

## Protecting the unborn child

### Outcome of negotiations on the Protocol on Abortion

By Dr Simon Busuttill, MIC Head

*"Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion."*



#### Abortion

- A Protocol on abortion will be annexed to Malta's Treaty.
- It gives legal certainty that EU law, present or future, cannot change Maltese law on abortion.

In Malta, a major concern over EU membership related to the sensitive issue of the legalisation of abortion. Abortion is illegal in Malta and punishable at law under Section 241-243A of the Criminal Code. On its part, the EU has no laws on the legalisation of abortion. Nor does it have any competence to make such laws. This means that a country that joins the EU is not required to legalise abortion as an obligation of membership.

However, the fact that all EU countries, except for Ireland, have already legalised abortion gave cause for concern that the EU might indeed call upon its members to legalise abortion at some point in future. This concern was fuelled by the intervention of the European Parliament which, from time to time, enters

the debate by adopting resolutions calling for the legalisation of abortion. Although not legally binding, these resolutions imply political pressure.

During the course of negotiations, Malta therefore sought to address these concerns by seeking a clear legal arrangement that guarantees Malta's position on abortion, both now and in future. In other words, Malta wanted an arrangement that confirms that if it joins the EU, it would not be obliged to legalise abortion, whether now or in future.

An agreement was finally reached on a Protocol on Abortion. This protocol will be attached to Malta's Accession Treaty. A Protocol is a legally binding instrument that is enforceable in a court of law, including the European Court of Justice. The wording of this Protocol clearly ensures that in any case of possible conflict between EU law and Maltese law or jurisprudence on the issue of abortion, Maltese law will prevail. The text of the Protocol is the following:

## PROTOCOL ON ABORTION

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### EU law on Abortion

The EU has no laws on abortion, nor the power to make them. This matter is left entirely up to individual Member States to regulate. All EU countries, except for Ireland, have legalised abortion, although in Spain and Portugal abortion remains very strict. Among the new member countries, only Poland and Malta ban abortion. In Poland, abortion was banned after the end of the communist regime and forty years of a liberal regime.

### Free movement of services in the EU

It is not possible for foreign doctors to offer "abortion services" in Malta under the EU principle of free movement of persons or the free movement of services, that is the right to work or offer services in any EU country. This is because services offered are still subject to the laws, including the public policy, of the country where they are offered. In Malta's case, abortion is illegal and remains illegal irrespective of whether it is performed by a Maltese or a foreign practitioner.

### The European Parliament

From time to time, the European Parliament has expressed itself on the issue of abortion through the adoption of resolutions. These resolutions focus on women's rights and on sexual and reproductive health and rights. The Parliament has consistently made it clear that it does not favour abortion as a method of family planning. However, since 1994, the European Parliament has adopted five resolutions that call, whether directly or indirectly, for the legalisation of abortion. The latest was adopted in July 2002. Resolutions of the European Parliament are not legally binding and the European Parliament has no power to pass laws on this matter. But they are often seen as a means of exerting political pressure.

The July 2002 resolution was met with a stern response from European Catholic Bishops as well by the Bishops in Malta.

On its part, the Maltese Government responded publicly to the resolution by reiterating that it had no intention of changing Maltese law on abortion. It also wrote to the Secretary General of the European Parliament restating its position. The Maltese Government wrote that "not only is abortion illegal in Malta, but successive Governments ... have been strongly committed to retaining the legal prohibition and have held this position also in the context of European and international fora, not least at the level of the United Nations". The Maltese Government stated its confidence "that this will remain the position of Malta after membership" and that as a Member State of the EU, Malta "will continue to advocate its strong determination against abortion as a faithful reflection of the values of the Maltese people".

### The Irish Protocol on Abortion

Malta is not the first country to negotiate a protocol on abortion. Ireland, which has been a member of the EU since 1973, also has a protocol on abortion. The Irish Protocol (No. 17) was



attached to the Maastricht Treaty in February 1992 and reads as follows: "Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."

As can be clearly seen, Malta's Protocol is based on the Irish model. The only difference is that whereas Malta's protocol refers openly to abortion, the Irish protocol does not – it just refers to the Irish Constitutional provision.

In Ireland, the issue of abortion is very controversial. More than one referendum have been held on the legalisation of abortion – none have been carried. So far, the Irish people have voted to keep abortion illegal. But the debate goes on. In March 2002, Ireland held another referendum to decide whether the exceptional circumstances in which abortion is allowed - where there is a real and substantial risk to the life of the mother - should continue to be permitted. The referendum was carried by those who favoured leaving things as they stand.

### Values

- Abortion, euthanasia, divorce, prostitution and drugs are not affected by EU membership.
- The EU has no laws on these issues and it is up to Malta to decide.

### The "morning-after pill"

It is up to the Maltese authorities to decide whether the sale of this pill should be allowed in Malta.



The protocol of abortion is also available from MIC or from:  
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