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**Pan-European Conference - Work: a Tool for Inclusion or a
Reason for Exclusion?**

Research Paper 2

***Combating discrimination in employment, including access to work and
workplace discrimination***

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Promoting the integration of third-country nationals through the labour market: Combating discrimination in Employment: The case of third-country nationals in Malta

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1.0 Introduction

Over the last few years, Eurostat statistics clearly show that the net increase in the EU's total population was due to immigration. The EU's Europe 2020 Strategy and the EU's Stockholm Programme recognise that legal migration can help European countries address the challenges of demographic change, including ageing population, longer life expectancies and a declining working-age population. Suban and Zammit (2010) argued that Malta is also affected by similar demographic trends and that legal migration could be a solution for Malta. However, successful migration and subsequent integration require that the host country has a labour market that guarantees migrants a treatment that is as much as possible similar to the native population. This study investigates this question in the context of third country nationals (TCNs) in Malta. This paper is the outcome of a research project commissioned by the Malta office of the International Organisation for Migration (IOM) undertaken as part of the European Union's Integration Fund programme IF 2001-08: "Pan-European Conference – Work: a Tool for inclusion or a Reason for Exclusion?".

1.1 Objectives of the Study

The principal objective of the project is to provide support to all Maltese stakeholders involved in the development and/or implementation of labour market or integration policies of TCNs. The study will first focus on policy areas where the current Maltese situation leads to discrimination/unfavourable treatment³ of TCNs. Then, the study will suggest how these situations of discrimination/unfavourable treatment could be reduced or eliminated by outlining successful policies and practices developed and implemented in other EU countries. The study will also discuss the best possible way to import and adapt these EU wide best practices by taking into account the particular Maltese context.

1.2 Methodological Note

The project was based on three stages. During the first stage, the Malta office of the IOM sent an assessment questionnaire⁴ to all potentially relevant Maltese stakeholders. These were identified as stakeholders who are active in the area of immigration and the labour market. The first stage of the project was concluded in November 2012 by a meeting between the authors and the relevant stakeholders whereby the former could comment and ask clarifications on the assessment questionnaires responses and the authors also outlined some ideas that could be explored in the subsequent stages of the project. During the second stage, the authors drafted the research paper to be submitted to the final pan-European conference. The third stage will consist of revising and

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³ See section 1.3.2 for a discussion of the distinction between discrimination and unfavourable treatment.

⁴ A copy of the assessment questionnaire is available on request from the authors.

amending the research paper by taking into account the feedback of both the stakeholders and other experts during the final pan-European conference which will be held in April 2013.

In preparing the research paper, we used the answers to the assessment questionnaires and other ideas discussed during the November 2012 experts meeting. The input provided during the first stage of the project served to limit the scope of our research to shortcomings currently present in Malta and only identifying best practices for those shortcomings. This was complemented by additional research. First, we undertook a wide desk research by reviewing the annual reports and other literature produced by all relevant stakeholders. We also consulted previous academic studies relevant to our area of research. Secondly, we also entered into direct contact with certain stakeholders in order to ask for additional information or clarifications regarding certain aspects of their work, notably the policy setting function and the implementation of policies falling under their remit. Thirdly, we consulted documents and websites of other organisations within the European Union in order to identify those best practices which we could implement in Malta in order to improve the situation and/or remedy to the shortcomings identified in the first two stages of the project.

1.3 Definitions

1.3.1 Third-Country National (TCN)

For the purpose of our study, a third-country national (TCN) is any person that is not a citizen of the European Union as per the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who does not enjoy the Union right to freedom of movement as defined in Article 2(5) of the Schengen Borders Code.

We acknowledge that there are different categories of TCNs and that the rights and thus situations that they experience will be different. Other categories of TCNs include those who would be EU Blue Card holders as per Council Directive 2009/50/EC⁵, TCNs who are researchers, TCNs who would have acquired long-term resident status as per Council Directive 2003/109/EC⁶, and TCNs who are married to a Maltese or EU National. However, currently, most statistics and previous research in Malta do not make a distinction between all these categories of TCNs though anecdotal evidence suggests that the vast majority of TCNs would not belong to these sub-categories.

As a result, the paper will be referring to the situations experienced by most TCNs in Malta and exclude TCNs who are researchers, EU Blue Card holders, Long-term resident status holders and those married to Maltese or EU nationals. Overall, with regards to employment, all these sub-categories would be treated in a more favourable way compared to other TCNs. TCNs who are married to a Maltese or EU national are even supposed to be treated like Maltese nationals although anecdotal evidence suggests that it is not always the case in practice.

⁵ This directive was transposed in Malta in November 2011 through legal notice 433 of 2011 (Conditions of entry and residence of third-country nationals for the purpose of highly qualified employment regulations).

⁶ This directive was transposed in Malta in November 2006 through legal notice 278 of 2006 (Status of long-term residents (third-country nationals) regulations).

1.3.2 Discrimination/Unfavourable Treatment

For the purpose of this study, we make a distinction between situations when TCNs experience an unfavourable treatment and when TCNs experience discrimination. On the one hand, we will refer and use the expression “unfavourable treatment” in situations when the Maltese Government is allowed by law to treat differently Maltese and TCNs. On the other hand, we will refer and use the word discrimination when a different treatment between Maltese and TCNs is not allowed by law.

1.4 Limits of the study

The paper focuses on investigating the situation of TCNs legally residing in Malta and stakeholders dealing directly or indirectly with TCNs in Malta. Although large parts of the findings of this study would also reflect the situation that other migrants experience in Malta, there are differences between the three main economic migrant groups: nationals of EU countries, of European Economic Area (EEA) countries and of Switzerland; third-country nationals; and nationals seeking asylum in Malta. Most of the previous immigration related research which has studied the situation in Malta has focused on the situation of nationals seeking asylum in Malta (Pisani (2011); Gauci (2011); Suban (2012); Rizzo (2012); Pace (2012); Debono (2012); Lutterbeck (2012)).

1.5 Outline of rest of study

Section 2 discusses the main issues raised by the stakeholders who answered the assessment questionnaires. Section 3 analyses the instances of discrimination/unfavourable treatment that TCNs currently experience in Malta prior to accessing work. Section 4 focuses on Maltese legislative safeguards against discrimination, highlighting certain loopholes which make this protection less comprehensive than it might initially appear to be. Section 5 describes and discusses situations of discrimination/unfavourable treatment that TCNs currently experience in Malta once they are employed. Section 6 discusses other sources of discrimination which impact the everyday life of TCNs in Malta. Section 7 discusses and describes the examples of EU best practices that reduce or eliminate discrimination vis-a-vis TCNs in the workplace and, finally, section 8 will conclude the study with recommendations on reducing or eliminating discrimination vis-a-vis TCNs outside the workplace.

2.0 Feedback from the assessment questionnaires

The assessment questionnaire was distributed by the Maltese IOM office to all the stakeholders identified as relevant to the research project. The stakeholders could be grouped under three categories: namely government departments and agencies; stakeholders, such as trade unions, employers associations and local councils; and the last category representing non-governmental organisations (NGOs) operating in the field of immigration.

The IOM received answers⁷ from four government departments or agencies, namely the Employment and Training Corporation (ETC), the Department of Industrial and Employment Relations (DIER), the Department of Citizenship and Expatriates Affairs (DCEA), and the National Commission for the Promotion of Equality (NCPE). From the second category, the IOM received

⁷ We are including answers of the assessment questionnaires or feedback provided during the November 2012 experts' meeting.

answers from one trade union (General Workers Union) and two local councils (St Paul's Bay and Gzira). With regards to the NGOs, the IOM received answers from three of them, namely, Aditus Foundation, Solidarity Overseas Service Malta, and the People for Change Foundation.

2.1 Themes emerging from the assessment questionnaires

2.1.1 No feedback from employers

First of all, one must say that it would have been useful to get feedback from employers as they are an essential part of combating labour related discrimination. Given that it is extremely difficult to get feedback from individual employers, the project should, at least, try to not only get feedback from the Malta's Employers Association (MEA) which represent all employers but also get feedback from the General Retailers Trade Union (GRTU) as the latter represents small businesses, in particular shop owners where a large number of foreigners find employment⁸.

2.1.2 Lack of information regarding work permits

All the stakeholders commented on the fact that not enough information is provided on the recruitment procedures; work permit applications are processed differently according to the nationality of applicant. Furthermore, respondents have the impression that the processing of work permit applications is not transparent, takes too much time, and outcomes are discretionary. This sentiment is shared by both prospective TCNs and Maltese employers. We recognise that a great deal of information exists and is relatively accessible but this perception reflects the fact that for the average employer, the information is not easily accessible and not presented in a user friendly way. One way to reduce this perception gap is by improving the accessibility of information and making the latter as simple and understandable as possible. Best practices from other countries should be pursued in this area.

2.1.3 Enforcement of anti-discrimination laws

Several stakeholders mentioned that although Malta had adopted anti-discrimination legislation, one had to ensure that such legislation had to be adhered to in practice and that cases of breaches should be enforced and remedied to.

2.1.4 Increasing awareness about rights and obligations, means of redress in case of discrimination, and living and working conditions in Malta

Several stakeholders mentioned that foreign workers were not aware of their rights and obligations once employed in Malta. As a result, they would not be in a position to find out whether they were being discriminated. Furthermore, foreign workers did not know have adequate knowledge on how and where to go to seek redress when their rights were being breached.

2.1.5 Intercultural training at the place of work

As the number of foreigners working in Malta continues to increase, it is important that both employers and employees get trained in managing diversity and multicultural issues at the

⁸ According to the European Commission (2012) 99.9 of Maltese enterprises are SMEs and 95.8% are micro enterprises (entities employing less than 10 persons).

workplace. This is particularly important given that most enterprises are SMEs which will usually not have a formal Human Resources department trained in these issues which can in turn organise such training. In this regard, over the past few years, several initiatives and projects have been implemented, notably by the National Commission for the Promotion of Equality (NCPE), to remedy this situation. However, such programmes and training need to be provided on a regular basis rather than as one-off projects given that the flow of foreign workers is constant, increasing and spreading over all the sectors of the economy.

2.1.6 Provision of language and cultural training

In order to improve the employability and integration of foreign workers, several stakeholders suggested providing language tuition and basic tuition about Maltese culture, history and lifestyle. Programmes of this type have already been organised in the past but these need to be made available on a regular basis. TCNs, wishing to get the long-term resident status, have to attend similar courses. One could think of extending these programmes to all TCNs and use them as a form of induction before they start their employment as a way to facilitate their integration at the workplace.

2.1.7 Need for continuous initiatives rather than one-off projects

One must acknowledge and commend the ability and speed of the relevant agencies, government departments, NGOs and other stakeholders to take initiatives and projects aimed at addressing some of the problems identified throughout the years. One must particularly praise the ability of all actors in tapping EU funding without which most of these initiatives would not have been possible. However, some of these initiatives, such as language and cultural training should not be implemented as one-off projects but should be provided on an ongoing basis as there is a continuous flow of migrants entering the Maltese labour market. This is a major issue given the limited resources available to the agencies and NGOs working in the field. Best practices ought to put forward ways how to ensure that this type of training and initiatives are provided on a regular basis.

2.1.8 Lack of cooperation between stakeholders

Given that the remit of some policy areas falls under the remit of various agencies and government departments, one gets the impression that there are synergies which could be developed in order to reach and serve better their customers. Let us illustrate this point by taking the example of work permits and conditions of work. The former falls under the responsibility of the Employment and Training Corporation (ETC) while the latter falls under the responsibility of the Department of Industrial and Employment Relations (DIER). These two entities are separate. As a result, when employers or foreign workers pick up work permits, no information⁹ is provided to them on conditions of work, discrimination at the workplace and what entities and procedures to follow to seek redress in case of breaches.

⁹ There is a link provided from the ETC website to the DIER website but no extensive or formal presentation of conditions of work is provided when work permits are delivered.

3 Unfavourable treatment of TCNs prior to accessing work

This section will analyse the present situation in Malta vis-a-vis TCNs access to work. It will describe how the treatment of TCNs is unfavourable compared to that of other migrant groups, such as nationals from EU, EEA, or Switzerland or asylum seekers. This section will also outline the reasons for the different treatment and the impact that it has on TCNs' prospects for access to work.

3.1 Reasons for difference in treatment between TCNs and other migrants

As per the Immigration Act (Chapter 217 of the Laws of Malta), all foreigners who wish to work in Malta must hold a work permit¹⁰. With regards to access to work, the difference in treatment between TCNs and other migrants is the direct result of the rules and implementation of the work permit system. The Employment and Training Corporation (ETC) is the government agency which administers the work permit system. In the case of EU, EEA and Swiss nationals¹¹, the way that the current work permit system is implemented is the result of EU legislation and EU case law. As a result, all EU workers are virtually treated like Maltese workers which mean that they are granted work permits on an automatic basis. Furthermore, given the principle of community preference, workers from other countries cannot be given a more favourable treatment than EU nationals thus all other foreign workers are bound to be treated at least on a par or at worse less favourably.

However, when comparing the other two remaining groups of migrants, i.e. TCNs and asylum seekers, we notice that TCNs are even treated less favourably compared to asylum seekers. One can easily explain and understand this policy. Part of the explanation lays in international treaties and United Nations conventions which regulate the treatment of asylum seekers and the automatic rights to access the labour market that recognised asylum seekers get. The other reason is that, given that asylum seekers are already in Malta, it makes sense both for the authorities and for employers to encourage making use of labour already in Malta to fill up labour shortages rather than importing additional TCNs from other countries. As a result, the ETC can only adopt a full discretionary policy with regards to granting access to work for TCNs. The ETC makes use of this full discretion by only allowing access to Malta's labour market those TCNs that the ETC is convinced have skills which cannot be sourced from the two other sources of migrants (Suban and Zammit (2010)).

3.2 Sources of unfavourable treatment between TCNs and other migrants vis-a-vis access to work

Table 1 lists all the sources of unfavourable treatment that TCNs are faced with when trying to access the Maltese labour market.

The first source of unfavourable treatment is related to police clearance. Indeed, work permit applications from TCN workers, unlike applications from other categories of migrants, must undergo police clearance. The police have no time limit to submit a reply to the ETC. One must say that most

¹⁰ The Immigration act uses the term employment licence instead of work permit. We have decided to use the term work permit throughout our paper.

¹¹ Given that EU, EEA and Swiss nationals are treated in the same way, from now on the use of EU workers will comprise all these categories.

applications are granted police clearance. It is only refused in a minority of cases (less than 1% of applications).

Table 1 Sources of Unfavourable Treatment of TCNs vis-a-vis Access to Work		
Work permit application	EU, EEA, Swiss, REF, THP, AS	TCNs
Subject to police clearance	No	Yes
Subject to labour market test	No	Yes
Work permit fee	Lower	Higher
Can have access to self-employment	Yes	No
Automatic renewal	Yes	No
Limited number of renewals	No	Not anymore
Can submit application while in Malta	Yes	Not always
Amount of documentation to be provided	Lower	Higher
Time to process application	Automatic to a few days	No time-limit
Level of uncertainty about outcome	Non-existent	High
Access to vacancies	Yes (EURES portal)	Limited
Access to work for partners	Yes	Subject to LMT
Recognition of Qualifications	Automatic for certain professions	Process can be very long

Source: Own workings based on legislation and ETC policy implementation

Secondly, work permit applications of TCNs are subject to a higher application fee compared to the other migrant groups. The reason for the higher fee is that the assessment of work permit applications of TCNs involves more administrative work compared to the other migrant groups. The higher fee can act as a deterrent for employers to select a TCN worker. There is also anecdotal evidence which suggests that the employer deducts these fees from the workers' wages.

Thirdly, all applications submitted by TCNs are subject to a labour market test. The latter consists of the ETC enquiring and collecting proof from the employer that every effort has been taken to try to fill the post from workers already in Malta or from the other migrant groups. This mainly consists of checking that the vacancy has been advertised on the ETC and EURES portals and that it has been advertised in the local newspapers. The ETC also requires employers to hold interviews with potential candidates that would have either applied online for the post or that the ETC would have recommended through its matching system. The reason why the labour market test is used is a direct result of the government's policy, as explained in section 2.1, of only granting access to work to TCNs once a high degree of assurance has been obtained that the skills requested are not already available in the Maltese labour market. This also means that applications submitted by TCNs require more information about the vacancy and thus a greater amount of documentation needs to be submitted at time of application. As a direct result of the labour market test whose outcome is uncertain, TCNs' perceive that the outcome of a work permit application has a high level of uncertainty whereas there is no uncertainty in the case of other group of migrants. Zammit (2012) also mentions that TCNs perceive that the outcome of the labour market test is seen as a discretionary process.

Fourthly, unlike other groups of migrants who have access to both employed and self-employed type of employment, TCNs, unless they are doing a substantial capital investment, do not have the possibility to work as self-employed.

Fifthly, while all work permits are granted on an annual basis, they are renewed automatically for EU, EEA, Swiss and asylum seekers, but they are not automatically renewed for TCNs as these will be subject to a labour market test. In practice, it is very rare for a work permit of a TCN not to be renewed once it has been issued. Furthermore, renewals were limited to a maximum number of three times up to a year ago. This provision has been removed since the entry into force of the language and culture requirements needed to obtain the long-term resident status.

TCNs are also subject to other conditions which are less favourable when compared to other groups of migrants. Indeed, most of the time, TCNs need to submit the application before their arrival in Malta. This is mainly the result of implementing the Schengen provisions and is not something specific to the Maltese authorities. Furthermore, the partners of TCNs are not automatically granted a work permit once a TCN is already in Malta, though the ETC tends to take into account that fact when considering an application from the partner and thus improves their employability.

Another source of unfavourable treatment is that there is no formal deadline for processing work permit applications when it is automatic or only take a few days for the other group of migrants. One must say that the ETC tries to process work permit applications as quickly as possible. However, it is not always possible to even guarantee a turnover time given that the ETC relies on other agencies, such as police. One must also add that over the years, the ETC has, at its own initiative or as a result of feedback from employers/stakeholders, shortened the process. For example, one such initiative consisted of the ETC informing employers/TCNs of refusal or acceptance of work permit applications prior to getting police clearance.

Another source of unfavourable treatment, particularly in the case of regulated professions, is related to the issue of recognition of qualifications. In the case of EU workers who obtained their qualifications in an EU country the process can be fairly quick. However, for TCN workers who have a qualification from a non-EU country, the process can be very long, especially for regulated professions. Indeed, the bodies in charge of recognising these qualifications are run on a part-time basis by practitioners in the field which present clear issues of possible conflicts of interest.

Finally, EU, EEA, Swiss and asylum seekers have a full access to the ETC/EURES portals. This means that they can create a profile and access vacancies and get contacted directly by EU employers. TCNs do not have full access to the portal and can only browse the vacancies but cannot register with their details so that employers can contact them.

3.3 Impact of unfavourable treatment on TCNs employment prospects

Table 2 lists the impact that the unfavourable treatment that TCNs get has on their employment prospects.

The impact of the differences in treatment granted to work permit applications submitted by TCNs versus other migrant groups can be grouped under five factors. The first factor is financial as it is more expensive to submit a work permit application for a TCN migrant. The second factor is the administrative burden resulting from having to submit more paperwork and submitting the application while TCN is still in country of origin. The third factor is the delay in processing the application and the impossibility of knowing at submission time by when the work permit will be granted. The fourth factor is that there is an element of uncertainty inherent in TCN work permit

applications given that one cannot know the outcome of the process with certainty before application. The fifth and final factor is a direct result of the other factors in the sense that applications for TCN work permits are unattractive from both the perspectives of the employer and to a certain extent the TCN themselves. We are referring here mostly to TCNs who could have skills in demand not only in Malta but in other countries which would have a more attractive work permit regime. These factors could induce TCNs to think that applying for a work permit in another country is more attractive. We have also tried to list to what extent the impact of each of these differences in treatment is low or high.

Work permit application	Type of Impact	Level of Impact
Subject to police clearance	Delay	Medium
Subject to labour market test	Uncertainty	High
Work permit fee	Financial	Medium
No access to self-employment	Attractiveness	Low
No Automatic renewal	Uncertainty	Low
Not able to submit application while in Malta	Administrative burden	Low
Higher amount of documentation to be provided	Administrative Burden	Low
Time to process application	Delay	High
Level of uncertainty about outcome	Uncertainty	High
Limited Access to vacancies	Attractiveness	Low
Access to work for partners	Attractiveness and financial	Medium to High

Source: Own workings based on legislation and ETC policy implementation

3.4 Assessment and conclusion on differences in treatment vis-a-vis access to work

It emerges from section 3.3 that it is clear that work permit applications of TCNs are treated unfavourably compared to those submitted by other migrant groups. This clearly makes such work permit applications less attractive for employers. It also makes it harder for Malta, compared to other countries, to attract TCNs. The overall impact for the country is not so high as long as Malta can afford not to attract workers with skills that can be found in other migrant groups. But, if TCNs have skills that cannot be sourced elsewhere then it is not a good policy. The latter point is even more evident when we consider that Malta might already be at a disadvantage compared to other countries labour markets, given that our wages are lower compared to mainland Europe, our labour market is also smaller thus prospects for career progression are limited. Our country might also be less attractive given that there might not be large communities for all TCN nationalities, etc. Although, compared to other mainland European countries we also have some advantages, such as the weather, the security, and a more favourable tax system, especially for highly skilled workers.

Section 3.2 also showed that the sources of less favourable treatment granted to TCNs are a result of legislation/conventions and thus cannot be altered at will or even completely eliminated. The margin of changes is not completely discretionary. One must also add that the system might also appear to be overly cumbersome for TCNs but the authorities are fairly flexible. Indeed, in case of

large labour shortages for certain professions¹² or, even, related to certain projects¹³, the employers can quickly relay their needs and problems in recruiting to the politicians/relevant authorities and these can, in turn, relax the rules. In that case, the authorities can decide to open a sector/profession and thus remove the need for a labour market test, grant automatic renewals, remove the uncertainty regarding the outcome of the work permit application and reduce the time needed to process the application and also allow for applications to be submitted when workers are already in Malta.

Having said that, we can still identify some areas where the system could be improved and look in other EU countries for examples of best practices. First the system could make use of better IT technology. For example, one could have a system whereby documents are submitted electronically which would remove the need for physically having to go to the ETC offices. One could also have a portal whereby one could check online the status of the work permit application. The ETC could also post online and update regularly the information on sectors which are open and closed in order to reduce the uncertainty about work permit applications' outcomes. One could also list the type of work permits which have been approved on a regular basis¹⁴ so that employers and TCNs can get a feel of what is being accepted and not. The latter would contribute to reduce both the level of uncertainty and impression of discretion, and improve transparency.

4. Legal safeguards against discrimination

Maltese legislation has developed various safeguards against discrimination both in the workplace and in social life in general. However one should note that a characteristic feature of many of these laws is that they do not protect against discrimination on grounds of nationality, thus automatically excluding third country nationals from invoking them on this basis. This approach was already evident in the Constitution of 1964, article 45 of which enshrines the principle of non-discrimination, defining discrimination in Article 45(3) as:

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

By contrast the European Convention on Human Rights, which was incorporated into Maltese law in 1987, does protect against discrimination on the basis of nationality in relation to the equal enjoyment of the fundamental rights and freedoms guaranteed in the Convention. Thus, Article 14 states:

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

¹² This was the case for construction workers during the construction boom of the late 2000s or for IT workers or for nurses.

¹³ This was the case with regards to the construction of Mater Dei hospital whereby all applications for work permits submitted by companies working on the hospital construction project were automatically approved. This practice was also used by the Malta Shipyards whenever they would bring workers related to a new contract.

¹⁴ One would have to make sure not to breach data protection but one could list professions being granted/refused work permits.

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

While this provision gives TCNs significant protection against discrimination on the basis of their nationality if such discrimination cannot be justified on objective and reasonable grounds, one should note that this protection is qualified insofar as: (1) it only protects against discrimination in the enjoyment of the human rights found in the Convention, (2) an expensive and time-consuming court case would probably have to be opened in order to secure this protection and (3) as human rights are an exceptional remedy one would first have to show that one has exhausted any other local remedies in order to obtain protection on this basis.

The legal framework which implements the EU’s Anti-Discrimination Directives in Malta is also unhelpful in this regard, because it specifically excludes nationality from the prohibited grounds of discrimination. In fact, the Equal Treatment in Employment Regulations of 2004 state in Regulation 1(5)(a) that it:

“does not apply to any differences of treatment based on nationality and is without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta and to any treatment which arises from the legal status of these individuals concerned.”

Similarly, the Equal Treatment of Persons Order, 2007, which protects against discrimination in other, non-employment related, areas of social life, provides that it:

“ shall not apply to any differences of treatment based on nationality and is without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons in Malta and to any treatment which arises from the legal status of these individuals concerned.”

From a legal standpoint, it seems that the Maltese legal framework is somewhat problematic insofar as it is not clear to what extent it protects against discrimination against Third Country Nationals, whether in employment or in other areas of social life, on grounds of nationality. It would appear that in all but the most blatant cases the law does not provide a clear and easily accessible remedy against discrimination on this basis. The law does, however, protect against discrimination, whether direct or indirect, which is based on racial or ethnic origin and has now implemented the EU Anti-Discrimination Directives *in toto*, by protecting against harassment, shifting the burden of proof and providing two alternative avenues of complaint and redress for discrimination either through the National Commission for the Promotion of Equality or through the Department of Employment and Industrial Relations, which allows the complainant to sue for redress before the Industrial Tribunal. One could moreover argue that the laws do protect TCNs against discrimination quite well as in most cases nationality-based discrimination would be a camouflage for what is really ethnic or racially motivated discrimination. However, given this lacuna in the prohibited grounds of discrimination, it is also possible that what is really racially motivated discrimination may be justified on the grounds of nationality. It is clear that this lacuna does not promote sensitivity to cases of discrimination against TCNs which occur when they are already in employment and which can be justified on the basis of nationality and also indirect in nature.

5. Discrimination vis-a-vis TCNs at the workplace

In this section, we will analyse the situation at the workplace and assess to what extent TCNs are treated differently and possibly discriminated against, when compared to Maltese workers. It will explore whether foreign workers are really treated like Maltese in practice.

5.1 Role of employers

This sub-section will analyse the attitude of employers and its possible impact on the treatment of foreign workers at the workplace.

5.1.1 Lack of diversity awareness and diversity training

Over the last few years, Malta has witnessed not only an increase in the number of immigrants but also an increased diversification in the countries of origin of immigrants and thus an increase in differences in cultures of immigrants. As a result, Malta is slowly transiting towards becoming a multicultural society. However, aspects of diversified cultures and managing diversity have not seeped through all layers of society and employers, especially SMEs and micro-enterprises, might lack awareness and training in managing diversity. Consequently, it is possible that employers, even unintentionally, adopts practices and policies which make it more difficult for workers from diverse countries to integrate into the workforce. This aspect is expected to affect more TCNs as these originate from countries outside the EU whose cultural distance is higher compared to Maltese culture. The NCPPE conscious of this reality has tried to remedy this situation by implementing a number of projects and initiatives over the last few years, notably the publication of a diversity manual that was made available to all employers. Training regarding cultural diversity as well as media campaigns on cultural diversity were also implemented.

5.1.2 Use and abuse of employers' leverage

The Maltese newspapers have reported on various occasions cases of Maltese employers which exploited foreign workers. These abuses ranged from paying lower wages than the legal minimum wage, not paying them at all, not paying all the hours worked, employing asylum seekers in "degrading" jobs, etc. However, most of the cases reported in the newspapers refer to workers who are asylum seekers. One can say that even TCNs with a valid work permit could be abused by their employers in the form of being offered conditions of work which are not as attractive as those offered to Maltese workers and having the TCNs workers accepting these conditions. The employers derive their power to impose less attractive conditions as a result of work permits having to be renewed on an annual basis following a request from the employer. As long as the work permit has not been renewed, the TCN is at the mercy of the employer's whims. Furthermore, TCNs cannot easily shift employers in search of better conditions of work given a certain degree of uncertainty associated with applying for a new work permit. Employers also used¹⁵ to exert pressure on ETC not to grant work permits to TCNs who would apply with a new employer unless agreed to by last employer as this would lead to poaching.

5.2 Who is responsible for ensuring anti-discrimination and how is anti-discrimination legislation enforced ?

Sub-section 4.2.2 shows that the balance of power is clearly tilted towards the employer and the latter could use it to discriminate against TCN workers. Therefore, the only way that equality between Maltese and TCN workers can be achieved at the workplace in practice is if three conditions are fulfilled. First, the anti-discrimination redress system must efficient so that it acts as a deterrent for employers to discriminate. Secondly, alleged discriminated workers must be confident that any complaints will be solved in a speedily manner and that their future employment prospects will not be jeopardised by having submitted a case. Last but not least, workers must be well aware of the anti-redress system and must be able to easily access it easily and cheaply. The rest of section 3 will assess the anti-discrimination redress system in Malta along these three criteria.

5.2.1 Government agencies responsible for ensuring equality at the workplace

¹⁵ The authors could not confirm whether this practice was still in place.

There are two government agencies which have the responsibility for ensuring equality at the workplace.

5.2.2 National Commission for the Promotion of Equality (NCPE)

The NCPE was set up in 2004 to promote and raise awareness about equality. The NCPE is also responsible for investigating complaints related to discrimination based on national legislation and the EU equality directives. The NCPE is responsible for the six grounds of discrimination, namely gender, age, disability, race and ethnic origin, religion, and sexual orientation. NCPE's remit is much broader than equality at the workplace as they are concerned with equality vis-a-vis goods and services. It should be clear that discrimination on the basis of race and ethnic origin is only part of NCPE's vast remit. To a lower extent, NCPE is also responsible for carrying research in the area of discrimination in order to use it as an input in policy making.

Since inception, most of NCPE's work has focused on raising awareness about equality to both the general public and to enterprises and human resources personnel. To this date, the NCPE has a very limited budget and has a small core skeleton staff which limits the overall reach and impact of its action. In spite of this, the NCPE has been able to very effectively mobilise additional staff and resources by successfully applying for EU funded projects. As a result, they have managed to do numerous projects. Throughout the years the projects have reflected the national priorities and realities of Malta's society. Indeed, the earlier projects focused on gender related issues in order to promote higher female rates (Living Equality project; Unlocking the female potential project; Gender mainstreaming – in practice). Then, as NCPE's remit got wider, it consisted of presenting the six grounds of discrimination (Strengthening equality beyond legislation; Voice for all; Think Equal project; Underreporting of discriminatory incidents in Malta). In the last few years, the projects have taken a more multicultural aspect reflecting the reality of today's Maltese society (Racial and Ethnic Origin Equality Manual toolkit; Think Equal project; I'm not racist, but...).

NCPE has an enforcement arm but it is very limited. Indeed, when a complaint is submitted it will investigate it with the relevant entity and try to resolve the dispute amicably. If it still doesn't manage it can decide to open a court case or suggest the complainant to open up a court case. If it is related to employment, it can suggest the complainant to open a case at the Industrial Tribunal. Table 3 shows that the number of alleged cases of discrimination referred to NCPE has been negligible. One can also notice that the nature of the cases referred to NCPE in any given year are directly linked to the discrimination grounds on which NCPE would have raised awareness on during that year or the previous year. However, as soon as awareness about a discrimination ground ceases to be raised, the number of alleged cases of discrimination submitted in that ground drops. This suggests that it is not sufficient to raise awareness through a one-time campaign but the NCPE needs to keep on raising awareness on a regular basis. NCPE also lists the alleged cases of discrimination submitted based on ethnic origin as the legislation has been extended to this ground in 2007. However, one can still notice that the number of complaints related to this ground is still negligible.

Table 3 Alleged cases of discrimination submitted to NCPE

Alleged cases of discrimination submitted to NCPE			
Type of alleged discrimination cases received	Total 2011	Total 2010	Total 2009
Alleged gender discrimination in employment/training	6	10	25
Alleged gender discrimination in	4	1	1

access and supply of goods and services			
Alleged racial discrimination in access and supply of goods and services	4	2	1
Complaints referred to relevant entities/not falling within NCPE's remit	2	2	8

Source: NCPE Annual Reports (2011, 2010, 2009)

5.2.2.1 Underreporting of discrimination incidents in Malta

Given that the number of alleged cases of discrimination reported was very low, the NCPE commissioned a research study to investigate the reasons which inhibited people from reporting cases of discrimination. The study also investigated whether persons were aware of their rights and whether they realised whenever they were being discriminated. The study interviewed three persons, who were alleged victims of discrimination, for each of the six grounds of discrimination. The results confirmed that most cases of alleged discrimination are not reported, mainly because of lack of knowledge about how to report cases. Furthermore, most people do not report cases due to embarrassment, fear of prosecution, lack of faith in the reporting bodies, and feelings of powerlessness (NCPE 2010). The study also revealed that increasing media attention and public awareness together with staff training in discrimination issues would encourage people to report more cases of discrimination.

5.2.3 The Department of Industrial and Employment Relations (DIER)

In addition to the NCPE, the DIER is another government department which has an active role in combating discrimination at the workplace. Indeed, as per the provisions of the Employment and Industrial Relations Act 2002 (Chapter 452 of the Laws of Malta) and its subsidiary legislation, the DIER is responsible for regulating, checking and enforcing conditions of work and industrial relations. One of the functions of the department is to advise employers and employees on labour related legislation and industrial relations. The Department is also responsible for investigating and solving any potential breaches of legislation and also tries to avert and/or resolve potential industrial relations disputes. Whenever, disputes are not solved through the intervention of the department's officials, these can be referred to the Industrial Tribunal which formally investigates and decides on labour related disputes.

5.2.3.1 Remit of DIER with regards to employment disputes

As per Maltese legislation, once workers are employed, there should not be any distinction in treatment between Maltese and foreign workers. In fact, when complaints are referred to the DIER, the department, in investigating the case, does not make any distinction between cases of Maltese and foreign workers. In fact, the department does not even ask the workers about their nationality though they would eventually get to know through their identification card number. In fact, the department does not produce any statistics on a nationality basis. The remit of the department concerns all issues related to conditions of work and to termination of work. In fact, discrimination in employment and discrimination in conditions of work between Maltese and foreign workers is only part of their remit.

However, the only statistics that the department produces relate to totals and refer to number of trade disputes resolved, number of strikes, number of inspections carried and irregularities found,

number of enquiries submitted to the department, number of cases solved through their intervention and the monetary values these cases represent. A further breakdown of these statistics would facilitate research and enable researchers to derive trends in the evolution of conditions of work.

The only way to obtain detailed statistics is to refer to cases directly submitted to the Industrial Tribunal. However, the number of cases actually submitted, on a yearly basis (around 100), represent less than 1% of cases compared to the number of inspections or enquiries that the department carries out every year (more than 15000). This could be explained by several factors. First of all, it is possible that employees after enquiring with the department realise that they do not have a case and decide not to file it. Secondly, it is reasonable to think that the intervention of the department enables cases to be solved amicably and do not require further legal action or a formal complaint to the industrial tribunal.

5.2.3.2 Industrial Tribunal

Table 4 presents the number of cases submitted on a yearly basis to the industrial tribunal. One can notice that the number of submissions has been regular at around 100 per year over the period 2006-2011¹⁶. One can also notice that the number of solved cases is also around 100 per year. In fact, when one looks at the number of pending cases, it is stable at around 500 which mean that there is a five-year backlog in cases. In reality it is lower than that given that around three hundred cases of this backlog refer to the former Malta Shipyards¹⁷.

Table 4 Cases submitted to the Industrial Tribunal

Industrial Tribunal cases							
Year		2011	2010	2009	2008	2007	2006
New cases	Alleged unfair dismissal	89	105	87	84	92	90
	Alleged discrimination /harasement /victimisation	19	5	2	5	8	4
Solved cases during year	Alleged unfair dismissal	88	86	101	57	82	73
	Alleged discrimination /harasement /victimisation	6	4	4	1	4	17
Pending cases as at end of year	Alleged unfair dismissal	473	472	453	478	496 out of which	482 out of which
	Alleged discrimination /harasement /victimisation	68	52	44	51	314 refer to the alleged unfair dismissal of dry	315 of shipyards

¹⁶ The only exception was in 2003 when around 300 workers of the former shipyards submitted a case. However, one can consider that it is the same case for several hundred workers.

¹⁷ This is in fact the same case submitted by three hundred different ex-Malta Shipyards workers. One can reasonably assume that the ruling of this case would be the same for all workers. Having said that this case dates back to more than five years so one can find it difficult to understand why it has not yet been solved.

						dock workers	
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Source: DIER Annual reports (2011, 2010, 2009, 2008, 2007, 2006)

However, the Industrial Tribunal should consider increasing its capacity to solve a higher number of cases every year in order to reduce this backlog as it could be a factor which discourages persons to submit a new case. The legislation regulating the Industrial Tribunal clearly stipulates some timeframe in order to solve cases but it is rarely adhered to given that sittings have to be postponed or the hearings of all witnesses takes longer than expected. One can also notice that the majority of cases (more than 85% refer to unfair dismissals) and only less than 15% refer to alleged discrimination/harassment and victimisation, though the number of cases in this category has increased in percentage terms over the period 2006-2011.

If one analyses the individual cases, one can notice that a number of cases are referred by foreigners both in terms of unfair dismissal or discrimination/harassment and victimisation. One notices that cases of discrimination/harassment and victimisation, whether submitted by Maltese or foreign workers, tend to be settled out of court.

Overall, there are a number of barriers that workers have to overcome in submitting a case to the Industrial Tribunal. Needless to say that some of these are too daunting, especially when you consider TCN workers. First, besides the uncertainty of the outcome, most cases take around one year to be solved which is far too long. Second, workers have to bear a cost as they are represented by a lawyer that has to be paid regardless of the outcome of the case. Furthermore, the Industrial Tribunal’s secretariat does not provide any assistance in filing up the paperwork related to opening up a case¹⁸. Finally, there is also an indirect cost which is related to the future prospects in the labour market. Indeed, employees submitting cases at the Industrial Tribunal can be deemed to be “troublesome” employees to avoid when recruiting.

6 Other sources of discrimination

Although not directly related to employment, we are also discussing some other sources of discrimination as these contribute to render Malta more or less attractive and welcoming to prospective TCNs wishing to settle in Malta. The items outlined below are not exhaustive but we decided to include these as these have emerged from various other research studies (Zammit (2012); NCPE (2012)) to be areas where foreigners complain most about.

6.1 Attitude of Maltese population

We have already mentioned that Malta has started to become a multicultural society fairly recently. The 2012 Eurobarometer survey on discrimination in the EU¹⁹ provided evidence that Malta ranks above the EU27 average with regards to discrimination on the basis of ethnic origin outside the workplace. On a positive note, one must say that, since the last version of this Eurobarometer study (2009), Malta has witnessed the largest improvement in the EU as the proportion thinking that ethnic discrimination is rare or non-existent has increased by 23 percentage points to 41%. It seems that the efforts and initiatives of the NCPE in raising awareness and encouraging diversity have paid off.

6.2 Provision of Accommodation

The NCPE commissioned a research study in 2012 as part of the project (I’m not racist, but...) on the topic of immigrant and ethnic minority groups and housing in Malta. The study sought to determine

¹⁸ This help is usually provided by a lawyer which will then go on appearing for them during hearings.

¹⁹ Eurobarometer special survey 393 of 2012 on Discrimination in the EU.

whether these groups were subject to discrimination when trying to access accommodation services. The study made a survey amongst persons coming from these minority groups. The study also sought the views of landlords and estate agents. The study also tried to measure discrimination by asking tenants through telephone or e-mails whether they would consider renting a place or not based on the characteristics of the persons. The outcome clearly showed that ethnic and minority groups are being discriminated for several reasons.

6.3 Discrimination vis-a-vis basic services

There is also tariff discrimination between residents and non-residents in the provision of basic services such as utilities like water and electricity or public transport. Persons who are residents have access to a cheaper tariff with regards to these services. The price difference can be quite substantial (almost 50% in the case of transport). The only way one can have access to this cheaper tariff is by producing a Maltese identification card, a registration certificate or residence card and a long-term residence permit for TCNs. To have access to one of these documents, one needs to be a resident in Malta for at least six months. Lately there has also been a delay in issuing such documents even for residents who have been in Malta for more than six months. The situation for TCNs is even worse given that the long-term resident status can only be reached, if one qualifies, after five years. Therefore one will be able to access the cheaper tariffs only after five years.

Conclusion

The paper identifies a series of obstacles to the integration of Third Country Nationals as a category within the Maltese labour market, including: TCNs' lack of knowledge about the procedures for obtaining a work permit; institutionalised discrimination against them as a category in allowing their entry into the labour market; opaque, dilatory and discretionary procedures for obtaining and renewing work permits and for recognising TCNs' qualifications; poor knowledge by managers about handling workplace diversity and intercultural issues, abuse of employers' leverage powers as regards wages and other conditions of employment, linguistic problems, overlapping and poorly defined political responsibilities for integration, lack of cooperation between institutional stakeholders and pervasive discrimination against foreigners in relation to utility rates and other areas of social life.

Specifically in regard to discrimination against individual TCNs, the paper focused on the absence of nationality from the list of prohibited grounds for discrimination both in the Constitution and in the laws implementing the EU Anti-Discrimination Directives. While this is permitted in terms of EU law, this lacuna combines with (a) the generalised lack of information and transparency in this field, as well as (b) the institutionalised discrimination against TCNs as a category in regard to access to employment, to create a worrying scenario where the mechanisms for remedying discrimination through the National Equality Commission and the Department of Industrial and Employment Relations are poorly understood and utilised. In this context the possibility of significant levels of unreported discrimination against TCNs based on racial grounds but camouflaged as nationality-based, as well as discrimination of an indirect kind, should not be ignored.

The paper also tried to bring out the impact on TCNs of particular instances of discrimination or unfavourable treatment and drew upon the experience of other European states to, identify best practices in relation to the above-charted fields of integration.