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I Review
Department of Industrial and Employment Relations

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Welcome Note

Welcome to the first issue of I Review, a newsletter published by the Department of Industrial and Employment Relations with the aim to inform and to contribute to public debate on employment conditions and industrial relations in Malta.

Our main target readership is all those who in one way or another are involved in the industrial relations scenario. Through this electronic newsletter, we hope to offer informed articles on current industrial and employment issues in Malta and abroad.

The Department hopes that you will find this newsletter useful and informative and invites you to let us know of any observations you may have on its contents. Submission of articles from your end for possible publication are most welcome.

In this Issue

Improving employment relations

The inevitable restructuring of an economy in an increasingly globalised environment brings with it attendant anxieties and worries, at the societal, enterprise and particularly at the individual level. Despite these concerns, our population has grown accustomed to a continual improvement in its lifestyle fuelled by the ever growing expectations of our society. But is there a similar increase in expectations as regards the quality of our working life?

Important factors, though not the only ones, which determine the quality of a person's working life are the employment conditions governing the working relationship and the industrial relations climate, both in the individual enterprise as well as in the country. One measure which is doubtless changing the face of industrial and employment relations is the rapid evolution of Maltese labour law over the past four years. Spurred onwards by our commitments as an EU Member State, Malta has broadened its industrial and employment relations legislation to encompass various EU directives, thus giving employees greater rights.

From entitlements previously based primarily on pecuniary matters, namely wages, bonuses and various leave entitlements, there has been a shift to a situation where there is an increasing emphasis on improvements in work-life balance. Examples of this are the promulgation of working time and protection of maternity legislation. Measures against discrimination have included the granting of new rights to fixed-term and part-time workers to prevent abuse. Additional legislative initiatives have been aimed at protecting employees, particularly those undergoing difficult transitions such as in the event of collective redundancies or a transfer of business.

Dr. Noel Vella
Director

The promotion of employee information and consultation, both at the national and transnational level has been given considerable impetus. These changes have resulted in a silent and rapid revolution in employment relations and its practice in Malta.

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This changing scenario necessitates a review in the outlook of all the stakeholders. There has been a noticeable increase in queries regarding these new rights received by the Department, both from individual workers or employers as well as from employers' associations

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> "…. Malta has broadened its industrial and employment relations legislation …. These changes have resulted in a silent and rapid revolution in employment relations and its practice in Malta."

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and trade unions. This is a positive sign since persons who are unaware of their rights and obligations cannot exercise or fulfil them. Stakeholders are increasingly exposed to the situation prevailing in other Member States and to the workings of various EU Committees and working groups thus widening their perspectives. Seminars, conferences and other events, including regular radio programmes by GWU and UĦM, have been organised by the stakeholders themselves and other interested parties to draw attention to these legislative changes. These have all undoubtedly helped to raise awareness and tried to change mentalities.

So yes, I do feel that whilst issues of holding one's job and financial remuneration remain paramount, there has been a gradual raising of expectations with regards to employment conditions to take account of other positive elements which improve the quality of our working life. This is gradually filtering down to the shopfloor and workstations, albeit at a slow pace. It is recognised that this is only the start and further efforts are required to make persons more aware of their rights and obligations. This newsletter, to be issued initially on a biannual basis, is one of the efforts the Department has engaged in to increase information on these matters.

These legislative initiatives would not have borne the desired results if the social partners, through the Employment Relations Board, had not been actively involved in their preparation. This Board was statutorily set up by the Employment and Industrial Relations Act, 2002 to make recommendations and tender advice to the Minister responsible for employment and industrial relations on conditions of employment. Since its inception, the Board has met thirty-eight times and discussed and made recommendations on over 30 Legal Notices.

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The Department of Industrial and Employment Relations has worked hard in the past years to help establish increased awareness on these evolving conditions of employment, and to provide impartial advise on their implementation. It is only fitting that the contribution of the staff of the Department to the success of this process is acknowledged. It is also fitting in our first newsletter to thank Mr Frank Pullicino, the previous Director of Industrial and Employment Relations, under whose stewardship this difficult process was initiated, for his valid contribution not just on this matter, but also for his broader efforts to foster a stable industrial relations climate in Malta. We wish him a well deserved long and happy retirement.

We hope that you will find the information contained in this newsletter useful and would appreciate comments and suggestions on the context and on the topics which you feel may merit discussion in this newsletter.

Reminder

Further to the registrar of trade unions' notice appearing in the government gazette of 16th June 2006, in terms of the Employment and Industrial Relations Act (article 58), Trade Unions and Employers Associations should supply the Department at their earliest possible:

- a list of the names of the officers of the union or association, showing also the office held by each of them;
- a declaration that the names of members and other particulars shown in the record required to be kept by article 57 have been brought up-to-date and that the necessary alterations have been made to the said record for that purpose;
- a statement of the receipts, funds and expenditure of the union or association in respect of the preceding year;
- a copy of the annual report showing the activities of the union or association during the preceding year or, if no such report has been made, a statement signed by the secretary of the union or association showing the said activities during that year.

At a glance

The Department of Employment and Industrial Relations:

- along with the social partners, seeks to establish standard conditions of employment and transforms them as legal instruments.
- ensures that employment conditions are those established by law;
- ensures that rights and obligations arising out of an employment contract are observed in an equitable manner;
- protects workers whose employment has been terminated by an employer;
- eliminates discriminatory practices;
- supports in the functioning of the Industrial Tribunal, National Employment Authority, Guarantee Fund Administration Board, and Employment Relations Board;
- so as to reduce industrial actions and trade disputes, provides mediation and conciliatory services.
- promotes good relations between employers' and workers' representatives.

THE EMPLOYEE (INFORMATION AND CONSULTATION) Regulations 2006

Dr. Pamela Vassallo
Junior Legal Officer

Area of application

LN 10 of 2006 is based on Directive 2002/14/EC which establishes a general framework for informing and consulting employees in the European Community. The regulations apply to undertakings established in Malta; undertakings meaning public or private undertakings carrying out an economic activity, whether or not operating for gain. Currently the regulations address undertakings employing 150 employees and over. However in 2007 they will also apply to undertakings employing between 100 and 149 employees and in 2008 to undertakings employing 50 employees and over.

The regulations impose duties on employers and create rights for employees. The employer must make the practical arrangements necessary to allow his employees to effectively exercise the right to information and consultation.

Information and Consultation Representatives

The employer must ensure that information and consultation of employees is carried out in the case of undertakings where there is one or more recognized trade union covering all categories of employees, with the representatives of such trade union, and in the case where the recognized trade union does not represent all categories of employees, with the representatives of such trade union together with the elected or appointed (by secret ballot) representatives of the workers in the unrepresented categories. Where there is no recognized trade union, information and consultation must be carried out with the representatives of the employees elected or appointed by means of a secret ballot from amongst all employees.

When the secret ballot has to take place, the employer shall ensure that the ballot is fair and shall supply the Director of Industrial and Employment relations with the procedure to be followed at least one month before the projected date of the ballot. The number of representatives appointed or elected, as the case may be, shall be of not more than one representative per unrepresented category and shall hold office for a period of three years from their date of election or appointment. The employees are to be informed in writing of the identity of the information and consultation representatives by the employer. The employer is to hold a first information and consultation meeting within two months from the date of the representatives' election or appointment, which meeting must be convened within nine months from the relevant date of entry into force of these regulations. The employer is also obliged to hold a minimum of at least one meeting within six months after the date of each preceding meeting.

Information and Consultation

'Information' is defined in regulation 2 as transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it. 'Consultation' means the exchange of views and establishment of dialogue between the employees' representatives and the employer.

The employer is obliged to provide the representatives with information on;

- The recent and probable development of the undertaking's activities and economic situation
- The situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking. In this case, the employer is obliged to consult the employees' representatives.
- Information and consultation on decisions likely to lead to substantial changes in work organization or in contractual relations. The employer must ensure that the consultation is conducted with a view to reaching agreement on decisions within the scope of the employer's powers.

Redress Provisions

The Legal Notice makes provision for submission and treatment of

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Practical information

Probation

The first six months of employment constitute probation. The parties can however agree to a shorter term.

In the case of a contract of service, or collective agreement, in respect of employees holding technical, executive, administrative or managerial posts and whose wages are at least double the minimum wage established in that year, such probation period is of one year unless otherwise specified in the contract of service or in the collective agreement.

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complaints on any matter related to the ballot to the Director of Industrial and Employment Relations. Complaints may be lodged within 21 days from the date when the alleged infraction occurred.

The Legal Notice also makes provision for confidentiality of information supplied by the employer and for recourse to the Industrial Tribunal in this regard.

The regulations protect information and consultation representatives. In particular, information and consultation representatives and candidates wishing to be appointed or elected representatives have a right not to suffer any detriment, including dismissal, by reason of their status. The same applies to other employees who exercise rights granted by these regulations. An employee may present a complaint to the Industrial Tribunal that he has been subjected to a detriment in contravention of this provision.

LN 10 of 2006 and other laws

The Legal Notice does not prejudice specific information and consultation procedures set out in other laws.

Enforcement

Any person who fails to comply with any obligation imposed shall be guilty of an offence and shall be liable to a fine of not less than ten liri and not more than fifty liri for every employee of the undertaking in relation to a failure by the employer to set up an information and consultation procedure and in relation to omit to do anything he is obliged to do under these regulations.

For any other offence, a person who fails to comply with any obligation imposed shall be liable to a fine of not less than five hundred liri and not more than five thousand liri.

The Centre for Labour Studies at the University of Malta

Mr. Saviour Rizzo
A/Director CLS

One of the main aims of the Centre for Labour Studies (CLS) is research. This work is intensifying as the Centre is continuously receiving invitations from various European institutions to join as partners or act as Malta's national centre in EU funded transnational projects. Participation in these projects involves monitoring and analysis of events in the industrial relations as well as quantitative and qualitative research about the operations of the labour market and developments in employee relations.

On a regular basis the Centre has been conducting the following research:

National Basis

- **Trends In Collective Bargaining:** An Analysis of trends in the collective bargaining in Malta in each calendar year.
- **Tracer Studies.** Since 1997 the Centre has been conducting research on career outcomes of students who graduate from the University of Malta. Three tracer studies have been conducted
- The Centre also intends to continue research work on themes relevant to the labour market. This year it has published **"The Dual Worker Family in Malta'.**

It has also made a substantial contribution to the two following publications:

- **Real Stories of Small Business Success Insights from Five European Island Regions.** This publication is a self help guide based on the NISSOS Project coordinated by CLS in conjunction with the Malta Enterprise and Malta Foundation for Human Resources.
- **RSI Repetitive Strain Injury: a training manual** published as a conclusion to a three year EU funded project 'Eurosafe' in which the Centre was a partner.

International Basis

- Since 2003 CLS has been acting as the National Centre for Malta for the **Employment and Industrial Relations Observatory (EIRO).** The Centre supplies, on a monthly basis, information on events and developments in industrial relations and participates in the production of comparative/ thematic studies, annual reviews and updates.
- The Centre also participates in the **European Restructuring Monitor (ERM)** and **European Working Conditions Observatory (EWCO)** programmes. ERM involves monitoring the restructuring process in Malta whereas EWCO involves analysis and evaluation of the quality of work and employment conditions. Following the award of this tender to the Centre the workload has tripled. The reports submitted by the Centre are displayed on the web site: www.eurofound.eu.int

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Clauses in restraint of trade

Dr. Joseph Bonello
Legal Officer

This article attempts to discuss the obtaining position with regards to clauses *'in restraint of trade'* in employment contracts. Only recently the position in respect of this type of clause can be said to have been crystallised by a sentence delivered by the Court of Appeal on 3rd March 2006 in the names *Attilio Vassallo Cesareo u Savour Coppini għan nom u in rappreżentanza tas-socjeta International Machinery Limited vs Anthony Cilia Pisani*. The Court of First Instance delved into the various aspects relevant to the examination of these clauses and this article will try to examine these aspects with a view to hopefully bring a certain amount of clarity in a somewhat nebulous area of employment law.

It is true to say that we do not have the doctrine of judicial precedent in Malta. However in areas where the law is not sufficiently clear, recourse is often made to case law to establish the legal principles involved. The case previously mentioned, as can be appreciated, bears a certain relevance to the obtaining position in respect of *'restraint of trade'* clauses. These are clauses which attempt to prevent the worker from disclosing the secrets which he would have undoubtedly got to know about through his employment, especially if he would have been employed in a position of trust as well as to possibly prevent that that same worker would provide competition to his ex-employer when he leaves work.

These clauses incorporated within a contract attempt to protect an employer from *'poaching'*. They attempt to restrict the activities which an employee may carry out after the said employee would have terminated his employment for whatever reason. The position which has to be considered is that preventing a worker from engaging into an activity which might potentially prove to be prejudicial to the interests of his ex-employer would effectively mean barring him from utilising his expertise and experience to his own benefit and that is one of the reasons that these clauses are interpreted as restrictively as possible.

The situation in this regard is a somewhat delicate situation in the sense that a balance has to be struck between the rights of the employer to safeguard his trade secrets from unlawful competition on the one hand and on the other hand the rights of the employee to make full use of the knowledge which he would have acquired during his employment with the employer, even if the use of this knowledge might possibly entail competition and possible undesirable consequences for his ex-employer. The test which has to be carried out here is basically one of reasonableness. One cannot reasonably expect the Courts to uphold a manifestly unreasonable clause. On the other hand other more reasonable clauses have been enforced by the Courts.

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With regards to the above mentioned case, it is the scope of this article to examine it and give a brief exposition of the principle which the case seems to have established. In this case the employee (Defendant) had signed a n employment contract with the plaintiff, w h i c h c o n t r a c t included a c l a u s e stipulating that the amount of Lm20,000 is payable by the employee to his ex employer if the former were to employ himself in a business similar to the line of business engaged in by the ex employer within the expiration of five (later changed by mutual agreement to two) years from the employee's termination of employment without the written consent of the same ex employer. It so happened that the employee did in fact employ himself in the same sector of business of his previous employer without the written consent of the latter. This fact was not contested not even by the employee himself and as a result, the ex-employer claimed the penalty which according to them was payable according to the contract signed between the parties.

The Court of First Instance considered the matter by making various considerations. It contended that a clause *'in restraint of trade'* should always be interpreted in a way which favours the employee. The Court quoted Baudry (Trattato Teorico-Pratico del Diritto Civile, Vol. XXI pagina 51 Para 1712) where one finds affirmed the principle that *"tuttavia tutte le clausole di questo genere debbono essere interpretate restrittivamente nell interesse del impiegato* (Trib. Fed.Svizzero - 15 Giugno 1895).

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The Court considered the case *Joseph Xerri nomine v. Brian Clarke* (Commercial Court - 31st July 1969) where the Court referred to what is today Article 985 (previously Article 1028) of the Civil Code which provides that among others, contracts which go contrary to public policy cannot be the subject matter of a contract. It also went into what Anson (Ansons, Law of Contract - 23rd Edition) had to say with regards to clauses of this nature when he mentioned that the concept of *'partial restraint of trade'* began to become accepted so long as the clause was reasonable and not contrary to the public interest. The Court also mentioned the case *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* (1894) which went into which of the parties had the responsibility to prove that the clause was reasonable and not contrary to the public interest.

Despite what was said, the Court recognized the fact that where legitimate interests were involved, then the contracting parties (the employer) had the right to try and safeguard its interests, be they trade secrets or otherwise against possible abuse from ex-employees. At this juncture the Court referred to Italian jurisprudence which mentioned three important criteria which have to be met if any clause *'in restraint of trade'* is to be regarded as enforceable by the Court. The requirements are that the restraint of trade clause has to be in writing, there has to be a *quid pro quo* in favour of the employee and its limits has to be certain as regards object, time and place.

Here an interesting point was in fact pointed out and, one might venture to say, established that for these type of clauses to be enforceable, there must be interests both from the part of the employer as well as from the part of the employee. It is submitted that a situation whereby the employer binds the employee not to exercise his trade or profession without receiving anything in exchange seems to be non-enforceable. It would seem to violate one of the basic concepts related to contract law, that of consideration. It does not seem to be permissible to have one party bound with certain clauses with the latter party receiving nothing or next to nothing in exchange (the reasonableness and *quid pro quo* test). Adequate measures have to be put in place not only to safeguard the interests (normally patrimonial interests) of the employer but also the interests of the employee who should be compensated adequately if he is to forgo his right to utilise his knowledge for his own benefit for any amount of time.

In the case in question the Court considered that at no point was adequate consideration exchanged between the parties to make up for the "*sacrificio richiesto del lavoratore or la riduzione delle sue possibilita di guadagno.*" In fact it pronounced itself in the sense that it is dubious as to whether or not such a clause does in fact satisfy the criteria of reasonableness, referred to above.

> *"partial restraint of trade* began to become accepted so long as the clause was reasonable and not contrary to the public interest."

The Court also entered into the possibility of a clause relating to restraint of trade limited to a place. In fact it quoted from the case *Jos. Xerri noe v. Brian Clarke* (Commercial Court - 31st July 1969) where due consideration was given to the fact that the clause referred to a place (Malta) which is a relatively small island and to the fact that Malta was not the ordinary place of residence of the employee. These criteria, however, did not apply to the facts of this case. In this case the employee was Maltese and it was unreasonable to expect the employee in question to leave his country of residence in order to find suitable employment elsewhere.

The Court also established that the law applicable to the case was the Conditions of Employment Regulation Act (CERA). This was because the contract was signed in 1981 when the main law regulating employment was Chapter 135, which law was subsequently abrogated and replaced by the current legislation, namely the Employment and Industrial Relations Act.

The Court made particular reference to Sections 36 and 26 of the CERA which dealt with the circumstances under which it is permissible for the employer to impose fines and penalties on an employee, which fines and penalties were however to be approved *a priori* by the Director of Labour, presently the Director of Industrial and Employment Relations.

In fact, the Court quoted the case *Salvino Borg D Anastasi v. Ian Decesare et noe et* (Appell Ċivili, 13 ta Ġunju 1995) and mentioned that this approval a priori from the part of the Director of Labour was a requirement which is to be considered as essential, a *sine qua non* requirement when one considers clauses *in restraint of trade*, apart from the test of reasonableness already referred to.

It transpired from the facts of the case that no approval was sought, much less obtained from the Director of Labour and as such that clause cannot be held to be enforceable against the employee. This case seems to have crystallised the obtaining position in relation to clauses in restraint of trade.

It would seem that the responsibility to assess the reasonableness or otherwise of a particular clause rests on the Director. On the other hand it is submitted that a decision in favour of a particular clause of this nature by the Director fulfills only one of the requirements necessary for the enforceability of clause in restraint of trade. All the other criteria above mentioned would have to delved into and examined in addition to the approval of the Director. This is being contended even in view of the doctrine of judicial review of administrative decisions where administrative decisions can be examined and, if need be, repealed by the Court.

Deċiżjoni mit-Tribunal Industrijali

B'rikors ippreżentat fil-21 ta' Mejju 2003, is-Sur A. C., wara li ddikjara li: -

1. Huwa jaħdem mal-kumpanija Air Malta plc.
2. Huwa legalment isseparat mill-mara tiegħu u għandu tifla.
3. Li qiegħed jgħix ma' mara oħra, ukoll separata minn żewġha, li għandha żewġt itfal tagħha.
4. Li lkoll qed jgħixu flimkien bħala familja.
5. Illi parti mill-kundizzjonijiet ta' l-impieg tiegħu jinkludu d-dritt għal biljetti tas-safar bir-roħs għalih u għall-familja tiegħu, liema roħs qed jiġi negat lis-sieħba preżenti tiegħu u lit-tfal tagħha u konsegwentement qed ibati danni morali u finanzjarji.
6. Li dan it-trattament jammonta għal trattament diskriminatorju fil-konfront tiegħu bi ksur tal-liġijiet ta' Malta u ta' liġijiet ta' l-Unjoni Ewropea.
7. Talab li t-Tribunal Industrijali sabiex jagħti dawk il-provvedimenti opportuni biex din is-sitwazzjoni tiġi rimedjata.

Is-soċjetà intimata sostniet li bħala trattament ugwali għall-ħaddiema tagħha dak pretiż mir-rikorrenti ma jinkwadrax la fil-liġijiet ta' Malta u l-anqas fil-liġijiet ta' l-Unjoni Ewropea u sostniet li t-talba għandha tiġi miċħuda.

Waqt it-trattazzjoni tal-każ il-partijiet qablu fuq il-fatti kif esposti mir-rikorrenti, liema fatti rriżultaw ukoll mill-karti ta' l-identità tar-rikorrenti u tas-sieħba tiegħu u minn dokumenti oħra li ġew esebiti.

It-Tribunal Industrijali, presjedut mill-Avukat Martin Fenech, ikkunsidra d-diversi aspetti tal-każ u evalwa d-dokumenti estensivi li ġew prodotti, inkluża l-korrispondenza skambjata bejn il-partijiet in kawza, lista ta' air-lines li jirrikonoxxu benefiċċju għal *partners* ta' l-impjegati tagħhom u anki għal invit fejn ir-rikorrenti ġie mistieden mal-*partner* tiegħu. Ikkunsidra wkoll il-fatt li s-sieħba tar-rikorrenti u t-tfal tagħha huma rreġistrati ma' l-Air Malta Group Health Scheme u dokumenti oħra li juru biċ-ċar illi r-relazzjoni eżistenti bejn ir-rikorrenti u s-sieħba tiegħu hija waħda li ilha ċertu żmien.

Mr. Vincent Micallef
Industrial Tribunal Secretary

It-Tribunal ra ukoll numru ta' deċiżjonijiet mgħotija minn Qrati differenti li ġew sottomessi. Ra wkoll rapporti u diskorsi li jikkonċernaw il-qasam tal-liġijiet tal-ħaddiema u d-dibattiti parlamentari li saru meta kienet qiegħda tiġi diskussa l-Liġi dwar Impieg u Relazzjonijiet Industrijali.

Ikkunsidra wkoll li sallum m' hemm xejn fil-liġijiet imsemmija li jagħti lok għall-allegazzjoni tar-rikorrenti. Ikkonkluda wkoll li "għalkemm fis-soċjeta' Maltija llum, bħala stat ta' fatt, jeżistu diversi relazzjonijiet fejn il-partijiet m'humiex miżżewġin, il-leġislatur s'issa ma pprovdix għal din is-sitwazzjoni minkejja li hija realtà. Għalkemm il-liġi ta' Malta għamlet ħafna avvanzi f'dan is-settur, xorta ma pprovditx għal din is-sitwazzjoni u għalhekk fid-definizzjoni ta' familja ma jinkwadrax li għandu jinkludi l-*partner* u t-tfal tagħha"

Bid-deċizzjoni numru 1705, datata 5 ta' Ġunju 2006, it-Tribunal ikkonkluda li l-Air Malta plc. m'hijiex taġixxi b'mod diskriminatorju kontra r-rikorrent u għalhekk ċaħad it-talba ta' l-istess rikorrenti.

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- In 2005, CLS was awarded to submit reports on **developments in the employment and labour market policy and analysis of statistical trends in the labour market** and the field of industrial relations. The reports are displayed on the web site: http://www.eu.-employment-observatory.net

- Since 2003 the Centre has been participating as a sub contractor in the project '**Situation of Social Partners in EU Member States**' It entails writing three in-depth reports every year on a Maltese industrial sector based on qualitative and quantitative analysis. To date 11 reports have been submitted. Web site: www.trav.ucl.ac.be

- **SEEUROPE:** This is a project on the EU Directive setting the **European Company (SE)** and cross border mergers. The reports can be accessed on web site: www.seeurope-network.org

- **Employee Board Level Representatives**: An EU funded project on workers' participation at board levels of the enterprise. Web site: http://www.eblr.com

- Studies on the **Implementation of EU Labour Directives in the Enlarged European Union**. This assesses the situation as regards the implementation of EU labour directives into Maltese law.

Contact Us

If you have queries on your minimum conditions of employment, termination benefits, or other queries related to the industrial relations in Malta contact the Department of Industrial and Employment Relations for assistance.

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