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Transposition and Implementation of the *Television Without Frontiers Directive*: The Maltese Experience - Part II¹



Dr Kevin Aquilina, Dip. Phil., B.A., B.A. (Hons.), M.A., LL.M., LL.D., Ph.D. (Lond.)(L.S.E.) is Senior Lecturer in the Department of Public Law, Faculty of Law, University of Malta.

¹ Part I of this article was published in *Law and Practice*, Issue 17, December 2007, pp. 26-33.

² The Commission Interpretative Communication on Certain Aspects of the Provisions on Televised Advertising In The "Television Without Frontiers" Directive, Adopted on 23 April 2004, C (2004) 1450.



PART II - THE TWFD IMPLEMENTATION EXPERIENCE

18. Implementation Measures

Once the TWFD was transposed it only meant that Maltese national law was EU compliant. But this is not enough for a Member State must ensure that the EU law, in this case the TWFD, is not only reduced to paper in the form of a written legislation, but that the provisions of that legislation are fully complied with. Hence implementation requires monitoring, enforcement, seeking advice, reporting and training.

19. Monitoring the Provisions of the TWFD

Monitoring did not really pose much of a problem here because the Broadcasting Authority has been monitoring programme content since its inception in 1961. So the Programme Monitoring Department could easily take on board - after the necessary training was given - the monitoring of the new rules of the *acquis*. The main problem was with enforcement. The Broadcasting Act still considered each and every violation thereof as giving

rise to a criminal offence.

20. Enforcing the Provisions of the TWFD

The Broadcasting Authority had been feeling that it was not capable of enforcing with the due diligence expected out of it by the legislation the provisions of the Broadcasting Act since radio stations began to mushroom following the enactment of the Broadcasting Act in 1991 and the advent of pluralism in the broadcasting landscape. Hence, for the Authority to be in a position to implement the 2000 amendments which included the transposition of the TWFD into Maltese law a new enforcement regime had become of the utmost importance. The new enforcement regime is now contained in article 41 and the Fifth Schedule of the Broadcasting Act and in the Special Administrative Procedure Regulations, 2000 - Legal Notice 162 of 2000; Subsidiary Legislation 350.07. Not only has the Broadcasting Authority been empowered to impose administrative sanctions by way of a warning, penalty, suspended penalty or putting off the air a station for such time as the Authority may direct, but the 2000 amendments also stipulate

that the Authority's decision is final, even if subject to judicial review, and has to be complied with forthwith in terms of article 41(6) of the Broadcasting Act. The 2000 amendments also provided in article 41(7) of the Broadcasting Act that a synopsis of the Authority's decision has to be broadcasted in the main news bulletin of the offending station or during such time as the Authority directs.

21. Obtaining Advice from other State Entities on the Implementation of Relevant *Acquis* to the TWFD

It could be that a directive makes reference to another directive which in the Member State is administered by another state entity. Take the case of Article 14, paragraph 2, above-mentioned which refers to a Council Directive on medicinal products. In that case, the Broadcasting Authority has to consult the appropriate health authority when applying Council Directive 65/65/EEC on medicinal products to the broadcasting scene.

22. Obtaining Advice from the European Commission and from Other Regulators on the Implementation of the TWFD

Invariably problems crop up about the interpretation of certain provisions of the TWFD. In this case either the European Commission or other Regulators are consulted. In the case of the former, the Commission has issued an interpretative communication which is of direct interest to regulators.² Studies published by the Commission are also relevant. So are the publications of the Council of Europe's Audiovisual Observatory. On the other hand, the European Platform of Regulatory Authorities (EPRA) is the best source from where to learn from the experience of other regulators in

³The List of Major Events has been published in *The Malta Government Gazette* of 29 January 2007 as Government Notice 86 of 2007.

⁴The text of the policy is reproduced in: *Broadcasting Authority Annual Report 2006*, Hamrun, Broadcasting Authority, April 2006, at pp. 55-56.

implementing the TWFD in other European Union Member States. Naturally one must not forget the case law of the European Court of Justice and the various books, journals and articles written on the subject of the TWFD. There is also the case law of the courts of EU Member States and the decisions of EU Member States' broadcast regulators which have to be reckoned with. All these sources provide a wealth of information on the broadcasting landscape.

23. Reporting Duties to the European Commission

Article 4, paragraph 3, of the TWFD obliges Member States to report to the European Commission by providing statistics on European works and independent productions. These statistics are compiled by the Broadcasting Authority and forwarded on the appropriate Commission prepared form to the Ministry for Culture and Tourism - the Ministry responsible for broadcasting - which in turn submits them to the Commission. Hence this yearly statistics submission requirement constitutes one of the measures of implementation of the TWFD as through the compilation of such statistics the Broadcasting Authority is in a position to take remedial action if a television station does not comply with the TWFD's provisions on European works and independent productions.

24. Training for Stakeholders

Once the TWFD was transposed, its provisions had to be brought to the attention of stakeholders. These are: the Minister responsible for broadcasting and the Ministry's staff; the members of the Broadcasting Authority; the staff of the Broadcasting Authority; Television Stations; Independent producers; advertising agencies; consumers organisations; the general public.

Seminars for stakeholders had to be organised, press releases issued, circulars to broadcasting stations disseminated and handouts distributed all detailing

the new legal regime which had to be followed.

25. The Major Events Conundrum

Although the provisions of Article 9a of the TWFD were transposed *ad litteram* - as were, after all, all the other provisions of the TWFD, problems arose in 2006 when the list of major events had to be applied to the FIFA World Cup. This was due to the fact that although there was a List of Major Events in place, this list did not set out which major events were to be broadcast in full or in part and which had to be transmitted via live or deferred coverage. This problem has been seen to by the Broadcasting Authority and the Authority has recently announced a revised list of major events.³

PART III: TRANSPOSITION AND IMPLEMENTATION OF THE AUDIOVISUAL MEDIA SERVICES WITHOUT FRONTIERS DIRECTIVE

26. Lessons Learnt from the Transposition and Implementation Process of the TWFD

With the benefit of hindsight various lessons can be learnt from past experience in the transposition and implementation of the TWFD. First, the Transposition Plan should have been a detailed written document setting out each and every single step which needed to be carried out together with relative timeframes. Second, if a provision requires the making of regulations or the taking of certain administrative decisions - as was the case with the major events example above quoted - then it is not wise to delay in making such regulations or taking such decisions. Third, more publicity should have been afforded especially to explain the new broadcasting regime to the public at large. Fourth, public consultation on the proposed changes was perhaps not as thorough as one might have expected even though the audiovisual

industry was consulted at the inception stage. But more work could have been done in this regard. Just last year, for instance, the Broadcasting Authority adopted a policy on public consultation.⁴ According to this policy, draft legislation is prepared and discussed internally and subsequently approved in draft form by the Authority. The Authority then circulates the draft legislation to all broadcasting stations which usually have up to a six-week period to submit their views. Where no feedback is given or where the feedback is such that it does not merit further detailed discussion, the Authority discusses the feedback and passes on to approve the draft legislation, with or without changes. Where the feedback is such as to require further discussion, a public seminar is normally held. A transcript of that seminar is made and discussed by the Authority. The proceedings of that seminar are usually published. The Authority will then approve the legislation in a final form. The legislation will be brought into force preferably on a given date depending on the nature and urgency of the case or if it has to be approved by a Minister of Government the pertinent discussions with such Minister will have to be undertaken and concluded. Sometimes a comparative study is carried out at the very initial stage to establish how other regulatory authorities in Europe regulate a particular aspect of television and/or radio productions.

Hopefully when Malta comes to transpose and implement the Audiovisual Media Services Without Frontiers Directive, it keeps in mind these four above-mentioned deficiencies with a view to avoid their recurrence.

27. The Proposed Audiovisual Media Services Without Frontiers Directive

The proposed Audiovisual Media Services Without Frontiers Directive will usher a widening of the TWFD to apply not only to television broadcasting but also to audiovisual media services so much so that the general provisions

of the TWFD contained in Chapter II thereof, as will be revised by the proposed Directive, will apply to all audiovisual media services, that is, to both linear and non-linear services. Chapters III to VI of the new Directive will however continue to apply only to television programmes but with some changes. The two-tier approach mentioned in previous Commission documentation is therefore being adopted. This implies that the proposed Directive's general principles apply both to linear and non-linear services whilst in so far as television broadcasting is concerned, the relative quantitative rules are being relaxed. The local broadcasting stations have been lobbying with the Broadcasting Authority to ensure that a more flexible approach is adopted in so far as the quantitative rules of the Directive are concerned. The Commission's proposal is entertaining these requests to a certain extent.

28. Resource Requirements for Implementation of the Audiovisual Media Services Without Frontiers Directive

The proposed Audiovisual Media Services Directive needs to be addressed from an institutional, financial, technical and human resources point of view. Naturally, for a small island state with limited resources, Malta still has to quantify the exact impacts that such a proposal will bring about.

28.1. Institutional Problems

Malta has to establish which Government entity will be responsible for monitoring the provisions of the revised TWFD in so far as the non-linear services are concerned. In fact, content on television broadcasting services is currently regulated by the Broadcasting Authority but there is a vacuum at present from the institutional point of view as to which entity of the Government should regulate content on non-linear services.

28.2. Technical

Tenders will have to be issued and consultants engaged in order to advise



on and prepare the relative tenders for the purchase of monitoring equipment for non-linear services if the same method currently adopted by the Broadcasting Authority for television monitoring is emulated.

28.3. Human Resources

Human resources have to be engaged and trained for the job. Naturally this will come at a cost both in so far as salaries and training are concerned.

28.4. Financial

Whether a new entity of the Government is set up or whether an existing entity of the Government such as the Broadcasting Authority is tasked with monitoring content on the non-linear services, this will come at a cost to Malta.

Human resources will have to be engaged; they will have to be trained for the job; investments will have to be made in the purchase of the relative monitoring equipment and ancillary equipment; office space will have to be bought or rented out, if this is not available, for both the monitoring recording facilities and for the human resources who will be monitoring content on non-linear services; consultants might as well have to be engaged at the initial stage to advise accordingly.

28.5. Capital Expenditure

Capital expenditure will have to be incurred for the purchase of monitoring equipment for monitoring content on non-linear audiovisual services.

28.6. Recurrent Expenditure

Consultants' fees, maintenance agreements, staff salaries and recording

media expenses will have to be paid and all this will constitute a new recurrent expenditure for Government.

As stated above, the proposal will place a burden on Malta of a financial, institutional, technical and human resources nature. Hence, it is necessary for the Government to address these issues when transposing the proposed Directive so that its implementation will move as smoothly as possible.

29. Regulatory Impact Assessments and the Legal Notice Checklist

Although a directive has to be transposed in terms of EU law, this does not necessarily imply that it must be transposed immediately without the necessary regulatory impact assessment/s being carried out. For it might result that certain burdens are placed on stakeholders and some other consequential measures might need to be taken to ease these burdens. Naturally this depends on a case-by-case basis. At the time that the TWFD was transposed there was no such regulatory impact assessment requirement but things have changed since then. Consultation with stakeholders is also an essential requirement in the regulatory impact assessment procedure. So this new procedure needs to be kept in view for the future transposition of the Audiovisual Media Services Directive.

30. The Legal Notice Checklist

In addition, if the Directive is to be transposed through subsidiary legislation, a checklist form has to be filled up. This is also a new requirement which did not apply at the time of transposition of the TWFD. It will however be a requisite for transposition of the Audiovisual Media Services Directive. All legal notices require the Prime Minister's clearance and such approval is given after the preparation of an assessment of the regulatory impact of any measure. Again, when a legal notice transposing an EU directive goes beyond the directive's minimum requirements, detailed justification has to be provided.

31. The role of the Regulator in the New Broadcasting Landscape

Whilst it was clear when the TWFD was transposed that the competent regulator had to continue to be the Broadcasting Authority, in the case of the Audiovisual Media Services Directive, it is not as yet clear who will regulate the non-linear aspects of that directive. This is due to the fact that with the convergence of telecommunications equipment, sometimes the distinction of what constitutes a television broadcast and what does not tends to be blurred. Hence, ways and means may be considered for adoption to enable the regulators in this field - the Broadcasting Authority and the Malta Communications Authority - so that they may work better in unison such as through an agreed Memorandum of Understanding. Input from other Government entities might also be required. It would not be amiss if the institutional requirements of the new Directive are studied in depth prior to the drawing up of any transposing legislation for any eventual legal regime might need to go beyond the actual transposing provision as was the case in the year 2000 when the Broadcasting Authority was empowered to hear and determine infringements of the broadcasting *acquis*. *Stricto jure* that was not a requirement of the TWFD but undoubtedly it was greatly beneficial in enforcing the directive's provisions.

32. Conclusion

It is one thing having a law on the statute book and it is quite another to implement and enforce it. To implement a law to its full adequate resources is of the essence. Undoubtedly the implementation of the new Audiovisual Media Services Directive will pose a bigger challenge than the implementation of the TWF Directive did in the year 2000. However, we are still in time and provided that there is co-operation between all stakeholders involved the relative difficulties can be successfully overcome. ■

THE HUMAN RIGHT PRINCIPLE OF LEGALITY: NULLUM CRIMEN/NULLA POENA SINE LEGE CERTA

With reference to the article By Dr. Kevin Aquilina entitled 'The Human Right Principle of Legality: *Nullum Crimen/Nulla Poena Sine Lege Certa* (Law and Practice, Issue 18, June 2008), we are publishing hereunder the Appendix referred to at p. 28 of that article listing the Constitutions of the states hereunder which give effect to the said principle:

APPENDIX

Afghanistan (article 27), Albania (article 29), Algeria (article 46), Andorra (article 9), Angola (article 36), Antigua and Barbuda (article 15), Argentina (article 18), Armenia (article 22), Azerbaijan (article 71), Bahamas (article 20), Bahrain (article 20), Bangladesh (article 35), Barbados (article 18), Belarus (article 26), Belgium (article 14), Belize (article 6), Benin (article 16), Bosnia and Herzegovina (article II.2), Brazil (article 5, XXXIX, XL), Botswana (article 10), Burundi (article 18), Cambodia (article 38), Cameroon (Preamble, article 65), Cape Verde (article 30), Chad (articles 22 and 23), Chile (article 19), Colombia (article 29), Cook Islands (article 65), Cuba (article 59), Cyprus (article 12), Dominican Republic (article 8), East Timor (article 31), Ecuador (article 24), Egypt (article 66), El Salvador (article 15), Equatorial Guinea (article 13), Eritrea (article 17), Estonia (article 23), Ethiopia (article 54), Fiji (article 28), Finland (article 8), Ghana (article 19), Greece (article 7), Grenada (article 8), Guatemala (articles 15 and 17), Guinea (article 9), Guinea-Bissau (article 38), Guyana (article 144), Haiti (article 24), Honduras (article 90), Hungary (article 57), Iceland (article 69), Iran (article 36), Iraq (article 15), Ireland (article 38), Italy (article 25), Jamaica (article 20), Japan (article 39), Jordan (article 8), Kiribati (article 10), Kuwait (article 32), Lebanon (article 8), Liberia (article 21), Libya (article 31), Lithuania (article 31), Madagascar (article 13), Malawi (article 42), Malaysia (article 7), Maldives (article 17), Mali (article 9), Malta (article 39), Marshall Islands (article 8), Mauritania (article 13), Mauritius (article 10), Mexico (article 14), Micronesia (article 11), Monaco (article 20), Montenegro (article 25), Morocco (article 10), Mozambique (article 60), Namibia (article 12), Nauru (article 10), Nepal (article 14), The Netherlands (article 16), Nicaragua (article 38), Niger (articles 15 and 16), Nigeria (article 36), Oman (article 21), Pakistan (article 12), Palau (Article IV, Section 6), Panama (articles 31 and 32), Papua New Guinea (article 37), Paraguay (article 14), Peru (article 2), Philippines (article 22), Poland (article 42), Portugal (article 29), Puerto Rico (article 12), Qatar (article 40), Romania (article 23), Russia (article 54), Rwanda (article 12), Saint Lucia (article 8), Samoa (article 10), Sao Tome and Principe (article 37), Saudi Arabia (article 38), Serbia (article 34), Sierra Leone (article 23), Singapore (article 11), Slovakia (article 49), Slovenia (article 28), Solomon Islands (article 10), South Africa (article 35), South Korea (article 13), Spain (article 25), Sri Lanka (article 10), St. Kitts and Nevis (article 10), St. Vincent and the Grenadines (article 8), Sudan (article 30), Swaziland (article 22), Sweden (article 10), Syria (articles 29 and 30), Taiwan (article 8), Tajikistan (article 20), Tonga (article 20), Tunisia (article 13), Turkey (article 38), Turkmenistan (article 43), Tuvalu (article 22), Uganda (article 28), Ukraine (article 58), United Arab Emirates (article 27), Uruguay (article 12), Uzbekistan (article 26), Vanuatu (article 5), Venezuela (article 24), Viet Nam (article 72), Yemen (article 31), Zambia (article 18) and Zimbabwe (article 18).