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Country report

Gender equality



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Country report

Gender equality

How are EU rules transposed into
national law?

Malta

Peter G Xuereb

Reporting period 1 January 2014 – 1 July 2015

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Contents

1.	Introduction.....	6
1.1	Basic structure of the national legal system	6
1.2	List of main legislation transposing and implementing Directives	6
2.	General legal framework	7
2.1	Constitution	7
2.2	Equal treatment legislation	8
3.	Implementation of central concepts	9
3.1	Sex/gender/transgender	9
3.2	Direct sex discrimination	10
3.3	Indirect sex discrimination.....	12
3.4	Multiple discrimination and intersectional discrimination	12
3.5	Positive action.....	13
3.6	Harassment and sexual harassment.....	13
3.7	Instruction to discriminate.....	15
3.8	Other forms of discrimination.....	16
4.	Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54).....	17
4.1	Equal pay	17
4.2	Access to work and working conditions.....	18
5.	Pregnancy and maternity protection; maternity, paternity, parental leave and adoption leave (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18).....	21
5.1	Pregnancy and maternity protection	21
5.2	Maternity leave	23
5.3	Adoption leave	25
5.4	Parental leave	25
5.5	Paternity leave.....	28
5.6	Time off/care leave.....	28
5.7	Leave in relation to surrogacy	29
5.8	Leave sharing arrangements.....	29
5.9	Flexible working time arrangements.....	29
6.	Occupational pension schemes (Chapter 2 of Directive 2006/54).....	30
6.1	Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?.....	30
6.2	Is the personal scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.	31
6.3	Is the material scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.	31
6.4	Have the exclusions from the material scope as specified in Article 8 of Directive 2006/54 been implemented in national law?.....	31
6.5	Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?	31
6.6	Is sex used as an actuarial factor in occupational social security schemes? ..	31
6.7	Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.....	31
7.	Statutory schemes of social security (Directive 79/7).....	33
7.1	Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?	33

7.2	Is the personal scope of national law relating to statutory social security schemes more restricted or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.	33
7.3	Is the material scope of national law relating to statutory social security schemes more restricted or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.	33
7.4	Have the exclusions from the material scope as specified in Article 7 of Directive 79/7 been implemented in national law? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any. .	33
7.5	Is sex used as an actuarial factor in statutory social security schemes?	33
7.6	Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.....	34
8.	Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)	35
8.1	Has Directive 2010/41/EU been explicitly implemented in national law?	35
8.2	What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU).....	35
8.3	Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.	36
8.4	How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment more restricted or broader than specified in Article 4 Directive 2010/41/EU?	37
8.5	Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?	37
8.6	Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?	37
8.7	Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?	37
8.8	Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?	38
8.9	Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.	38
8.10	Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?	38
9.	Goods and services (Directive 2004/113)	39
9.1	Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?	39
9.2	Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.	39
9.3	Have the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education, been implemented in national law?	39
9.4	Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.	39
9.5	Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial	

	services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?.....	39
9.6	How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 <i>Test-Achats</i> ruling in national legislation.....	39
9.7	Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?	40
9.8	Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.....	40
10.	Violence against women and domestic violence in relation to the Istanbul Convention.....	41
10.1	Has your country ratified the Istanbul Convention?	41
11.	Enforcement and compliance aspects (horizontal provisions of all directives)	42
11.1	Victimisation.....	42
11.2	Burden of proof.....	42
11.3	Remedies and Sanctions.....	43
11.4	Access to courts	44
11.5	Equality body	45
11.6	Social partners.....	46
11.7	Collective agreements.....	46
12.	Overall assessment	47

1. Introduction

1.1 Basic structure of the national legal system

The Supreme law of the land is the Constitution of 1964 as amended. Malta is an independent republic with a parliamentary system of government. Parliament makes laws subject to respect for Malta's international obligations including membership of the European Union. The European Union Act of 2003 made European Union Law applicable and effective in Malta. Enforcement is through a system of Courts with the Court of Appeal and the Constitutional Court at the apex, with below them the Civil Court and the Criminal Court and below the latter the magistrates courts. Constitutional matters are ultimately decided by the Constitutional Court. Gender equality legislation is a matter for Parliament and often for Ministerial secondary or 'subsidiary' legislation (with the prefix 'SL') by virtue of enabling or primary law.

1.2 List of main legislation transposing and implementing Directives

All Acts and Subsidiary Legislation (SL) are available at:
<http://www.justiceservices.gov.mt/LOM.aspx?pageid=24>, accessed 12 September 2013.

Employment and Industrial Relations Act, Chapter 452, Laws of Malta [EIRA]

- SL 452.78, Parental Leave Entitlement Regulations
- SL 452.79, Part-Time Employees Regulations
- SL 452.81, Contracts of Service for a Fixed Term Regulations
- SL 452.87, Organisation of Working Time Regulations
- SL 452.88, Urgent Family Leave Regulations
- SL 452.89, Employment and Industrial Relations Interpretation Order
- SL 452.91, Protection of Maternity (Employment) Regulations
- SL 452.95, Equal Treatment in Employment Regulations [ETE Regs]
- SL 452.97, Extension of Applicability to Service with Government (Part-Time Employees) Regulations
- SL 452.99, Extension of Applicability to Service with Government (Contracts of Service for a Fixed Term) Regulations
- SL 452.100, Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations
- SL 452.101, Minimum Special Leave Entitlement Regulations
- SL 452.102, Extension of Applicability to Service with Government (Parental Leave Entitlement Regulations and Urgent Leave) Regulations
- SL 452.105, Extension of Applicability to Service with Government (Protection of Maternity Employment) Regulations
- SL 452.109, Extension of Applicability to Service with Government (Employment Status) Regulations Act III of 2013
- Budget Measures Implementation Act, 2013, Government Gazette of Malta No. 19 090 of 17 May 2013
- Equality for Men and Women Act, Chapter 456, Laws of Malta [EMWA]
- SL 456.01, Access to Goods and Services and their Supply (Equal Treatment) Regulations [AGS Regs]
- SL 456.02, Procedure for Investigation Regulations

Gender Identity, Gender Expression and Sex Characteristics Act 2013, Chapter 540 of the Laws of Malta.

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. Article 45 of the Constitution provides as follows:

45. (1) Subject to the provisions of sub-articles (4), (5) and (7) of this article, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of sub-articles (6), (7) and (8) of this article, 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.

(3) In this article, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity 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.

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

Yes. The Constitution lists the following as 'Principles'.

Article 7 – Right to Work for all citizens and state to promote the conditions to make this right effective.

Article 12 – The State to Protect work and promote advancement of workers.

Article 14 – Rights of Women workers – The State shall promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men.

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Article 45, yes.

Article 46 provides for the justiciability of Article 45, certainly against public authorities (usually the Minister responsible for the particular government department or entity), which is interpreted as including as a possible co-defendant the public officer who was actually responsible for the act or omission. Thus far it appears that private persons acting in their private capacity cannot be cited as defendants, although an action should lie under the ordinary law implementing rights and principles in Chapter IV.

'Principles' are not justiciable. By Article 21, the 'Principles' shall not be enforceable in any court, but 'are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws.'

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes. The main law prohibiting sex discrimination is the Equality for Men and Women Act, Chapter 456 Laws of Malta. Other legislation includes the Employment and Industrial Relations Act 2002, Chapter 452 of the laws of Malta, and the Gender Identity, Gender Expression and Sex Characteristics Act 2013, Chapter 540 of the Laws of Malta.

There is also a great deal of subsidiary legislation in the form of regulations (subsidiary legislation):

- SL 452.91, Protection of Maternity (Employment) Regulations
- SL 452.95, Equal Treatment in Employment Regulations
- SL 452.97, Extension of Applicability to Service with Government (Part-Time Employees) Regulations
- SL 452.99, Extension of Applicability to Service with Government (Contracts of Service for a Fixed Term) Regulations
- SL 452.100, Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations
- SL 452.101, Minimum Special Leave Entitlement Regulations
- SL 452.102, Extension of Applicability to Service with Government (Parental Leave Entitlement Regulations and Urgent Leave) Regulations
- SL 452.105, Extension of Applicability to Service with Government (Protection of Maternity Employment) Regulations
- SL 452.109, Extension of Applicability to Service with Government (Employment Status) Regulations Act III of 2013
- SL 456.01, Access to Goods and Services and their Supply (Equal Treatment) Regulations [AGS Regs]
- SL 456.02, Procedure for Investigation Regulations

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

No. But Article 2 of the Gender Identity Act, Chapter 540 laws of Malta, defines gender expression and gender identity as follows:

- 'gender expression' refers to each person's manifestation of their gender identity, and/or the one that is perceived by others;
- 'gender identity' refers to each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, a modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including one's name, dress, speech and mannerisms.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

Yes. Article 45 (3) of the Constitution of Malta.

By Regulation 4 of the Equal Treatment in Employment Regulations, there is a prohibition on 'discriminatory treatment' which under Regulation 2 means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any of the grounds mentioned in Regulation 1(3) which is not justifiable in a democratic society and includes:

'..... (d) in so far as the ground of sex is concerned, any less favourable treatment of a person who underwent or is undergoing gender reassignment, which for the purpose of these regulations shall mean where a person is considering or intends to undergo, or is undergoing or has undergone, a process, or part of a process, for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'

National legislation includes discrimination on the ground of gender identity albeit less explicitly; this is also done by the Gender Identity Act, as follows:

Article 13. (1) Every norm, regulation or procedure shall respect the right to gender identity. No norm or regulation or procedure may limit, restrict, or annul the exercise of the right to gender identity, and all norms must always be interpreted and enforced in a manner that favours access to this right.

(2) The public service has the duty to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics discrimination and harassment are eliminated, whilst its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics.

(3) The provisions of this Act shall apply to the private sector, all public sector and public service departments, agencies and all competent authorities that maintain personal records and/or collect gender information. Such forms, records and/or information shall be assessed and modified to reflect the new standards established by this Act within a maximum of three years from the date of entry into force of this Act.

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes.

Direct discrimination is not defined in national legislation.

Article 4 EMWA: '(1) It shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.'

There is therefore no express reference to, and no formal distinction, between 'direct' and 'indirect' discrimination in this Act. However, sub-Article 3 of Article 2 goes on to provide that:

'(3) For the purposes of sub-article (1) discrimination based on sex or because of family responsibilities or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity is:

- a) the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities or because of their sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity;
- b) any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

This means that indirect discrimination is not expressly referred to as such, but is dealt with by the Act. The terminology of 'direct' and 'indirect' does feature in the Employment and Industrial Relations Act 2002, Chapter 452 Laws of Malta, and can be relied upon. Indeed, Article 4A of the EMWA states that 'indirect discrimination may be proved by any means of evidence including statistical evidence.. Also Article 2 of the ETSEO Order makes a cross-reference to the Equal Treatment in Employment Regulations (the ETE Regulations) which in their Regulation 3 contain the correct definitions of direct and indirect discrimination and of harassment and sexual harassment.

Article 4 of the Access to and Supply of Goods and Services (Equal Treatment) Regulations:

'4. (1) It shall be unlawful for a person to subject another person to discriminatory treatment, *whether directly or indirectly*, on the grounds of sex, including discriminatory treatment related to pregnancy or maternity.(2) Without prejudice to the provisions of the Act and of the Employment and Industrial Relations Act: "*direct discrimination*" shall be deemed to occur where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation; and "*indirect discrimination*" shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Yes. Article 4 (1) and (2) of the Access to and the Supply of Goods and Services (Equal Treatment) Regulations (see above 3.2.1).

Article 2(3) EMWA:

‘(3) For the purposes of subarticle (1) discrimination based on sex or because of family responsibilities or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics is:

- a) the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities or because of their sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics;
- b) treating a woman less favourably for reasons of actual or potential pregnancy or childbirth;
- c) treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex and/or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics;
- d) any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or of the same sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors.’

Regulation 4 of the Equal Treatment in Employment Regulations prohibits ‘discriminatory treatment,’ which under Regulation 2 means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any of the grounds mentioned in Regulation 1(3) which is not justifiable in a democratic society and includes:

- (a) harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct;
- (b) an instruction to discriminate against persons on grounds of sex;
- (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC;
- (d) in so far as the ground of sex is concerned, any less favourable treatment of a person who underwent or is undergoing gender reassignment, which for the purpose of these regulations shall mean where a person is considering or intends to undergo, or is undergoing or has undergone, a process, or part of a process, for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex;

In my view, the definitions comply with EU law.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant

No.

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Article 4 EMWA and Article 4 of the Access to and the Supply of Goods and Services Regulations (see above in 3.2.1).

The Equal Treatment in Employment Regulations (the ETE Regulations) contain, in their Regulation 3, the definitions of direct and indirect discrimination and of harassment and sexual harassment.

Indirect discrimination is defined in national legislation, see above.

In my view, this complies with EU law.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

The EMWA provides that '(4A) Indirect discrimination may be proved by any means of evidence including statistical evidence.' (No cases available).

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

There have been no reported cases on the subject.

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

None apparent.

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation simultaneously – and/or intersectional discrimination – i.e. discrimination?

Not to date. [Future legislation may provide for this].

No proposals have been published, but coverage of this point is not excluded as a possibility in the current review of human rights legislation being undertaken by the Government. In the Government's Consultation Document (White Paper) of 10 December 2014, 'Towards the Establishment of the Human Rights and Equality Commission', reference was made (at p. 50) to intersectionality in conjunction with sex workers (See at http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/Human_Rights.aspx accessed 25 August 2015).

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

No.

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Article 45 of the Constitution, which prohibits discrimination, provides as follows:

'(11)Nothing in the provisions of this article shall apply to any law or anything done under the authority of a law, or to any procedure or arrangement, in so far as such law, thing done, procedure or arrangement provides for the taking of special measures aimed at accelerating de facto equality between men and women, and in so far only as such measures, taking into account the social fabric of Malta, are shown to be reasonably justifiable in a democratic society.'

The Access to Goods and Services and Their Supply (Equal Treatment) Regulations (the AGS Regulations) provide in Regulation 6 'With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any person from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.'

While the phrase 'taking into account the social fabric of Malta' in Article 45 of the Constitution might have caused some difficulty in a past where a relatively conservative social milieu prevailed, I do not think this would cause any difficulty of that kind now.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

In principle there are no difficulties of a legislative or judicial kind. However, there appears to be a cultural obstacle to its use. Even women's organisations have not come out in favour of positive action, and indeed some are against this.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

No. Neither are there proposals pending or policy measures in place.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

Some effort has been made at political party level, for example, to improve women's presence on committees. Also women are increasingly appointed to the judiciary but without any clear bias in that regard. The majority of MEPs (of course elected) are women, however, so that we see conflicting results at the political level.

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

Yes. Article 251A of the Criminal Code, Chapter 9 of the Laws of Malta.

Regulation 4 of the Access to and Supply of Goods and Services (Equal Treatment) Regulations.

Regulation 4 of the Access to and Supply of Goods and Services (Equal Treatment) Regulations (S.L. 456.01) provides:

'(3) Harassment [and sexual harassment] shall also be deemed to constitute discrimination for the purposes of these regulations. A person's rejection or submission to harassment [or sexual harassment] may not be used as a basis for a decision affecting that person.

(4) Without prejudice to the provisions of the Act and of the Employment and Industrial Relations Act:

"harassment" shall be deemed to occur where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment; and ["sexual harassment" shall be deemed to occur where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.]'

3.6.2 Does the definition of harassment cover a broader scope than employment in your country? If so, please specify the scope.

In so far as S.L. 456.01 is enacted under the EMWA, which is not limited to employment, the Regulations have the widest scope, so that the provision is not confined in its scope to the employment context.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes.

- Article 2 of EMWA;
- Article 29 of the EIRA.

The definition and prohibition often feature in the same provision.

EMWA Article 2 defines sexual harassment by reference to Article 9 which provides:

'(1) Without prejudice to the provisions of Article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass other persons, that is to say:

- a) to subject other persons to an act of physical intimacy; or
- b) to request sexual favours from other persons; or
- c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or
- d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.

(2) (a) Persons responsible for any work place, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in, or to avail themselves of any facility, goods or service provided at that place, to suffer sexual harassment at that place.

(b) It shall be a defence for persons responsible as EIRA, Article 29 makes it unlawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct,

including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

(2) It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by:

- a) subjecting the victim to an act of physical intimacy; or
- b) requesting sexual favours from the victim; or
- c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where:
 - (i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim;
 - (ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct.'

The Gender Identity Act, Article 13(2) provides: The public service has the duty to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics *discrimination and harassment* are eliminated, whilst its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics.

In my view these provisions are compliant.

3.6.4 Does the definition of sexual harassment cover a broader scope than employment in your country? If so, please specify the scope.

It includes the supply of goods and services, as well as employment.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Yes. In Article 9 (1) (d) of EMWA (see above 3.6.3) and in Article 29 (2)(c)(ii) of the EIRA (see above 3.6.3).

3.7 Instruction to discriminate

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes. Regulation 3 (4) of the Equal Treatment in Employment Regulations, S.L. 452.95 provides that for the purposes of these regulations, employers or any persons or organisation to whom these regulations apply shall also be deemed to have discriminated against a person if they:

- (a) instruct any person to discriminate against another person;
- (b) neglect their obligation to suppress any form of harassment at their workplace or within their organisation, as the case may be.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There has been no case law.

3.7.3 Is incitement to discrimination explicitly prohibited in your country?

Incitement to violence is, but not explicitly incitement to discrimination. Article 82A of the Criminal Code, Chapter 9 of the Laws of Malta. It provides that:

- (1) Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial hatred against another person or group *on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.*
- (2) For the purposes of the foregoing subarticle 'violence or racial hatred' means violence or racial hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion.

Otherwise in general it is a crime to instigate others to commit a criminal offence (Article 69) or to incite others to disobey the law (Article 70, Criminal Code).

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

Not explicitly.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. EIRA, Article 27 provides that employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.

Regulation 3A of the Equal Treatment in Employment Regulations, S.L. 452.95 prohibits direct or indirect discrimination on grounds of sex in relation to all aspects and conditions of remuneration.

These provisions prohibit discriminatory treatment in the context of the same work or work of equal value. The employer must ensure that the same conditions apply to men and women and that any job classification scheme is not directly or indirectly discriminatory.

4.1.2 Is the concept of pay defined in national legislation?

Yes, although the matter is ambiguous.

EIRA, Article 2.

Regulation 2 of the ETE Regulations.

The main Act, the EIRA, defines 'wages' in Article 2 as follows: "'wages" means remuneration or earnings, payable by an employer to an employee and includes any bonus payable under Article 23 other than any bonus or allowance related to performance or production,' but for the purposes of 'equal pay' the term used in the relevant provision on equal pay (Article 27) is 'remuneration', for which there is no definition in the EIRA. There is no definition of 'pay' either.

However, there is a definition of 'pay' in Article 2 of the ETE Regulations, as follows: "'pay" means the ordinary basic salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his or her employment from his or her employer.'

The term pay is in fact used in Article 3A (2) of the Regulations, although Article 3A (1) speaks of remuneration.

This definition complies with the definition of Article 177(2) TFEU.

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

Yes. Regulation 3A of the Equal Treatment in Employment Regulations, S.L. 452.95.

Regulation 3A of the Equal Treatment in Employment Regulations, S.L. 452.95 prohibits direct or indirect discrimination on grounds of sex in relation to all aspects and conditions of remuneration.

4.1.4 Is a comparator required in national law as regards equal pay?

Yes. The EIRA provides that '27. Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.' Therefore, the comparator is employees in the same class of employment, at least with the same employer. The issue of comparing the position of employees with different employers has not yet been tested.

It is not clear if a hypothetical comparator is allowed. There is no case law on this point.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

No.

4.1.6 Does national (case) law address wage transparency in any way?

No.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

No obvious reference to this as yet.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

Article 27 EIRA allows', as follows:

'Provided that an employer and a worker or a union of workers as a result of negotiations for a collective agreement, may agree on different salary scales, annual increments and other conditions of employment that are different for those workers who are employed at different times, where such salary scales have a maximum that is achieved within a specified period of time.'

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

One main difficulty is the lack of transparency stemming from obscure pay structures and a lack of information or access to such about pay.

There are no relevant landmark cases.

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Yes. Article 26, EIRA, provides a blanket prohibition against discrimination against *any person or class of persons* in relation to an application for employment, recruitment or training and all aspects of employment including promotion and dismissal.

The EIRA uses the term 'employee', defining it in Article 2 as follows: "'employee" means any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the

immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service.'

An 'outworker' is defined as 'a person to whom articles, materials or services of any nature are given out by an employer for the performance of any type of work or service where such work or service is to be carried out either in the home of the outworker or in some other premises not being premises under the control and management of that other person.'

This definition of a 'worker' reflects the relevant case law of the CJEU.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes. Article 26 of the EIRA. Article 26 EIRA provides a blanket prohibition against discrimination against any person or class of persons in relation to an application for employment, recruitment or training and all aspects of employment including promotion and dismissal.

In my view this Article reflects the scope of Article 14 (1) in terms of its material scope.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. Regulation 4 (1) and (4) of the Equal Treatment in Employment Regulations (S.L. 452.95). These provide:

'4. (1) ... any difference of treatment based on a characteristic related to grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin shall not constitute discriminatory treatment where by reason of the nature of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective is legitimate and the requirement is proportionate.... (4) With regard to access to employment, including the training leading thereto, a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.'

The Provision effectively reproduces Article 14(2) of the Directive.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes. By Regulation 4 of the Equal Treatment in Employment Regulations (L.N. 452.95) 3. (1) It shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds of a particular religion or religious belief, disability, age, sex, including discriminatory treatment related to gender reassignment and to pregnancy or maternity leave as referred to in the Protection of Maternity (Employment) Regulations, sexual orientation, or racial or ethnic origin in any situation referred to in regulation 1(4).

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

No particular difficulties.

5. Pregnancy and maternity protection; maternity, paternity, parental leave and adoption leave (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

Yes. Regulation 2 of the Protection of Maternity (Employment) Regulations.

A 'breastfeeding employee' means an employee who is breastfeeding during a period of up to twenty-six weeks after her date of confinement and who has informed her employer of her condition by means of a certificate issued by a registered medical practitioner or midwife.

An 'employee who has recently given birth' means an employee who has formally informed her employer of her condition by means of a certificate issued by a registered medical practitioner or midwife, and whose date of confinement was:

- (a) not more than fourteen weeks before in the case of a stillborn child, and
- (b) not more than twenty-six weeks before in the case of a live birth.

A 'pregnant employee' means an employee who informs her employer in writing of her pregnancy and who subsequently, within fifteen days, formally informs her employer of her pregnancy and of the expected date of confinement by means of a certificate issued by a registered medical practitioner or midwife;"

This definition is consistent with the definition in Article 2 of Directive 92/85.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes. Regulations 3, 4 and 5 of the Protection of Maternity (Employment) Regulations.

Regulations 3, 4 and 5 of the Protection of Maternity (Employment) Regulations make provision accordingly.

3. (1) In this regulation, employee includes 'pregnant employee,' 'employee who has recently given birth' and 'breastfeeding employee.'

(2) The employee's employment shall be ensured and her wages shall not be less favourable than those stipulated in her contract of employment when an employer takes measures to protect the health and safety of an employee, after a risk assessment has revealed a risk to the safety or health or an effect on the pregnancy or breastfeeding of the employee.

(3) The measures referred to in the preceding subregulation include:

- (a) the temporary adjustment of the working environment and, or the hours of work of the employee concerned;
- (b) the assignment of the employee to suitable alternative work which is appropriate for her to do in the circumstances, in the event that the adjustment of her working conditions and, or hours of work is not technically and, or objectively feasible, or cannot reasonably be required on duly substantiated grounds: Provided that an employee who, without justification, refuses to perform suitable alternative work provided by her employer which is considered acceptable in the circumstances by the Occupational Health and Safety Authority, shall not be entitled to any remuneration referred to in subregulation (5) during her special maternity leave: Provided further that when the reason for the measures taken in terms of subregulation (3) no longer remain valid, the employer shall endeavour to reassign the employee to the same job or when this is no longer possible for a valid reason,

to equivalent or similar work which is consistent with her original contract of employment.

(4) If the employer acts in accordance with the General Provisions for Health and Safety at Workplaces Regulations but is still unable to comply with the provisions in subregulation (3), the employee concerned shall be given special maternity leave by the employer for the whole of the period necessary to protect her safety or health, without prejudice to her other entitlement by virtue of regulation 6 and regulation 7. Cap. 318.

(5) During the special maternity leave referred to in subregulation (4), the employer shall pay the employee, for the whole of the period necessary to protect the employee's safety or health, a special allowance equivalent to the rate of sickness benefit payable in terms of the Social Security Act: Provided that the employee shall remain entitled on termination of the special maternity leave, to all benefits which may accrue to other employees of the same class or category of employment at that place of work.

(6) If an employee to whom leave has been given under subregulation (4) as being an employee who is breastfeeding ceases breastfeeding, she shall, at the earliest practical time, notify her employer in writing that she has so ceased.

(7) Without prejudice to subregulation (6), if, during a period of special maternity leave given to an employee, the employee becomes aware that her condition is no longer such that she is vulnerable to the risk by virtue of which she was given the special maternity leave, she shall at the earliest practical time notify her employer in writing that she is no longer at risk.

(8) Where an employer receives notification from an employee under subregulation (6) or (7) and has no reason to believe that, if the employee returned to work, she would be vulnerable to risk as an employee to whom these regulations apply:

- (a) the employer shall take all reasonable measures to enable the employee to return to work in the job which she held immediately before the start of her leave and shall then notify her in writing that she can resume work in that job; and
- (b) the special maternity leave given to the employee shall end seven days after the notification under paragraph (a) is received by her or, if it is earlier, on the day she returns to work.

(9) If, during a period of special maternity leave, her employer - (a) either takes whatever measures which are necessary in terms of the General Provisions for Health and Safety at Workplaces Regulations to ensure that she will no longer be exposed to any risk by virtue of which she was given the special maternity leave or becomes able to move the employee referred to in subregulation (2), and (b) notifies the employee in writing that she can return to work without exposure to that risk or, as the case may be, that other work is available to her which is suitable for her as mentioned in subregulation (3)(b), the special maternity leave shall end seven days after the notification under paragraph (b) is received by her or, if it is earlier, on the day she returns to work or, as the case may be, takes up the other work. Prohibition of exposure to certain agents or working conditions.

4. The provisions of regulation 3 shall apply mutatis mutandis, when an employer takes measures to protect the health and safety of an employee who becomes pregnant or starts breastfeeding, in terms of the General Provisions for Health and Safety at Workplaces Regulations, to prevent the risk of exposure which could jeopardise the health or safety of such an employee, to agents, processes or working conditions to which exposure is prohibited in terms of specific provisions made under the Occupational Health and Safety Authority Act: Provided that the employee has duly informed her employer that she is pregnant or breastfeeding.

5. (1) The employee's employment rights shall be ensured and her wages shall not be less favourable than those stipulated in her contract of employment when an employer, who has received notification by means of a medical certificate that an employee should not perform night work during her pregnancy and during breastfeeding for reasons relating to her health and safety, transfers her to daytime work to comply with his

obligations as an employer in terms of the Occupational Health and Safety Authority Act, or of subsidiary legislation issued thereunder. (2) If the employer acts in accordance with the General

Provisions for Health and Safety at Workplaces Regulations but is still unable to comply with the requirement to transfer the employee to daytime work as referred to in subregulation (1) as this is not technically and, or objectively feasible or cannot be required on duly substantiated grounds, the employee shall be given special maternity leave as referred to in regulation 3.

In my view this is a correct implementation.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes. Regulation 12 of the Protection of Maternity (Employment) Regulations. It protects the employee against dismissal during the relevant period. It provides:

12. (1) Subject to subregulation (2), it shall not be lawful for the employer to dismiss a pregnant employee, an employee who has recently given birth or a breastfeeding employee, from the date in which such employee informs her employer, by means of a certificate issued by a registered medical practitioner or midwife, of her pregnancy to the end of her maternity leave, or during any period of special maternity leave, because of her condition or because she avails herself or seeks to avail herself of any rights in accordance with these regulations.

(2) The provisions of subregulation (1) are without prejudice and shall not apply to cases falling under article 36(4) and (14) of the Act.

(3) In cases where there is good and sufficient cause to dismiss the employee, the employer shall:

- (a) cite duly substantiated grounds for her dismissal in writing in her notice of termination;
- (b) send a copy of such notice to the Director.

Exceptions are allowed in terms of Article 10 of the Directive, and this by virtue of Regulation 12 itself, on grounds of redundancy and good and sufficient cause as provided in Article 36 (4) and (14) of the EIRA.

It is provided in Article 36(5) of EIRA that notice of the termination of employment may not be given during maternity leave.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. Regulation 12 (3) of the Protection of Maternity (Employment) Regulations.

5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

18 weeks. Regulation 6 of the Protection of Maternity (Employment) Regulations.

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes. Protection of Maternity (Employment) Regulations, Regulation 6.

The periods are four weeks before and six weeks after the expected date of confinement, respectively.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes. Protection of Maternity (Employment) Regulations, Regulations 3, 4 and 5 respectively.

These provisions essentially implement the provisions of Articles 5.6 and 7 of Directive 92/85.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) are ensured during the pregnancy and maternity leave?

Yes. Protection of Maternity (Employment) Regulations, Regulation 11.

The Regulation preserves contractual rights as per the Directive, excluding bonus payments or allowances related to performance or production.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

It is higher. Workers on maternity leave are entitled to full wages during the first 14 weeks, paid by the employer. However, if an employee chooses to avail herself of additional maternity leave beyond 14 weeks, the employer is not obliged to pay wages for those extra four weeks. A maternity leave benefit for four weeks is paid by the Government in accordance with the provisions of Social Security Act, by virtue also of Regulation 7 of the Protection of Maternity (Employment) Regulations.

The ceiling can vary from year to year. It is currently EUR 166.26 per week (Schedule 14, Part IV, Social Security Act).

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

See above.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Yes. Regulation 7 of the Protection of Maternity (Employment) Regulations.

After 14 weeks the provision provides for an additional payment per week for four weeks under the Social Security Act.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Yes. According to Regulation 11(1) of the Protection of Maternity (Employment) Regulations, on the return to work, the employee shall be entitled to return to the same

job or when this is no longer possible for a valid reason, to equivalent or similar work which is consistent with her original contract of employment.

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes. Parental Leave Entitlement Regulations, S.L. 452.78, Regulations 4 and 5.

According to Regulation 4 (1) it is the individual right of both male and female workers to be granted unpaid parental leave on the grounds of birth, adoption, fostering or legal custody of a child to enable them to take care of that child for a period of four months until the child has attained the age of eight years: Provided that this right shall be granted on a non-transferable basis: Provided further that parental leave shall be availed of in established periods of one month each.

5.3.2 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

No.

5.3.3 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. Parental Leave Entitlement Regulations, Regulations 8, 9, 9A and 10. These implement Article 16 of Directive 2006/54.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes, in the sense of 'expressly'. Parental Leave Entitlement Regulations. S.L.452.78.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes, by virtue of the Parental Leave Entitlement Regulations, Article 3 (1).

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

Yes, by Article 3 (1) of the Parental Leave Entitlement Regulations, the regulations apply to all employees, whether full time or part time, and whether they are employed on an indefinite or a fixed-term contract: Provided that in all cases the employee has been in the employment of the same employer for a continuous period of at least twelve months.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

Four months. 12 months in the public service according to the Public Service Management Code.

5.4.5 Is the right of parental leave individual for each of the parents?

Yes.

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Any of those forms by agreement between the employer and employee, or as provided in an applicable collective agreement. Parental Leave Entitlement Regulations, Regulation 4(2).

5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

A minimum of three weeks' notice in writing, specifying the beginning and the end of the parental leave, prior to taking such leave. Regulation 6 (1) of the Parental leave Entitlement Regulations.

There is no mechanism for further flexibility.

5.4.8 Is there a work and/or length of service requirement in order to benefit from parental leave?

Yes. Parental Leave Entitlement Regulations, Regulation 3 (1).

The employee must have been in the employment of the same employer for a continuous period of at least twelve months.

In case of successive fixed-term contracts with the same employer (as defined in Council Directive 1999/70/EC on fixed-term work), the sum of these contracts is taken into account for the purpose of calculating the qualifying period. Parental Leave Regulations, Regulation 3(2).

5.4.9 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

Regulation 7 provides for flexibility as follows: '7. (1) An employer who receives notice for parental leave as prescribed in regulation 6, may temporarily postpone the granting of parental leave for justifiable reasons related to the operation of the place of work.'

5.4.10 Are there special arrangements for small firms?

Yes. Parental Leave Regulations, Regulation 7 (2).

Regulation 7(2) sets out acceptable grounds, all of which impact most closely on SMEs. These are: the term "justifiable reasons" includes:

- (a) where the work carried out at the place of business is of a seasonal nature;
- (b) where a replacement cannot be found within the notice period given by the employee;
- (c) where the specific employment of the employee who requests parental leave is of strategic importance to the undertaking or place of business;

- (d) where the place of business is a small enterprise employing not more than ten people, provided that the employer consults with the employee in order to establish alternative dates when such leave may be availed of, in such a way to avoid indefinite postponement of the requested parental leave;
- (e) where a significant proportion of the workforce applies for parental leave at the same time:

Provided that an employer who decides to postpone the granting of parental leave shall inform the employee in writing of the reasons for the postponement within two weeks of receipt of the employee's notice in cases provided for in Regulation 6(1):

Provided further that the postponement by the employer of the taking of parental leave is without prejudice to the employee's right to take the parental leave entitlement at the latest before the child reaches eight years of age and if such postponement may result in the loss of the parental leave entitlement or part thereof, it shall be the duty of the employer to immediately grant parental leave for a period equivalent to the leave still unavailed of, or for such other lesser period as may be requested by the employee.

5.4.11 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

No.

5.4.12 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes. Parental Leave Regulations, Regulation 10.

It provides that it is unlawful to dismiss a person solely for the reason that that person has applied for or taken parental leave.

5.4.13 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Yes. Parental Leave Regulations, Regulation 8 provides exactly provides for this.

5.4.14 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Yes. Parental Leave Regulations, Regulation 9.

5.4.15 What is the status of the employment contract or employment relationship for the period of the parental leave?

The employment relationship and contract continue, although this is not expressly stated.

5.4.16 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes.

5.4.17 Is parental leave remunerated by the employer? If so, how much and in which sectors?

Yes. Normal wages.

5.4.18 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

N/A.

5.4.19 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

None.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes. Minimum Special Leave Entitlement Regulations, S.L. 452.101.

A father is entitled to one working day of paid leave upon the birth of a child, known as 'birth leave.' The period is of two days in the public service.

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

No. It would be unlawful dismissal if this happened.

5.6 Time off/care leave

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes. Urgent Family Leave Regulations, S.L. 452.88.

By Regulation 4 (1) All employees shall be entitled to time off from work on grounds of force majeure for urgent family reasons in cases of sickness or an accident making the immediate presence of the employee indispensable.

By Regulation 4 (2) the circumstances in which leave will apply are set out.

By UFL Regulation 6: (1) The employer shall be bound to grant to every employee a minimum total of 15 hours with pay per year as time off from work for urgent family reasons as specified in these regulations:

Provided that the total number of hours availed of by the employee for urgent family reasons shall be deducted from the annual leave entitlement of the employee.

(2) The employer shall have the right to establish the maximum number of hours of time off from work in each particular case, save that the minimum time should not be less than one hour per case unless there is the specific agreement of the employee.

5.7 Leave in relation to surrogacy

5.7.1 Is parental leave available in case of surrogacy?

No.

5.8 Leave sharing arrangements

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

No.

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent ?

No.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

No. There is no legal right to work reduced hours unless provided for by a collective agreement, but a recent mother may avail herself of her unpaid parental leave entitlement to work fewer hours by an arrangement with her employer.

Also by Regulation 4 of the Parental Leave Entitlement Regulations (Legal Notice 225 of 2003) it is provided that unless otherwise prescribed in a collective agreement applicable to the employee, the employer together with the employee may decide whether to grant (sic) the parental leave on a full-time or a part-time basis, in a piecemeal way or in the form of a time credit system.

The Public Service Management Code (reflecting the collective agreement between the public service and its employees) makes provision for several elements of flexible working including reduced hours and telework. However, this is always a matter of changeable policy, the discretion of the Director and never a matter of right.

In principle, other collective agreements could provide for this in which case there could be rights which may be enforceable depending on the wording of the agreement.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

No.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

No.

6. Occupational pension schemes (Chapter 2 of Directive 2006/54)

The relevant legislation is the Equal Treatment in Occupational Security Schemes Regulations, enacted under the powers given by the Social Security Act. The extension of the material scope to occupational social security schemes is reflected in Maltese law. Now in force is the Retirement Pensions Act, Act XVI of 2011, which provides for the licensing and regulation by the competent authority (the Malta Financial Services Authority) of occupational retirement schemes and in part implements the Occupational Pensions Directive, Directive 2003/41/EC and related measures.

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Yes. This is done by Regulations 3 and 4 of the Equal Treatment in Occupational Social Security Regulations, S.L. 318.20 as follows:

3 (1) It shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, particularly with regard to:

- (a) the scope of the schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions; and
- (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

(2) For the purposes of these regulations:

- (a) direct discriminatory treatment shall be taken to occur where one person is treated less favourably than another is, has been, or would be, treated in a comparable situation;
- (b) indirect discriminatory treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a disadvantage when compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

4 (1) Any provisions contrary to the principle of equal treatment in any law, individual or collective contracts or agreements, internal rules of undertakings or rules governing any registered organisation in terms of applicable law, shall be considered null and void.

(2) The provisions referred to in subregulation (1) shall include such provisions:

- (a) determining the persons who may participate in an occupational scheme;
- (b) fixing the compulsory or optional nature of participation in an occupational scheme;
- (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
- (d) laying down different rules, except as provided for in paragraphs (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
- (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
- (f) fixing different retirement ages;
- (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons, which are granted by law or agreement, and are paid by the employer;

- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes.

Provided that in the case of funded defined-benefit schemes, certain elements including:

- (i) the conversion into a capital sum of part of a periodic pension;
 - (ii) the transfer of pension rights;
 - (iii) a revisionary pension payable to a dependant in return for the surrender of part of a pension;
 - (iv) a reduced pension where the worker opts to take early retirement;
- may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex, at the time when the scheme's funding is implemented;

- (i) setting different levels for workers' contributions;
 - (j) setting different levels for employers' contributions,
- except:

- (i) in the case of defined-contribution schemes if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes;
 - (ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;
 - (k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in paragraphs (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.
- (3) For the purpose of these regulations, where the granting of benefits is left to the discretion of the scheme's management bodies, the latter must comply with the principle of equal treatment.

6.2 Is the personal scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

It is as required by Article 6 of the Directive.

6.3 Is the material scope of national law relating to occupational social security schemes more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

It is the same as required by Article 7 of the Directive.

6.4 Have the exclusions from the material scope as specified in Article 8 of Directive 2006/54 been implemented in national law?

No.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

No. Maltese law is in compliance.

6.6 Is sex used as an actuarial factor in occupational social security schemes?

There is no provision as yet for occupational pensions.

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security

schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

There is very little provision as yet for occupational schemes, so there is very little experience.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

Yes. The Social Security Act (Chapter 318 of the Laws of Malta) is deemed to cover all the relevant risks and the general principle of equality between men and women is applied. This law applies to all persons who work for an employer for eight hours or more per week. This may have the effect of ruling out of its operation (and protection) many female workers who work few hours with the same or several employers per week (for example, as a home help).

7.2 Is the personal scope of national law relating to statutory social security schemes more restricted or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

It is the same.

7.3 Is the material scope of national law relating to statutory social security schemes more restricted or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

It is the same.

7.4 Have the exclusions from the material scope as specified in Article 7 of Directive 79/7 been implemented in national law? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

In general, Maltese law has in the past not addressed the matters referred to in Article 7(1) of the relevant Directive, i.e. the exclusions. However, the Government has declared its intention to abide by its obligation under the Directive to periodically examine the matter of the exclusions. For example, the statutory scheme was in fact amended by the Social Security (Amendment) Act of 2006 to provide for equal retirement ages and for the gradual (phased-in) increase in the retirement age to 65 for both men and women.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

No. Article 5 of the Directive has been transposed in Regulation 5 of the Access to Goods and Services and their Supply (Equal Treatment) Regulations, 2008 (L.N. 181 of 2008) issued by the Minister of Social Policy under the Equality for Men and Women Act (Cap. 456). These Regulations have been amended by means of the Access to Goods and Services and their Supply (Equal Treatment) (Amendment) Regulations, 2012 (L.N. 417 of 2012) published in the Government Gazette of Malta No. 18, 995 on the 30 November 2012 in order to bring the said Regulations into line with the *Test-Achats* ruling and the Guidelines issued by the European Commission.

Moreover, on 13 February 2012, the MFSA amended Insurance Rule 6 of 2011 on the Scheme of Operations Relating to the Business of Insurance so as to refer to the Guidelines issued by the European Commission to clarify that the unisex rule contained in Article 5(1) of the Directive is to apply to all insurance contracts entered into after 21 December 2012.

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

No.

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

Yes. The Directive was sought to be transposed by an amendment of the Equality for Men and Women Act of 2003, Chapter 456 of the Laws of Malta, by the Equality for Men and Women (Amendment) Act of 2012, and by the Equal Treatment in Self-Employment and Occupation (Amendment) Order 2012, which amended the ETSEO Order of 2007. The first amending Act introduced a new definition of a 'self-employed worker' into the definition Article, Article 2, in a manner that combines into one provision Paragraphs (a) and (b) of the Directive. It is expressly stated in the definition that this meaning is 'in line with Directive 2010/41 of the European Parliament and the Council of 7 July 2010.' The Equal Treatment in Self-Employment and Occupation (Amendment) Order of 2012 (Legal Notice 260 of 2012) amended the ETSEO Order of 2007 in order expressly to bring the law into line with the Directive. The broad effect of the above legislation was to apply many of the provisions of the Equal Treatment in Employment Regulations to the self-employed and to their spouses and to implement Directive 2010/41.

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

The following illustrates one problem that can arise and has arisen: the dividing line between self-employment and employment. The Industrial Tribunal has now delivered its ruling in the *Psaila Savona* Case.¹ This case had been pending for four years, only to end with the Tribunal deciding in March of this year that it had no competence to hear the case on the merits since there was no employment relationship between the parties but rather a consultancy agreement. In effect, the Tribunal held that there was no contract of service and therefore no employer-employee relationship, so that the relationship was not governed by the law relating to employment relationships. Nor did the Industrial Tribunal have competence to decide disputes other than those arising from a contract of employment.

Dr Anika Psaila Savona, a lawyer, had alleged unfair dismissal on grounds of pregnancy. Her employer, a leading hotel group, argued that she was not an employee but a 'legal consultant' operating as a self-employed person, and that she was therefore not covered by employment legislation, as well as the fact that she was not dismissed on grounds of pregnancy.

The case was to test the limits of the anti-discrimination provisions of the Employment and Industrial Relations Act of 2002 (Chapter 452 of the Laws of Malta, hereafter 'EIRA') and the Protection of Employment (Maternity) Regulations by reference to the definitions of an 'employer', 'employee', 'contract of service' and 'contract of employment.'

The claimant argued that irrespective of the profession and designation, and even the signing by her of a 'consultancy agreement' she was in fact and in law an employee at the time of her dismissal, albeit as a highly qualified professional. Dr Psaila Savona

¹ *Annika Psaila Savona v. CHI Ltd.*, Industrial Tribunal, Decision No. 2275 of 3 March 2014.

<https://dier.gov.mt/en/Industrial%20Relations/Industrial%20Tribunal/Decisions/Pages/2014-Decisions.aspx>. Accessed 26 November 2015.

Massa, A., (2014), 'Tribunal takes four years on pregnant woman's case and then it decides it has no jurisdiction over sacked mother's claim', *Sunday Times*, March 16.

<http://www.timesofmalta.com/articles/view/20140316/local/Tribunal-takes-four-years-on-pregnant-woman-s-case.510749>. Accessed 26 November 2015. Industrial Tribunal, Decision No. 2275 of 3 March 2014.

argued that she only signed the agreement presented to her – which inter alia provided that the agreement was not to be construed as creating an employment relationship – pending a reordering of her employment relationship and on the assurance of her employer that this would occur.

The Employment Status National Standard Order of 2012 [S.L. (Subsidiary legislation) 452.108 of 31 January 2012, Legal Notice 44 of 2012, as amended by Legal Notices 110 and 364 of 2012] sets out, in Paragraph 3, a presumption in favour of an employment relationship. The criteria to be applied in supporting the presumption centre around the concept of dependent work.

The proviso added to the definitions in the EIRA of 'contract of service' and 'contract of employment' by the Employment Status National Order (Legal Notice 44 of 2012) appeared possibly to indicate an outcome in favour of the claimant if the facts showed that in the course of carrying out her duties she had acted under instruction to a high degree. Legal Notice 44 had the object of 'clarifying' certain provisions of the EIRA. The case might also have led to the sort of preliminary reference to the Court of Justice that would bring before the Court of Justice the issue of the personal (and/or relational) scope of EU anti-discrimination employment law. Here, no reference was made, since the Tribunal dismissed the case for lack of jurisdiction, arguing that since there was no 'employment' the Industrial Tribunal was not the proper forum (and this after a number of years after the filing of the case). The claimant has since filed a case before the civil court and the possibility of a reference to the Court of Justice may arise there.

The above case illustrates one potential problem, as faced by those in unclear territory between employment and self-employment. Having said this, discrimination on grounds of sex is prohibited by the general legislation on equality for men and women, namely the Equality for Men and Women Act of 2003, Chapter 456 Laws of Malta which provides that the term 'employment' in the Act shall mean any gainful activity including self-employment. 'Self-employed workers' are then defined in a manner stated to be in line with Directive 2010/41. Also, the Equal Treatment in Self-Employment and Occupation Order of 2007 (hereafter the 'ETSEO Order') as amended in 2012 to give effect to Directive 2010/41 makes a clear provision for the female self-employed and spouses (and presumably life partners at least to the extent that there is a registered civil union).

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

There is no express exclusion. Article 2(a) has been transposed via the definition of 'self-employed worker' as inserted by an amendment into the Equality for Men and Women (Amendment) Act of 2012. The relevant part reads: 'self-employed workers... means all persons pursuing a gainful activity for their own account' and then goes on to assimilate to the above 'spouses of self-employed workers not being employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.' In short, the two categories listed separately under the two paragraphs of Article 2 of the Directive are assimilated and brought under the definition of 'self-employed worker.' Also relevant is Article 4 of the ETSEO Order 2007, as amended in 2012. The definition is now the standard. Any reference to the self-employed in other legislation is now normally a reference to the definition in the amended EMWA. By virtue of the scope of the Directive as set out in Article 2 of the Directive, which has been transposed as a matter of the definition also of a 'self-employed worker,' business partners are excluded. There is no special provision for the agricultural sector.

Neither Article 2 of the EMWA nor the ETSEO Order refer to 'life partners.' However, it would now seem to be the position at law that the word 'spouse' in the Act will be interpreted to cover a life partner if there is a civil union registered under the Civil Unions Act 2014 which, in Article 4, assimilates a civil union with marriage and declares that save as provided in the Act a civil union, once registered, shall have the corresponding effects and consequences in law of a properly contracted civil marriage. No judicial interpretation has so far been given to this provision, but it would seem that unregistered unions will not produce any legal effects.

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment more restricted or broader than specified in Article 4 Directive 2010/41/EU?

The EMWA is framed in terms of non-discrimination, rather than in terms of equal treatment or equal opportunities. The emphasis is on formal rather than substantive equality, despite a provision allowing positive action measures. On the other hand, it is not clear how much more is required by the actual wording of Article 4(1) of the Directive. Article 4 of the Directive is otherwise implemented by Article 4A of the ETSEO order 2007 as amended in 2012.

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

No positive action has been taken, although Article 2(4)(b) of the EMWA provides that nothing shall be deemed to constitute discrimination insofar as the 'treatment' at issue constitutes measures of positive action for the purpose of achieving substantive equality for men and women.

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

Yes. Social protection is available to all in work on a compulsory basis through the payment of weekly contributions. The contributory scheme is universal as a system where an employee, a self-occupied [a self-employed person earning at least EUR 950 per annum] or a self-employed person pays a weekly contribution as laid down by the Social Security Act. All employed, self-employed, self-occupied and unemployed persons may be insured. Therefore as long as one is registered with the Department of Social Security and makes the minimum payments as required one is covered for a pension and all other benefits (health, unemployment, maternity etc.). There is little provision at the moment for occupational pensions. Some occupational pensions do exist but these are very few. One presumes that the Civil Unions Act has put life partners so determined according to the Act in the same situation as spouses. The spouse or life partner would have to declare their work situation as either an employee or as a self-employed person and pay contributions as required in order to benefit from social security provisions.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

Yes. Under Maltese law, maternity benefits are payable to all women who are in employment, self-employment or self-occupation, as defined in the Social Security Act (Chapter 318 Laws of Malta), and who have paid the minimum number of contributions. The expert believes that these maternity benefits meet the requirement of sufficiency under sub-paragraph (a) of Article 8(3). No specific provision has been made with regard to ensuring access to temporary replacement services. There is still an absence of temporary agencies in Malta.

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

Yes. The relevant legislation is the Equal Treatment in Occupational Social Security Schemes Regulations, Legal Notice 317 of 2005, enacted under the powers given by the Social Security Act. The extension of the material scope to occupational social security schemes is reflected in Maltese law. Now in force is the Retirement Pensions Act, Act XVI of 2011, which in part implements the Occupational Pensions Directive, Directive 2003/41/EC and related measures. The (ongoing) pensions reform is designed to introduce a three-pension structure, but so far no developments have occurred as to the second and third pensions.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

There is no provision at the moment for occupational pensions.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Yes. Regulation 4 of the Equal Treatment in Self-employment and Occupation Order of 3 April 2007, S.L. 460.16.

Regulation 4 provides that:

'Regulations 1 to 8, both inclusive, 12, 12A, 13 and 14 of the relevant (Equal Treatment in Employment) regulations, shall be applicable to all persons, also in relation to conditions for access to self -employment or to occupation, including the spouses of persons in self-employment or occupation, not being employees or business partners, where they habitually participate in the activities of the self-employed or occupied person and perform the same tasks or ancillary tasks, and the provisions of regulation 1(3) and (4) of the relevant regulations shall be understood and construed accordingly.'

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes. Access to Goods and Services and Their Supply (Equal Treatment) Regulations, S.L. 456.01, (the AGS Regulations) enacted under the Equality for Men and Women Act 2003, Chapter 456 of the Laws of Malta.

The Equality for Men and Women Act (Chapter 456 of the Laws of Malta) itself already contained some provisions that can be considered as implementing some of the principles of the Directive. For example, Articles 8(1) and (3), 9, and 10 of the Act, respectively on educational guidance, sexual harassment, and discriminatory advertising.

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

It is broader. By Regulation 1(3) of the AGS Regulations, the regulations shall apply to all persons who provide goods and services made available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life, and to all transactions carried out in this context.

9.3 Have the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education, been implemented in national law?

No.

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

Provision for this is made in Regulation 4(8) of the AGS Regulations. This provides that these regulations shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

There has been no application of this in legislation.

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Yes. AGS Regulations, Regulation 5 (1).

AGS Regulations, Regulation 5 (1), which substantially reproduces Article 5 (1) of the Directive.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.

By Regulation 5 (2) Malta has taken advantage of the option provided in Article 5(2) of the Directive with respect to insurance contracts concluded before 21 December 2012.

Article 5 of the Directive was transposed in Regulation 5 of the Access to Goods and Services and their Supply (Equal Treatment) Regulations, 2008 (L.N. 181 of 2008) issued by the Minister of Social Policy under the Equality for Men and Women Act (Cap. 456). These Regulations have been amended by means of the Access to Goods and Services and their Supply (Equal Treatment) (Amendment) Regulations, 2012 (L.N. 417 of 2012) published in the Government Gazette of Malta No. 18, 995 on the 30 November 2012 in order to bring the said Regulations into line with the *Test-Achats* ruling and the Guidelines issued by the European Commission.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

No.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

No.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

Yes. The pre-existing legal framework was broadly in compliance but was far less elaborate than the current provision. It incorporated: Criminal Code - Chapter 9, Civil Code - Chapter 16, Domestic Violence Act - Chapter 481, Victims of Crime Act, and Chapter 539, of the Laws of Malta. The Commission on Domestic Violence was set up under Article 3 of the Domestic Violence Act (Chapter 481, hereinafter the DV Act) on March 1, 2006. The main role of the Commission is that of advising the Minister responsible for social policy on all aspects of domestic violence. These aspects include:

- (i) combating domestic violence, especially by raising awareness of the problem;
- (ii) suggesting areas for research, recommending policy amendments, and identifying training for professional groups.

Provisions penalising female genital mutilation, stalking, forced marriage and enforced sterilisation were introduced into the Criminal Code (Chapter 9 Laws of Malta, Articles 251AA – 251I) prior to the Convention's ratification, and in anticipation of that event.

Malta passed the 'Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act,' Chapter 532 of the Laws of Malta, on 17 June 2014 [hereinafter referred to as 'The Ratification Act']. By Article 5, the Ratification Act incorporates the Convention into Maltese law and makes it enforceable in Malta as part of the Law of Malta. The Schedule to the Act comprises the English text of the Convention by virtue of Article 6 of the Act. There are no major problematic areas. However, the Convention needs implementation in order to have proper and full effect. An inter-ministerial committee was set up to ensure this, and is currently in the process of submitting recommendations to the Government.

Recent legislation has proceeded to fill many gaps. There are no further legislative proposals at this time.

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

They are implemented in national legislation. There is no case law.

Under the EIRA, Article 28, it is provided that: 'It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.'

This precise wording is also to be found in Regulation 4(7) of the AGS Regulations.

The legislation complies with the Directives.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. Regulation 7(3) of the AGS Regulations provides that '(3) In any proceedings mentioned in subregulations (1) and (2) hereof, where persons who consider themselves wronged since the principle of equal treatment has not been applied to them, establish before any competent Court or Tribunal facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the defendant to prove that there has been no breach of the principle of equal treatment on the hearing of the complaint, and the Court or Tribunal shall uphold the complaint if the defendant does not prove that he did not commit that unlawful act.'

The same wording is to be found in Regulation 10(3) of the Equal Treatment in Employment Regulations.

It is for the complainant to show 'facts from which it may be presumed that there has been direct or indirect discrimination.' The Maltese Courts have not specifically had to apply this but, as is implicit in the *Meister* case, this wording lends itself to an approach where the complainant must effectively prove facts that are typically in the knowledge or possession of the employer or other alleged defaulter before the burden of proof then shifts to the defendant. So the *Meister* case is important as being interpretative of the national court and Tribunal's obligations. However, the starting point is that the written law is in line with the Directives. A recent amendment of the Equality for Men and Women Act sought to place the burden of proof concerning non-discrimination even more clearly on the defendant after the plaintiff shows facts suggesting discriminatory treatment, in principle bringing the law squarely into line with EU law on this point.²

² The onus is now on defendants to prove non-discrimination, *Times of Malta*, Tuesday May 27, p. 8.

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

The EIRA did not make the breach of Articles 26 or 27 a criminal offence. It did provide for civil liability in Article 30, which empowers the Industrial Tribunal to give relief. Further to this, Article 10 of the ETE Regulations, enacted under the EIRA, also adds a right of access to the Civil Court for relief by way of an injunction and/or compensation. These Regulations, via Article 14 of the Regulations, also render all breaches of the Regulations – and therefore also of the ‘equal pay for same or equal work’ principle – a criminal offence punishable by a fine (*multa*) not exceeding EUR 2 329.37 or imprisonment for a period not exceeding six months, or both.

Without prejudice to the remedies available under Article 30 of the EIRA, Article 19 of the EMWA grants a right of access to the competent court of civil jurisdiction (the ‘Civil Court First Hall’) for an injunction and/or compensation. The time limit for the bringing of the action is four months ‘from the alleged breach,’ according to the ETE Regulations. While it is considered that the prospect of imprisonment provides an adequate deterrent, it cannot really be said that the prospect of the fine is any real deterrent, due to its rather low ceiling.

Under the Protection of Maternity (Employment) Regulations of 2003, it is an offence for any person to contravene the Regulations, punishable by a fine of not less than EUR 465.87, a minimum which is considered by many NGO experts to be too low to provide a deterrent.

Any breach of the Parental Leave Regulations is an offence rendering the offender liable to a minimum penalty of EUR 116.47 and a maximum penalty of EUR 1 164.69, and again it can be seriously doubted whether this provides sufficient deterrence in practice.

Both in terms of the EIRA and of the EMWA, avenues for redress include the Industrial Tribunal and the Civil Court; the Civil Court sitting in its constitutional jurisdiction; the Constitutional Court; the Public Service Commission (for the public service) and the Ombudsman (whose recommendations are non-binding). The Industrial Tribunal and the Court are also accessible with the assistance of the NCPE, Malta’s ‘equality body’ as established under the EMWA. It possesses powers of investigation and mediation and, with the victim’s approval, of suit. Until a few years ago, the annual reports of the NCPE used to declare that some 100 or so complaints were filed each year in the gender context and that a large number of these were settled after mediation by the NCPE. The numbers seem to have dropped markedly in recent years to a dozen or so. Meanwhile, the entire human rights structure is under review by the Government, which has proposed the setting up of a Human Rights and Equality Commission.

Regulation 10 of the ETE Regulations applies to all situations of sex discrimination in employment and vests the right to access the Industrial Tribunal (without prejudice to the right to bring an action in the Civil Court for an order to cease and desist) for a declaration of the nullity of any contract, collective agreement or clause as such, and for compensation. As is usual, it places the burden of proof on the employer once the claimant proves facts from which it can be presumed that ‘there has been direct or indirect discrimination.’ This wording is now compliant with Article 4 of Directive 97/80/EC (the Burden of Proof Directive). As to time limits, the EIRA and the ETE Regulations 2004 set a peremptory period of ‘within four months of the alleged breach’ for the filing of the complaint or the bringing of the action. The EMWA, which applies also beyond the employment context, sets no time limit.

In 2011, Parliament adopted the Procedure for Investigations Regulations 2011 made under the power conferred by Article 18(3) of the EMWA, which lay down important provisions for the carrying out of investigations under the Act, giving the Commissioner for the Promotion of Equality, whether conducting an investigation following an individual complaint or under own powers of the Commission, the power to conduct a general investigation, the power to require information or documents and to summon persons to give information orally.

Under the AGS Regulations any contractual provision, internal rules or governing rules that breach EU law are rendered null and void ipso jure, and are unenforceable, by virtue of Regulation 10(2). The enforcement of good practice, for example with regard to exclusion from places of leisure and entertainment for reasons of race, is another matter.

The NCPE and other associations, organisations or legal entities having a 'legitimate interest' may engage themselves on behalf of or in support of a complainant in all judicial proceedings, with the complainant's approval. There is no clear provision engaging the 'social partners.' While the trend is to regard collective agreements as binding, they cannot be said to have been employed as such to implement Union Law. Also, the dearth of cases shows the reluctance of complainants to sue or authorise others to sue on their behalf. Otherwise, remedies include an order to cease and desist and/or, in the eventuality, reinstatement and compensation.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

While it is considered that the prospect of imprisonment provides an adequate deterrent, it cannot really be said that the prospect of the fine is any real deterrent, due to its rather low ceiling. In general it can be said that where the law imposes a penalty (a fine) such penalties are surely too low to sufficiently dissuade and deter in all cases. Imprisonment is laid down for cases of victimisation, harassment or sexual harassment.

11.4 Access to courts

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Legislation and case law do not throw any light on the matter. However, the number of complaints to the NCPE (the current main Equality Body) have diminished to a point of about twenty per year, which all agree is ridiculously low and can only be explained by the stigma that will attach to the complainant in a small territory where everyone knows everybody else and reputations (including as a 'trouble-maker') are easily established. Also, cases tend to take a very long time to be heard and decided.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

While such access is freely available for the protection of their own interests, when it comes to acting on behalf of a victim the latter's approval is needed in order that the victim be assisted or represented by them.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

The ordinary rules on legal aid apply. It is generally available.

11.5 Equality body

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. National Commission for the Promotion of Equality (the NCPE). Its website is www.equality.gov.mt.

Its brief was recently widened, and now covers any form of discrimination based on:

- (i) sex/gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity, gender expression or sex characteristics in employment; banks and financial institutions, as well as education; and
- (ii) racial / ethnic origin and gender in the provision of goods and services and their supply.

According to Article 12 of the EMWA, the functions of the NCPE entail:

- (a) to identify, establish and update all policies directly or indirectly related to issues of equality;
- (b) to identify the needs of persons who are disadvantaged by reasons of their sex and to take such steps within its power and to propose appropriate measures in order to cater for such needs in the widest manner possible;
- (c) to monitor the implementation of national policies with respect to the promotion of equality;
- (d) to liaise between, and ensure the necessary coordination between, government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the Commission from time to time;
- (e) to keep direct and continuous contact with local and foreign bodies working in the field of equality issues, and with other groups, agencies or individuals as the need arises;
- (f) to work towards the elimination of discrimination between men and women;
- (g) to carry out general investigations with a view to determine whether the provisions of this Act are being complied with;
- (h) to investigate complaints of a more particular or individual character to determine whether the provisions of this Act are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints;
- (i) to inquire into and advise or make determinations on any matter relating to equality between men and women as may be referred to it by the Minister;
- (j) to provide assistance, where and as appropriate, to persons suffering from discrimination in enforcing their rights under this Act;
- (k) to keep under review the working of this Act, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution;
- (l) to perform such other function as may be assigned by this or any other Act or such other functions as may be assigned by the Minister.

Legal Notice 85 of 2007 - Equal Treatment of Persons Order extended the NCPE's remit to include the promotion of equality on the grounds of race/ethnic origin in access to and the supply of goods and services. Employment issues in the context of racial or ethnic discrimination remained with the Department of Employment and Industrial Relations. By virtue of this Legal Notice, the NCPE is bound to ensure that no person, establishment

or entity, whether in the private or public sector, discriminates against any other person in relation to:

- (a) Social protection, including social security and healthcare;
- (b) Social advantages;
- (c) Education;
- (d) Access to and supply of goods and services which are available to the public, including housing; and
- (e) Access to any other service.

The NCPE is also responsible for enhancing equality between genders in access to and the supply of goods and services, as established by Legal Notice 181 of 2008 – Access to Goods and Services and their Supply (Equal Treatment) Regulations, 2008. Hence, the NCPE also works to combat direct and indirect discrimination as well as sexual harassment on the grounds of gender in access to and the supply of goods and services. In effect, the functions of the NCPE are extended to safeguard gender equality in this sphere, and specifically to:

- (a) providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- (b) conducting independent surveys concerning discrimination; and
- (c) publishing independent reports and making recommendations on any issue relating to such discrimination;
- (d) Access to and supply of goods and services which are available to the public, including housing; and
- (e) Access to any other service.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

They are active in the context of the Malta Council for Economic and Social Development, a tripartite body representing the Government, employers and the unions. This body also discusses the upcoming national budgets. It is established by Act of Parliament XXV of 2001.

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are in the main concluded at enterprise level. However, employment in the public service is regulated by the Public Service Management Code, which applies to all public service employees. Collective agreements are generally binding as part of the contract of service of the employee. The law (for example, the EIRA) will often save the terms and conditions in collective agreements and explicitly state that those terms and conditions apply where they are more favourable to the employee than the minimum safeguards provided by the law.

12. Overall assessment

The main laws (Acts) passed by the Maltese House of Representatives in order to implement or transpose the relevant EU Directives into Maltese law are the Employment and Industrial Relations Act 2002 (EIRA) and the Equality for Men and Women Act 2003 (EMWA). The implementation was completed by the passing of a number of pieces of subsidiary legislation in the form of Legal Notices under powers conferred by these main Acts of Parliament. This legislation seeks (in the view of the expert largely successfully) to implement all the main concepts and provisions of the EU gender acquis.

Some rationalisation of the various bits and pieces of legislation adopted over time has taken place. Previously there were too many separate small pieces of legislation, often with overlap or duplication among them and sometimes with differences in wording. The Equal Treatment in Employment Regulations of 2004 (the ETE Regulations) plugged many of the gaps, generally bringing all concepts and definitions into line with EU law. Later Acts of Parliament amending the primary legislation in April 2009 brought the EIRA and the EMWA themselves more fully into line with EU law. These were Act No. IV 2009, amending the EMWA, and Act No. V 2009, amending the EIRA. New definitions were included for discrimination of all kinds. In 2011, the Procedure for Investigations Regulations 2011 were adopted (Legal Notice 316 of 2011), governing the conduct of investigations by the National Commission for the Promotion of Equality (NCPE), and further empowering the Commissioner for the Promotion of Equality for this purpose. More recent legislation includes detailed regulations on equal treatment in employment, on equality regarding various types of leave, including maternity leave, and the extension of equality to employees in the public service (both full time and part time, fixed term or indefinite) and legislation on access to goods and services and their supply. Most recently (2015) legislation includes a Gender Identity Act.

In the above legislation one will find the definitions and main rules relating to discrimination, positive action (permitted both by the EMWA and by the Constitution), harassment and sexual harassment, and all further principles and rules implementing the various directives. The definitions in the law of the various concepts such as discrimination (direct and indirect), harassment and sexual harassment, and an instruction to discriminate are faithful reproductions of the definitions in EU law.

A categorical assessment is impossible without sufficient court judgments. Also, it remains true that the manner of implementation in general has itself given rise to some lack of clarity in the law. There are the respective but overlapping spheres of the EIRA and the EMWA. The EMWA is a general Act, while the EIRA deals only with the employment context. Yet both prohibit discrimination in employment and set out definitions of discrimination, sexual harassment and other matters. Yet they are congruent in essence and no real problems of interpretation or application probably need arise. Regulations for giving 'better effect' to the primary legislation have been made under the EIRA and more recently under the EMWA. The EIRA regulations effectively updated the principal legislation's key concepts and brought these concepts closer to the definitions in the respective EU directives. The situation was much improved by the enactment of Acts IV and V of 2009. Still, where penalties are laid down, they are regarded as weak in the estimation of many, so that no truly effective deterrent is provided. Also, European law may really need to take a hand in solving the problem that complainants are reluctant to take up their rights and pursue remedies through the national tribunals and courts, for example by examining the use of public interest actions. Previous reports had raised the issue of the lack of clarity as to the wording and potential application of the rule on the burden of proof in judicial proceedings in the context of discrimination. A recent amendment of the Equality for Men and Women Act seeks to place the burden of proof concerning non-discrimination even more clearly on the defendant after the plaintiff shows facts suggesting discriminatory treatment, bringing the law squarely into line with EU law on this point.

Having said this, the overall comment should be that the Maltese courts and tribunals have the tools at their disposal to fully 'apply' Union law by properly interpreting and applying the Maltese law in place as well as giving effect to directly applicable or directly effective Union law.

Annexes

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