the system of protection.

- [75]. The area of processing by police authorities was excluded from the applicability of the Data Protection Act, however this was remedied with the introduction of Legal Notice 142 of 2004 entitled Data Protection (Processing of Personal Data in the Police Sector) Regulations, 2004⁷⁰.
- [76]. Other areas are excluded from the applicability of the Data Protection Act. In this manner, the Data Protection Act does not apply to the processing of personal data where such processing is undertaken by a natural person in the course of a purely personal activity and to processing operations concerning public security, defence, State security (including the economic well being of the State when the processing operation relates to security matters).
- [77]. However, the above indicated deficiencies are issues which can be remedied not necessarily through amendments to the law or through the enactment of new legislation, but more so through better awareness raising for the general public, and better understanding of the right to privacy underlying the notion of data protection by the authority.

7. Good practices

- [78]. The author identifies as good practice the work undertaken by the Office of the Data Protection Commissioner in liaising with particular sectors in the drafting of guidelines promoting data protection within these sectors⁷¹.

8. Miscellaneous

- [79]. Nothing to report further.

⁷⁰ www.doi.gov.mt

⁷¹ www.dataprotection.gov.mt

Annex 1 - Tables and Statistics

Please complete the table below

	2000	2001	2002	2003	2004	2005	2006	2007
Budget of data protection authority	N/A	N/A	N/A	€164,765 ⁷²	€304,307 ⁷³	295,941 ⁷⁴	No Information Available	
Staff of data protection authority	N/A	N/A	N/A			No Information Available		
Number of procedures (investigations, audits etc.) initiated by	N/A	N/A	N/A		No Information Available	14	4 ⁷⁵	

⁷² This was divided as follows: Government Subvention of € 162, 767 and a Government Grant of €1,998

⁷³ This was divided as follows: Notification Fees: €163,370 Government Subvention: €137,644 Government Grant: €2664.4 and €622 in interest

⁷⁴ This was divided as follows: Notification Fees: €141,920 Government Subvention: €151,357, Government Grant: €2664.4 and €46,58 interest

⁷⁵ The annual report refers to inspections carried out as periodic review in terms of EU requirements.

data protection authority at own initiative						
Number of data protection registrations	N/A	N/A	N/A	7	8300	350
Number of data protection approval procedures	N/A	N/A	N/A			No information available
Number of complaints received by data protection authority	N/A	N/A	N/A	9	45	41
Number of complaints upheld by data protection authority	N/A	N/A	N/A			No Information Available
Follow up activities of data protection authority, once problems were established (please disaggregate according to type of follow up activity: settlement, warning issued, opinion	N/A	N/A	N/A			No Information Available ⁷⁶

⁷⁶ The only information available is that in 2007 three inspections were carried out further to complaints received

issued, sanction issued etc.)				
Sanctions and/or compensation payments in data protection cases (please disaggregate between court, data protection authority, other authorities or tribunals etc.) in your country (if possible, please disaggregate between sectors of society and economy)	N/A	N/A	N/A	No Information Available
Range of sanctions and/or compensation in your country (Please disaggregate according to type of sanction/compensation)	N/A	N/A	N/A	No Information Available

Any other tables or statistics relevant for assessment of effectiveness of data protection, where available

Annex 2 – Case Law

Please present at least 5 cases on data protection from courts, tribunals, data protection authorities etc. (criteria of choice: publicity, citation in media, citation in commentaries and legal literature, important sanctions) in your country, if available (please state it clearly, if less than 5 cases are available)

Case title	Vodafone Malta Limited v. Commissioner for Data Protection and the Commissioner of Police who was admitted to intervene in the proceedings by a Court decree of the 25 th October 2006 (Appeal No: 16/2006)
Decision date	3 rd October 2007
Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])	Decided by the Court of Appeal (Inferior Jurisdiction) Appeal Number 16/2006 Official language of the decision is Maltese.
Key facts of the case (max. 500 chars)	Vodafone Malta Limited and another telecommunications service provider were asked by the Commissioner of Police to process raw data and to indicate to the Police persons who made use of their mobile phones in a number of locations in Malta on certain dates. The service providers object to this request for information and the Commissioner of Police sought a ruling from the Data Protection Commissioner. Following a ruling of the Commissioner, Vodafone appealed before the Data Protection Appeals Tribunal and consequently to the Court of Appeal.

Main reasoning/argumentation (max. 500 chars)	The Data Protection Commissioner delivered a ruling on the 8 th June 2006 wherein he concluded that the service providers were to give such information to the Police and that the Police could not retain any information so received for any other purpose than the investigation in question and that the service providers had to inform the Police on the completeness, accuracy and degree of reliability of the information provided. The Commissioner considered that the request made by the police was one falling within the ambit of the interest of national security, defence, public security, the prevention, investigation, detection and prosecution of criminal or administrative offences. The Data Protection Appeals Tribunal who delivered a decision on the 4 th August 2006 after considering that the crime of arson being investigated was of a serious nature and after stating that the right to privacy had to be further restricted in the light of terrorism, concluded that the service providers had to abide with the request. The Court of Appeal revoked these decisions and concluded that the request for information presented by the Police was ambiguous and did not refer to any particular persons against whom there was a reasonable suspicion. In reaching this conclusion, the Court of Appeal emphasised that the important issue at hand was whether the privacy of the individuals against whom there was no reasonable suspicion was going to be violated by such a request. It thereby sought to consider data protection as an issue of the fundamental right to privacy and sought to consider whether the request of the Police ran counter to that balance that ought to be established between the rights of the individual and the permitted limitations to such rights.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	This judgment emphasised the perspective that data protection is an essential element of right to privacy and that consequently any similar request of information must be considered in the light of the justifications allowed to the right to privacy. Fundamental rights are only to be restricted where this is strictly necessary.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court of Appeal in revoking the judgment of the Data Protection Appeals Tribunal and the ruling of the Data Protection Commissioner brought about a situation whereby the processing of data requested of the service providers by the Police was not to take place.
Proposal of key words for data base	Data protection; privacy; police request for information; telecommunications data processing;

Please attach the text of the original decisions in electronic format (including scanned versions as pdf).