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IMPORTANT TO READ BEFORE ANSWERING THE QUESTIONNAIRE:

The FORMOBILE project is aimed at creating better mobile forensic tools to help combat crime more efficiently, enlarging the capacities of both first responders, common forensic laboratories and highly specialised laboratories and experts by providing them with better tools to acquire, decode, and analyse data coming from mobile devices. The majority of these tools will be integrated in the existing suite of MSAB software (XRY). Please refer to the FORMOBILE website for more information and especially to the work package breakdown of WPs 4-6: https://formobile-project.eu/project#.mod-wp-steps. It is essential to have this background to be able to accurately answer this questionnaire.

One of the aspects of the FORMOBILE project is to make sure that these tools are able to be used in the EU for the collection, decoding and analysis of information from mobile phones in a way that makes the obtained evidence admissible in court ("from crime scene to courtroom").

Hence, the questions that make up this questionnaire in essence aim to understand how mobile forensic tools aimed at retrieving, decoding and further analyzing information from a mobile device (e.g. a smartphone), are allowed in your jurisdiction under the applicable criminal law. We are especially interested in:

- whether technical measures may be used (and to what extent) to bypass security;
- to what extent the data on the mobile device may be read, searched, used and copied etc.;
- what the formal conditions are for accessing data on a mobile device;
- who must order such actions and in what level of detail the mandate must describe the authorized actions;
- in what scenarios this is permissible (only in certain scenarios, only if the phone belongs to the accused?), as well as the potential differences between scenarios;
- existing limits on the access to or further analyzing and use of the data on a mobile device.

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In addition, we want to know under what conditions information on the Cloud can be accessed and if this is possible by technical means. We are also interested in any human rights' impacts, existing guidelines and issues in practice, existing case law and any other elements you deem relevant.

As we want to be able to compare answers across jurisdictions, we have drafted this request for information in a questionnaire format. This, however, does not mean we are looking for simple yes/no answers. Most questions are open questions and naturally invite an elaborate answer. Some questions may perhaps in theory be answered as yes/no question, but **please give as much guidance and details as possible within every question, to enhance our understanding of the legal system in your jurisdiction. Always cite the provision of the law or the case law you are relying on in providing an answer and please try to be exhaustive or at least as complete as possible. If you are relying on practical guidance or other informal rules and practice, please also refer to this and, if documentation on this is available, provide the link to where we can find this documentation.**

Please feel free to give additional guidance in the comments section at the end, in case you feel we did not sufficiently cover certain elements throughout the questionnaire.

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The questionnaire is made up of 61 questions, in the following sections:

- ☐ Introductory questions
- ☐ Section 1: Criminal procedure when searching/reading mobile devices, seizing mobile devices and for acquisition of data on mobile devices
- ☐ Section 2: Criminal procedure rules on analysis of data from mobile devices
- ☐ Section 3: Admissibility of evidence before court
- ☐ Section 4: Interpretation and presentation of evidence from mobile forensics before the Court
- ☐ Section 5: Implications of the use of mobiles forensics on the role of the different parties in the trial
- ☐ Section 6: Comments

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Introductory questions:

1. **Question:** *Please identify your organisation and your individual position?*

Answer: Managing Partner at Azzopardi, Borg and Abela Advocates

2. **Question**: *Where is your organisation based?*

Answer: In Malta

3. **Question:** *Do you have a legally defined term for a "mobile device"? If yes, what kind of devices are included within it? (e.g. Smartphones, Tablets, Smartwatches, Cameras, MP3-players, Navigation devices, Drones)*

Answer: Maltese Legislation does not define the term 'mobile devices.' However article 25(1) of Chapter 399 of the Laws of Malta – The Electronic Communications (Regulation) Act defines a 'conditional access device' as 'any equipment, software, or arrangement designed or adapted to give access in an intelligible form to one of the services constituting a protected service'

Moreover a 'protected service' is defined as 'any of the following services when provided against remuneration and on the basis of conditional access:(i) television programme services;(ii) radio broadcasting services including radio programmes intended for reception by the public, transmitted by wire or over the air, including by satellite;(iii) information society services offered by electronic means, at a distance and at the individual request of the recipient of the services, or the provision of conditional access to the above services considered as a service in its own right.'

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Section 1: Criminal procedure when searching/reading mobile devices, seizing mobile devices and for acquisition of data on mobile devices

Question: *Mobile devices (e.g. a smartphone) may enter investigations in a variety of scenarios. A suspect or a witness may have a smartphone on them during questioning or at the scene, mobile devices may be found during the search of a home or other premises, a suspect caught in the act may have a mobile device in use etc. We want to know for all these scenarios (and others you may be able to identify) what the applicable national rules are, namely answering the following questions:*

Mobile device not seized

4. *Under what circumstances can a mobile device be read or searched without seizing it?*
5. *Are there any limits to this search (e.g. core area of private life, privacy limits, limits defined by the crime, limits defined by the order/warrant)? If so, how precise are these/must these be defined?*
6. *Is it allowed to use technical tools to bypass security?*
7. *Can information be copied or only read at this stage?*
8. *Is consent of the owner/person in possession of the mobile device necessary?*
9. *Can the owner/person in possession of the mobile device be forced to unlock the device?*
10. *Must the owner/person in possession of the mobile device be informed?*
11. *Who can order a search and what are the formal requirements, if any?*
12. *Does it matter whether this person is the accused or witness/third party or the victim?*
13. *What about data stored in the Cloud, what is the procedure to access/read this data if it is known or suspected to reside outside your jurisdiction? Is international cooperation like the European Investigation Order (hereinafter: EIO) or Mutual Legal Assistance Treaties (hereinafter: MLAT) the only route or do other options exist? Please elaborate.*
14. *Does any of the foregoing depend on the type of crime involved (e.g. terrorism, child pornography etc.)?*

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15. *Does not following the applicable rules always lead to inadmissibility in court of the evidence in this scenario? If not, please elaborate on exceptions and relevant conditions.*

Mobile device seized

16. *Can the mobile device (e.g. a smartphone) be seized?*

17. *What are the conditions for this, who can order it and what are the formal requirements?*

18. *If seized, can the mobile device always be searched, information copied etc?*

19. *Are there any limits to this search (e.g. core area of private life, privacy limits, limits defined by the crime, limits defined by the order/warrant)? If so, how precise are these/must these be defined?*

20. *Is consent of the owner/person in possession of the mobile device ever a relevant element?*

21. *Can the owner/person in possession of the mobile device (if identified) be forced to unlock the device?*

22. *Must the owner/person in possession of the mobile device be informed? If so, about what exactly?*

23. *Is it allowed to use technical tools to bypass security measures and/or anti-forensic measures?*

24. *Does it matter whether this person is the accused or witness/third party or the victim?*

25. *What about data stored in the Cloud, what is the procedure to access this data if it is known or suspected to reside outside your jurisdiction? Is international cooperation like the European Investigation Order or Mutual Legal Assistance Treaties the only route or do other options exist? Please elaborate.*

26. *What about data stored in the Cloud, where you are unable to determine the location of the server or the identity of the service provider?*

27. *Can you legally access data in the Cloud, even if there is no app that links to this data or other direct link from the mobile device?*

28. *How is the access to data kept by a Service Provider related to the device regulated? Is it performed upon a Court order, or also through other means?*

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29. *Does any of the foregoing depend on the type of crime involved (e.g. terrorism, child pornography etc.)?*

30. *Does not following the applicable rules always lead to inadmissibility of the evidence in this scenario? If not, please elaborate on exceptions and relevant conditions.*

Please, answer all these questions separately for each scenario or instance which, in your opinion, is (partially) subject to different rules than other scenarios. At least, make the difference between the scenarios where a mobile device is seized and where it is not. If all sub-scenarios in one of these scenarios are the same, it suffices to only answer the questions once. However, most jurisdictions have different situations in which seizure is possible (e.g. in the context of a search of premises vs. not in the context of a search), so please differentiate between these scenarios, as well and answer the questions for them separately. If you prefer, you can answer the questions in their totality in an integrated explanation, as long as all elements are covered and again, various scenarios are differentiated between.

Please, give as much guidance as possible to enhance our understanding. Always cite the provision of the law or the case law you are relying on (legal basis) and mention conditions, people involved in the action, formal requirements etc., even if not specifically asked.

Answer:

Questions 4-30 are being answered in their totality in the below integrated explanation.

First of all it is important to point out that Maltese legislation does not distinguish between those scenarios where a mobile device is not seized and those instances where the mobile device is actually seized. Moreover, Maltese legislation dealing with searches and seizures does not differentiate between evidence obtained through mobile devices and any other piece of evidence.

In this regard, when dealing with searches and seizures, reference needs to be made to various provisions of the Maltese Police Act (Chapter 164 of the Laws of Malta) and the Maltese Criminal Code (Chapter 9 of the Laws of Malta).

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In terms of the Police Act, police officers may interfere with the enjoyment of private property only to the extent authorized by law.[1] Any person from whose possession any item of property has been seized by the Police in the course of an investigation or otherwise having an interest in the same property, may file an application before the Court of Magistrates to release in his favor the property so seized. The Magistrate will then decide on the release after having heard the reply of the Police.[2]

In accordance with article 346 of the Maltese Criminal Code, it is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favor of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.

A police officer may, in a public place, or in any place to which the public is admitted, even against payment of an entrance fee, search any person or vehicle, if he/she has a reasonable suspicion that the search will discover the possession of things, which are prohibited, stolen or acquired as the result of any offence whatsoever, or which may be used or may have been used in the commission of an offence or which may serve in the investigation of an offence. The Police may stop a person or a vehicle until the search is performed and shall seize anything discovered during the search and the possession of which is prohibited or which may be connected with an offence, even if it is suspected that such offence has been committed outside Malta in terms of the Convention of the19th June, 1990 implementing the Schengen Agreement.[3]

Where the search to be performed is required in an unattended vehicle and it is not possible to obtain the attendance of its registered owner, then a police officer may only carry out the search if he has a warrant from a superior officer not below the rank of an inspector.[4]

[1] Article 91 of Chapter 164 of the Laws of Malta
[2] Article 95 of Chapter 164 of the Laws of Malta
[3] Article 351 of Chapter 9 of the Laws of Malta
[4] Article 352 of Chapter 9 of the Laws of Malta

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Anything seized during such searches, shall be preserved and the Police carrying out the search shall draw up a report stating all the particulars of the search and including a detailed list of the things, including mobile devices, so seized.[5]

Notwithstanding the above, no police officer shall, without a warrant issued by the on-duty Magistrate, enter any premises, house, building or enclosure for the purposes of effecting any search therein unless:

- The offence is a crime and there is imminent danger that the said person may escape or that the corpus delicti or the means of proving the offence will be suppressed;
- The person is detected in the very act of committing a crime;
- The intervention of the Police is necessary in order to prevent the commission of a crime;
- The entry is necessary for the execution of any warrant or order issued by any other competent authority;
- The arrest is for the purpose of apprehending a person who is unlawfully at large after escaping from lawful arrest or detention;
- The entry is necessary for purposes of:(i) executing the arrest, or ascertaining the whereabouts, of a person in respect of whom an alert has been entered in the Schengen Information System and there is an imminent danger that the said person may escape or discovering any property in respect of which an alert has been entered in the Schengen Information System and there is an imminent danger that the property may be concealed, lost, damaged, altered or destroyed.[6]

It is worth mentioning, especially in light of questions 5 and 19, that any entry and search warrant and any search or seizure shall be limited to the offence under investigation and to that evidence which is admissible and relevant to the case at hand. For example if the offence related

[5] Article 354 of Chapter 9 of the Laws of Malta.
[6] Article 355E of Chapter 9 of the Laws of Malta

to child pornography, generally court appointed forensic expert in Malta, when analysing mobile devices, input keywords such as 'porn', 'child', 'mature', 'penis' and other related keywords so that the search will yield those results which are related to the offence/crime/investigations, criminal proceedings in question.[7]

Nonetheless, any search, irrespective of whether the mobile device has been seized or otherwise, shall not extend to items subject to legal privilege or to any excluded material.[8] Items subject to legal privilege means any communication between a professional legal adviser and his client or any person representing his client and any document or record enclosed with or referred to in such communication and made in connection with the giving of legal advice or in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, but the term does not include items held with the intention of furthering a criminal purpose. Moreover the expression 'excluded material' refers to personal records acquired or created by a person in the course of any trade, business, profession or other occupation, or for purposes of any paid or unpaid office and which he holds in confidence as well as journalistic material which a person holds in confidence.[9] A breach of this limitation may tantamount to a breach of the suspect, accused or witness' fundamental human rights.

Furthermore in terms of article 355L of the Maltese Criminal Code, the Police have the power to enter and search any premises, house, building or enclosure used, occupied or controlled, even temporarily, by a person who is under arrest, if they have reasonable grounds for suspecting that there is evidence, other than items subject to legal privilege, that relates to the offence or a connected offence, and such search shall be limited to the extent that is reasonably necessary for discovering such evidence. However if offences other than the offence or offences

[7] Reference inter alia to a case decided by the Court of Criminal Appeal presided by Hon. C. Scerri Herrera on the 11th of July, 2019 in the names of 'Il-Pulizija vs Rupert Buttigieg'
[8] Article 355G of Chapter 9 of the Laws of Malta
[9] Article 350 of Chapter 9 of the Laws of Malta

for which the person was arrested are discovered in the course of the search then the search may extend to the extent required for the purposes of such other offences.

The Police, when lawfully on any premises, may seize anything which is on the premises if they have reasonable grounds for believing that it has been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence or it is the subject of an alert in the Schengen Information System and that it is necessary to seize it to prevent it being concealed, lost, damaged, altered or destroyed.[10]

Apart from the power of seizing any mobile device as aforementioned, the Police may require any information which is contained in a computer to be delivered in a form in which it can be taken away, visible and legible.[11]

With respect to question 10, the Police shall always issue to the person on the premises or in control of the thing seized a receipt for anything seized and on request by any such person, the Police shall, against payment and within a reasonable time, supply to him/her photographs, or a film, video recording or electronic image or copies of the thing seized, unless the investigating officer has reasonable grounds for believing that this would be prejudicial to the investigation or to any criminal proceedings that may be instituted as a result thereof.[12]

Moreover in light of question 22, if the evidence obtained from an analysis of any mobile device is produced in criminal proceedings instituted against any person, the accused has the right to obtain a copy of such analysis as well as all information ancillary to said analysis and if necessary he/she has the right to cross-examine on oath the expert who conducts such investigation.

[10] Article 355P of Chapter 9 of the Laws of Malta
[11] Article 355Q of Chapter 9 of the Laws of Malta
[12] Article 355R of Chapter 9 of the Laws of Malta

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Any thing seized by the Police may be retained so long as is necessary in all circumstances. Inf act anything lawfully seized by the Police may be retained for use as evidence at the trial or for forensic examinations or any other aspects of the investigation or in order to establish the thing's lawful owner.[13]

Upon the receipt of any report, information or complaint in regard to any offence liable to the punishment of imprisonment exceeding three years, a magisterial inquiry dealing with the 'in genere' is triggered. Magisterial inquiries are intended to collect and preserve evidence of a potential crime. Its main function is to establish if there is enough evidence to file criminal charges. Magistrates work to a roster, taking it in turns to be on duty around the clock, seven days a week. The duty magistrate on the day the report is filed is the one tasked with conducting an inquiry.

Whilst an inquiry is underway, Magistrates can summon witnesses as well as appoint court experts, including forensic experts, to assist the Magistrate by obtaining and preserving all relevant evidence so that eventually the Magistrate may decide whether or not someone ought to be charged with an alleged crime.

Different reports require different expertise. For instance for an inquiry into an alleged murder, magistrates usually appoint scene of crime officers, ballistic experts, pathologists, photographers, medico-legal experts as well as forensic experts. The role of forensic experts may range from searching for any CCTV cameras and obtain recordings, analyse any mobile device found on the victim, obtain information from mobile service providers to obtain information on suspects or geolocation data. Experts shall, in connection with their role in the magisterial inquiry, make all such observations, experiments and conclusions as their art or

[13] Article 355S of Chapter 9 of the Laws of Malta

trade may suggest and subsequently compile a report, which is exhibited in the acts of said magisterial inquiry, outlining the expert's findings and conclusions.[14] [15]

When criminal charges are filed and criminal proceedings are underway, where for the examination of any person or thing, special knowledge of skill is required, a reference to experts shall be ordered. Experts shall be chosen by the court. The magistrate presiding the case may empower any expert to receive documents and to examine witnesses on oath. On terminating the work their profession may suggest, experts shall make their report, either orally or in writing, stating the facts and the circumstances on which the conclusions of the experts are based.

If in the course of their work, the experts shall obtain from any person information on circumstances of fact, such person shall be mentioned in the report and shall be examined in court in the same manner as any other witness.[16]

In this regard and in relation to question 30 of this questionnaire, reference needs to be made to Maltese Subsidiary Legislation 586.01 – Processing of Personal Data (Electronic Communications Sector) Regulations. Such regulations bind service providers to supply to the police and security services, personal data held by fixed and mobile telephony companies and Internet service providers. Such data includes incoming and outgoing telephone numbers, subscribers' details, Internet protocol addresses, log-in and log-out details of internet access and location data identifying the geographic location of mobile phones. Such legislation gives the power to police to request personal data orally in urgent cases.

[14] Articles 546 – 569 of Chapter 9 of the Laws of Malta
[15] Reference to a judgment delivered by the Court of Criminal Appeal on the 3rd of July, 1997 in the names of 'Ir-Repubblika ta' Malta vs Jason Calleja'
[16] Articles 650-657 of Chapter 9 of the Laws of Malta

In all stages of the police investigation, magisterial inquiry or criminal proceedings, the police, the magistrate in charge of the magisterial inquiry as well as the presiding magistrate upon the request of the Prosecution may order the copying of any information revealed on any mobile device discovered in connection with the investigation at hand. However, this is no longer possible if criminal proceedings are underway and they reached a certain stage where the accused is producing his / her evidence. At this juncture, the Prosecution cannot request the Court to appoint an expert to analyse anything further in connection with the said case.

Both when the mobile device is seized or not, the consent of the owner/person in possession of the mobile device for that mobile device to be analysed is not necessary, however said owner or possessor of the mobile device, in either scenario, may not be forced to unlock the device. This is in light of article 366E of the Maltese Criminal Code which holds that suspects and accused persons have the right to remain silent in relation to the criminal offence which they are suspected or accused of having committed and shall have the right not to incriminate themselves.

In those cases where the suspect/accused voluntarily decided to unlock the device in question, the forensic expert may proceed with the investigation accordingly. Contrastingly, when the suspect/accused decides not to unlock said device, the forensic expert may use all technical tools possible to bypass security of the device.

The police, the prosecution, as well as the accused may demand that a forensic analysis is performed on ay device, as long as it is sufficiently proven that such request is related to the criminal offences in question and that any evidence yielded from such analysis is relevant to the case at hand. Such request and the same procedure shall apply in respect to any device possessed/owned by the accused, victim or third parties.

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Article 349(2) of Chapter 9 of the Laws of Malta holds that "the omission of any precaution, formality or requirement prescribed by law shall be no bar to proving, at the trial, in any manner allowed by law, the facts to which such precaution, formality or requirement relates."

***31.* Question**: *In cases where the examination or data acquisition is not possible without changing the configuration of the device, is there a strict protocol that should be followed (e.g. procedure and changes should be tested, validated, and documented)? If yes, please specify on what rules this is based and what the requirements are. Please also provide examples.*

Answer: Yes, all procedure should be documented. Reference is made to article 653(2) of the Maltese Criminal Code. Article 653(2) stipulates that: "The report shall in every case state the facts and the circumstances on which the conclusions of the experts are based."

In addition reference is made to the *'Guidelines for Evidence Collection and Archiving'*[17] as outlined by D. Brezinski and T. Killalea:

> "3 The Collection Procedure
>
> Your collection procedures should be as detailed as possible. As is the case with your overall Incident Handling procedures, they should be unambiguous, and should minimise the amount of decision-making needed during the collection process.
>
> 3.1 Transparency
>
> The methods used to collect evidence should be transparent and reproducible. You should be prepared to reproduce precisely the methods you used, and have those methods tested by independent experts.
>
> 3.2 Collection Steps
>
> - Where is the evidence? List what systems were involved in the incident and from which evidence will be collected.
>
> - Establish what is likely to be relevant and admissible. When in doubt err on the side of collecting too much rather than not enough.

[17] https://www.rfc-editor.org/rfc/rfc3227.txt

- For each system, obtain the relevant order of volatility.
- Remove external avenues for change.
- Following the order of volatility, collect the evidence with tools as discussed in Section 5.
- Record the extent of the system's clock drift.
- Question what else may be evidence as you work through the collection steps.
- Document each step.
- Don't forget the people involved. Make notes of who was there and what were they doing, what they observed and how they reacted.

Where feasible you should consider generating checksums and cryptographically signing the collected evidence, as this may make it easier to preserve a strong chain of evidence. In doing so you must not alter the evidence.

4.1 Chain of Custody

You should be able to clearly describe how the evidence was found, how it was handled and everything that happened to it.

The following need to be documented

- Where, when, and by whom was the evidence discovered and collected.
- Where, when and by whom was the evidence handled or examined.
- Who had custody of the evidence, during what period. How was it stored.
- When the evidence changed custody, when and how did the transfer occur (include shipping numbers, etc.).”

32. **Question:** *Are there any specific rules in criminal procedure that regulate the use of mobile forensics tools using/deploying AI technology? Are there any conditions which need to be met so AI-powered tools could be applied in the process of evidence collection?*

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Answer: As of yet, in Malta, there are no specific rules in criminal procedure regulating the use of artificial intelligence and forensics.

33. **Question:** *What are the main legal issues in your jurisdiction in the cases when mobile devices are involved in crimes across geographical boundaries? What procedures are foreseen to tackle these multijurisdictional issues? Should the forensic examiner be aware of the nature of the crime and the regional laws/legislative framework?*

Answer: Indication of length of answer: couple of paragraphs

34. **Question:** *Is there an established procedure/course of action to decide whether to apply the EIO or another instrument for cross-border gathering of evidence within the EU?*

Answer: Indication of length of answer: 1-2 paragraphs.

35. **Question:** *Since, the abovementioned Directive does not preclude the application of MLAT by judicial authorities under some circumstances, what is the practice in your jurisdiction?*

Answer: Indication of length of answer: 1-2 paragraphs.

36. **Question:** *Are you aware of any existing cooperation mechanisms and practices with the private sector?*

Answer: Indication of length of answer: 1-2 paragraphs.

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Section 2: Criminal procedure rules on analysis of data from mobile devices

***37.* Question:** *When data has been made accessible through mobile forensics, are there any rules on how the data must be analysed, especially to take into account:*

- *Data protection concerns (Law Enforcement Directive 2016/680 and implementing national law)*
- *Privacy concerns and respect for core area of private life (i.e. how is it guaranteed that very sensitive information, not relevant to the investigation is not used)*
- *Human rights such as the right to a fair trial (tools may deliver faulty results and methods used are often untransparent) and the right to non-discrimination (tools that are untransparent may contain bias)*
- *What information can be retained/copied? For how long?*

Please elaborate on both criminal procedure law, relevant data protection law and any other measures or guidelines that may exist. Please also cite and explain relevant case law.

Answer: In this regard, it is worth mentioning one of the landmark judgements delivered by the Maltese Court of Appeal in its Inferior Jurisdiction on the 3rd of October, 2007 in the names of 'Vodafone Malta Limited vs Kummissarju ghall-Protezzjoni tad-Data et.' In this particular case, the executive police requested a domestic telephony service provider to provide information regarding calls through the cell communication apparata and this in light of police investigations revolving around xenophobic and racial incidents. The Court concluded that in order to ascertain that the fundamental right of privacy is safeguarded, the principle of proportionality shall apply. Such principle holds that when making a request for data related to mobile devices, both the investigating authorities as well as the service providers must ensure that the investigating authorities, through the use of such data, do not embark on a fishing expedition and such measures are appropriate, effective, relevant and necessary to reach the expected objective. In all other cases, it is likely that there would be a breach of one's fundamental rights.

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On the other hand, reference is to be made to article 355AD(4) of the Maltese Criminal Code which holds that:

> "Any person who is considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to attend at a police station to give as required any such information or document:
>
> Provided that no person is bound to supply any information or document which tends to incriminate him."

Ax explained above, in order to ensure that the evidence obtained through mobile forensics may lead to a conviction, it is of utmost importance that the whole procedure is well documented. This allows the suspect, accused as well as the court to have a clear picture of how such evidence was obtained and if necessary, the accused would have the possibility, in light of the principle of equality of arms, to challenge such evidence.

With respect to the retention of data obtained through mobile forensics, reference is made to article 355S of the Criminal Code which holds that as long as such evidence was seized lawfully, such evidence may be retained so long as is necessary.

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Section 3: Admissibility of evidence before court

38. **Question:** *Are there general rules or guidelines on the admissibility of electronic evidence in your jurisdiction applicable to mobile forensics, not yet discussed above?*

Answer: As explained above, Maltese legislation dealing with searches and seizures does not differentiate between evidence obtained through mobile devices and any other piece of evidence.

39. **Question:** *Are the criteria for admissibility of evidence collected through mobile forensics the same as for the other types evidence? Please elaborate in any case.*

Answer: Refer to Answer of Question 38.

40. **Question:** *What if procedural rules are not followed? Can evidence from mobile forensics still be submitted to the Court in certain circumstances, balancing out the interest of the criminal justice with the severity of the procedural breach?*

Answer: As per article 349(2) of Chapter 9 of the Laws of Malta - "The omission of any precaution, formality or requirement prescribed by law shall be no bar to proving, at the trial, in any manner allowed by law, the facts to which such precaution, formality or requirement relates."

41. **Question:** *Specifically, if data in the Cloud is accessed according to criminal procedure, but it turns out to be located outside your jurisdiction does this mean it is not admissible at all? Is it relevant that there was reasonable doubt about the location of the data at the time?*

Answer: Indication of length of answer: 1-2 paragraphs.

42. **Question:** *What are the consequences if mobile evidence are altered either intentionally, or unintentionally due to their dynamic nature during the investigation process? Note that intentional alteration refers to using a process to uncover data which is known to alter some*

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(meta)data, not to the falsification of evidence. The question is more whether any alteration, even on small and not relevant data may render the evidence inadmissible.

Answer: Despite the fact that intentional or unintentional alteration of mobile evidence due to the dynamic nature of such evidence will not render the evidence collected inadmissible, as long as such alterations are well-documented, however said alterations may affect the probative value of the evidence collected. One must bear in mind that in criminal proceedings, the prosecution is expected to prove its case beyond reasonable doubt.

43. **Question:** *Specifically, are there rules on the used technology, methodology or standard, such as for example that this must be forensically sound as a prerequisite for admissibility? If yes, please elaborate.*

Answer: In Malta, there is no legislation dealing specifically with the methodology or standards which forensic experts need to adopt.

44. **Question:** *Are you aware of existing case-law in your jurisdiction, dealing with the admissibility of evidence produced using mobile forensics? If yes, please elaborate.*

Answer: Reference is made to various judgments including:

- 'Il-Pulizija vs Domenico Savio Micallef' delivered by the Court of Criminal Appeal on the 26th of November, 2019 – The Court delved into the notion of documentary hearsay evidence and held that when police officers / forensic experts, in the course of their work, obtain from any third party any information, such third party shall be mentioned in the report and shall be examined in court.

- 'Il-Pulizija vs Sylvester Grech' decided by the Court of Magistrates (As a Court of Criminal Judicature) on the 20th of October, 2020 – The Court delved into the admissibility of voice recordings in relation to the identification of the voice heard in such recordings. The Court concluded that it is generally accepted that the identification of an accused from voice

recognition is potentially even more difficult and unreliable than visual identification (especially when the voice is heard only over a telephone) but such evidence may still be taken into account and , where relevant voice recordings exist, apart from digital experts, voice identification experts should be appointed to assist in the matter.

- 'Il-Pulizija vs Johan Pace et. decided by the Court of Magistrates (As a Court of Criminal Judicature) on the 29th of October, 2020 – The Court pointed out that although the Prosecution has managed to prove that at the time of the offence Mr Pace received several calls from other suspects and his mobile phone location revealed that he was in the area where the theft had occurred however this was not enough to lead to a conviction.

45. **Question:** *Is there in your jurisdiction an established and recognised standardisation(s) of the processes of collection, analysis, interpretation and reporting of digital evidence that must be followed for the evidence to be admissible? (as critical to the validity of evidence, their quality and impact evidence's acceptance by the courts)? If yes, please elaborate.*

Answer: In Malta, there is no legislation dealing specifically with the methodology or standards which forensic experts need to adopt.

46. **Question:** *Is a failure to comply with Data Protection law, or privacy rules in itself, enough to refuse admissibility of the evidence, even when procedure is otherwise followed?*

Answer: In Malta, any court competent to hear and decide cases related to fundamental human rights, upon determining that such failure amounts to a breach of one's fundamental human right to privacy may provide any remedy which the Court deems fit. Consequently, such remedy may also include the same court to declare such evidence as being inadmissible and thus having no probative value.

47. **Question:** *Is there case law in your jurisdiction on evidence collected through mobile forensics having been questioned or rejected in Court because the admissibility was questioned? If yes, please elaborate on at least 3 cases.*

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Answer: please refer to answer of Question 44

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Section 4: Interpretation and presentation of evidence from mobile forensics before the Court

48. **Question:** *Are there general rules or guidelines on the interpretation and presentation of evidence from mobile forensics, such as:*

- *Is mobile forensic evidence given a certain probative value?*
- *Are there rules on how to interpret mobile forensic evidence or requirements which must be complied with for the evidence to be considered reliable?*
- *Must such evidence be examined by an expert witness?*
- *If not obligatory, is this a common practice?*
- *What are the requirements for experts (experience, independence, training, etc.)?*
- *Is there a centralised management of mobile forensic operations in your jurisdiction to ensure the work is compliant with standards and can be presented in court in a consistent manner?*

Answer: Before the Maltese courts of criminal jurisdiction all forms of evidence including forensic evidence, are given due importance as long as such evidence is admissible and relevant to the case.

There are no rules on how to interpret mobile forensic evidence. However a distinction is made between evidence produced by expert witnesses and non-expert witnesses. Whereas expert witnesses are allowed to voice their opinion, non-expert witnesses may not and any opinion expressed by non-expert witnesses is not admissible.

In Malta expert witnesses are chosen by the court. However the Maltese Minister for Justice may, after consultation with the Chief justice, appoint one or more persons as official experts on matters requiring special technical skill or knowledge, and when such persons are appointed, the court shall choose such experts.[18] When more than one expert is appointed, the experts shall be appointed in an uneven number.

[18] Article 650(2) of Chapter 9 of the laws of Malta

An expert may be challenged:

- If he is related by consanguinity or affinity in a direct line to any of the parties;
- If he is related by consanguinity in the degree of brother, uncle or nephew, grand-uncle or grand nephew or cousin, to any of the parties, or if he is related by affinity in the degree of brother, uncle, or nephew, to any of the parties;
- If he is the tutor, curator, or presumptive heir of any of the parties;
- If he is or has been the agent of any of the parties
- If he is the administrator of any establishment or partnership involved in the case,
- If any of the parties is his presumptive heir;
- If he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependant thereon;
- If he had previously taken cognizance of the cause as a judge or as an arbitrator
- If he has made any disbursement in respect of the cause;
- If he has given evidence or if any of the parties proposes to call him as a witness;
- If he, or his spouse, is directly or indirectly interested in the event of the suit.

However, it is worth mentioning that those who are to judge are not bound to abide by the conclusions of the experts against their own conviction.[19]

49. **Question:** *Are you aware of existing case-law in your jurisdiction dealing with the interpretation and presentation of evidence produced using mobile forensics? If yes, please elaborate.*

Answer: Not aware of any domestic judgements in this regard.

50. **Question:** *Is there in your jurisdiction an established and recognised standardisation(s) of the processes of collection, analysis, interpretation and reporting of digital evidence that must be followed for the interpretation and presentation of evidence before a court? Or alternatively*

[19] Article 656 of the Criminal Code

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which is not obligatory but considered as critical for the validity of evidence, its quality or the impact of the evidence and its acceptance by the courts? If yes, please elaborate.

Answer: No.

51. **Question:** *Is there case law in your jurisdiction on evidence collected through mobile forensics having been questioned or rejected in Court because of interpretation issues or presentation issues (e.g. considered admissible but not reliable)? If yes, please elaborate on at least 3 cases.*

Answer: Not aware of any of such judgements.

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Section 5: Implications of the use of mobiles forensics on the role of the different parties in the trial

***52.* Question:** *Are there rules or guidance, or is there case law in your jurisdiction on how to respect the right to a fair trial in case of evidence extracted via mobile forensics? What practices are established in view of the respect of the principle of equality of arms?*

Answer: The principle of equality of arms represents one of the elements of the broader concept of fair trial and requires that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent as well as the possibility to challenge any evidence produced.

As aforementioned, all evidence extracted via mobile forensics needs to be documented and produced before the court in the presence of the accused. The accused would then have the right to cross-examine the witness presenting such evidence and may require said witness to give further elucidations and/or clarification on their report and evidence presented. The accused and any other party to the case may also request such witness to comment on any other point which may be useful in order to make the opinion of the expert clear.[20]

***53.* Question:** *Is there any training required by law for the judges, prosecution, expert witnesses, lawyers involved in cases with evidence coming from mobile forensics?*

Answer: There is no compulsory training in this regard.

***54.* Question:** *Is there a pre-determined time duration/limitation period required for the extraction of evidence from mobile devices, time for decoding, reviewing and analysing of the data, time for reporting that data in a form that prosecutors and others can use?*

Answer: No, there is no pre-determined time duration, however one must bear in mind that in light of article 6(1) of the European Convention of Human Rights: "In the determination of his civil

[20] Article 655 of Chapter 9 of the Laws of Malta.

rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing **within a reasonable time** by an independent and impartial tribunal established by law."

***55.* Question**: *What are the procedural rights inherent to the different participants in a criminal procedure (i.e. the prosecution, the court, the defendant, the witness, the victim, etc.)?*

Defendant

i. To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
ii. To have adequate time and facilities for the preparation of his defence;
iii. To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
iv. To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
v. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
vi. The right to remain silent;
vii. The right to be presumed innocent until proven guilty;
viii. The right to appeal from judgment of the Court of Magistrates.

Prosecution

i. To perform an active role in criminal proceedings, including institution of prosecution, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest;
ii. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded;

iii. To examine witnesses on the Prosecution's behalf and cross-examine and witnesses produced by the defendant;
iv. In those instances allowed by law, the right to appeal from judgements of the Court of Magistrates

Victim

i. To be present for the proceedings;
ii. To engage an advocate or a legal procurator to assist him/her;
iii. To examine or cross-examine witnesses;
iv. To produce such other evidence as the court may consider admissible;
v. When applicable, to testify via video conference, to avoid secondary victimization. This is most likely the case when dealing with minor victims and victims of sexual offences.

Witnesses

i. The right not to incriminate oneself
ii. No objection to the competency of any witness shall be admitted on the ground that he was the party who laid the information or made the complaint, or that he was the party who made the report or the application in consequence of which proceedings were instituted, or that he is, by consanguinity or affinity, or by reason of any contract, employment or otherwise, in any manner related to or connected with the defendant[21];

5.1 The Prosecution

***56.* Question:** *Are there any requirements or guidance provided to the prosecution as how to control and deal with mobile forensics and evidences?*

Answer: Not aware if such guidance is provided.

[21] Article 633(1) of Chapter 9 of the Laws of Malta.

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5.2 The Court

57. **Question:** *Is there judicial control over the approaches and methods used for acquiring, collecting and analyzing evidence? Please refer to case law if possible.*

Answer: Indication of length of answer: couple of paragraphs.

58. **Question:** *How does the Court assess the evidence obtained via mobile forensics? Please refer to case law if possible to illustrate the approach.*

Answer: Indication of length of answer: couple of paragraphs.

5.3 The defendant and defender

59. **Question:** *Are there rules and standards regulating the defendant and his/her defender's rights to access and to make copies of the acquired mobile evidence? Are they able to get any information on the process used to acquire mobile forensic evidence (e.g. information on how the tools work, the procedures used, the parties involved and how the validity of the results is guaranteed)? Please refer to case law if possible.*

Answer: Please refer to answer of question 52

5.4 Witnesses

60. **Question:** *During the pre-trial stage, how is the right to privacy of the witnesses preserved? Are there any practical steps taken to exclude certain types of information which are cumulatively non-relevant to the case and too private? Are there particular requirements for witnesses regarding their capability to testify in terms of mobile forensics both in the pre-trial and the trial phase of the criminal proceedings? Please refer to case law if possible.*

Answer: Indication of length of answer: couple of paragraphs.

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5.5 The Victim

61. **Question:** *How are the victim's/victims' rights ensured during both the pre-trial and the trial phase of the proceedings? How is their privacy preserved? Can they use the evidence obtained via mobile forensics when exercising their rights? Please refer to case law if possible.*

Answer: Indication of length of answer: couple of paragraphs.

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Section 6: Comments

If you feel some important elements of your national law relating to the use of mobile forensics in criminal investigations have not sufficiently been covered, please explain them here. If you feel an overview is missing, please also provide guidance on this below.

Answer: Indication of length of answer: few paragraphs up to a couple of pages.