

Negotiations on property explained

By Dr Simon Busuttil, MIC Head

The issue of the purchase of property by foreigners in Malta was always considered as one of the most difficult negotiating points for Malta. It was tackled during talks on free movement of capital because the purchase of real estate by citizens of different countries presupposes the right to be able to transfer money from one country to another.

Negotiations on this area were opened in November 2000 and were closed more than a year later just a few days before Christmas 2001, at a specially-convened negotiating session held on December, 21st, 2001.

On the issue of property Malta requested a permanent arrangement. With the exception of this issue, Malta confirmed that its laws will conform to EU laws by January 1, 2003 which is the deadline that Malta set for itself to be prepared for EU membership. Malta also committed itself to liberalise all capital transactions by membership. The last remaining restrictions will be removed by January, 2003 and in a few areas, by the actual date of accession at the latest.

This article focuses only on the property issue that was negotiated under this chapter.

Property: What was the issue?

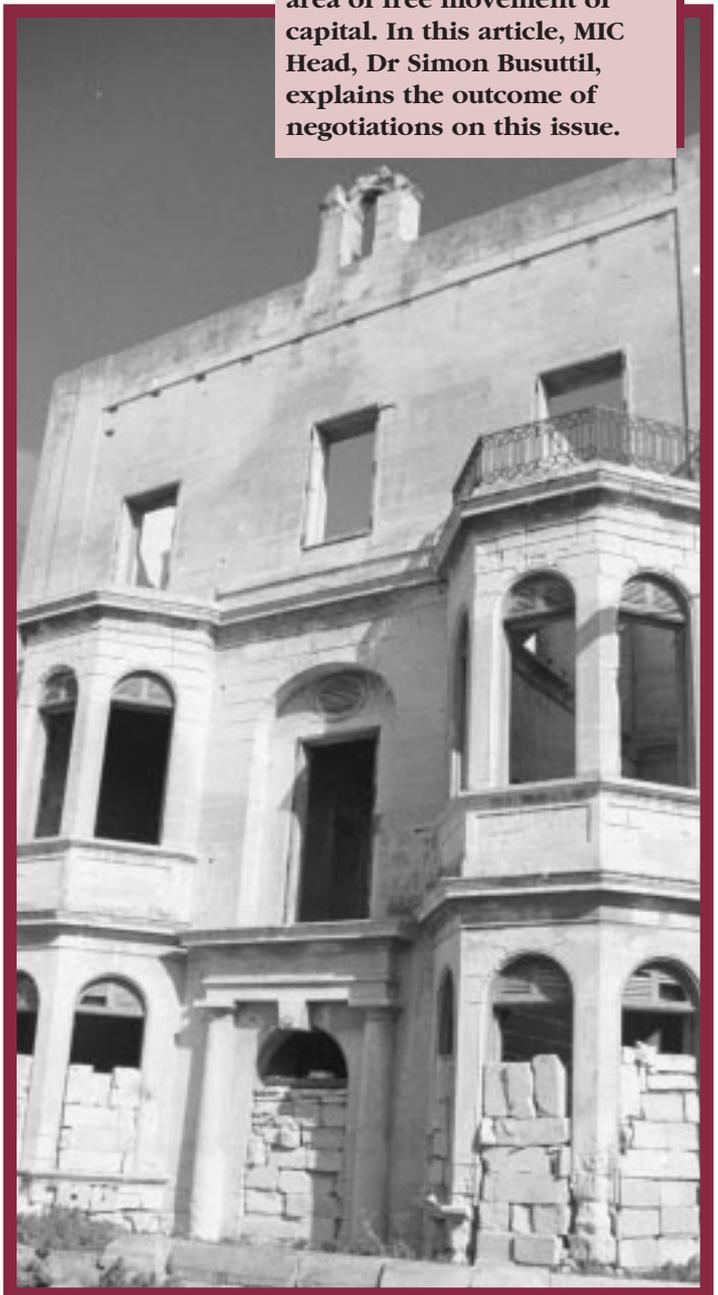
The difficulty of negotiations on this point can be better understood when put in the proper perspective of the way that negotiations are conducted. By joining the EU, a country accepts to adopt and apply the rules of the club. Exceptionally, the EU agrees that certain rules can be adopted over a longer time frame after membership – known as transitional period – provided that this is limited in time and in scope.

Exceptions are therefore temporary in nature and granted to allow a country sufficient time to adapt. In Malta's case, transitional periods lasting up to 2007 have already been obtained in the areas of transport, social policy, energy and in free trade in goods. Other requests are still pending.

Yet, if transitional periods are exceptional, it is evident that permanent arrangements (also known as derogations) are all the more difficult, practically ruled out. The reason for this is that by their very nature derogations go against the principle that the law is equal for all. Derogations also go against the spirit of acting in common because they allow a country to operate outside the scope of the law which binds all the rest. If derogations applied in all cases, there would be no common action and there would be little scope for having the EU at all. No country can expect to benefit from the rights of membership if, at the same time, it does not want to shoulder the obligations.

Unless, of course, it proves to have a paramount reason to do so because a vital national interest is at stake. Under careful scrutiny one finds various examples in EU law where derogations have been granted to individual countries to

On Friday, December, 21st, 2001, Malta closed negotiations on the sensitive issue of the purchase of property by foreigners in Malta, obtaining a special arrangement on a permanent basis. This was discussed under the area of free movement of capital. In this article, MIC Head, Dr Simon Busuttil, explains the outcome of negotiations on this issue.



allow them to operate differently from the rest. But this is only done in cases where applying a particular law would go against a vital national interest of a particular country and where therefore there is a paramount reason for different treatment to be justified.

And here lies the crux of the issue with Malta's request on property. Does Malta's position on the issue of property justify a permanent exception to the rules of membership? It is this issue that was negotiated.

Sensitive for Malta

On Malta's part, the sensitivity of the issue is not difficult to understand. Under EU law, all EU citizens have the right to freely buy property in any EU country. And that would include the right to buy property in Malta if our country joins the EU.

On the other hand, in Malta, we have a law which only allows foreigners to buy property in Malta subject to prior authorisation and under certain conditions. For instance, it limits them to just one property and imposes thresholds on the minimum value of the investment. This is done in order to retain a measure of control on land use and speculation in property in Malta.

During negotiations Malta requested to keep these restrictions in place on a permanent basis even after membership.

There were two basic factors helping Malta's case. The first is the size of our country which is what it is. The second is the density of our population which would make Malta by far the most densely populated country in the EU. As the table shows, Malta would have a population density almost three times that of the Netherlands which is currently the most densely populated country in the EU.

Land Size and Population Density		
	Land Surface (km ²)	Population Density (persons per km ²)
MALTA	316	1,191
Netherlands	33,883	459
Belgium	30,528	334
Luxembourg	2,586	164
Cyprus	9,251	83
Sweden	410,934	20
Finland	304,529	17

Malta's concern was that if the right of EU citizens to buy property in Malta after membership leads to an increase in demand for property in Malta, this could affect the price of property and therefore have a negative social impact on Maltese families, especially on young couples. Of course, housing affordability in Malta is not only affected by EU membership since the property prices in our country have long been going up. However, Malta's concern was that EU membership should not add to the problem by making housing in our country even less affordable.

This concern is not just real. It is also permanent in nature because, if anything, should a problem arise, it would be greater in future than at present, affecting our children more than it would affect us.

This is why a transitional period was not sufficient for Malta. Only a permanent arrangement was acceptable.

Perhaps the problem was most starkly put by none other than EU Commissioner Gunther Verheugen himself. Addressing a negotiating session held on December, 12th, 2001 at Ministerial level, he appealed to EU countries to reach an agreement with Malta on this issue saying that "it cannot be in the interest of the European Union that an ordinary Maltese family could find difficulty buying property in its own country." Malta's conditions, he said, show no similarity to that of any other candidate country or even of any current Member State. Therefore, this situation had to be borne in mind in negotiations with Malta on this point.

Negotiations on Free Movement of Capital: A Snapshot

Screening of laws	December 1999
Negotiations opened	November 2000
Negotiations closed	December 2001

Special Arrangements	Requested	Obtained
Purchase of property by foreigners in Malta	Notwithstanding the obligations under the EU Treaties, Malta requests to maintain, on a permanent basis, the legislation in place on the date of accession regarding the acquisition of secondary residences and real estate. This request is dictated by the size of the country, the density of population and the social effects that a substantial increase in demand for property would cause.	YES

The permanent solution

That a permanent solution for Malta's case was necessary is now clear. What needs to be seen now is how an agreement acceptable to both sides could be reached.

The point of departure was Malta's current law on the purchase of property by foreigners which is a 1974 law known as the Immovable Property (Acquisition by Non-Residents) Act.

It is wrong to assume that today foreigners cannot buy property in Malta. This is not the case. Under current law, foreigners can already buy property in Malta, typically for use as a holiday residence and therefore as a secondary residence. But to do so, they require a permit which is only granted for one property and which is subject to qualifications, such as on the value of the property. No authorisation is granted for the purchase of more than one property.

As a result of negotiations, this situation will now be retained on a permanent basis even after membership notwithstanding the fact that EU law allows EU citizens to purchase property in any EU country without any restrictions. This was the main outcome of negotiations.

During negotiations, the EU agreed that, bearing in mind the very limited number of residences in Malta and the very limited land available for construction, which can only cover the basic needs of the present residents, Malta may maintain restrictions, on a non-discriminatory basis, on the right of EU citizens, who have not legally resided in Malta for at least five years, to acquire and hold secondary residences.

This means that EU citizens seeking to buy a secondary house in Malta will still require to apply for an authorisation and satisfy conditions as is the case now. And they will not be entitled to buy more than one property, unless they resided in Malta for at least five years.

The five year period as a residence requirement was the balance that was struck between the two diametrically opposed positions in Maltese and EU law. On the one hand, under Maltese law foreigners can never have full rights to buy property in Malta unless they obtain Maltese nationality. And on the other hand, under EU law, EU citizens would have had full rights to buy as much property in Malta as they like without any need to reside in Malta.

Instead, Malta agreed to give equal rights to EU citizens to buy property freely in Malta only if they first resided here for a period of five years. In practice, this means that only those EU citizens who settle in Malta permanently can do so.

This was done in order to eliminate the possibility of foreigners freely buying as much property in Malta as they like. More importantly, Malta wanted to remove the possibility of a burst of growth in property prices because of EU membership.

The Protocol

In order to guarantee the permanent nature of the special agreement, it was also agreed that this arrangement will be set out in a Protocol to be annexed to the Accession Treaty of Malta. This means that this arrangement will have the force of law. It cannot be altered in future unless Malta agrees to do so and that it cannot be attacked in a Court of law.

The EU also made it clear that this arrangement with Malta on the acquisition of secondary residences by EU citizens is only acceptable because of Malta's unique demographic and geographical situation and the permanent nature of the natural constraints that it faces. Therefore, this arrangement cannot set any precedent in the negotiations with any other candidate country.

Buying a first property in Malta to use as holiday residence

The tables below give an easy comparison between the situation today, the situation under EU law and the situation that will prevail after membership as negotiated by Malta. This comparison illustrates the salient points that were negotiated. But let us take a few concrete examples to explain how the agreement will work in practice.

A British citizen wants to buy a first property in Malta to enjoy as a holiday home in Winter whilst still residing in the UK for the rest of the year. She can already do so today under our law by applying for a permit, which is granted, subject to conditions such as the value of the property which must be of at least Lm30,000 in the case of a flat and Lm50,000 for a house. This situation will not change after membership and the permit will continue to be granted subject to these conditions.



Settling in Malta on a permanent basis

A French citizen wants to settle permanently in Malta and wants to buy property to live in. The current situation is that again, prior authorisation is required, although this is granted automatically. After membership, the only change will be that no authorisation will be required and no thresholds for value will apply because the residence will be used as a primary residence and not as a holiday home.

Purchase of FIRST property in MALTA

	Position TODAY	Position under EU law WITHOUT negotiations	Position AFTER EU Membership AS NEGOTIATED BY MALTA
Maltese Citizen	FREE to buy	FREE to buy (ALSO IN EU)	FREE to buy (ALSO IN EU)
EU Citizen residing ABROAD	Permit granted	FREE to buy	Permit granted
EU Citizen residing in Malta	Permit granted	FREE to buy	FREE to buy
Non-EU Citizen	Permit granted	No change	Permit granted

Purchase of SECOND or FURTHER property in MALTA

	Position TODAY	Position under EU law WITHOUT negotiations	Position AFTER EU Membership AS NEGOTIATED BY MALTA
Maltese Citizen	FREE to buy	FREE to buy (ALSO IN EU)	FREE to buy (ALSO IN EU)
EU Citizen residing ABROAD	No permit granted	FREE to buy	No permit granted
EU Citizen residing in Malta LESS than 5 years	No permit granted	FREE to buy	No permit granted
EU Citizen residing in Malta MORE than 5 years	No permit granted	FREE to buy	FREE to buy
Non-EU Citizen	No permit granted	No change	No permit granted

Malta also agreed that, after membership, authorisation will no longer be required when an EU citizen who has settled permanently in Malta wants to purchase property that is connected with his business activities in Malta. Other than this, the French citizen will not be able to buy more property in Malta until he has been here for five years.

Buying a second or further property in Malta

A German citizen who already owns a Summer residence in Gozo. Currently this is not allowed under our law. This situation will not change after membership and this person will still not be allowed to buy a second property. He can only do so if he has first resided in Malta for a period of five years, which cannot be the case if he is still living in Germany.

An Italian citizen who already owns a house in Malta decides to settle here permanently and wants to buy a second property. Currently this is not allowed under our law. After membership, this would still not be possible, unless the Italian citizen has first resided in Malta for five years.

A Belgian citizen who has been living in Malta for more than five years and already owns a house in Malta wants to buy a second property. Currently this is not allowed under our law. After membership, this will become possible because this EU citizen would have resided in Malta for more than five years and would have earned the right to freely buy property in our country without any restrictions.

The position of Maltese migrants

The position of Maltese migrants must be clearly explained because the first reactions to the results of negotiations indicate that it may have been misunderstood.

Maltese citizens who return to Malta after having emigrated to any other country – whether in the EU or not – retain the full rights to buy as much property in Malta as all the rest of us living here. For clearly, they would have resided in Malta for five years before leaving the country and this five-year period remains sufficient even if they return after several years. Therefore, under the arrangement that was negotiated these Maltese citizens do not lose any rights.

Furthermore, a Maltese citizen who has emigrated can also continue to buy property in Malta without any restrictions even if he is residing permanently abroad and does not intend to come back to Malta.

On the other hand, the position of the children of Maltese migrants is different. We are here talking of those children who never lived in Malta but who acquired Maltese nationality. If they want to settle here permanently they can buy a first property and no authorisation would be required. They can also buy a first property to use as a holiday home even if they are still resident abroad, subject to prior authorisation, which is granted. However, they cannot buy more than one property in Malta unless they have first lived here for five years. It is this category of Maltese passport holders that lose some of their current rights.

Non-discrimination

Although the outcome of negotiations effectively gives Malta the safeguards that it wanted, it is still an agreement that in law does not discriminate against EU citizens. In

other words it is non-discriminatory. In fact, for all intents and purposes EU citizens will be treated in the same way as Maltese citizens. Restrictions will only be imposed on those EU citizens who have not resided in Malta for five years. The same restrictions will also be imposed on Maltese citizens who have not resided in Malta for five years.

The thresholds on the value of the property

Foreigners may only buy property of a certain value. Currently, this is set at not less than Lm30,000 in the case of flats and not less than Lm50,000 in the case of houses. If in future, Malta wants to increase the thresholds on the value of property that may be purchased by foreigners in order to reflect changes in real estate prices, it may do so.

Buildings of historical importance or situated in a historical locality

Under current law, authorisation for the purchase of property by a foreigner may be refused if the Maltese Government feels that the property is of historical importance or is situated in a historical locality. This will not change after membership.

Buying property in designated zones

The position that was negotiated by Malta excludes certain zones in our country that were specifically indicated as development zones for secondary residences. These include the Manoel Island, Tigne, Portomaso and the Cottonera waterfront projects. In these areas, any person, whether a Maltese citizen, EU citizen or even a non-EU citizen may freely buy property without any restrictions whatsoever.

The position of non-EU citizens

The position of non-EU citizens is not affected by what was negotiated. This means that nationals of non-EU countries will continue to be treated in the same way as now and current restrictions will continue to apply even after membership. Restrictions cannot, however, be increased.

Inheritance

The position that was negotiated by Malta also does not affect inheritance rights. Any person inheriting property in Malta will be entitled to have it transferred to his or her name irrespective of nationality. Equally, any person who co-owns a property and wants to buy the remaining portions of the property can do so irrespective of nationality.

Buying property in an EU country

After membership, Maltese citizens will have the right to buy property in any EU country without any restrictions whatsoever. This means that whereas, under the terms of the negotiations, Malta will retain restrictions on the right of foreigners to purchase property in Malta, this treatment is not being reciprocated in the sense that no restrictions will apply to Maltese citizens who want to buy property abroad.

These new rights will also be extended to Maltese emigrants living abroad as well as their children as long as they hold a Maltese nationality.



Malta's official negotiating position paper on this area is also available from MIC or from:
www.mic.org.mt

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