

Country report: Malta

1. Introduction

The relative ease with which Malta weathered the financial and sovereign debt crisis has generally allowed it to escape the deregulatory rigor that other countries have been pressured to enact.¹ In 2013, according to Eurostat employment figures, Malta was among the best performing countries in Europe with regard to employment. The Maltese government attributed this development to the adoption of several targeted budget policies, specifically the introduction of childcare centres for working parents, the Youth Guarantee helping young people find their path to employment, lower tax on part-time work and a tax cut incentive for the middle classes.² In 2015, Malta's unemployment rate was the third lowest and youth unemployment the fifth lowest in Europe.³

However, rises in atypical employment and short-term contracts have increased precariousness in employment, something the government has been preparing to address. Since 2006 pensions have been a major subject of legislative reform, as Malta grapples with the same problems of ageing population and early retirement facing many other European nations. Legislative efforts to separate wage increases from a Cost of Living Allowance index (COLA) has divided the social partners in recent years as trade unions have fought hard to prevent such measures from reaching fruition.

Within the annual Country-Specific Recommendations (CSRs), the European Commission and the Council have drawn attention to the following reform needs, which they consider would put Malta back on a path to growth and competitiveness:⁴

- They advise pension reform to ensure the system's sustainability by, among other things, linking the retirement age to life expectancy, setting up a comprehensive active ageing strategy and reducing early retirement schemes (CSRs 2011–2015).
- There is a need to adjust education outcomes to labour market needs, especially by reducing early school leaving and enhancing the effectiveness of the vocational training system (CSRs 2011–2015).
- From 2012 to 2014 attention was also drawn to improving the employment gap between the genders by, among other things, improving the provision and affordability of childcare and promoting flexible working arrangements, particularly for women.
- In 2011 and 2012, furthermore, reform of the system of wage bargaining and wage indexation was stressed, which ought to be implemented in consultation with the social partners and according to national practices.

¹ From a legal perspective, it is noteworthy that Malta's legal system is based on English common law, although with many elements of Roman civil law. The country maintains a statutory exclusion of public officials from the scope of specific labour law. For more information on Malta's labour law and industrial relations system see: http://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158914/lang-en/index.htm (accessed 13 January 2016)

² <http://education.gov.mt/en/resources/News/Pages/News%20items/UNEMPLOYMENT-DOWN,-EMPLOYMENT-ON-THE-RISE-%E2%80%93-EUROSTAT.aspx> (accessed 13 January 2016)

³ See <http://education.gov.mt/en/resources/News/Pages/News%20items/Youth-Guarantee-is-a-major-contributor-to-Malta%E2%80%99s-outstanding-employment-figures.aspx> (accessed 13 January 2016)

⁴ See the European Commission's recommendations and consolidated versions for the years 2011–2015 at http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm; for an overview see Clauwaert (2015) at 102-103.

2. Atypical employment in the 2012 labour law reforms

The Maltese government introduced the *Employment Status National Standard Order* in 2012, which was in part in response to a media blitz over the issue of *precarious employment*. Bogus self-employment has been a major problem in Malta. The most prevalent precarious work relationships in Malta are those in which the employee is ‘self-employed’ and therefore does not enjoy the rights arising out of an employment relationship, even though the relationship – to all intents and purposes – resembles one of regular employment. The Employment Status Order created a checklist by which an individual can determine whether or not their relationship with an employer is that of an employee or self-employed. If the parameters of a relationship fall into five of eight conditions established in the Order, then the individual in question is deemed an employee. This determination establishes certain practices:

- The person in question must be given equal treatment and rights in comparison with other employees, or if there are none, to a set of minimum conditions laid out in the Employment and Industrial Relations Act.
- The employer is bound to provide a letter of engagement detailing conditions of employment to the employee.
- The employment relationship is considered to have begun from the continuation of service provision and the contract is considered to be open-ended (indefinite)

Although a positive step in the defence of workers’ rights, the bill has had a major flaw in its reliance on the person providing the service requiring a statement from the ‘employer’ that the Order may have been breached in order to secure an Industrial Tribunal hearing. Obviously it is in the employer’s interest to disregard such requests and this provision thus limits the effectiveness of the bill.

Building further on this legislation, the Maltese government adopted Act No. XVI of 2012 which amends the Employment and Industrial Relations Act. The amendment widened the scope of the definition of employment contract, the so-called ‘contract of service’.⁵ Nonetheless, it also clarified that establishing the existence of a legal relationship does not depend on the form of agreement.⁶ These additional legislative changes have been important as they complement the Employment Status National Standard Order, seeking to eliminate any loopholes in the definitions of subordinate employment in view of the use of service contracts which may create precarious working situations. Thereby, the Maltese legislator showed its determination to address and remove precariousness in employment relationships, according more importance to substance rather than form.

Following up on this determination in summer 2013 the Maltese government also adapted national rules on *public procurement*. Mandatory criteria were added which must be observed by contractors who participate in public procurement procedures to ensure that regulations on working conditions are not violated. If a tenderer violates the conditions of the contract and/or breaches industrial and employment legislation, the Director of Industrial and Employment Relations has the duty to inform the Director General (Contracts) who, in turn, is obliged to terminate the contract. In addition, the DG (Contracts) has the discretion to terminate any other contract/s the employer may have with any other government department or public sector organisation. Even a violation of the Health and Safety Authority’s legislation may constitute sufficient grounds for the termination of a contract.⁷

Despite these measures to improve the recognition of employment status, no definition of ‘precarious employment’ exists in Malta. Social partners are divided over the recognition and extent of the problem. The Malta Employers’ Association (MEA) considers the problem of precarious work as being blown out of proportion by unions in defence of their members’ interests. The MEA instead seems satisfied that the form of employment represents the

⁵ Following the amendment, ‘contract of service’ (contract of employment) means an agreement (other than service as a member of a disciplined force), whether oral or in writing, in any form, whereby a person binds him- or herself to render service to or to do work for an employer, in return for wages and, in so far as conditions of employment are concerned, includes an agreement of apprenticeship.

⁶ It added the following proviso: ‘Provided that unless otherwise specifically referred to in another law, in this Act or in any regulations made under this Act, irrespective of the declared nature of the relationship, whenever the employer exercises effective direction, control and choice over the nature of the work or the tasks being or to be performed by a person for the employer, that relationship shall be considered to be one of a contract of service and the person carrying out the work shall be deemed to be an employee of the employer.’

⁷ No contract may be renewed before the above new conditions are agreed to by the contractor.

employees' preference in the majority of cases. Hence, it regards the existing legal protection as sufficient and opposes the promulgation of new laws to tackle precarious employment. One of the main problems concerned enforcement. Compared with the EU average of around 22 per cent, the MEA observed that in 2012 Malta had one of the lowest rates of part-time workers (around 14 per cent). Equally, the rate of fixed-term employment (6 per cent) was about half the EU average (14 per cent), whereas the rate of self-employment, at 13 per cent, is closer to the European average of 15 per cent.

In fact, the practice of *temporary agency work* has long been underdeveloped in Malta. Factors considered to hinder the development of temporary agency work are multifaceted.⁸ In autumn 2010, Malta adopted the Temporary Agency Workers Regulations (Legal Notice 461/2010), issued under the Employment and Industrial Relations Act (CAP. 452) and published in the Maltese Government Gazette on 22 October 2010. It gave effect to the relevant provisions of Directive 2008/104/EC and came into force on 5 December 2011.⁹ The new rules enable temporary agency workers to present a complaint to the Industrial Tribunal within four months of the alleged infringement. Violations of the Temporary Agency Work Regulations are liable to incur a fine of at least 500 EUR and not more than 2,329 EUR.

In 2011, due to the unfolding of the sovereign debt crisis, the Troika and the European Commission advised Malta to remove its mandatory measures on wage increases pegged to the cost of living allowance. Although new policy implementation was discussed, the issue was eventually dropped due to vocal criticism by the country's major unions and the government's hesitancy to destabilise industrial relations.

3. Labour market reforms

Regarding measures to improve the functioning of the labour market, in 2007 *pension reform* was enacted in an effort to create a more sustainable system. Pensionable age rose from 61 to 65, although 61 remained the retirement age for those who had contributed for 40 years. Since reform was brought in prior to the crisis, the European Commission has been less vocal on the issue, although through the CSRs they have been pushing for an increase in the rate of implementation of rises in statutory retirement age and in annual contributions. Accordingly, the Maltese government has been focusing on further consultations to continue with the pension reform process. The Pensions Strategy Group submitted its report to the Maltese government, which announced it would present a strategy to Cabinet, after which it will be published for public consultation.¹⁰ Furthermore, the Maltese government has introduced fiscal incentives with the aim of sustaining the policy objective of diversifying retirement income through the taking up of voluntary third pillar pensions.

The Maltese government further stressed in its 2015 National Reform Programme that it has put in place the following initiatives to *improve the linkages between the labour market and the education system*: the Employment Aid Programme, educational and vocational training programmes, the Youth Guarantee Programme, apprenticeship programmes for students, the National Literacy Strategy and promotion of flexible working arrangements. The participation of women and young people in the labour market is reported to have increased.¹¹ In order to address the skill gaps, the Maltese government drafted a legal notice to reform the national apprenticeship schemes that are currently being offered by Malta College of Arts, Science and Technology (MCAST). It aims to create a single national apprenticeship scheme covering more qualification levels. This reform, along with scholarship schemes and a National Strategy on Lifelong Learning,

⁸ These included, for example, the lack of a comprehensive legal framework, the government's lack of a proactive attitude towards labour market transitions and a cultural mentality on the workers'/union side associated with a preference for job security and an unwillingness to pay for employment services on the part of the employers. See <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/malta/malta-temporary-agency-work-and-collective-bargaining-in-the-eu> (accessed 16-11-2015)

⁹ Section 2(1) of these Regulations defines a 'temporary agency worker' as a worker who has entered into a contract of employment or an employment relationship with a temporary work agency and who is assigned, whether on a regular or an irregular basis, to a user undertaking to temporarily work under its supervision and direction. These Regulations shall not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.

¹⁰ Maltese Ministry of Finance, National Reform Programme 2015, April 2015.

¹¹ Similar initiatives include the reduction of income tax for long-term unemployed women who are over 40 years of age, a change in the income tax rate brackets and the provision of a full pension for employed widows. Strengthened labour market incentives are to come from reforms in benefit design, particularly through the tapering of benefits and the introduction of in-work benefits.

the relevance of education at the place of work and a reduction of the skills gap ought to be achieved.¹² In that context, it is noteworthy that the Maltese government also runs a ‘Jobs+’ initiative, in which social partners and representatives of the political parties are entrusted with advising and coordinating with the Maltese government on issues related to the labour market. Such initiatives are discussed within the Active Labour Market Counselling and Action Committee. The Committee’s remit is as follows:¹³

- to design a holistic active labour market policy that addresses the long-term needs of the labour market;
- to ensure that there is adequate funding to promote an ongoing active labour market policy;
- to coordinate with the Ministry for Employment the implementation of active labour market policies;
- to monitor labour market and training programmes;
- to analyse the effectiveness and efficiency of labour market and training programmes;
- to make recommendations to the Ministry for Education and Employment on how labour market and training programmes can be improved.

Following the successful implementation of a *Youth Guarantee* from 2014, the Maltese Ministry for Education and Employment launched the new National Youth Policy (NYP), *Towards 2020 – A shared vision for the future of young people*, on 11 August 2015.¹⁴ In this initiative, the Maltese government seeks to cooperate with national youth councils, NGOs and other stakeholders. The NYP focuses on all 13 to 30 year-olds and will be implemented over the period 2015–2020. It has two related aims: (1) to support and encourage young individuals in fulfilling their potential and aspirations while addressing their needs and concerns, and (2) to support young people as active and responsible citizens who fully participate in and contribute to the social, economic and cultural life of the nation and Europe. The policy is underpinned by three separate but interlocking pillars:

- (i) The first pillar focuses on the reality of the lives of young people in Malta today, considering how coherent policies, effectively implemented and actively supported can help young people meet their needs and aspirations.
- (ii) The second pillar looks to the past, analysing how youth policy developed over the past 20 years at both European and national level.
- (iii) The third pillar is the Maltese government’s policy for greater democratic participation, equitable economic and social progress for all, and inclusive change.

The policy will be implemented through two targeted, yet interrelated strategies responding to the two policy aims (Strategy 1 addresses youth work and services for young people and Strategy 2 elaborates cross-sectoral support for young people). Each of the two strategies has a number of designated Action Plans under which specific actions will be taken and implemented over the six-year timeframe 2015–2020. More recently, the Maltese government also acknowledged that more action and investment was needed to support young people who couldn't find their way in the education system due to systemic problems (considering them as ‘push outs’ rather than drop-outs). It has stepped up its efforts in implementing a ‘lifelong learning’ approach to refocus efforts towards wider and varied pathways for young people.¹⁵

¹² Interestingly, the Maltese government concluded an agreement with the multinational Microsoft to develop Malta as a worldwide Lighthouse Centre through collaboration in innovative products, with a specific focus on education. The ‘lighthouse’ concept is to put Malta at the forefront of the ‘best and most innovative educational technology in the world’ and play a central role in its development. This agreement is to serve as a framework of collaboration to develop initiatives in the education sector in line with Malta’s vision of strengthening its reputation as a technology hub in Europe. This agreement also strengthens and extends current partnerships between the Maltese government and Microsoft, such as the student software licencing programmes. The collaboration is to be guided by the agreement’s priorities of learning, innovation, skill development and employability. Consultation with stakeholders will follow on how best to utilise this collaboration to develop the local education sector. See Joint Press Release by the Ministry for Education and Employment and Microsoft, Reference Number: PR150602, Press Release of 23 March 2015, available at <http://education.gov.mt/en/resources/News/Pages/News%20items/Joint-Press-Release-by-the-Ministry-for-Education-and-Employment-and-Microsoft.aspx>

¹³ See <http://education.gov.mt/en/employment/Pages/jobsplus.aspx> (accessed 13 January 2016)

¹⁴ <http://education.gov.mt/en/resources/News/Pages/News%20items/Launch-of-the-National-Youth-Policy-Towards-2020-%E2%80%93-A-shared-vision-for-the-future-of-young-people.aspx> (accessed 13 January 2016).

¹⁵ See <http://education.gov.mt/en/resources/News/Pages/News%20items/Youth-Guarantee-offering-fresh-start-for-young-persons.aspx> (accessed 13 January 2016).

4. Reform of the Working Time Regulation

The Maltese rules on *working time* are based on the Organization of Working Time Regulations of 2003. Early in 2012, the legislator enacted additional provisions to regulate overtime. The Overtime Regulations 2012 put a cap on overtime. For full-time employees, the average weekly working time, including overtime – as required by the employer – shall not exceed an average of 48 hours over the applicable reference period stipulated by the 2003 Working Time Regulations. However, the worker may give their consent in writing to work more than this weekly average. The payment of overtime is regulated at the rate of one and a half times the normal rate for work carried out in excess of a 40-hour week, averaged over a four-week period or over the shift cycle at the discretion of the employer. Nevertheless, the Regulations also allow for a certain flexibilisation. Employers can introduce schemes to bank hours, that is, for higher work activity periods to be redeemed against lower activity periods.

Following warnings by the European Commission that Malta's transposition of the Directive on Parental Leave was deficient, the Protection of Maternity (Employment) (Amendment) (No. 2) Regulations were published on 30 December 2011. Under the amended Regulations, the main change is the gradual increase of *maternity leave*: a pregnant employee may apply for maternity leave on full wages for an uninterrupted period of fourteen weeks if she notifies her employer and this uninterrupted period shall (automatically) increase to 16 weeks as from 1 January 2012 and to 18 weeks as from 1 January 2013 onwards. On 6 July 2015, the Maltese government launched the Maternity Leave Trust Fund. This requires employers to pay the equivalent of 0.3 per cent of basic pay for every employee, irrespective of gender and age, to establish a fund from which maternity leave will be paid. The notion underlying such a Trust Fund is to end discrimination where employers engage more men than women to avoid the payment of wages during maternity leave.

In autumn 2013, the Maltese Parliament enacted the *Protection of the Whistle-blower Act* (Chapter 527 of the Revised Edition of the Laws of Malta, hereinafter 'the Act'). It is intended to protect employees who make a disclosure to a whistleblowing reporting officer or a whistleblowing reports unit. It defines what qualifies as a protected disclosure or not under the Act (Article 2). It applies to both public and private sector employees. A protected disclosure means an internal disclosure or an external disclosure of information, made in writing or in any format prescribed by any legislation. Legal protection to employee whistle-blowers is based on a prohibition of subjecting the employee to 'detrimental action' on account of having made a protected disclosure (Article 3).¹⁶ Hitherto, there was a lacuna in Maltese law which created a detrimental position for those employees who might have discovered 'improper practices' (as now defined in the Act) but who, due to their silence, could very well become, at best, unwitting witnesses, and at worst, unwilling accomplices. Under the new Act, a Maltese government official has been appointed from the level of Assistant Director or above within every government ministry to serve as a Whistleblowing Officer detailed to receive reports. Another high ranking civil servant from within the Maltese government's Cabinet Office serves as External Whistleblowing Officer charged to receive all the reports according to the law.¹⁷ From a labour law perspective, it is interesting that the new law centres on the employment relationship, which may provide the context in which the employee could discover 'improper practices'. That is, a self-employed professional providing a service to a company – unless such a person would be under the immediate direction and control of another person (paragraph 'b' of the description of 'employee') – for example, is excluded which goes to prove that the main preoccupation of the legislator was to protect the employee. Indeed, disclosures by self-employed persons would usually benefit from protection under the Professional Secrecy Act of Chapter 377 (particularly Article 6A).

¹⁶ Detrimental action includes (inter alia) action causing injury, loss or damage, victimisation, intimidation, harassment and/or occupational detriment (Article 2). The Act exempts a whistle-blower who makes a protected disclosure from civil and criminal liability (and hence proceedings) as well as from disciplinary proceedings for having made such a disclosure, unless the whistle-blower had also been a perpetrator or an accomplice in an improper practice which constitutes a crime or contravention under any applicable law prior to its disclosure.

¹⁷ See <http://education.gov.mt/en/resources/News/Pages/News%20items/Protection-of-the-Whistleblower-Act.aspx> (accessed 13 January 2016)

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