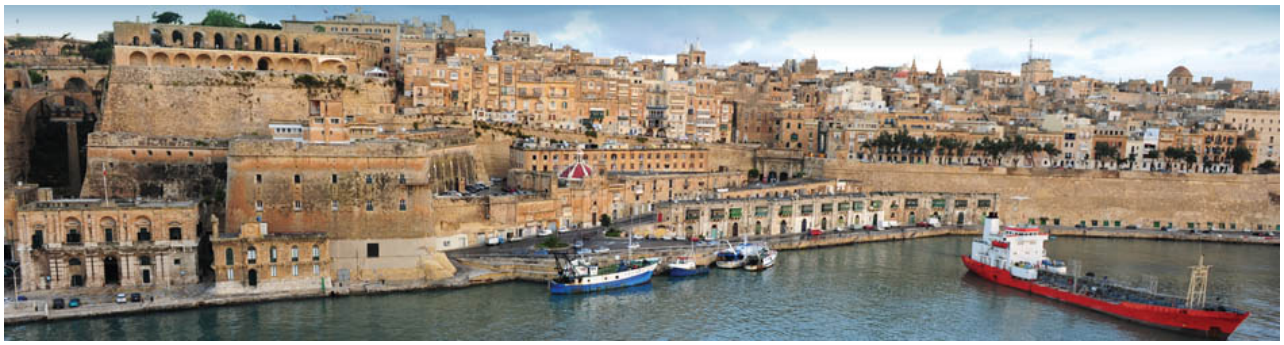
DATA PROTECTION LAWS OF THE WORLD

Malta

DLA PIPER

MALTA



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LAW

The General Data Protection Regulation (Regulation (EU) 2016/679) (**GDPR**) is a European Union law which entered into force in 2016 and, following a two-year transition period, became directly applicable law in all Member States of the European Union on May 25, 2018, without requiring implementation by the EU Member States through national law.

A Regulation (unlike the Directive which it replaced) is directly applicable and has consistent effect in all Member States. However, there remain more than 50 areas covered by GDPR where Member States are permitted to legislate differently in their own domestic data protection laws, and there continues to be room for different interpretation and enforcement practices among the Member States.

Territorial Scope

Primarily, the application of the GDPR turns on whether an organization is established in the EU. An 'establishment' may take a wide variety of forms, and is not necessarily a legal entity registered in an EU Member State.

However, the GDPR also has extra-territorial effect. An organization that it is not established within the EU will still be subject to the GDPR if it processes personal data of data subjects who are in the Union where the processing activities are related "*to the offering of goods or services*" (Article 3(2)(a)) (no payment is required) to such data subjects in the EU or "*the monitoring of their behaviour*" (Article 3(2)(b)) as far as their behaviour takes place within the EU.

The relevant law is the Data Protection Act 2018 (Act) (Chapter 586 of the Laws of Malta) and the Regulations (at present 9 in number) issued under it. The Act repealed and replaced the previous Data Protection Act (Chapter 440 of the Laws of Malta).

In 2020, Subsidiary Legislation 586.10 (‘Processing Of Data Concerning Health for Insurance Purposes Regulations’) was significantly amended. Pursuant to Article 9 of the GDPR, it was made explicit that processing of data concerning health shall be deemed to be in the substantial public interest when such processing is necessary for the purpose of the business of insurance or insurance distribution activities. However, this is made subject to suitable and specific measures designed to safeguard the fundamental rights and freedoms of data subjects.

The main legislative amendments that came into effect in 2021 were those to Subsidiary Legislation 586.07 (Processing of Personal Data (Education Sector) Regulations). The main purpose of these amendments was to bring the terminology used in these regulations in line with the wording of the GDPR rather than the previous local law. The full text, in English, is available here.

In 2021, certain procedural amendments were also made to the Act. The amending act (having the aim of providing for the amendment of various laws for the purpose of reforming the procedure for the making of various appointments) can

be read here.

In 2023, a new Subsidiary Legislation was introduced: the Enforcement of the Rights of Data Subjects in Relation to Transfers of Personal Data to a Third Country or an International Organisation Regulations (S.L. 586.12). The scope and purpose of this law is to establish rights in Maltese law for third party beneficiaries with respect to transfers of personal data to a third country or an international organisation. This law provides a clear mechanism in Malta for data subjects to enforce their rights (including those granted under GDPR) when their personal data is transferred to a third country, even though they would not be parties to the instrument (either the Standard Contractual Clauses or any other appropriate safeguard), by virtue of which the third country transfer is being made. As a general principle of Maltese law, a contract is not normally deemed to have the power to confer rights to third parties, rendering S.L. 586.12 an exception to the rule, albeit, a necessary one. The full text of the law can be read here.

See all Maltese Legislation here.

DEFINITIONS

Personal data is defined as "*any information relating to an identified or identifiable natural person*" (Article 4). A low bar is set for "identifiable" – if the natural person can be identified using “*all means reasonably likely to be used*” (Recital 26) the information is personal data. A name is not necessary either – any identifier will do, such as an identification number, phone number, location data or other factors which may identify that natural person.

Online identifiers are expressly called out in Recital 30, with IP addresses, cookies and RFID tags all listed as examples.

The GDPR creates more restrictive rules for the processing of **special categories** (Article 9) of personal data (including data relating to race, religion, sexual life, data pertaining to health, genetics and biometrics) and personal data relating to **criminal convictions and offences** (Article 10).

The GDPR is concerned with the **processing** of personal data. Processing has an extremely wide meaning, and includes any set of operations performed on data, including the mere storage, hosting, consultation or deletion of the data.

Personal data may be processed by either a **controller** or a **processor**. The controller is the decision maker, the person who "*alone or jointly with others, determines the purposes and means of the processing of personal data*" (Article 4). The processor "*processes personal data on behalf of the controller*", acting on the instructions of the controller. In contrast to the previous law, the GDPR imposes direct obligations on both the controller and the processor, although fewer obligations are imposed on the processor.

The "**data subject**" is a living, natural person whose personal data are processed by either a controller or a processor.

The Data Protection Act reproduces the definitions provided by Article 4, GDPR.

NATIONAL DATA PROTECTION AUTHORITY

Enforcement of the GDPR is the prerogative of data protection regulators, known as supervisory authorities (for example, the Cnil in France or the ICO in the UK). The European Data Protection Board (the replacement for the so-called Article 29 Working Party) is comprised of delegates from the supervisory authorities, and monitors the application of the GDPR across the EU, issuing guidelines to encourage consistent interpretation of the Regulation.

The GDPR creates the concept of **lead supervisory authority**. Where there is cross-border processing of personal data (*ie,* processing taking place in establishments of a controller or processor in multiple Member States, or taking place in a single establishment of a controller or processor but affecting data subjects in multiple Member States), then the starting point for enforcement is that controllers and processors are regulated by and answer to the supervisory authority for their main or single establishment, the so-called lead supervisory authority (Article 56(1)).

However, the lead supervisory authority is required to cooperate with all other concerned authorities, and a supervisory authority in another Member State may enforce where infringements occur on its territory or substantially affect data subjects only in its territory (Article 56(2)).

The concept of lead supervisory authority is therefore of somewhat limited help to multinationals.

The Information and Data Protection Commissioner (Commissioner). Informally, the Office of the Information and Data Protection Commissioner (OIDPC).

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The Commissioner has the function (among others) of generally protecting individuals' data protection rights against privacy violations in personal data processing.

REGISTRATION

There are no EU-wide systems of registration or notification and Recital 89 of the GDPR seeks to prohibit indiscriminate general notification obligations. However, Member States may impose notification obligations for specific activities (*eg,* processing of personal data relating to criminal convictions and offences). The requirement to consult the supervisory authority in certain cases following a data protection impact assessment (Article 36) constitutes a notification requirement. In addition, each controller or processor must communicate the details of its data protection officer (where it is required to appoint one) to its supervisory authority (Article 37(7)).

In many ways, external accountability to supervisory authorities via registration or notification is superseded in the GDPR by rigorous demands for internal accountability. In particular, controllers and processors are required to complete and maintain comprehensive records of their data processing activities (Article 30), which must contain specific details about personal data processing carried out within an organization and must be provided to supervisory authorities on request. This is a sizeable operational undertaking.

Under Article 7 of the Maltese DPA, data controllers must consult and gain prior authorization from the Commissioner to process in the public interest: genetic data, biometric data or data concerning health for statistical or research purposes or special categories of data relating to the management of social care services and systems.

DATA PROTECTION OFFICERS

Each controller or processor is required to appoint a data protection officer if it satisfies one or more of the following tests:

- It is a public authority
- Its core activities consist of processing operations which, by virtue of their nature, scope or purposes, require regular and

systemic monitoring of data subjects on a large scale
- Its core activities consist of processing sensitive personal data on a large scale

Groups of undertakings are permitted to appoint a single data protection officer with responsibility for multiple legal entities (Article 37(2)), provided that the data protection officer is easily accessible from each establishment (meaning that larger corporate groups may find it difficult in practice to operate with a single data protection officer).

DPOs must have expert knowledge (Article 37(5)) of data protection law and practices, though it is possible to outsource the DPO role to a service provider (Article 37(6)).

Controllers and processors are required to ensure that the DPO is involved "*properly and in a timely manner in all issues which relate to the protection of personal data*" (Article 38(1)), and the DPO must directly report to the highest management level, must not be told what to do in the exercise of his or her tasks and must not be dismissed or penalized for performing those tasks (Article 38(3)).

The specific tasks of the DPO, set out in GDPR, include (Article 39):

- To inform and advise on compliance with GDPR and other Union and Member State data protection laws
- To monitor compliance with the law and with the internal policies of the organization including assigning responsibilities, awareness raising and training staff
- To advise and monitor data protection impact assessments where requested
- To cooperate and act as point of contact with the supervisory authority

This is a good example of an area of the GDPR where Member State gold plating laws are likely. For example, German domestic law has set the bar for the appointment of DPOs considerably lower than that set out in the GDPR.

The Act does not derogate or further regulate from the provisions of the GDPR in this regard.

However, **DPOs must be notified to the Commissioner** (where Commissioner has jurisdiction) by sending, even via email, the following basic information:

- Data Controller identity
- name of DPO
- position
- mailing address
- email address
- contact number
- nature of business
- date of appointment, and
- whether the DPO is fulfilling this role for other data controllers.

COLLECTION & PROCESSING

Data Protection Principles

Controllers are responsible for compliance with a set of core principles which apply to all processing of personal data. Under these principles, personal data must be (Article 5):

- Processed lawfully, fairly and in a transparent manner (lawfulness, fairness and transparency principle)
- Collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes (purpose limitation principle)
- Adequate, relevant and limited to what is necessary in relation to the purpose(s) (data minimization principle)
- Accurate and where necessary kept up-to-date (accuracy principle)

- Kept in a form which permits identification of data subjects for no longer than is necessary for the purpose(s) for which the data are processed (storage limitation principle)
- Processed in a manner that ensures appropriate security of the personal data, using appropriate technical and organizational measures (integrity and confidentiality principle)

The controller is responsible for and must be able to demonstrate compliance with the above principles (accountability principle). Accountability is a core theme of the GDPR. Organizations must not only comply with the GDPR but also be able to *demonstrate* compliance perhaps years after a particular decision relating to processing personal data was taken. Record keeping, audit and appropriate governance will all form a key role in achieving accountability.

Legal Basis under Article 6

In addition, in order to satisfy the lawfulness principle, each use of personal data must be justified by reference to an appropriate basis for processing. The legal bases (also known lawful bases or lawful grounds) under which personal data may be processed are (Article 6(1)):

- With the consent of the data subject (where consent must be "*freely given, specific, informed and unambiguous,*" and must be capable of being withdrawn at any time)
- Where necessary for the performance of a contract to which the data subject is party, or to take steps at the request of the data subject prior to entering into a contract
- Where necessary to comply with a legal obligation (of the EU) to which the controller is subject
- Where necessary to protect the vital interests of the data subject or another person (generally recognized as being limited to 'life or death' scenarios, such as medical emergencies)
- Where necessary for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller
- Where necessary for the purposes of the legitimate interests of the controller or a third party (which is subject to a balancing test, in which the interests of the controller must not override the interests or fundamental rights and freedoms of the data subject. Note also that this basis cannot be relied upon by a public authority in the performance of its tasks)

Special Category Data

Processing of special category data is prohibited (Article 9), except where one of the following exemptions applies (which, in effect, operate as secondary bases which must be established for the lawful processing of special category data, in addition to an Article 6 basis):

- With the explicit consent of the data subject
- Where necessary for the purposes of carrying out obligations and exercising rights under employment, social security and social protection law or a collective agreement
- Where necessary to protect the vital interests of the data subject or another natural person who is physically or legally incapable of giving consent
- In limited circumstances by certain not-for-profit bodies
- Where processing relates to the personal data which are manifestly made public by the data subject
- Where processing is necessary for the establishment, exercise or defense of legal claims or where courts are acting in their legal capacity
- Where necessary for reasons of substantial public interest on the basis of Union or Member State law, proportionate to the aim pursued and with appropriate safeguards
- Where necessary for preventative or occupational medicine, for assessing the working capacity of the employee, medical diagnosis, provision of health or social care or treatment of the management of health or social care systems and services
- Where necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of health care and of medical products and devices
- Where necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with restrictions set out in Article 89(1)

Member States are permitted to introduce domestic laws including further conditions and limitations for processing with regard to

processing genetic data, biometric data and health data.

Criminal Convictions and Offences data

Processing of personal data relating to criminal convictions and offences is prohibited unless carried out under the control of an official public authority, or specifically authorised by Member State domestic law (Article 10).

Processing for a Secondary Purpose

Increasingly, organizations wish to re-purpose personal data – *ie,* use data collected for one purpose for a new purpose which was not disclosed to the data subject at the time the data were first collected. This is potentially in conflict with the core principle of purpose limitation; to ensure that the rights of data subjects are protected. The GDPR sets out a series of factors that the controller must consider to ascertain whether the new process is compatible with the purposes for which the personal data were initially collected (Article 6(4)). These include:

- Any link between the original purpose and the new purpose
- The context in which the data have been collected
- The nature of the personal data, in particular whether special categories of data or data relating to criminal convictions are processed (with the inference being that if they are it will be much harder to form the view that a new purpose is compatible)
- The possible consequences of the new processing for the data subjects
- The existence of appropriate safeguards, which may include encryption or pseudonymization

If the controller concludes that the new purpose is incompatible with the original purpose, then the only bases to justify the new purpose are consent or a legal obligation (more specifically an EU or Member State law which constitutes a necessary and proportionate measure in a democratic society).

Transparency (Privacy Notices)

The GDPR places considerable emphasis on transparency, *ie,* the right for a data subject to understand how and why his or her data are used, and what other rights are available to data subjects to control processing. The presentation of granular, yet easily accessible, privacy notices should, therefore, be seen as a cornerstone of GDPR compliance.

Various information must be provided by controllers to data subjects in a concise, transparent and easily accessible form, using clear and plain language (Article 12(1)).

The following information must be provided (Article 13) at the time the data are obtained:

- The identity and contact details of the controller
- The data protection officer's contact details (if there is one)
- Both the purpose for which data will be processed and the legal basis for processing, including, if relevant, the legitimate interests for processing
- The recipients or categories of recipients of the personal data
- Details of international transfers
- The period for which personal data will be stored or, if that is not possible, the criteria used to determine this
- The existence of rights of the data subject including the right to access, rectify, require erasure, restrict processing, object to processing and data portability
- Where applicable, the right to withdraw consent, and the right to complain to supervisory authorities
- The consequences of failing to provide data necessary to enter into a contract
- The existence of any automated decision making and profiling and the consequences for the data subject
- In addition, where a controller wishes to process existing data for a new purpose, they must inform data subjects of that further processing, providing the above information

Somewhat different requirements apply (Article 14) where information has not been obtained from the data subject.

Rights of the Data Subject

Data subjects enjoy a range of rights to control the processing of their personal data, some of which are very broadly applicable, whilst others only apply in quite limited circumstances. Controllers must provide information on action taken in response to requests within one calendar month as a default, with a limited right for the controller to extend this period thereby a further two months where the request is onerous.

Right of access (Article 15)

A data subject is entitled to request access to and obtain a copy of his or her personal data, together with prescribed information about the how the data have been used by the controller.

Right to rectify (Article 16)

Data subjects may require inaccurate or incomplete personal data to be corrected or completed without undue delay.

Right to erasure ('right to be forgotten') (Article 17)

Data subjects may request erasure of their personal data. The forerunner of this right made headlines in 2014 when Europe’s highest court ruled against Google (Judgment of the CJEU in Case C-131/12), in effect requiring Google to remove search results relating to historic proceedings against a Spanish national for an unpaid debt on the basis that Google as a data controller of the search results had no legal basis to process that information.

The right is not absolute; it only arises in quite a narrow set of circumstances, notably where the controller no longer needs the data for the purposes for which they were collected or otherwise lawfully processed, or as a corollary of the successful exercise of the objection right, or of the withdrawal of consent.

Right to restriction of processing (Article 18)

Data subjects enjoy a right to restrict processing of their personal data in defined circumstances. These include where the accuracy of the data is contested; where the processing is unlawful; where the data are no longer needed save for legal claims of the data subject, or where the legitimate grounds for processing by the controller are contested.

Right to data portability (Article 20)

Where the processing of personal data is justified either on the basis that the data subject has given his or her consent to processing or where processing is necessary for the performance of a contract, then the data subject has the right to receive or have transmitted to another controller all personal data concerning him or her in a structured, commonly used and machine-readable format (*eg,* commonly used file formats recognized by mainstream software applications, such as .xsl).

Right to object (Article 21)

Data subjects have the right to object to processing on the legal basis of the legitimate interests of the data controller or where processing is in the public interest. Controllers will then have to suspend processing of the data until such time as they demonstrate “compelling legitimate grounds” for processing which override the rights of the data subject.

In addition, data subjects enjoy an unconditional right to object to the processing of personal data for direct marketing purposes at any time.

The right not to be subject to automated decision taking, including profiling (Article 22)

Automated decision making (including profiling) "*which produces legal effects concerning [the data subject] … or similarly significantly affects him or her*" is only permitted where:

a. Necessary for entering into or performing a contract
b. Authorized by EU or Member State law

c. The data subject has given their explicit (*ie*, opt-in) consent

Further, where significant automated decisions are taken on the basis of grounds (a) or (c), the data subject has the right to obtain human intervention, to contest the decision, and to express his or her point of view.

The position under the Maltese Data Protection Act, 2018

The Act states that controllers and processors may derogate from the provisions of Articles 15, 16, 18 and 21 of the GDPR for the processing of personal data for scientific or historical research purposes or official statistics insofar as the exercise of the rights set out in those Articles:

1. Is likely to render impossible or seriously impair the achievement of those purposes, and
2. The data controller reasonably believes that such derogations are necessary for the fulfilment of those purposes.

Controllers and processors may also derogate from the obligations of Articles 15, 16, 18, 19, 20 and 21 of the GDPR for archiving purposes in the public interest. The same criteria ((1) and (2) above) must subsist for this derogation to apply.

Article 8 of the Act stipulates that an identity document shall only be processed when such processing is justified having regards to the purpose of processing and (1) the importance of a secure identification; or (2) any other valid reason as may be provided by law.

Personal data being processed for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purpose of academic, artistic or literary expression, is exempt from compliance with the provisions of the GDPR (listed below), where, having regard to the right of freedom of expression and information in a democratic society, compliance with the following provisions would be incompatible with such processing purposes:

a. Chapter II (Principles)

- Article 5(1)(a) to (e) (principles relating to processing)
- Article 6 (lawfulness)
- Article 7 (conditions for consent)
- Article 10 (data relating to criminal convictions, etc.)
- Article 11(2) (processing not requiring identification)

b. Chapter III (rights of the data subject)

- Article 13(1) to (3) (personal data collected from data subject: information to be provided)
- Article 14(1) to (4) (personal data collected other than from the data subject)
- Article 15(1) to (3) (access to data and safeguards for third country transfers)
- Article 17(1) and (2) (right to erasure)
- Article 18(1)(a), (b) and (d) (restriction of processing)
- Article 20(1) and (2) (right to data portability)
- Article 21(1) (objections to processing)

c. Chapter IV (controller and processor)

- Article 25 (data protection by design and by default)
- Article 27 (representatives of controllers or processors not established in the Union)
- Article 30 (records of processing activities)
- Article 33 (notification of personal data breach to supervisory authority)
- Article 34 (communication of personal data breach to the data subject)
- Article 42 (certification)
- Article 43 (certification bodies)

d. Chapter VII (co-operation and consistency)

- Articles 60 to 62 (co-operation)
- Articles 63 to 67 (consistency)

Important note regarding age of consent: The processing of personal data of a child in relation to information society services has been lowered from eighteen (18) to thirteen (13) years of age by means of the ‘Processing of Children’s Personal Data in Relation to the Offer of Information Society Services Regulations’ (Subsidiary Legislation 586.11 issued under the Data Protection Act 2018). It is important to note that the age of consent for valid contract formation in Malta remains 18 years of age. This grey area is still subject to local authoritative interpretation. We are not aware of any such interpretations at time of writing.

Finally, in certain circumstances, the collection and processing of personal data are further regulated by local sector-specific regulations. By way of example, medical data relating to students can only be processed under specific conditions.

TRANSFER

Transfers of personal data by a controller or a processor to third countries outside of the EU (and Norway, Liechtenstein and Iceland) are only permitted where the conditions laid down in the GDPR are met (Article 44).

The European Commission has the power to make an adequacy decision in respect of a third country, determining that it provides for an adequate level of data protection, and therefore personal data may be freely transferred to that country (Article 45(1)). Currently, the following countries or territories enjoy adequacy decisions: Andorra, Argentina, Canada (with some exceptions), Switzerland, Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, Eastern Republic of Uruguay and New Zealand.

Transfers to third countries are also permitted where appropriate safeguards have been provided by the controller or processor and on condition that enforceable data subject rights and effective legal remedies for the data subject are available. The list of appropriate safeguards includes, among others, binding corporate rules, standard contractual clauses, and the EU-US Privacy Shield Framework. The GDPR has removed the need which existed in some Member States under the previous law to notify and in some cases seek prior approval of standard contractual clauses from supervisory authorities.

The GDPR also includes a list of context specific derogations, permitting transfers to third countries where:

a. Explicit informed consent has been obtained
b. The transfer is necessary for the performance of a contract or the implementation of pre-contractual measures
c. The transfer is necessary for the conclusion or performance of a contract concluded in the interests of the data subject between the controller and another natural or legal person
d. The transfer is necessary for important reasons of public interest
e. The transfer is necessary for the establishment, exercise or defense of legal claims
f. The transfer is necessary in order to protect the vital interests of the data subject where consent cannot be obtained
g. The transfer is made from a register, which according to EU or Member State law, is intended to provide information to the public, subject to certain conditions

There is also a very limited derogation to transfer where no other mechanism is available and the transfer is necessary for the purposes of compelling legitimate interests of the controller which are not overridden by the interests and rights of the data subject. Notification to the supervisory authority and the data subject is required if relying on this derogation.

Transfers demanded by courts, tribunals or administrative authorities of countries outside the EU (Article 48) are only recognized or enforceable (within the EU) where they are based on an international agreement such as a mutual legal assistance treaty in force between the requesting third country and the EU or Member State (transfers in response to such requests where there is no other legal basis for transfer will infringe the GDPR).

The Act does not derogate or further regulate from the provisions of the GDPR in this regard.

For more information, please visit our Transfer - global data transfer methodology website.

SECURITY

Security

The GDPR is not prescriptive about specific technical standards or measures. Rather, the GDPR adopts a proportionate, context-specific approach to security. Article 32 states that controllers and processors shall implement appropriate technical and organizational measures to ensure a level of security appropriate to the risk of the processing. In so doing, they must take account of the state of the art, the costs of implementation, and the nature, scope, context and purposes of processing. A 'one size fits all' approach is therefore the antithesis of this requirement.

However the GDPR does require controllers and processors to consider the following when assessing what might constitute adequate security:

a. The pseudonymization and encryption of personal data
b. The ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services
c. The ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident
d. A process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing

The Act does not derogate or further regulate from the provisions of the GDPR in this regard.

BREACH NOTIFICATION

The GDPR contains a general requirement for a personal data breach to be notified by the controller to its supervisory authority, and for more serious breaches to also be notified to affected data subjects. A personal data breach is a wide concept, defined as any "*breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*" (Article 4).

The controller must notify a breach to the supervisory authority without undue delay, and where feasible, not later than 72 hours after having become aware of it, unless the controller determines that the breach is unlikely to result in a risk to the rights and freedoms of natural persons. When the personal data breach is likely to result in a high risk to natural persons, the controller is also required to notify the affected data subjects without undue delay (Article 34).

Where the breach occurs at the level of the processor, it is required to notify the controller without undue delay upon becoming aware of the breach (Article 33(2)).

The notification to the supervisory authority must include where possible the categories and approximate numbers of individuals and records concerned, the name of the organization’s data protection officer or other contact, the likely consequences of the breach and the measures taken to mitigate harm (Article 33(3)).

Controllers are also required to keep a record of all data breaches (Article 33(5)) (whether or not notified to the supervisory authority) and permit audits of the record by the supervisory authority.

The Act does not derogate or further regulate from the provisions of the GDPR in this regard.

The application form to be used when notifying data breaches to the OIDPC can be accessed here.

ENFORCEMENT

Fines

The GDPR empowers supervisory authorities to impose fines of up to 4% of annual worldwide turnover, or EUR 20 million (whichever is higher).

It is the intention of the European Commission that fines should, where appropriate, be imposed by reference to the revenue of an economic undertaking rather than the revenues of the relevant controller or processor. Recital 150 of the GDPR states that 'undertaking' should be understood in accordance with Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit anti-competitive agreements between undertakings and abuse of a dominant position. Unhelpfully, the Treaty does not define ‘undertaking’ and the extensive case-law is not entirely straightforward, with decisions often turning on the specific facts of each case. However, in many competition cases, group companies have been regarded as part of the same undertaking. The assessment will turn on the facts of each case, and the first test cases under the GDPR will need to be scrutinized carefully to understand the interpretation of ‘undertaking’. Under EU competition law case-law, there is also precedent for regulators to impose joint and several liability on parent companies for fines imposed on those subsidiaries in some circumstances (broadly where there is participation or control), so-called "look through" liability. Again, it remains to be seen whether there will be a direct read-across of this principle into GDPR enforcement.

Fines are split into two broad categories.
The highest fines (Article 83(5)) of up to EUR 20 million or, in the case of an undertaking, up to 4% of total worldwide turnover of the preceding year, whichever is higher, apply to infringement of:

- The basic principles for processing including conditions for consent
- Data subjects’ rights
- International transfer restrictions
- Any obligations imposed by Member State law for special cases such as processing employee data
- Certain orders of a supervisory authority

The lower category of fines (Article 83(4)) of up to EUR 10 million or, in the case of an undertaking, up to 2% of total worldwide turnover of the preceding year, whichever is the higher, apply to infringement of:

- Obligations of controllers and processors, including security and data breach notification obligations
- Obligations of certification bodies
- Obligations of a monitoring body

Supervisory authorities are not required to impose fines but must ensure in each case that the sanctions imposed are effective, proportionate and dissuasive (Article 83(1)).

Fines can be imposed in combination with other sanctions.

Investigative and corrective powers

Supervisory authorities also enjoy wide investigative and corrective powers (Article 58) including the power to undertake on-site data protection audits and the power to issue public warnings, reprimands and orders to carry out specific remediation activities.

Right to claim compensation

The GDPR makes specific provision for individuals to bring private claims against controllers and processors:

- Any person who has suffered "material or non-material damage" as a result of a breach of the GDPR has the right to receive compensation (Article 82(1)) from the controller or processor. The inclusion of “non-material”

damage means that individuals will be able to claim compensation for distress even where they are not able to prove financial loss.
- Data subjects have the right to mandate a consumer protection body to exercise rights and bring claims on their behalf (Article 80).

Individuals also enjoy the right to lodge a complaint with a supervisory authority (Article 77).

All natural and legal persons, including individuals, controllers and processors, have the right to an effective judicial remedy against a decision of a supervisory authority concerning them or for failing to make a decision (Article 78).

Data subjects enjoy the right to an effective legal remedy against a controller or processor (Article 79).

The position under the Maltese Data Protection Act, 2018

Appealing against a decision of the Commissioner

Any person against whom an administrative fine has been imposed by the Commissioner may appeal to the Data Protection Appeals Tribunal within 20 days from service of the Commissioner’s decision imposing such fine. An appeal to the Tribunal may be made on any of the following 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

Within 2 days of filing an appeal, the Registry of the Tribunal shall:

- Serve a copy of the appeal on the Commissioner and request that he or she file a statement on the decision, together with any other information on which the decision was based within 20 days from the date on which the appeal was served
- Serve a copy of the appeal on the respondent(s) to the appealed decision, and request the respondent(s) file a reply within 20 days of service of the appeal

Appealing against a decision of the Data Protection Appeal Tribunal

Any party to an appeal before the Tribunal may appeal to the Court of Appeal by means of an application filed in the registry of that court within 20 days from the date on which the decision of the Tribunal was notified.

Fines against a public authority or body

The Commissioner may impose an administrative fine on a public authority or body of up to EUR 25,000 for each violation and an additional EUR 25 for each day during which such violation persists for an infringement under Article 83(4) of the GDPR. The fine that the Commissioner may impose on a public authority or body for an infringement of Article 83(5) or (6) of the GDPR shall not exceed EUR 50,000 for each violation and additionally EUR 50 for each day during which such violation persists.

Any person who knowingly provides false information to the Commissioner when so requested or who does not comply with any lawful request pursuant to an investigation by the Commissioner, shall be guilty of an offence and upon conviction shall be liable to a fine (*multa*) of not less than EUR 1,250 and not more than EUR 50,000 or to imprisonment for six months.

Actions against a controller/processor

Without prejudice to any other available remedy, a person who believes that his or her rights under the GDPR or the Act have been infringed may file a sworn application in the First Hall Civil Court for an effective judicial remedy and in the

same way may also 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. If the court finds that the controller or processor is liable for damage caused pursuant to Article 82 of the GDPR, the court shall determine the amount of damages including, but not limited to, **moral damages**, due to the data subject.

Any action under Article 30 of this Act shall be instituted within 12 months from when the data subject became aware or should have reasonably become aware of such a contravention, whichever is earlier.

ELECTRONIC MARKETING

The GDPR will apply to most electronic marketing activities, as these will involve some use of personal data (*eg*, an email address which includes the recipient's name). The most plausible legal bases for electronic marketing will be consent, or the legitimate interests of the controller (which is expressly referenced as an appropriate basis by Recital 47). Where consent is relied upon, the strict standards for consent under the GDPR are to be noted, and marketing consent forms will invariably need to incorporate clearly worded opt-in mechanisms (such as the ticking of an unticked consent box, or the signing of a statement, and *not* merely the acceptance of terms and conditions, or consent implied from conduct, such as visiting a website).

Data subjects have an unconditional right to object to (and therefore prevent) any form of direct marketing (including electronic marketing) at any time (Article 21(3)).

Specific rules on electronic marketing (including circumstances in which consent must be obtained) are to be found in Directive 2002/58/EC (ePrivacy Directive), as transposed into the local laws of each Member State. The ePrivacy Directive is to be replaced by a Regulation. However, it is currently uncertain when this is going to happen, as the European Commission has discarded its draft of the ePrivacy Regulation after disagreements by the Member States in the Council of the European Union. In the meantime, GDPR Article 94 makes it clear that references to the repealed Directive 95/46/EC will be replaced with references to the GDPR. As such, references to the Directive 95/46/EC standard for consent in the ePrivacy Directive will be replaced with the GDPR standard for consent.

The Act applies also to most electronic marketing activities since in the course of such activities, it is likely that ‘personal data’ as defined above (including email) will be ‘processed’ as understood by the Act. In relation to direct marketing (even electronic), consent may be revoked at will by the data subject(s).

The controller is legally bound to inform the data subject that he or she may oppose such processing at no cost.

Apart from the Act, the ‘Processing of Personal Data (Electronic Communications Sector) Regulations’ (Subsidiary Legislation 586.01 issued under the Data Protection Act 2018) (the Electronic Communications Regulations) address a number of activities relating specifically to electronic marketing.

In the case of subscriber directories, the producer of such directories shall ensure (without charge to the subscriber) that before any personal data relating to the subscriber (who must be a natural person) is inserted in the directory, the subscriber is informed about the purposes of such a directory of subscribers and its intended uses (including information regarding search functions embedded in the electronic version of the directories). No personal data shall be included without the consent of the subscriber. In furnishing his consent the subscriber shall determine which data is to be included in the directory and is free to change, alter or withdraw such data at a later date. The personal data used in the directory must be limited to what is necessary to identify the subscriber and the number allocated to him, unless the subscriber has given additional consent authorizing the inclusion of additional personal data.

The Electronic Communications Regulations also deal with the issue of unsolicited communications. A person is prohibited from using any publicly available electronic communications service to engage in unsolicited communications for the purpose of direct marketing by means of:

- An automatic calling machine

- A facsimile machine
- Email

to a subscriber, irrespective of whether such subscriber is a natural person or a legal person, unless the subscriber has given his prior explicit consent in writing to the receipt of such a communication.

By way of exception to the above (informally known as the ‘soft opt-in’ rule), where a person has obtained from his customers their contact details for email in relation to the sale of a product or a service, in accordance with the Act that same person may use such details for direct marketing of its own similar products or services. However, the customers must be given the opportunity to object, free of charge and in an easy and simple manner, to such use of electronic contact details when they are collected and on the occasion of each message where the customer has not initially refused such use.

In all cases the practice of, inter alia, sending email for the purposes of direct marketing, disguising or concealing the identity of the sender or without providing a valid address to which the recipient may send a request that such communications cease, shall be prohibited.

The Act does not change the position under the previous Data Protection Act (Chapter 440) and does not introduce derogations from the provisions of the GDPR in this regard. The proposed ePrivacy Regulation would need to be analyzed separately.

ONLINE PRIVACY

Cookie Compliance

Subsidiary Legislation 586.01, entitled ‘Processing of Personal Data (Electronic Communications Sector) Regulations' amended the regulations implementing Article 2(5) of Directive 2009/136/EC into Maltese Law.

The Commissioner has recently published a “**Guidance Note on Cookies Consent Requirements**” which can be read here.

Traffic Data

Under the Processing of Personal Data (Electronic Communications Sector) Regulations, traffic data relating to subscribers and users processed by an undertaking which provides publicly available electronic communications services or which provides a public communications network, must be erased or made anonymous when no longer required for the purpose of transmitting a communication.

Traffic data required for the purpose of subscriber billing or interconnection payments may be retained, provided however, that data retention is permissible only up to the period that a bill may lawfully be challenged or payment pursued.

Traffic data may be processed where the aim is to market or publicize the provision of a value-added service, however, the processing of such data shall only be permissible to the extent and for the duration necessary to render such services.

Processing of traffic data is also permissible by an undertaking providing publicly available electronic communication for the following purposes:

- Managing billing or traffic management
- Customer inquiries
- Fraud detection
- Rendering of value-added services

The Act does not introduce any new rules in this regard.

Location Data

Where location data (other than traffic data) relating to users or subscribers of public communications networks or of publicly available electronic communications services can be processed, such data may only be processed when it is made anonymous or with the consent of the users or subscribers, to the extent and for the duration necessary for the provision a value-added service.

Prior to obtaining user or subscriber consent, the undertaking providing the service shall inform them of the following:

- The type of location data which shall be processed
- The purpose and duration of processing
- Whether the processed data shall be transmitted to a third party for the purpose of providing the value-added service

A user or subscriber may withdraw consent for the processing of such location data (other than traffic data) at any time.

The Act does not change the previous position and does not derogate from the GDPR or further regulate in this regard.

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DATA PRIVACY TOOL

You may also be interested in our Data Privacy Scorebox to assess your organization's level of data protection maturity.