

REPORT
on the Free Movement of Workers
in Malta in 2005

Rapporteur: Dr. Gabriella Pace

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Chapter I

Entry, residence and departure

Texts in force

Entry and residence into Malta is regulated by the Immigration Act (Chapter 217 of the Laws of Malta) and the secondary legislation issued thereunder. The Immigration Act, first issued in 1970, essentially restricts, regulates and controls immigration into Malta and also makes provision for a number of other ancillary matters, such as the issue of work permits to foreigners.

The main amendments to the Immigration Act, in order to bring it in line with the European Union's *acquis* on entry and residence were introduced via Legal Notice 248 of 2004 and Legal Notice 205 of 2004, both of which came into force upon Malta's accession to the European Union on the 1 May 2004.

Legal Notice 248 of 2004, the European Union (Construction and Amendment of Laws) Order, was published on the 30 April 2004 and extended the applicability of the Immigration Act to nationals of other EU Member States. Probably the most significant amendment introduced through this Legal Notice is the revised definition of Border Agreement which in section 4(ii) is defined as follows:

“‘Border Agreement’ means an agreement to which Malta is a party, or any rule in or under the Treaty providing for common border controls and free entry and exit of persons lawfully with the territory, into and from each of the territories of the Member States or States parties to the agreement, and Border Agreement State and citizen of a Border Agreement State shall be construed as such”

LN 248 of 2004 also amended the Immigration Act, enabling the competent Minister to make Regulations in order to:

- (a) grant and regulate the right of any citizens of a Member State or their dependents to enter, remain and reside in, and leave Malta;
- (b) grant and regulate the right of such persons to seek employment and work in Malta and to establish, provide or receive such services in Malta;
- (c) grant and regulate the aforementioned rights to any person and his dependents who is lawfully in the territory of any state which is bound by a Border Agreement.

Legal Notice 205 of 2004, the Immigration Regulations, was published on the 1 May 2004 and came into force on the same day. These Regulations grant EU citizens the right to seek employment, work and reside in Malta. They also implement the provisions of EC Regulation 1612/68 on the free movement of workers, EC Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that state, EC Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers from the EU Member States and their families, EC Directive 90/364 on the right of residence and EC Directive 64/221 on the co-ordination of special measures justified on grounds of public policy, public security and public health.

As a rule, there shall be no border checks on Maltese citizens and EU citizens entering or leaving a border crossing point, provided that this shall not affect the obligation of any person to hold and carry such permits and documents required. The competent authorities may also exercise police powers under Maltese law throughout Maltese territory. However, it shall also be possible for the competent Minister, in the interests of public policy or national security, to provide that for a limited period border checks appropriate to the situation be carried out at the border crossing point, provided that the other Member States shall be informed at the earliest opportunity. When border checks are carried out, every person shall be subject to at least one check carried out with a view to establishing identity on the basis of the travel documents required. Citizens of the Union, including Maltese nationals, their vehicles and objects shall only be subjected to random border checks and these shall include the verification of the travel documents and of the other conditions governing entry and residence, including the documentation, and also checks to detect and prevent threats to the national security and public policy.

Section 3 of the Immigration Regulations grants all EU citizens and their dependents the right to enter, remain and reside in Malta as well as to seek or take up employment or self-employment. EU citizens are entitled to enter and leave Malta simply on production of a valid identification document, which includes a valid passport, identification card, travel document or any other appropriate document as the Minister may designate. Where EU citizens intend staying in Malta for a period exceeding three months,¹ a residence permit will be issued. The Regulations provide that the Principal Immigration Officer is obliged to decide, as soon as possible, whether or not to grant or refuse the first residence permit or renew the same. In any event, the said decision is to be taken within six months from the date of application and, pending this decision, the applicant is allowed to remain in Malta.

It is worth noting that the documents referred to in the Immigration Regulations are issued by the Police Immigration Authorities, except for the work permit which, until the 31 July 2005 was issued by the Citizenships and Expatriate Affairs Directorate. With effect from 1 August 2005, responsibility for the issue and renewal of employment licences to foreign nationals (both non-Maltese EU nationals and third country nationals), has been assumed by the Employment and Training Corporation (ETC). The document, which is also in the form of a residence permit, is also endorsed by the Police authorities.

The Immigration Regulations also distinguish between the residence document and the residence permit. The former is issued to dependents of EU citizens who are not themselves citizens of the Union;² the latter is issued to Union citizens and is defined as including an authorisation of any type, whether of a temporary nature or otherwise or whether given for a special or *ad hoc* purpose, and which gives the right of residence in Malta. The document issued, whether a residence permit or a residence document, is in fact to specify whether the residence has been taken up on a long-term or permanent basis or whether it is for work, study or any other purpose. When an individual wishes to modify the reason for which a residence permit or a residence document has been issued, an application is to be submitted to the Principal Immigration Officer, who shall issue the new permit or document accordingly.

In the case of the migrant worker, entitlement to a residence permit and/or residence document for the purpose of employment shall be evidenced by production of a valid identification document with which the Union citizen entered Malta, and the production of an employment licence (issued in order to enable the said citizens to take up employment³). With regard to dependents, the required documents are a valid identification document; a visa, if they are citizens of a third country whose citizens require a visa when crossing the border crossing point; a document issued by a competent authority of the home state or the state from which such dependents came, proving their relationship to the worker; and a document issued by the competent authority of the home state or the state from which the dependents came, testifying that they depend on the worker or that they share the same residence in that country.

Reproducing the contents of Directive 68/360, the Immigration Regulations provide that residence permits are issued for a period of five years from the date of issue and are automatically renewable upon expiry. Furthermore, breaks in residence for a period not exceeding six months, as well as absence on military leave will not in any way affect the validity of the permit. Residence may be revoked where the worker becomes voluntarily unemployed and such revocation may be extended to his dependents as the case may be.

The Immigration Regulations also make it clear that the holding of a residence permit or a residence document does not, in itself, in any way entitle the holder thereof to purchase or hold property in Malta.⁴

In cases where a residence permit is issued for the purpose of work, such residence permit may not be withdrawn solely on the grounds that the worker is no longer employed, either because he is temporarily incapable of work as a result of illness or accident or due to his being involuntarily unem-

1 This three month period may be extended to six months where one can prove that one is genuinely seeking employment and has real prospects of securing a job within that six month period.

2 This will be tackled in Chapter V of this Report

3 The employment licence for citizens of the European Union can be obtained within ten days and costs range from €60 for a permit for one year to €180 for a permit valid for an indefinite term.

4 The acquisition of immovable property by aliens and non-Maltese EU citizens is discussed in further detail in Chapter III ('Equality of Treatment').

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ployed. However, if he has been involuntarily unemployed for a period exceeding twelve consecutive months at the first renewal date, the subsequent period of residence may be restricted to a period of less than five years but more than twelve months, on the advice of the Employment and Training Corporation (ETC).

A Union citizen entering Malta to take up employment for a period between three and twelve months and who is employed by a Maltese employer or by a person lawfully providing services in Malta, shall be entitled to apply for a temporary residence permit the validity of which shall be limited to the duration of expected period of employment. In the case of seasonal workers, a residence permit shall likewise be issued to a seasonal worker employed for a period exceeding three months for the expected duration of the seasonal work. The period of employment shall be shown in the work licence.

With regard to a Union citizen entering Malta to take up employment lasting for less than three months, whether seasonal or otherwise, (s)he shall not be entitled to a residence permit but may stay in Malta for the duration of the work period solely on the basis of a work licence. In all cases however, completion of the formalities for obtaining a residence permit shall not hinder the immediate commencement of employment under a contract lawfully concluded by applicants having the right to take up employment in Malta, provided that they are in possession of a work licence.

With regard to the right to remain, the Regulations faithfully transpose the contents of EC Regulation 1251/70 on the right of workers and their families or successors to remain in the territory of a Member State after having been employed in that state.

The Immigration Regulations also include provisions relating to the rights of those who are not gainfully occupied, thereby transposing the contents of EC Directive 90/364 on the right of residence. A Union citizen and his dependents who do not otherwise enjoy the right of residence in Malta shall nonetheless have the right to reside in Malta. In such cases, the Principal Immigration Officer shall issue such persons with a residence permit and/or a residence document valid for a maximum period of five years. Upon expiry, the said permit or document is automatically renewable, provided that the Union citizen and those dependents actually accompanying him are covered by sickness insurance in respect of all risks in Malta; have 'sufficient resources' to avoid their becoming a burden on the social assistance system in Malta during their period of residence; and provide evidence to that effect, along with a valid identification document when submitting the application for the residence permit.

'Sufficient resources' have been established as an amount higher than the level of resources indicated by the Ministry responsible for Social Policy as being the minimum means which determine the grant of social assistance⁵ to Maltese nationals and taking also into account the personal circumstances of the applicant and, where appropriate, the personal circumstances of accompanying dependents. The Regulations also stipulate that if the foregoing criteria cannot be applied, resources shall also be deemed to be sufficient if they are higher than the level of the national minimum social security pension⁶ payable by the Government of Malta at the time of application.

The Immigration Regulations also transpose the contents of EC Directive 64/221 on the co-ordination of special measures justified on grounds of public policy, public security and public health. Section 3(4) expressly provides that the Principal Immigration Officer shall not refuse entry into Malta, nor shall he refuse to issue or renew a residence permit, residence document, or any stamp or visa, as the case may be, to which migrants may be entitled, nor shall he refuse or deport such persons, except this is justified on grounds of public policy, public security or public health. The expiry of the identification document used by an EU citizen and his dependents to enter Malta and the failure of such persons to obtain a residence permit or a residence document as the case may be, shall not, by itself, justify removal from Malta.

Where necessary, the Principal Immigration Officer may also request information concerning any previous criminal or conduct certificate of the applicant. Such information can be requested from the home State of the applicant or any other Member State. However, any such refusal or deportation must be based exclusively on the personal conduct of the individual concerned, and any previous criminal records shall not in themselves constitute grounds for the taking of such measures. Where

5 The current threshold in respect of a single person is approximately €14,000 and approximately €23,000 for a married person.

6 The current maximum rates for the national minimum pension are approximately €108 per week for a man maintaining a wife and approximately €93 per week for any other person

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this kind of information is requested from the Maltese competent authority by another Member State, the competent authority shall reply within two months of receiving the request.

When the Principal Immigration Officer refuses entry or refuses to issue a first residence permit to any EU citizen on grounds of public health, reference may only be made to the diseases and disabilities mentioned in any regulation issued under articles 44 and, or, 50 of the Prevention of Disease Ordinance. Diseases or disabilities occurring after a first residence permit has been issued shall not, by themselves, justify refusal to renew the residence permit or removal from Malta.

Where an application is refused, the applicant shall be officially notified of any decision to refuse the issue or renewal of a residence permit or of a decision to remove him from Malta, in which case, the individual shall be asked to leave Malta within a particular period. Unless this is contrary to the interests of the security of Malta, the applicant shall also be informed of the grounds upon which the decision taken in his case is based. Except for cases of urgency, the period within which the unsuccessful applicant must leave Malta shall be not less than fifteen days if the person concerned had not been granted a residence permit and not less than one month in any other case.

It has been indicated by the Ministry of Justice and Home Affairs in Malta that since 1st May 2004 there have been no cases of deportation of EU nationals or their dependent family members from Malta. Neither have there been, in respect of the same period, any cases of refusals to enter or to issue resident permits in respect of EU nationals or their dependent family members.

Chapter II Access to employment

Texts in force

Employment and Industrial Relations

Under the Employment and Industrial Relations Act (2002) (hereinafter “EIRA”), Chapter 452 of the Laws of Malta, protection from discrimination is granted to an employee or prospective employee against his employer or prospective employer by virtue of the ordinary law of the land.

Part IV of the EIRA, 2002 is entitled “Protection Against Discrimination Related to Employment”. Section 2 of the EIRA defines discriminatory treatment as

“any distinction, exclusion, or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association.”

It is immediately evident that the definition of discriminatory treatment for the purposes of this Act does not include any reference to nationality. Therefore, it can be inferred that an EU citizen alleging discrimination with regard to access to employment and working conditions would have to rely upon the relevant provisions in the Constitution of Malta or the equal treatment provisions in the EC Treaty which are directly applicable.

The Employment and Training Services Act (Chapter 343 of the Laws of Malta) has always been in line with EU Regulation 1612/68 as it does not specifically limit the number of foreigners that employers can hire and it does not discriminate against expatriates. The Act, particularly Sections 13 and 15 thereof, obliges the Employment and Training Corporation (ETC) to refer, amongst other things, persons for employment according to their registration priority. The Act requires parastatal companies to refer their vacancies to the ETC or through a public examination duly advertised in the Government Gazette.

Nationality Condition for Access to the Posts of Captains and First Officers of Ships Flying the Maltese Flag

The Merchant Shipping Act (Chapter 234 of the Laws of Malta) regulates access to the posts of Master and Seaman of sea vessels flying the Maltese flag. A ‘Master’ is defined as including every person (except a pilot) having command or charge of a ship; a ‘Seaman’ is defined as including every person (except masters, pilots and apprentices) employed or engaged in any capacity on board a ship.

As an open register, Malta does not impose any nationality restrictions on crews of ships registered under its flag. This is reflected in the provisions of the Act which do not restrict access to these posts to Maltese nationals. It therefore appears that Maltese legislation in this field conforms to the recent pronouncements of the European Court of Justice in Case C-405/01 (*Colegio de Oficiales de la Marina Mercante Española v. Administración del Estado*) and Case C-47/02 (*Albert Anker, Klaas Raas, Albertus Snoek v. Bundesrepublik Deutschland*).

Mutual Recognition of Qualifications

The mutual recognition of professional and occupational qualifications is a corollary to the provisions on the free movement of workers. The basic principle here is that if an EU citizen is qualified to practice a profession or occupation in his or her home country, that EU citizen should be entitled to practice such profession or occupation in another Member State. Malta is also a party to various UNESCO Conventions on the recognition of qualifications. The Mediterranean Convention (1976) was ratified on the 22 January 1986, the European Region Convention (1979) was ratified on the 24 March 1983, and the Lisbon Convention (1997) was ratified on the 16 November 2005 and came into force on the 1 January 2006.

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Prior to accession, the Maltese legal system already included a distinction between the recognition of professional and academic qualifications. The Education Act (Chapter 327 of the Laws of Malta) provides for the academic recognition of qualifications at University level to be granted by the Registrar of the University, on behalf of the Rector of the University. Other academic qualifications, including trade competence certificates and non-degree trade diplomas, are assessed by the Education Division within the Ministry of Education as well as other statutory bodies.

Malta was partly aligned with the *acquis* on the mutual recognition of professional qualifications and in preparing for EU accession, legislative changes were needed with regard to the strengthening of the professional regulatory framework and the setting up of formal infrastructure for the recognition of specialised training. The National Academic Recognition Information Centre (NARIC) of Malta was set up in February 2001 to act as the national co-ordinator required under the general system Directives

The General System of Recognition

Regulated Professions

A number of amendments were nonetheless necessary to transpose Directive 89/48/EEC (general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration) and Directive 92/51/EEC (recognition of professional qualifications requiring at least 1 year but less than 3 year course of higher or vocational education). The mutual recognition of regulated professional qualifications is now catered for by the Mutual Recognition of Qualifications Act (Chapter 451 of the Laws of Malta), published in 2002, and in subsidiary regulations issued thereunder. The subsidiary legislation issued under the Mutual Recognition of Qualifications Act is the following: the Mutual Recognition of Professional Education and Training Regulations (Legal Notices 271 and 272/2002), the amending Regulations thereof (Legal Notices 160 and 161/2004), and the Malta Qualifications Recognition Information Centre and the Mutual Recognition of Qualifications Appeals Board Regulations (Legal Notice 196/2004)

This Act, which aligned the Maltese system with the EU's general system of recognition, came into force upon accession, and applies to the professions and professional activities listed therein, provided that an applicant shall not be entitled to practise a *regulated profession* or a *regulated professional activity* unless s/he fulfils the conditions for the taking up or pursuit of that profession or activity.

The recognition of qualifications for those professional activities that are regulated by law is granted by the designated authority identified. The designated authorities for the fifty-nine professions in Malta that would fall under the General System Directives are listed in the Schedule to the Mutual Recognition of Qualifications Act. A designated authority for a regulated profession shall consider an application as soon as it is reasonably practicable, and shall notify the applicant of its decision, together with the reasons upon which it is based, within four months of receipt of all the relevant documents.

At the centre of the Maltese system of mutual recognition is the Malta Qualifications Recognition Information Centre whose functions include:

- (a) the evaluation of diplomas;
- (b) the provision of assistance to designated authorities, learning institutions and individuals, counterpart bodies and other interested parties in the comparative analysis and evaluation of qualifications;
- (c) the collection and dissemination of information related to professional and vocational qualifications;
- (d) the promotion of recognition of Maltese qualifications abroad;
- (e) the enforcement and facilitation of the application of the articles regarding comparability of higher education, professional and vocational qualifications;
- (f) the facilitation of academic mobility; and
- (g) the promotion of transparency of qualifications.

The Mutual Recognition of Qualifications Act also provides for a right of appeal from decisions on the recognition of qualifications to a Mutual Recognition of Qualifications Appeals Board.

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In 2005, the Malta Qualifications Recognition Information Centre received several requests for the recognition of qualifications. Table 1 shows the number of requests received in 2005 from EU nationals.

Table 1

Requests Received in 2005 by Nationality of Applicant (EU Member States)	
Malta	86%
Italy	3%
UK	3%
Germany	2%
Spain	1%
Greece	1%
France	1%
Poland	1%
Czech Republic	1%

Table 2 shows the distribution of requests received in 2005 by region. The 511 Maltese applicants (70%) are not included in the figures referring to EU nationals.

Table 2

Requests Received in 2005 by Region of Applicant		
EU Citizens	93	41%
Non-EU Europeans	54	24%
Asia	37	16%
Africa	16	7%
America	15	7%
Australia	12	5%

With regard to requests for the evaluation of qualifications obtained overseas, these were received from Maltese nationals, other EU nationals as well as *from third country nationals*. Table 3 below shows the requests received in 2005, categorised by the country of certification.

Table 4 shows the distribution of requests for evaluation received between 2002 and 2005, categorised by region.

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Table 3

Requests Received in 2005 by Country of Certification (EU Member States)	
UK	66%
Malta	16%
Italy	5%
Germany	3%
The Netherlands	2%
France	2%
Belgium	1%
Greece	1%
Ireland	1%
Czech Republic	1%
Poland	1%
Switzerland	1%

Table 4

Requests for Evaluation Received 2002-2005 by Region of Applicant		
EU Member States	1544	74%
America	136	7%
Asia	128	6%
Non-EU Europeans	122	6%
Africa	76	4%
Australia	57	3%

Non-Regulated Professions

Non-regulated professions are dealt with by the Malta Qualifications Council Regulations (Legal Notice 347/2005), published on the 28 October 2005 and issued under the Employment and Training Services Act (Chapter 343 of the Laws of Malta). These Regulations repealed the Malta Professional and Vocational Qualifications Regulations and provide for the setting up of the Malta Qualifications Council.

In classifying qualifications and national standards of knowledge skills, competences and attitudes, the Council shall be guided by eight levels of qualifications and competence as indicated in the Schedule to the Regulations, describing the levels of qualifications and competences needed to access further study and training and to perform work at a specific level effectively.

The overall objective of the Malta Qualifications Council shall be to steer the development of the National Qualifications Framework and to oversee the training and certification leading to qualifications within the Framework and which is not already provided for at compulsory education institutions or degree awarding bodies. It will also establish and maintain a qualifications framework for the development, accreditation and award of professional and vocational qualifications, other than degrees, based on standards of knowledge, skills, competences and attitudes to be acquired by learners. In addition, it shall promote and facilitate life-long learning access, transfer and progression; as well as foster the recognition abroad of professional and vocational certificates awarded in Malta.

The provisions of the Malta Qualifications Council Regulations clearly do not apply to those occupations the exercise of which requires the granting of a warrant or of a certificate, or a registration in accordance with any other law. The Council shall not have the power to grant warrants, licences or registrations of professions and occupations provided for under any other law. These professions include, amongst others, the legal profession, architects, healthcare professionals and veterinary surgeons, all of which are regulated by the relevant sectoral legislation.

Sectoral Legislation

Lawyers

The profession of advocate in Malta is regulated by the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta). The Code formerly laid down that advocates need to be in possession of the necessary academic qualifications obtained from the University of Malta as well as Mal-

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tese citizenship. A one-year training period with a warrant holder is required before being granted a warrant. A warrant is then issued following an examination by a board composed of two judges.

Legal Notice 273/2002, the Mutual Recognition of Qualifications of Legal Profession Regulations, adopted in 2002 and subsequently amended by Legal Notices 55, 170 and 248 of 2004, came into force on the 1 May 2004. These Regulations aligned the Maltese legal framework relating to the legal profession with Directive 77/249/EEC (effective exercise by lawyers of freedom to provide services) and Directive 98/5/EC (facilitating the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained). These amendments also removed the Maltese nationality requirement as well as the necessity that legal training is carried out only at the University of Malta.

A legal professional who has obtained professional qualification in the home Member State, and wishes to establish himself and practise the profession of lawyer in Malta, shall register with the designated authority. The Schedule to the Mutual Recognition of Qualifications Act identifies the President of Malta as the designated authority. The designated authority shall register the legal professional upon presentation of a certificate attesting to his registration with the competent authority in the home Member State.

By virtue of these Regulations, post-1 May 2004, EU nationals who are qualified to practice as lawyers in another EU Member State will be able to opt to exercise their profession in Malta under the title of the home Member State or the professional title applicable in Malta, in line with the provisions of Directive 98/5/EEC. Where a legal professional is practising in Malta under the home-country professional title, such title shall be expressed in the official language of his home Member State, in an intelligible manner and in such a way as to avoid confusion with the professional title used in Malta.

A legal professional practising under the home-country professional title in Malta may, at any time, also apply to have the degree recognised with a view to gaining admission to the legal profession in Malta and practising it under the professional title corresponding to the profession in Malta and shall not start to so practice before such recognition is obtained.

Architects

The Periti Act (Chapter 390 of the Laws of Malta) regulates the profession of *perit* (architect) in Malta. A warrant to practise the profession of *perit* is granted upon the recommendation of a Warrants Board based on criteria laid down by the Act.

Legal Notice 274 of 2002, the Mutual Recognition of Qualifications of Perit Regulations, was adopted in 2002 and subsequently amended by Legal Notices 172 and 248 of 2004. These Regulations aligned the Maltese legal framework relating to the profession of *perit* with Directive 85/384/EEC (mutual recognition of qualifications in architecture, and measures to facilitate the effective exercise of the right of establishment and freedom to provide services) and came into force on accession. These amendments allow that one of the two-years of training required by the Periti Act be undertaken in another EU Member State and also removed any existing discrimination on the basis of nationality.

These Regulations set out the Minimum core subjects in the field of architecture and civil engineering, as well as the minimum requirements which must be satisfied by education and training received. The infrastructure to implement the *acquis* in this area was in place before accession. The *Periti* Warrants Board within the Ministry for Resources and Infrastructure will register EU nationals who possess the necessary professional qualifications to exercise the profession of *perit*.

Since 1 May 2005, the *Periti* Warrants Board has only received one request. This was from a German national and concerned the recognition of qualifications. This application is currently being processed by the Board.

Medical and Paramedical

The requirements for health care professionals to exercise their profession in Malta were laid down in the Medical and Kindred Professions Ordinance (Chapter 31 of the Laws of Malta). However, its contents were partly replaced by the Health Care Professions Act (Chapter 464 of the Laws of Malta), which was published in 2003 and came into force on accession.

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The Health Care Professions Act regulates all health care professions, with the exception of veterinary surgeons, and aligned Maltese legislation with Directive 93/16/EEC (free movement of doctors and the mutual recognition of their qualifications), Directive 78/686/EEC (mutual recognition of the formal qualifications of practitioners of dentistry), Directive 78/687/EEC (co-ordination of provisions in respect of the activities of dental practitioners), Directive 85/432/EEC (co-ordination of provisions in respect of the activities in the field of pharmacy), Directive 85/433/EEC (mutual recognition of the formal qualifications in the field of pharmacy), Directive 80/154/EEC (mutual recognition of the formal midwifery qualifications), Directive 80/155 (co-ordination of provisions in respect of the activities of midwives), Directive 77/452/EEC (mutual recognition of the formal qualifications of nurses responsible for general care) and Directive 77/453/EEC (co-ordination of provisions in respect of the activities of nurses responsible for general care).

In Part VIII, the Health Care Professions Act deals specifically with the registration of citizens of EU Member States. All health care professionals in Malta must be registered with one of the four professional regulatory bodies, namely the Medical Council, the Nursing and Midwifery Board, the Pharmacy Board and the Board for the Professions Supplementary to Medicine. Doctors, dentists, pharmacists, midwives and pharmacy technicians are required to hold a warrant to practise their profession in Malta. These regulatory bodies were originally set up by the Department of Health (Constitution) Ordinance (Chapter 94 of the Laws of Malta), which was subsequently repealed in part by the Health Care Professions Act which now regulates the composition of these bodies.

Academic training requirements for health care professions, formerly laid down by the Education Act (Chapter 327 of the Laws of Malta) and its subsidiary legislation were in line with the *acquis*, except for the practical training period required for doctors and pharmacists. The training requirements for all health care professions are now regulated by the Health Care Professions Act. Local training requirements, with effect from the fourth quarter of 2002, for undergraduate and post-graduate levels provided by the Faculty of Medicine and Surgery, the Faculty of Dentistry and the Institute of Health Care at the University of Malta, and are conducted in line with the *acquis*. The Health Care Professions Act also provides for the recognition, by the University of Malta, of the one-year pre-registration practical training period (housemanship) for doctors in line with Directive 93/16/EEC and for a mandatory six-month in-service training period for pharmacists in line with Directive 85/433/EEC.

The necessary structures and systems for accreditation of post-graduate qualifications and training obtained both in Malta and overseas are provided for by the Health Care Professions Act. Administrative measures to recognise specialist training and qualifications are also in place. Specialist Accreditation Committees were set up for the formal recognition of training. Medical and paramedical professional qualifications are certified for equivalence by one of the four regulatory bodies. All health care professionals whose training was completed or commenced prior to the date of accession have been guaranteed acquired rights. These persons also include health care professionals who had to interrupt their career prior to accession.

The four regulatory bodies within the Ministry of Health which regulate the Medical, Pharmacy, Nursing and Midwifery professions as well as the Professions Complementary to Medicine are responsible for assessing the equivalence of professional qualifications obtained in EU Member States and for registering these professions.

Council for the Professions Complementary to Medicine

The Council for the Professions Complementary to Medicine (CPCM) is responsible for the registration of eighteen health care professions. The regulated professions of falling within the responsibility of this Council do not require a warrant, but only registration. The CPCM has received various applications from EU citizens after since the 1st May 2004. Between 1st May 2004 and 1 March 2006, ten EU citizens were registered after evaluation by the CPCM. These are shown in Table 5 below.

Table 5

Profession	Country	Registration
Acupuncturist	United Kingdom	1
Chiropractor	United Kingdom	1
Dental Technologist	United Kingdom	1

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Environmental Health Officer	Italy	2
Optometrist	United Kingdom	1
Physiotherapist	United Kingdom	1
	United Kingdom	2
	Poland	1

With regard to applications from citizens of Bulgaria and Rumania, the CPCM has registered a Nutritionist from Rumania and a Physiotherapist from Bulgaria. These were each granted registration for a period of two years in accordance with the Health Care Professions Act.

A few applications were also turned down. These were from a German Physiotherapist, a German Chiropractor and a Podologist from the UK. Furthermore, the CPCM also refused the registration as a Medical Laboratory Scientist of a Bulgarian citizen.

As at 1 March 2006, there are four applications that are pending. These are from a Physiotherapist from Germany (still to submit certain documents), a Physiotherapist from the UK (application has just been received), a Dental Technologist from Poland (under consideration by the relevant sub-committee) and a Podologist from the UK (under consideration by the relevant sub-committee).

Medical Council

Between the 1 May 2004 and 30 April 2005, the Medical Council, one of the four professional regulatory bodies for the healthcare professions, processed 27 requests from doctors and medical specialists from EU Member States to practise in Malta. These were as follows: 17 cosmetic surgeons from France, 3 doctors from Germany, 3 doctors from Italy and 1 doctor from the Netherlands. The Medical Council also received and processed applications from 2 British doctors who were registered for a period of two years. During the same period, the Medical Council also received and processed a request from a German dentist. From this it therefore appears that out of the 27 requests received, only 2 were registered. In both cases, registration was for a two-year period only.

Council for Nurses and Midwives

Between the 1 May 2004 and the 15 March 2006, the Council for Nurses and Midwives had received a total of 68 applications from nationals from EU and EEA Member States. Table 6 below provides further insight into the nationalities and professions involved.

Table 6

EU Member States	Applications for Registration May-Dec 2004	Applications for Registration 2005	Applications for Registration Jan-March 2005
Czech Republic	2 nurses	4 nurses	1 nurse
France	1 nurse	0	1 nurse
Germany	2 nurses	1 nurse, 1 midwife	0
Greece	2 nurse	0	0
Ireland	1 nurse	1 nurse	1 nurse
Italy	1 nurse	0	0
The Netherlands	0	1 nurse	0
Poland	0	4 nurses	0
Slovakia	0	2 nurses	0
Slovenia	0	1 nurse	0
UK	24 nurses, 1 midwife	13 nurses	1 nurse
EEA Member States			
Switzerland	2 midwives	0	0

Veterinary Surgeons

Maltese veterinary surgeons receive their training overseas, since training in veterinary surgery is not available in Malta. A warrant is required in order to practise as a veterinary surgeon in Malta. The Medical and Kindred Professions Ordinance (Chapter 31 of the Laws of Malta) used to regulate the

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profession of veterinary surgeon. Practitioners are required to register with the Medical Council. The profession is however now regulated by the Veterinary Services Act (Chapter 437 of the Laws of Malta), which was adopted in 2001 and came into force upon accession. The new Act established and consolidated the requirements in the veterinary field, veterinary medicinal products, feeding stuffs and zootechnical requirements and for the regulation of the veterinary profession. It also transposed Directive 78/1026/EEC (mutual recognition of the formal qualifications in veterinary medicine) and Directive 78/1027/EEC (co-ordination of provisions in respect of the activities of veterinary surgeons).

Part VI of the Veterinary Services Act refers to the provision of professional veterinary services in Malta and section 43 provides that no person can practise as a veterinary surgeon unless:

- (a) in possession of a warrant to practice from the President of Malta; and
- (b) the name is registered in the Veterinary Surgeons' Register.

The Act also provides for the setting up of the Veterinary Surgeons' Council with the following functions and duties:

- (a) advise and make recommendations to the President of Malta concerning the grant of warrants to veterinary surgeons to practice their profession;
- (b) keep a Register in respect of such profession and professions and trades supplementary to the veterinary profession;
- (c) prescribe and maintain professional and ethical standards for the veterinary profession and professions and trades supplementary to the veterinary profession;
- (d) advise the Minister on any matter, including legislation, affecting such profession;
- (e) advise the Minister on the issue of licences for the running of veterinary practices, veterinary clinics, veterinary hospitals, veterinary laboratories and other veterinary establishments;
- (f) advise and make recommendations to the President of Malta concerning the suspension or withdrawal of warrants to veterinary surgeons who are found to be in breach of the obligations or conditions laid down under the Veterinary Services Act;
- (g) plan, monitor and organise professional training of veterinary surgeons and professional proficiency tests for veterinary surgeons in private veterinary activities;
- (h) carry out expert supervision of private veterinary activities;
- (i) co-operate in the preparation of programmes of educational and expert training; and
- (j) carry out such other functions as may be assigned to it from time to time.

Chapter III

Equality of treatment on the basis of nationality

Texts in force

The Constitution

In Maltese legal tradition, the concept of discrimination was more of a constitutional law matter rather than anything else. Section 45(1) of the Constitution of Malta establishes a broad and generic principle of protection against discrimination and prohibits the enactment of any law that is discriminatory either of itself or in effect. Subsection (2) of the same section goes on to provide that

“no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority”.

Section 45 (3) defines the term ‘discriminatory’ as

“...affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, *place of origin*, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

Subsection (4) identifies a number of limitations to the general abovementioned prohibition against discrimination, including the condoning of legislative provision meting out discriminatory treatment with respect to “*persons who are not citizens of Malta*”. This clearly appears to be contrary to Malta’s equality obligations in terms of the EU’s *acquis communautaire* and specifically with regard to the free movement of persons. Nevertheless, the effects of this seemingly broad licence to the Maltese legislator to discriminate on the basis of nationality are neutralized by virtue of section 65(1) of the Maltese Constitution which, with regard to Parliament’s power to make laws, provides that such laws must be

“...in conformity with full respect for human rights, generally accepted principles of international law and Malta’s international and regional obligations in particular those assumed by the Treaty of Accession to the European Union signed in Athens on the 16th April, 2003”.

In fact, article 2 of the Treaty of Accession stipulates that the provisions of the original Treaties, including the EC Treaty and the Treaty on European Union, as well as amending or supplementary legislation, shall be binding on Malta and shall apply accordingly. This is reiterated in section 3(1) of the European Union Act (Chapter 460 of the Laws of Malta) which reinforces the binding nature of Malta’s EU obligations under the Treaties and provides, in subsection (2) thereof that:

“Any provision of any law which from the said date is incompatible with Malta’s obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable.”

The European Convention for the Protection of Human Rights and Freedoms

The European Convention Act, 1987 (Chapter 319 of the Laws of Malta) bolsters the protection from discrimination in the Maltese Constitution and embraces the human fundamental rights and freedoms set out in the European Convention for the Protection of Human Rights and Freedoms and its First, Second, Third and Fifth Protocols as part of the Laws of Malta. Article 14 of this Convention provides that

“the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other

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opinion, *national or social origin*, association with a national minority, property, birth or other status”.

Admittedly, the protection under the Convention reaches further than that in the Maltese Constitution, which in section 45(3) defines “discriminatory” as

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex....”

However, over the years, legislative enactments have come to stretch this concept beyond mere constitutional parameters. These mark important developments of the concept because they seek to widen protection against discrimination committed not only by the State but also by private individuals rendering it a significant consideration in certain aspects of one’s everyday life.

Training Grants

Training grants granted under the Business Promotion Act (Chapter 325 of the Laws of Malta) do not discriminate against foreign nationals. Similarly, the Employment and Training Services Act does not discriminate against foreign nationals in the provision of vocational training services. With regard to access to vocational training, it was formerly the practice not to allow foreign nationals to participate in courses and apprenticeships run by the ETC. However post-accession, EU nationals can participate in the training schemes organised by the ETC and may notify their intention to work in Malta through the ETC.

Voting Rights

By virtue of Act 16 of 2003, the provisions of the Local Councils Act (Chapter 363), particularly those relating to eligibility for election and voting rights, were extended to European Union citizens whose name appears in the last published European Union Electoral Register and who have not been convicted of any offence connected with the election of members of Local Councils.

The criteria for an EU citizen to be registered as an eligible voter are listed in section 11 of the European Parliament Elections Act (Chapter 467 of the Laws of Malta). A person shall be eligible for registration in the European Union Electoral Register if the following five cumulative conditions are satisfied:

- (a) he is a national of a Member State whose name does not appear in the Electoral Register; and
- (b) he is requested to be, and is, in possession of an identity card in accordance with the Identity Card Act; and
- (c) he fulfils the requirements listed in article 57(b) and (c) of the Constitution⁷.
Provided that for the purposes of this paragraph residence in any Member State shall be deemed to be residence in Malta;
- (d) he declares that he will exercise his right to vote for election of members of the European Parliament in Malta only; and
- (e) he has not been deprived of the right to vote in his Home Member State,

Furthermore, by virtue of section 14, an EU citizen shall only be entitled to remain so registered if, besides satisfying the abovementioned requirements, a declaration is made to the Electoral Commission stating:

- (a) that s/he is resident in Malta;
- (b) his/her nationality;
- (c) the date on which s/he took up residence in Malta or in any other Member State;
- (d) his/her address in Malta;
- (e) the locality or constituency in his Home Member State or any other Member State, if any, on the Electoral Roll of which his/her name was last registered;
- (f) that s/he will exercise his/her right to vote in Malta only;
- (g) that s/he has not been deprived of his/her right to vote in his/her Home Member State.

7 The conditions referred to in section 57 (b) and (c) of the Constitution of Malta are that he has attained the age of eighteen years, is resident in Malta and has, during the eighteen months immediately preceding his registration, been resident for a continuous period of six months.

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In addition, the EU citizen must show the said Commission a valid identity document.

Acquisition of Immovable Property

With regard to the acquisition of immovable property by non-Maltese EU citizens, Malta was the only country in the 2004 enlargement to negotiate and obtain a permanent arrangement retaining restrictions on the acquisition of property in Malta by non-Maltese residents. This is reflected in a Protocol annexed to Malta's EU Accession Treaty. By virtue of this arrangement, Maltese and other EU citizens, on a non-discriminatory basis, will not be granted authorization to purchase a second property in Malta, unless they have resided in Malta for at least five years prior to acquisition and obtained the necessary permit. In accordance with section 6(1) of the Immovable Property (Acquisition by Non-Residents) Act (Chapter 246 of the Laws of Malta), this permit may be granted by the Minister if in the opinion of the Minister, it is in the public interest or is otherwise appropriate to grant such permit. With regard to the acquisition of the first property, both Maltese and non-Maltese EU citizens who have resided in Malta for a continuous period of five years do not require any permit

This permanent derogation has been reflected in amendments introduced to the Immovable Property (Acquisition by Non-Residents) Act, by virtue of the Various Laws (Amendment) Act (Act 9 of 2003). Section 2 of the Immovable Property (Acquisition by Non-Residents) Act defines a resident of Malta as an individual who is a citizen of Malta or another Member State who has been resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition; or the spouse, of whatever nationality and wherever resident, of a citizen of Malta or another Member State where such spouses are acquiring together on the same deed;

The law also makes clear⁸ that any person (whether Maltese or any other EU citizen) not fulfilling the five-year continuous residence requirement is to be considered as a non-resident for the purpose of the acquisition of immovable property in Malta by such person. The fact that such Maltese or other EU citizen are in possession of a valid residence permit is irrelevant.

Social Security

Equality of treatment in the case of social security is provided for by virtue of the European Social Charter Order (Legal Notice 204/1999). Section 2 of this Legal Notice extended the application of the provisions of the Social Security Act to nationals of countries which are party to the European Social Charter and who have their ordinary residence in Malta.

Education of Children of Migrant Workers

Legal Notice 220/2003 regulates the education of children of migrant workers. For the purposes of these Regulations, a migrant worker means any person who carries out or has carried out an activity in Malta, in an employed or self-employed capacity, and who is a citizen of an Agreement State⁹. The Migrant Workers (Child Education) Regulations, through section 3(1) ensure equal access to free tuition¹⁰ in State schools as well as the teaching, as adapted to the specific needs of such children, of any of the official languages Malta. By virtue of these Regulations, children of migrant workers must be residing in Malta, and they must be of compulsory school age as well as dependents of a migrant worker.

With regard to training, the Employment and Training Services Act does not preclude children of non-Maltese EU nationals from being admitted to apprenticeship and vocational training courses.

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- 8 In section 2 of the said Act, a "non-resident person" is defined as including:
"(a) any individual who is not a citizen of Malta or of another Member State; or
(b) a citizen of Malta or of another Member State, even in either case, if in possession of a valid residence permit, who has not been resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition...."
- 9 By virtue of the definition in section 2 of these Regulations, an Agreement would include the Malta-EU Accession Treaty, in so far as the latter grants reciprocal rights of entry, residence and general rights of free movement to the respective citizens of the participating countries.
- 10 In Malta, the education of Maltese citizens who are of compulsory school age is free in the case of State schools.

Chapter IV Employment in the public sector

Texts in force

Broadly speaking, the Public Service consists of staff recruited under the authority of the Public Service Commission (in legal parlance, known as public officers) who serve in Ministries and Departments and are subject to a common framework of rules and regulations.

The wider public sector includes many public corporations, statutory authorities and other entities which are not part of the Public Service. Teachers in state schools, for instance, are public officers; university lecturers are not. Police officers are also members of the Public Service, but soldiers are not.

The Public Service Commission is established under Section 109 of the Constitution of Malta and exercises its functions through:

- a. the Public Service Commission Regulations, 1960. (These regulations are now being revised.)
- b. the Public Service Commission (Disciplinary Procedure) Regulations, 1999
- c. a number of Instruments of Delegation, made in terms of section 110 of the Constitution, which empower heads of department or other authorities to exercise certain functions relating to appointments and discipline, subject to the overview of the Commission.

The primary role of the Public Service Commission is to give advice and to make recommendations to the Prime Minister in the making of appointments to public offices, in the removal of persons from such offices and in the exercise of disciplinary control over public officers.

In so far as the *Public Service* (Ministries and Departments) is concerned, all recruitment is open to Maltese and EU nationals subject to the exceptions stipulated under article 39(4) EC, in accordance with the criteria set out by the jurisprudence of the European Court of Justice, namely:

- posts which involve the exercise of powers conferred by public law; and
- posts which involve responsibility for the safeguarding of the general interest of the State.

There is no list of posts, which meet these criteria. It is determined on an ad hoc basis.

Public sector entities outside the Public Service normally function autonomously within the parameters of the law and Government policy where recruitment procedures are concerned. The Maltese Government is currently in the process of finalising Guidelines for Public Sector entities to ensure that recruitment and selection procedures conform with Malta's obligations as an EU Member State in this regard.

With regard to the *assessment criteria*, selection processes run by the Public Service Commission are based on the merit principle. This means that the individual and relative suitability of a candidate for a particular post, assessed on the following criteria, taking into account the duties and responsibilities of the post to be filled:

- related professional/administrative/technical knowledge
- relevant experience including previous performance, where applicable
- abilities/skills required in the job
- qualifications
- personal qualities.

Selection criteria for particular posts approved by the Public Service Commission are made available on request at the Office of the Public Service Commission in Valletta.

With regard to the recognition of diplomas for access to the public sector, it is normal practice for calls for applications to be framed in such a way as to indicate that where a specific qualification is requested, equivalent qualifications are accepted. Selection boards regularly seek the advice of the competent authorities where this is necessary to assess the equivalence of qualifications obtained from abroad.

In its Communication "Free Movement of Workers – Achieving the Full Benefits and Potential" of December 2002, the EU Commission recommends that eligibility for public sector posts should be assessed not on the basis of whether applicants have qualifications equivalent to those required, but

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whether they are eligible for comparable posts in their own country. When asked how the Maltese Government is proposing to implement this EU Commission recommendation, the reply received was to the effect that, given that this Commission document is not legally binding on Member States, the Maltese Government prefers to continue basing itself directly on the European Community's relevant *acquis* and jurisprudence of the European Court of Justice.

In cases where the Public Service post concerned requires candidates to possess specific qualifications or to have carried out specific training programmes, recruitment to virtually all posts allows for the recognition of equivalent qualifications. Exceptions are limited to instances where the *Burbaud* case does not apply. For instance, the grade of Houseman is normally filled directly by those who obtain the degree of Doctor of Medicine of the University of Malta. The *Burbaud* situation does not arise for the following reasons:

- appointments in this grade are for a fixed term of two years only, at the end of which incumbents have to apply for selection to the grade of Medical Officer;
- although the housemanship is considered at law to be an integral part of the requirements for the warrant to practice as a medical doctor in Malta, doctors who qualify elsewhere in the EU can obtain a warrant without going through a local housemanship;
- once the EU-originating applicants hold a local warrant, they can compete on equal grounds for selection as Medical Officers, provided that they meet the necessary requirements.

Public sector entities outside the Public Service do not appear to be using recruitment procedures that would contravene the Court's ruling on the *Burbaud* case. However, the Guidelines referred to earlier and which are currently being finalised are addressing this matter amongst others.

In so far as the recognition of professional experience and seniority is concerned, the information provided by top officials in the Public Service is to the effect that current practices appear to be in line with requirements of the *Burbaud* judgement, but no further details were revealed at this stage. Nonetheless the Guidelines mentioned above, once finalised, should provide further insight in this regard.

Applicability of Article 39(4) EC to the Maltese Public Sector

The two key criteria identified in the ECJ's definition of public service are the exercise of powers conferred by public law and the safeguarding of the interests of the State. Bearing this in mind, the following considerations can be made with reasonable confidence.

The following may be considered as an indicative list of posts satisfying the criterion referring to the 'direct or indirect participation in the exercise of powers conferred by public law':

- police officers;
- other officials who carry out investigations or inspections in terms of the law, such as Customs staff, VAT Inspectors, Environment Inspectors, and auditors with the Internal Audit and Investigations Directorate and the National Audit Office;
- officers who take decisions on individual cases according to law or who prepare recommendations on the basis of which such decisions are taken, such as Inland Revenue staff and case officers in regulatory authorities.

The following may be deemed an indicative list of posts satisfying the criterion referring to 'duties designed to safeguard the general interests of the state or of other public authorities':

- staff in the central government, regulatory authorities established by law, or local councils;
- uniformed AFM personnel and police officers;
- other staff, uniformed or otherwise, whose duties involve maintaining security;
- diplomatic officers;
- senior managers, including Executive Secretaries in local councils;
- lawyers who interpret legislation, provide legal advice or handle cases on behalf of their employer (including legal staff in the Attorney General's Office);
- staff who take decisions or provide advice on matters of public policy, or who draft legislation;
- staff who are entrusted with the handling of sensitive information.

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Recruitment to Public Entities Outside the Public Service

In Malta many statutory authorities outside the Public Service perform a regulatory role on behalf of the State, and they exercise legal powers assigned to them specifically for the fulfilment of their role. It is clear that posts which play a role in the exercise of such powers fall within the ECJ's definition of public service for the purpose of article 39(4) of the Treaty. Since such bodies act on behalf of the State, senior management posts and policy advisory posts belonging to such bodies can be said to have the role of "safeguarding the general interests of the state" regardless of whether they exercise legal powers, and thereby also fall within the scope of article 39(4).

Language Proficiency Requirements

The draft Guidelines for Public Sector Entities provide that public sector employers in Malta should consider the type of linguistic skills they would require on the part of new recruits, bearing in mind two main issues. Firstly that, although administrative business is largely handled in English, Maltese is the national language and the language of first preference for most citizens. It is a matter of long-standing Government policy that members of the public are entitled to communicate with public officials in Maltese.¹¹ Moreover, article 3 of the National Language Act 2004¹² obliges the State to promote the use of the Maltese language.

Secondly, officials whose duties do not involve serving the public on a daily basis may still need to reply to correspondence, deal with requests received through the Government websites, or see to members of the public who are referred with detailed queries on their areas of competence. It is hardly ever possible to restrict all contact with the public to a single office or unit.

It should be noted that where a formal qualification obtainable only locally is required as evidence of linguistic ability, equivalent qualifications obtainable from abroad should be accepted.

Recognition of Length of Service for Promotion or Progression Purposes

Over the years, the ECJ, in its jurisprudence, has also considered the recognition of experience for the purpose of salary determination and career progression, again in respect of posts which are *not* covered by article 39(4) EC. The general principle set out by the ECJ is that where an individual's position in a salary scale, or his/her advancement to a higher level, depends on length of service, comparable employment in another member state should be taken into account for the purpose of determining length of service.

The cases *Commission of the European Communities v. Hellenic Republic*¹³ and *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v. Republik Österreich*¹⁴ involved jurisdictions where it is normal practice to recognise service with other employers for the purpose of placement in a grade or salary scale (for instance, a teacher who moves from one regional authority to another in the same country). In such a case it is logical to recognise equivalent service in another Member State. These cases do not therefore call into question the practice, common in the Maltese Public Service, as well as in some other Government entities, of making progression to a higher salary scale or grade conditional on the attainment of a certain length of service in a particular grade.

On the other hand, the *Schoning-Kougebetopoulou* case¹⁵ and *Kobler*¹⁶ are less clear-cut and therefore require more detailed consideration, although a careful reading of the Court's judgements here also appears to support current practice in the Maltese Public Service.

11 OPM circulars no 52/87 dated 4 June 1987 and 32/96 dated 17 December 1996.

12 Chapter 470 of the Laws of Malta. This Act has not yet been brought into force.

13 Case C-187/96.

14 Case C-195/98.

15 Case C-15/96.

16 Case C-224/01.

Chapter V

Members of the family

Entry and residence into Malta of family members is regulated by the Immigration Act (Chapter 217 of the Laws of Malta) and the secondary legislation issued thereunder. Section 6 of the Immigration Act empowers the Principal Immigration Officer to grant leave to enter or leave to remain (temporary residence) to any person arriving in Malta, under such conditions and for such period as may be deemed proper to establish.

The Principal Immigration Officer is bound to facilitate the admission of family members, if such persons are economically dependent upon the citizen of the Union or share the same abode in the home country. The definition of 'dependent' under the Immigration Regulations is divided into two, namely a. definition of "dependent" for the purposes of the right of residence and for the right of employment. Dependents for the purposes of the right of residence, who have the right to accompany an EU national when settling in Malta, are defined as the spouse and descendants under 21 years of age or who depend on them as well as dependant ascendants. However, if the EU national settling in Malta is a student, it shall not be possible for ascendants to accompany the said student. For the purposes of the right of employment, dependents are defined as the spouse and children under 21 years of age or who are dependant on such person.

Where the migrant Union citizen is a worker employed in Malta, dependents shall, even if they are third country nationals, have the right to install themselves with him, and for such purposes, they shall be issued with a residence permit or a residence document subject to the same rights and conditions as the person of whom they are dependents, including the right to take up an activity as an employed person in Malta, provided that the worker shall have available for his dependents, accommodation considered as normal for Maltese workers. However, nowhere in the Regulations is 'normal accommodation' defined or explained further, presumably leaving the matter to be decided on a case-by-case basis, thus leaving room for discretion by the competent authorities.

Third Country Family Members

As far as non-EU/EEA citizens are concerned, an entry visa may be required from some countries that do not have a free movement agreement with Malta. Non-EU citizens always require a work permit in order to work in Malta. The work permit can be obtained within three months and costs range from 60 Euros for a permit valid for one year to 132 Euros for a permit valid for three years. If a Non-EU citizen wishes to be employed in Malta, s/he must have a genuine prospect of securing employment before entering Malta. Once a prospective employer has been identified, the applicant will be issued with a residence permit that shall be valid for a fixed period of time (which shall be valid from 3 to 6 months as determined by the Immigration Police) until the work permit is issued.

The Principal Immigration Officer shall refuse leave to enter Malta to any person seeking to enter Malta and who must be in possession of a visa but in fact is not in possession of such visa. Article 8(2) of the Immigration Act empowers the competent Minister to make regulations in order to

- (a) list the countries whose nationals will be required to be in possession of a visa for any stay for such period of time as may be prescribed, or whose nationals will be exempted from such requirement;
- (b) regulate the issue of visas or other forms of authorisation and make provision for different types of visa including visas for single or multiple entry or re-entry;
- (c) make provision for and regulate the issue of visas at the border;
- (d) make provision for and regulate the revocation of visas;
- (e) regulate the issue and revocation of emergency travel documents to persons who hold the nationality of such states as may be prescribed.

However, all third country nationals entering Malta and who have shown that they are in possession of the necessary documents are issued with a residence document. A residence document is defined by the Immigration Regulations (Legal Notice 205/2004) as including a permit issued to dependents of citizens of the Union, who are third country nationals, and in particular includes an authorisation of any type, whether temporary or not, or whether given for a special or *ad hoc* purpose, giving the right

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of residence in Malta. Just like a residence permit, a residence document is to specify whether the residence has been taken up on a long-term or permanent basis or whether it is for work, study or any other purpose. When an individual wishes to modify the reason for which a residence document has been issued, an application is to be submitted to the Principal Immigration Officer, who shall issue the new document accordingly. The Principal Immigration Officer cannot refuse entry into Malta, or refuse to issue or renew a document, or any stamp or visa, as the case may be, to which a third country family member of a Union citizen is entitled. Neither is the Principal Immigration Officer entitled to deport such persons, except where such refusal or removal is justified on grounds of public policy, public security or public health.

Draft legislation

The author is informed that the Legal Notice transposing the contents of the Directive 2003/86, granting the right to family reunification to regular immigrants on family reunification, has been drafted and should be published soon.

Chapter VI

Relevance, influence, follow-up of recent European Court of Justice decisions

Free Movement in the Sports Sector

Article 9 of the Competition Rules of the Malta Football Association (MFA) has recently been the subject of controversy in Malta due to claims that these rules contravene the principles of free movement of persons enshrined in the EU Treaties. The rule in question stipulates as follows:

“ART. 9

Who may play in Competitive Matches Organised by the Association

(i) Only “bona fide” players are permitted to play in competitive matches.

(ii) A “bona fide” player is any amateur or non-amateur player who is registered to play in accordance with the rules and regulations of the Association and with those of FIFA, is not under a suspension which renders him ineligible to play and who is otherwise, in accordance with the rules and regulations of the Association and those of FIFA, eligible to play in a competitive match in which he takes part.

(iii) (a) In the case of competitions organised by the Association, only male players are permitted to play in those competitions organised for male players whilst only female players are permitted to play in those competitions organised for female players.

(b) Furthermore, in the case of matches of competitions organised for the Senior Team of Member Clubs, at least eight (8) players, who prior to having played their first match for the Senior Team of their Member Club were duly registered with the Association in accordance with rule 79 of the MFA Statute and with any Member Club and/or Club affiliated with the Gozo Football Association for at least three (3)

seasons, including the season during which their first registration with a Member Club or Club affiliated to the Gozo Football Association was made, and who during each of such three (3) seasons were eligible to take part with their Club in the youth and/or the junior competitions organised by the Association and/or The Youth Football Association and/or the Gozo Football Association, must form part of the team on the field of play at the start of the match.

In the case that any of these eight (8) players is substituted, such a player may only be substituted by a player who is likewise so qualified as above-mentioned. However, such a player may also be substituted by a player who is not so qualified as above mentioned both in the case that at the time that such a substitution is made there are in the team less than three (3) players who are not so qualified as above mentioned and in the case that after such a substitution is made there will still be in the team no more than three (3) players who are not so qualified as above mentioned.

This rule shall not apply to those players who on the 1st February 2004 were duly registered with the Association in accordance with rule 79 of the MFA Statute and with a Member Club or with a Club affiliated to the Gozo Football Association if on the 1st February 2004 such players were in accordance with the FIFA rules and regulations qualified to play for the Association in a FIFA or UEFA competition for national teams.

(c) Furthermore, in the case of matches of competitions organised for teams other than the Senior Team of Clubs, at least nine (9) players, who in accordance with the FIFA rules and regulations are qualified to represent the Association in a FIFA or UEFA competition for national teams must form part of the team on the field of play at the start of the match. If any of these players is substituted, such a player may only be substituted by another player who is likewise qualified in accordance with the FIFA rules and regulations to represent the Association in a FIFA or UEFA competition for national teams.

(d) If a player takes part in a competitive match in breach of any of these provisions, such a player shall be deemed to be 'non bona fide' for the purpose of such a match.”

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This rule has been interpreted to the effect that while non-Maltese football players, including those from EU Member States, can register with local football clubs without any limit, this is subject to a requirement that at least eight home-grown players must be playing on the field at any point in time during a football match in local competitions. Assuming that home-grown players are likely to be Maltese nationals, this means that, in practice, under current Malta Football Association rules, no more than three “foreign” players can play at any point in time during a football match.

These rules have given rise to claims that they constitute a breach of applicable European legislation and European Court of Justice jurisprudence, particularly the *Bosman* ruling. The MFA, on its part, has rebutted these allegations. In an official pronouncement,¹⁷ the MFA President declared that “*The primary objective [of the MFA rules] is to safeguard Maltese football, particularly the youth sector*” and that it appears that the principle of the “specificity of sports” in the European Constitution supports this objective.

In an article published in *The Times*¹⁸ on the 24 February 2005, the MFA President stated that these rules “will force clubs to maintain local regional identity and the link between them and the local community. Furthermore, these rules will enforce more Clubs to contribute socially to their community by using their resources for training young football players with all the benefits that such initiatives may bring about to the communities within which these operate.” Furthermore, he asserted that [since *Bosman*] “*there has never been a case...that dealt with restrictions imposed to protect local youth sports*”, and that the Advocate General Lenz’s Opinion in the *Bosman* case and the Court ruling itself “*may also lead one to conclude that the protection of the sports youth sector is something very laudable*.” The implication therefore is that the MFA enunciated these rules in the belief that the *Bosman* ruling does not preclude it from restricting the number of non-Maltese players in domestic competitions in so far as the very *raison d’être* of these rules is the protection of the sports youth sector.

On its part, the European Commission has confirmed that it is making enquiries with Maltese authorities to obtain further clarifications on the issue, with a view of establishing whether the MFA rules are discriminatory or not vis-à-vis non-Maltese EU nationals.

17 MFA Press Release dated 13 July 2004.

18 A daily newspaper in Malta published in the English language.

Chapter VII

Policies, texts and/or practices of a general nature with repercussions on free movement of workers

Non-Family Members/Dependents

The Immigration Regulations provide for a different procedure with regard to third country nationals who are not dependents of EU citizens. In April 2000, Malta upgraded its computerised passport issuance system and introduced additional security features on passports. Third country nationals who are not dependents are issued with a uniform residence permit, which is an authorisation of any type giving the right of residence in Malta to this category of third country nationals. A uniform residence permit shall not include temporary permission for residence in Malta for the purpose of the processing of an application for asylum or an application for a uniform residence permit.

A third country national may be permitted to enter Malta for a visit the duration of which shall not exceed three months provided s/he satisfies all the following conditions

- (a) is in possession of a valid passport;
- (b) is in possession of a valid visa, as required by the Common Consular Instructions;
- (c) submits, before entry into Malta, documents substantiating the purpose and the conditions of the planned visit;
- (d) has, even if in possession of a valid visa, sufficient means of support, both for the period of the planned visit as well as to return to his country of origin or to travel in transit to a third state into which his admission is guaranteed, or is in a position to acquire such means legally;
- (e) has not been reported as a person to be refused entry; and
- (f) is not considered to be a threat to public policy or national security.

In default, a third country national shall be refused entry into Malta except where the Principal Immigration Officer considers that it is necessary to admit him/her on humanitarian grounds, or in the national interest, or in honour of the international obligations of the Maltese Government; or (s)he holds a uniform residence permit and/or a re-entry visa, as may be required, issued by a Member State, in which case, (s)he shall only be allowed entry into Malta for the purpose of transit. The same applies if the third country national holds a Schengen visa when entering Malta from a Schengen State, provided that if (s)he is returning to a Schengen State, the validity of the Schengen visa covers the period to be spent in Malta and his/her return to the Schengen State from which he arrived, or, where (s)he is not returning to a Schengen State, (s)he has sufficient means and the necessary documents to cover his/her stay in Malta and the rest of his journey.

A third country national for whom a visa is not required shall be entitled to enter into and move freely in Malta for a period of three months, provided that the Principal Immigration Officer may extend the said period.

The Schengen Agreement

As with all the other new Member States of the 2004 enlargement, Schengen is not fully implemented in Malta since it is not yet a full member of this Agreement.

The new Member States cannot become full members of Schengen until the Schengen Information System II is put in place EU-wide. Preparations for Malta to join the Schengen borderless area are at an advanced stage and it has been mentioned in the local press that there are good prospects that Malta will be joining together with the first wave of new entrants, which is foreseen for the end of 2007.

Malta's geographical position as an island state on the periphery of the EU mandates more stringent preparations as Malta's borders will eventually become part of the external borders of the EU. Also as a result of Malta joining the Schengen area, its official data of blacklisted entrants will have to be shared as part of the Schengen Information System (SIS).

The purpose of the Schengen Agreement is to remove all controls on persons at the EU's internal borders and to harmonise controls at its external borders. EU Member States had agreed on a common

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list of countries requiring a visa. Malta's visa policy had to conform with this list upon accession. This means that post-1 May 2004, visas had to be introduced for certain countries, such as Libya, whereas, prior to accession, Libyan citizens only needed an identity card to enter Malta. Visas for entry into Malta are now also a valid permit for entry into the EU (normally, for up to three months).

The Malta-Libya Arrangement

The imposition of a visa requirement on Libyan citizens clearly raised some concern among the members of the Maltese business community with interests in Libya. These concerns were taken into account in setting up the necessary arrangements to issue visas. Thus, it is possible to issue long term visas which would be geographically limited to Malta. This is permissible under the Schengen Agreement. The systems described below have been in force since 1 May 2004 and will remain applicable until such time as Malta joins the Schengen system.

Malta and Libya entered into an Agreement on the facilitation of entry, exit and movement of nationals of both countries. This Agreement was concluded on 13 April 2004 and provides for various arrangements agreed to on a reciprocal basis, with regard to different categories of nationals of both countries.

Maltese businessmen and members of recognised professional bodies will be issued with a Business Multiple Visa valid for six months, provided that the application is supported by a letter of accreditation from the Maltese-Libyan Chamber of Commerce or the Maltese-Arab Chamber of Commerce, or any other Chamber of Commerce or entity agreed upon between the two countries, indicating the corporate, recognised professional body or individual membership of such entity. The same applies with regard to Libyan businessmen and members of recognised professional bodies who need to travel to Malta frequently.

Furthermore, Malta and Libya agreed that Maltese and Libyan nationals, who are frequent visitors to their respective countries and who are applying for a visa to travel to Libya and Malta, will be granted 3-month multiple entry visas. Libyan nationals holding a valid Schengen visa shall be exempt from the requirement of application for the issue of a Maltese national visa, provided that the Schengen visa is valid for the return to the country of origin, unless the holder is continuing the journey to Libya.

Libyan nationals who are holders of a Maltese work or residence permit will not be required to be in possession of a Maltese national visa for entry to and exit from Malta for the period of validity of the permit, except for the first entry. In case of the first entry, an entry visa would still be required in order to proceed to Malta. For subsequent entries, no visa will be required once the passport is duly endorsed by the Maltese Immigration authorities to signify the purpose.

Chapter VIII

EU enlargement

Although formal (and documented) Malta-EU relations had commenced in 1970 with the signing of the Malta-EEC Association Agreement, as subsequently supplemented by various other protocols and amending instruments, an analysis of their contents reveals that no provisions on the free movement of persons were ever included.

On 27 June 2002, Malta concluded its negotiations in the sensitive area of free movement of persons, securing a special safeguard that may be applied in the event of a big influx of EU workers into Malta. At the same time, however, Maltese citizens are still able to enter and seek work in other EU countries, and this as from the first day of membership.

Malta has obtained a deal which is different from that obtained by the other new Member States. For a period of seven years after membership, Malta will be able to apply safeguards on the right of EU nationals to work in Malta. The seven-year safeguard will apply until 2011 and essentially allows Malta to withhold the issue of work permits in the event of a potential disruption to its labour market which is of an urgent and exceptional nature. Restrictions can be imposed if an inflow of EU workers may put a strain on the local labour market, even if in certain sectors only. In such cases, it is up to Malta to determine when such cases arise and when restrictions may be imposed. In imposing restrictions Malta will be able to act *unilaterally*, and does not require prior authorisation from the EU.

Malta has also been allowed to maintain a work permit (also known as employment licence) system, but merely in order for the Maltese authorities to be able to monitor the domestic labour market with a view of anticipating potential disruptions to the labour market as explained in the paragraph above. Work permits are therefore to be issued automatically and work permits should in no way constitute a pre-condition for the taking up of employment. .

After this seven-year period, in the event of a disproportionate influx of EU workers, Malta may still seek a remedy, but this time acting through the EU institutions, rather than unilaterally. This arrangement, after the first seven years, would apply indefinitely and would cover Malta's future position at any time, in the event of possible difficulties relating to the free of movement of workers into Malta. This agreement was confirmed in a Joint Declaration between Malta and the EU which is annexed to Malta's Treaty of Accession. This special arrangement is also reflected in article 5(7) of the Immigration Regulations (LN205/2004). It must be said that Malta is not the first to get a Declaration of this kind. This declaration has already been used in the case of Austria in 1995. Interestingly, after ten years of membership, Austria has never felt the need to resort to it.

This means that Malta's requests with regard to the free movement of workers were both accepted by the EU. Malta was the only candidate country that sought and obtained an arrangement of this nature. It must also be noted that restrictions on non-EU nationals who seek work in Malta continue to apply even post-membership. These are not affected by Malta's membership of the EU.

With regard to the procedure related to the issue of an employment licence, the application must be signed by a Director or a person holding a senior management position in the establishment where the EU/EEA national is to be employed. In the case of entertainers and other performers, applications must be received at least ten days before the performer/s is/are due to start working in Malta, and application for extension must be submitted one month before it is due to expire. The explanatory notes relating to applications for employment licences, issued by ETC and dated 1 August 2005, clearly stipulate that a person may not take up employment before he is in possession of an employment licence. This *prima facie* appears to contradict the automaticity of the issuance of a work permit implied earlier. It also appears to be in breach of applicable EU rules and relevant case-law.

Chapter IX Statistics

Table 7 below provides a resume of statistics published by the Employment and Training Corporation (ETC) with regard to the non-Maltese nationals in possession of a work permit at the end of 2005. These statistics are as at 24 December 2005.

Table 7

	EU	Non-EU	Total
Number of non-Maltese nationals holding a work permit (Aliens Only)	1237	2268	3505
Number of non-Maltese nationals (Aliens Only) having an active engagement form	835	1623	2458
Number of non-Maltese nationals (Aliens Only) Non-Active	402	645	1047
Number of non-Maltese nationals (Aliens Only) Non-Active and having a termination form	148	189	337

The next four Tables provide a breakdown of the 2458 expatriates who are working in the Maltese economy. Table 8 shows a breakdown on the basis of age bracket.

Table 8

Age Bracket	EU	Non-EU
16-19	12	3
20-29	234	318
30-39	265	610
40-49	154	458
50-59	124	204
60+	46	30

Table 9 shows a breakdown on the basis of the industry involved.

Table 9

Industry	EU	Non-EU	Total
Community & Business Services	289	288	577
Construction	96	194	290
Manufacturing of Machinery Except Elect. Machinery	2	205	207
Restaurants & Other Drinking Places	17	182	199
Hotels including Lodging homes etc	96	99	195
Manufacturing of Elect. Machinery, Appliances and Supplies	50	62	112
Private Schools and Gov. Schools	34	64	98
Travel Agencies	50	34	84
Wholesale and Retail Trade	11	64	75
Manufacturing of Footwear & Made-Up Textile Goods	0	75	75
Government Services	24	40	64
Banking and Other Financial Institutions	21	31	52
Personal Services	8	40	48
Other	129	234	363

Tables 10 and 11 provide an overview of the total number of Work Permits issued in Malta to EU and third country nationals, on the basis of nationality, as in December 2005..

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Table 10

DECEMBER 2005 - EU Nationals	
Citizenship	Number of Work Permits Held
Austria	22
Belgium	11
Cyprus	1
Czech Republic	15
Denmark	24
Estonia	1
Finland	7
France	38
Germany	105
Greece	8
Hungary	10
Ireland	16
Italy	101
Latvia	40
Lithuania	3
Luxembourg	1
Poland	27
Portugal	3
Slovakia	21
Slovenia	5
Spain	7
Sweden	83
The Netherlands	26
United Kingdom	260
TOTAL	835

*Malta**Table 11*

DECEMBER 2005 – Third Country Nationals	
Candidate Countries	
Bulgaria	90
Croatia	31
Romania	2440
Turkey	
EEA/EFTA States	
Iceland	0
Liechtenstein	0
Norway	11
Switzerland	11
Other States	
Albania	14
Bosnia-Herzegovina	83
China	219
Egypt	24
India	301
Libya	119
Nigeria	10
Pakistan	18
Philippines	49
Russia	86
Serbia and Montenegro	14
Thailand	11
The Philippines	49
Tunisia	21
Ukraine	36
United States of America	14
Yugoslavia	264
TOTAL	1490
Other States	133

Chapter X Social security

Texts in force

Social Security in Malta is regulated by the Social Security Act 1987 (Chapter 318 of the Laws of Malta). The Social Security Act is undoubtedly one of the most complicated statutes in Maltese legislation. It lists the benefits that persons who satisfy the conditions stipulated thereunder would become eligible to and could therefore claim. The Act does not discriminate on the basis of nationality. Eligibility for benefits normally depends on the contributions made by a person to the social security system in Malta. Non-contributory benefits are conditional on other factors depending on the benefit being sought, but no nationality requirement is included.

In the light of the above coupled with the fact that the provisions of Regulations 1408/71 and 574/72 became directly applicable in Malta by virtue of the Malta-EU Accession Treaty (signed in Athens on 16th April 2003), no amendments to the Act were effected post-accession. In other words, in the event that a Union citizen claims a conflict between the Social Security Act and Regulation 1408/71 (with respect to the issue of the co-ordination of social security systems) (s)he would have to rely on the direct applicability of the Regulation/s in question.

The Equal Treatment in Occupational Social Security Schemes Regulations¹⁹ were published on 13 September 2005 and have been in force since that date. These Regulations give effect to the relevant provisions of Directive 86/378 EEC as amended by Directive 96/97 EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

Enhancing Administrative Capacity – The Twinning Light Project

The Department of Social Security informs that the Regulations are fully operational in Malta. An International Relations Unit (IRU) has been set up within the Department of Social Security in order to deal specifically with issues related to the application of regulations 1408/71 and 574/72. The Department of Social Security has expertise in the coordination of social security matters with other countries on a bilateral level, gained from years of coordinating four bilateral agreements with Australia, Canada, United Kingdom and The Netherlands. Following Malta's accession to the European Union on 1st May 2004, the Department of Social Security is also responsible for the implementation of the EU social security regulations which are much more comprehensive in their scope than the abovementioned bilateral agreements. Moreover, the obligations they impose on the institutions responsible for their implementation may have serious financial repercussions on social security expenditure.

The principles of the EU's social security regulations imply the exchange of information between social security institutions. An effective and coherent co-ordination system of social security schemes between Member States is therefore essential in order to achieve the objectives of the regulations. This is the responsibility of the competent authority in each Member State.

As of 1st May 2004, the IRU acts as the liaison body between the competent units within the Department of Social Security handling claims under the EU regulations and its counterparts in all the other Member States. It also supervises and monitors the on-going implementation process, while disseminating information to the general public about various related issues. The IRU also offers advice and assistance relating to entitlements abroad. Staff has been trained on the application of such Regulations. Furthermore, a Twinning Light Project has been initiated with the specific aim of providing further training to staff. Office manuals are being drawn up to strengthen the administration of such Regulations by officers within the said Department. At the time of the completion of this report the Office Manuals were not yet available.

Five Instruction Manuals were compiled as part of the Twinning Light Project. These concerned Unemployment Benefits, Contributory Pensions, Sickness and Maternity Benefits, Family Benefits and the Posting of Workers. The Twinning Light Project came to an end in October 2005. This Project was a huge success considering the level of knowledge obtained on the EU coordination rules.

19 Legal Notice 317/2005.

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The IRU was restructured as of 1 January 2006, on the basis of recommendations put forward by the experts at the end of the Twinning Light. The Project involved various activities, such as a review of organisational structures, training of staff, the development of manuals, the development of a public information strategy (where 55,000 information leaflets were printed and distributed via Local Council offices and Social Security district offices amongst others.), the organisation of management, technical and legal seminars, as well as study visits.

The Benefits

The benefits that may be claimed, by virtue of the EU's social security regulations, from Malta's Department of Social Security are sickness and maternity benefits, invalidity benefits, old age and death pensions, benefits and pensions relating to accidents at work and occupational diseases, death grants, unemployment benefits, family benefits and family allowances for employed and unemployed persons, and benefits for dependent children of pensioners and for orphans. These aforementioned social security benefits paid by the Department of Social Security in cash. However, sickness and maternity benefits also include benefits in kind. These refer to medical assistance: the Maltese National Health Scheme is free for all, and given that in 1979 there was a statement of policy in Parliament that declared that payment of the Maltese social security contribution gives right to the services provided under our health scheme, such services fall under the provisions of EU Regulation 1408/71.

This also means that the provisions of Maltese legislation create obligations on the Department of Health and the Department of Social Security to provide for health care or benefits to persons insured under the Maltese scheme, whether they are working in Malta or in another EU country. Moreover, it is to be noted that by virtue of EU Regulation 859/03, with effect from the 1st June 2003, third country nationals who were legally residing in an EU Member State are now also covered by the provisions of Regulation 1408/71.

The implementation of Regulation 1408/71 has so far proceeded quite smoothly in Malta. Table 12 below shows a breakdown of applications received between the 1 January and the 31 December 2005.

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Table 12

Type of Application	Number
Retirement Pension	73
Survivor's Benefit	7
Invalidity Pension	12
Posted Workers	57
Posted Workers (extensions)	4
Unemployment Benefits (art.69 Cases)	32

On the other hand, Table 13 shows a breakdown of applications sent during the same period.

Table 13

Type of Application	Number
Retirement Pension	75
Survivor's Benefit	9
Invalidity Pension	36
Posted Workers	62
Posted Workers (extensions)	1
Unemployment Benefits (art.69 Cases)	3

A rather difficult and unforeseen issue has developed with regard to posted workers. Most of the EU-15, being cautious of a large influx of migrant workers from the Eastern European Countries, obtained a transitional arrangement restricting the freedom of movement of workers and subjected migrant workers to controls. This arrangement did not include Malta and Cyprus. This has presented employers based in the EU-15 with the opportunity of setting up 'satellite' companies in Malta for the purpose of recruiting employees from the East European Countries and then posting them immediately to the country where the 'mother' company is situated.

This appears to have developed into a way of by-passing the transitional arrangements when a company situated in an EU-15 Member State wants to recruit workers from the new East European Member States.

This activity appears *prima facie* legal, but it has certain social security consequences that have created some difficulty. The companies involved have claimed that their workers are being posted from Malta and that, as such, by virtue of Regulation 1408/71 they should be subject to Maltese social security legislation. The Department of Social Security in Malta is therefore receiving applications for E101 certificates for such workers, to be presented to the authorities in the other country and which will excuse the payment of social insurance contributions in that country. In any such case which arises, the Department will be following the approach adopted by the European Court of Justice in *Fitzwilliam (C-202/97)* and will be looking closely to establish the precise nature of the activities of the company here in Malta. If these cannot be said to constitute "habitual and significant" activities, then E101 certificates will not be issued. In particular the presence of an administrative base in Malta will not, in itself, be regarded as satisfying this criterion.

Another series of cases which has arisen concerns third country nationals employed in international transport, particular long-distance lorry drivers. Following the extension of the personal scope of the Regulation to include third country nationals as of 1st July 2003, such drivers could in principle be covered provided they were lawfully resident in a Member State and were in a situation involving more than one State. With respect to the latter applications, the Department has taken the stance that the criteria for lawful residence were not being satisfied by third country nationals of the said transport companies. Consequently, these workers could not be regarded as resident in any Member State and are consequently deemed to fall outside the scope of Regulation 1408/71. This means they would therefore fall within the remit of applicable Maltese legislation.

Chapter XI

Establishment, provision of services, students

Establishment and Services

Texts in force

Section 7 of the Immigration Regulations (Legal Notice 205/2004) refers to the right of entry for the purposes of self-employment, establishment and the provision or receipt of services. Any citizen of the Union may enter Malta to establish himself in Malta in order to pursue activities as a self-employed, as well as to provide or receive services. Furthermore, any dependents²⁰ benefit from derivative rights, thereby acquiring the same rights as the Union citizen upon whom they depend. The Principal Immigration Officer is to facilitate the admission of any family member, if such family member is economically dependent upon the citizen of the Union, or his spouse, or was sharing the same abode in the home country.

The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided or received. If such period exceeds three months, a residence permit shall be issued; where the period does not exceed three months, the identification document with which the individual concerned entered Malta shall suffice to cover his stay. With regard to dependents who are not citizens of the Union, a residence document shall be issued. Furthermore, both the Union citizen as well as his dependents shall have the right to remain permanently in Malta, subject to the procedures outlined in Chapter 1 of this Report.

By virtue of section 7(8) of the Immigration Regulations, no citizen of the Union or his dependent can pursue activities as a self-employed or provide services, unless such person -

- (a) is a bona fide self-employed person;
- (b) operates from a registered address and satisfies all other requirements that are normally required of a self-employed Maltese national, including all matters relating to registration and taxation; and
- (c) has the ability to support himself and any dependents accompanying him.

All natural or legal persons require a trade licence to pursue an economic activity in Malta. The Trading Licences Act (Chapter 441 of the Laws of Malta) was adopted in 2001 and came into force in May 2002. The Trading Licences Act makes provision for the regulation of commercial activities and for matters ancillary to or connected with such activities and introduces provisions intended to allow EU companies or nationals who are established in any other Member State to provide services in Malta. This Act streamlined the procedure relating to the issue of trading licences in line with the *acquis communautaire* and devolved the issue and transfer of licences to the respective regulatory authorities. Post-accession, all EU nationals have access to all activities requiring a licence. Furthermore, the issue and transfer of licences for those business activities restricted in number, due to physical, geographical, demographic, economic or other logistic limitations, is also now open to EU nationals post-accession.

The Commerce Division (incorporating the former Department of Trade), the Department of Health within the Ministry of Health, the Department of Agriculture within the Ministry for Agriculture and Fisheries, the Police Department within the Ministry for Justice and Home Affairs, the Malta Tourism Authority, the Malta Maritime Authority, the Malta Transport Authority and the Malta Resources Authority, are responsible for the regulation and administration of sectoral trade licences. Licences are generally issued in terms of administrative policies that include norms for their transfer, as well as for amendments and other requirements. Prior to the enactment of the Trading Licences Act, Malta operated a trade licensing system regulated by the Code of Police Laws (Chapter 10 of the Laws of Malta) and by established administrative practices and procedures.

The Commerce Division informs that since the 1 May 2004, it has received number of requests from EU nationals to operate as free-lancers or as buskers. These were as follows – 21 from Britain, 4

20 The concept of ‘dependent’ has been defined in Chapter 1 of this Report.

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from Italy, 2 from Germany and Poland, and 1 from Portugal, Slovakia and the Czech Republic. Furthermore it received 3 applications from non-EU nationals who married Maltese nationals. These hailed from Chile, Morocco and Serbia.

With regard to companies and branches of non-Maltese companies, the competent authority for registration purposes is the Registry of Companies within the Malta Financial Services Authority (MFSA). The legislation regulating the registration of companies is the Companies Act (Chapter 386 of the Laws of Malta), enacted in 1995. The provisions of this Act did not contain any discriminatory provisions based on nationality with regard to the establishment of companies in Malta.

Students

Section 8 of the Immigration Regulations grants citizens of the Union the right to reside in Malta for the purpose of following a course of education, including vocational training. Their right of residence shall be subject to the following conditions:

- (a) the citizen of the Union must be enrolled in a recognized educational establishment for the purpose of following a course of education, including a vocational training course;
- (b) the citizen of the Union and accompanying dependents are to be covered by sickness insurance in respect of all risks in Malta; and
- (c) the citizen of the Union is to make a declaration of resources or must otherwise give an assurance to the Principal Immigration Officer that he has sufficient resources to avoid becoming a burden on the Maltese social assistance system during his period of residence and that of his dependents.

A Union citizen seeking entry into Malta for study purposes must provide sufficient proof of compliance with the abovementioned conditions to the Principal Immigration Officer at the time of entering into Malta.

As in the case of the self-employed and service providers, the dependents of a student shall be entitled to accompany him, to reside in Malta and to take up any employed or self-employed activity in Malta, even if they are not themselves citizens of the Union. However for the purposes of entry into Malta for study purposes, the term *dependent* does not include ascendants of the student or of the spouse.

The rights of residence enjoyed by Union citizens moving to Malta for study purposes shall continue for the duration of the course of studies. A residence permit in this case, issued upon application to a citizen of the Union, shall be limited in duration to the particular course of studies, where the duration of such course is shorter than one year, or to a period of one year on a renewable basis if the course of studies is longer in duration. Dependents of the student shall also be entitled to such permit, but if they are not Union citizens they shall be issued with a residence document which has the same validity as that issued to the Union citizen.

Entitlement to a residence permit and/or a residence document shall be evidenced as follows for the student:

- (i) a valid identification document;
- (ii) proof that the student has been enrolled in a recognized educational establishment for the principal purpose of following a course of education or a vocational training course;
- (iii) proof that the student is covered by sickness insurance;
- (iv) a declaration that the student has sufficient resources.

With regard to the dependents of the student, the following documents are required:

- (i) a valid identification document;
- (ii) a visa, if the dependents are not citizens of the Union but of a state whose citizens require a visa when crossing the border crossing point;
- (iii) proof of the relationship with the student and, where applicable, of dependence on him;
- (iv) proof that each dependent is covered by sickness insurance;
- (v) a declaration by the student that he has sufficient resources.

Student Maintenance Grants

The Students' Maintenance Grants were established by virtue of the Post-Secondary and Tertiary Student Grants Regulations (Legal Notice 165 of 1999). This Legal Notice was subsequently amended by Legal Notice 372 of 1999, 180 of 2000, 193 of 2001, 204 of 2003, and 372 of 2005. It lays down the conditions, a student must satisfy, in order to qualify for these grants.

These Regulations provide for the setting up of a Students Maintenance Grants Board (SMBG) responsible for the Management of the allocation of maintenance grants to students at postsecondary and tertiary levels, and for making policy recommendations. Section 2 of these Regulations defines a maintenance grant as the financial benefits paid to post-secondary and tertiary students to facilitate and promote the continuation of the pursuit of all forms of full-time post-secondary education.

Legal Notice 372/2005 provides that students who joined a course of study or training in a post secondary, vocational educational institution, or at the University of Malta course prior to the 1st October 2005, shall continue to be eligible to the maintenance grant as prescribed in the Post-Secondary and Tertiary Students Maintenance Grants Regulations, 1999. On the other hand, all other students who joined a course of study or training in a post-secondary, vocational educational institution, or at the University of Malta on or after the 1st October 2005 shall be eligible to the maintenance grant as prescribed in the Schedule to Legal Notice 372/2005.

The following are entitled to receive maintenance grants:

- (i) full-time students following post-secondary and vocational courses, mentioned in Part I of the Schedule to the Regulations;
- (ii) full-time students following an undergraduate course at the University of Malta, as indicated in Part II of the Schedule to the Regulations;
- (iii) full-time students following a postgraduate degree course at the University of Malta as may be indicated in Part II of the Schedule to the Regulations.

Post-Secondary and Vocational Students

In order for post-secondary and vocational students to be eligible for a Maintenance Grant, they must be full-time students who are registered and who have been accepted as regular students in a day course of studies by a post-secondary or vocational education and training institution and:

- (i) be Maltese citizens, or students with at least one parent being a Maltese citizen; and
- (ii) have resided in Malta for a period of not less than five years from the commencement of the relative course of studies; and
- (iii) have completed their term of compulsory education; and
- (iv) be not more than 30 years of age at the commencement of the course; and
- (v) be attending their course regularly and making satisfactory progress.

Students, who are following a course of studies at the Malta College of Arts, Science and Technology (MCAST), who are over 30 years of age at the commencement of the course, and who satisfy the above conditions may, in exceptional cases, qualify for a maintenance grant where they are the principal breadwinners in a household and the SMBG deems that they are deserving of a maintenance grant.

Maltese citizenship of the student or of at least one of the parents therefore clearly appears to be a prerequisite for eligibility for a maintenance grant. Moreover, the Regulations make it possible for students who, due to proven hardship, are deemed by the SMBG to qualify for a supplementary maintenance grant, to receive an additional fixed monthly rate.

University Students

Part II of the Regulations deals with the eligibility of University students for a Maintenance Grant. Again, Maltese citizenship of the student clearly appears to be a prerequisite for eligibility for a maintenance grant. The student must be registered as a full-time student, who has been accepted as a regular student by the University of Malta in a day course of studies and who fulfils the following conditions:

- (i) be a Maltese citizen, or student with at least one parent being a Maltese citizen; and
- (ii) have resided in Malta for a period of not less than five years from the commencement of the relative course of studies; and

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- (iii) have completed his/her term of compulsory education; and
- (iv) be not more than 30 years of age at the commencement of the course; and
- (v) is attending a course regularly and making satisfactory progress.

Where a student is over 30 years of age and satisfies all the abovementioned conditions, the student may qualify for a maintenance grant where he/she is the principal breadwinner in a household and the SMBG deems that he/she is deserving of a maintenance grant.

Again, Maltese citizenship of the student or of at least one of the parents therefore clearly appears to be a prerequisite for eligibility for a maintenance grant.

Implications of Bidar Judgement (Case C 209/03 decided on 15th March 2005)

As a result of the *Bidar* judgement, it appears that the ECJ considers that a student who is lawfully resident in a host Member State, cannot be discriminated against, either overtly or covertly. It also established that once a student satisfies the criteria for European citizenship (art. 18 EC) and lawful residence under Directive 90/365 (namely, a derived right of residence, which in turn means that the student is no burden on the State and is in possession of a sickness insurance), then no discrimination on grounds of nationality (art. 12 EC) may be allowed vis-a-vis such student, even in terms of maintenance grants.

The Court established that differentiation with respect to maintenance grants may only be established by a Member State with regard to

- a. students who have gone to another MS for study purposes only, and
- b. *only* on the basis of objectively justifiable purposes.

It considered that a three year residence in the host country prior to the commencement of studying and to have been “settled” there as being more readily satisfied by nationals of the host MS rather than other EU nationals, and therefore discriminatory.

On the basis of the above, it is submitted that the Maltese Regulations on Maintenance Grants may be deemed to fall foul of this case law on at least two counts:

- a. the requisite of Maltese nationality, and
- b. a 5 year residence period in Malta.

Chapter XII Miscellaneous

Texts in force

Maltese citizenship

The acquisition of Maltese citizenship is regulated by the Maltese Citizenship Act (Chapter 188 of the Laws of Malta). This Act provides for the acquisition of citizenship by birth or descent, by registration after marriage to a Maltese citizen or to a person who has become a Maltese citizen, as well as by naturalisation.

Part IV of the Maltese Citizenship Act, added by Act 4 of 2000, deals with multiple citizenship. Section 7 of the Act clearly provides that it shall be lawful for any person to be a citizen of Malta, and at the same time a citizen of another country. This means that an individual can have dual nationality and thereby be both a Maltese citizen, as well as a citizen of any other EU Member State. This therefore means that under Maltese law, the acquisition of the citizenship of another country will not bring about, automatically or otherwise, the forfeiture of Maltese citizenship.

By virtue of section 8 of the Act, it shall also be possible for an individual to reacquire Maltese citizenship by registration. Any person who, prior to the coming into force of the amendments introduced by Act 4 of 2000, was to have ceased to be a citizen of Malta because of the possession or acquisition, voluntary or involuntary, of any other citizenship, shall be entitled to be registered as a citizen of Malta. Such registration can be made by submitting an application to that effect and upon taking an oath of allegiance. Furthermore, any person who was formerly, at any time, a citizen of Malta, resided in any country outside Malta for an aggregate period of at least six years, subsequently acquiring or retaining the citizenship of any other country, shall be deemed not to have ever ceased to be a citizen of Malta.

Notwithstanding this, there still exists an anomaly with regard to voting rights. The legislation currently in force provides that a person must have resided in Malta for six out of the previous eighteen months in order to be deemed an eligible voter. This essentially means that a number of persons who would normally be entitled to vote but who by reason of the fact that they happen to be employed in another EU Member State or even with the EU institutions, may in fact lose their right to vote in Malta. This is one of the issues currently being addressed in an exercise set to reform the electoral laws and which is being led by the three main political parties in Malta.²¹ No information as to tabled solutions was publicly available at the time of finalisation of this draft report.

Teaching

Postgraduate and graduate courses including elements of the Community's Free Movement of Persons *acquis* have been offered at the University of Malta, by the Faculty of Laws, the Faculty of Arts and the European Documentation and Research Centre, since 1993. A module focusing specifically on the EU's *acquis* on the Free Movement of Persons is also offered, on an optional basis, as part of the curriculum leading to the Degree of Doctor of Laws.

Websites

Laws of Malta Online: <http://www2.justice.gov.mt/lom/home.asp?lng=ENG>

Sentenzi Online: <http://www2.justice.gov.mt/sentenzi/default.asp?lng=ENG>

21 The *Partit Nazzjonalista* (in government), the Malta Labour Party and the *Alternattiva Demokratika* (Greens).