

# THE EXPAT POST

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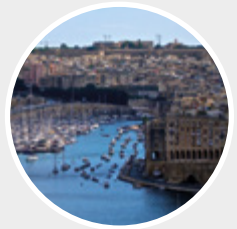
IN FOCUS

**Brexit:** The Tax and  
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The Expat's View



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## SPECIAL FEM EMEA SUMMIT EDITION

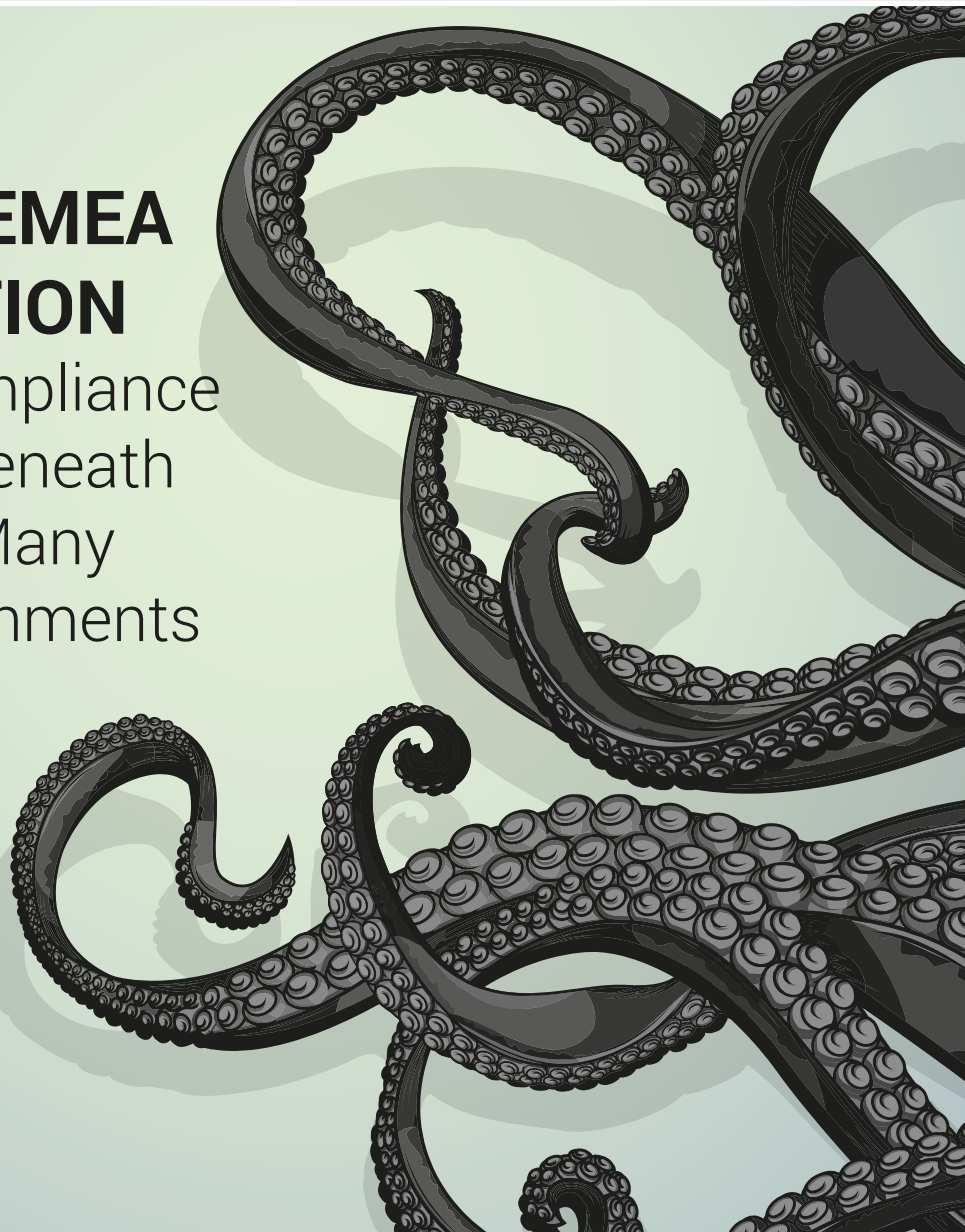
Conquering the Compliance  
'Kraken' Lurking Beneath  
the Surface of Many  
International Assignments

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EXPATRIATE MANAGEMENT  
EMEA SUMMIT**



**8-9 NOVEMBER 2018**



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# Welcome

This special edition of The Expat Post contains two feature articles expanding on the expert insights we will share during our panel session at the Forum for Expatriate Management's EMEA Summit. We are proud co-sponsors of this prestigious conference which brings our team into personal contact with some 400 global mobility professionals working for international employers and leading vendors in this fast-growing market sector.



**Luc Lamy,**  
EMEA Chair of Alliot Group's  
Global Mobility Services Group

Our session *Conquering the Compliance 'Kraken' With the Power of Medium Sized Firms* will explain via two case studies how our collaborative global team of tax advisers, immigration experts and lawyers can help in-house global mobility professionals to grapple with and tie up the various tentacles that can potentially take down the corporate 'ship'. It is a session not to be missed, but if you do, please come and see us on expo stand F7 or email myself or Client Liaison Officer Giles Brake ([globalmobility@alliotgroup.net](mailto:globalmobility@alliotgroup.net)) for more information about our outsourced solutions.

Being in the heart of the 'Brexit zone' during the FEM EMEA Summit, we also re-run excerpts from two recent articles on the tax and legal considerations that could impact businesses transferring executives across borders.

*Luc Lamy*

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## Our **Global Mobility Team** at the FEM EMEA Summit includes:



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# Brexit: The Tax and Legal Issues Global Mobility and HR Managers Need to Consider

With the 29th March 2019 Brexit deadline casting its shadow over businesses across the EU, and no deal in place at the time of writing, two of our UK members, **Sherrards Solicitors** and **Smith Cooper**, provide practical tips on how businesses that work with the UK or operate from the UK can prepare for the impact of Brexit in terms of changes that could affect the supply chain, tariffs and the free movement of people, goods and services.

## LEGAL CONSIDERATIONS



**Mark Fellows**, Partner, Employment Law, **Sherrards Solicitors** ([mark.fellows@sherrards.com](mailto:mark.fellows@sherrards.com))

### Employment Law

Much employment law in the UK originated in Brussels. Following the decision to leave the EU, one concern was whether the Government might repeal some legislation. The Government published a white paper which proposes there will be no regression in employment laws such as the Working Time Regulations, protection of employees' rights on transfer of business undertakings, discrimination laws and the current collective consultation requirements. This could change and likewise, once the UK leaves, there may in the longer term be a growing divergence between UK and EU employment law.

We suggest that you should manage and communicate with your workforce to tackle diversity issues. For example, consider using the staff's natural turnover to recruit who you need now rather than post Brexit. Manage your employees' questions on their own uncertainties (*right to work, benefits, pension*). It would also be wise to review your internal employment policies for termination of employment, recruitment and travel within and outside the EU.

### Immigration

Some categories of person with EU free movement rights, and who have been resident in the UK, could be left without a right to reside and work in the UK. A wider concern is that EEA nationals will now be subject in whole or in part to the UK's existing Points Based System which is identical to that for non-EEA nationals who require Sponsorship. Worryingly, there are currently only 29,211 registered Sponsors in the UK vs. 5 million+ companies. Our advice is to obtain a Sponsorship licence if not in place already. Failure to do so now will increase Home Office scrutiny, cost and processing time.

Moreover, you should keep an eye on migration policies the EU and UK Government may implement. Seek legal advice and anticipate the potential changes and delays in your recruitment process.

### Other legal considerations

- Future plans to set up in the UK or EU could be brought forward to now rather than post Brexit
- Analyse the terms of your relationships with third parties.

## TAX CONSIDERATIONS



**Jackie Hendley**, Head of Tax, **Smith Cooper** ([jackie.hendley@smithcooper.co.uk](mailto:jackie.hendley@smithcooper.co.uk))

Under a transition arrangement, EU law will continue to apply until 31st December 2020. Although the precise details are not yet known, it is not currently anticipated that there will be any planned changes to the tax status of EU nationals. It is expected that any future treatment will be determined based on the status of the EU national i.e. Settled status, Pre-settled status or neither.

In a 'No Deal' scenario, there would be no transition period and, therefore no specific agreement on the future rights of EU citizens in the UK and border checks would be re-imposed. Social security arrangements with EU countries will need to be renegotiated. Currently, employees moving within the EU are only subject to social security from one country – arrangements with EU countries will need to be renegotiated by the UK.

When overseas employees come to the UK, they need to adhere to laws covering short-term business visitors. Unless they obtain exemption, PAYE tax and National Insurance contributions (*NIC*) will be due in the UK from day 1 and the individual will have to negotiate relief for the double tax/ social security in their home country of tax. Strict PAYE requirements for employees on short-term business visits to the UK can only be relaxed in certain circumstances and, of relevance here, where there is a Double Tax Treaty under which the Dependent Personal Services / Income from Employment article exists.

Without EU membership, individual tax treaties and social security agreements will have to be agreed. Despite previous arrangements, it cannot be guaranteed that there will be any automatic relief or exemptions.

If the individual is on a permanent contract rather than a secondment, any travel and accommodation expenses met or provided in the UK at or near to their place of work will also be taxable as benefits in kind.

European Health Insurance Card arrangements will cease.

While precise arrangements post 29th March 2018 are still unknown, we recommend that you and your clients assess any foreign assignees as Brexit talks progress and take appropriate advice.

# Conquering the Compliance 'Kraken' Lurking Beneath the Surface of Many International Assignments



International assignments have become common practice within multinational companies. Nevertheless, they remain challenging exercises in terms of (*at least*) ensuring compliance with legal requirements in different countries. Our Expert Panel at the **Forum for Expatriate Management EMEA Summit** in London (8-9 November) will present two case studies which highlight the issues that international companies need to address in various different jurisdictions when transferring executives and the practical solutions that can be implemented with the help of our global multidisciplinary team of tax advisers and lawyers.

## CASE STUDY 1 Meet Amélie, a Belgian national going on assignment to the UK for three years

Presented by **Stefan Creemers**, Global Mobility Specialist at **Tax Consult**, Belgium



### KEY FACTS

- Amélie is a Belgian national and an employee of a Belgian company
- Her Belgian employer is a subsidiary of a US multinational corporation
- She will be assigned to the UK subsidiary of the same US multinational for three years
- Amélie will remain an employee of the Belgian company while on assignment
- Her Belgian employer will continue to pay her remuneration
- During the assignment, Amélie will receive stock options from the US multinational
- She will undertake regular travel to Germany for team meetings during the assignment.

### CHALLENGES

This particular long-term assignment creates a fairly fierce compliance 'Kraken' - the following tentacles will need to be grappled with and tied up:

#### Immigration

Will Amélie be entitled to live and work in the UK? Under current EU legislation, the free movement of people allows Amélie to move to and work in the UK. However, a question mark hangs over how this will be handled after Brexit (March 29, 2019). To date, no agreement has been concluded between the UK and the EU on this issue.

#### Social security

Articles 12 and 16 of the EU regulation 883/2004 outline rules on secondments and mean that Amélie can remain subject to Belgian social security while on assignment. An A1 document will need to be requested from the

Belgian social security authorities. This document needs to indicate the start and end dates of the secondment. However, questions remain over whether this document (*and continued submission to the Belgian social security system while on assignment in the UK*) will remain valid after Brexit and will depend on the agreement that is reached.

#### Income taxes

In which country will Amélie be taxed? First, the country in which Amélie will be considered tax resident needs to be determined. This will initially depend on the internal legislation of each jurisdiction. In the event of double tax residency, Article 4 of the tax treaty concluded between the UK and Belgium will need to be called upon to determine Amélie's tax residency. The so-called 'tie-breaker rule' will need to be applied which takes into consideration details including Amélie's permanent home, personal and economic relations (*centre of vital interests*), habitual abode, nationality, and mutual agreement.



## SOLUTIONS

### Scenario 1: Amélie remains a resident of Belgium

In this scenario, Amélie's country of residence will tax her worldwide income, but the UK will tax the income derived from activities she has performed in the UK. To avoid the potential double taxation which could occur, Article 15 of the Belgium-UK tax treaty can be applied as this stipulates which country is entitled to tax her employment income.

Under this rule, the country of residency (*i.e. Belgium*) is entitled to tax. However, an exception to the rule can apply if Amélie's employment activity is physically exercised in the other Contracting State (*i.e. the UK*) with this country being entitled to tax the remuneration derived from this activity.

However, it gets complicated as there is an exception to the exception in that even if Amélie's activity is physically exercised in the other Contracting State (*i.e. the UK*), her country of residence remains solely competent to tax her income provided the following conditions are met simultaneously:

- Amélie is present in the other Contracting State (*i.e. the UK*) less than 183 days within any period of 12 months; AND
- Her remuneration is paid by or on behalf of an employer that is not a resident of the other State (*i.e. the UK*); AND
- The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State (*i.e. the UK*).

As Amélie's UK assignment is scheduled for three years, condition 'a' is not met and consequently the UK is entitled to tax the remuneration relating to the activities physically performed in the UK. Based on Article 23 of the Belgium-UK tax treaty, Belgium will however provide for treaty relief in order to avoid double taxation.

As the UK will tax the remuneration paid to Amélie by the Belgian employer, the latter is not entitled to withhold the Belgian withholding taxes which, in principle, are to be withheld at source.

### Scenario 2: Amélie becomes tax resident in the UK

Under such a scenario, the UK would be solely entitled to tax Amélie's remuneration provided that she does not exercise part of her activity on Belgian soil. Her Belgian employers would be under no obligation to withhold tax although they are paying her salary, provided that she does not carry out her activity on Belgian soil.



**David Gibbs**, Corporate Tax Partner at **Alliotts** in London comments "In either scenario, the Belgian employer needs to operate a UK payroll to ensure PAYE and NICs are deducted from the payments to Amélie. The employer is able to set up and register a payroll even though it is not UK resident nor has any permanent establishment in the UK. In the situation where Amélie becomes UK tax resident, then she will be required to either disclose and pay tax on her worldwide income or

*elect for the remittance basis and declare only income arising in the UK or remitted to the UK."*



**Joerg Scholz**, Partner at **Scholz GmbH** in Duesseldorf confirms that as long as Amélie's regular trips to Germany do not amount to more than 183 days per year in Germany, she will not be considered a German tax resident and will therefore not be required to file a German tax return or make German social security contributions.

In both scenarios, the points below regarding tax on stock options and employment law need to be taken into consideration:

### Tax considerations related to stock options



**Hunter Norton**, Tax Director at **Farkouh, Furman & Faccio**, New York, comments: "The grant of nonpublicly traded, compensatory stock options to an employee is not a taxable event in the US or UK. However, in Belgium this will depend on whether the Law of March 26, 1999 is applicable or not. If it is applicable, taxation occurs at grant. When Amélie exercises the stock options, in the US and UK, she will need to recognize income if the exercise price is less than the fair market value of the stock. The tax treaty concluded between the US and Belgium or the US and UK (depending on where Amélie is considered to be tax resident) must be consulted to determine which country is entitled to tax her on the benefit derived from the exercise of the stock options. Generally, under the applicable treaty provisions, income from the exercise of stock options is taxable in the state in which the services are performed which give rise to the compensation. Consequently, Amélie may have the ability to determine in which state she is primarily subject to tax based upon where she performs the services attributable to such compensation."

### Employment law issues



**Mark Fellows**, Partner at **Sherrards Solicitors** in London, comments that under both scenarios it will be "important that Amélie's employment contract is clear regarding which country's legal system and regime for disputes resolution should apply."

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## CASE STUDY 2

# Meet Nick, a UK citizen who spends 75% of his time travelling to the US, Europe & Australia

Presented by *Kathie Gaber*, Principal and Chair of the Business Immigration Practice Group at *Masuda Funai*, Chicago



### KEY FACTS

- Nick is a UK citizen born in the US
- He is the Director of Program Management at a UK multinational corporation
- He is based and payrolled out of London
- His role requires him to travel 75% of the time in the US, Europe (*Germany*) and Australia
- He travels to the New York office where he has a team of four people at least once every quarter for two weeks at a time
- He enters the US under the visa waiver program
- On his last entry to the US, he was sent to secondary inspection at the airport and questioned about his frequent trips to the US before being allowed to enter for the permitted 90 day period
- His company is concerned about whether he will be allowed to re-enter the US in December for a two month stay to roll out a project in the US.

### CHALLENGES

In this case study, there are various immigration, tax and employment law 'tentacles' that need to be fought with and manacled!

We are seeing an increasing number of these types of scenarios due in large part to the Buy American and Hire American (BAHA) Executive Order, effective April 18, 2017, issued with the intent to promote the hiring of American workers as opposed to the sponsorship of foreign workers, among other purposes. With regard to immigration, BAHA requires the US Secretary of State, Attorney General, Secretary of Labor, and Secretary of Homeland Security to propose new rules and guidance, and to supersede or revise previous rules and guidance, to protect American workers and to prevent visa fraud and abuse. Governmental agencies are only now starting to issue new guidance with regard to visa issues/processing. Consequently, all visa applications and entries into the US by foreign nationals are much more highly scrutinized than before.

### SOLUTIONS

Note: For purposes of the immigration analysis, we will assume that Nick decides to renounce US citizenship (*after consulting with US tax advisers*).

The B-1 Visitor for Business nonimmigrant classification allows Nick to engage in legitimate business activities of a temporary nature which do not amount to productive employment. As a UK citizen, Nick is eligible to use the Visa Waiver Program although he must demonstrate compliance with the B-1 requirements to the US Customs and Border Protection (CBP) Officer when entering the US. It is extremely important to know precisely what Nick is doing

each time he enters as that will determine whether he may be classified as a business visitor. Immigration regulations affirmatively classify the following activities as permissible: conducting commercial transactions; negotiating contracts; consulting with business associates; litigation activities; participating in conferences; and undertaking independent research. All other activities are discretionary, taking into account the frequency and lengths of prior visits.

Since Nick has previously been sent to secondary inspection, there is likely a "lookout" in the system and he should expect to be extensively questioned on his next entry. A refusal at the port of entry can result in expedited removal which comes with a five year bar and so the stakes are very high. If denied entry, Nick will no longer be eligible for future use of the visa waiver program. Short of applying for a working visa, Nick may also consider applying for an actual B-1 visa at the US Embassy in London, setting forth more detail regarding his eligibility which could facilitate his entry.

With regard to the upcoming two month assignment, Nick should consider the "B-1 in lieu of H-1B" which is a hybrid classification. Similar to the B-1, Nick must be employed and salaried abroad. Similar to the H-1B, the US activities must be classifiable as a specialty occupation and Nick must have corresponding academic or experience credentials to qualify. It will only be issued for a US assignment of six months or less.

The L-1 intracompany transferee classification is a viable working visa option if there is a qualifying relationship of parent, subsidiary, branch office or affiliate between Nick's current employer and the US subsidiary. Nick has worked with the foreign employer for at least one year within the three years prior to application; and his current role can

be classified as executive, managerial or specialized. This classification is flexible, allowing the US position to be full or part time, and allowing salary to be paid in either the home or host country. Although a desirable option for multinational companies, traditional petitions must be approved by the USCIS (*US Citizenship and Immigration Services*) located in the US before Nick can process his visa in London and the category has its lowest approval rate since inception in the 1970s. For this reason, if the US subsidiary has sales of \$25 million, a total US workforce of 1,000 employees or at least 10 transfers in one year, it should file for the L-1 Blanket designation which streamlines the visa process and results in more predictable adjudications.

If Nick's employer is the UK parent company, he may also qualify for an E-2 Treaty Investor visa as a manager or executive if the parent has substantially invested in the US subsidiary. This classification is not available if the ultimate UK parent is publicly traded and more than 50% of its shareholders are not British. No guidelines clearly define how much money is considered as "substantial" but a leased office with few hard assets can be problematic. However, if issued, there is no limitation on the number of years that Nick can spend in the US as long as he and the company continue to qualify.



**Scott Shapiro**, Partner at **Weber Shapiro** in New Jersey, comments: *"There are some complications to consider. US citizenship is a benefit not to be taken lightly. If Nick remains a US citizen, he will be taxed in the US on this worldwide income and will be required to file a US resident individual income tax return unless he has renounced his citizenship. Moreover, he is required to submit FinCEN Form 114 disclosing assets held in foreign bank accounts if the aggregate value in the UK/ outside the US is over US\$10,000."*

According to Shapiro, Nick will receive a foreign earned income exclusion amount on his wages in the UK up to US\$102,100 (for 2017). If his wages are in excess of the exclusion, a foreign tax credit would be available for the income in excess of the exclusion. However, frequent travel to the US *"may affect the amount of exclusion he is entitled to."*

If Nick renounces US citizenship, will he be subject to US reporting requirements? *"After surrendering US citizenship, Nick should have minimal contacts with the US which generally means that he should not remain in the US for more than 30 days each year otherwise he will trigger a tax reporting requirement,"* adds Shapiro.

With regards to whether Nick's securing of an employment based visa combined with the company paying a portion of his salary in the US, will affect where he is required to make social security contributions, Shapiro comments: *"As long as Nick is not sent to the US for more than five years, then the US-UK totalization agreement provides that he may continue to be covered by the UK's social security system."*



**David Gibbs**, Corporate Tax Partner at **Alliotts** in London comments *"Nick is UK resident and by denouncing his US citizenship he may be clearly confirming his UK domicile and hence remains taxable in the UK on worldwide income. This is regardless of whether income is earned or brought into the UK but he will benefit from double tax relief where income has suffered tax at source overseas."*



**Mark Fellows**, Partner at **Sherrards Solicitors** in London, comments that it will be *"important that Nick's employment contract is clear regarding which country's legal system and regime for disputes resolution should apply."*



**Christian Bruetting**, Partner at **audalis** in Dortmund does not see Nick triggering tax liability - income generated from occasional trips to Germany will not be subject to tax due to the protection afforded under UK-Germany tax treaties. Furthermore, EU rules mean that German social security will not apply either.



As per Nick's occasional business trips to Germany, occasional business trips to Australia are also unlikely to trigger any tax liability or superannuation (*pension*) obligations by Nick or his employer in Australia adds **Aaron Fitchett**, Partner at **Baumgartners** in Melbourne.

However, a complication could occur in the form of Nick's activities in Australia amounting to the accidental creation of a 'permanent establishment' for his employer - in this event, explains Fitchett, Nick and his employer would have Australian tax obligations: *"To avoid Australian income tax complications, in essence, care would need to be taken to ensure that Nick does not routinely sign and finalise contracts on behalf of his employer while in Australia."*



# Living in Malta: The Expat's View

In this interview with Malta member firm **Dixcart**, Italian expat **Georgia** talks about her experience of living and working in Malta.

## **Where are you from and when did you move to Malta?**

I come from northern Italy but moved to Malta for work purposes about two years ago. I received an offer from the company which allowed me to work from home if my children were sick – it was a great opportunity to change my job. Whenever I am alone with the kids on the island, it is not easy, so the flexibility is very important.

## **What do you need to consider before moving to Malta?**

You do not have to think about a lot of things before coming. You can't do much remotely, you can organise almost everything once you're here in Malta. Just book a flight and book accommodation for the first week in a hotel that is relatively central.

## **Was it easy to find property?**

We started looking a couple of months before moving to Malta to find an apartment. Malta is a popular destination, so rental stock keeps on changing and the prices increase all the time.

## **What are the main obstacles you had to overcome?**

Bureaucracy is not an issue. We had a residency card in no time. It was quick, probably, it was easier for us because we are EU nationals.

What I find a bit awkward here is the health system. Being a wealthy country – having low unemployment and low public debt - I would expect the public health system to be more personalised. In the public system you are not assigned to a specific doctor. When you come to the health centre you might visit a different doctor each time and not all of them have access to your medical history. If you go private you can visit doctors in a pharmacy and then it will be the same person. What is good, especially having children, is if you need a doctor to come to your house, it is not a problem. If you have an urgent matter after the pharmacies are closed, the doctor will visit you at home. There are no Government subsidies for medication; these are at the resident's expense, unless you have private insurance.

## **What are the best aspects of living in Malta?**

The weather and the climate. The people are also very nice. It takes time for them to trust you. At first, they may make a barrier between you, so you should make the first move, but once you break that barrier you will have a nice relationship. For the kids it is safe place and I am not worried that I might be burgled. Living in Malta is also a good opportunity for the kids to learn English.



## **What kind of activities are there to do at the weekends?**

First of all, you should like the idea of living on a small island. If you do, then you will find a lot of things to do. There is always something to do on an island; plenty of events and plenty of initiatives.

## **How does the cost of living compare to your home country, Italy?**

It depends, some things cost more, some less. Private schools cost more, but activities such as sports and robotics courses cost less. There are a number of activities funded by the government, for example music, dance classes etc. Medication costs less, but you cannot deduct medical expenses from your tax return.

## **What advice would you give to someone moving to Malta?**

In Malta a lot of things work by 'word of mouth', so I would recommend building up a network with friends, you will feel much more comfortable.

## **How do taxes in Malta compare to those in Italy?**

The taxes in Malta are lower. There is no property tax, there is also no tax on waste. There are only housing and utility bills, but that would be true anywhere.

## **If you had to do it again, would you move to Malta?**

If you think too much about the move then there is probably no place on earth you would go to. There will always be something that you will not like, but not being on the ground it is difficult to say how it will be. Unless you experience it yourself you won't know how it is. Each of us have different needs, requirements, family situations and interests. For me, island life is great and I like it!