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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

Romina Bartolo

Reporting period 1 January 2018 – 31 December 2018

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1 Introduction

1.1 Basic structure of the national legal system

The supreme law of Malta 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: at the top is the Court of Appeal and the Constitutional Court, below them is the Civil Court and the Criminal Court, and below that are the Magistrates courts. Constitutional matters are ultimately decided by the Constitutional Court. Gender equality legislation is a matter for Parliament and often takes the form of ministerial secondary or 'subsidiary' legislation (denoted by the prefix 'SL') by virtue of enabling or primary law. Article 14 of the Constitution states:

'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.'

1.2 List of main legislation transposing and implementing the directives

Acts and subsidiary legislation (SL).¹

Employment and Industrial Relations Act (Chapter 452, Laws of Malta) (EIRA)

- SL 452.78, Parental Leave Entitlement Regulations of 2 September 2003 as amended in 2007, 2010 and 2011 transposing Council Directive 2010/18/EU of 8 March 2010 repealing Directive 96/34/EC implementing the revised framework agreement on parental leave.
- SL 452.79, Part-Time Employees Regulations of 1 January 2003 as amended in 2007, 2008, 2010 and 2016 implementing Directive 97/81/EC the framework agreement on part-time working.
- SL 452.81, Contracts of Service for a Fixed Term Regulations of 15 June 2007 as amended in 2008 and 2009 implementing Directive 1999/70 concerning the framework agreement on fixed-term work.
- SL 452.87, Organisation of Working Time Regulations of 5 April 2004 as amended in 2007, 2012, 2017 and 2018 implementing Directive 2003/88/EC concerning certain aspects of the organisation of working time.
- SL 452.88, Urgent Family Leave Regulations of 5 April 2004 as amended in 2007 implementing Directive 2010/18/EU the revised framework agreement on parental leave and repealing Directive 96/34/EC.
- SL 452.89, Employment and Industrial Relations Interpretation Order of 7 October 2003 implementing Council Directive 2000/43/EC of 29 June 2000 and Directive 2000/78/EC of 27 November 2000, prohibiting discrimination on the basis of religion or belief, disability, age, sexual orientation, race or ethnic origin.
- SL 452.91, Protection of Maternity (Employment) Regulations of 5 January 2004 as amended in 2004, 2007, 2011, 2012 and 2014 implementing Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
- SL 452.95, Equal Treatment in Employment Regulations (ETE Regs) of 5 November 2004 as amended in 2007, 2008, 2011 and 2014 implementing the relevant provisions of Council Directives 76/207/EEC, 2000/78/EC, 2000/43/EC, 2002/73/EC and 2006/54/EC.

¹ <http://www.justiceservices.gov.mt/LOM.aspx?pageid=24>.

- SL 452.97, Extension of Applicability to Service with Government (Part-Time Employees) Regulations of 9 March 2007 implementing Directive 97/81/EC the framework agreement on part-time working.
- SL 452.99, Extension of Applicability to Service with Government (Contracts of Service for a Fixed Term) Regulations of 15 June 2007 implementing Directive 1999/70 concerning the framework agreement on fixed-term work.
- SL 452.100, Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations of 13 March 2007 implementing the relevant provisions of Council Directives 76/207/EEC, 2000/78/EC, 2000/43/EC, 2002/73/EC and 2006/54/EC.
- SL 452.102, Extension of Applicability to Service with Government (Parental Leave Entitlement Regulations and Urgent Leave) Regulations of 1 December 2009 implementing Directive 2010/18/EU the revised framework agreement on parental leave and repealing Directive 96/34/EC.
- SL 452.105, Extension of Applicability to Service with Government (Protection of Maternity Employment) Regulations of 22 October 2010 implementing Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Equality for Men and Women Act, Chapter 456, Laws of Malta [EMWA] of 9 December 2003 implementing Directive 2006/54/EC on equal treatment for men and women in matters of employment and occupation and Directive 2010/4/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

- SL 456.01, Access to Goods and Services and their Supply (Equal Treatment) Regulations (AGS Regs) of 1 August 2008 implementing Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to goods and services and their supply and the Communication from the European Commission (22.12.2011 C(2011) 9497) containing guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*).

1.3 Sources of law

The main sources of gender equality law are: national legislation as described above; EU gender equality law; international treaties, such as the Istanbul Convention on preventing and combating violence against women and domestic violence; the Discrimination (Employment and Occupation) Convention; the Equal Remuneration Convention; the European Convention on Human Rights; the European Social Charter, the Convention on the Nationality of Married Women, the Convention on the Political Rights of Women; the Convention on the Elimination of all Forms of Discrimination against Women; and case law. Opinions of the equality bodies do not play an important role, since they are not binding unless the parties agree that they should be binding. However, when the opinions of the equality bodies are reported in the press, they raise awareness about the issues involved.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Article 45 of the Constitution provides as follows:

- (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 Other constitutional protection of equality between men and women

The Constitution lists the following principles:

- right to work for all citizens and the responsibility of the state in promoting the conditions to make this right effective (Article 7);
- state protection of work and promotion of the advancement of workers (Article 12);
- the equal right of men and women to enjoy all economic, social, cultural, civil and political rights, for which purpose the state will take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; in particular the state will aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men (Article 14 – rights of women workers).

2.2 Equal treatment legislation

The main law prohibiting sex discrimination is the Equality for Men and Women Act, (EMWA) (Chapter 456 of the Laws of Malta). Other legislation includes the Employment and Industrial Relations Act (EIRA), and the Gender Identity, Gender Expression and Sex Characteristics Act 2013 (Chapter 540 of the Laws of Malta), the Cohabitation Act (Act 15 of 2017), the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act (Chapter 567 of the Laws of Malta) and the Gender-Based Violence and Domestic Violence Act (Chapter 581 of the Laws of Malta).

The relevant secondary legislation includes: Parental Leave Entitlement Regulations, Part-Time Employees Regulations, Contracts of Service for a Fixed Term Regulations, Organisation of Working Time Regulations, Urgent Family Leave Regulations, Employment and Industrial Relations Interpretation Order, Protection of Maternity (Employment) Regulations, ETE Regulations, Extension of Applicability to Service with Government (Part-Time Employees) Regulations, Extension of Applicability to Service with Government (Contracts of Service for a Fixed Term) Regulations, Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations, Minimum Special Leave Entitlement Regulations, Extension of Applicability to Service with Government (Parental

Leave, Entitlement Regulations and Urgent Leave) Regulations, Extension of Applicability to Service with Government (Protection of Maternity Employment) Regulations, Extension of Applicability to Service with Government (Employment Status) Regulations Act III of 2013, AGS Regs, and the Procedure for Investigation Regulations.

Besides sex discrimination, other discrimination grounds covered by national equal treatment legislation are gender, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, gender expression or sex characteristics.

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

No surveys have been published on these issues.

3.1.2 Other issues

There are no other issues to report.

3.1.3 General overview of national acts

National acts include: Chapter 456 of the Laws of Malta - Equality for Men and Women Act to promote equality between men and women; Chapter 452 of the Laws of Malta - Employment and Industrial Relations Act to regulate employment and industrial relations; the Constitution of Malta; Chapter 16 of the Laws of Malta - the Civil Code; Chapter 581 of the Laws of Malta - Gender-Based Violence and Domestic Violence Act; Chapter 540 of the Laws of Malta - Gender Identity, Gender Expression and Sex Characteristics Act and Chapter 318 of the Laws of Malta - Social Security Act.

3.1.4 Political and societal debate and pending legislative proposals

Pending legislative proposals include an equality bill, entitled:

'Act to prohibit discrimination in various spheres of life, to promote equality and prevent discrimination, inter alia, by giving effect to the relevant provisions of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to goods and services and their supply, Council Directive 2006/54/EC of 5 July 2006 implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), and the Communication from the European Commission (22.12.2011 C(2011) 9497) containing Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)'.²

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

A manual published by the National Commission for the Promotion of Equality in Malta (NCPE) defines sex as the biological and physiological characteristics that define men and women. Male and female characteristics are differentiated by genes, hormones,

² https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Equality%20Act.pdf. The Equality Bill was virtually on hold until the summer of 2019. It went through a First Reading in Parliament on 17th July 2019.

reproductive organs and other physical features.³ The manual describes gender as the 'socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for femininity and masculinity'. The variables which make up the concept of gender may vary from one society to another or even in different contexts within the same society. From birth, society attaches 'cultural roles', which are dependent on the sex of the child. Unless these roles are challenged, individuals become the products of this cultural conditioning.⁴

Article 2 of the Gender Identity Act 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.'

Act LVI of 2016 amended Chapter 540 of the Laws of Malta and introduced the definition of 'lived gender', which refers to each person's gender identity and its public expression over a sustained period of time.⁵

3.2.2 Protection of transgender, intersex and non-binary persons

Under 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. The Gender Identity Act holds that:

'(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 NCPE (2008) *Gender Sensitivity Manual*, p.7, available at: https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Living_Equality/manual.pdf.

⁴ NCPE (2008) *Gender Sensitivity Manual*, p.8, available at: https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Living_Equality/manual.pdf.

⁵ <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>.

(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.' (Article 13)

3.2.3 Specific requirements

Section 3(4) of the Gender Identity Act (Chapter 540 of the Laws of Malta) specifies that a transgender person must not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment, to make use of the right to gender identity.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

Direct discrimination is explicitly prohibited in national legislation.

Article 4 of the Equality for Men and Women Act states that '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.'

Article 2 states that "discrimination" means discrimination based on sex or because of family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics and includes the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds and "discriminate" shall be construed accordingly.'

Article 2 of the Employment and Industrial Relations Act defines 'discriminatory treatment' as 'any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association'.

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

'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. 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.'

In the view of the author of this report, this definition complies with the EU definition.

3.3.2 Prohibition of pregnancy and maternity discrimination

Pregnancy and maternity discrimination are explicitly prohibited in Article 4(1) and (2) of the Access to and the Supply of Goods and Services (Equal Treatment) Regulations (see above 3.3.1).

Moreover, Article 2(3) of the Equality for Men and Women Act states that, 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, 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 the view of the author of this report, the definitions comply with EU law.

3.3.3 Specific difficulties

There are no reported difficulties.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Article 4 of the Equality for Men and Women Act (EMWA) and Article 4 of the Access to and the Supply of Goods and Services Regulations explicitly prohibit indirect discrimination (see 3.3.1).

Regulation 3 of the ETE Regulations contains definitions of direct and indirect discrimination and of harassment and sexual harassment.

Indirect discrimination is defined in national legislation as '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'.⁶

In the view of the author of this report, this complies with EU law.

3.4.2 Statistical evidence

Section 4A of the EMWA provides that 'indirect discrimination may be proved by any means of evidence including statistical evidence.' There is no case law available.

3.4.3 Application of the objective justification test

There are no reported cases.

3.4.4 Specific difficulties

No specific difficulties arise.

3.5 Multiple discrimination and intersectional discrimination⁷

3.5.1 Definition and explicit prohibition

Article 3A of the Equal Opportunities (persons with disability) Act (Chapter 413 of the Laws of Malta) states that 'a person discriminates with another person in a multiple manner if apart from the disability there exists discrimination *inter alia* due to gender, age, civil status, sexual orientation, race, ethnicity, beliefs, skin colour, trade union affiliation or political belief.'

Moreover, Section 6 of the pending equality bill (see 3.1.4 above) states that 'it shall be unlawful to engage in any discrimination, whether direct or indirect, whether ordinary or intersectional, on the basis of any one or more of the protected characteristics laid out under this Act.'⁸

3.5.2 Case law and judicial recognition

There is no case law or judicial recognition to report.

3.6 Positive action

3.6.1 Definition and explicit prohibition

Article 45 of the Constitution, which prohibits discrimination, provides that

⁶ See Article 4 of the Equality for Men and Women Act and Article 4 of the Access to and the Supply of Goods and Services Regulations.

⁷ See for more information Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

⁸ https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Equality%20Act.pdf.

'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 AGS Regulations provide for positive action:

'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.' (Regulation 6)

The definition complies with Article 157(4) TFEU, in the opinion of the author.

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

There are no studies on this to report.

3.6.3 Specific difficulties

There are no specific difficulties to report.

3.6.4 Measures to improve the gender balance on company boards

No measures have been proposed.

3.6.5 Positive action measures to improve the gender balance in other areas

The two main political parties in Malta, that is the Labour Party and the Nationalist Party, have adopted voluntary measures to ensure that more women are represented within party structures. The Labour Party has adopted various systems over the years, including quota systems- a voluntary 20% women's quota on electoral lists and a 1/3 quota within its national executive. The Nationalist Party adopted voluntary party measures to increase female visibility in party structures in 2008. The party put in place policies ensuring that 4 out of the 13 members from the general council on to the executive council had to be female. In 2014, 10 new procedures were adopted establishing statutory rights to be represented in party structures: nine women and nine men were elected to the executive committee from two separate lists. The same exercise was extended to local sectional committees.⁹

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment is specifically prohibited through Article 251A of the Criminal Code (Chapter 9 of the Laws of Malta). It is defined in Regulation 4 of the AGS Regulations. Harassment is defined as an unwanted conduct related to the sex of a person with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

⁹

<https://ncpe.gov.mt/en/Documents/Updates%20and%20Upcoming%20events/Women's%20political%20participation/Paper%20on%20Women%20and%20Political%20Participation%20in%20Malta%20FINAL%2020141219.pdf>.

In the author's view, this definition complies with the EU definition found in Article 2(1)(c) of Directive 2006/54.

3.7.2 Scope of the prohibition of harassment

The AGS Regulations enacted under the Equality for Men and Women Act (EMWA), are not limited to employment but are wide in scope since they refer to goods and services.

3.7.3 Definition and explicit prohibition of sexual harassment

Sexual Harassment is prohibited by Article 2 of the Equality for Men and Women Act and Article 29 of the Employment and Industrial Relations Act.

Article 2 of the Equality for Men and Women Act defines sexual harassment by reference to Article 9, which provides that

'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.'

Article 29 of the Employment and Industrial Relations Act defines sexual harassment as subjecting the victim to an act of physical intimacy or requesting sexual favours from the victim or 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 the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim. or 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.

Sexual harassment is also defined in Regulation 4(4) of the AGS Regulations, which states that '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'.

In the author's view, this definition complies with the EU definition in Article 2(1)(d) of Directive 2006/54.

3.7.4 Scope of the prohibition of sexual harassment

The scope of the prohibition of sexual harassment is wide. It covers not only employment and access to goods and services, but also other areas as specified in the Criminal Code, which states that a person who:

'(a) pursues a course of conduct which amounts to harassment of another person; or (b) pursues a course of conduct which he knows or ought to know amounts to harassment of such other person; or (c) subjects another person to an act of physical intimacy; or (d) requests sexual favours from another person; or subjects another person to any act and, or conduct with sexual connotations, including spoken words,

gestures and, or the production, display or circulation of any written words, pictures, and, or any other material, where such act, words, and, or conduct is unwelcome to the victim, and could be reasonably be regarded as offensive, humiliating, degrading, and, or intimidating towards that person shall be guilty of an offence under this article.'

3.7.5 Understanding of (sexual) harassment as discrimination

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 as specified in Article 9(1)(d) of the Equality for Men and Women Act (see 3.7.3 above) and in Article 29 (2)(c)(ii) of the Employment and Industrial Relations Act (see 3.7.3 above).

3.7.6 Specific difficulties

There are no specific difficulties to report.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

Regulation 3(4) of the Equal Treatment in Employment Regulations provides that employers or any persons or organisations to whom the regulations apply will 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.'

3.8.2 Specific difficulties

There are no specific difficulties or cases to report.

3.9 Other forms of discrimination

The pending equality bill (see 3.1.4 above) states that 'direct discrimination' will be taken to occur

'where a person is treated less favourably than another person is, has been, or would be, treated in a comparable situation, on the basis of one of the protected characteristics laid down under this Act, or when a person is treated less favourably than another person is, has been, or would be, treated in a comparable situation, on the basis of that person's association with another person who has any one or more of the protected characteristics laid down under this Act.'¹⁰

3.10 Evaluation of implementation

The author of this report believes that national law satisfactorily implements the EU law concepts discussed above.

3.11 Remaining issues

There are no other issues to report.

¹⁰ https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Equality%20Act.pdf.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

In 2018, a video was released aiming to raise awareness about Malta's gender pay gap and the factors that contribute to it; the video was part of a project initiated by V Squared Media, a Maltese media house, in collaboration with EY Malta and with the support of the Centre for Labour Studies at the University of Malta, the National Statistics Office and emPOWER: Platform for Organisations for Women.¹¹ The pay gap was found to be more pronounced than the 11 % Maltese average in specific industries: a 28.3 % pay gap was found in the financial and insurance industry, a 23.1 % pay gap was found in professional, scientific and technical activities and a 20.6 % pay gap was found in the ICT industry.¹²

4.1.2 Surveys on the difficulties of realising equal treatment at work

There have been several articles and presentations on the barriers to equal treatment at work.¹³ In 2017, the National Commission for the Promotion of Equality (NCPE) implemented a project co-funded by the EU: Equality Beyond Gender Roles. The project aimed to raise awareness of the relevance of men's role in gender equality in order to: reach a fair balance between work and private life and between paid and unpaid work; break down gender stereotypes tied to traditional gender roles by sensitising and empowering students, employers and citizens; further encourage men to take action to combat or prevent unilateral responsibilities, to share domestic duties and care responsibilities, as well as to strive towards equal economic independence between the genders; and increase overall awareness of the various types of family friendly measures and the benefits and responsibilities of making use of them.¹⁴

4.1.3 Other issues

There are no additional issues to report.

4.1.4 Political and societal debate and pending legislative proposals

There are no debates or pending legislative proposals to report.

4.2 Equal pay

4.2.1 Implementation in national law

The Employment and Industrial Relations Act, Article 27, provides that employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.

¹¹ The Malta Independent (2018), 'Women earn 11% less on average than men; gender pay gap hindering inclusive economy – President', 12 November 2018. Available at: <http://www.independent.com.mt/articles/2018-11-12/local-news/Women-earn-11-less-on-average-than-men-gender-pay-gap-hindering-inclusive-economy-President-6736199234>.

¹² The Malta Independent (2018), 'Women earn 11% less on average than men; gender pay gap hindering inclusive economy – President', 12 November 2018.

¹³ Articles include newspaper articles <https://timesofmalta.com/articles/view/Equality-and-the-workplace.612206>, <https://timesofmalta.com/articles/view/malta-remains-worse-than-eu-average-for-gender-equality.691432>; <https://www.pressreader.com/>.

¹⁴ https://ncpe.gov.mt/en/Pages/Projects_and_Specific_Initiatives/Equality-Beyond-Gender-Roles.aspx.

Regulation 3A of the Equal Treatment in Employment Regulations 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.

4.2.2 Definition in national law

The Employment and Industrial Relations Act (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'. However, 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 Equal Treatment in Employment Regulations (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 used in Article 3A (2) of the ETE Regulations, although Article 3A (1) speaks of remuneration.

This definition complies with the definition of Article 157(2) TFEU.

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

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

4.2.4 Related case law

In 2015, the Commissioner of the National Commission for the Promotion of Equality (NCPE) concluded an investigation that determined the occurrence of gender discrimination in the wage of a female employee.¹⁵ The complaint alleged discrimination and differential treatment on the grounds of sex in pay/wage and other work-related benefits. The complainant alleged that she was receiving a lower wage than male employees who were in a similar or same rank and had similar responsibilities. She stated that she was the only female manager and that her colleagues, who are managers and who are on the same scale and have the same responsibilities, have a private office and a higher wage, even though she had seniority and more experience. She held that the above amounted to discrimination since the principle of equal pay for equal work was not being observed. Together with her complaint form, the complainant attached a number of references from clients, evidence supporting her statement that she had seniority and more experience, evidence of her work history, payslips and salary breakdown over the years, a number of performance appraisal forms and her curriculum vitae. The employer argued that the complainant's job position and role were not comparable with those of the other two managers who happen to be males, and thus there was no discrimination. The employer further stated that the company had treated the complainant fairly and favourably when it acceded to her request for flexitime, even though the company was under no legal obligation to do so. After examining all the evidence collected, NCPE's

¹⁵ NCPE (2016) *Annual Report 2015*
https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf.

commissioner noted that while all three managers' wages differed in amounts, the gap between the male managers' wages was smaller than the one between the average male manager's wage and the complainant's wage. Moreover, NCPE's commissioner deemed that the company's arguments that there is no set salary scale for managers should not act as a detriment towards the company's employees and that the company should strive for more transparency in the manner in which wages are set.

4.2.5 Permissibility of pay differences

No allowances for pay difference are recorded.

4.2.6 Requirement for comparators

The Employment and Industrial Relations Act (EIRA) provides that 'Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.' Therefore, the comparator is an employee 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 whether a hypothetical comparator is allowed. There is no case law on this point.

Section 2 of the EIRA defines a comparable full-time employee as a full-time employee

'in the same establishment who is engaged in the same or similar work or occupation, due regard being given to other considerations including seniority, qualification and skills, provided that where there is no comparable full-time employee in the same establishment, the comparison shall be made by reference to collective agreements covering similar comparable full-time employees in other establishments, and further provided that where there is no applicable collective agreement, reference shall be made to law or in default of provision by law to the prevailing practice as may be established by the Employment Relations Board'.

4.2.7 Existence of parameters for establishing the equal value of the work performed

There is no case law on this. However, Section 2 of the EIRA provides a legal basis by defining a comparable full-time employee as a full-time employee

'in the same establishment who is engaged in the same or similar work or occupation, due regard being given to other considerations including seniority, qualification and skills, provided that where there is no comparable full-time employee in the same establishment, the comparison shall be made by reference to collective agreements covering similar comparable full-time employees in other establishments, and further provided that where there is no applicable collective agreement, reference shall be made to law or in default of provision by law to the prevailing practice as may be established by the Employment Relations Board.'

4.2.8 Other relevant rules or policies

There are no other relevant rules or policies to report.

4.2.9 Wage transparency

There is no case law on wage transparency. However, a recent case¹⁶ investigated by the National Commission for the Promotion of Equality (NCPE) in 2015 addressed the issue of pay and this was the subject of an article published by the *Times of Malta*,¹⁷ which also highlighted the fact that the commission had made proposals to the Government on issues including pay. A female employee overheard her co-workers discussing their monthly salaries and realised that she was receiving approximately EUR 500 less than her colleagues and made a complaint to the NCPE. When the commission investigated the local company, it found that the female employee was receiving approximately EUR 6 000 less in salary than her male colleagues. When the NCPE looked at the wages offered to workers of the same designation within the company, it found a situation that was discriminatory. The company was urged to rectify the situation and the employee was offered a EUR 500 monthly increase. Furthermore, NCPE's commissioner deemed that the company's argument that there was no set salary scale for managers must not disadvantage the company's employees and that the company should strive for more transparency in the manner in which wages are set.

4.2.10 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

The National Commission for the Promotion of Equality in its input on the pending equality bill (see 3.1.4 above) proposed strengthening protection in the area of pay, referring to provisions in the European Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency.¹⁸

4.2.11 Other measures, tools or procedures

The audit system devised by the National Commission for the Promotion of Equality (NCPE) for organisations applying to be certified with the Equality Mark is one measure that is used in order to study the wage patterns of such organisations and ensure that there is no discrimination. However, the Equality Mark certification is optional and so is only taken up by organisations that have gender equality at heart.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Article 26 of the Employment and Industrial Relations Act provides a blanket prohibition on 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

¹⁶ NCPE (2016) *Annual Report 2015*, p.38.
https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202015.pdf.

¹⁷ Times of Malta (2018), 'Woman finds male colleagues are paid €500 more per month - investigation proves her right', 24 January 2018. Available at:
<https://www.timesofmalta.com/articles/view/20180124/local/woman-finds-male-colleagues-are-paid-500-more-per-month-investigation.668732>.

¹⁸ NCPE (2015) 'NCPE's Input to the HREC and Equality Bills', p.6.
https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/NCPE.pdf.

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.'

Moreover, the EIRA defines an 'outworker' 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.

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Article 26 of the Employment and Industrial Relations Act (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 the view of the author of this report, the material scope of this provision reflects the scope of Article 14(1) of the Recast Directive.

4.3.3 Implementation of the exception on occupational activities (Art. 14(2) Recast Directive 2006/54)

The exception on occupational activities has been implemented in Regulation 4(1) and (4) of the Equal Treatment in Employment Regulations. 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.'

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

National law provides for sufficient protection against the non-hiring, non-prolongation of contracts and dismissal of women, connected to their state of pregnancy and/or maternity. Article 2(3)(b) of the EMWA states that discrimination includes treating a woman less favourably for reasons of actual or potential pregnancy or childbirth and Article 2(1)(c) of the ETE Regulations states that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave. Regulation 12 of the Protection of Maternity (Employment) Regulations prohibits the dismissal of pregnant employees or those who have recently given birth or are breastfeeding.

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

According to the Protection of Maternity (Employment) Regulations, it is illegal for an employer to dismiss a pregnant employee, an employee who has recently given birth or a breastfeeding employee. This prohibition applies from the date on which the employee informs her employer of her pregnancy, by means of a certificate issued by a registered medical practitioner or midwife, to the end of her maternity leave. It also applies 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 the Protection of Maternity (Employment) Regulations. An employer can still terminate the employment of an employee on grounds of redundancy but in such case, he shall terminate the employment of that person who was engaged last in the class of employment affected by such redundancy. In the case of dismissal for a good and sufficient cause, the employer must quote the grounds for her dismissal in writing in her notice of termination and send a copy of such notice to the Director General responsible for employment and industrial relations

When an employee who is pregnant or has recently given birth or who is breastfeeding is in her probationary period, if the probationary period has not been exhausted on the date when the pregnant employee is to start her maternity leave, the probationary period shall be deemed to have been automatically suspended on the commencement of the maternity leave for the whole period of maternity leave and for any period of incapacity for work owing to a pathological condition arising out of confinement in the five weeks following the end of maternity leave. Any remaining probationary period will thereafter continue to run upon her return to work following the end of the maternity leave or from a period of incapacity for work following the end of such leave. If a pregnant employee or an employee who has recently given birth or who is breastfeeding is granted special maternity leave before the probationary period has been exhausted, the probationary period will be considered to have been automatically suspended for the duration of the special maternity leave. It will only start to run again upon her return to work. If the employer decides to dismiss a pregnant employee during the probationary period, the employer is bound to give the reason or reasons for the employee's dismissal in writing at the time of dismissal to justify that the dismissal is unrelated to the employee's condition. If no such reason is provided or if the employee considers the reason to be unjustified, and she considers that the dismissal was unfair, the employee may present a complaint of alleged unfair dismissal before the Industrial Tribunal within four months from the date of the dismissal. In any proceedings where the employee establishes before the tribunal facts from which it may be presumed that there has been direct or indirect discrimination related to her condition, the employer must prove that the dismissal was based on a good and sufficient cause and in the absence of such proof, the Industrial Tribunal will uphold the complaint. If the employer fails to give the reason or reasons for the employee's dismissal in writing at the time of the dismissal, this failure shall be considered by the tribunal as an inference that the dismissal was indeed related to the employee's condition.

An employee who is dismissed will be regarded as having been unfairly dismissed if the reason or the principal reason for the dismissal is that the employee refused (or proposed to refuse) to comply with a requirement that the employer imposed (or proposed to impose) in contravention of the Protection of Maternity (Employment) Regulations; or refused (or proposed to refuse) to forgo a right conferred on her by these regulations. An employee may present a complaint to the Industrial Tribunal, that her employer has refused to permit her to exercise any right she has under the Protection of Maternity (Employment) Regulations.

4.3.6 Particular difficulties

There are no particular difficulties to report.

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

The equality bill makes reference to substantive equality. Positive action measures or reasonable accommodation for the purpose of achieving substantive equality by maintaining or adopting specific measures in order to prevent or compensate for disadvantages linked to any of the protected characteristics (age, belief, creed or religion, disability, family responsibilities, family or marital status, gender expression or gender identity, HIV status, maternity, pregnancy, race, colour or ethnic origin, sex or sex characteristics, and sexual orientation) will not be deemed to constitute discrimination.¹⁹

4.4 Evaluation of implementation

National law is satisfactory and in accordance with EU legislation. There are no cases to report.

4.5 Remaining issues

There are no remaining issues.

¹⁹ Malta, Equality Bill 2015. Available at: https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Equality%20Act.pdf.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)²⁰

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

There are no reported surveys and reports published.

5.1.2 Other issues

Statistics on the take-up of family-friendly measures show that women are the ones who access such measures, whereas very few men do.²¹

5.1.3 Overview of national acts on work-life balance issues

The national acts on work-life balance include the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta), Parental Leave Entitlement Regulations, Urgent Family Leave Regulations, Equal Treatment in Employment Regulations, Minimum Special Leave Entitlement Regulations, Extension to Applicability to Service with Government (Equal Treatment in Employment Regulations Parental Leave Entitlement Regulations and Urgent Leave Regulations) Regulations, Equality for Men and Women Act (Chapter 456 of the Laws of Malta), Protection of Maternity at Workplaces Regulations.

5.1.4 Political and societal debate and pending legislative proposals

There are no additional issues to report.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Regulation 2 of the Protection of Maternity (Employment) Regulations provides the definitions below.

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'.

²⁰ See Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015) *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway* European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

²¹ https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Equality%20Beyond%20Gender%20Roles/Power-point%20Presentation%20-%20JosAnn%20Cutajar.pdf.

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'.²²

5.2.2 Obligation to inform employer

Regulation 2(1) of the Protection of Maternity (Employment) Regulations provides that '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'.

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no case law to report.

5.2.4 Implementation of protective measures (Article 4-6 of Directive 92/85)

Regulations 3, 4 and 5 of the Protection of Maternity (Employment) Regulations make provision for protective measures. The regulations aim to ensure that an employee who is pregnant, has recently given birth or breastfeeding and will receive wages and they will be not less favourable than those stipulated in her contract of employment when measures are taken to protect her health and safety after a risk assessment has revealed a risk to the safety or health or an effect on her pregnancy or breastfeeding. Such measures include the temporary adjustment of the working environment and/or hours of work of the employee concerned, 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. If this is not possible, the employee will be given special maternity leave for the whole of the period necessary to protect her safety or health with a special allowance equivalent to the rate of sickness benefit payable under the Social Security Act.

When an employer receives notification from the employee that she has ceased breastfeeding or notifies her employer that her condition is such that she is no longer vulnerable to the risk for which she was on special maternity leave, but the employer has reason to believe that if the employee returned to work, she would be vulnerable to risk, the employer must 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 will then notify her in writing that she can resume work in that job and the special maternity leave will end seven days after the employer's notification.

If during a period of special maternity leave, the employer takes necessary measures to ensure that the employee will no longer be exposed to any risk by virtue of which she was given the special maternity leave or is able to move the employee to alternative employment, they must notify the employee that she can return to work without exposure to that risk or to other work available to her which is suitable for her and the special maternity leave will end seven days after the notification or, if it is earlier, on the day she returns to work or, as the case may be, takes up the other work.

Finally, when an employee notifies her employer by means of a medical certificate that she should not perform night work during her pregnancy and during breastfeeding for reasons relating to her health and safety and she is transferred to daytime work, her rights and wages will be ensured and must not be less favourable than those stipulated in her

²² <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11225&l=1>.

contract of employment. If transfer to daytime work is not possible, the employee must be given special maternity leave.

5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

There is no case law to report.

5.2.6 Prohibition of night work

Regulation 5 of the Protection of Maternity (Employment) Regulations specifies that if an employee notifies her employer, by means of a medical certificate, that she is pregnant or breastfeeding, she should not perform night work for reasons relating to her health and safety. Her employer must transfer her to daytime work subject to the same rights and wages. If this is not technically or objectively feasible or cannot be required on duly substantiated grounds, the employee will be given special maternity leave for all the period necessary to protect her safety and health.

5.2.7 Case law on the prohibition of night work

No case law is available.

5.2.8 Prohibition of dismissal

Regulation 12 of the Protection of Maternity (Employment) Regulations protects the employee against dismissal during the relevant period and provides that it is not legal for the employer to dismiss a pregnant employee, an employee who has recently given birth or a breastfeeding employee, from the date on which such an employee informs her employer of her pregnancy, by means of a certificate issued by a registered medical practitioner or midwife, 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 the regulations.

Exceptions, as defined in Article 10(1) of Directive 92/85, are allowed on the grounds of Article 36 (4) and (14) of the EIRA, as prescribed in Regulation 12.

5.2.9 Redundancy and payment during maternity leave

Notice of termination of employment cannot be given during maternity leave according to Article 36(5) of the Employment and Industrial Relations Act (EIRA). Furthermore, a full-time female employee cannot be dismissed by the employer during the period of her maternity leave or the period of five weeks following the end of such leave in which she is incapable for work owing to a pathological condition following her pregnancy.²³ Moreover, a pregnant employee is entitled to paid maternity leave during her employment. When this is not due and is not paid by the employer, a claim for maternity benefit can be lodged with the Director of Social Security. Maternity benefit is paid for 14 weeks.²⁴

The obligation is on the employer to substantiate any dismissal. Regulation 12(3) of the Protection of Maternity (Employment) Regulations states that 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'. Moreover, Regulation 12A(c) stipulates that, if the employer decides to dismiss a pregnant employee during the probationary period, 'the employer shall be bound to give reason or reasons for the employee's dismissal in writing at the time of dismissal to justify that the dismissal is unrelated to the employee's condition'. If

²³ Malta, Employment and Industrial Relations Act, Chapter 452 Laws of Malta, Article 36(17).

²⁴ Malta, Social Security Act, Chapter 318 Laws of Malta, Article 71.

the employer fails to give written reasons for dismissal at the time of dismissal or if the employee considers that any reason given by the employer is unjustified, and that she considers that the dismissal was unfair, the employee may present a complaint of alleged unfair dismissal before the Industrial Tribunal within four months from the date of the dismissal.

5.2.10 Case law on the protection against dismissal

A case which refers to protection against dismissal of pregnant workers is that of *Cumbo v Float Glass Ltd.*²⁵ The claimant argued that her pregnancy was the reason behind the termination of her employment. Although the defendant company presented various reasons for the dismissal, such as her unsuitable work attire and flirting with men, the Industrial Tribunal concluded that it was the pregnancy of the claimant that gave rise to the termination of employment.

5.3 Maternity leave

5.3.1 Length

Maternity leave is 18 weeks long. This is regulated by Regulation 6 of the Protection of Maternity (Employment) Regulations.

5.3.2 Obligatory maternity leave

Regulation 6 of Protection of Maternity (Employment) Regulations, specifies that four weeks are to be taken before and six weeks are to be taken after the expected date of confinement.

5.3.3 Legal protection of employment rights (Article 5, 6 and 7 of Directive 92/85)

Protection of Maternity (Employment) Regulations, Regulations 3, 4 and 5 implement the provisions of Articles 5, 6 and 7 of Directive 92/85. These include the prohibition of less favourable wages, temporary adjustment of working environment and special maternity leave.

5.3.4 Legal protection of rights ensuing from the employment contract

Regulation 11 of the Protection of Maternity (Employment) Regulations states that

'when an employee is on maternity leave or special maternity leave, the employee shall be deemed to have been in the employment of the employer and during any such absence she shall be entitled to all rights and benefits which may accrue to other employees of the same class or category of employment at the same place of work, including the right to apply for promotion opportunities at her place of work, and on return to work, she 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. Bonuses and allowances related to performance or production are excluded.'

5.3.5 Level of pay or allowance

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

²⁵ Industrial Tribunal, *Cumbo v Float Glass Ltd*, Decision 1851, 9 April 2008. Available at: https://dier.gov.mt/en/Industrial%20Relations/Industrial%20Tribunal/Decisions/Documents/Dec_2008/dec%201851.pdf.

weeks. A maternity leave benefit for four weeks is paid by the Government in accordance with the provisions of the Social Security Act and Regulation 7 of the Protection of Maternity (Employment) Regulations.

The ceiling for maternity leave benefit can vary from year to year. It is currently EUR 172.51 per week (Schedule 14, Part IV, Social Security Act).

5.3.6 Additional statutory maternity benefits

On 11 August 2015, the Maternity Leave Trust was established for the purpose of receiving maternity leave contributions from employers.²⁶ Employers who contribute to this trust and in accordance with the terms of the trust are entitled to reimbursement from the trust for any maternity leave payment paid to their employees. Employers who are required to pay contributions and fail to do so will be liable to fines and penalties.

In 2015, Legal Notice 258 amended Schedule 10 of the Social Security Act and added a new part, which includes the amount or percentage of contribution to be paid by employers. To this end, different rates are paid according to the age of the employees, their basic weekly wage, date of birth and whether they are following a full-time course or otherwise. Employees engaged in the general government sector, authorities, agencies or public corporations are excluded from the scope of the regulations.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

Regulation 7 of the Protection of Maternity (Employment) Regulations provides for an additional payment per week for four weeks (under the Social Security Act) after 14 weeks.

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

According to Regulation 11(1) of the Protection of Maternity (Employment) Regulations, on the return to work, the employee is entitled to return to the same job or, when this is no longer possible for a valid reason, to equivalent or similar work that is consistent with her original contract of employment.

5.3.9 Legal right to share maternity leave

There is no national law providing a legal right to share any part of maternity leave.

5.3.10 Case law

The Court of Magistrates of Malta delivered a judgment on 3 May 2017 in the case *Damian Mifsud et vs Gila Isabel Al Chaaer*²⁷ concerning the liability or otherwise of an employee to refund the full amount of wages received during maternity leave if she left the service of the employer before the end of six months from the termination of maternity leave in accordance with Article 36(2) of the Employment and Industrial Relations Act. The court stated that there was sufficient proof that the employee had a good and sufficient cause to leave her employment and that therefore she was exonerated from reimbursing her employer for maternity leave already paid.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

²⁶ Malta, Legal Notice 257, Trusts and Trustees (Maternity Leave Trust) Regulations 2015, entered into force 1 July 2015.

²⁷ <https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=106368>.

The Adoption Leave National Standard Order (SL 452.111), which came into force on 10 October 2016 provides in Section 3(1) that 'an employee who is the parent of an adopted child shall be entitled to an uninterrupted period of 18 weeks of adoption leave whenever a child is adopted and such leave shall commence on the date when the child passes into the care and custody of the adoptive parent or parents by means of a judgment of a court of law in the country of origin'. This national standard order does not apply in the case of adoptions where the person adopted is the natural offspring of either of the parents.

An employee on adoption leave is entitled to the first 14 weeks of adoption leave with full wages. If the employee chooses to avail himself or herself of any additional adoption leave beyond the 14 weeks, the employer is not obliged to pay any wages for the weeks of adoption that go beyond these 14 weeks. However, such an employee would be entitled to any relevant benefit in respect of these additional four weeks under the Social Security Act if he or she chooses to avail himself or herself of such additional leave.

Single parents can take the full adoption leave. If there is more than one parent, but only one parent is in employment, the working parent can take the full adoption leave. If both parents are in employment, regardless whether with different employers or with the same employer, each parent is entitled to such part of the 14 weeks of adoption leave as they may agree upon in writing. It is the responsibility of the employee requesting adoption leave, where there is more than one adoptive parent, to provide proof to the employer that the other parent of the adoptive child is not in employment or there is an agreement between the parents that stipulates what part of the adoption leave is to be enjoyed by one parent and what part of the adoption leave is to be enjoyed by the other parent.

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Section 6(4) of the Adoption Leave National Standard Order states that 'an employee who intends to or avails himself of adoption leave shall not be dismissed by the employer by reason of the intention or availing himself of such adoption leave'. Moreover Section 6(5) states that 'when an employee intends to avail himself of adoption leave during his probationary period, the probationary period shall be suspended on the day of the start of the adoption leave and shall resume when the employee returns to work after the adoption leave'.

5.4.3 Case law

There is no case law to report.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

Directive 2010/18 has been implemented by means of the Parental Leave Entitlement Regulations.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

National legislation is applicable to all employees by virtue of Article 3(1) of the Parental Leave Entitlement Regulations.

5.5.3 Scope of the transposing legislation

By virtue of 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.

5.5.4 Length of parental leave

The length of parental leave is four months for private sector employees and 12 months for public service employees.

5.5.5 Age limits

Parental leave may be taken for a child up to the age of 8 in the private sector and up to the age of 10 in the public sector.

5.5.6 Individual nature of the right to parental leave

The right to parental leave is an individual right for each of the parents. Four months are reserved for each parent until the child has attained the age of eight years in the private sector. In the public sector, parental leave may be availed of by either of the parents or shared by both parents, if they are both public employees, provided that they do not utilise parental leave concurrently and that together they do not exceed the prescribed limits.

5.5.7 Transferability of the right to parental leave

It is not possible for one parent to transfer part of the parental leave to the other parent.

5.5.8 Form of parental leave

Unless a collective agreement provides otherwise, the employer together with the employee may decide whether to grant the parental leave on a full-time basis, in a piecemeal way or under a time-credit system.²⁸

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

In the private sector, the employee needs to be in the employment of the same employer for a continuous period of at least 12 months prior to being eligible to apply for parental leave.²⁹ In the public sector, the employee needs to have successfully completed his or her probationary period.³⁰

When there are successive fixed-term contracts with the same employer, the sum of these contracts must be taken into account. When there is a fixed-term contract that is renewed within a six-month period from its termination, the period between the two contracts must also be taken into account.³¹

5.5.10 Notice period

A minimum of three weeks' notice in writing, specifying the beginning and the end of the parental leave, must be given prior to taking such leave.³²

There are no studies on whether national legislation takes sufficient account of the interests of workers and of employers in specifying the length of such notice periods.

²⁸ Malta, Parental Leave Entitlement Regulations SL 452.78, Regulation 4(2).

²⁹ Malta, Parental Leave Entitlement Regulations SL 452.78, Regulation 3(1).

³⁰ Office of the Principal Permanent Secretary, Office of the Prime Minister (2019 – latest version), *Manual on Work-life Balance Measures*, Section 2.2, pp.25-27.

³¹ Malta, Parental Leave Entitlement Regulations SL 452.78, Regulation 3(1).

³² Malta, Parental Leave Entitlement Regulations SL 452.78, Regulation 6(1).

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

Regulation 7 of the Parental Leave Entitlement Regulations defines the circumstances in which the employer is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the place of work. These are listed in 5.5.12 below.

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

Regulation 7(2) of the Parental Leave Entitlement Regulations sets out acceptable grounds, all of which impact most closely on small and medium-sized enterprises (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.'

However, an employer who decides to postpone parental leave for reasons listed above, must inform the employee in writing and the postponement 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. If such a postponement may result in the loss of the parental leave entitlement or part thereof, the employer has a duty to immediately grant parental leave for a period equivalent to the leave that has not been availed of or a lesser period as may be requested by the employee.

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3 (3) of Directive 2010/18)

There are no special rules and exceptional conditions for parents of children with a disability or long-term illness.

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

No such measures were introduced. However, the Adoption Leave National Standard Order specifies that an employee who is the parent of an adopted child is entitled to an uninterrupted period of 18 weeks adoption leave whenever a child is adopted, which starts on the date when the child passes into the care and custody of the adoptive parent or parents by means of a judgment of a court of law in the country of origin.³³

³³ Malta, Adoption Leave National Standard Order SL 452.111, Article 3.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

Regulation 10 of the Parental Leave Entitlement Regulations states that

'it shall not be lawful for the employer to dismiss an employee solely because an employee takes or applies to take parental leave in accordance with these regulations, and any such dismissal shall not constitute a valid reason for termination of employment, without prejudice to any justified termination of employment as prescribed by the Act: Provided that notice of termination of employment, as provided for in the Act may be given during the period of parental leave: Provided further that, in the case of issuing a notice of termination by either the employer or the employee during the parental leave, this shall result in the automatic suspension of the parental leave from the third working day following the date of issue of such notice.'

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

Regulation 8 of the Parental Leave Entitlement Regulations specifies that

'the employee who exercises the right to make use of parental leave shall be entitled to return to the same job that the employee occupied prior to the granting of parental leave, or, where this is no longer possible for any valid reason, to an equivalent or similar job consistent with the original contract of employment of the employee.'

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

Regulation 9(1) of the Parental Leave Entitlement Regulations states that

'the employee who is on parental leave, shall, during the period of parental leave, be still entitled to all rights and benefits which may accrue to other employees of the same class or category of employment at that same place of work; Provided that during the period of parental leave, the employee shall still have the right to apply for promotion opportunities arising within the place of work. (2) During the period of parental leave, an employee shall not, upon the resumption of duties at the workplace, be entitled to any other leave, bonuses or allowances and shall not avail himself of such entitlement which might have accrued during such period. 3) Unless the employer and the employee agree otherwise, the employer shall not, during the period of parental leave, have the right to suspend the parental leave and to request the employee to return to work before the agreed date of resumption of duties, and the employee shall have no right to return to work prior to the agreed date of resumption of duties.'

5.5.18 Status of the employment contract or relationship during parental leave

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

5.5.19 Continuity of entitlement to social security benefits

There is continuity of entitlement to social security benefits if the employee satisfies the necessary conditions for any such benefits, if these are applicable.³⁴

³⁴ Ministry for the Family and Social Solidarity (2017), *Social Security Benefits in Malta 2017*. Available at: <https://socialsecurity.gov.mt/en/Documents/Booklet%20Social%20Security%20Benefits%202017%20EN.pdf>.

5.5.20 Remuneration

There is no remuneration since parental leave is unpaid.

5.5.21 Social security allowance

No specific allowances are provided except for the children's allowance, which is applicable across the board. However, credits for social security contributions are provided for parents who take leave to care for a child. Social security contributions are credited to fathers or mothers who have attained the age of 18 years and were born on or after 1 January 1952, who have the legal care and custody of a child who has not attained the age of 6, or the age of 10 in the case of a child who has been certified by a medical consultant as suffering, during the period for which the credit is being requested, from a serious disability. The sum total of such credited contributions that may be given with regard to each child to a parent or both parents together must not exceed 104 contributions in any period of two years, such that for the first three children, the accredited contributions that may be given to a parent or both parents together who were born between 1 January 1952 and 31 December 1961 must not exceed 312 contributions in any period of 6 years. Meanwhile, the sum total of such credited contributions that may be given with regard to each child to a parent or to both parents together who were born on or after 1 January 1962 must not exceed 208 contributions in any period of four years. The maximum credited contributions that may be given to the first three children to a parent or to both parents together who were born on or after 1 January 1962 must not exceed 624 contributions in any period of 12 years.

5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

There are no more favourable provisions in the private sector. However, in the public sector, the length of parental leave and the age limit are greater than the minimum provided for by Directive 2010/18.

5.5.23 Case law

There is no case law to report.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Under Regulation 4(1)(b) of the Minimum Special Leave Entitlement Regulations on employment, every employee is entitled to be granted by his employer one working day of birth leave. The birth leave/paternity leave is paid. For employees in the public service the leave period is two days.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Dismissing an employee because he takes up paternity leave would be unlawful. Article 2 of the Employment and Industrial Relations Act under the definition of unfair dismissal includes dismissal which, although made on grounds of redundancy or for a good and sufficient cause, is discriminatory. Moreover, Regulation 5 of the Minimum Special Leave Entitlement Regulations specifies that any contravention of the regulations will incur a fine of EUR 465.87.

5.6.3 Case law

There is no relevant case law to report.

5.7 Time off/care leave

5.7.1 Existence of care leave in national law (Clause 7 of Directive 2010/18)

The Urgent Family Leave Regulations, SL 452.88 regulate care leave. All employees are 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. Such reasons may include accidents, sudden illness or sickness of any member of the immediate family of the employee as well as the presence during births and deaths of members of the immediate family of the employee. Employers must grant a minimum of 15 hours with pay per year, which are deducted from the annual leave entitlement of the employee. The employer has the right to set the maximum number of hours of time off from work in each particular case. However, the minimum time should not be less than one hour per case unless there is the specific agreement of the employee.

The *Manual on Work-Life Balance Measures* provides for 16 hours of urgent family leave for employees in the public service.³⁵

5.7.2 Case law

There is no case law to report.

5.8 Leave in relation to surrogacy

There is no leave in relation to surrogacy. Surrogacy is not legal in Malta.

5.9 Flexible working time arrangements

5.9.1 Right to reduce or extend working time

There is no legal right to work reduced hours unless provided for by a collective agreement. A mother, whose child is not older than 8 years, may avail herself of her unpaid parental leave entitlement to work fewer hours. In fact, Regulation 4 of the Parental Leave Entitlement Regulations provides 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'.

5.9.2 Right to adjust working time patterns

There is no legal right to adjust working time patterns.

5.9.3 Right to work from home or remotely

There is no legal right to work from home or remotely.

5.9.4 Other legal rights to flexible working arrangements

There are no other legal rights to flexible working arrangements.

³⁵ Office of the Principal Permanent Secretary, Office of the Prime Minister (2019 – latest version), *Manual on Work-Life Balance Measures*, p.17.
https://publicservice.gov.mt/en/Documents/Public%20Service%20Management%20Code/PSMC%20Manual/Manual_on_Work-Life_Balance_Measures.pdf.

5.9.5 Case law

In 2016, the Commissioner of the National Commission for the Promotion of Equality concluded an investigation concerning allegations of a discriminatory arrangement of working conditions.³⁶ The complainant alleged that she was being discriminated against because 'the arrangement of her working conditions was made in a discriminatory manner in the context of her family responsibilities'. The employee complained that her employer refused to extend her reduced hours contract for a short period until the commencement of her maternity leave for her second child.

The commissioner acknowledged that employees do not have a right to work on reduced hours although, 'working a reduced hours timetable is in line with policies adopted by the Government of Malta in an effort to further promote equality between men and women'. During the course of the investigation the employer reiterated that the complainant's role was irreplaceable. However, through evidence brought forward, it was proved otherwise and that her colleagues could share the workload. The commissioner noted that other persons could be trained as had happened when the complainant was on maternity, parental leave and reduced hours before. For these reasons, 'the Commissioner found enough evidence to prove the occurrence of discrimination against the complainant'.

5.10 Evaluation of implementation

The national law implements EU law and, in some areas, such as maternity leave, exceed EU law, given that 18 weeks of maternity leave are provided (14 of which on full pay and 4 of which on an amount stipulated by the Social Security Act).

5.11 Remaining issues

There are no remaining issues to highlight.

³⁶ NCPE (2017) *Annual Report 2016*, p.32.
https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Annual_Reports/NCPE%20AR%202016%20Lo%20res.pdf.

6 Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

On 9 August 2016, the Malta Chamber of Commerce published an article on women and pensions. The author is a national expert in the field. The article highlights the differences between the work patterns of women and of men, their life expectancy and the fact that these differences are not incorporated directly into the pension system design.³⁷ The article highlighted the challenges that women face, including the fact that they work fewer hours because of their family, stay in jobs for shorter periods and are more likely to work part time or on reduced hours. Moreover, the life expectancy for women in Malta is 84 years, which is 5 years longer than men and this means that a woman is more likely to outlive her savings and, hence, is at a higher risk of living below the poverty line. The author describes the counter-measures taken in the form of contributory credits and the introduction of a concept where the pension of the male spouse 'moves in full to the female spouse in the event that a woman qualifies for a pension in her own right'. The article also explores the complications that arise with regard to pensions when a marriage is dissolved.

6.1.2 Other issues related to gender equality and social security

There are no other issues to report at present.

6.1.3 Political and societal debate and pending legislative proposals

None to report.

6.2 Direct and indirect discrimination

Direct and indirect discrimination on the ground of sex in occupational social security schemes is prohibited by means of Regulations 3 and 4 of the Equal Treatment in Occupational Social Security Regulations with regard to the scope of the schemes and conditions for accessing them, the obligation to contribute to the schemes and the way that the contributions are calculated, the way the benefits are calculated and the conditions governing them.

Any provisions such as those determining who may participate in an occupational scheme, fixing the compulsory or optional nature of participation in an occupational scheme, different rules regarding age of entry into a scheme or minimum period of employment or membership of a scheme in order to obtain benefits, different conditions for granting or restricting benefits that is contrary to equal treatment, fixing different retirement ages, suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons and setting different levels of benefits except as may be necessary to take account of actuarial calculation factors will be considered null and void.

However, for funded defined-benefit schemes — which the Retirement Pensions Act, (Chapter 514 of the Laws of Malta) defines as 'a retirement scheme, other than a defined contribution retirement scheme, which has as its primary purpose that of providing for the payment of fixed or determinable retirement benefits', — 'certain elements including:

- (i) the conversion into a capital sum of part of a periodic pension;
- (ii) the transfer of pension rights;

³⁷ Spiteri Gingell, D. (2016), 'Women and Pensions', *MaltaChamber*, 9 August 2016. <https://www.maltachamber.org.mt/en/blogs/32>.

- (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.'

On 4 December 2015, Act 39 of 2015 amended the Social Security Act (Chapter 318 Laws of Malta), to include the right of appeal from any decision of the Director of Social Security on any question of law or principle of importance arising in connection with any claim of discrimination on the ground of sex made by any person concerning the determination of that person's eligibility and entitlement for any benefit, pension, allowance and assistance payable under the act.

6.3 Personal scope

The personal scope of national law relating to occupational social security schemes is as required by Article 6 of Directive 2006/54.

6.4 Material scope

The material scope is the same as required by Article 7 of Directive 2006/54. On 15 January 2016, the Equal Treatment in Occupational Social Security and Other Pensions Schemes Regulations (SL 318.20) were amended through Legal Notice 13 of 2016 in order to widen the material scope of national law and include pension schemes for particular categories of workers, which provide for benefits payable by reason of the employment relationship with the public employer and established under the Malta Armed Forces Act, the Police Act, the Prisons Act and the Pensions Ordinance. The legal notice also included the definition of the term 'scheme', as covering occupational social security schemes and pension schemes.

6.5 Exclusions

Regulation 1(5) of the Equal Treatment Regulations specifies that the regulations do not apply to: a) individual contracts for self-employed workers; b) schemes for self-employed workers having only one member; c) insurance contracts, in the case of salaried workers, to which the employer is not a party; d) optional provisions of occupational schemes offered to participants individually to guarantee them – i) additional benefits, or ii) a choice of date on which the normal benefits for self-employed workers will commence or, a choice between several benefits; e) occupational schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There are no relevant laws or case law.

6.7 Actuarial factors

Article 5 of Directive 2006/54 was transposed in Regulation 5 of the AGS Regulations issued by the Minister for Social Policy under the Equality for Men and Women Act. These regulations were amended by the Access to Goods and Services and their Supply (Equal Treatment) (Amendment) Regulations 2012³⁸ in order to bring the regulations into line with the *Test-Achats* ruling and the guidelines issued by the European Commission.

Moreover, on 13 February 2012, the Malta Financial Services Authority (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 Directive 2006/54 is to apply to all insurance contracts entered into after 21 December 2012.

6.8 Difficulties

There are no difficulties to report.

6.9 Evaluation of implementation

National law adequately implements EU law in this regard.

6.10 Remaining issues

There are no other issues to discuss.

³⁸ Malta, Legal Notice 417 of 2012, published in the Malta Government Gazette No. 18 995 on the 30 November 2012.

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

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

No relevant surveys or reports have been published.

7.1.2 Other relevant issues

The Social Security Act 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).

7.1.3 Overview of national acts

The Social Security Act establishes a scheme of social security and consolidates with amendments existing provisions concerning the payment of social insurance benefits, pensions and allowances, social and medical assistance, non-contributory pensions and the payment of social insurance contributions by employees, employers, self-employed people and the state.

7.1.4 Political and societal debate and pending legislative proposals

There are no current debates or pending legislative proposals to report.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

The Social Security Act, which is deemed to cover all the relevant risks and the general principle of equality between men and women, is applied.

7.3 Personal scope

The personal scope of national legislation is the same as Article 2 of Directive 79/7.

7.4 Material scope

The material scope is the same as Article 3(1) and (2) of Directive 79/7.

7.5 Exclusions

In general, in the past, Maltese law has not addressed the exclusions referred to in Article 7(1) of Directive 79/7. 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.

Act 39 of 2015, which came into force on 4 December 2015, stipulates different entitlements for married persons depending on whether the spouse is a dependant or otherwise. Moreover, the act amended the provision referring to a married couple in cases where both husband and wife qualify for a pension. Whereas before, the pension payable to the wife ceased to be payable, the amendment stipulates that where a married couple

both qualify for a pension, any such pension shall be apportioned equally between each of the spouses.

7.6 Actuarial factors

Sex is not used as an actuarial factor.

7.7 Difficulties

There are no specific difficulties to report.

7.8 Evaluation of implementation

National law implements EU law topics in a satisfactory manner.

7.9 Remaining issues

There are no remaining issues.

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

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

No surveys or reports have been published on this topic.

8.1.2 Other issues

There are no other issues to report.

8.1.3 Overview of national acts

National acts pertaining to self-employed workers are: the Income Tax Act (Chapter 123 Laws of Malta); the Equality for Men and Women Act (Chapter 456 Laws of Malta); the Equal Treatment in Self-Employment and Occupation Order (SL 460.16).

8.1.4 Political and societal debate and pending legislative proposals

There are no debates or legislative proposals to report.

8.2 Implementation of Directive 2010/41/EU

Directive 2010/41 was transposed by means of an amendment to the Equality for Men and Women Act and an amendment to the Equal Treatment in Self-Employment and Occupation (ETSEO) Order. The Equality for Men and Women Act includes a definition of 'self-employed worker', which is defined in line with Directive 2010/41/EU as 'all persons pursuing a gainful activity for their own account, and the 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'.

The ETSEO Order was also amended to include 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'. Moreover, Article 4A of the ETSEO Order stipulates that no person who is self-employed or in self-occupation can be discriminated against in relation 'to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity or occupation'.

8.3 Personal scope

8.3.1 Scope

The Equality for Men and Women Act defines employment as any gainful activity including self-employment.

8.3.2 Definitions

Article 2 of the Equality for Men and Women Act defines self-employment as 'all persons pursuing a gainful activity for their own account, and the 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'.

8.3.3 Categorisation and coverage

All self-employed workers are considered part of the same category.

8.3.4 Recognition of life partners

Neither Article 2 of the Equality for Men and Women Act nor the Equal Treatment in Self-Employment and Occupation 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. Article 4 of the Civil Unions Act assimilates a civil union with marriage and declares that, 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 of this provision has so far been given, but it would seem that unregistered unions would not produce any legal effects.

Moreover, Act 15 of 2017 which regulates cohabitation, defines a 'cohabitant' as a person who is continually and habitually living with another person in an ordinary, primary, common home, with whom he or she has an intimate relationship, and together consider themselves to be a couple.³⁹

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The provision is framed within the concept of non-discrimination.

8.4.2 Material scope

The material scope is equivalent to the material scope defined in Article 4 of Directive 2010/41/EU. In fact, Article 4A of the Equal Treatment in Self-Employment and Occupation Order states

'1) No person in self-employment or occupation shall be discriminated against in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity or occupation. 2) For the purpose of this Order, a person in self-employment or occupation shall also be deemed to have been discriminated against if in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity or occupation he is subject to harassment or sexual harassment, or if any person is instructed to discriminated against a self-employed or occupied person'.

8.5 Positive action

No positive action has been taken, although Article 2(4)(b) of the Equality for Men and Women Act 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.

Furthermore, it is worth noting that the pending equality bill makes reference to substantive equality and states in Section 6(3)(b) that 'measures of positive action or reasonable accommodation for the purpose of achieving substantive equality by maintaining or adopting specific measures to prevent or compensate for disadvantages

³⁹ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28387&l=1>.

linked to any of the protected characteristics laid down under this Act shall not be deemed to constitute discrimination'.⁴⁰

8.6 Social protection

Social protection is available to all in work on a compulsory basis through the payment of weekly contributions. The contributory scheme is universal in the sense that it is a system where an employee, a self-occupied or 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 someone is registered with the Department of Social Security and makes the minimum payments as required that person is covered for a pension and all other benefits (health, unemployment, maternity etc).

There is little regulation at the moment on occupational pensions. Some occupational pensions do exist, but these are very limited. One presumes that the Civil Unions Act has put life partners 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 Maternity benefits

Under Maltese law, all women who are in employment, self-employment or self-occupation, are eligible for maternity benefits, as defined in the Social Security Act. The current maternity benefits amount to EUR 175 per week.

The author of this report believes that these maternity benefits meet the requirement of sufficiency under Article 8(3)(a). No specific provision has been made with regard to ensuring access to temporary replacement services.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

The relevant legislation is the Equal Treatment in Occupational Social Security Schemes Regulations, Legal Notice 317 of 2005, enacted under the Social Security Act. The extension of the material scope to occupational social security schemes is reflected in Maltese law.

Article 3(1) states that it will 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'.

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 Recast of Directive 2006/54)

The Voluntary Occupational Pension Scheme Rules (SL 123.175) do not refer to this.

⁴⁰ https://meae.gov.mt/en/Public_Consultations/MSDC/Documents/2015%20HREC%20Final/Bill%20-%20Equality%20Act.pdf.

8.9 Prohibition of discrimination

Regulation 4 of the Equal Treatment in Self-Employment and Occupation Order 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.'

8.10 Evaluation of implementation

National law implements EU law satisfactorily with regard to protection from discrimination for the self-employed.

8.11 Remaining issues

There are no remaining issues to report.

9 Goods and services (Directive 2004/113)⁴¹

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

No surveys or reports on difficulties linked to equal access to and supply of goods and services have been published.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

There are no specific problems to report.

9.1.3 Political and societal debate

There has been no political or societal debate.

9.2 Prohibition of direct and indirect discrimination

National law prohibits direct and indirect discrimination on grounds of sex by means of the AGS Regulations enacted under the Equality for Men and Women Act 2003.

The Equality for Men and Women Act 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, on educational guidance, sexual harassment, and discriminatory advertising, respectively.

9.3 Material scope

The material scope of national law is broader than Directive 2004/113. Regulation 1(3) of the AGS Regulations states:

'These 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.'

9.4 Exceptions

Maltese law has not applied any exceptions, given that Regulation 1(3) of the AGS Regulations states that the regulations

'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.'

9.5 Justification of differences in treatment

Provision for justification of differences in treatment is made in Regulation 4(8) of the AGS Regulations, which provides that 'these regulations shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members

⁴¹ See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

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 case law.

9.6 Actuarial factors

Regulation 5(1) of the AGS Regulations states 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 the premiums and benefits related to an individual with respect to insurance contracts concluded after 21st December 2007 where the policyholder is an individual.'

There have been no cases in relation to this.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

Malta has taken advantage of the option provided in Article 5(2) of Directive 2004/13 with respect to insurance contracts concluded before 21 December 2012. Article 5 of the Directive was transposed in Regulation 5 of the AGS Regulations 2008.⁴² These regulations have been amended by means of the AGS Regulations 2012⁴³ in order to bring them into line with the *Test-Achats* ruling and the guidelines issued by the European Commission.

9.8 Positive action measures (Article 6 of Directive 2004/113)

There are no positive action measures to report.

9.9 Specific problems related to pregnancy, maternity or parenthood

There are no specific problems to report.

9.10 Evaluation of implementation

The national law that implements the relevant EU law is satisfactory.

9.11 Remaining issues

There are no remaining issues to report.

⁴² Malta, Access to Goods and Services and their Supply (Equal Treatment) Regulations, 2008 (LN 181 of 2008) issued by the Minister of Social Policy under the Equality for Men and Women Act (Cap. 456).

⁴³ Malta, Access to Goods and Services and their Supply (Equal Treatment) (Amendment) Regulations, 2012 (LN 417 of 2012) published in the Malta Government Gazette No. 18 995 on the 30 November 2012.

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

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

A research study entitled *Full Cooperation: Zero Violence - Barriers to Help-Seeking in Gender-Based Violence Against Women* was published in 2018. The main objective of this study was 'to gain a better understanding of the barriers being faced by survivors of gender-based violence against women when seeking help as well as difficulties encountered by professionals when delivering a service to the survivors'.⁴⁴

The study presents a list of 32 recommendations, which are categorised in accordance with the four Ps of the Istanbul Convention: prevention, protection, prosecution and integrated policies. The recommendations include:

'Awareness campaigns, specialist training, promotion of gender sensitivity in the justice system, the provision of handbooks and training to first responding officers and investigators, better legal provision, addressing the gap between service availability and accessibility, specialist services in Gozo [one of the Maltese islands], mechanisms for more effective inter-agency collaboration, gender-mainstreaming in areas of policy, and further research'.⁴⁵

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

The main legislation is the Gender-Based Violence and Domestic Violence Act (Chapter 581 of the Laws of Malta). Other national acts in place are the Criminal Code (Chapter 9 of the Laws of Malta), the Civil Code (Chapter 16 of the Laws of Malta) and the Victims of Crime Act (Chapter 539 of the Laws of Malta).

10.1.3 National provisions on online violence and online harassment

There are no specific national provisions.

10.1.4 Political and societal debate

There are no pending legislative proposals.

10.2 Ratification of the Istanbul Convention

The pre-existing legal framework was broadly in compliance but was far less detailed than the current provision. It incorporated: the Criminal Code, the Civil Code, the Domestic Violence Act, and the Victims of Crime Act.

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

⁴⁴ Naudi, M., Clark, M. and Saliba, H (2018) *Full Cooperation: Zero Violence - Barriers to Help-Seeking in Gender-Based Violence Against Women*, University of Malta. Available at: <https://meae.gov.mt/en/ZeroViolence/Documents/Full%20Cooperation%20-%20Zero%20Violence.pdf>.

⁴⁵ Naudi, M., Clark, M. and Saliba, H (2018) *Full Cooperation: Zero Violence - Barriers to Help-Seeking in Gender-Based Violence Against Women*, University of Malta, p.13. Available at: <https://meae.gov.mt/en/ZeroViolence/Documents/Full%20Cooperation%20-%20Zero%20Violence.pdf>.

The Convention was signed on 21 May 2012, ratified on 29 July 2014 and entered into force on 1 November 2014. The Government of Malta made some reservations. Malta reserved the right not to apply Article 30(2) of the Convention with regard to state compensation. Malta also reserved the right not to apply Article 44(1)(e) of the Convention and therefore to establish jurisdiction itself when the offence is committed by a person holding permanent residence in Malta.

The Gender-Based Violence and Domestic Violence Act⁴⁶ is

'an Act to make provision for the substantive articles of the Council of Europe Convention on prevention and combatting of violence against women and domestic violence to become, and be, enforceable as part of the Laws of Malta; to promote and protect the right of everyone, and particularly of persons who are at risk of domestic violence to live free from violence in both the public and private sphere; to repeal the Domestic Violence Act (Cap. 481) and the Council of Europe Convention on Prevention and Combating of Violence against Women and Domestic Violence (Ratification) Act (Cap.532) and to make consequential and other amendments to various other laws.⁴⁷

⁴⁶ Malta, Gender-Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta of 14 May 2018.

⁴⁷ Malta, Gender-Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta of 14 May 2018, preamble.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

No relevant surveys or reports are available.

11.1.2 Other issues related to the pursuit of a discrimination claim

There are no other issues related to the pursuit of a discrimination claim.

11.1.3 Political and societal debate and pending legislative proposals

An awareness-raising campaign was organised targeting women who are victims and/or potential victims of violence and to raise awareness amongst witnesses and bystanders to be more vigilant and to encourage them to report instances of violence against women.⁴⁸ This campaign featured on radio, social media, online media, posters in public toilets and bus shelters.

11.2 Victimisation

The provisions on victimisation are implemented in national legislation. There is no case law.

Article 28 of the EIRA provides 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.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

There are no reported difficulties with regard to access to courts.

11.3.2 Availability of legal aid

The provision of legal aid is regulated by the Code of Organisation and Civil Procedure (COCP) (Chapter 12 of the Laws of Malta). Article 912 provides that in civil cases, legal aid is subject to a means test. It is available in all cases except for companies. The advocate must also be satisfied that the applicant has reasonable grounds for taking or defending, continuing or being a party to proceedings.

⁴⁸ <https://meae.gov.mt/en/ZeroViolence/Pages/Raising-Awareness-Campaign.aspx>.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

Due to a lack of case law, this has not yet been tested.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

Case law in this area is still very limited and therefore the impact of horizontal direct effects of the Charter following *Bauer* may not be effective, at least in the short term. A greater awareness of the implications of this case is needed.

11.5 Burden of proof

Regulation 7(3) of the AGS Regulations provides that where persons consider that they have been discriminated against and establish before any competent court or tribunal facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant (the other party) to prove that there has been no breach of the principle of equal treatment on the hearing of the complaint. If the defendant against whom the complaint is made does not prove that he did not discriminate, the court or tribunal will uphold the complaint.

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,⁴⁹ 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. In *Meister*, the Court stated that although the worker does not have the right to access information held by the employer, such refusal may be 'one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination'. Therefore, *Meister* is important in interpreting the obligations of the national courts and the Industrial Tribunal. However, the starting point is that the written law is in line with the directives.

A recent amendment to the Equality for Men and Women Act sought to place the burden of proof in discrimination cases even more clearly on the defendant, once the claimant has shown facts suggesting discriminatory treatment. In principle, this brings Maltese law squarely into line with EU law on this point.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

The EIRA does not make a breach of its Articles 26 or 27 a criminal offence.⁵⁰ It provides for civil liability in Article 30,⁵¹ which empowers the Industrial Tribunal to give redress. Further to this, Article 10 of the ETE Regulations, enacted under the EIRA, also adds a right of access to the Civil Court for redress by way of an injunction and/or compensation. The ETE Regulations, via Article 14, also render all breaches of the regulations – and therefore also of the 'equal pay for same or equal work' principle – a criminal offence

⁴⁹ CJEU, Judgment of 19 April 2012, C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH* EU:C:2012:217.

⁵⁰ Article 26 of the EIRA refers to discrimination and gender equality in employment while Article 27 refers to work of equal value.

⁵¹ Redress by means of recourse to the Industrial Tribunal within four months from an alleged breach.

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 relevant court of civil jurisdiction (the 'Civil Court First Hall') for an injunction and/or compensation. The time limit for bringing the action is four months 'from the alleged breach,' according to the ETE Regulations. Although it can be said that the prospect of imprisonment provides an adequate deterrent, the prospect of the fine is not a 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 that 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 a sufficient deterrent in practice.

Under the EIRA and the EMWA, avenues for redress include the Industrial Tribunal and the Civil Court; the Constitutional Court; the Public Service Commission (for the public service) and the Ombudsman⁵² (whose recommendations are non-binding). The Industrial Tribunal and the Civil 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 prosecution. The entire human rights structure is under review by the Government, which has proposed the setting up of a Human Rights and Equality Commission. The main aim for the setting up of this Commission is to provide individuals with an effective mechanism against discrimination and other human rights breaches. It is proposed that the institution will be modelled on the United Nations Paris Principles and the European Union's equality body model laid out in EU equality directives.

Regulation 10 of the ETE Regulations applies to all situations of sex discrimination in employment and provides 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 discriminatory, and for compensation. 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,⁵³ which laid down important provisions for carrying out investigations under the EMWA, giving the Commissioner for the Promotion of Equality, whether conducting an investigation following an individual complaint or on the initiative of the commission, the powers to conduct a general investigation, to require information or documents and to summon persons to give information orally.

⁵² The Ombudsman investigates any action taken by or on behalf any government or other authority of the Government, Minister or Parliamentary Secretary and any other public officer; any statutory body and/or partnership or other body in which the government has a controlling interest; local councils, mayors, councillors and members of staff and any other body or entity subjected by law to his jurisdiction.

⁵³ Malta, Procedure for Investigations Regulations 2011, made under the power conferred by Article 18(3) of the EMWA.

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 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.' The trend is to regard collective agreements as binding, but this does not mean that they have been used to implement European Union law. In addition, the dearth of cases shows the reluctance of complainants to sue or authorise others to sue on their behalf.

Remedies include an order to cease and desist and/or reinstatement and compensation.

11.6.2 Effectiveness, proportionality and dissuasiveness

Although the prospect of imprisonment can be said to provide an adequate deterrent, the prospect of the fine is no real deterrent, due to its relatively low ceiling. In general, where the law imposes a penalty (a fine) the amount is too low to sufficiently dissuade and deter people from discrimination. Imprisonment is provided for in cases of victimisation, harassment or sexual harassment.

However, Article 1045 of the Civil Code in Malta states that 'the damage which is to be made good by the person responsible shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequences of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.'

The situation under Maltese law allows only for compensation of damages of a pecuniary nature and therefore it does not allow for moral damages. However, recent court cases are moving away from this and are gradually recognising non-pecuniary and non-patrimonial damages in Maltese law. The relevant cases relate to issues in employment and outside employment.⁵⁴

11.7 Equality body

The equality body of Malta is the National Commission for the Promotion of Equality (the NCPE).⁵⁵

Its remit 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;

⁵⁴ Civil Court, *Busuttill v Muscat et* 30 November 2010 and *Cassar v Dragonara Casino Limited* 19 June 2012. These cases are not sex discrimination cases.

⁵⁵ www.equality.gov.mt.

- (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.'

The Equal Treatment of Persons Order (Legal Notice 85 of 2007) 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. Under the order, 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.⁵⁶

The NCPE is also responsible for enhancing equality between genders in access to and the supply of goods and services, as established by the Access to Goods and Services and their Supply (Equal Treatment) Regulations 2008 (Legal Notice 181 of 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

⁵⁶ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=19430&l=1>.

- (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.⁵⁷

11.8 Social partners

Social Partners 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 XV of 2001 and governed by the Malta Council for Economic and Social Development Act (Chapter 431 of the Laws of Malta).

Article 49(1) of the EIRA states that 'a trade union and an employers' association shall, for all purposes of law, be treated as an association of persons and not as a body corporate, but (...) c) it shall be capable of suing and, subject to the provisions of this Act, of being sued, whether in proceedings relating to property or founded on contract, tort or quasi-tort, or any other cause of action whatsoever.'⁵⁸

Collective agreements may include provisions on gender equality and family friendly measures. Such agreements are binding.

11.9 Other relevant bodies

There are NGOs on women's rights such as the National Council of Women,⁵⁹ the Malta Confederation of Women's Organisations,⁶⁰ the Women's Rights Foundation,⁶¹ and the Association for Equality.⁶² They publish press releases and lobby for change through their activities. An organisation can only be recognised as a legal person if it complies with such formalities as are applicable to the legal form selected for its establishment and registration according to the Civil Code.

11.10 Evaluation of implementation

National law is deemed to be satisfactorily implementing EU law in this regard. However, under-reporting of discrimination cases may be due to the fact that the fines that can be imposed for discrimination are very low.

11.11 Remaining issues

There are no remaining issues.

⁵⁷ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1>.

⁵⁸ Malta, Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.

⁵⁹ <http://www.ncwmalta.com/home?l=1>.

⁶⁰ <http://maltacvs.org/voluntary/malta-confederation-of-womens-organisations-mcwo/>.

⁶¹ <https://www.wrf.org.mt/about>.

⁶² <https://www.associationforequality.com>.

12 Overall assessment

Overall, Malta has implemented EU law in accordance with its obligations, although in the vast majority of instances it has not gone beyond the minimum dictated by the EU acquis. The low female employment rate in Malta necessitates additional measures to facilitate the retention of women in the labour market. More positive action measures would potentially increase the number of women in the labour market and decrease their drop-out rate. Measures to specifically support women in their care responsibilities would also address Malta's low birth rate, which is a result of women having to choose between a career/work and a family.

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Social Security Act, Chapter 318 Laws of Malta.
Gender-Based Violence and Domestic Violence Act, Chapter 581 Laws of Malta.

Secondary Legislation

[Parental Leave Entitlement Regulations](#) SL 452.78.
[Urgent Family Leave Regulations](#) SL 452.88.
[Protection of Maternity \(Employment\) Regulations](#) SL 452.91.
[Equal Treatment in Employment Regulations](#) SL 452.95.
[Minimum Special Leave Entitlement Regulations](#) SL 452.101.
[Access to Goods and Services and their Supply \(Equal Treatment\) Regulations](#) SL 456.01.
Adoption Leave National Standard Order SL 452.111.

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