



substituted. It transpired that two laws essentially were up for review: the Broadcasting Act and the Press Act.<sup>7</sup> Needless to say the bulk of the amendments were addressed at the former enactment. The legal gap analysis was in the form of a document entitled 'Report on the Screening of Maltese Broadcasting Legislation from the E.U. Broadcasting Legislation Perspective'.<sup>8</sup>

#### 4. The Transposition Plan & Legislative Drafting

The unwritten transposition plan adopted by the Office of the Prime Minister consisted into two parts: the above mentioned screening report, which identified the gaps in Maltese Law which needed to be addressed to be brought in line with the audiovisual *acquis communautaire* and the drafting of legislation to fill in the identified gaps. Once this legal gap analysis was drawn up and approved, the actual legislative drafting began.

#### 5. The Committee Entrusted With Transposition

An *ad hoc* Committee was established for the purpose of carrying out the legal gap analysis and for drawing up the relative bill. This Committee was presided by Mr. Richard Cachia Caruana, then Personal Assistant to the Prime Minister; Dr. Peter Grech LL.D., then Assistant Attorney General; and Dr. Kevin Aquilina, Chief Executive of the Broadcasting Authority. At this stage of the transposition plan, no Minister was directly involved although the Office of the Prime Minister was the lead Ministry in the TWFD transposition process. The Prime Minister was subsequently involved when the *ad hoc* Committee had concluded its task. A draft bill was forwarded to the Prime Minister for his approval and, subsequently, for Cabinet's approval, together with a Memorandum thereto.

#### 6. The Legislative Process

Once the bill was approved it was published in *The Malta Government Gazette* as Bill No 56. The first reading in the House of Representatives was moved by the then Prime Minister, Dr. Eddie Fenech Adami, on 10 January

2000. This was the first bill to be given a first reading in the House of Representatives in the new millennium. Bill No 56 entitled the 'Broadcasting (Amendment) Act, 2000' was seconded by the Hon. Minister Dr. Louis Deguara and was published in *The Government Gazette* of Friday 28 January 2000.<sup>9</sup> The 'Objects and Reasons' of the Bill were 'to further stimulate broadcasting activities in the implementation of the right to freedom of expression and information, as a means to promote commercial activity and in their function in the expression of audio-visual creativity. The Bill also introduces measures to further international co-operation in the field of broadcasting and for the de-penalisation of certain offences by broadcasters which are combined with a more effective administrative procedure for the enforcement of the Broadcasting Authority's decisions.'

Bill No 56 consisted of 12 clauses and one Schedule. The first ten clauses of the Bill were intended to amend the Broadcasting Act, the eleventh clause purported to amend the Press Act and the last clause proposed the introduction of a Fifth Schedule to the Broadcasting Act.

In the meantime, the Prime Minister had entrusted the task of piloting the Bill through Committee Stage in the House of Representatives to the Minister responsible for broadcasting who, at the time, was the Hon. Minister Dr. Louis Galea. It was Minister Galea who presented each and every single clause to the Committee for the Consideration of Bills of the House of Representatives. The members of the Committee who sat when this Bill was being discussed were: the Hon. Tony Abela N.P., LL.D., who was then the Chairman of the Committee; the Hon. Minister Dr. Louis Galea who was piloting the Bill, the Hon. Dr. Michael Frendo LL.D. and the Hon. Dr. Carmelo Mifsud Bonnici LL.D. for the Government side; and the Hon. Dr. Alfred Sant, Leader of the Opposition, the Hon. Dr. Angelo Farnugia and the Hon. Adnan Vassallo for the Opposition side.

The second reading in the House of Representatives took place on 14 March, 15 March (two sittings) and 20 March 2000. The second reading was proposed by Minister Dr. Louis Galea on behalf of the Prime Minister and seconded by Minister Dr. Louis Deguara. The committee stage before the Committee for the Consideration of Bills began on Tuesday 11 April 2000 and the last sitting of the said Committee discussing Bill No 56 was held on Tuesday 6 June 2000. In all eight sittings were held at Committee stage.<sup>10</sup> The third reading took place on Monday 12 June 2000 and was moved by Minister Dr. Louis Galea on behalf of the Prime Minister and seconded by the Hon. Dr. Jason Azzopardi. Act No XV of 2000, the Broadcasting (Amendment) Act, 2000, was published in *The Malta Government Gazette* on 13 June 2000. All the provisions of Act No. XV of 2000 came into force on 11 July 2000 in terms of Legal Notice 123 of 2000. It ended up having sixteen articles amending the Broadcasting Act, one article amending the Press Act and one article adding a Fifth Schedule to the Broadcasting Act. The end product had six new provisions which were inserted at Committee stage.

#### 7. Proposed Amendments To Maltese Law Which Went Beyond The Transposition of The TWFD

The ensuing enactment did contain a few provisions which strictly speaking were not directly connected to the transposition of the TWFD but which the Broadcasting Authority was insisting upon with Government to address in future broadcasting legislation.<sup>11</sup> Hence the time was ripe to essentially cater for both legislative needs, that is, the amendments proposed by the Broadcasting Authority and the amendments which the Government wanted to see through to transpose the TWFD. The Government also took the opportunity to incorporate the provisions of the Council of Europe's *European Convention on Transfrontier Television* into Maltese domestic law. Malta had in fact signed this Convention on 26 November 1991, ratified it on 21 January 1993 and this treaty came

<sup>7</sup> Report on Malta's Progress Towards Accession, 13 November 2001, SEC(2001) 1751, pp. 59-60; 2002 Regular Report on Malta's Progress Towards Accession, 9 October 2002, COM (2002) 700 final, pp. 81-82.

<sup>8</sup> Chapter 248 of the Laws of Malta.

<sup>9</sup> Compiled by Dr. Kevin Aquilina, it was dated 3 May 1999.

<sup>10</sup> No. 16,901 Part C, pp. C1 to C21.

<sup>11</sup> The eight sittings were held as follows: Tuesday, 11 April 2000; Wednesday 12 April 2000; Tuesday 9 May 2000; Wednesday 10 May 2000; Monday 22 May 2000; Tuesday 30 May 2000; Wednesday 31 May 2000; and Tuesday 6 June 2000.

<sup>12</sup> The Broadcasting Authority was advocating the aligning of the Broadcasting Act rules on advertising to those of the TWFD; the introduction of provisions in the Broadcasting Act which regulated satellite transmissions and the de-penalisation of criminal offences in the Broadcasting Act.

into force vis-à-vis Malta on 1 May 1993. No reservations were made by Malta on ratification but a declaration was entered indicating the competent authorities in Malta for the purpose of Article 19 of the Convention dealing with mutual assistance and co-operation between the parties. The declaration designated the Attorney General's Office, Dr. Peter Grech LL.D. being the competent officer in that Office, as the competent authority in so far as the legal aspect of that Convention was concerned and the Public Broadcasting Services Limited was designated as the competent authority in so far as technical matters were concerned. The amending Protocol to the European Convention on Transfrontier Television was ratified by Malta on 1 October 2000 and entered into force vis-à-vis Malta on 1 March 2002. No reservation or declaration was made by Malta with regard to the amending Protocol.

The most important provision which though not transposing the broadcasting *acquis* was considered by the Authority of the essence was the depenalisation of the offences provision in terms of which the vast majority of criminal offences in the Broadcasting Act were depenalised and henceforth it was the Broadcasting Authority that had to take cognisance and inflict an administrative sanction upon broadcasters who acted in breach of the Broadcasting Act. This provision was very much needed in order to avoid having to prosecute very minor offences established by the Broadcasting Act before the ordinary courts of criminal jurisdiction. This provision, undoubtedly, as experience has shown over the past six years, has ensured a timely intervention by the Authority where there was an infringement of the relevant law coupled with a speedy determination of the charge. In all, 293 infringements have been found by the Broadcasting Authority to have occurred in the period between 2000 and 2006 and it was only in a handful of instances that the stations in question have sought judicial review of the Authority's decision. At the time of writing there has not even

been a final decision on three pending cases in court subject to judicial review. Hence the point which I am trying to make here is very simple: transposition *per se* is not sufficient: a Member State has to ensure that once it devolves enforcement duties upon a statal entity, that entity must have sufficient authority to ensure compliance with the provisions of that law. To leave this enforcement process to the courts leaves much to be desired bearing in mind the length of time the courts take to arrive at a decision and that these infringements are of a minor nature.

Other provisions not linked to the TWFD transposition plan were the following: the possibility of licensing broadcasting stations exclusively devoted to teleshopping; widening of the rules where the Broadcasting Authority's approval is required before a broadcasting licence can be assigned or where transfer of shares, effective control, managerial control and beneficial ownership of a licence or in a company, as the case may be, could take place, or a merger of companies holding a broadcasting licence could materialise; the introduction of a provision - albeit rudimentary - to regulate satellite broadcasting; the possibility to make variations in the conditions concerning frequencies already assigned; a new complaints procedure was established by law; a new provision on must carry was added; and a provision regulating the power in terms of wattage of community radio stations was substituted for the then existing provision which regulated community radio stations through their range of reception.

An important provision to empower the Government to amend the National Broadcasting Plan by subsidiary legislation was withdrawn by the Government following the Opposition's objection thereto. To date the National Broadcasting Plan remains outdated and crying for reform. For instance, it still refers to the 1989 TWFD and totally ignores all the developments which have taken place in the broadcasting scenario since the enactment of the Broadcasting

Act way back 16 years ago. Hopefully this lament will be addressed when the Audiovisual Media Services Directive is transposed into Maltese Law.

#### **8. Method of Transposition**

An EU Directive, although it is a binding instrument upon Member States, has to be transposed: but it is left to the national authorities to choose the form and method of transposition. So the transposition plan had to examine each and every provision of the original and transposing directive to decide which method was the best suitable for transposition, that is, should it be transposed by primary law, by a subsidiary law or through administrative action?

Furthermore, to be sure that all the provisions of the directive have been transposed into Maltese Broadcasting Law, the *ad hoc* Committee had to ensure that even those provisions of the TWFD which already obtained in the Broadcasting Act had been hitherto correctly and faithfully transposed.

#### **9. Provisions of The TWFD Transposed By Primary Law**

The relevant national laws are the Broadcasting Act, the Press Act and the Copyright Act. In so far as the former is concerned, practically all the provisions of the TWFD were transposed either in the Broadcasting Act itself or in subsidiary legislation made thereunder. The provisions of the TWFD which were transposed by primary legislation in the Broadcasting Act were the following: - Articles 1, 10, 11, 12, 13, 14, 15, 16, 17, 18, 18a, 19, 19a and 20. These provisions essentially deal with television advertising sponsorship and tele-shopping and the main rules on this subject were contained in the parent legislation itself. Hence, the transposition of these articles had to take place in the Broadcasting Act itself. On the other hand, the provisions of Article 22a of the TWFD were transposed in article 6 of the Press Act while the provisions of Article 23 of the TWFD were already contained in the right of reply provision in article 21 of the Press Act and hence no transposition was required in this case.

<sup>12</sup> Chapter 415 of the Laws of Malta.

Article 7 concerning cinematographic works was not transposed in the Broadcasting Act nor in any subsidiary legislation made thereunder but in article 7 of the Copyright Act.<sup>12</sup>

#### **10. Provisions of The TWFD Transposed By Subsidiary Law**

Not all the provisions of the TWFD were transposed into primary legislation. In fact new provisions were transposed by subsidiary legislation. However an enabling provision - article 37 - had to be added to the Broadcasting Act in order to empower the Prime Minister to make regulations to transpose the provisions of Article 2, 2a, 3, 4, 5 and 6 of the TWFD into Maltese Law. These articles of the TWFD are contained in the Broadcasting (Jurisdiction and European Co-Operation) Regulations, 2000 - Legal Notice 158 of 2000 as amended by Legal Notice 258 of 2000, now Subsidiary Legislation 350.04.

Again, when it came to transpose Article 22 of the Directive, it was thought more appropriate if this provision were to be included in the Broadcasting Code for the Protection of Minors rather than in the Broadcasting Act so as to try as far as possible to consolidate all the provisions regulating minors in one law.

#### **11. Provisions of The TWFD Transposed By Administrative Action**

No provision of the TWFD was transposed by an administrative action.

#### **12. Cross References To Other Directives**

Sometimes when transposing a directive, reference has to be made to another directive which has not yet been transposed. The problem arises when the directive which is making the cross-reference to another directive is being transposed first. This was indeed the case with the TWFD and its article 14, paragraph 2, which refers to Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products, came to be transposed. To complicate

matters further, although the TWFD referred to Council Directive 65/65/EEC, this latter directive had been repealed through another directive. Indeed, Directive 2001/83/EC states in its article 128 that Directive 65/65/EEC is repealed and that any reference to this repealed Directive is to be construed as a reference to Directive 2001/83/EC. In other words, the reference in the TWFD to Council Directive 65/65/EEC is to be understood as a reference to Directive 2001/83/EC of the European Parliament And of the Council of 6 November 2001 on the Community Code Relating to Medicinal Products For Human Use. This Directive has been transposed in the Medicines Act, Chapter 458 of the Laws of Malta, and in subsidiary legislation made thereunder.

#### **13. Form of Transposition**

As to the form of transposition, the literal approach was adopted in terms of which all the provisions of the TWFD were lifted *verbatim* and inserted into Maltese law with very minor changes being affected such as where references to a Member State implementing that directive had to be corrected to be read as a reference to Malta. Nor was it deemed at the time that the TWFD's provisions had to be re-written by using different language or else supplemented by rules which would clarify or elaborate upon the text of the TWFD's provisions transposed into Maltese law. But I will return to this point when discussing the provision on major events.

#### **14. Obligatory & Optional Parts For Transposition**

Sometimes a directive leaves it up to a Member State to decide whether or not to transpose a provision thereof. In this sense, the transposition of a provision is not compulsory. In the case of the TWFD, a provision whose transposition is not obligatory is found in Article 3a concerning major events. Although the provision states that 'Each Member State may take measures' Malta decided to adopt a list of major events and transpose Article 3a accordingly in regulation 6 of Subsidiary Legislation 350.04. Hence, the Maltese experience

had favoured transposition rather than leaving the matter to be decided by copyright law.

#### **15. Exercise of Discretionary Powers By Member States When Transposing The Acquis**

Sometimes a directive grants discretionary power to a Member State as to how to transpose certain provisions. Consider the wording 'where practicable and by appropriate means' contemplated in Articles 4 and 5 of the TWFD. In this case the transposing directive should avoid repeating these words *ad litteram* and instead adopt a clear position on the specific issue in question.

#### **16. Provisions Which Refer to The Commission & to The Relationship Between The Commission & Member States Inter Se**

Some provisions in a directive do not necessarily need to be transposed as they might refer to the Commission or to the relationship between the Commission and Member States *inter se*. Such is the case with regard to Articles 23a to 27 of the TWFD.

#### **17. Notification of The Transposing Legislation to The European Commission**

Once a Member State has transposed a directive, it is up to that Member State to notify the European Commission of the details of its transposition - vide Article 25 of the TWFD in this respect. The Commission is at liberty - either itself or through a sub-contractor - to check whether a directive has been faithfully transposed by the Member State concerned. With regard to Malta, the Commission has not so far queried Malta's transposition of the TWFD. ■

