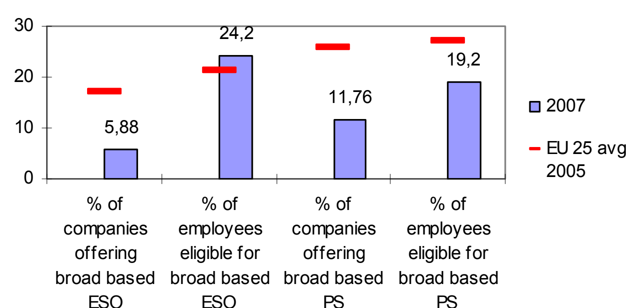
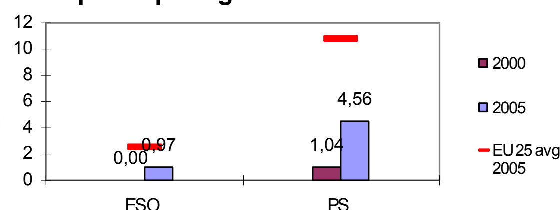
XVIII. Malta

In spite of a strong historical link to the United Kingdom, the source of much of the law on Companies and Employment, in practice employee financial participation is not well developed in Malta, being neither well diffused nor enjoying much political support. The ramifications of the nationalisation programme in the 1970s and the privatisation drive of the 1990s had the unintended consequences of introducing employee financial participation in some larger firms first. However, privatisation cannot be said to have been auspicious for workers' participation. The largest schemes in operation at two previous state owned enterprises are share ownership schemes; profit-sharing is rare. Most of the firms which operate financial participation schemes have a unionised work force with trade union support.

PEPPER IV - Offer in firms with > 200 Empl.



EWCS - Proportion of employees participating in FP schemes



1. General Attitude

The government polices that actually triggered the largest PEPPER schemes in practice were not focused upon employee financial participation but produced it rather as a side effect. Between 1971 and 1987 the newly elected government of the Malta Labour Party (MLP) embarked upon a programme of nationalisation as part of the de-colonialisation process, seven years after attaining political independence. The banking sector, at that time dominated by two major banks, was one of the nationalisation targets. The winding up of a 'widow and orphans' fund in operation in these banks prior to nationalisation resulted in the creation of a number of shares for the employees of one of these banks. The privatisation programme of 1990 adopted by the Nationalist Party (NP), in power since 1987, also had the unintended consequence of introducing employee financial participation schemes in the banking sector. Reversing the process of nationalisation begun by the previous administration, the government divested itself of several entities in which it was a majority shareholder. A side effect of this privatisation process was the creation of a trust fund for the benefit of employees in one of the banks.

Despite the social partners' apparent lack of enthusiasm, trade unions have supported all the schemes that were proposed, putting them into practice and actively participating in their administration. With no collective bargaining at the sectoral level, it is easier for Maltese trade unions to support such schemes in practice. The most active trade union in this area is the Malta Union of Bank Employees. This arises from the fact that the two major banks, where the union is heavily represented, were the targets of both the aforementioned nationalisation and privatisation programmes. The general trade unions, that is, General Workers Union, the island's largest union, and the Union of United Workers, were also involved in prolonged discussions with the Government about the introduction and implementation of a public sector scheme which gave employees the opportunity to set up co-operatives and submit tenders for work contracts. PEPPER schemes have never been prominently featured on the agendas of the two major political parties. The present NP government, while rather passive, is not adverse to financial participation.

2. Legal and Fiscal Framework

Maltese law tends to refer to employee participation schemes indirectly; it tacitly recognises that Maltese firms may put such schemes in place (by means of private or collective agreements), rather than establishing a formal framework for their establishment or creating any significant fiscal or other incentives. However, Maltese law does provide a legal instrument for ESOPs, namely the trust vehicle. Tax incentives for financial participation schemes are few.

a) Share Ownership

Privatisation (1990) – The privatisation drive which the Nationalist Party embarked upon in the early 1990s resulted in a share ownership scheme being put into place for the employees of two formerly para-statal entities[147] which were partially privatised.[148] However, these schemes had no statutory basis; they were set up and regulated by means of private agreements (both individual contracts and collective agreements) between the newly privatised companies and their employees. Interestingly, the statutes of two as yet un-privatised utility providers, the Enemalta Corporation[149] and the Water Services Corporation,[150] explicitly permit the '*establishment, by the Corporation […] of schemes or incentives related to productivity or performance.*'

Private Companies (2004) – There is no statutory framework for either share ownership or share option schemes. Maltese law does not regulate the exact conditions under which

147 By virtue of their nationalisation these two banks had become para-statal entities (independent statutory bodies within the realm of the public sector).

148 This was a trust fund, set up on behalf of employees, in the Bank of Valletta, a formerly state owned bank, and in Maltacom, a state owned telecommunication enterprise.

149 Enemalta Corporation Act, 1977 (Chapter 272 of the Laws of Malta).

150 Water Services Corporation, 1991 (Chapter 355 of the Laws of Malta).

share option schemes may be offered. It is left to individual companies to create their own schemes based on general company and civil law principles. Provided that a company is empowered by its Memorandum and Articles of Association to implement employee financial participation schemes, employers wishing to adopt one of the two types of schemes can enter into private or collective agreements with their employees, setting out the scope, terms and conditions. Where the employer company is itself the issuer of the shares to be offered to its employees, it is not considered to be providing an investment service subject to the Investment Services Act 1994 (IS Act).

Shares must be allocated to employees in accordance with the general rules set forth in the Companies Act 1995 (CA). As a general rule, the CA prohibits a company from acquiring its own shares (Art. 105 para. 1 CA) or the shares of its parent company (Art. 110 para. 1 a) CA), or providing financial assistance for the purchase of either (Art. 110 para. 1 lit. b) CA). However, Art. 106 para. 4 CA and Art. 110 para. 2 CA make an exception to this general rule allowing a company to both acquire its own shares or those of its parent and to provide financial assistance in order to facilitate the acquisition of shares by or for its own employees or the employees of a company of the same group. It should also be noted that the CA generally allows companies to offer their shares at a discount or pay a commission to anyone subscribing or agreeing to subscribe to company shares. This may also apply where shares are offered to employees at a discount in a corporate share ownership scheme. In this context the CA does not differentiate between discounted shares offered to employees or to third parties.[151] Tax law, on the other hand, offers no significant tax incentives for these schemes. As for stock options, it offers certain minor incentives. Under the Fringe Benefit Rules issued under the Income Tax Act,[152] share options are taxable only upon exercise.[153]

Employee Share Ownership Plans (ESOPs) – Maltese law contains no specific legislation on ESOPs. Recent Trust legislation,[154] inspired by Jersey legislation, has seamlessly integrated the UK common law concept of trusts into Maltese law. A Trust can take many forms, and although the concept originated in the UK, trusts are not exclusive to countries that follow the common law tradition. One of these civil law countries is Malta which, through the Trusts and Trustees Act 1988, as amended in 2004 (Trusts Act), allows Maltese individuals and companies both to found and be a beneficiary in trusts regulated by Maltese law. The Trusts Act does in fact contain an explicit reference to 'employee benefit or retirement schemes or arrangements' as forming the basis of a Trust. Although traditionally used for hedge funds, the 'Collective Investment Scheme' (CIS) may also be the basis for an ESOP.[155] With regard to the taxation of ESOPs which fall

151 Consequently, the following conditions apply across the board: (i) authority for the making of discounts must be given by the company's Memorandum and Articles of Association, (ii) the discount must not exceed 10 per cent of the issue price or as prescribed by the Memorandum and Articles, whichever is less, (iii) the amount or rate of discount must be made public, and (iv) in no event may the value of the shares be reduced to below their nominal value as a result of such a discount.

152 Legal Notice 125 of 2001.

153 Rule 36 of the Fringe Benefit Rules (LN. 125 of 2001).

154 The Trusts and Trustees Act, 1988 (Chapter 331 of the Laws of Malta)

155 'Collective Investment Scheme' defined in Art. 2 IS Act is any scheme which aims at 'collective investment of capital acquired by means of an offer of units for subscription, sale or exchange'. It must operate according to the principle of risk spreading and either (i) the contributions of the participants and

within the definition of CISs, unfortunately the Income Tax Act 1948 does not distinguish between exempted and non-exempted CISs; therefore the income from CIS ESOPs will be taxable at the normal rate. For taxation purposes, a CIS is treated as a prescribed fund. Investment income, as defined in the Income Tax Act 1948, which is received by a prescribed fund, is subject to a withholding tax of 15 per cent on bank interest and 10 per cent on investment income from other sources. Other income and capital gains remain exempt for prescribed funds. When Maltese resident participants of the CIS (the employees) redeem, liquidate or cancel their units in the CIS, they are not subject to a second withholding tax.

b) Profit-Sharing

Maltese employment law considers profit-sharing arrangements between employers and employees as forming part of the employee's wage. Maltese labour legislation also recognises service contracts in which remuneration is solely in the form of a commission or a share of the employer's profits,[156] although these are rarely found in practice. This treatment as a 'wage' implies that any share of the profits will be computed together with the employee's salary for the purposes of the imposition of income tax.

c) Participation in Decision-Making

There are no general statutory arrangements for board level representation in Malta. Employee representatives in companies at board level are only found in the state-owned and recently privatised sector, and even here they are becoming less common. In Malta it is the union, provided it is recognised (that is, the employer agrees to negotiate with it), that normally represents the employee at workplace the level. Although EU directives have led to new arrangements for non-unionised employees, these do not seem to have been implemented to any extent. 2006 legislation, requiring the setting up of information and consultation structures, applied to companies with 150 or more employees from January 2006, and to companies with 100 or more employees from March 2007. From March 2008 on, it applies to companies with 50 or more employees. The key level for collective bargaining is the company level. There is also protection for those not covered by collective bargaining through a series of wage orders for specific industries that set minimum terms.

the profits or income out of which payments are to be made to them are pooled; or (ii) at the request of the holders, units are or are to be re-purchased or redeemed out of the assets of the scheme or arrangement, continuously or in blocks at short intervals; or (iii) units are, or have been, or will be issued continuously or in blocks at short intervals.

156 Art. 22 (3) and Art. 36 (13) Employment and Industrial Relations Act, 2002.