Lifting the screen: welcome to the silent revolution

Dr. Fabri is the Director for Legal and EU Affairs at the Malta Financial Services Centre. He also heads the EU Consumer Affairs Task Force. During these past six months, he has been closely involved in the so-called screening process with the Commission of the EU. (This process was finalised last January.) He has participated in five of the twenty-nine chapters of EU legislation screened and debated in Brussels. In this article, he sheds some light on how the process works and gives some very personal insights on what went on and what we should expect to see in the next months and years. Views expressed here are entirely his own.

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Directives, regulations, screening, pacman, transposition, alignment, compliance, implementation, institution-building, administrative fische, acquis communautaire are but some of the words that have gradually become part of the daily vocabulary of persons who, like me, have found themselves immersed directly or indirectly in the current EU accession process. This complex exercise has involved first, a meticulous identification of the areas where our legislation is different from EU law, and second, the formulation of a programme for the drafting and adoption of the parts of the EU acquis which have not yet found their way into our legal system.

It was repeatedly explained that the EU Commission would not be looking at the legislative work merely at face value, but would be assessing whether the country has the administrative and enforcement structures in place to guarantee that the laws would not remain on paper. This means that applicant countries would be expected to show that they have the means to enforce the law and actually do so.

The Acquis

The backdrop to this process, in simple terms, is that the EU has over the years established quite a complex body of rules, which bind its member states in a wide number of sectors. These include respect for human rights, common policies in various areas such as agriculture and foreign affairs, as well as detailed rules promoting the single market and achieving high levels of consumer and investor protection. These rules run into thousands of pages but do not add up to a complete legal system, and probably never will. Member states have remained free to adopt their own rules in every sector provided they do not run counter to any EU law. In fact, while many countries in Europe (e.g. Italy, France and Belgium) have a civil code system of private law, the common law still prevails in Ireland and the United Kingdom.

Following the completion of the screening exercise, the new applicants for membership are required to adopt all the mandatory rules of the EU acquis before they may be allowed in. This involves a laborious and time-consuming process which the current members of the EU did not and will not have to undergo. New applicants undergo this exercise as an admission fee prior to membership. In certain restricted circumstances, applicant countries may be allowed transitional periods, which means being given more time in which to carry out the necessary adjustments to legislation and institutional structures as may be required in a particular area. One may venture a guess that our unholy art of hunting and trapping and the acquisition of property in Malta by foreigners might be two candidates for such temporary arrangements.

The Screening

So what really went on during the screening exercise? The complete body of EU law is divided into thirty-one chapters. Of these twenty-nine had to be screened. Screening is a process of identifying where Maltese law matches or fails to match EU law in all the various areas. It involves a detailed analysis of our laws and regulations, comparing them to each article of the relevant EU directive or regulation, and determining what changes and adjustments are required to achieve compliance. My personal participation in this process was complicated by the fact that I was involved in five different chapters, namely

- Company Law
- Consumer Policy
- Freedom to provide Services (which includes financial and professional services)
- Freedom of Movement of Capital (which includes exchange controls and inward investments)
- External Relations (a chapter which includes aspects of insurance law relating to export credit guarantees and the WTO agreement on the liberalisation of financial services.)

The first three chapters on this list required considerable preparation and study. I had not studied so hard since the time of my last University exams. The screening exercise takes the shape of an informed discussion. It may become quite detailed at times and one has to stay on one's toes; at best it develops into a constant stream of interesting and productive exchanges of views. There is a pre-established formal procedure to be followed. A typical screening session would usually follow this pattern.

The meeting would usually start at around 9.30 am and end at around 6.00 pm, with an hour's break for lunch. Most of us ensured we were present in the designated building in good time before the opening of the session. Others - very few - proved less scrupulous. The two delegations then find their seat in a conference room facing each other. Microphones are available for every participant. Translators are available if necessary. The "unofficial" official languages are limited to English and French. This means you cannot have an exchange with your Italian counterpart in his native language. He would have to make his statements in either English or French. If he uses French, then you get a translation into English. Most of the proceedings are actually held in English. The EU representatives repeatedly expressed their relief that we can converse well in English, because problems were apparently encountered with other applicant countries who had to have every word of the proceedings translated, considerably slowing down the proceedings.

The chairman of the EU side would start each daily session by giving a brief welcoming address and an introduction to the day's work. He would explain the agenda of the session which would have been circulated some time before and ensures there is agreement on it. . He would then invite his colleagues to identify themselves and the post they occupy within the EU structure. When this is completed, the chairman of the Maltese delegation would then reciprocate and introduce the Maltese members present. The actual screening is then kicked off when the first speaker on the EU side would explain the part of the acquis assigned to him. This part of the exercise is mandatory and is called the "didactic" part.

After the expert concludes his explanation, the Maltese side is invited to submit questions or comments. Tactically, one should be prepared to raise some relevant issues at this point in order to start the debate. Regrettably, on a number of occasions, I noticed that the Maltese side remained rather passive and failed to make comments or ask questions. This omission may have given an impression of inadequate preparation. On the other hand, some sessions saw detailed points and issues being immediately raised, and on occasion the EU experts found themselves wrong-footed.

The session would then continue with the Maltese side being expected to give an overview of the local position in the sectors being discussed and the time frames for bridging the gaps. The debate would also analyse any difficulties that may be encountered in the actual implementation. Some sessions were relatively easy going, while others were very intensive. In my experience, the toughest and possibly also the most instructive screening session was the one dealing with consumer policy, which covered a variety of topics over two full days. (Financial services and company law only occupied a day and a half each.)

Luckily, the atmosphere at these meetings was very cordial and professional, polite and friendly without undue familiarity. The persons representing the EU Commission come from different backgrounds and from different member states, but almost invariably they would be true experts in their field. Sometimes their field of expertise seemed rather limited to us, as they would tend to shy away from discussing any area which falls outside their strict brief. Thus an expert on insider dealing would refrain from venturing into a discussion on money-laundering or some other aspect of financial services or

company law. A speaker on investor compensation schemes would not be drawn into a more general discussion on investment services. He would leave that matter to some other colleague working with the Commission whose expertise lies in that limited and specific area. On our part, we tend to be able to discuss a broader range and number of issues and we do usually limit our focus exclusively to a single subject. I think that this flexibility and broader outlook proved a plus for our side throughout.

As regards the Maltese delegations, my feeling is that sometimes they tended to be overmanned and with too many inactive participants. (A few seemed to be taking interminable notes of some sort – an attempt to look busy perhaps, or a stratagem to keep awake?). Some of our presentations were well prepared with structured verbal presentations and powerpoint slide-shows which were greatly appreciated by our counter-parts. However, others revealed poor presentation and debating skills.

Once the agenda has been exhausted, the session would be closed with the same pleasantries adopted at the start. Then back to the hotel for a quick shower and brief rest and perhaps some TV, then out again for dinner. All in all, a good day's work.

What will all this screening lead to? In a recent article in this same journal (***From MIBA to MFSC – the first decade and beyond***, *May1999, pp15-16*), I have already identified some of the main areas which are likely to be affected by developments in 2000. Predictably, some of the changes are related to the EU accession exercise, while others are home-grown initiatives intended to improve our legislation independently of specific EU requirements.

Company Law

In company law, an extensive review has been undertaken during these past months and one may expect a substantial amendment bill later on this year. This will include some items required to bring the Companies Act and the Accountancy Profession Act in full alignment with the EU harmonisation directives, including additional rules governing branches opened in Malta by foreign companies and training for auditors. Not much needs to be done. The chapter on Company Law should not see any significant negotiation, at least not in the normal meaning of the term, as most of this chapter already is or is about to become an integral part of our law. For this reason, it has been identified as one of the easier chapters that may be negotiated straightaway with the first batches of chapters agreed with the EU Commission. What might be needed here is a brief transitional arrangement to accommodate the few remaining offshore companies that may last until September 2004. It is envisaged that not more than a hundred offshore companies will still have been on the register by the beginning of 2004.

The EU rules on company law do not amount to a complete company law framework, and member states are still free to make their own rules in all areas not covered by a directive. Thus, for instance, there is no specific requirement to have a central authority in the shape of the Registrar of Companies as we know it. In fact other countries resort to the commercial courts or to semi-official business associations or bodies. There are no harmonised rules on such matters as pledging of shares or on any aspect of dissolution and winding-up. On the other hand, matters as the single member company, many of the disclosure requirements, the format of the accounts, the lodging of company documents and amendments to the statute in a centralised location are among the mandatory rules of the EU.

Financial Services

In financial services, considerable drafting work has still to be done to fulfil the requirements of the EU acquis, particularly on the Investment Services Directive which is quite an extensive document. Fortunately, the basic infrastructural and administrative capabilities are already in place. We still need to implement the directives on the single authorisation and home supervision principles, the single prospectus, the investor's compensation scheme, the Ucits directive, capital adequacy, greater liberalisation of our stock exchange practices and other mandatory measures. It will take some time to achieve full alignment in this sector.

Consumer Policy

The Consumer Policy chapter is an important part of EU law. This chapter will require Malta to introduce new laws regulating unfair contractual terms, product liability, misleading and comparative advertising, distance selling, consumer credit, certain price indications on products offered for sale, and consumer guarantees. A significant gap still exists between our current law and the EU chapter on consumer law. The consumer directives may have a bearing on consumers and suppliers of financial services. In my view, special consideration should be given to the impact of the unfair contract terms directive which extends to all pre-formulated agreements offered by a trader to a consumer. Most if not all providers of financial services

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(e.g. insurance companies, banks, investment services licence-holders) qualify as traders, while a large segment of their customers qualify as consumers when they transact for their personal or household needs. One may think of various banking agreements, investment services agreements and insurance policies which will be caught by the rules to be adopted in the near future. Indeed, all standard-form consumer agreements may soon have to be thoroughly reviewed in order to bring them into line with the directive's requirements. The major objective of this directive is to ensure that such agreements represent a reasonable balance between the rights of the trader and the consumer, and that the terms of the agreement do not place the consumer in an unduly disadvantageous position.

The mandatory rules governing misleading and comparative advertising too are relevant to the financial services sector. It is interesting to note that this directive obliges member states to permit comparative advertising, and lays down the applicable conditions and parameters. The consumer credit directives will require the implementation of a brand new framework to govern the provision of credit by a trader in connection with the sale of goods or services to a consumer. The directive establishes extensive transparency rules to ensure that the consumer is given complete and correct information to allow him to make a sensible choice from competing credit offers and to understand what he is going in for. The idea is to ensure adequate consumer information and a level playing field for credit providers throughout the single market. What the directive refrains from doing is establish a maximum interest rate, a licence requirement or a cooling off period. It should be noted that standard consumer credit agreements would also be subject to the rules on unfair contract terms.

External Relations

The External Relations chapter is a rather mixed bag, but an interesting one. Basically it seeks to group all the agreements and commitments that the EU entered into in its international relationships with other individual states and with international organisations. The screening of this chapter was quite a laborious one as it involved an assessment of all treaties and international obligations to which Malta is a party, as well as an assessment of whether these commitments are in line with the EU position. If they are

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What is the organisational structure of the FCM?

The FCM is headed by the President who is elected on a north/south and east/west country rotation basis. The member country which receives the presidency has to submit the name of the president to serve, to the Council of the FCM. In turn the Council submits the nomination for approval by the General Assembly.

The other bodies are;

- the Executive which consists of the President, the Deputy President and three Vice Presidents. In addition the President of FIDEF will be a member of the Executive. The Executive is collectively responsible for the implementation of the decisions taken by the Council.

- The Council which consists of one representative appointed by each country. The Council is vested with the power to perform all managerial and administrative functions necessary for the realisation of the Federation's objectives.

- The Secretariat made up of the Secretary General who shall be responsible for servicing the technical committees and task forces of the Federation under the direction of the Executive.

Who currently holds the post of President and Deputy president?

The first President of the Federation is Mr. Hazem Hassan, President of the Egyptian Institute of Accountants. The deputy President is Mr. Francesco Serao, President of the Italian Ordine, whilst the post of Secretary General is occupied by Dott. Giuseppe Messina.

What role does the MIA expect to play within this Federation?

This is another opportunity for the members of our Institute to participate in international gatherings, forums, conferences etc. as stated in the objectives of the Federation. The Institute will certainly play an active part in the organisation of these meetings and naturally in keeping our members informed thereof. A seminar could eventually be held in Malta. Remember also that, like all other members of the Federation, we hold a seat on Council where major developments in the profession are discussed and varied views can be relayed back to our members. This apart from electing the Executive of the Federation of which the Institute could eventually form part. Finally, the fact that we speak Italian and French is undoubtedly an asset when forming part of a Federation such as the FCM. ■

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found to be out of step with the EU's foreign policy position, they will have to be reviewed.

Part of the acquis here involves the financial services sector, and the exercise required a comparison between the different liberalisation commitments entered into by Malta and the EU in December 1997 within the context of the WTO Agreement on Trade in Services. Another relevant though less important item was a review of export credit guarantee facilities available to Maltese exporters. This required an assessment of whether these facilities include direct or indirect forms of state aids which may give rise to distortions of competition in international trade. Export credit guarantees are scheduled as insurance business for the purposes of the recent insurance legislation.

Conclusion

One of our disadvantages is that most of us involved in these sessions had not had the benefit of undergoing formal studies in EU affairs. Prior to the Company Law screening session in October of last year, I had never visited Brussels; and I certainly had never benefitted from the periodical government-sponsored familiarisation jaunts to the major EU institutions in Brussels! However, all the meetings and discussions throughout the screening process have served as an intensive learning course in various aspects of EU institutions, laws and procedures.

There is no doubt whatsoever that the next three years will constitute another landmark period in the evolution of our corporate, financial services and consumer law. As we approach membership, our professional and business classes will have to learn to come to terms with a new regulatory environment the likes of which we have never experienced. Our legal system is having to learn to cope with the influx of numerous new sets of rules and novel unfamiliar concepts. The EU accession process is adding a major new dimension to our existent legislation and institutions. Things can never be the same again. Indeed, we are witnessing a silent revolution. ■