



Conformity Study for MALTA
Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission. The national report reflects that legal situation as it stands on 1 August 2008. No subsequent changes have been taken into account.

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**ANALYSIS OF THE LEGISLATION TRANSPOSING
DIRECTIVE 2004/38/EC ON FREE MOVEMENT OF UNION CITIZENS**

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EXECUTIVE SUMMARY

1. Introduction

Malta has a written Constitution based on the British Westminster model, which like all Maltese legislation, is published in Maltese and English, being the two official languages. The Constitution cannot be superseded and thus international conventions, according to their nature ratified either by the Executive or as a result of an enabling law passed by Parliament, must generally be enacted as domestic law to render rights and obligations enforceable by private persons. However, European Union Regulations as from the 1st of May 2004 are directly applicable in Malta, whereas European Union Directives have to be transposed into national laws usually through subsidiary legislation and have to be implemented in accordance with their terms.

In terms of its domestic law, Malta is fortunate in having been influenced by two different regimes. Roman law governing Malta's law of persons, goods and obligations and English Common law on which a number of our mercantile law is based such as Company law and Shipping.

In so far as domestic legislation is concerned, principal legislation is enacted by Parliament, but many Legislative Acts provide for the granting of powers to issue subsidiary legislation and regulations under a principal legislative Act to a Minister or sub-governmental body or corporation. Such further direction is implemented by means of regulations which are published as legal notices in the Government Gazette. Other regulatory instruments are policy documents. Finally, regulatory decisions are taken on a case-by-case basis.

2. Introduction to the main particularities of the Maltese legal system relating to the transposition of the Directive 2004/38

In accordance with the powers vested in the Minister to provide regulations under the Immigration Act (Cap.217 of the Laws of Malta), when Malta joined the EU in order to be in line with the *acquis* concerning the free movement of persons, the Immigration Regulations (LN 205 of 2004) were adopted. The definition and Part II of the said regulations transpose the provisions of the above mentioned *acquis* pre 1st of May 2004.

In order to transpose the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004, an order made under the European Union Act was adopted implementing *inter alia* the provisions of the said Directive. This order is referred to as LN 191 of 2007 (Free Movement of European Union Nationals and their Family Members Order 2007). The provisions of LN 191 of 2007 revoke Part II of the Immigration Regulations namely (LN 205 of 2004) insofar as EU nationals are concerned, leaving the original provisions applicable in respect of EEA nationals i.e. nationals of Norway, Iceland, Liechtenstein.

Under this Act another administrative function was created and this is vested in the Director for Citizenship and Expatriate Affairs. This has the administrative power to implement the provisions regulating the confirmation of the eligibility of EU nationals and their family members to exercise Treaty rights. The Director for citizenship and expatriate affairs has been delegated this function by the Minister responsible for immigration in accordance with the powers granted to said Minister as stipulated under Article 26 of the Immigration Act.

Then, under this Legal Notice, the Principal Immigration Officer who is currently the Commissioner of Police, is specifically responsible for the implementation of any removal order which may be issued to a Union citizen and his family members under the provisions of LN 191 of 2007. Also in accordance with the same provisions of this LN, any union citizen or his family member may seek redress for any decision taken by the Director for citizenship and expatriate affairs in respect of his

right of free movement. Such redress may be made to the Appeals Board established under the Immigration Act, as mentioned above.

As seen from above, the legislative power is vested in the minister responsible for immigration, and he is also responsible for the implementation. In this regard, the necessary legislation has been adopted and this same legislation has designated the administrative bodies that are responsible for the adoption and implementation of this legal instrument.

3. Conclusions on the legal analysis of the transposing measures for Directive 2004/38

a. Overview of how the requirements have been transposed

As noted above, Directive 2004/38/EC has been transposed into Maltese law by means of secondary legislation adopted under the European Union Act (Chapter 460 of the Laws of Malta). This Act was adopted specifically for the adoption of European legislation into Maltese law. The Legal Notice is referred to as the Free Movement of European Union Nationals and their Family members order 2007 (LN 191 of 2007), which was published in the Government Gazette of 20th July 2007. These regulations transpose faithfully nearly all the provisions of the Directive even though the presentation and set up of the provisions is different from that of the Directive.

The Table of Concordance and the Conformity Study give a good indication of how this Directive was transposed into Maltese law and it also gives an indication of what has not been properly transposed.

b. Conformity problems and complete and accurate transposition

The requirements of Directive 2004/38 are mainly correctly transposed. This is especially the case for the most important requirements that are directly related to the right of entry or residence. Transposition is less accurate concerning procedural safeguards and related rights. Furthermore, certain ambiguities were noted because the drafter of these regulations sometimes did not use the same wording of the Directive, and this might lead one to conclude that incorrect transposition exists. However, the general provision laid down under Article 3 of the LN may cover such ambiguities. In fact, Article 3 is the article which grants the right of entry and residence to all Union citizens and also grants the right of equal treatment, and all these are applicable to family members accompanying or joining the Union citizen, including those who are not nationals of a MS. At this stage it is good to take a look where certain ambiguities exist between the LN and the Directive's provisions and also highlight those provisions where full transposition does not exist or where a gap exists.

1. transposition issues related to situation of family members

Firstly, under Maltese law registered partnership is not recognized as equivalent to marriage and hence this has not been adopted under LN 191 of 2007. Obviously this also excludes the direct descendants and dependent direct relatives in the ascending line of such partners.

And there is some ambiguity regarding the beneficiaries, namely those mentioned under Article 3(3)(b) of the Directive which includes the partner with whom the Union citizen has a durable relationship, duly attested. Under Maltese law this has been adopted but such relationship is accepted if it is in conflict with the public policy of Malta. No definitions are given of what constitutes a conflict with the public policy of Malta, so this has to be decided on a case-by-case basis by the competent authorities.

2. transposition issues related to right of entry

Under these regulations the right of entry is guaranteed to all union citizens and their family members. Yet still sometimes transposition might be incomplete. For example, under Article 5(4) of the Directive it is stipulated that where the Union citizen or a family member who is not a national of a

MS do not have travel documents, these have to be brought to them within a reasonable time. The Maltese drafter has introduced this right, but the relevant provision does not qualify that these documents have to be brought within a reasonable time, and this may prejudice the persons concerned.

3. transposition issues related to the right of residence and retention of residence

The right of residence and the requirements for this to be attained have been fully transposed by the LN, but with regard to the retention some small ambiguities exist. Firstly, according to LN 191 of 2007, where reasonable doubt exists, the Maltese authorities may verify whether a Union citizen or his/her family members satisfy the required conditions for the right of residence. This is in line with Article 14(2) of the Directive but the LN omits to clarify that this verification has not to be adopted in a systematic way. For the sake of clarity, this has to be introduced under Maltese law so that any abuses and bureaucratic practices will be avoided.

Furthermore, Article 14(4)(a) and (b) concerning derogation from expulsion measures to employed or self-employed persons or to job seekers and their family members was not fully transposed because family members were not mentioned. This might lead one to believe that an expulsion order may not be adopted against a Union citizen who is employed or self-employed or a job seeker, but that it could be exercised against a family member since they have not been included under the respective provision of LN 191 of 2007. On the other hand, the Maltese authorities argue that this is not the case because for implementation purposes once they are dealing with an EU citizen employed here or seeking a job, then they will include his family members and their right to reside with him, together with all the advantages. Furthermore, the general provision of Article 3(1) of the LN immediately stipulates that the right to enter and reside in Malta is equally applicable to family members accompanying or joining the Union citizen including those who are not nationals of a MS.

4. transposition issues related to continuity of residence

Under Maltese law, it is not being stipulated like in the case of the Directive, namely under Article 21, that an expulsion order duly enforced will break the continuity of residence.

5. transposition issues related to notification of decisions

Under LN 191 of 2007 as in the Directive, the person against whom an expulsion order has been ordered has the right to be notified with this decision by the Director, but no time limit to leave the territory has been established as that stipulated under Article 30(3) of the Directive.

6. transposition issues related to procedural safeguards

Procedural safeguards are mentioned in LN 191 of 2007, but one will not find a literal transposition of this Article. The mechanism of these procedural safeguards is mainly found under the provisions of the Criminal Code, mainly under Article 422 and under the Immigration Act mainly under Article 14. Again this might cause some ambiguity.

Furthermore, concerning these procedural safeguards, it should be noted that the Maltese Courts are generally respectful of elementary procedural rights guaranteed by European or Community law. However the absence of clear legal indications, and the use of interim enforcement orders, could constitute a non-sufficient transposition.

c. Conclusions of the legal analysis of the transposing measures for Directive 2004/38/EC.

In summary, the Maltese authorities transposed faithfully the provisions of Directive 2004/38/EC and made a good effort to include and respect the aim and spirit of the Directive. Most remaining

transposition issues are due to ambiguous transpositions, which through the interpretation of the courts in light of the Directive will lend clarity. . Furthermore where non transposition occurs, the necessary amendments will certainly be effected and perhaps when such amendments are worked on one must give due consideration to the procedural safeguards. Despite the fact that they appear to be in line with the Directive, the amendments are still spread out over different laws. This may lead to confusion and go against the spirit of the Directive, but this aspect could not be evaluated at this point

i. Summary of conformity problems

The summary of conformity problems gives a quick overview of conformity problems.

1. Non conformity due to gaps or incomplete transposition

a. Non-transposition

As highlighted above, the provisions of the Directive have been transposed by LN 191 of 2007, and rather than gaps there is more incomplete and incorrect transposition.

b. Incomplete transposition

Article 5: Right of entry

Article 5(4) has not been completely transposed. In fact, the words “*a reasonable period of time*” in relation to the possibility of having the documents brought to those who need them in order to enter Malta, has been left out. In practice the provisions of the Directive are respected, but for clarity purposes the necessary amendments to LN 191 of 2007 have to be made.

Article 14: retention of the right of residence

Article 14 has not been literally transposed by LN 191 of 2007. The last paragraph of Article 14(2) has not been fully transposed. This second paragraph highlights that there should be a reasonable doubt for a MS to verify whether a Union citizen or his/her family members satisfy the required conditions for the right of residence, but under Maltese law, it omits the fact that such verification shall not be carried out systematically.

Under Article 14(4)(a), the wording has not been literally transposed. Under Article 13(1) of the LN 191 of 2007, family members were not included. This might lead one to think that an expulsion order may not be adopted against a union citizen who is employed, self-employed or a job seeker, but then it can be exercised against a family member since they are not mentioned under this provision. However, from viewing both implementation practices and a reading of the whole text of the LN, another interpretation is found.

Article 30: notification of decisions

This Article has been almost literally transposed, with the exception of Article 30(3). In fact, the time limit of not less than one month in order to leave the territory in case of an expulsion order has been omitted and the necessary amendments to the LN have to be made.

Article 31.3: Procedural safeguards

Procedural safeguards are mentioned in LN 191 of 2007, but one will not find a literal transposition of this Article. The mechanism of these procedural safeguards is mainly found under the provisions of the Criminal Code, mainly under Article 422 and under the Immigration Act mainly under Article 14. Again this might cause some ambiguity.

2. Incorrect or imprecise/ambiguous transposition

a. Incorrect transposition

Article 40: Delay for transposition

Transposition was adopted in 2007.

b. Imprecise/ambiguous transposition

Article 3: Beneficiaries

The Maltese legislator accepts the partner with whom the Union citizen has a durable relationship as an “*other family member*” but only as long as this relationship is not in conflict with the public policy of Malta. This definition of other family member is rather vague under Maltese law, and it might not be acceptable if such a relationship were scrutinized and examined on the grounds of public policy.

SUMMARY DATASHEET

1. Transposing legislation

In order to transpose the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004, an order made under the European Union Act was adopted implementing *inter alia* the provisions of the said Directive. This order is referred to as LN 191 of 2007 (Free Movement of European Union Nationals and their Family Members Order 2007). The provisions of LN 191 of 2007 revoke Part II of the Immigration Regulations (LN 205 of 2004) insofar as EU nationals are concerned, leaving the original provisions applicable in respect of EEA nationals i.e. nationals of Norway, Iceland, Liechtenstein.

Under this Order another administrative function was created and this is vested in the Director for Citizenship and Expatriate Affairs. This has the administrative power to implement the provisions regulating the confirmation of the eligibility to EU nationals and their family members to exercise Treaty rights. The Director for citizenship and expatriate affairs has been delegated this function by the Minister responsible for immigration in accordance with the powers granted to said Minister as stipulated under Article 26 of the Immigration Act.

Under this Legal Notice, the Principal Immigration Officer, who is currently the Commissioner of Police, is specifically responsible for the implementation of any removal order which may be issued to a Union citizen and his family members under the provisions of LN 191 of 2007. Also in accordance with the same provisions of this LN, any union citizen or his family member may seek redress of any decision taken by the Director for citizenship and expatriate affairs in respect of his right of free movement. Such redress may be made to the Appeals Board established under the Immigration Act, as mentioned above.

As seen from above, the legislative power is vested in the minister responsible for immigration, and he is also responsible for its implementation. In this regard the necessary legislation has been adopted and this same legislation has designated the administrative bodies which are responsible for the adoption and implementation of this legal instrument.

2. Assessment of the transposition

The following conformity issues exist for Malta. They are organized pursuant to the type of conformity issues and then presented in the order of the Directive's articles.

a) Incomplete transposition or non-transposition

i. Non-Transposition

As highlighted above the provisions of the Directive have been transposed by LN 191 of 2007, and there are no gaps.

ii. Incomplete Transposition

Article 5(4): Right of entry	Article 5(4) has not been completely transposed, in fact the words "a reasonable period of time" in relation to the possibility of having the documents brought to those who need them in order to enter Malta, has been left out. In practice this rule is respected, but for clarity purposes the necessary amendments to LN 191 of 2007 have to be made.
Article 14(2) last paragraph	This second paragraph, apart from highlighting that

	there should be a reasonable doubt for a MS to verify whether a Union citizen or his/her family members satisfy the required conditions for the right of residence, it also lays down that such verification shall not be carried out systematically. Under Maltese law this last part has been omitted.
Article 14(4)(a)	The wording has not been literally transposed. Under Article 13(1) of the LN 191 of 2007, family members were not included. This might lead one to believe that an expulsion order may not be adopted against a union citizen who is employed or self-employed or a job seeker, but then it can be exercised against a family member since they are not mentioned under this provision. But in light of implementation practices and a reading of the entire text of the LN, another interpretation is clear.
Article 30(3)	The time limit of not less than one month in order to leave the territory in case of an expulsion order has been omitted and the necessary amendments to the LN have to be made.
Article 31.3: Procedural safeguards	Procedural safeguards are mentioned in LN 191 of 2007, but one will not find a literal transposition of this Article. The mechanism of these procedural safeguards is then mostly found under the provisions of the Criminal Code, mainly under Article 422 and under the Immigration Act mainly under Article 14. Again this might cause some ambiguity..

b) Incorrect or imprecise/ambiguous transposition

iii. Incorrect transposition

Article 40: delay for transposition.	Transposition was adopted in 2007.
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iv Imprecise/ambiguous transposition

Article 3.2 (b): Beneficiaries	The Maltese legislator accepts the partner with whom the Union citizen has a durable relationship as an “other family member” but as long as this relationship is not in conflict with the public policy of Malta. One might argue that this definition of other family member is rather vague under Maltese law, and it might not be acceptable that such relationship be scrutinized and examined on the grounds of public policy.
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ABBREVIATIONS USED

Insert any abbreviations used e.g.:

Art	Article
CA	Competent Authority
ECJ	European Court of Justice
MS	Member State/s

1 INTRODUCTION

This conformity study analyses in detail the provisions of Directive 2004/38/EC on the free movement of EU citizens in its consolidated version, and it compares it with the legislation in place in Malta.

Directive 2004/38/EC repealed the earlier directives on free movement of persons (Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) as from 30 April 2006.

EU citizenship gives every Union citizen the right to move and to reside freely within the territory of the Member States. The facilitation and promotion of this right, which is at the same time one of the fundamental freedoms of the internal market, is the objective of Directive 2004/38/EC. A second objective of Directive 2004/38/EC was to codify and review the various pieces of legislation and case-law dealing with this issue.

Free movement as a fundamental freedom of the internal market

Free movement is one of the fundamental freedoms of the internal market and can therefore only be restricted in a limited number of pre-determined circumstances. Thus, national legislation cannot adopt more restrictive legislation than provided for in the Directive.

Directive 2004/38/EC introduces, on the one hand, a uniform approach regarding the formalities that Member States can impose upon EU citizens residing in their territory. These formalities are expressly established in the Directive and restricted in function of the duration of the stay in the Member States.

- For a stay of less than three months, the only formality a Member State can impose is the presentation of a valid passport or national identity card.
- For residence of more than three months, a Member State can only require the EU citizen to register in the population register of the place of residence. This registration needs to be validated immediately if a certain number of conditions are complied with. The Member State can only require the EU citizen to present proof that he/she is a worker, self-employed person, student or has sufficient resources not to become a burden upon the social security system of the Member State. Member States cannot lay down a fixed amount of what they consider to be “sufficient resources”, but must always take into account the personal situation of the person concerned. Family members of the EU citizen will have to present an identity document and proof of the family link to an EU citizen.
- After five years of continuous residence in a Member State, an EU citizen obtains a right to permanent residence. The host Member State shall issue a document certifying permanent residence. A permanent resident has the right to be treated equally to a national of the Member State.

On the other hand, the Directive also determines and clarifies the only acceptable reasons for restriction of the free movement of citizens by Member State authorities, namely for reasons of public order, public security and public health. (For the interpretation and conditions of such exceptions, it is important to rely upon the case-law of the Court of Justice.)

These measures guarantee a strong protection against expulsion for EU citizens who have been long-term residents in another Member State. Such measures need to be proportionate and shall always look at the personal conduct of the individual concerned which must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. In addition, the Directive establishes some procedural safeguards in case an expulsion decision is considered.

1.1 OVERVIEW OF THE LEGAL FRAMEWORK IN MALTA

The legal system in Malta is based on written law. In fact, the Republic of Malta has its own written Constitution, which has as its basic principles the basic rights and freedoms, namely personal liberty, the right to a free trial, property rights, and freedom of opinion, of assembly and of organization. The Constitution guarantees that any person who alleges that his fundamental rights and freedoms have been, are being, or are likely to be contravened in relation to him, may without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall for redress.

The Constitution also guarantees the separation of the powers. In fact the legislative power vests in a unicameral Parliament and is exercised by bills passed by the House of Representatives and assented to by the President of the Republic. The Executive is vested in the President, who shall exercise his functions in accordance with the advice of the Cabinet, or as otherwise provided by the Constitution.

The legislative power may delegate its authority to the Government, where it is specifically stated in an Act of Parliament. Moreover, Ministers charged with responsibility for any Governmental department, directorate or authority, shall exercise general direction and control over the said government department, directorate or authority, and are also given the power under primary law regulating matters falling under their responsibility to make regulations in the form of subsidiary legislation. Under Maltese law, such subsidiary or secondary legislation is adopted through a Legal Notice (LN). Even EU Directives are transposed in the same way, and hence are mostly adopted into national law by means of a LN issued by the Minister responsible for its implementation. All Ministers bear parliamentary responsibility and are duty bound to reply to questioning in parliamentary sessions, thus ensuring cohesion of the Legislature and the Ministries.

Furthermore, the constitution guarantees the independence of the Judiciary from the Legislature and the Executive, with the power to review legislation and to declare it null and void, if it is held to be inconsistent with any of the fundamental rights and freedoms of the individual.

1.2 FRAMEWORK FOR TRANSPOSITION & IMPLEMENTATION OF DIRECTIVE 2004/38/EC IN MALTA

Under Maltese law the EU Directives are usually transposed by subsidiary legislation issued under a particular Act. Directive 2004/38/EC was transposed by LN 191 of 2007 and falls under the responsibility of the Minister responsible for immigration. Within the Ministry itself there exists the required framework and administrative bodies to ensure that the implementation of the Legal Notice is being adequately adopted.

1.2.1 Distribution of competences according to the national Constitution

Therefore, under Constitutional Law, in Malta, like in all democratic states, the separation of powers is exercised. Hence, the legislative power vests in the unicameral Parliament and is exercised by bills passed by the House of Representatives and assented to by the President of the Republic. The executive power vests in the President, who shall exercise his functions in accordance with the advice of the Cabinet, or as otherwise provided by the Constitution. The judiciary reviews legislation and has the power to interpret the law and penalize all those who do not abide with it.

Hence, in relation with immigration matters, the legislative power is vested in the minister responsible for immigration. In fact the primary law which regulates such issues is the Immigration Act (Cap 217 of the Laws of Malta). Under this Act the Minister responsible for immigration, currently the Ministry for Justice and Home Affairs, has the power to make regulations to give effect to the Treaty of the European Union, or any Border agreement to which Malta may be a party.

In accordance with the powers vested in the Minister to provide regulations under the Act, when Malta joined the EU in order to be in line with the *acquis* concerning the free movement of persons, the Immigration Regulations (LN 205 of 2004) were adopted. The definition and Part II of the said regulations transpose the provisions of the above mentioned *acquis* pre 1st of May 2004.

In order to transpose the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004, an order made under the European Union Act was adopted implementing *inter alia* the provisions of the said Directive. This order is referred to as LN 191 of 2007 (Free Movement of European Union Nationals and their Family Members Order 2007). The provisions of LN 191 of 2007 revoke Part II of the Immigration Regulations namely (LN 205 of 2004) insofar as EU nationals are concerned leaving the original provisions applicable in respect of EEA nationals i.e. nationals of Norway, Iceland, Liechtenstein.

Under this Act another administrative function was created and this is vested in the Director for Citizenship and Expatriate Affairs who has the administrative power to implement the provisions regulating the confirmation of the eligibility to EU nationals and their family members in order to exercise Treaty rights. The Director for Citizenship and Expatriate Affairs has been delegated this function by the Minister responsible for immigration in accordance with the powers granted to such Minister as stipulated under Article 26 of the Immigration Act.

Under this Legal Notice the Principal Immigration Officer who currently is the Commissioner of Police, is specifically responsible for the implementation of any removal order which may be issued to a Union citizen and his family members under the provisions of LN 191 of 2007. Also in accordance with the same provisions of this LN, any union citizen or his family member may seek redress of any decision taken by the Director for citizenship and expatriate affairs in respect of his right of free movement. Such redress may be made to the Appeals Board established under the Immigration Act, as mentioned above.

As seen from above, the constitutional division is shared between three separate powers. With regard to this particular Directive, the power mostly greatly involved is the legislative power which is vested in the Minister responsible for immigration. In this regard, the necessary legislation has been adopted and this same legislation has designated the administrative bodies that are responsible for the adoption and implementation of this legal instrument.

1.2.2 General description of organisation of national authorities implementing Directive 2004/38/EC in Malta

The primary Act which regulates immigration matters is the Immigration Act (Cap 217 of the Laws of Malta). Other subsidiary legislation under the form of Legal Notices has then been adopted. These Legal Notices further specify the functions of the administrative bodies which have been legally delegated the required powers in order to implement such regulations.

In relation to Directive 2004/38/EC, as transposed by LN 191 of 2007, one will notice that the following are responsible for the adoption and implementation of this Directive, namely:

- the Minister responsible for immigration who has the power to make such regulations and coordinate with his administrative staff lawfully engaged;
- the Principal Immigration Officer who is appointed by the Prime Minister, and has the authority to regulate border controls, and is responsible for the removal of prohibited immigrants from Malta;
- the Immigration Appeals Board, that serves as an adjudicating body, and for the immigrant to seek redress when a removal order has been issued by the Principal Immigration Officer against him;
- the Director for Citizenship and Expatriate Affairs who is responsible for the implementation of the provisions regulating the confirmation of eligibility to EU nationals and their family members to exercise Treaty rights.

Under the provisions of LN 191 of 2007, the Director for Citizenship and Expatriate Affairs is a public officer not below the rank of a Head of Department and is empowered to implement the provisions regulating the confirmation of the eligibility to EU nationals and their family members to exercise Treaty rights, namely their right to free movement. In this regard, the said official issues the residence permit to such persons. Furthermore, he also has the power to refuse, terminate or withdraw any such right especially in cases of abuse of rights or fraud. The Director for Citizenship and Expatriate Affairs has been delegated this function by the Minister responsible for immigration in accordance with the powers granted to such Minister, as stipulated under Article 26 of the Immigration Act.

The Immigration Act provisions regulate the appointment of the Principal Immigration Officer. This Officer is appointed by the Prime Minister and can exercise his powers in accordance with the general or special directions of the Minister. Within the scope of his powers, the Principal Immigration Officer has the authority to regulate border controls and is responsible for the removal of prohibited immigrants from Malta. Currently this office vests in the Commissioner of Police, who is responsible for the implementation of any removal order which may be issued to a Union citizen and his family members under the provisions of LN 191 of 2007.

Also in accordance with the same provisions of this LN, any Union citizen or his family member may seek redress for any decision taken by the Director for Citizenship and Expatriate Affairs in respect of his right of free movement. Such redress may be made to the Appeals Board established under the Immigration Act, as mentioned above. The setting up of this Board is regulated under Article 25A of the Immigration Act. According to this Article, the Board is made up of a lawyer who will preside over it, a person versed in Immigration matters and another person, each of whom shall be appointed by the President acting on the advice of the Minister. This Board has the jurisdiction to hear and determine appeals or applications made in virtue of the provisions of this Act or regulations made hereunder or in virtue of any other laws. The scope of this Board is to serve as an adjudicating body and for the immigrant to seek redress when a removal order has been issued by the Principal Immigration Officer against him.

2 LEGAL ANALYSIS OF THE TRANSPOSING MEASURES FOR DIRECTIVE 2004/38/EC

As already mentioned above, this LN was transposed into Maltese law through subsidiary legislation issued under the European Union Act (Chapter 460 of the Laws of Malta). This Act was adopted specifically for the adoption of European legislation into Maltese law. The Legal Notice is referred to as the Free Movement of European Union Nationals and their Family Members Order 2007 (LN 191 of 2007), which was published in the Government Gazette of 20th July 2007. These regulations transpose faithfully nearly all the provisions of the Directive even though the presentation and set up of the provisions is different from that of the Directive.

These Regulations are divided into 2 parts. Part I is the preliminary part and includes the scope and definitions and Part II lays down the provisions which regulate the entry and residence of citizens of the Union, their family members and other family members.

Part II starts by laying down the general provisions which have to be followed by all EU nationals and their family members who enter Malta. Firstly, Article 3 of the LN, which is the first article of Part II, immediately grants to all Union citizens the treaty right of free movement within the Maltese territory and also the right to seek and take up employment or self-employment therein, with the guarantee that they will be treated like Maltese nationals. Furthermore, this right is also applicable to family members accompanying or joining the Union citizen, including those who are not nationals of a Member State. According to the same provision, this right may only be refused, terminated or withdrawn by the Director of citizenship in case there is an abuse of rights or fraud.

This same Article 3 makes it clear that a Union citizen, other than workers, self-employed persons, persons who retain such status and their family members, shall not be entitled to social assistance during the first three months of residence, nor shall they be entitled, prior to acquisition of the right of permanent residence, to maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons.

After this general presentation of the rights which a Union citizen and his family enjoys, the law provides for the requirements which have to be followed by a Union citizen who arrives or wants to depart from Malta. Accordingly, the operative part of the LN is that from Article 8 to Article 11. These Articles tackle those situations where an EU citizen and his family members, including those who are not EU nationals, and also other family members as defined under the regulation, may reside in Malta for more than 3 months and would be entitled to a registration certificate and, or a residence card. It is good to note that under Article 8 the right to reside for more than 3 months is given because the Union citizen is given the status of a worker. Under the Accession Treaty Malta has been granted a **derogation for free movement of workers in Malta**. This derogation is for 7 years following the date of accession. So the LN clearly stipulates that “no such employment can be undertaken unless a licence has been issued”. This licence is equivalent to a work permit. In fact the current procedure for EU nationals to obtain a work permit is as follows. The employer who is going to employ the EU national fills the relevant application form and attaches to it a CV of the person, a copy of the passport and one passport-sized photo. The work permit by ETC is not subject to a labour market test and is always issued. It is issued in less than five working days. The individual can actually start work from the date of the application for the work permit. At the moment, negotiations between the Maltese Government and the European Commission are taking place regarding new procedures to be adopted for the faster issuing of work permits to EU nationals and their family members.

The last provisions of the LN provide for those instances where restriction on right of entry and right of residence may be applied, namely on grounds of public policy, public security or public health. They also provided for those instances where removal from Malta may be ordered and all the requirements which have to be followed and the grounds which have to exist for such removal order to be issued. Finally, there are those procedures which have to be followed by the Director when a

restriction or removal order is to be issued. Generally, these provisions transpose fully Chapter VI of the Directive. In this regard, one must also note that certain procedural safeguards in the case of such restriction to free movement and expulsion orders are provided for under Article 25A of the Immigration Act (Chapter 217 of the Laws of Malta). Furthermore, sanctions for non observance of these rules are also included under LN 191 of 2007.

2.1 Definitions, family members and beneficiaries

Definitions: the concept of family members (Article 2)

Practically all definitions have been fully and accurately transposed into national law. There seems to be some doubts with regard to the definition of Union Citizen, because under LN 191 of 2007 this has been defined as “*any person having the nationality of a MS, but does not include Maltese nationals*”. But in fact the law has been drafted like this because the treaty right of free movement for Maltese citizens is already granted under the supreme law of Malta i.e. the Constitution, and this was before the actual Directive was adopted in Malta. Furthermore even the Immigration Act guarantees this fact, together with ECJ case law such as the *Surrinder Singh* case¹ which the Maltese authorities are aware of.

Furthermore, Malta does not recognize registered partnerships, and so this does not fall under the definition of “family member”. But, this is in line with the Directive, since Article 2(2)(b) specifically states that such a family member is allowed only “*if the legislation of the host MS treats registered partnerships as equivalent to marriage*”. Obviously this also excludes the direct descendants and dependent direct relatives in the ascending line of such partners.

Moreover, under the definition of “*family member*” which includes the “*spouse*”, the Maltese law qualifies that this should not be the spouse to a marriage of convenience. A marriage of convenience is not defined, and it has to be proved in a court of law. This qualification does not make this definition incompatible with that of the Directive. On the contrary, one must note that such marriages are not permitted in most states. Also this definition has to be read together with Article 35 of the Directive since such marriages will constitute an abuse of rights.

One might have some doubts as to whether Malta will accept same sex marriages or even same-sex partners. Will these be considered as a durable relationship or a family for the purposes of the Directive? In Malta same-sex marriages are not recognized. It is not the only country doing so and under private international law this is permitted as well. Under this regime of the law same sex-marriages are still being studied and the rules of Private International law on the matter are the following:

“The private international law on marriage as laid down by Dicey insist on the determination of formal validity according to lex loci celebrationis and the capacity of parties according to lex domicile. However, even if both these criteria are satisfied, the public policy exception is still available for the courts of another jurisdiction to refuse to recognise such a marriage.”

Furthermore, Maltese public policy requires that all marriages, whether contracted in Malta or abroad, must necessarily be monogamous in order to be valid.

An interpretation by the Maltese Courts in the light of this Directive still has to be given when the case arise.

¹ Case C-370/90 R v. Immigration Appeal Tribunal and Surrinder Singh, ex parte Secretary of State for the Home Department (1992) ECR I-4265.

Beneficiaries and facilitation of the right of entry and residence (Article 3)

The *Surrinder Singh* case provides guidelines for the interpretation of certain situations regarding the free movement of EU nationals and Maltese nationals who have exercised their free movement in another MS. The Maltese authorities are aware of the principles and when similar cases arise in Malta these principles will certainly will be taken into consideration. Furthermore, one has to keep in mind that when Directive 2004/38/EC was drafted and finally adopted, all ECJ decisions (including the *Surrinder Singh* case) were taken into consideration, and hence this decision is also reflected in the provisions of the Directive which now forms part of our legislation. In fact, two important elements which grant the Treaty right to free movement are the taking up of work in a MS or existing in a self-sufficient capacity in that MS. Under Maltese law these elements are treated under Articles 8, 9 and 11 respectively. Furthermore, under Maltese law the *Surrinder Singh* case principles existed prior to the adoption of this Directive because Maltese citizens are granted the right of free movement through the supreme law of the state i.e the Constitution of Malta. In fact Article 44(1) provides that:

“No citizen of Malta shall be deprived of his freedom of movement, and for the purpose of this article the said freedom means the right to move freely throughout Malta, the right to reside in any part of Malta, the right to leave and the right to enter Malta.”

Furthermore, according to Article 44(4)(c) of the Constitution, the spouse, the widow or widower or a child of a citizen of Malta, shall be deemed to be a citizen.

Together with the *Surrinder Singh* case one must also mention both *Akrich*² and the recent *Metock*³ cases, in relation to the beneficiaries of this Directive. These dealt with the matter of lawful residence in order to be granted the Treaty right of free movement. The Maltese authorities were in favour of the reasoning brought forward by these two cases, even though now with the recent *Metock* case this principle of previous lawful residence in another Member State has not been accepted. Under Maltese law there is nothing to this effect and the Maltese authorities recognise the fact that ECJ case law is also binding as well, so it will follow such rulings.

- *Transposition problems in relation to other family members*

LN 191 of 2007 applies to all Union citizens who move to or reside in Malta, and to their family members or other family members. The definition of “*other family members*” is transposed literally with the exception of Article 3(3)(b) of the Directive. The Maltese legislator accepts the partner with whom the Union citizen has a durable relationship as an “*other family member*” but only when this relationship is not in conflict with the public policy of Malta.

One might argue that this definition of other family member is rather vague under Maltese law, and it might not be acceptable that such a relationship be scrutinized and examined on the grounds of public policy. On the other hand, even the Directive does not qualify who such persons are, and it seems to indicate that it falls under the competence of the host MS to undertake an extensive examination of relevant personal circumstances, and for it to justify denial of entry or residence to such people.

One must note that it is very difficult to make an exhaustive list of the relationships which might constitute a conflict with the public policy of Malta. In fact case 41/74 *Van Duyn v Home Office*, the Court of Justice acknowledged that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation. However, it went on

² Case C-109/01 Secretary of State for the Home Department v Hacene Akrich (Reference for a preliminary ruling from the Immigration Appeal Tribunal), [2003] E.C.R I-9607.

³ Case C-127/08 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, 25 July 2008, not published in E.C.R

to state that recourse by a national authority to the concept of public policy to justify restrictions on the free movement of persons “must in any event presuppose the existence, in addition to the perturbation of the social order which any infringement of the law involves, of *a genuine and sufficiently serious threat to one of the fundamental interests of society.*”

So before the Maltese authorities take any decisions on this matter they have to be very careful, but they are allowed to do so as long as they decide within the limits imposed by the Treaty and the provisions adopted for its implementation. Until now the authorities did not have the occasion to decide upon such matters, in the light of the provisions of this Directive, so before drawing any concrete conclusions one has to see how the Maltese authorities as well as the Maltese Courts will pronounce on this matter.

2.2 Rights of exit and entry (Articles 4-5)

Right of exit (Article 4)

Article 4 provides a general right for Union citizens and family members, provided they have the required identity card or passport. Member States are also required to issue to their own nationals, and renew an identity card or passport.

There are no problems with this Article and all the provisions of LN 191 of 2007 are in line with the provisions of the Directive.

Right of entry (Article 5)

Article 5 provides a general right of entry for Union citizens and family members.

Even this Article has been nearly transposed fully, even though Article 5(4) has not been completely transposed, in fact the words “*a reasonable period of time*” in relation to the possibility of having the documents brought to those who need them in order to enter Malta, has been left out. This is done in practice, but for clarity purposes the necessary amendments to LN 191 of 2007 have to be made.

2.3 Right of residence

2.3.1 Right of residence for up to three months (Article 6)

Article 6 grants an initial right of residence for up to three months without any conditions except holding a valid identity card or passport.

This Article has been fully transposed by LN 191 of 2007, mainly by Article 3(3) and (4). Over here the Maltese provisions might seem to go against the principles established in the *Antonissen and Collins case (C-292/89)*, concerning job seekers, but in actual fact the Maltese authorities are aware of this case and apply its principles. At the same time they are also aware of Recital 9 of the Directive which specifically states that a Union citizen has the right to reside in the host MS for a period of 3 months without being subject to formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favorable treatment applicable to job-seekers. The Maltese LN was drafted on this recital. So the Maltese authorities first follow the first rule that for the first 3 months no formalities are needed and that is the general rule. Then they pass on the exception and if, for example, an EU citizen is asked by the Maltese authorities to show any identification documents and they indicate that he has been here for more than 3 months but he proves that he is a job seeker, the 3 months rule will not be applicable to him, because the authorities will grant him the 6 month period granted for job-seekers.

2.3.2 Right of residence for more than three months (Article 7-13)

a) *General conditions under Article 7*

Article 7 introduces a simplified system of conditions governing the right of residence for the Union citizen and his or her family members, which are based on those applicable under existing *acquis*. The beneficiaries of the right of residence who are Union citizens are divided into four broad groups (a-d), namely:

- Those who exercise an economic activity;
- Those who do not engage in any economic activity but have “sufficient resources” for themselves and their family members, as well as comprehensive sickness insurance cover;
- Students

This right of residence for more than 3 months is extended to family members who are also Union citizens of the Union citizen who complies with the above mentioned conditions, and is also extendable to family members who are not nationals of a MS. In the case of student the right to family reunification is limited to the spouse and dependent children, even though the MS must facilitate the right of residence of students’ dependent ascendants in accordance with Article 3(2) of the Directive.

Furthermore Article 7(3) is based on and clarifies certain provisions of Directive 68/360 and incorporates Court of Justice case-law regarding the retention of worker status where the worker is no longer engaged in employed or self-employed activity.

All these conditions have been adopted by LN 191 of 2007.

- *The concept of sufficient resources*

The concept of sufficient resources has been adopted by Article 11(1) (a) and (b) of LN 191 of 2007. The wording is practically the same as that of the Directive and hence if a Union citizen has sufficient resources for himself and his family together with a comprehensive sickness insurance cover in Malta for himself and his family members, so as not to become a burden on the social assistance system in Malta, then he can enjoy this right of residence for more than 3 months.

- *Retention of the status of worker*

The retention of status of worker is guaranteed by means of Article 8(8)(b) of LN 191 of 2007. The provisions of the Directive have been literally transposed.

b) *Administrative formalities for Union citizens (Article 8)*

This Article provides that MS may require, if they so desire, that Union citizens and their family members who are themselves Union Citizens to register with the competent authorities in their place of residence. In this case a registration certificate will be issued. The application for the registration certificate is CEA 21 (a copy is annexed to this study). The registration certificate is one of the main novelties of the Directive and it replaced the requirement of residence card for Union citizens. This is in line with established case law by the ECJ according to which a residence card is not an authorization but merely a document recording a pre-existing right (*Case C 48/75-Royer*). Then Article 8(3) exhaustively defines what documents are necessary in order for the EU citizen in question to obtain such residence certificate and Article 8(5) provides this list for his family members who are not EU nationals.

Article 8(4) was a new Article introduced in this Directive. This establishes that MS may not require EU citizens to dispose of a fixed amount of resources. In no case may Union citizens be required to dispose of more than a minimum of resources as defined.

LN 191 of 2007 adopts the above provisions. Even though with regard to Article 8(2) of the Directive the Maltese law does not specifically say that non-registration is an offence. What actually constitutes an offence is when the Police ask for such a certificate and one is not in a position to present it. Twenty-four hours are given to present the required certificate.

The Identity Card Act Article 14 lays down the same penalties and if an offence is committed the penalty is a fine (*multa*) not exceeding 232.94 euros and in the case of a continuing offence, to a fine (*multa*) not exceeding 11,65 euros for each day during which the offence continues. The sanctions can thus be considered as proportionate and non-discriminatory.

In the case of the worker, as well as producing the valid identification documentation which a Union citizen enters Malta, he must also produce the working license. This is required because Malta has obtained a derogation until 2011 permitting it to restrict the free movement of workers.

c) *Family members who are not nationals of a Member State (Articles 9-11)*

- **Administrative formalities (Article 9)**

Article 9 provides for the issuing of residence cards to the family members of EU citizens, who are not nationals of a MS. This provision has been effectively transposed. However, it would be desirable to make clear in Maltese legislation that one may also apply for a residence card immediately and not only after the lapse of 3 months. This provision also allows the MS to impose sanctions in case of non-compliance. Under Maltese law there is no specific provision for sanctions for not registering. The sanctions mentioned are applicable by default, because if the persons concerned fail to produce the document when demanded they will be penalized. This also serves as a deterrent in order to ensure that application is made. This Article has been also been effectively transposed.

With regard to these persons, application CEA/21 has to be used (as copy is annexed to this study). So a family member who is not an EU national has to fill in this form, and the CA responsible for such documentation is the Directorate of Citizenship and Expatriate Affairs. At the moment these cards are just a paper document which will be signed by the Director of Citizenship and Expatriate Affairs, but now cards have been developed and will soon be used.

- **Issue of residence cards (Article 10)**

The provisions of this Article have been duly transposed by LN 191 Of 2007. In fact, under Maltese law the Director shall issue a residence card to such family members no later than six months from the date of application.

- **Validity of residence cards (Article 11)**

Under current legislation, the “residence document” issued to members of the family shall have the same validity as that issued to the EU national on which they depend. Even this provision has been fully transposed into Maltese legislation.

d) *Retention of the right of residence by family members in the event of death, departure, divorces, annulment or termination of partnership*

- **Retention of the right of residence in the event of death or departure of the Union citizen (Article 12)**

Article 12 provides that family members retain the right to reside where the Union citizen dies or leaves the Member State. It intends to clarify that family members who are Union citizens have a residence entitlement in their own right which is not effected by the departure or death of the Union

citizen, but that in such an event they must satisfy the conditions for the exercise of the right of residence as established by Article 7(1) if they have not acquired a permanent right of residence.

Under Maltese law the required provisions have been fully transposed.

- **Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership (Article 13)**

Article 13(1) aims to clarify that Union citizens have a residence entitlement in their own right, which is not affected by the termination of marriage or registered partnership. Furthermore Article 13(2) creates a new right of residence for family members who are third country nationals when the marriage or registered partnership ends. Conditions for retaining the right of residence are however, strict.

The provisions of LN 191 of 2007 are in full accordance with this Article.

2.3.3 Retention of the right of residence (Article 14) and Article 15(2)

Article 14 provides for the circumstances in which the person may lose the right of residence granted by Articles 6, 7, 12 and 13 of the Directive.

(a) General aspects

Article 14 has not been literally transposed by LN 191 of 2007. In fact under Article 14(2) the last paragraph, where in case of reasonable doubt the MS may verify whether a Union citizen or his/her family members satisfy the required conditions for the right of residence, has not been fully transposed. The second paragraph, apart from highlighting that there should be a reasonable doubt for this practice to be adopted, also lays down that such verification shall not be carried out systematically. Under Maltese law this last part has been omitted, even though the regulations provide (as the Directive does) that such verification may only be carried out if there is reasonable doubt, hence this is not in a systematic way, because one has to keep in mind that reasonable doubt is more qualified than just mere doubt. Such verifications are only carried out when certain serious and extraordinary circumstances exist.

Again, in Article 14(4)(a) and (b), the wording has not been literally transposed. Under Article 13(1) of the LN 191 of 2007, family members were not included. This might lead one to believe that an expulsion order may not be adopted against a Union citizen who is employed, self-employed or a jobseeker, but that it could be exercised against a family member since they are not mentioned under this provision. Actually, listing family members here was not really necessary. The right of residence depends on certain factors such as being an EU citizen and being employed etc. Once this is satisfied then family members will also enjoy these rights. In fact the general provision of Article 3(1) of the LN is also highlighting this concept immediately at the beginning of the LN. Consequently, all that which is applicable to EU citizens under this Directive is equally applicable to their family members.

(b) Article 15(2)-(3) expiry of document not a ground for expulsion

Article 15(2) of the Directive provides that the expiry of the ID or passport on the basis of which the person concerned entered the host MS and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host MS.

Article 15(3) forbids the imposition of a ban on entry in the context of an expulsion decision taken on grounds of not meeting the requirements of Article 6, 7, 12 and 13.

These two specific sub paragraphs have been effectively transposed.

2.4 Right of permanent residence

2.4.1 General rule for Union citizens and their family members (Article 16: eligibility)

Article 16(1) and (2) of the Directive grant the right of permanent residence after legal residence for five years. Effective Transposition was made. Furthermore, the procedure is that there is a form CEA 21 which has to be filled in by those seeking permanent residence, and has to be presented to the Maltese authorities together with evidence. Then, after due verifications, the Maltese authorities will issue the permanent residence card. Usually the change will be recorded on the same residence card of the person concerned.

2.4.2 Acquisition of the right of permanent residence for workers/self employed persons and their family members (Article 17)

Article 17 allows for workers/self-employed persons and their family members to acquire the right of permanent residence before completion of the five-year period of residence.

This Article has been transposed even though Article 17(2) has not been literally transposed and this may lead one to interpret it as if this Article was not transposed correctly. In fact Article 6(8) of the regulations stipulate that the exemptions laid down under this article whereby permanent residence can be attained before the completion of 5 years, do not apply if the worker's or the self-employed person's spouse is a former citizen of Malta who has lost Maltese citizenship by reason of marriage to that particular worker, and then leaves out the spouse being a Maltese citizen. Actually, the Directive is catering for these two situations under Article 17, but LN 191 of 2007 caters only for the first situation. This is correct though, because the spouse of a citizen of Malta is covered by Article 4 of the Immigration Act (Cap. 217 of the Laws of Malta). In fact, the spouse of a Maltese citizen can stay here and work for an indefinite period.

2.4.3 Acquisition of the right of permanent residence by certain family members who are not nationals of a MS (Article 18)

Article 18 allows family members of EU citizens who retain a right of residence under Article 12(2) or Article 13(2). This Article has been rightly transposed.

2.4.4 Documents certifying permanent residence for Union citizens (Article 19)

Article 19 deals with the permanent residence certificate for Union citizens. Effective transposition was done.

2.4.5 Permanent residence card for family members who are not nationals of a MS (Article 20)

Article 20 similarly provides for the permanent residence certificate for family members who are not Union citizens. Almost literal transposition has been made.

2.4.6 Continuity of residence (Article 21)

Article 21 provides that continuity of residence may be proven by any means of proof.

The proof is treated on a case-by-case basis, but most of the time rent bills, electricity and water bills are asked for in order to prove his permanent residence.

The second part of this Article, i.e. *continuity of residence is broken by any expulsion decision duly enforced against the person concerned*, is not clearly stated in the LN. The LN has the expulsion

provisions mainly under Article 13(1), but it is not specifically mentioned that when such expulsion is duly enforced it will break the continuity of residence. This insures more favourable treatment.

2.5 Common provisions (Articles 22-26)

2.5.1 Article 22 territorial scope

Article 22 provides that the territorial scope of the Directive is the whole of the Member State and that restrictions on movement may only be imposed where the same restrictions apply to nationals of the Member State itself. LN 191 of 2007 from its first provisions provides that free movement is allowed to all Union citizens and their family members and they will enjoy equal treatment as well.

2.5.2 Article 23 Related rights

Article 23 provides a right for family members who have the right of residence to take up employment.

Effective transposition has been made.

2.5.3 Article 24: equal treatment

Article 24 provides for the principle of equal treatment for EU citizens and their third country family members. Effective transposition has been made.

2.5.4 Article 25: general provisions concerning residence documents

Article 25.1 provides that possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

Effective transposition has been made of this provision.

2.5.5 Article 26 checks

Article 26 provides that Member States may have checks to ensure that beneficiaries of the Directive carry their residence cards in the same way as nationals carry their identity card. This Article has been rightly transposed.

2.6 Restrictions on the right of entry and residence on grounds of public policy, public security and public health

2.6.1 General principles (Article 27)

Article 27.1 provides that Member States may restrict the freedom of movement and residence of Union citizens and their family members on grounds of public policy, public security or public health. This article has been duly transposed. Its application and interpretation in our Law Courts still has to be tested though, since this Directive was only adopted last year.

Hence, in order to check how cases of expulsion are treated under Maltese Law one must examine cases of deportation which had arisen mainly in front of the Constitutional Court of Malta⁴. In these cases the applicant asks the Constitutional Court to cancel the deportation order because it infringes

⁴ Savir El Yeferin vs Prime Minister et.- Constitutional Court- 28th June 2005; Mouchef Choubene vs Commissioner of Police –Constitutional Court -28th December 2001; Rita Schillaci vs Prime Minister – Constitutional Court – 11th June 1993.

his right to family life. Maltese Courts, while giving out their decision, always make reference to the Convention on Human Rights and case law of the European Court of Human Rights in Strasbourg. This is an indication that once the Maltese courts have to decide on the merits of LN191 of 2007, they will almost certainly take note of ECJ case law related to public policy matters like the *Bouchereau case C-30/77* and the *Donatella Calfa case C- 348/96*.

In these cases, our judges concentrate mostly on Article 8 of the Convention where it is stated that:

“There shall be no interference by a public authority with the exercise of this right to family life except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health and morals, or the protection of the rights and freedoms of others.”

In one particular case decided on 28th June 2005, *Samir Elyeferin vs Prime Minister et.*, the Court established that in these cases it has to see whether:

- (1) the applicant has a family life
- (2) the deportation is going to create a ‘serious disruption ‘ to family life
- (3) the deportation falls under one of the grounds of derogation mentioned under Article 8 of the Convention.

Furthermore, one of the cases of the European Court of Human Rights mostly quoted by the Maltese Courts is *Farah vs Sweden* (No. 43218/98) decided on 24th August 1999. Here it was stated:

“The interference was in accordance with law and pursued the legitimate aim of preventing order or crime... the authorities cannot be considered as having failed to strike a fair balance between the applicant’s right to respect for family life and the prevention of disorder and crime.”

As seen from above, the Maltese Courts, while examining these cases, make reference to foreign judgments and in light of these judgments reach their conclusions. As in ECJ case law, the Maltese courts does not order deportation simply because the person involved has committed a crime. It considers other factors, as done in the European Courts of Human Rights, Before it gives its final decision it has to be convinced that there is a fair balance between the applicant’s right to family life and the prevention of disorder and crime in Malta.

2.6.2 Protection against expulsion Article 28

Article 28 provides for a number of protections against expulsion decisions. This provision has been effectively transposed. In fact there has been almost literal transposition of the Article, the only difference lies in the fact that instead of the word ‘expulsion’ the legislator uses the word ‘removal’.

The Maltese law, just like the Directive, does not specify what the serious grounds of expulsion are, but refers to the grounds related to public policy and public security. These grounds will be determined on a case-by-case basis and on their own merit, since under Maltese law no specific legal grounds have been established and scheduled.

AAs already explained in relation to Article 27.1 of the Directive, when the Maltese courts are going to decide on a deportation order, they will always take into account the principle of proportionality and see that there is a fair balance between the applicant’s right to family life and the prevention of disorder and crime in Malta.

This goes in line with the scope of the Directive, because even in Recital 23, whereby when an expulsion order is being processed against a Union citizen and their family members on grounds of public policy or public security, the principle of proportionality has to be applied. Apart from considering these grounds for the security of the State one must also consider also the personal circumstances of the person in question.

Like the serious grounds, the imperative grounds have not been legally established and scheduled, but the competent authority in Malta tends to interpret these grounds as terrorism and similar crimes.

2.6.3 Public health (Article 29):

This Article is based on Article 4 of Directive 64/221. It specifies diseases which may justify restrictions to free movement. Article 29(2) implies that the right of residence, after three months may never be contested on grounds of health. This provision was not literally transposed, and the Maltese provision stipulates that an examination may take place after 3 months if there are serious indications that it is necessary, but it has not been written down that this will not constitute grounds for expulsion. One might be particularly aware about this, because no literal transposition has been made and this might constitute a gap in the Maltese system. However, the Maltese authorities confirmed that a removal for reasons of public health under Maltese law is only possible in practice if the disease in question is like those described in Article 29(1). Otherwise where there are serious indications that it is necessary a medical examination will be carried out on the persons entitled to right of residence. These provisions still have to be tested.

2.6.4 Expulsion as a penalty or legal consequence (Article 33)

This Article is new and concerns cases where an expulsion order is issued as a penalty or legal consequence of a custodial sentence, either by a criminal court or an administrative authority. This article has almost been literally transposed. However, under Maltese law there is no list in the Criminal Code which enlists the crimes where expulsion may occur. This is decided on a case-by-case basis by the Court or by the administrative authorities mainly on grounds of public policy and public security.

2.7 Procedural safeguards against decisions restricting free movement (Article 15, and Articles 30-31)

2.7.1 Notification of decisions (Article 30)

Article 15.1, Article 30 and Article 31 – procedural safeguards. These three articles envisage certain procedural protections that apply when decisions are taken to restrict the free movement of EU citizens and their family members. Article 15 makes reference to the procedural guarantees actually contained in Articles 30 and 31.

It seems that the Maltese legislator does not see much difference between notification and information. It appears that the Maltese authorities notify and inform at the same time. Nonetheless, it is not a bad practice because once you notify then you have to inform the individual concerned with the reasons for such expulsion. Article 14(1) of LN 191 of 2007 specifically covers this procedure. In actual fact notification and information in the case of expulsion are related, because once you notify then you have to inform. Now information in full is only restricted when this goes against the interests of state security. But the persons concerned are always going to be notified in writing in such cases and what are the implications are to them.

Furthermore, Article 30 has been almost literally transposed, with the exception of Article 30(3). In fact the time limit of not less than one month in order to leave the territory in case of an expulsion order has been omitted and the necessary amendments to the LN have to be made.

2.7.2 Procedural safeguards under Article 31

The procedural safeguards are mentioned in the Legal Notice, but one will not find a literal transposition of this Article. The mechanism of these procedural safeguards is then mainly found under the provisions of the Criminal Code, mainly under Article 422 and under the Immigration Act mainly under Article 14.

Once a removal order is issued, the person involved has the right to appeal in front the Appeals Board, and he has also the right to have another appeal in front of the Courts Of appeal on points of law. In the meantime, the same person may also apply under the Code of Organization and Civil Procedure (Cap. 12) of the Laws of Malta for a warrant of prohibitory injunction and hence the Principal Immigration officer will be duty bound to respect such interim measure and keep the person in Malta until all proceedings are finalized. However, in most cases, this interim measure is not used very often because once a removal order is issued, the person is given time to present his case in front of the Appeals Board and if needed even in front of the Court of Appeal. The presence of the applicant is required to present his case and local authorities only remove a person after the court's final decision.

Procedural safeguards are mentioned in LN 191 of 2007, but one will not find a literal transposition of Article 31 (3) of the Directive. The mechanism of these procedural safeguards is then mostly found under the provisions of the Criminal Code, mainly under Article 422 and under the Immigration Act mainly under Article 14. Again this might cause some ambiguity, even though in practice the system mentioned above guarantees that the person involved is given time to present his case and be adjudged by the Maltese judicial authorities.

2.7.3 Exclusion orders (Article 32)

This Article incorporates into the legislation a right already recognised by the Court of Justice (Cases 115-116/81: *Adoui and Cornuaille* and Case C-348/96 *Donatella Calfa*) by prohibiting life-long exclusion orders against persons who have been expelled on grounds of public policy and public security. It establishes that the reasonable period after which a new application may be submitted, as referred to by the Court in the above mentioned cases may not be more than three years form the enforcement of the national exclusion order.

Under the LN this Article has been effectively transposed, and when the case arises, one will see how the authorities and our courts will apply this provision.

2.8 Final provisions (Chapter VII)

2.8.1 Article 34: publicity

No particular publicity exists.

2.8.2 Abuse of rights (Article 35)

This Article introduces the possibility for MS to adopt measures restricting free movement rights under the Directive in case of abuse of rights. However, such measures must be proportionate and subject to procedural safeguards. This Article has been transposed well by LN 191 of 2007, but its application and interpretation still has to be tested.

2.8.3 Sanctions (Article 36)

The sanctions imposed by the Maltese legislator, will serve as a deterrent so that persons who require the registration certificate, residence card etc. make sure that they apply for them and obtain them so that when a member of the Police Force asks them to produce it they will have it available otherwise this will constitute an offence against this Order.

2.8.4 More favourable provisions (Article 37)

More favourable provisions have not been granted by the LN.

2.8.5 Transposition

The Directive was transposed into Maltese Law. The Directive was not transposed in time and started to be applicable as from 2007.

ANNEX I: Table of concordance for Directive 2004/38/EC

ANNEX II: List of relevant national legislation and administrative acts

- Free movement of EU Nationals and their Family Members order, 2007 (LN 191 of 2007)
- Passport Ordinance (Cap. 61 of the Laws of Malta)
- Passport Regulations (LN 59/01)
- Identity Card Act (Cap. 258 of the Laws of Malta)
- Constitution of Malta
- Criminal Code (Cap. 9 of the Laws of Malta)
- Immigration Act (Cap. 217 of the Laws of Malta)

All these laws are accessible from web site:

<http://www.gov.mt/frame.asp?l=1&url=http://www2.justice.gov.mt/lom/home.asp?langid=m&pubid=lg&psb=p>

ANNEX III: Selected national case law

- Savir El Yeferin vs Prime Minister et.- Constitutional Court- 28th June 2005;
- Mouchef Choubene vs Commissioner of Police –Constitutional Court -28th December 2001;
- Rita Schillaci vs Prime Minister – Constitutional Court – 11th June 1993.

All published on (only publication of case-law is online):

<http://www.gov.mt/frame.asp?l=2&url=http://www2.justice.gov.mt/sentenzi/default.asp?lng=eng>

No national case law on the transposing legislation of Directive 2004/38/EC to report.

ANNEX IV: Application forms