# TRANSPOSITION TABLES, TOIL AND TEARS......
# TRUE TALES FROM THE ACCESSION

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*"The reforms which imply Malta's adoption of the 'acquis communautaire' affect so many different areas (tax, finance, movement of capital, trade protection, competition law, etc) and require so many changes in traditional patterns of behaviour that what is effectively involved is a root-and-branch overhaul of the entire regulatory and operational framework of the Maltese economy."*
European Commission Opinion (Avis) on Malta's Application for Membership, June 1993, Bulletin of the European Communities, Supplement 4/93, para.34

*"If you have a tale to tell, then I say, tell it."*
Stanley Adams, *Roche versus Adams*, Jonathan Cape, 1984, last page

**Introduction**

The significance of Malta's application to join the European Union in 1990 and of its eventual accession in 2004 cannot be over-stated. The transposition of EC Directives by European Union member states is an interesting phenomenon and the Maltese transposition experience was a very complex and in several ways also a peculiar exercise that deserves closer attention. Transposition ordinarily refers to the ongoing obligation applicable to all member states to implement into national law the Directives adopted by the EC. The transposition of EC Directives by Malta as an applicant state in the immediate pre-accession period proved even more interesting, challenging and intense[1]. Malta's moves towards accession of the European Union, the relative negotiations and consequential adoption of Community rules into national law introduced new concepts, new principles, new ways of doing things, and perhaps inevitably also – up to a degree - a new language with its own jargon.

While we waited anxiously for the European Commission's initial *avis*, we compiled numerous *pacman tables*, later travelling to Brussels for the *screening sessions* dedicated to the different chapters of the *acquis*. After completing endless *transposition tables* and *numerical tables*, one for each EC Directive, we gradually grew accustomed to the new jargon made up of *fundamental freedoms, single passports, Regulations, mutual recognitions, subsidiarity, TAIEX, peer reviews* and *administrative fiches*.

This paper was originally intended as a comment on European Union membership, five years on - a timely opportunity to look back and to tackle a few elements of the recent past, examine their implications, and hopefully identify strengths and weaknesses. There is much one can write about the accession and transposition processes as they played out in Malta, and yet much has remained unrecorded and insufficiently analyzed. Indeed, excluding a few notable individual efforts and the excellent initiatives taken by the EDRC through its regular conferences and publications, academic attention to the recent transposition phenomenon has been patchy[2]. The current paper seeks to fill a very small part of that void.

Malta and the other applicants in the largest ever enlargement group to join the European Union were regularly advised by the European Commission how their respective legal systems, laws and administrative structures and practices fell below the European Union standard in many respects and were warned that massive reforms would have to be implemented. The European Commission's 1993 Avis, quoted earlier,

[1] See: National Programme for the Adoption of the *Acquis*, Ministry of Foreign Affairs, 1 September 2000.

[2] See: *Challenges of Change*, Ed. Peter G. Xuereb, European Documentation and Research Centre, University of Malta, 2000, collected papers of the 2000 annual EDRC conference; *Transposition and Implementation of the 'Television Without Frontiers Directive': the Maltese Experience*, Kevin Aquilina, *Law and Practice*, published in two parts, Part I appeared in issue 17, December 2007 and Part II appeared in issue 19, December 2008, The Malta Chamber of Advocates; *Public Enterprise Implications of Malta's Entry into the European Union,* Godfrey Pirotta, *The Asia Pacific Journal of Public Administration* , Vol 27, No 2 (December 2005).

had described this task as no less than a *"root-and-branch overhaul"*. In the case of Malta, huge administrative resources had to be marshalled for this undertaking which inevitably created its own additional bureaucracy. Expert resources were however thin on the ground. Several of those engaged in European Union related work actually knew little about Community law and the learning curve had to be overcome quickly[3].

The concept of transposition is peculiar to the European Union and it represents a huge commitment. This paper draws mainly on my experiences in transposing EC Directives and in many other stages leading to Malta's accession to the European Union in 2004. My involvement was always of a technical nature related to my various interests and involvement in law, particularly in consumer protection, financial services and company law. Although my role was not a political one[4], I was close enough to observe and to recognize the circumstances and factors that were shaping, influencing or merely accompanying such momentous changes in our island's recent political and legal history[5]. These circumstances were largely visible and played out in public. Some other factors were less visible remaining hidden behind a facade of normality. This paper shall address some of these factors as there are useful lessons to be learnt.

The paper shall accordingly refer to a selected number of incidents or statements that are indicative of certain attitudes and reactions which formed part of the less visible backdrop to the crucial years 1998 - 2000. Though not parables or fables, they form part of the reality of those years and raise interesting issues. Some show Maltese officialdom in a good light, while others do not[6]. They have been selected because in their own way they are all instructive, possibly hinting at local cultural difficulties in adjusting to the new unfolding European Union scenario.

### Free Movement of Capital[7] - Silence in the Screening Room

When the Maltese team for the screening session on the Free Movement of Capital chapter in Brussels was being selected, my name was placed on the list. My role was to provide assistance and clarifications on issues that might arise regarding financial services laws, the role of the regulatory authority, related freedom of establishment issues, and the prevention of money laundering laws and procedures[8]. While preparing for the trip, I noticed that the official European Commission's agenda included the identification of limitations relating the acquisition of property in Malta by European Union citizens[9]. I unearthed an old copy of the Act I had also looked at ten years previously when still engaged in private practice. The screening proceedings were underway and everything was moving fine without major hitches. The acquisition of property item was eventually called, and I pulled out my copy of the Act, anticipating an interesting discussion on this politically sensitive subject. In accordance with established procedure, the European Union negotiators briefly explained the Community rules on the acquisition of property in the Union countries by European Union citizens in terms of their free movement of capital and freedom of establishment. When this part of the exercise was completed, and in line with normal procedure, they politely asked the Maltese Government side for its remarks on the relevant *acquis*, to explain Malta's current legislation and its plans for aligning it to EC rules. Nobody volunteered a reply. The silence that followed was truly embarrassing. At every screening

[3] Many of the people directly involved in the procedures and work on transpositions and negotiations had, like the writer, received no formal training in EU law and institutions and some worked on very generic knowledge and assumptions.
[4] Perhaps I qualified as an almost-insider, on the outside looking in.
[5] The writer participated in five different screening sessions in Brussels during the accession negotiations. He led and coordinated the transposition efforts on behalf of the then Malta Financial Services Centre and headed the government appointed EU Consumer Affairs Task Force. He attended numerous MEUSAC meetings and helped complete the transposition of many EC Directives, filled in many transposition tables, complained regularly but vainly about excessive bureaucracy, endless meetings, questionnaires and form-filling. He is still involved in the transposition process.
[6] Names of persons are being withheld for reasons of privacy. Part of the Maltese accession enterprise was well organized and almost heroically pursued and finalized on time. Some other parts were rather shambolic.
[7] Chapter 4 of the *acquis*
[8] These were the days prior to the establishment of the Financial Intelligence Analysis Unit.
[9] This was a sore issue with the EC whose citizens were to be free to invest their capital in immovable property anywhere in the Union. Sectors of the Maltese public feared that extensive purchases by EU citizens would drive up property prices.

session, each item on the agenda would have its designated spokesman. In hushed tones, I asked the head of delegation seated next to me who had been detailed to cover this agenda item. He hissed back that it seemed nobody had actually been detailed probably because government still had no clear ideas on the issue. After some more moments of silence, he then bravely and apologetically explained that the issue was extremely sensitive politically and government was still in the course of developing its policy in this respect. That was it. To try to move this non-discussion forward, a European Commission official then politely (and patiently) suggested that the Maltese side could simply brief the European Commission on the current Maltese law position governing the matter. Again, nobody from the Maltese delegation volunteered. Some looked sideways......others looked downwards....others seemed to simply melt away and disappear....others were pretending to take notes.....

Ever eager to help, I told the head of delegation that I happened to have a copy with me, but I was not in a position to attempt any presentation on the subject. I had the only copy - big mistake. He immediately grasped the '*get out of jail*' card and he desperately whispered to me to '*just say something to get us out of this mess*'[10]. He advised the EC side that I would brief them on the existing law. Thus it came about that without any prior preparation, I found myself - against my better judgement - starting to address a highly professional EC negotiating delegation, briefly explaining the origins and objectives of the law and its salient provisions, dangerously digging into memories from many years previously. This was not the way things were supposed to happen. This was an official EC enlargement screening session with all the formalities and microphones and minutes being taken. Unsurprisingly, at one point, I stumbled on the definition of *residency* for the purposes of the law. The head of delegation eventually intervened promising that Malta would take the matter in hand and draw up and submit a comprehensive policy document within a few days. And then it was over. I was glad it was over. The other members were equally relieved. They could stop pretending they were taking notes and proceed with the consideration of the other items on the agenda. Danger had safely passed them by. Anyway, we survived and Malta was accepted as a member of the European Union despite this and other embarrassing lapses. I often wonder what is recorded in the EC's official minutes of the proceedings[11].

### Consumer Protection[12] - Product Safety and a Happy Ending

In November 1999, a screening session was held in cold and wet Brussels (as always) to debate the consumer protection EC Directives and their transposition in Maltese law. The EC side was headed by a Dr Stein, a Swedish consumer law expert seconded with the European Commission. She had been entrusted with leading the enlargement discussions and negotiations on the consumer protection chapter. The event involved two full days of intensive and exhausting discussion and question and answer sessions on the details and the gaps in Maltese law when compared to the *acquis*. It felt like a two-day oral examination. Thankfully, we had prepared for the session diligently. All in all, the sessions went well except for a serious hiccup in relation to a draft law that had been presented by the Maltese authorities then called the General Product Safety and Quality Act. This draft Bill was at that stage meant to be presented to Parliament shortly and was earmarked for adoption by the end of December 1999. The European Commission experts had examined it and found it severely wanting. Dr Stein politely but firmly explained in very clear terms[13] that the European Commission felt that the Bill was badly conceived and drafted and that it should simply be scrapped and re-written from

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[10] More precisely, the Maltese original probably went something like this: "*Tinkwetax...int basta tgħid xi ħaġa biex toħroġna minnha.*".

[11] A few years later, the law was changed to allow EU citizens to acquire a residence in Malta and to incorporate certain conditions and reservations that had been negotiated with the Commission. Indeed, following a series of amendments and refinements, the Act now specifically makes specific reference to the *European Union* and grants rights of acquisition of property in Malta to citizens from other *member states*. The Immovable Property (Acquisition by Non Residents) Act 1974, Chapter 245 of the Laws of Malta, strikingly still describes itself as an Act intended "*to prohibit the acquisition of immovable property by non-residents*".

[12] Chapter 23 of the *acquis*.

[13] Dr Yvonne Stein always conveyed her views very clearly. I am grateful to her for giving us a proper lesson in calling a spade by its name.

scratch[14]. This was quite depressing news.... and we felt let down and embarrassed that we had been found wanting. We had failed that particular test.

The rest of the day's discussion on other consumer issues however went well and I believe we proved fairly knowledgeable and articulate. We were a good team. Later, as the second day drew to a close, something quite unusual happened. Winding down the lengthy proceedings and after thanking all the persons from both sides who had participated and listing a number of conclusions, Dr Stein unexpectedly added that in her estimation, the Maltese delegation had been the best prepared from all the enlargement countries who had concluded the screening on the consumer chapter. At least someone appreciated the effort.

**The Applicants Who Came in From the Cold**

As the screening sessions progressed, and informal exchanges became more frequent, EC officials entrusted with managing Malta's transposition compliance confided to me that the EC side felt broadly comfortable dealing with Malta during the various pre-accession stages, and this for at least two reasons. First, communication between the two sides was very easy as we spoke English fluently - this was not the case with several other applicant states, and East European delegates still spoke better Russian than English. Secondly, Malta was familiar with the workings of a free market economy, already had an established legal system with European-style Civil and Commercial Codes, an EU-compliant Companies Act and much UK inspired legislation and practices. Malta also already enjoyed a foundation of consumer and competition legislation laid down in 1994. Other state delegations were not so lucky. Several fellow applicant states had much catching up to do, enacting new laws on companies and free enterprise, new legislation and structures for the promotion of fair competition and consumer protection. I was told in confidence that in the case of a couple of East European countries[15], the screening proceedings had proved very cumbersome and slow, and the EC side would often remain uncertain - up till the end of the sessions - whether the communication between the two sides had been at all successful. The difficulties were compounded as interpreters had to be engaged, and it seems that some of them were barely proficient. It might not have occurred to us that for these peculiar reasons, the EC people broadly felt a measure of relief when dealing with Maltese delegations. Malta did have its advantages.

**..... More of the Same**

During the intensive transposition process in advance of accession, we frequently encountered a disturbing lack of response from the European Commission with regard to drafts of laws and regulations in the financial services area that we would have with much effort produced against great odds and sent to Brussels to satisfy the strict pre-accession deadlines. In most cases, little or no feedback as to whether our transposition measures were complete and correct was being received and the target date for accession was fast approaching. Some of the laws and regulations we were producing addressed novel issues and we were concerned whether we had got things right. On most drafts, we received just an official acknowledgement. Eventually, as negotiations progressed further and membership drew closer, we tried to press for definite answers. We were concerned that problems would be advised to us at too late a stage. Would we be asked to revise all those laws at the final moments? We pressed the head of an EC Peer Review delegation present in Malta on the matter. His reply appeared sincere and re-assuring:

"*Just carry on as you have done so far*", we were advised. "*We* (the EC) *are not particularly concerned about your work because whenever we checked it, we found it to be satisfactory. So we suggest you just carry on; don't worry if you fail to receive any feedback, and if someday we find something that requires correcting, we shall let you know and you will have time enough to revise it. We do not consider Malta as a problem…it is some of the other applicant countries that we really need to worry about.*" So there you have it - reproduced almost verbatim: a piece of good counsel.

[14] This particular measure was re-drafted and three years later became the Product Safety Act of 2001, Chapter 427 of the Laws of Malta, now thankfully a much improved piece.
[15] He referred to two applicant states in particular; they shall remain unnamed here, the comment having been offered in confidence.

Recently a report issued on behalf of the European Commission by Mr McCreevy confirmed that Malta's transposition measures were largely acceptable and that financial services was one of two areas where transposition was found to be practically correct and complete[16].

**Company Law and Freedom of Establishment[17] - The Strange Case of the Unwritten Policy**

The next incident was an embarrassment and conveys a serious lesson. This case tackles the public administration inclination to take important decisions affecting third parties on (or allegedly on) the strength of policies often found unwritten and unpublished. The patient EC officials were not easily fobbed off by the Maltese justifications for such practices and kept pushing for more openness.

During one particular exchange with an EC delegation, the Maltese side kept justifying a government policy which prohibited foreigners from competing with Maltese business on Maltese soil on the basis that one could not afford allowing the foreigner to come in to take over local business and work opportunities. Under the then applicable exchange control rules, a foreign-owned Maltese company still needed official permission to transfer legitimate dividends overseas to foreign shareholders, and, incredibly, auditors were asked to justify in writing the payment of such dividends[18]. The EC side remained unimpressed and suggested that Malta fully respect the principles of freedom of establishment and free movement of capital.

At one of the later meetings held in Malta to tie up some final loose ends prior to imminent accession, the EC side had once again placed this item on the agenda. It was my job to explain the position under company law. The Companies Act did not raise any obstacle or restriction on the holding of shares or the setting up of companies and other partnerships by non-residents. Indeed, it was (and remains) nationality-neutral. Nor did it impede the declaration and payment of dividends. So that part was European Union compliant. The setting up of branches by foreign companies was already allowed and regulated - only minor cosmetic amendments were required to bring the existing rules fully in line with the relevant EC Directive on branches. So that aspect too was easily cleared.

Then the EC side raised the issue of administrative practices whereby the Exchange Control authorities and the Department of Trade had for many years combined to prohibit foreigners or foreign owned companies from carrying on certain types of business activities in Malta. The Maltese civil servant cheerfully waffled his way about government policy of protecting vulnerable local traders and industrialists from overseas intrusion. "*Can we receive a copy of this policy?*", he was asked. This may have been the tenth time the EC people had politely requested a copy. The important civil servant replied to this effect:

"*The beneficial nature of this administrative policy was that it is not written anywhere. It could therefore be disapplied at our discretion on a case by case basis, depending on circumstances. The European Commission need not have any cause for concern because since it is not published, we can even stop enforcing it if we wish. We may stop applying it to European Union nationals after accession, and retain it for the rest.....but government was still studying the matter and an inter-departmental has just been set up to make recommendations ...etc ...etc ...etc.*"[19].

The EC side reiterated that these so-called policies violate fundamental EU principles and the matter needed to be resolved. More transparency was definitely called for. The matter dragged on but the unwritten policy was only put to rest quietly by way of regulations a couple of years after accession.

Internal resistance to repeal the administrative discretions remained till the very end. It was clearly only thanks to the EC that much use and abuse of administrative discretions was brought to an end, in the areas falling within the scope of the *acquis*. This case may be typical of how certain sectors in the public

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[16] Commission Staff Working Paper, Internal Market Scoreboard No 18, Council of the European Union, 5 February 2009 (register.consilium.europa.eu/pdf/en/09/st06). See also *Transposition of EU market rules: Malta gets top marks*, The Malta Independent Online, 16 April 2009.

[17] Chapter 5 of the *acquis*.

[18] Oh the joys of exchange control...how have we survived without them?

[19] The EC officials were elegant enough not to enquire when this committee was set up and how many times it had met. The committee was only set up a few days before the EC delegates landed on the island.

administration in Malta still struggled to extricate themselves from the seventies' and eighties' mentality and cosy discretionary arrangements.

**Of Counterfeiters and their Families**

The problem of counterfeit goods[20] was being discussed by MEUSAC[21]. The senior police officer was pleased to confirm that following EC pressure, extensive action had started been taken against hawkers selling counterfeit CDs and clothing at the Valletta 'Monti' market. Results had proved positive and the police had put in place a programme of constant physical monitoring of the market in order to stamp out this illegal activity. Various hawkers had already been prosecuted and hundreds of counterfeit goods had been confiscated. More raids and confiscations were planned. To the consternation of several, including one of the independent expert members sitting on MEUSAC itself, a senior member of government said that the police should not be over-zealous in their prosecutions because *"the hawkers have families and we should not risk turning them against Europe and lose their votes in the referendum on membership"*. The expert reacted with undisguised irritation that the statement was not acceptable as even drug traffickers have families. Should one now refrain from investigating them not to risk losing their votes? The senior member explained that his interest was in not spreading a negative impression on the European Union which could *"cause us to lose the referendum"*[22].

**The Transposition Process - A Cupboard Full of Tables**

The European Union membership bid was complex and highly bureaucratic. It involved massive paper work which very often disrupted the real core work that had to be done. There were many forms to fill, checklists to tick off, questionnaires to answer and finally the famous transposition tables to compile. As if getting to grips with a hundred and one new EC Directives, concepts and principles, and studying them and reading about them (if you were able to trace suitable material) was not enough, the EC required each applicant member state to compile a detailed paragraph by paragraph Transposition Table wherein an applicant state would demonstrate exactly where and how each line of an EC Directive had been implemented in its national law. Usually the same handful of people would be responsible for all the work, including the conceptual and planning stage (if any), the drafting of legislation, the carrying out of briefings and seminars, attending MUESAC meetings, attending Parliament to assist the Minister in piloting the Bills through the various stages, etc. As a reward, one used to be then requested to complete the relative Transposition Table as well. Without a completed Table, the transposition measure would not even be considered.

Again as if this was not bad enough, hardly any feedback was being received from the European Commission confirming whether the quality of our transposition measures (laws and regulations) were up to standard and correct. We often worked in a context of unnerving uncertainty...and the haste and the rush - that was really something else. At one point, complaining about this matter with a high EC official who was in charge of part of the enlargement transpositions, Mr CC. - a very helpful and generous person - suddenly burst out his genuine very unofficial opinion on the whole position.

*"You are right"*, he exclaimed, *"they are treating you new members very unfairly. We advised them but they ignored us. We are putting you new members through a bureaucratic nightmare forcing you into a massive and hasty transposition process unheard of before now. Indeed, something that the existing members themselves had never had to undertake themselves. Obviously huge scarce resources have to be deviated to filling and compiling endless forms and questionnaires, and you know what? Nobody is even looking at them!!!!"*.

He pointed to a relatively modern, sizable steel cupboard which he opens with some contempt. I see that packed full with files in different colours, all neatly arranged. *"You see these cupboards overflowing with*

[20] Chapter 4 of the *acquis*.

[21] The Malta-EU Steering and Action Committee, a government-established expert and consultation grouping which served as a central mechanism for co-ordinating the various negotiation, screening and transposition procedures preceding EU accession. See: www.meusac.gov.mt.

[22] A statement which might presumably not have been made had the Malta Labour Party (MLP) been participating in MEUSAC.

*files and papers......these are all the draft legislation and transposition tables received from all you applicant states during these past years. We have nobody to look at them and they are just lying there.... in the future some young stagiaire will probably be asked to go through those files.... Fortunately, by then, I'll be long gone from the European Commission. They could have made it much easier for you by allowing you to focus on what is really important.*"[23]

**The New Europeans**[24]

Barely two months after the referendum and general elections which definitely confirmed Malta's accession to the European Union, I had an animated discussion with a particular Parliamentary Secretary regarding the transposition of an EC Directive. The transposition was already late. I was alerting the honourable gentleman to the fact that certain changes he wanted done to a draft I had drawn up many months previously were unacceptable because "*inter alia*" they violated EC law. The reply was that he did not care what *they* said[25] and that he was not prepared to start letting *them* dictate what he may or may not do. He appeared sincere in his views and he was not playing to any gallery. Reminding him of the freshly assumed membership obligations and the possibility of infringement produced no effect. A politician who up to recently had campaigned forcefully in favour of European Union membership now advocated deliberately ignoring clear membership obligations. I remarked facetiously that once he seemed to dislike Brussels and its Directives so much, then perhaps he should have voted against membership. "*Yes*", he replied, "*perhaps I should have done that*". The discussion was drawing to a close and his decision was that while he acknowledged my warnings and my advice, he would nonetheless proceed as he intended accepting full political responsibility for doing so. Should an infringement letter be eventually received from the European Commission, he would accept the situation, take steps to rectify the matter and correct the transposition measure.

We also had a Cabinet Minister rather unwisely minimizing Malta's failure to abide by binding EC commitments. He was quoted as saying that although in a particular case Malta knowingly breached the European Union *acquis*, the likelihood of infringement proceedings did not unduly perturb him because the European Commission's procedures take so long that Malta would have all the time in the world to rectify the breach before enforcement action would actually be implemented. In The Times report of 12 August 2004 under the heading "*Malta risks EU fines for sake of consultation*", the then Minister for Competitiveness and Communications was quoted as officially playing down the consequences:

*"By the time the European Commission starts court proceedings against Malta for not transposing the EU's set of communication-related legislation, Malta would have transposed these laws and be in line with the acquis communautaire, thus averting possible fines."*

It is surprising how quickly senior government officials felt free to express more flexible thoughts about the European Union, shedding their earlier largely unquestioning devotion to the European ideals, laws and structures of just a few months before, in the course of the accession referendum and general election campaigns.

One may also refer to an unexpected statement made by Dr L. Gonzi on one of his first visits to Brussels as Prime Minister. The Times reported the Prime Minister as having said that EC Directives should not apply locally in the same way they apply to bigger member states. Malta was small and EC Directives should apply flexibly. Under the revealing heading "*Gonzi presses for EU rules flexibility*", The Times front-page article of 27 March 2004 quoted Dr Gonzi as having told a European Union summit that:

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[23] It often took several years for the Commission to communicate what it perceived as transposition discrepancies to the Maltese government. By way of example, recent Bill No 23, *An Act to amend the Consumer Affairs Act*, published on 3 April 2009 currently seeks to correct and complete the transposition of the Unfair Contract Terms Directive (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) which had been originally implemented in 2000. In this case, seven years elapsed before the issue was raised by the Commission.

[24] With apologies to Anthony Sampson, *The New Europeans*, Hodder and Stoughton, 1970.

[25] The word *they* was expressed with contempt, his finger defiantly pointing somewhere many miles away.

*"Malta has its own realities, as a small island and a small territory, and the rules laid down by the EU should be applied in a flexible way....They may be beneficial in certain large sectors and large countries but might need to be more flexible depending on the situation."*[26].

To conclude this short piece dedicated to the new Europeans, perhaps the saddest comment that I recall in this context came from a very important Minister during a MEUSAC meeting. Seeking to assuage business representatives who were loudly complaining of the potential harmful consequences of a particular Directive (actually quite a harmless measure), the Minister assured them that the Directive had to be implemented due to mandatory accession requirements, but he added: *"Don't we know that we Maltese have a knack of doing things our way. So let's proceed with this Directive ........but then we shall make sure that we apply it and interpret it our way"*[27]. The business representatives were now all smiles and, pleased with this statement, they withdrew their complaints against the pernicious measure imposed by Brussels.

**The Language of Transposition**[28]

The final section of this paper is dedicated to a dimension of the local transposition process which is still relatively unexplored. It seeks to shed some light on what may be termed the 'language of transposition' and shall comment on the ways that accession has shaped and in a sense Europeanized the style and content of recent local law-making practices.

The revived application to join the European Union submitted by the Maltese government late in 1998 soon brought in its wake a massive process involving negotiation, screening and transposition[29]. Transposition here meant implementing by way of specific local legislative measures a spate of Community rules developed over a period of many years. The Maltese accession transposition was a peculiarly complex one as it was undertaken and completed in rather abnormal haste and under considerable pressure, and often without sufficient preliminary study and preparation. Additionally, this process was being completed without the certainty that membership of the Union would be the logical conclusion of all that effort. This uncertainty persisted while the transposition measures were being converted into legally binding instruments.

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[26] This was the kind of statement for which the Nationalist Party had been accustomed to mock the Malta Labour Party. The following report is very telling:

*Tony Barber Europe Editor*

*Friday, 29 November 1996*

*To the barely disguised irritation of some European Union officials in Brussels, Malta's new Labour government is freezing its application for EU membership, saying it wants to negotiate a free-trade zone instead. "We don't want to turn our backs on Europe, but we want to carry on together without incurring any disadvantages," the Deputy Prime Minister, George Vella, said in an interview in London. He defended the decision partly on the grounds that EU membership would damage the Mediterranean island's economy, particularly the ship- repairing industry, agriculture and fishing. However, when he visited Brussels earlier this week with a proposal for the closest possible ties with the EU short of full membership, some EU officials criticised what they called the new government's "selective approach" to EU relations.*

(Commission officials repeatedly warned that the EU *acquis* could not be adopted on a selective basis. There was only one *acquis* and it applied to all states equally, subject to a few specifically negotiated derogations or transitional arrangements).

[27] Paraphrased and translated from the more colourful Maltese.

[28] Transpose:

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trans·pose trans pōz • v. [tr.] 1. cause (two or more things) to change places with each other: the captions describing the two state flowers were accidentally transposed. 2. transfer to a different place or context: the problems of civilization are transposed into a rustic setting. ■ write or play (music) in a different key from the original: the basses are transposed down an octave. ■ Math. transfer (a term), with its sign changed, to the other side of an equation. ■ change into a new form: he transposed a gaffe by the mayor into a public-relations advantage. • n. Math. a matrix obtained from a given matrix by interchanging each row and the corresponding column. DERIVATIVES: trans·pos·a·ble adj. trans·pos·al - spōzəl n. trans·pos·er n.

[29] See: 1999 Regular Report from the Commission on Malta's Progress Towards Accession and 2000 Regular Report from the Commission on Malta's Progress Towards Accession.

The local transposition phenomenon, which remains an ongoing obligation of membership, has seen some good drafting efforts but also some bad ones. In this section I shall highlight briefly a few instances where the drafting appears unsatisfactory. Indeed, the European Union accession process brought with it new drafting challenges, which have been insufficiently appreciated to date[30].

Pre-accession Malta introduced numerous EC Directives into national law without making a single direct reference to the Directives themselves or to the Community or its members. This gave rise to several drafting difficulties. Just to mention one instance, the Single European Passport for financial services companies was incorporated on the strength of various primary laws that contained no reference to the European Union or to its member states or that the measures were transposing EC Directives. Following accession, references to EU became possible and now transposition has become a less complicated task. Implementing measures now freely admit they are transposing EC Directives. This point is clearly shown in the recent *Materials in Contact with Foodstuffs (Amendment) Regulations, 2009*[31]. Regulation 2 which explains the "*scope*" of the regulations contains no less than six different references to EC Directives as well as a reference to "importation into the Community". One of the questions being addressed in this section is how would this regulation have been drafted if it was prohibited to include any reference to the European Union? The answer probably should be: with some difficulty and judicious resort to creative drafting devices[32].

Needless to say, pressure, haste and lack of preparation do not constitute the ideal basis for well-written and effective legislation. We have witnessed a few terrible transposition efforts and a number of truly amateurish attempts. Accession placed and is placing our law making capabilities under strain and the results sometimes show. Several Maltese transpositions are barely comprehensible and evidence a lack of clear thinking and of basic writing skills.

A bad example of European Union related transposition drafting is Legal Notice 447 of 2004[33]:

"*The proprietor of a food business may derogate from compliance with the provisions of hygiene as set in the Schedule to have regulations provided that such proprietor does so in accordance with Commission Directive 96/3/EC as amended by Commission 2004/4/EC (corrected version) or in accordance with Commission Directive 98/28/EC.*"

Another unfortunate recent case was the Consumer Affairs Act (Amendment) Act 2008[34] which transposed the Unfair Commercial Practices Directive[35]. Here the Maltese version, the main text, is written in a style which defies comprehension and coherence. The English version too reveals a number of drafting weaknesses. One illustration will suffice to make the point: Para 4 of the First Schedule introduced by the Act lists a number of misleading practices. These include:

"*Claiming that a trader, including his/her commercial practices, or a product has been approved, endorsed or authorised by a public or private body when he/she/it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation.*"[36].

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[30] Thus, for example, much transposition has been implemented by way of regulations made by Ministers under delegation from Parliament, rather than by primary legislation.
[31] L.N. 102 of 2009 issued under the Food Safety Act, Chapter 449 of the Laws of Malta.
[32] The writer hopes to explore further "The Language of Transposition" and how the transposition phenomenon has influenced and shaped the style and content of recent local law-making in a future paper.
[33] Hygiene of Food (Amendment) (No. 2) Regulations, 2004 issued under the Food Safety Act (above).
[34] Act II of 2008.
[35] The style and content of the recent transposition, through Act II of 2008, of the Unfair Practices Directive by way of amendments to the Consumer Affairs Act, Chapter 378 of the Laws of Malta, has already been addressed by the author in, "A fresh look at the state of play of Consumer Protection and Legislation in Malta: coherence, confusion, or a bit of both?", a talk given to the Malta Chamber of Advocates, 28 May 2008. (The Unfair Practices Directive - Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council).
[36] The Maltese version is a poor translation even though it is the prevailing text. The bad drafting has been aggravated by a misguided attempt at political correctness by inserting both masculine and feminine in every possible context. The

One instance of inconsistency results from the strangely worded reference in the new article 52A which prohibits "*Any scheme of the type similar to a chain letter scheme, which is unconnected with the supply of goods or services.....if....the financial awards of the majority of the participants are dependant on the recruitment of additional participants...*". This language is far removed from the wording one finds in paragraph 14 of the Fist Schedule which uses different language to regulate the same issue. It prohibits any "*pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.*"

Local transposition has also yielded such unlikely items as Legal Notice 52 of 2009[37] which is "deemed" to have come into force on the 30 April 2006. This Legal Notice introduced the Interoperability of the Trans-European Conventional Rail System Regulations of 2002, which transposes a railway system-related EC Directive[38]. The measure had to be implemented despite the absence of a railway system on the island.

The language and style of transposition is an intriguing subject which merits academic interest. Certainly, this little section does not do it sufficient justice; but it has, one hopes, indicated an area of research so far insufficiently investigated. This paper suggests that even a relatively superficial analysis of Malta's transposition of EC Directives indicates that transposition imposes its own particular language and style, and that while most local efforts seem to be satisfactory, mistakes have been and continue to be made.

## Conclusion

This paper has tried to highlight and explain some aspects of this process and the conditions and circumstances under which it unfolded. Transposition remains an ongoing challenge and one of the main obligations attached to European Union membership. European Union law is now the most significant source of our legislation. Considerable conceptual and practical differences exist between pre-accession and post-accession transpositions. The pre-accession transposition happens at a time when achievement of membership itself may still be uncertain. This was the peculiar case with Malta where most of the mandatory pre-accession transpositions were successfully completed at a stage when membership itself rested on the outcome of a future popular referendum.

Malta's accession to the European Union was not just an important event or historical milestone, but it represented the concluding act of a very complex, unique and unrepeatable process that merits more analysis than seems to have been the case so far. Accession introduced a new phase in our nation's history affecting in several ways the way we think, the way we administer our affairs and the way we legislate. In a certain way, although we may have done much, we may have actually understood little. The tales from the accession narrated here probably reveal typical local attitudes not only towards the European Union but also to the notion of regulation more generally. They are relevant not so much in the facts they narrate but in what they represent.

## Related Materials by the Author

"*Lifting the Screen: Welcome to the Silent Revolution*", David Fabri, The Accountant, March 2000 cover feature, published by the Malta Institute of Accountants.

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attempt is an incoherent failure, a point first made in my talk at the Malta Chamber of Advocates in May 2008, already referred to above.

[37] Made in terms of the Product Safety Act , Chapter 427 of the Laws of Malta.

[38] Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system.

*Adventures in Screening and Transposition - a case study: the EU Consumer Protection Acquis 1990-2004*, David Fabri, The Jean Monnet Seminar Series, Malta European Studies Association, EDRC 2006.

*Financial Services and the European Accession Process: the case of Malta (The MFSC experience)*, David Fabri, 4th EURISA Seminar, 14 October 2000.