

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

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Introduction

The amendments to the Broadcasting Act made at the very inception of the new millennium warrant an in-depth analysis of the procedure pursued in effecting those amendments to bring in line Maltese domestic law with the European Union's *Television Without Frontiers Directive* (hereinafter referred to as the 'TWFD').

In this light, the experience acquired by Malta when amending the Broadcasting Act in 2000 becomes valuable to the process which will have to be initiated and followed in the near future to bring the Broadcasting Act in line with the amendments adopted to the TWFD.

Given that the existing law is likely to undergo further amendments some time in the near future, it is of imperative importance that past experience in transposing and implementing that law into Maltese legislation is studied in order to learn lessons for the future.

The proposed new directive, undoubtedly, poses novel challenges which have not been dealt with previously in the transposition and implementation of the 1989/1997 TWFD.

Partial Transposition of the TWFD

When the process to transpose the TWFD into Maltese domestic law was initiated, our broadcasting law was to a certain extent - albeit limitedly - compliant with the TWFD and this due to the fact that the Maltese Broadcasting Act, when enacted by Parliament in 1991, was modelled on the U.K. Broadcasting Act 1990 which contained elements of transposition of the 1989 TWFD into United Kingdom legislation either in the enactment itself or through subsidiary legislation made thereunder. Naturally, as Malta then was not an EU Member State it was not obliged to take on board the 1997 amendments.

In addition, certain provisions of the original directive were not to be found in the Maltese Broadcasting Act, 1991. I have here in mind the TWFD's provisions regulating European works and independent productions. Hence, in the year 2000, when it was decided that the TWFD was to be transposed into Maltese national law, the exercise was more limited in scope as not all the 1989 TWFD provisions had to be transposed but the transposition was directed mainly at the 1997 amendments to the TWFD.

To a certain extent, therefore, Malta was in an advantageous position as it had already been applying some provisions of the TWFD very much well in advance before its date of accession to the European Union on 1st May 2004.

The Legal Gap Analysis

When Malta decided to transpose the remaining provisions of the original directive and the amending 1997 directive into Maltese domestic law, a legal gap analysis was carried out to establish which provisions of Maltese law needed to be amended or substituted. Two laws essentially were up for review: the Broadcasting Act and the Press Act. The bulk of the amendments were addressed at the former enactment.

The Transposition Plan and Legislative Drafting

The unwritten transposition plan adopted by the Office of the Prime Minister consisted into two parts: a screening report, which identified the gaps in Maltese Law which needed to be addressed to be brought in line with the audiovisual *acquis* 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.

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. A draft bill was forwarded to the Prime Minister for his approval and, subsequently, for Cabinet's approval, together with a Memorandum thereto.

The Legislative Process

Once the bill was approved it was published in *The Malta Government Gazette*. This was the first bill to be given a first reading in the House of Representatives in the new millennium. Bill No 56 was entitled the 'Broadcasting (Amendment) Act, 2000'

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 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. 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.

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. Hence the time was ripe to essentially cater for both legislative needs.

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.

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. 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.

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.

Provisions of the TWFD Transposed by Subsidiary Law

Not all the provisions of the TWFD were transposed into primary legislation. 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 various provisions 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.

Provisions of the TWFD transposed by Administrative Action

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

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. 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 and in subsidiary legislation made thereunder.

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.

Obligatory and 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.

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.

Provisions which refer to the Commission and to the relationship between the Commission and 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.

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.

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 advise, reporting and training.

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.

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. 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 broadcast in the main news bulletin of the offending station or during such time as the Authority directs.

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.

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. 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 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.

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.

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.

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.

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.

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 who 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 avoiding their recurrence.

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 to a certain extent entertaining these requests.

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.

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.

The new Directive 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 smooth as possible.

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.

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.

The Legal Notice Checklist

In addition, if the Directive is to be transposed through subsidiary legislation, a checklist form has to be filled up. All legal notices require the Prime Minister's clearance and such approval is given after an assessment of the regulatory impact of any measure is prepared. Again, when a legal notice transposing an EU directive goes beyond the directive's minimum requirements, detailed justification has to be provided.

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 is a television broadcast and what is 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 – to 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 was of great benefit in enforcing the directive's provisions.

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 are 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.