

**WHITE PAPER  
ON  
CONSUMER PROTECTION**

**PROPOSALS FOR LEGISLATIVE REFORMS**

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## PRELIMINARY

This White Paper is a discussion paper. It presents ideas and proposals for legislative reforms in favour of the consumer.

No consultations have preceded the preparation of this Paper which is being submitted as the point of departure for discussions and consultations with all interested parties. For this reason, the proposals have not been presented in the unduly formal and restricted shape of a draft bill.

The hope is expressed that the suggested measures and reforms shall stimulate greater interest in matters relating to consumer protection.

The proposals have necessarily taken into consideration the existing laws. These are criticized and evaluated, while amendments and other reforms are suggested, often in great detail. Efforts have been made to define a new organization structure to give these various laws and proposals a common sense of purpose and direction rendering them easier to enforce and consequently more meaningful.

The causes of consumer complaints are various and disparate including such matters as shoddy goods and services, deceptive descriptions, false bargains, broken promises, unreturned deposits, unsafe products. It has proved very difficult for the law to react adequately to all the various forms of trade malpractices that arise and to provide consumers with a proper remedy.

There have been a few initiatives that have gone some way towards improving the consumer's lot. However these efforts have proved sporadic, inconsistent and with no clear framework, direction or organizational support.

Regrettably voluntary consumer associations have not really experienced any consistent or popular success, certainly not to the extent as similar associations have enjoyed in other countries.

An attempt is therefore being proposed not only to establish an Authority which will monitor and influence the operation and enforcement of the various relevant laws, but to have a substantial part of our consumer legislation incorporated in one single statute.

The setting up of a central body whose function shall explicitly be that of promoting consumer protection in the various spheres of the law and of educating and guiding the consumer becomes the focal point around which revolve many

of the proposals set out in this White Paper. For this reason, the ideas and proposals regarding the setting up of the Consumer Protective Authority are presented at the outset.

Following a brief description of the organization and functions of the proposed Authority, the Paper proceeds to a brief review of the various spheres of commercial activity where the law should intervene to safeguard the legitimate interests of the consumer.

At present there are a variety of laws and regulations which directly or indirectly have provided forms of consumer protection or have had the potential to do so. Unfortunately much of this potential remains untapped, often forgotten and ignored. Admittedly few of the relevant existing laws and regulations were conceived specifically with the consumer's protection in mind. More often the aim had been to prevent unscrupulous traders from engaging in unfair competition with their rivals or to maintain public order. The consumer in these situations benefitted only indirectly and was not provided with any adequate remedy. He could not initiate proceedings to obtain compensation for any loss suffered. At most, he could request the Police authorities to proceed against the offending trader in the criminal courts.

In more recent years, consumer protection has become the subject of several legislation initiatives, and the very term 'consumer' has suddenly found itself formally recognized and used in the law itself.

Who is the consumer? The term 'consumer' is used to describe a person who purchases goods or services exclusively for private use (including use by friends and family) and not for business purposes. The term is often used interchangeably with such other terms as 'user', 'purchaser', 'shopper', and 'customer'. A company or other commercial enterprise cannot qualify as a consumer, while the acquisition of articles for use in business cannot qualify as consumer transactions.

Consumer law is concerned with the consumer as a vital factor of modern society, his position in the market place and his relations with suppliers of goods and services. Consumer law is not directly or primarily concerned with the consumer in his relations with other private persons. Thus in transactions between private persons, where neither party is a trader, consumer law does not come in at all; such transaction would remain governed solely by general private law, which is largely incorporated in our Civil Code. Therefore the definition once given that a consumer is 'everybody all the time' may be a convenient catch-phrase, but it is certainly not precise and requires qualification.

Consumer law is of course another convenient term that embodies all those various laws and regulations that deal directly with the consumer's legal rights and remedies. Possibly this term too is a misleading one as it may lead one to think that we are here dealing with a separate category of law.

The present Paper is not the appropriate occasion to examine whether consumer law is or should be considered a new field of law, or whether it should simply fit into the traditional classification of civil law and public law. The emphasis here will be on the actual legislation available and on amendment proposals for the creation of a comprehensive substantive and procedural regulatory framework to ensure a fair-deal to consumers in all their dealings with the business world, comprising primarily manufacturers, traders and suppliers of services.

The aim of the law therefore is to seek to deter traders from assuming that they can supply shoddy goods and services to consumers and get away with it. If the law fails or hesitates to do so, traders will be encouraged to lower their standards to obtain even higher profits. Clearly this goes against the legitimate interests both of consumers and of honest traders who strive to maintain higher standards of service and who will find it difficult to compete with dishonest rivals who resort to profitable malpractices.

The law should therefore have two complimentary aims: to defend the legitimate interests of consumers and to protect honest traders against unscrupulous competitors.

Consumer protection comes mainly in two forms - civil (or private) law remedies and the criminal law. Very few and limited measures have been taken by private law in favour of consumers and these consist mostly of judicial interpretations which have somewhat protected the consumer in particular situations. However, no general principles or measures specifically intended to safeguard the consumer in his various transactions with traders have so far been adopted either by the Courts or by Parliament.

There have always been criminal laws which produce a vague pattern of protection to the consumer. The Code of Police Laws, the Weights and Measures Ordinance, the Criminal Code and a few other statutes punish a number of malpractices that may be carried out by traders to further their business interests. However the principal aim of these statutes was to promote good order between competing traders and to discourage unfair competition, rather than to protect the consumer.

It is only in recent years that the criminal law has started to expressly acknowledge the status of the consumer and to safeguard his economic interests.



The Civil Law, on the other hand, still does not recognize the figure of the consumer or the notion of a consumer transaction.

## CHAPTER I

### THE CONSUMER PROTECTION AUTHORITY

The case for setting up a new public-financed body to promote and protect the consumers' interests rests on at least three considerations:

- (1) Consumers as a general category of persons coming from different walks of life and with different needs and outlooks are not organized. They are incapable of converging to promote their interests, to speak with a common voice and to lobby and make pressure on the formulators of policies and regulations not to be indifferent to consumers' views and economic interests.
- (2) Voluntary consumers' associations have failed to develop a valid, generally recognized and working alternative organization.
- (3) A growing tendency favours the intervention of a Government agency that will not only monitor market practices and investigate consumer grievances but that will have the power to intervene and prohibit specific malpractices as well as the authority to influence policy-making in favour of consumers. It can thus undertake measures to counter trading abuses in the common interest of consumers, who would otherwise have had to seek a remedy in their own name, at their own expense and with their own sole resources.

It is therefore proposed that there shall be an authority to be called the Consumer Protection Authority. The Authority shall consist of five members being

- (a) the Director of Consumer Protection who shall act as chairman and who shall be nominated by the Prime Minister;
- (b) two public officers who are actively performing duties relating to consumer protection, and who shall be nominated by the Parliamentary Secretary responsible for Consumer Protection;
- (c) two other members nominated by the Parliamentary Secretary responsible for Consumer Protection after consultation with the Director of Consumer Protection.

The law will define the functions and powers of the Authority. Apart from the functions which can be defined as constituting the Authority's ordinary role, another important innovation shall be the executive powers granted to the Authority.

These powers shall be directly and strictly related to the functions and duties of the Authority and shall only be such as to enable the Authority to carry out its role in an effective and credible manner.

The ordinary functions of the Authority shall include the following:

1. to monitor and keep under review all commercial activities relating to the supply of goods and services

- to consumers, to collect all relevant information on such activities and on the terms on which they are offered and to advise the Parliamentary Secretary responsible for Consumer Protection on consumer affairs and to recommend legislative and other measures;
2. to investigate and identify products, services or trade practices which directly or indirectly adversely affect consumer interests and to study and recommend counter-measures;
  3. to guide and educate consumers and for this reason to prepare and issue reports or other publications on all matters of interest to consumers and to provide consumers with information to enable them to choose and shop sensibly and to ignore unsafe or worthless goods;
  4. to monitor developments in consumer law and practice in other countries and to establish fruitful contacts with authorities and other entities which promote the consumers' interests overseas.

The Authority is not being devised as a mere advisory or investigatory body. The watchdog must be given a set of teeth. It is therefore proposed to grant the Authority certain executive powers which would enable it to intervene directly in the market place in respect of a trade practice connected with the supply of goods and services to consumers. In fact there is bound to be a measure of duplication in this field, whereby the Authority can take executive action which will have a limited duration while

the Parliamentary Secretary will enjoy power to enact regulations in the form of delegated legislation.

The executive powers of the Authority will enable it

- to ban instances of misleading advertising,
- to prohibit the sale of unsafe products and of badly or falsely labelled goods,
- to prohibit the use of specific unfair contractual clauses in consumer contracts, and
- to halt other practices deemed harmful to consumers.

Such practices may refer to the price, mode of payment and other conditions relating to the supply of goods and services, to the manner in which these are communicated to consumers, to all forms of promotion and salesmanship.

The violation of a ban ordered by the Authority shall be a punishable offence, on a strict liability basis. The trader involved can seek to have the ban reversed by the Courts if it is considered *ultra vires* or otherwise invalid. During the judicial proceedings, the ban would continue in effect. An order once made can of course be modified or withdrawn by the Authority, which can even limit the duration or applicability of its order.

It is proposed that any executive order issued by the Authority shall be valid for a temporary or definite duration. An order lapses after a period of six months

unless prior to the date of expiry, the order shall have been ratified and endorsed by the Parliamentary Secretary responsible for Consumer Protection. .pa

Such endorsement is being proposed for three reasons:

- (a) to avoid the creation of uncontrolled administrative power;
- (b) to render any such executive orders subject to review by an authority which is answerable to Parliament;
- (c) to demonstrate a clear intention to follow up the issue of an order with an initiative aimed at settling the issue by means of an agreement or other appropriate arrangement with the trader or traders concerned.

Once endorsed by the Parliamentary Secretary, the order shall enjoy indefinite duration and validity.

The executive powers to be given to the Authority shall therefore be as restricted as possible. They shall not include any delegated legislative powers. Any legislative authority shall be vested solely in the Parliamentary Secretary for Consumer Protection who remains politically responsible to Parliament.

Nevertheless it is essential for the Authority to have powers of intervention particularly to issue orders prohibiting practices identified and defined as being detrimental to consumers and prohibiting products or services which present certain risks or dangers to the

consumer's health or safety.

Additionally the Parliamentary Secretary responsible for Consumer Protection may, acting on the advice of the Consumer Protection Authority, by legal notice published in the Government Gazette, declare specific commercial practices as being detrimental to the interests of consumers and to ban any such practices.

The Authority shall have the power to appoint an advisory body to be known as the Consumer Affairs Advisory Council, which shall be made up as follows:

- (a) the Director of Consumer Protection Authority who shall act as Chairman;
- (b) the Attorney-General or his representative;
- (c) the Chairman of the Food Standards Board or his representative;
- (d) the Chairman of the Malta Board of Standards or his representative;
- (e) two members from the teaching staff at the University of Malta;
- (f) two additional members who in the opinion of the Director can contribute to the achievement of the aims of the Council.

The role of the Consumer Affairs Advisory Council shall be to assist the Authority in monitoring the position of the consumer and market practices in Malta. The Council shall review and prepare studies on policies and issues of short-

term and long-term interest to the consumer, and it shall report its findings to the Authority, who may request the Council to advise it on any matter connected with consumer protection, to submit legislation proposals or other measures and to undertake enquiries and investigations. The Council would also study and promote forms of technical and financial support for voluntary consumer associations and to stimulate and propose measures of consumer education and information.

To promote mutual understanding between the Authority and the trading community, it is proposed that the Authority shall appoint a number of Commissions to deal with the different spheres of trading activity. The function of these Commissions shall be to act as an open channel of communication between businessmen and the Authority, enabling the latter to discover and understand the views of the other side. The existence of this body should reduce the possibility of misunderstandings or conflict while increasing the opportunities for whatever joint cooperation is possible, for discussing and negotiating Codes of Practice as well as legislative proposals and other measures which the Authority may be contemplating from time to time.

There would be one Commission to cover public services and public corporations, such as the Telemalta and Enemalta Corporation. Other commissions would deal with such areas as insurance, banking and travel and it is envisaged that it



would be fruitful to have a commission to deal generally with advertising and trade descriptions. Each commission will consist of a chairman, a number of members representing the Consumer Protection Authority and an equal number representing the sectors of trade for which the Commission would have been established. The role of the Commission shall be strictly consultative, they shall have no executive or legislative Authority and their recommendations shall therefore not be binding.

As the voice of the consumer the Authority shall secure appropriate representation on a number of Government bodies and committees whose objectives are of interest to consumers. Here one is referring to such entities as the

- \* the Malta Board of Standards
- \* the Food Standards Board
- \* the Hotels and Catering Establishment Board
- \* the Wind Board
- \* the Air Terminal Users Committee

Most of these bodies can in fact easily accommodate a representative of the consumers nominated by the Authority.

It is not felt appropriate to propose that similar representatives should sit on the Board of Directors of public corporations such as Telemalta. The interests of consumers should be suitably considered in the *ad hoc* Commission that would be established to review the provision

of public services and amenities.

The presence of a consumer representative on such committees should add stimulus to their workings and sense of purpose and would ensure that the consumer is not overlooked where official policy is being formulated or considered. The Authority will therefore be in a better position to assess the performance of these Boards and to ensure that the consumer's point of view is suitably presented.

The Authority shall in addition seek to coordinate and to give a consistent direction to the various authorities and entities in matters which, directly or indirectly, affect the consumers.

The Authority will use its influence to make sure that the many existing laws which in one way or another safeguard the consumer will actually be enforced. Where necessary the Authority will fight the lax and indifferent enforcement of the various laws and the disinclination of the authorities concerned to consider the consumer point of view.

The receipt of complaints directly from the public is a matter which should be handled with great care. It is felt that the Authority should not, in principle, formally deal with individual complaints received from the public, except where a systematic system of conduct detrimental to consumers is detected.

If constrained to deal with all sorts of complaints submitted by individual consumers, the Authority will without doubt end up spending all its energy, time and resources in performing this limited function. The Authority will not be set up to replace the lawyers and the courts. On the other hand, it will always be one of the Authority's functions to find out what consumers complain about, to carry out its own independent investigations and to ferret out abuses, whether or not these have been the subject of a complaint.

Whether or not the Authority will successfully fulfil its function will depend to a large extent on the quality of the personnel and facilities granted to it and on the way it handles problems and organizes itself.

In so far as it is within its means and facilities, the Authority would carry on or commission research on particular products to establish such matters as product safety and the truthfulness of producers' claims. It shall not be one of the Authority's function to involve itself in comparative testing of articles available on the market. The Authority should not be perceived as expressing a preference for one brand over another. Comparative testing should preferably be carried out by voluntary associations.

The Authority shall exercise its powers properly and reasonably. It would have to give reasons for its

decisions. In the event that its powers are used improperly or unreasonably the relative decisions can be subject to judicial review.

The Authority shall however be completely exempt and free from any civil or criminal liability in respect of its actions. The exemption applies to all statements, publications, broadcasts and other communications issued by the Authority, by its officials and representatives or by persons acting officially on its behalf.

The Authority acts in the general interest, particularly in the interests of consumers. It has to be free to pursue its roles and goals without fear of liability or court action which may inhibit effective and meaningful action.

At the end of each year, the Authority shall draw up a full and detailed report on its workings and initiatives. Such report shall be made available to the public.

## CHAPTER II

### CONSUMER PROTECTION ACT 1981

This law will have to be radically overhauled. The title will definitely be changed because it promises more than it actually gives. Apart from this, most provisions of the existing law will be amended. The following are a number of proposals:

- (a) A definition of 'consumer association' will replace the available definition of 'consumers' organization'.
- (b) The Consumer Protection Authority will administer this law and oversee its working in lieu of the Minister of Trade.
- (c) A serious defect in section 4 of the Act which refers solely to the sale of goods but not also to the provision of services will be rectified. In fact, the operative provisions of section 4 will be extended to all 'bona fide' activities carried out by a consumer association.
- (d) The entire section 6 will be deleted and remain unreplaced. It is not good law, has never worked and will not be missed.
- (e) Consumer associations will be encouraged to fulfil an important role not only in consumer information and participation, but also in supplementing and complementing the proposed statutory functions of the

Consumer Protection Authority. The law will acknowledge that such associations give a consumer a better opportunity to safeguard his interests not only judicially but also extra-judicially.

Voluntary consumer associations should play a very important role in consumer protection law and practice, performing the following function:

- (a) collectively represent the general class of consumers in their common interests;
- (b) articulate the consumers' interests with a view to influencing political decisions;
- (c) counter-balance the power and influence of manufacturers, traders and suppliers of service;
- (d) provide consumer counselling and education;
- (e) test products and services available on the market and provide shopping tips;
- (f) assist in achieving a satisfactory settlement of consumer complaints;
- (g) assist the Consumer Protection Authority in enforcing the law.

Finally consumer associations should be entitled to institute legal actions and to appear as plaintiffs in judicial proceedings representing the general interest of consumers. The law will provide that a 'bona fide' voluntary consumer association shall have the right to be considered as the injured party for the purpose of criminal proceedings instituted under the various consumer law

provisions. A representative of such association will be entitled to assist the prosecution in such proceedings.

Consumer associations will also be invited to nominate a representative to sit on the Consumer Affairs Advisory Council

As a voluntary association, a consumer association does not need any official permit to exist and to promote the consumers' interests. The Consumer Protection Act rewards official recognition of associations, particularly by way of exemption from civil and criminal liability and also unspecified forms of assistance. The problem remains of course that everything revolves around a Minister's unfettered discretion; the law in fact provides that the Minister of Trade may set his own conditions for the recognition of consumer organizations "as he may deem fit" (Section 3). Later on the law goes further: "The Minister may, in his absolute discretion, at any time withdraw the official recognition of any consumers' organization" (Section 7).

This is considered to be bad law and will have to change. Dependence on a politician's arbitrary choice, changeable from day to day, can induce or influence an association into trying to please the Government of the day, into hesitating before criticizing a Government policy, a law, a Public Corporation, or even into choosing not to criticize

at all lest the Minister concerned should be offended, and reminded of his discretionary powers. Therefore what is being suggested is that any 'bona fide' voluntary association whose principal aims in terms of its constituting statute are the promotion of consumer protection and the education and guidance of consumers will benefit from the exemption described in the present Section 4 of the Act, provided that the communication or other activity is made 'bona fide', and not recklessly or maliciously, for the protection and education of the consumer.

The law shall therefore provide for the creation of clear criteria for the setting up of 'bona fide' associations. Such criteria would be applicable to all equally and they would also be published for general information.

The criteria would require a consumer association

- to have as its principal objects the promotion of consumer protection and the education and guidance of consumers;
- to be managed by organs freely elected by the members;
- to be backed by a sizeable number of consumers (say 200 members);
- to be non-profit making;
- to lodge an updated copy of its statute with the Consumer Protection Authority.



The Consumer Protection Authority shall ascertain and certify that the established criteria have been met. Whatever little discretion the Authority will retain in this matter would have to be exercised reasonably and any interested party will be given the opportunity to make representations and a right of appeal to the Parliamentary Secretary responsible for Consumer Protection.

It is not for Government or any other official body to try to influence or guide the activities of voluntary consumer associations, whose freedom of action should be safeguarded.

Although the aims of the Authority and of consumer associations may overlap, neither should seek to establish or claim some form of exclusive hegemony over the sphere of consumer protection.

The Authority is not being set up to replace voluntary associations or to render them redundant. A framework will have to be developed for their mutual cooperation and assistance, with each entity acting independently, adopting its own methods, strategies and priorities.

## CHAPTER III

### DOOR-TO-DOOR SALESMEN ACT 1987

Another recent enactments in favour of consumers is the Door-to-door Salesmen Act 1987. The idea of the statute was of course an excellent one seeking as it did to control abuses arising from the peddling of various articles by salesmen at the consumer's house. Such salesmen frequently resort to aggressive badgering of the consumer inducing him to spend his hard-earned money on articles he often does not need or understand. The Act introduced the concepts of the right of cancellation and the so-called 'cooling-off' period. It is proposed not only to retain the Act but also to improve on it.

The phrase "door-to-door salesman" is of course to some extent a misnomer. The words extend to salesmen who offer their wares outside their principal's office and away from fairs or markets. The salesman may approach a potential customer at the latter's workplace, in the street or in other places. In such cases, we cannot really speak of "door-to-door" salesmen (or even of 'doorstep contracts'). This point is being raised merely for clarification purposes as is felt that the description 'door-to-door salesman' should be retained as it is convenient, popular and causes

no material confusion.

It is intended to improve and amend the Door-to-Door Salesman Act on the following lines:

1. Section 2 will be revised to remove certain ambiguities. In particular the definition of 'door-to-door' salesman which now refers solely to the offering of goods will be amended to refer also to services.
2. At present the law merely requires the salesman to provide the customer with a specified cancellation form. An amendment will oblige salesmen to thoroughly explain the meaning and purpose of this form to the customer in order to ensure that the latter understands his legal rights in this regard.
3. Schedule 1 of the Act sets out a specific form of cancellation document which has to be completed by a consumer who has decided to repudiate the contract (Section 8(3)). It will henceforth be made possible for the customer to give notice in writing in any form (even by means of a simple letter), provided the intention to cancel the contract results clearly.
4. Section 3 will be thoroughly revised and paragraphs (c) (f) and (g) will be deleted. The Consumer Protection Authority will be given power to prohibit the sale of

certain goods and services by peddling. Another amendment will bring into the ambit of section 3 offers of correspondence courses, or of other study or training programmes on any subject.

5. Section 5 shall henceforth also provide that any person convicted of having acted as an unlicensed door-to-door salesman shall, besides other penalties, be automatically perpetually disqualified from ever holding such a licence.
  
6. Section 7 shall be revised in three respects:
  - (i) it will require also the home address and identity card number of the salesman;
  - (ii) paragraph (e) shall be extended to refer not only to goods but also to services, and shall require a complete, honest and correct description of the goods or services being offered;
  - (iii) paragraph (f) shall, besides price and terms for payment, require full and correct details regarding interest and any other charges, if any.
  
7. Another amendment shall provide that where a doorstep contract is concluded in violation of any of the provisions of the law, not only will the contract be null but the consumer shall additionally be entitled to retain, free of charge, any goods that may have been given to him in connection with the said contract.

This will apply both where the contract was promoted by an unlicensed salesman, and where though promoted by a licensed salesman, the contract fails to comply with all the requirements of section 7.

8. Rather than retain the vague references to "no undue pressure" in section 7(j) and to "a just cause" in section 10, a general principle shall be introduced explicitly obliging salesmen not to indulge in coercive practices, exercise undue pressure on customers or resort to deceptive practices.
9. The present section 8 will be thoroughly re-worded to strengthen the prohibition against requesting the payment of any deposit on the signing of the contract. Where the prohibition is violated, the consumer will have a right to be refunded with interest from date of payment. Besides this, a salesman who takes a deposit will become guilty of an offence.
10. Section 11 will be revised so that henceforth any clause whatsoever in a private agreement which in any manner contradicts the provisions of the Act shall be null and without effect.
11. A new paragraph shall be added to Section 12 imposing on the trader the burden of proving that the right of cancellation was not exercised in time.

The proposed amendments are aimed at strengthening the existing provisions and they confirm a continuing disfavour with which doorstep contracts are viewed by the law. It is the geographical factor which distinguishes this method of procuring sales, a method which would be more justifiable where distances are great and accessibility to shopping outlets is difficult. The amendments will further ensure that a customer will be able to withdraw from contracts which are a nuisance to him and to retain only those contracts that he would still have agreed to after careful examination.

## CHAPTER IV

### TRADE DESCRIPTIONS ACT 1986

This statute was a major step in the development of consumer law in Malta. One should immediately in fact note that as an offence can only be committed "in the course of a trade or business", the law is only concerned with the dishonest trader, and not also with private sellers who are not engaged in trading. The Parliamentary debates on the bill created a healthy awareness of trade malpractices and of the need for the law to react with appropriate counter-measures. They also served to highlight the abuses occasioned by doorstep contracts, and eventually led to the enactment of an *ad hoc* law on that subject.

The Trade Descriptions Act was more than merely inspired by the original English statute of 1968, as regards both form and content. The laborious English style of drafting was borrowed rendering the rules needlessly complicated and often difficult to understand. Some editing would be in order particularly with regard to several provisions which are too closely related to the English situation and are not relevant locally. It is proposed to improve on the present law while retaining all its more important provisions.

The rules relating to trade descriptions and those relating to advertising must necessarily remain similar and run parallel to each other. However, in view of the particular character of the advertising industry and of the problems that it creates, it is proposed to handle the two matters separately, though within the same comprehensive Act.

The 1986 Act gives indirect and inadequate attention to advertising. This may possibly be attributed to the fact that advertising in the United Kingdom is also regulated through other measures and machinery, such as the Advertising Standards Authority and relative codes and standards which is not the case here. The borrowed provisions consequently seem weak and inefficient, and reveals the dangers of copying.

The Act will therefore have to be substantially revised. The proposed changes would include the following:

- (a) The law would henceforth contain a clear and concise declaration of rights of consumers in relation to trade descriptions. It will be stated directly and unambiguously that the consumer has the right to be completely and fairly informed about the essential characteristics of goods and services which are offered to him, and the right to expect that the information affixed on labels or provided at sales premises is



rigorously truthful, accurate and suitably informative on the characteristics, nature and use of the product, and services concerned. Coupled with the proposed new regulatory regime for advertising, these rules should ensure that consumers would receive all relevant information and would not be misled by fake or reckless descriptions or promises.

- (b) The powers accorded to the Minister of Trade shall be assigned to the Consumer Protection Authority, whose creation is being proposed in this White Paper.
- (c) Section 2 will be revised particularly in view of the new specific rules which will regulate advertising.
- (d) Section 4 shall be retained but reinforced so that a trade description shall include not only those features listed from paragraphs (a) to (e) of the present law, but will refer also generally to any other relevant feature or characteristic of the goods that may from time to time be offered for sale to the consuming public. Apart from this, section 4 will henceforth refer specifically *inter alia* to indications as to the availability of the goods, their utility and manner of use and the standing and capability of the persons indicated in paragraph (i). Paragraph (l) will be replaced by "period of fitness for use or consumption".

(e) Section 5 which had been thoroughly copied from English law is considered too lenient in its requirement that to violate the law, a false trade description should be false "to a material degree". It has been held that the test whether a description "is likely" to mislead is whether it would mislead an ordinary man, our 'bonus paterfamilias'. The risk here of course is that only reasonable persons will receive the protection of the law. This runs counter to the principle and objective that the law seeks to protect primarily those who are not diligent, who place too much faith in the words of businessmen and who are therefore more susceptible of being misled by false trade descriptions. The reasonable man would normally be able to resort to his own common sense and resources.

It is proposed to abandon this objective standard, which could have the unfortunate consequence of withholding the protection of the law from those consumers who need it more than others. New rules will have to be worked out that will prohibit trade descriptions containing incorrect, unreasonable or misleading information that may deceive a consumer lacking in diligence or experience.

The law will therefore seek to state unambiguously and without too many reservations (as is unfortunately the

case with the present law) that there is absolutely no justification to insert fake information in trade descriptions. Deceptive practices, both big or small, should be equally discouraged.

- (e) Section 6 will be revised to extend its provisions to descriptions carried on placards, posters, inscriptions, signs or screens which are placed close to where the product or service is offered to the public.
- (f) Section 8 will be incorporated within the present section 3, whereas sections 7, 9, 16 and 28 will be repealed as they are relatively unimportant and are serving only to render the law more complicated than it needs to be.
- (g) Sections 10 and 11 are unnecessarily confusing and should be replaced. New simple and direct rules will be enacted which will empower the Consumer Protective Authority to impose marking and labelling requirements on particular goods or classes of goods.
- (h) Section 13 which relates to false or misleading price indications is much too complicated and is of limited application. It is proposed to replace it by a broader prohibition of *all* false or misleading information about prices. False bargains or price reduction offers

would fall within this general prohibition.

- (i) The Act will be amended so as to provide that an employer shall be liable for the act or omission of his employees, salesmen or agents. Consequently the defence currently available under section 20 shall be withdrawn outright. It is felt that this defence leaves too much room for abuse. This section shall therefore undergo substantial amendments to ensure that defaulting traders will not find it so easy to place their blame on another's doorstep.

To close any loopholes, the law shall additionally provide that where the default is committed by a commercial partnership, each of the directors, partners or managers can be held responsible; it will henceforth not be possible for the person charged with the offence to plead that he exercised "due diligence". It is in practice too easy for a defendant to blame circumstances or somebody else for the violation of the law. There have indeed been instances in England where employers successfully escaped conviction by blaming their employees or agents; the latter would consequently find themselves burdened with criminal liability for acts which in the ultimate analysis benefitted none other than their employer. This deficiency should be rectified and sections 19, 20 and 30 thoroughly altered accordingly.

(j) There is an unjustified distinction between section 3 (relating to goods) and section 15 (relating to services). The first section establishes strict liability offences so that the prosecution need not prove that the defendant trader had no intention to deceive or mislead anyone. On the contrary, Section 15 requires proof of the defendant's state of mind, that is knowledge or recklessness as to the falsity of his statement. Therefore under the present law, the fact that the service supplied fails to meet the description given is not by itself an offence.

It is suggested to do away with this distinction. Paragraphs (2) and (4) of section 15 will be deleted. Moreover for the avoidance of any doubt, the section will expressly apply to offers and promises in respect of the *future* supply of any services, accommodation or facilities.

Section 15 will also be reviewed to include the offer of correspondence courses and of training and study courses or programmes. Under the present law, it is not clear that these matters come within the ambit of the Trade Descriptions Act.

## CHAPTER V

### LABELLING AND MARKING

A vital element in any Government's consumer policy is the taking of measures to improve consumer information. In a free market economy traders can generally compete freely so that the consumer may be helped to obtain the best goods for the lowest prices. For this purpose, the consumer has to be placed in a position to evaluate and compare the various offers and consequently make the most rational and advantageous purchases.

One finds however that the one-sided, frequently self-serving information by traders may be unsatisfactory for various reasons and may confuse rather than guide consumer choices. The law can intervene to require traders to provide consumers with objective, correct, useful and verifiable information on the goods offered for sale. A proper law on labelling and marking should permit the imposition of rules on quantity standardisation and net contents marking. Price marking is also important, but it is generally already provided for in our legislation.

The present state of our law on the matter of labelling and marking is not a totally unhappy one. On the contrary we have a considerable number of laws and regulations on the

strength of which various labelling and marking provisions are in force, including the Supply and Services Act, the Food, Drugs and Drinking Water Act, the Medical and Kindred Professions Ordinance and the Weights and Measures Ordinance.

The diversity of the various enactments and of the authorities empowered to execute them have to be taken into account in any new attempt to streamline and simplify the position regarding labelling and marking of goods. One has to avoid causing duplication and possible inconsistencies.

Obviously, in view of the unending variety of available products, any workable approach has to limit itself to a number of rules of general application, leaving the enactment of additional specific requirements for particular products or class of products to the statutory Consumer Protection regulatory body. Such disparate articles as canned foods, detergents and cigarettes merit different regulations, mirroring the variety of consumer interests being safeguarded, such as health, safety, product quality and proper use.

This will necessitate a substantial extent of delegated authority, which may be too great a responsibility for one body to assume. Consequently it is proposed to retain unchanged the responsibility of the Health Department and other associated bodies, such as the Food Standards Board,

for food, pharmaceutical and related products.

The Consumer Protection Authority shall be entrusted with the responsibility to propose rules for other classes of products. In carrying out this responsibility the Authority would be able to call upon the expertise available in other Government Departments and the University. As the Authority would also be accorded a general power to intervene in any matter of consumer interest, it will be able to monitor the level of success achieved by the other authorities involved, and to submit proposals for additional measures as it may deem fit.

The Parliamentary Secretary responsible for Consumer Protection acting on the advice of the Consumer Protection Authority shall be empowered to issue regulations imposing labelling requirements in respect of any article which is sold or offered for sale to consumers. The regulations can require that the label on a product or its packaging shall indicate such details as may be considered appropriate from time to time.

These details may include:

- (a) the full name and business address of whoever manufactured, imported and/or packaged the product;
- (b) the composition, weight, measurement, volume, size, number of pieces, or similar or related characteristics;



(c) other characteristics which could assist the consumer in assessing the value, use and quality of the product.

The law shall require labels to be conspicuous, easily discernible and clearly legible. For this purpose, regulations may be issued to regulate the type of labels to be affixed, the place where it shall be affixed and the language or languages in which the labels are to be worded. Vague or semi-concealed labelling will not be considered acceptable but will amount to a breach of the relevant regulation. Needless to say, labelling requirements would have to be tailored to the particular type of product involved.

It shall be prohibited to sell or to offer for sale products which are either not properly labelled in accordance with the relevant regulations or whose labelling contains incorrect information. Violation against the law shall be strict liability offences requiring no proof of malicious intent, knowledge or recklessness on the part of the offending trader.

The officials authorized by the Consumer Protection Authority shall have access to all the places where any product affected by any regulation is produced, stored, transported or sold. Such access is deemed necessary to verify that the legal requirements are being complied with and that the information indicated on the product's label is

correct. The officials will be entitled to take samples free of charge for verification and examination and they can request any information, considered necessary to carry out their duty, from the producers, suppliers and their employees. Any information so obtained shall, except for the purposes of the law, be kept strictly confidential.

Can labelling requirements be imposed also on traders supplying services to consumers? Services, unlike goods offered for sale, are intangible and consequently one finds it difficult to conceive the labelling of a service. Perhaps it may be thought that information on services should be more properly governed by the law regulating the formulation and content of standard contracts and by the law regulating the advertising of services. The law can intervene to make it obligatory to have the information usually indicated on labelling incorporated in service agreements and in relative advertising or other publicity material. Labelling requirements in respect of services should be restricted to requiring suppliers of services to provide customers with various relevant information, a precedent for which is found in the Door-to-Door Salesmen Act, where salesmen peddling doorstep offers for the supply of services or facilities are obliged to disclose a series of details and contractual terms to the customer.

Modern marketing techniques often offer the consumer attractively and glossily packaged articles, where the

emphasis is more on the packaging than on the article itself. Sometimes the packaging occupies an unduly large proportion of the item offered for sale, so that concealed within an eighteen by twelve inch attractively packaged box, one may discover some two lonely ounces of perfume. Among other abuses analogous to disproportionate packaging one finds unduly large caps and lids and incomplete filling.

This mode of deviating the consumer's interest can not only lead to a great wastage of materials but can induce a consumer to purchase goods for the wrong reasons and to pay more than he would otherwise sensibly pay had he been presented with the correct information and presentation. Although there is no doubt that the packaging and wrapping of products shall remain important elements in the marketing of products, the correct emphasis has to remain on the true worth, utility and value of the item being offered for sale.

Adequate consumer information must here play an important part, at least in the long term. Consumers have to be guided to examine such articles critically and to avoid making wrong purchases. Under present law, overpackaging by itself is not a violation of any law and does not carry any civil law implications, unless it amounts to fraud or to a false trade description.

To counter abuses and deceit arising from such features as excessive packaging of products, the law will state that

pre-packaging must not be overdone or designed in such a manner as to mislead or induce the consumer into believing that the package contains more than its actual net weight, size or dimensions.

The Consumer Protection Authority should have the power to intervene in the market and to request the repackaging of particular products. Failing such repackaging the Authority could order the removal of the offending article from the shelves and shop windows and prohibit its sale. The power to be granted to the Authority shall be used to curb instances of excess and clear abuse. This is new ground and one would need to proceed with caution.

## CHAPTER VI

### ADVERTISING

The few provisions governing unfair competition in our Commercial Code seek to protect traders not consumers. This may not be the proper occasion to suggest amendments to the Commercial Code, although the need for some updating is quite clear.

We already have the Trade Descriptions Act 1986 which makes a criminal offence of misleading or deceptive advertising. However the existing rules are inadequate and there are no provisions for compensation or for any other form of private law remedy.

It is proposed to fill this legislation void. Among the main principles that shall inspire the new law against deceptive advertising are:

- (a) the consumer should not be misled;
- (b) all advertised information should be correct;
- (c) the trader should be capable of justifying his factual claims;
- (d) a remedy under the Civil Law should be available;
- (e) provision should be made for the publication of corrective statements at the advertiser's expense.

It makes no practical sense to require that advertising should present relevant and helpful product information. As a general principle, there should not be direct interference or control over the content or method of advertisements, except to prohibit false factual claims and other misleading information. There can be no attempt to restrict or impose rules on fantasy, extravagance and wit.

On the other hand, it is possible to control, even in some detail, the labelling of products and to require that certain goods are to be presented complete with relevant and helpful information. The law can here conveniently intervene and lay down what and how certain important data is to be presented for the better information of the shopper.

A box of chocolates will illustrate this distinction between advertising and labelling, and why different rules have to apply.

The advertisement may show, for instance, that an ambassador's grand reception will be a failure unless huge quantities of a particular brand of chocolates is available. In an emergency, the chocolates would need to be brought over by helicopter. The information given on the box would demonstrate a different emphasis. It would probably show, preferably in order of importance, the various ingredients which make up the product, together with the name of the manufacturer, the place of manufacture, the net weight, the

production date and the suggested consumption date.

Clearly, the law will find it easier and more functional to try to impose mandatory information standards for labelling than for advertising. In the latter case, regulation would take a different shape: preventing excesses, countering false factual claims, banning comparative advertising, requiring warnings to be inserted in respect of pharmaceutical products, cigarettes and other articles which may affect the consumer's health or safety.

There are of course disparate types of advertisements and advertising methods. The more an advertisement seeks to present factual claims (e.g. "Winner of the Manufacturers' Fridge of the Year Award for 1990"; "Best selling washing machine in Malta during 1990"), the more the law can intervene to prohibit or to qualify such claims where these are blatantly false, deceptive or unduly exaggerated.

There are various advertising techniques which though not completely fair, honest or objective, do not quite merit blanket legal prohibition. The consumer knows well enough that advertisements puff products not describe them; that what purports to be the testing of a product is really artificial, and can lead only to a foregone conclusion obvious from the start; that endorsements of products by well-known personalities are usually obtained in return for payment and not motivated by true experience or enjoyment of the product.

There is a borderline here nevertheless across which the advertiser in his zeal should not stray.

It is proposed to keep the legal control of advertising to a minimum, but instead to grant the Consumer Protection Authority general power to supervise all advertising and to restrain its more undesirable forms. The law may also provide for temporary suspensions of particular advertisements to allow a period of time during which the Authority can verify factual claims which appear dubious.

The Consumer Protection Authority shall have a general power to order the cessation of advertisements considered misleading or unfair to consumers. The Authority shall, as in all other matters, give reasons for its decision. In addition to the control by the Consumer Protection Authority, efforts shall be made to encourage voluntary control of misleading advertising by self-regulatory bodies in terms of appropriate Codes of Practice.

The Authority shall, depending on the circumstances of each case, have the power to require an advertiser to furnish evidence as to the accuracy of any factual claims made in advertising. Such a power is exercisable at the Authority's discretion. The Authority can decide that the factual claims are inaccurate and/or that the evidence submitted is inadequate or inconclusive.

The Authority will of course be responsive to consumer complaints regarding advertising considered misleading or



unfair and may ask the advertiser to justify or substantiate factual claims presented, even prior to publication.

If the Authority decides that the advertiser has failed to justify or substantiate such claims, it can take various forms of remedial action. It can request the amendment of the advert or order its temporary or permanent withdrawal; it can also request the advertiser to issue at his own expense corrective advertisements to counter misleading features contained in the original advertisement.

Advertisements should always be prepared with a sense of responsibility to the consumer. The advertiser will be held primarily responsible for the observance of the relevant provisions, and advertising agencies will not as a general rule bear responsibility for the content of advertising.

Advertisements should not try to exploit weaknesses, fears or superstitions or to exploit credulity or lack of experience or knowledge on any particular matter, and they should not directly or indirectly encourage unsafe behaviour or products and particular care is to be taken when products are directed at children to ensure suitability and safety of the product.

One regrettably frequently recognizes advertisements surreptitiously concealed within apparently innocuous and

objective newspaper reports or broadcasts. Concealed advertisements mislead consumers by their omission to disclose that they have been placed by business enterprises. This amounts to a deceitful and unfair trade practice. It is therefore proposed to prohibit such advertisements, and also to hold the publisher or broadcaster responsible not merely for transmitting any such advertisement but for any false statement contained therein.

Such measures can of course only be taken within a context of absolute respect for the communication media's right to freedom of expression and public airing of views and comments.

The Broadcasting Ordinance 1961 contains a few references to the regulation of advertising and the Broadcasting Authority in the early years of its existence adopted guidelines on the subject. These guidelines enjoy no legal effect. Section II of the Ordinance states that the Authority may appoint a committee to submit advice *inter alia* on "standards of conduct in the advertising of goods or services". No substantial measures are known to have been taken.

However one should note rule number 1 contained in the Third Schedule to the Broadcasting Ordinance. This states: "The advertisement must be clearly distinguishable as such and recognizably separate from the rest of the programmes".

This rule supports the principle that consumers should not be surprised and deceived by advertisements cunningly slipped into an apparently untainted programme.

The law shall additionally prohibit disguised business sales, namely the practice of seeking to sell goods to consumers without disclosing that the goods are being sold in the course of business. The consumer may in this way be induced to believe that he is not transacting with a trader and that consequently his legal rights as a consumer do not apply. The law will therefore oblige any person seeking to sell goods in the course of a business to make this fact clear in any advertisement.

This may also be the appropriate occasion to consider whether claims or promises of fact contained in advertisements should be considered as constituting a term of the contractual relationship entered into between the trader and the consumer. Once a consumer proves that he was induced to enter into the contract by any such factual promise or claim, he will have the right to consider such promise or claim as a contractual undertaking on the part of the trader forming an integral part of the contract with the consumer.

Alternatively, it is proposed that all descriptions, qualities, assurances and other characteristics given or indicated in advertising materials and media shall be

considered to form an integral part of the individual contract with the consumer so that the latter can resort to legal remedies should the article or service supplied fall short of the promised characteristics. In this way, consumers can henceforth safely place their faith in the qualities extolled in advertisements.

Proper allowance would have to be made for promises which are too blatantly extravagant or not intended in any way to be considered factual. The burden of showing this would be on the trader. The adoption of such a proposal should further discourage the insertion of sly, baseless or reckless claims in advertisements.

Practice has disclosed that traders who resort to comparative advertising inevitably belittle or denigrate their competitors. Apart from the unjust financial damage that can be caused to rival traders, one finds that this form of advertising usually gives the consumer an unfair and an unbalanced presentation of information and factual claims. The comparison is inherently unfair because statements are presented about the products or services of competitors without these having any simultaneous right of reply or explanation.

Moreover the advertiser emphasises only selective features of his product which are allegedly better than those of his competitors, and play downs or ignores those features of his

product which are inferior.

In the final analysis therefore there is a case for the absolute prohibition of comparative advertising.

Provision should be made to distinguish between advertisements addressed to the general public and those addressed to a particular, specialist audience, such as advertisements placed in a medical journal, where the readers are assumed to have a particular developed skill or knowledge. Such an advertisement may be misleading to an ordinary person to whom it may not be completely comprehensible, though not misleading to the professional reader. Regulations should safeguard the freedom to place such advertisements in circumstances where it could have been safely assumed that an unskilled reader would not normally be exposed to it.

Any new law regulating methods of advertising will not be an attempt at censorship. It is envisaged that remedial action shall be resorted to only in a few isolated cases, where decent limits of competition and correctness of information are violated. Nobody is interested in reducing advertising to a stale narration of cold facts; the extravagance, wit and humorous exaggeration present in much advertising, will remain untouched, unless they degenerate into deception or wrongful misinformation

## THE CIVIL CODE - A COMMENT

The Civil Code is not hostile to the consumer, nor is it friendly. It is simply indifferent. The Code is now over a hundred years old. Its drafters had been more concerned with the promotion of freedom of contract and trade than with the emerging figure of the consumer.

There are three main areas of the Civil Code which are of interest in any discussion on consumer protection:

- (a) the principles regulating the supply of goods and services;
- (b) the law of contract;
- (c) the principles regulating liability for damage caused by defective products.

Each of these subjects will be reviewed and proposals for legislative reforms submitted.

## CHAPTER VII

### SUPPLY OF GOODS AND SERVICES

#### The Supply of Goods

The Civil Code devotes the entire Title VI, comprising sections 1346 to 1484, to the law of sale. The more relevant sections are sections 1424-1432 which deal with the 'warranty in respect of latent defects of the thing sold'.

Briefly stated, the law provides that where a purchaser discovers that an article is defective he can go to court and request to have the sale cancelled with a full refund, or else to have a refund of part of the price while keeping the sale in place. To succeed in obtaining either remedy the purchaser has to prove the following elements:

- (a) that the article is defective;
- (b) that the defect is serious;
- (c) that the defect is a hidden defect and not an apparent one;
- (d) that the defect existed when the purchase was made.

Additionally the purchaser has to institute court proceedings within one month from the date when the purchaser discovered the defect or could have done so. In

the case of immovable property, this period is lengthened to one year. This limitation period is one of forfeiture and not prescription and consequently cannot be suspended and renewed.

Experience has repeatedly demonstrated that the forfeiture period is much too short; consumers have time after time failed to obtain a remedy because the one-month period had elapsed. It has sometimes been the case that the consumer effectively brings the defect to the vendor's attention before the expiry of one month, but then fails to take any further action assuming that he has done enough to retain his rights at law.

Admittedly there have been cases where the Courts have recognized that where a trader has entered into negotiations to solve a dispute relating to a defective article, he would be thereby entering into a form of personal obligation towards the purchaser, who would therefore not lose all his legal remedies should the one-month period lapse without the dispute being solved. The matter however is very precarious, each case has to be seen in the light of its own circumstances and few hard and fast rules can be drawn with any measure of certainty.

It is therefore proposed to effect amendments to the law so that the period of forfeiture will be increased to six months. This should prove to be a long enough period for



the purchaser to try to settle his grievance outside the court without endangering his legal remedy.

One may also consider introducing a new principle stating that whereupon receiving notice of a defect, a vendor's action gives rise to a legitimate expectation on the part of the consumer that the matter can be settled amicably, then this will have the effect of suspending the period of forfeiture. In such an event, the entire period of forfeiture will commence from the date when the vendor expressly or implicitly terminates or withdraws from the negotiations for an arrangement with the purchaser.

The law permits the vendor to qualify or withdraw the legal guarantee against latent defects, and the purchaser has no legal remedy where the defect is small or was visible at the date of purchase. Neither can the purchaser request that the defective object be repaired or replaced, unless the vendor had bound himself to do so under a so-called 'guarantee' or 'warranty'.

As a general rule, a consumer would suffer greater loss and distress where the defect is discovered in an article brought as being "new", rather than in one which is sold as used or second-hand. For this reason it may be necessary to distinguish between the two cases and to introduce a new legal principle to the effect that where an article being sold is new, then the legal warranty against serious hidden

defects cannot be reduced or excluded. Additionally it will be prohibited for the vendor to insert contractual clauses purporting or attempting to reduce or exclude the legal warranty. If the insertion of such clauses is permitted, a purchaser may be misled as to his legal rights. The Consumer Protection Authority will therefore be given the power to prohibit the adoption of such clauses in agreement presented by sellers of goods to consumers.

On the other hand, it would seem more practicable to leave the possibility of requesting the repair or the replacement of a defective article to be regulated by Codes of Practice adhered to by the traders concerned.

The related problem of the availability of spare parts and facilities for the repair and servicing of consumer durable goods is a real one. There is no legal duty as such for a business enterprise to provide spare parts and servicing facilities, the two elements of what is usually referred to as "after-sales service". Although the availability of both is often promised in the advertising material of enterprises, it is not clear under our present law whether any contractual force can be attributed to such an undertaking, which is usually not confirmed or incorporated in the individual purchase agreement offered to the consumer for his signature.

For this reason, a proposal has been made, earlier in this

White Paper, to give contractual effect to all promises and assurances presented by traders in their advertising or other promotional material.

It is often remarked that it is not practicable to impose an obligation on all suppliers to provide after-sales service. However, in view of extensive consumer dissatisfaction in this area, it is time to examine how the legislator can intervene to ensure an acceptable standard of after-sales service availability.

The matter may be dealt with in two ways:

- (a) the law can impose a mandatory obligation on suppliers of durable consumer goods to provide satisfactory after-sales service, including the supply of spare parts, for the duration of the normal average life of the goods supplied. This latter qualification would seem necessary, for the sake of fairness, so as not to require business enterprises to have to stock parts which may not even be available from the manufacturer. Whether the obligation should extend solely to importers or also to all distributors is a matter which requires investigation.
- (b) the provision of satisfactory after-sales service would also be a major concern in any discussion on the formulation of Codes of Practices with importers and distributors.

## The Supply of Services

The Civil Code provisions relating to the supply of services are limited to a few inadequate and antiquated rules contained in sections 1633 to 1643. The provisions do not reflect at all the important role which services play in a modern economy, helping consumers to achieve a more comfortable standard of living. Everyday there are numerous persons engaged in providing a disparate variety of services to consumers for profit. Among them we find hair-dressers, house-builders, car-repairers and dry-cleaners.

The engagement for the provision of a service to a consumer for a price amounts to a contract no matter how informal the arrangement may have been. There are no formal requirements for the validity of such arrangements, and they are frequently concluded verbally.

The law of contract therefore applies to the present topic and one must therefore refer to what has already been proposed earlier in this Paper concerning the adoption of unfair contractual clauses and the Consumer Protection Authority's power to intervene to ban acts carried out by traders detrimental to consumers.

Besides the present existing provisions in the Civil Code, a

number of principles have been adopted by the Court, in the course of cases which have been presented before it. In fact it may be fair to state that the consumer has found most of his protection not in the written rules of the Civil Code but in legal principles introduced by judicial interpretation and practice.

Thus we find the Courts declaring

- (a) that a supplier of services guarantees his workmanship and skill to carry out the job properly;
- (b) that a customer is obliged to pay the full price only if the agreed job is executed satisfactorily;
- (c) that no price is payable for a job badly done;
- (d) that a supplier of services is liable even for slight negligence in respect of damage caused to his customer and that public policy does not permit exclusion of liability.
- (e) that a supplier of services must ensure that he can successfully carry out the required engagement and cannot demand payment for a task which he knew would not serve the customer;
- (f) that a supplier of services should resist his customer's instructions if they are contrary to the rules of his art or trade;
- (g) that a supplier of services has no right of retention ('ius retentionis') over a customer's property unless the task involved the provision of a substantial amount of spare parts or other material;

(h) a supplier of services should always deliver the customer's property on which he has worked before he can request payment because the customer must have the opportunity to verify that the job has been properly done.

It is proposed to formally confirm these principles by incorporating them within the written rules of the Civil Code.

There are two matters which cause considerable consumer discontent and merit close examination and legislative attention. These relate to

- (a) abuses in respect of deposits prepaid to suppliers of services;
- (b) difficulties arising out of the contractual remedy provided by section 1068.

Traders often request their customers to pay a deposit on the agreement. The contractual risks in this matter are usually all on the consumer. Standard form agreements presented by traders promote their rights in respect of deposits and part-payments, but remain silent on the consumer's rights, for example as to whether he should receive compensation if the work is done badly or completed after the established deadlines. (Sometimes, one finds that the work is not *started* by such deadlines, let alone completed.)

The request for a deposit is often justified as a demonstration of the customer's true commitment, as a means whereby the trader can purchase the materials needed for the task, and as a partial advance payment. Sometimes a deposit is given despite the absence of a written agreement laying down clear deadlines for the progressive finalization of the requested service. Here the risks for the customer increase.

Early completion of the service requested is often promised as a vital inducement to clinch a deal. However it is an unfortunate fact that many suppliers of services fail to abide by agreed work programmes and deadlines, and spend more energy in concocting excuses for their omissions than in completing their task.

Often, therefore, matters go astray; the task is not completed or is only completed in a small part, with the customer left with nothing better than great frustration and deep dissatisfaction. It would appear that the customer's remedy at law under the law of obligations is to ask the Court to declare the agreement resolved on the ground of the trader's breach of contract. If he succeeds - possibly after a number of years - to obtain the declaration, he would be entitled to a refund of his prepaid deposit and to whatever actual material loss he can prove to have suffered as a direct consequence of the trader's breach.

The Courts have often, even in such situations, and irrespective of the clear breach of contract, permitted the trader to collect payment for his partial fulfilment of his obligations. This has in effect meant that the customer departs forever with his prepaid deposit.

Matters are severely aggravated where the trader becomes insolvent or bankrupt. In such cases, the customer finds himself a complete loser; he discovers that he cannot recover his deposit even where the work has not been started, and that it is unprofitable to sue for breach of contract as no funds are available from the trader's estate (if any) for the unfortunate customers.

This situation is a deeply distressing one, and has given "service" a bad name in the market. The problem seems to be particularly felt where orders for the manufacture of furniture are involved. It should not however be thought that the problem concerns exclusively traders engaged in the provision of services. It is an abusive practice that regrettably rears its head also in the sphere of the sale of goods, where customers ordering a household appliance, a vehicle or other consumer goods are promised early delivery and are requested to pay a deposit.

As already stated, as part of the legislative reform, it is being proposed that a consumer should only be obliged to pay where the service requested is carried out satisfactorily



and is completed in full. (One may however consider whether some limited qualifications to this general proposition should be adopted in order to avoid causing undue hardship to traders who are in good faith.) As a corollary of the general rule, once the price is not due, any prepaid deposit would have to be refunded without delay to the customer.

Other more specific measures of protection that the law may provide to customers who have paid deposits or partial advance payment to traders include the following:

- (a) if the trader fails to refund the deposit where he is legally bound to do so, he shall be guilty of the offence of misappropriation under the Criminal Code;
- (b) where the trader is a company, the directors shall be liable to be disqualified from acting as director in terms of the Commercial Partnership Ordinance;
- (c) the directors may also be held personally liable to pay the relevant amount to the consumer;
- (d) the customer may be indicated as a privileged creditor in terms of Title XXIII of the Civil Code on the strength of which he shall have a prior claim over other creditors to a part of the trader's estate equivalent to the prepaid deposit. In this way, the consumer will not see the money paid to a trader utilized to pay other secured creditors;
- (e) traders can be prohibited from using a prepaid deposit for working capital or for any other purpose which may endanger its return to the customer.

As already remarked earlier in this White Paper, one may have to distinguish between consumer transactions and others. The latter would exclude transactions between private persons, and services required by a customer in connection with his business.

Consumer needs vary in relation to the disparate services offered to him on the market. Drycleaners and house-builders present different risks and problems. The Consumer Protection Authority would, as a long-term objective, review and monitor these risks and problems presented by the different trades and shall investigate and propose measures which may be taken for the protection of customers. The Authority would, for this purpose, endeavour to discover what consumers complain about and how the traders involved propose to remove the causes of such complaints. Accordingly, the Authority would also examine the feasibility of negotiating effective Codes of Practice for the different trades. This task, needless to add, would be a considerable one.

## CHAPTER VIII

### UNFAIR CONTRACT TERMS

This is hardly the place to venture into a full discussion on the evolution of contract and contract law. The Civil Code enacted in the 19th century sought to promote freedom of trade by securing freedom of contract. As a general principle, the Code treats all contracting parties as equals, with each being left free to negotiate the terms more beneficial to him. In practice however consumer contracts have evolved quite differently.

Freedom of contract has frequently meant freedom of one party to impose and dictate his own terms to another party who enjoys economic and bargaining inferiority. The consumer finds himself having to choose from preformulated contracts over whose drafting he has exercised no influence. This has spawned a variety of unfair and onerous contract terms embodied in standard form contracts designed by enterprises, saddling the consumer with all the contractual risks while undertaking the minimum possible commitments.

Traditional legal theory assumed that contracting parties

are equal and freely bargain among themselves the terms and conditions of their agreement. This theory has found itself in contrast with the function and features of standardized contracts, particularly those presented to consumers, in today's market economy. In practice the consumer often finds himself able to choose between different traders but there will hardly also be a choice of terms. Consequently it is unreal to claim that a consumer has a choice, an alternative to accepting the terms presented to him. This is particularly true of preformulated standardized contracts which tend to reflect a superior bargaining position and misuse of the contractual form.

A legislative reform is therefore being proposed to protect the consumer's legitimate rights in such situations where his inferior bargaining position can and has been regularly exploited. The consumer is found to be only slightly aware of the meaning and scope of the clauses contained in forms of agreements presented to him and which have been carefully and deliberately drafted by specialist professionals, intentionally to favour the trader. The terms of the contract are frequently found to be unfair or improper, sometimes couched in small print and barely intelligible language. Freedom of contract is then used to impose terms reflecting and promoting the superior economic and organizational resources of the trader. The consumer does not have the means to counter-balance the supplier's advantages and as a consequence he finds himself unable to

negotiate or to influence the terms of the contract.

It is proposed to tackle the question of unfair contract terms at two different levels:

- (1) The Civil Law would stipulate that certain unfair contract terms unduly detrimental to a consumer's legitimate interest are to be considered null and without effect as if they did not form part of the contract. The law would define clearly which types of terms would come within the range of this provision so as to avoid the uncertainty that would otherwise inevitably arise.
- (2) The law creating the Consumer Protection Authority would grant it the power to prohibit the use in standard contracts of terms deemed unfair and unduly detrimental to the consumer's legitimate interests. The law would lay down proper guidelines and parameters for the use of this power. Violation of the prohibition would amount to a criminal offence.

The Authority shall therefore have the right to review standard contracts formulated by commercial enterprises and shall have power to prohibit the adoption of terms and conditions which are deemed unfair, unreasonable or which unduly prejudice the consumers' legitimate interests. It is envisaged that this power will be used sparingly, cautiously and only after appropriate study and discussions with the interested parties. The Authority will first endeavour to

negotiate the deletion or dilution of the unfair contractual terms with commercial enterprises formulating such contracts.

The law shall define what factors need to be taken into account by the Court and by the Consumer Protection Authority for the purpose of applying the proposed measures. These factors refer both to the form and substance of the contractual terms and include the following:

- (a) whether the wording is clear, precise and legible;
- (b) whether it has been properly and adequately brought to the customer's notice;
- (c) whether it gives an unjustified advantage to the trader who has formulated it and whether it is fair and reasonable in the circumstances;
- (d) whether it allows the trader to render a performance different from that which the customer reasonably expects from the contract;
- (e) whether it allows the trader to exclude his liability for non-performance of his obligations;
- (f) whether it seeks to restrict the trader's liability under the law for economic or physical loss or damage to the customer or other user;
- (g) whether it unfairly excludes the jurisdiction of the Courts of Malta;
- (h) whether aggressive methods of sales promotion hindered the free evaluation by the customer of the contractual clauses;

(i) whether it unduly reflects the superior bargaining position of the trader as against the weaker position of the customer and whether there is a fair balance between the rights and obligations of the respective parties.

One may also consider whether the Courts should be given the authority not simply to declare a contractual term invalid and ineffective but also

- (i) to reduce the effect of the contractual term in question; or
- (ii) to interpret the clauses in question against the trader who has stipulated them and in favour of the consumer (the "contra proferentem" rule).

In both these instances, the contractual clause in question would be retained in existence diluted of its unfair or detrimental effects.

The proposals constitute a partial departure from two important premises underlying the Civil Code - freedom of contract and the equality of contracting parties. The new rules will apply exclusively to consumer transactions, particularly those reflected in standard form contracts.

Admittedly the new provisions might introduce a measure of uncertainty but there are various similar areas in the law. A balance needs to be established between attaining contractual justice and reducing uncertainty.

Precedents for state or legislative restrictions on freedom of contract in particular situations already exist. One need only refer to contracts regulating the relations between Employer and Employee, between Landlord and Tenant. The Civil Code already affords protection to various classes of persons who are perceived to be in a weak and exploitable situation. Thus we find the law limiting the contractual risks of the minor and of incapacitated persons (sections 967-970), the pledgee (sections 1973,1981) and the married woman (section 1933). The law also provides a remedy for a person who is induced to contract by fraud or violence (sections 974-981).

The existing law already recognizes the possibility of an abuse of rights, that a right arising under the law can be held to have been improperly exercised. The person who exercises a right outside "the proper limits" answers for the resulting damages (Section 1030 of the Civil Code). Extending this principle, the law shall proceed to restrict an exercise of freedom of contract outside the proper limits, and, for this purpose, shall but shall also seek to define the parameters of 'proper limits'.

The suggested new rules create a further qualification to the general rule declared by section 992(1) of the Civil Code. "Contracts legally entered into shall have the force of law for the contracting parties". They may however be viewed as an extension or application of the principle of good faith which permeates the Civil Code and which is



stated expressly in the first words of section 993:

"Contracts must be carried out in good faith..." The new rules shall attempt to enforce good faith also in the drafting and signing stages of a contract.

To some extent, one may also consider this to be a development of section 1003, which provides that where the literal sense of a contract contrasts with the parties' common intention, the latter shall prevail. Therefore one would have to consider what the customer really intended to agree to. A case in point are hire-purchase agreements where the customer's sole intention would normally be to purchase and acquire whereas the supplier presents for his signature an agreement with a prominent 'hire' element whose effect is that of placing the customer in a contractually weaker position.

One envisages that judicial practice and interpretation will provide traders with further guidance for the proper formulation of consumer contracts. The Consumer Protection Authority shall be responsible to monitor the working of the law and shall, where necessary, recommend amendments and other measures.

A few more comments on the hire-purchase agreement would be in order at this point, as it is a standard form agreement extensively used by suppliers in their daily transactions with customers.

A typical hire-purchase agreement would stipulate that a supplier hires goods to a customer who has an option, usually exerciseable at the later stages of the contract, to purchase the goods. The supplier has the right to take back the goods should the customer default on his payments, in which case the supplier can also retain all the payments already effected by the customer.

In many cases the consumer discovers that he has also signed an agreement with a finance company without having had any direct dealings with it and is requested to affect a schedule of regular payments by means of bills of exchange. This practice renders it more difficult to a customer to suspend payments if he discovers that the goods are defective or not of the agreed quality. The supplier and the finance company are frequently found to be closely related.

Undoubtedly the credit function of this type of agreement is very important as it permits people to acquire goods which they otherwise cannot afford and can thus enjoy a higher standard of living. However the forms of hire purchase agreements that have been moulded by suppliers and presented to customers are regularly one-sided, safeguarding solely the supplier's position and burdening the customer with all the risks and disadvantages.

Moreover, very often a customer does not even fully realize what amount he will end up paying in interests and charges.

Often charges are imposed without being explained or justified, and sometimes compound interest is charged without the consumer even noticing.

The cases that have arisen have created problems to the Court. The concept of hire purchase is not known by our Civil Code, but there would not seem to be any provision which excludes or prohibits such a type of contract.

In certain instances where a customer was going to suffer undue hardship by virtue of the strict terms of the hire-purchase agreement, the Courts have often, though not always, sought to devise ways of protecting the consumer. To mitigate the hardship of losing both the goods and all payments made, the Court has sometimes chosen to view the matter as falling within the notion of a penalty clause where partial performance has been effected. In this manner, the Court assumed the authority to reduce the 'penalty-clause'. This approach is uncertain based as it is on a fiction.

On other occasions, the Courts have allowed a customer time, in excess of that allowed by the contract, to settle arrears and thereby circumvent the stringent consequences envisaged by the agreement.

Judicial practice has however been inconsistent and there are several recorded cases where hire-purchase agreements have been enforced without hesitation and without any

attempt to mitigate the customer's losses.

The phenomenon of the hire-purchase agreement is therefore a complex one and merits deeper examination. It is proposed that measures should be undertaken in respect of the following points either through direct legislative reform or through administrative initiatives by the Consumer Protection Authority:

- (a) the 'hire' element - once a customer expresses a wish to buy goods, it is bad trade practice to impose a hire-purchase arrangement, often without the customer appreciating the difference;
- (b) once a considerable part of the payment schedule has been settled, the supplier's right of re-possession in the event of default will lapse;
- (c) the imposition of interest and other charges needs to be reviewed to exclude possibilities of abuse;
- (d) the employment of bills of exchange in consumer transactions is as a principle detrimental to consumers' interests. It needs to be considered whether this practice should be allowed to proceed. Bills of exchange properly belong to inter-trader relations; they were devised for use in commerce. In fact the law governing bills of exchange is the Commercial Code rather than the Civil Code. Their use in consumer transactions places the customer in an unacceptably inferior contractual position;
- (e) a mandatory obligation will be imposed on suppliers to

furnish the customer with a complete copy of the agreement and with a detailed schedule showing separately the capital, interest, commissions (if any), the penalty for late payment and the benefits (if any) of early payment.

The matters discussed and the proposals submitted in respect of unfair contract clauses and standard form agreements are all applicable to hire purchase agreements. If the general measures suggested earlier are adopted, a substantial exercise of re-thinking and re-drafting will have to be carried out by traders accustomed to dealing through this form of agreement.

## CHAPTER IX

### PRODUCT LIABILITY

One can define product liability as the liability of the manufacturer or seller to the consumer or user who suffers damage, physical, economic or both together, as a consequence of a defective product. No specific part of our law deals with this subject which has been the subject of extensive literature these past twenty years.

Product liability can arise either in contract or in delict. Owing to the inherent limitations of the contractual remedy, which arises out of the law of sale, the principles of law regulating delictual responsibility play a more important rule in any discussion of this subject. For this reason the emphasis in this brief review will be more on delict than on contract.

The contractual remedy is largely encompassed in section 1429. This renders the seller, who is aware of a defect in an article being sold, liable to compensate the purchaser for any damage that the product may cause. If the seller is not aware of the defect, he is not held liable for damages. The contractual remedy is therefore closely inter-connected with the notion of latent defect.

With regard to the seller in good faith, our courts have always adopted a literal interpretation and damages for physical or financial loss have not been awarded.

The seller who was aware of the defect often enjoys, in practice, a similar immunity from liability for damages. The onus of proving that the seller was in bad faith is on the purchaser who would very infrequently be able to produce sufficient proof that the seller actually knew of the defect. This as is explained elsewhere is a very unhappy state of affairs for the injured purchaser. No consideration is here given to such factors as whether the seller was negligent or reckless in effecting the sale, whether on the basis of his superior knowledge and experience he should have detected or at least suspected the presence of a defect. Legal commentators tried their best to soften the hardship created by these provisions, but the law remains clear, unambiguous and unsatisfactory.

One is constrained to ask: once the buyer has the duty to check and examine the produce before buying it (section 1425) should not an equivalent duty of vigilance burden the professional seller? Our Code of course finds no distinction between a seller who is a private person and a seller who is a professional trader, such as an importer, wholesaler, retailer. This failure to discriminate between the two classes of sellers runs parallel to the Code's failure to discriminate between professional buyers engaged in trade and private persons who buy for their personal use,

leading to incongruent results. The professional seller, with his superior trade experience, shares no affinity with a private inexperienced seller. Similarly, a private buyer, with his inferior knowledge, should not bear the same contractual risks as the professional buyer.

There is much scope for amendment and improvement in this part of the Code. One proposal is for the professional seller to be presumed to know that a defect existed, and so it would be up to the seller to prove that he did not know and could not reasonably have been expected to know about it. Modern legal thinking has proceeded even beyond this point and would have such a presumption an absolute irrebuttable one. In effect this means that the professional seller of a defective product would be deemed, in all cases, to have been aware of the defect. The result would be strict contractual liability irrespective of fault, so that the purchaser need no longer prove actual knowledge or recklessness on the part of the professional seller.

There are several other problems inherent in this contractual remedy:

- (a) Section 1001 of the Civil Code declares the traditional rule that "contracts shall only be operative as between the contracting parties", and accordingly do not benefit or harm the interests of third parties. A user other than the actual purchaser may find himself without a right of action. This rule is a serious distorting factor in consumer protection law as there



- is absolutely no presumption that a housewife, for instance, makes purchases for the benefit and on behalf of her entire household;
- (b) The law allows the trader to exempt himself from all liability arising from defects of which he is not aware (section 1426);
  - (c) The limitation period is of one month from the date when the defect was discovered or could have been discovered. The period, already too brief, does not commence from the date when the damage is suffered;
  - (d) To succeed in an action for damages, the purchaser would have to prove not just all the elements of the Actio Redibitoria (or Estimatoria), but also the direct causal nexus between the latent defect and the damage. Very often the proof required to bring a successful case is found too tough by the purchaser;
  - (e) The contractual remedy would normally leave the purchaser with no remedy against the person really responsible for the damage suffered, the manufacturer. The so-called "action directe" may be useful, but probably only in theory, as the brevity of the forfeiture period would in practice hamper the exercise of the right of recourse against the manufacturer.

Only one conclusion can therefore be reached in respect of the contractual remedy for product damage - it is too difficult to obtain an adequate remedy and the law creates so many obstacles that it would under normal circumstances

not be worth pursuing. Although it may be high time that this part of the law is brought in line with the realities of modern requirements, it is felt that the actual reforms regarding product liability remedies should be introduced by way of the rules governing delictual and quasi-delictual responsibility, rather than through the provisions regarding the law of sale.

The Civil Code does not contain any special rules on the manufacturer's liability. The general provisions found under the subtitle "Of Torts and Quasi-Torts", primarily sections 1029 to 1038 of the Civil Code, would apply. These provisions establish liability for fault. Without proof of the manufacturer's fault, no liability can be attached to him. This was and still is the basic rule of our law on delictual responsibility for damages.

A reform of these rules is called for on the basis of a new principle that the manufacturer should be answerable for the safety of any products which he introduces on the market. The manufacturer organizes and controls the mode and process of production and as such he can adopt the measures and safeguards that can verify that the product is safe and will present no harmful surprises to users.

The distributor or seller of the product is not in the same position; he has usually no access to or influence on the production process. He rests on assurances presented by the manufacturer and guarantees to the purchaser that the

product is of the quality required by the customer and is defect-free.

The moral responsibility of the producer and of the seller are therefore not on an equal footing. The former is primarily responsible for producing an unsafe article and for placing it on the market. The seller assumes a secondary responsibility for placing the product into circulation throughout his clients' households. However, if the seller knew, suspected or should reasonably have known that the product is not safe, then his moral responsibility increases and matches that of the manufacturer.

Among the major difficulties encountered when considering product liability law proposals are

- (a) how or even whether the law should differentiate between the responsibility of the manufacturer and the distributor;
- (b) making sure that any such differentiation will not hamper, restrict or otherwise adversely prejudice the injured user's right to quick and adequate redress for loss suffered.

Several of the difficulties which hamper an adequate recourse under the law of contract (as delineated above) are not found in an action in tort. Thus the problem caused by the principle of the relativity of contract obviously does not arise, while the period of prescription is of two years,

which can be extended in accordance with the relevant provisions of the law.

However it is still extremely difficult to successfully bring an action for damages against a manufacturer particularly because of the extremely stringent burden of proof. Fault arises out of malice or negligence, an actual intention to cause harm or negligence, lack of attention or skill. The injured consumer would have the burden of proving that the manufacturer was at fault in producing the article which caused damage.

With the increasing technical complexity of productive organizations, a consumer finds it too difficult to bring satisfactory proof of a specific negligent act by the manufacturer. The consumer would not have the necessary access, skill, knowledge or resources to enable him to pinpoint the manufacturer's fault.

Shifting the burden of proof would somewhat facilitate such a consumer action. This approach would require the consumer to prove merely that the product has caused him harm. Precedents for this shifting of the onus of proof can be found in section 1511 regarding the lessee in respect of damage to the thing let, and in section 1630 which refers to the carrier's liability for goods entrusted to his care.

This would create a presumption that the harm was caused by the manufacturer's fault. The consumer therefore need not

directly prove the manufacturer's fault, and it would instead be up to the manufacturer to prove that he was not negligent or otherwise at fault. The presumption would be a rebuttable one.

Experience, particularly in other countries, has shown that the shift in the burden of proof is usually insufficient. Legal thinking during the past ten years has progressed from calling for a shifting of the burden of proof to an outright shifting of *risk*. This would consider the proof that a product actually caused damage to be sufficient to attach responsibility to the manufacturer who would not be entitled to claim that he was not at fault. The rebuttable presumption which was fashionable twenty years ago is now being converted into an absolute, irrebuttable presumption. As a result the manufacturer now faces strict liability and no proof of his knowledge or recklessness need be brought by the plaintiff. The manufacturer is deemed responsible for the damage caused and he should bear the financial risk rather than the hapless user. After all, the manufacturer has created the risk, has placed the product on the market and has reaped the profits. It is both morally fair and logical that the risk of any harm being caused to third parties should be borne by him.

Reference must now be made to section 1037 of the Civil Code. Basically, this section concedes a possible defence to any employer (including therefore a manufacturer) from

claims for damages by third parties. To profit from this clause, the employer-manufacturer has to show:

- (a) that the damage was caused through the fault of an employee;
- (b) that when he had engaged that employee, he had no reason to believe that the employee was not competent.

This concept is usually referred to as "culpa in eligendo", indicating that the employer-producer's liability would arise if he recklessly recruits incompetent workers and these cause harm to third parties. The very possibility of such a defence may be considered an anachronism. Values and priorities have changed and it is felt that an employee should not be encouraged to use his employees to shield himself against liability claims, or worse, to shift the legal responsibility on them. Admittedly the issue is discussed extremely briefly here but the possibility of such a defence being raised is still real under the present law. A producer should always remain answerable for the consequences of a productive organization which he creates and operates, and of which the employees form an integral part. For these reasons, the deletion of section 1037 of the Civil Code should be seriously contemplated.

It may be noted from the foregoing that under the present law, a consumer may discover that he has no effective remedy at all in respect of loss occasioned by defective goods. This deficiency may result from the relativity of contracts

or from the inability to demonstrate that the manufacturer has been negligent. This possible absence of an adequate remedy under the traditional rules explains the various proposals submitted in recent years on product liability legislative reform. Of particular interest is the Product Liability Directive enacted by the Council of the European Community in 1985. Broadly, the Directive promotes the following framework to regulate manufacturer's liability for defective products and consumers' rights in this respect:

- (a) Manufacturers responsible for producing finished products which being defective cause death, personal injury or financial loss shall be subject to strict delictual liability. Accordingly proof that the defective articles caused the damage will be sufficient to render the manufacturer liable to compensate an injured user. The producer is not allowed to exclude or reduce his liability;
- (b) A product shall be considered as defective when it fails to meet the standard of safety which a person should be entitled to expect taking into account all the features of the product including its presentation;
- (c) Distributors of defective products which cause personal or financial loss are to be attributed a lower degree of responsibility than manufacturers and so will not, as a general rule, be held strictly liable in delict. There are however three situations which are deemed to justify attaching strict liability also to distributors:

- where they fail to reveal the identity of the manufacturer of the defective products. Here dealers would face a form of substitute liability, which should encourage them to reveal the identity of the producer;
- where they themselves sell the defective products exclusively under their own distinctive mark or brand name. By presenting himself as the producer, the dealer assumes equivalent legal liability;
- where they themselves import the defective goods into the country where they were purchased. This avoids leaving the consumer with a legal remedy to be sought in a foreign country.

These rules therefore acknowledge the difference in the degrees of responsibility attributable to a manufacturer and to a distributor or dealer. In these particular situations the law withdraws this differentiation and places a distributor on the same plane as a manufacturer. One notes immediately that they are an attempt by the law to guarantee an equitable remedy to an injured consumer in circumstances where the distributors or dealers basically assume the role and consequently also the responsibility of the producer. The third exception is of course very relevant to our circumstances as it might otherwise leave an injured person without any effective remedy locally, the manufacturer's



place of business being situated outside Malta. Rendering the dealer liable obviously makes it much easier for a consumer to obtain an adequate remedy.

A huge responsibility is therefore borne by importers of potentially defective products. It would be reasonable to assume that under a strict liability regime, the importer should review his contractual relationship with the foreign producer or supplier to secure adequate guarantees and indemnities to make good for any product liability claims.

The Directive also proposes that product liability claims cannot be raised after the expiry of ten years from the date when the product was placed on the market. Moreover proceedings for damages in a particular case will be prescribed by a period of three years from the date when the injured person becomes aware of the damage, the defect and the identity of the producer. The producer's liability extends to any person who is harmed by the defective product; whether the person was the purchaser or user of the product is not given importance.

The regime proposed by the Directive reflects the latest thinking on product liability. It guarantees to the injured person a reasonable opportunity to obtain compensation for injury. As we have seen, a similar opportunity is difficult to trace within the rules offered by our Civil Code. The drafters of the Code are not to blame as the concept of

product liability developed concurrently with the technological advances and complexities incorporated in many products made available to consumers today. The average consumer understands less and less the appliances and other articles that he purchases, becoming in the process less capable of detecting an unsafe or defective product.

These new realities suggest the need for a revision of the applicable rules.

## CHAPTER X

### PRODUCT SAFETY

A subject which is closely related to the problem of product liability is product safety. Technical progress and mass production have created products which present a number of risks to consumers. It is bad enough for a shopper to find that he has bought a defective article; it is unacceptable that the article endangers his health and safety. There are few specific rules which deal with product safety under our present law.

Powers exist under the Medical and Kindred Professions Ordinance 1901 and the Food, Drugs and Drinking Water Act 1972 for measures to be taken in respect of food and drug products which may be detrimental to the consumers' health. The latter statute also imposes hygienic requirements on establishments engaged in the provision of food products to customers. The Quality Control (Exports, Imports and Local Goods) Act 1971 empowers the Malta Board of Standards to prescribe minimum quality standards for imported, exported and local goods.

An article can be unsafe in various ways: (a) it can be inherently dangerous; (b) it can become dangerous if

employed for an improper purpose or if used recklessly or if sold without adequate directions for use.

A normally safe product such as a knife can become dangerous if used incorrectly. Put to its proper use, the article is as safe as any household utensil. Other products are dangerous by their very nature or as a result of some deficiency in their design, mode of product or in some other manner; such products would be unsafe even if used properly.

It is intended that the law should be unhesitating, clear and strict in dealing with the selling of articles which are indirectly dangerous. For this purpose the law shall prohibit traders from offering for sale products which can endanger the safety or health of the user even when used in normal or foreseeable circumstances. By 'normal and foreseeable use' one intends the use of an article in accordance with its nature, function and characteristics, and which follows any specific instructions written on the product's packaging or wrapping.

It is proposed that whether or not the producer or supplier actually knew of the dangers inherent in the product, he would still be considered liable. Criminal liability on a strict liability basis will therefore attach to traders who offer such articles for sale.

The Consumer Protection Authority will have the function of

monitoring and investigating products which can fall within the notion of 'unsafe product'. It would do this consequent to complaints and reports and also on the basis of its own initiatives. If the Authority, after carrying out the required verifications, establishes that an article being offered for sale is either intrinsically unsafe or is possibly or probably unsafe, the Authority shall have the power to take the following action:

- (a) to prohibit outright the sale of the hazardous article and to order its immediate removal from the shelves and shop windows;
- (b) to publish or broadcast warnings or other notices as may be deemed appropriate in any media alerting the public to the risks presented by the hazardous article;
- (c) in extreme cases to order the confiscation or destruction of the offending articles;
- (d) where appropriate and possible, to order the trader involved in the production or sale to recall the offending article already sold, and to grant the purchaser a full refund of the price irrespective of any conditions of sale to the contrary;
- (e) to have full access to inspect the trader's premises and business records, to take samples and to demand information.

In order to carry out its function properly, the Authority should be able to intervene speedily to deal with any new products creating fresh hazards. One envisages that in

furtherance of its role in this field, the Authority would

- (i) obtain specialist assistance and guidance in assessing product risk;
- (ii) utilize the Standard Laboratory facilities of the Department of Industry which at present are being enhanced and extended;
- (iii) carry out consultation with the Health, Trade and Police Authorities and the Malta Board of Standards.

There may of course be unsafe services which are offered to the consuming public. Though such cases may be less common than unsafe products, the law will as far as practicable apply equally to goods and services. The new rules on product safety and on product liability and the suggested broadening of labelling and marking requirement, should create a satisfactory framework for the protection of the consumer against unsafe goods and services.

It is in fact in this context of unsafe products that one can appreciate the proposal to delegate power to the Consumer Protection Authority to impose labelling and marking requirements in respect of a product or on a range of products. A mandatory requirement of proper information and directions for use would reduce the risk factor of such products to the user.

## CHAPTER XI

### OTHER PROPOSALS

- The Trading Stamps Schemes  
(Restriction) Act 1964
- The Expenditure Levy Act 1990
- Weights and Measures
- Purchasing a House
- Codes of Practice
- Remedies and Penalties
- A Comprehensive Consolidated Act

## THE TRADING STAMPS SCHEMES (RESTRICTION) ACT 1964

Good intentions were at the root of this statute, but its practical benefits are uncertain. The extensive exemptions conceded by section 6 of the Act raise doubts as to whether the law should be retained at all. There may be a case for the outright revocation of this statute on the ground that the creation of gift schemes is not in itself harmful to consumers, unless accompanied by such features as false promises of gain, misleading bargain offers, and reckless indications on the availability of gift items.

The view is often aired that trading stamps scheme tend to induce consumers into choosing a particular brand not because of its intrinsic quality but for the amount of stamps attached to it. There is much scope for improved consumer education in this area but consumers will always be free to take bad decisions, to choose wrong products or for the wrong purpose.

Another view which is expressed states that the benefit supposedly reflected by the scheme would be better represented by a reduction in the selling price of the goods



involved in the gift scheme. The real question however is whether such schemes are a legitimate marketing exercise, or not. The 1964 Act is a half-measure, permitting some schemes prohibiting others for reasons which are not easily understood as they relate to the status of the organizer and not to any actual conduct or abuse.

It would not therefore be amiss to recommend that the proposed Consumer Affairs Advisory Council should undertake the review of the whole matter of trading stamps and other gift schemes, and to recommend whether the 1964 Act should be amended, replaced or simply revoked. In any case it would seem that the Consumer Protection Authority would always be able to use its general power to order the prohibition of any trade malpractices detected in the promotion and practice of a gift scheme.

## THE EXPENDITURE LEVY ACT 1990

This recent statute is being referred to here as an illustration of how consumer interests are often not given adequate consideration in legislative drafting.

The major objections to the Act from the consumer point of view would appear to be three:

- (a) the law does not punish snack bar or restaurant owners who charge the levy when they are not supposed to. No such offence is contemplated in the law. It is onerous enough for a customer to have to pay a levy when eating out, it is unacceptable that the law does not impose harsher penalties on fraudulent traders who cheat customers;
- (b) the law imposes on customers two obligations: to "demand" an invoice or receipt from the seller, and to be able to produce it to a police officer or to an Inspector appointed under the Act;
- (c) the law punishes consumers and fraudulent businessmen equally.

From the consumer point of view, this is not considered good law and it is therefore proposed to delete the offending provisions, namely section 7 of the principal Act and section 14 of Legal Notice 101 of 1990. It shall be the

task exclusively of the Inspectors and of the Police to investigate and verify that the provisions of the law are being complied with by businessmen carrying on catering establishments. They may request the assistance of customers in verifying the facts, but it is wrong to demand that the consumer assist in the enforcement of the law against his will, to charge a customer with criminal liability for such omissions as failing to demand a receipt and to retain it for the required distance, and to impose on the consumer the same harsh penalties imposed on businessmen who criminally cheat Government of its levy.

It is proposed to enact appropriate amendments to deal with all these matters.

This Act can therefore serve as an illustration of how consumer protection is often not given sufficient consideration in the formulation of policy. This shall henceforth no longer be the case. To this end, one of the principal functions of the Consumer Protection Authority will be to ensure that government policy is in no way detrimental to consumer interests, to monitor and report on the operation of laws and policies affecting consumers and, where feasible, to propose amendments and other measures.

## WEIGHTS AND MEASURES

One of the oldest and still vital forms of consumer protection relates to weights and measures, especially by establishing a uniform system and curbing short weight and short measures by traders. The uniform system permits a consumer to compare prices of goods available on the market.

The Weights and Measures Ordinance 1921 (Chapter 39) establishes the office of Inspector of Weights and Measures, placing him under the jurisdiction of the Commissioner of Police. In recent years the Inspector of Weights and Measures has been operating from within the Department of Trade and has also been involved in the administration of the Trade Descriptions Act and in handling general consumer complaints received at the Department.

With the launching of the Consumer Protection Authority it would appear beneficial and logical that the competence over the administration of Weights and Measures legislation should be re-assigned to the Authority in order to avoid needless duplication of functions. Possibly the very designation of the office should be replaced to "Fair Trading Standards Officer" or some other suitable designation.

## PURCHASING A HOUSE

One can broadly state that in this Paper the acquisition of immovable property is not considered of great relevance. In the sphere of consumer protection, we are more concerned with the supply of goods and services. The purchase of a house may however very often be the most important and expensive transaction entered into by a consumer throughout his entire life.

For the sake of completeness therefore it is proposed to consider briefly the acquisition by a consumer of his house. We are not at all interested here of property acquired for purposes of business, investment, or re-sale.

Many of the elements involved in acquiring a house come under the law of sale and the law regulating the letting of works and services, the latter where the house is being constructed or finished.

Should the Consumer Protection Authority be empowered to intervene to protect a person against suffering economic loss when venturing to purchase a home? Or are the existing remedies sufficient?

In view of the high relative cost of the transaction and the corresponding loss that a person can possibly suffer, it is felt that consumer law and consumer protection bodies should no longer ignore or exclude home purchases.

The Consumer Protection Authority should be in a position to ascertain

- \* that property-dealing enterprises give their customers a fair deal;
- \* that estate agents do not indulge in hard-selling or other abusive sales methods;
- \* that advertisements and other information defused to promote the selling of a house are substantially truthful and relevant.

It should be the task of the Consumer Protection Authority to examine whether the provisions of the Trade Descriptions Act should be extended to purchases of a house and whether a commission should be established specifically to consider what safeguards can be established to safeguard the private purchaser, and whether it is feasible to negotiate a Code of Practice with traders active in property selling, including estate agents.

## CODES OF PRACTICE

Up to now in this Paper, we have dealt with four tiers of consumer protection law and practice:

1. offences under the criminal law
2. private, or civil, law remedies
3. measures by the Consumer Protection Authority
4. initiatives by voluntary consumer associations.

An attempt shall be made to establish also a fifth tier of regulatory machinery whereby consumer complaints can be examined and remedied. The Consumer Protection Authority shall pursue the possibility of negotiating suitable Codes of Practice with the different sectors of traders involved in the supply of consumer goods and services. This of course shall involve a considerable task.

The Codes of Practice would aim at creating a framework ensuring quick and practical solutions to disputes. The complete cooperation and good faith of the representatives of the various trading sectors shall be required.

It is envisaged that Codes of Practice would deal with the following matters:

- (a) a declaration of the responsibilities to be assumed by the traders participating in the Code;

- (b) a declaration of the consumers' legitimate expectations in respect of transactions entered into with such traders;
- (c) adequate machinery for receiving and hearing complaints from consumers;
- (d) a quick and suitable remedy for a justified complaint;
- (e) effective sanctions against defaulting traders.

In view of the uncertain success that Codes of Practice have experienced in other jurisdictions, the Consumer Protection Authority shall have to continuously monitor the effectiveness of any such Codes as well as the consumers' and traders' perceptions and attitudes on the workings of the Codes.

The Authority would in any case have to verify that a proposed Code is satisfactory in both its substantive and procedural aspects. In other words, the obligations being assumed by the traders concerned, as well as the machinery for dealing with consumer grievances and the remedies available, have to be reasonable, adequate and workable.

The Authority shall not expend its resources in trying to pursue agreement on Codes of Practice for their own sake. Codes are never an end in themselves but are a means for investigating consumer dissatisfaction and in promoting a suitable remedy. Should a Code fail to do this successfully, it will quickly degenerate into a dead letter



or, worse, into a sham.

One will have to study what binding effect, if any, should be attached to Codes of Practice, whether the sanctions shall be legally or merely morally enforceable, and whether the remedies available under the ordinary law would be automatically excluded, once the dispute is being dealt with in terms of a Code.

One will also have to see how many traders engaged in a particular sector actually adhere to the Code of Practice. Unless sufficiently subscribed, a Code would serve a very limited purpose and may even have to be abandoned.

A measure of experimentation will be necessary in this sphere owing to its novelty on the local scene. Much will depend on the readiness of the trading sectors to allow the concept of the Code of Practice to take root, thereby creating a network of Codes promoting a framework for the promotion of mutual trust between consumers and traders, viewing each other as co-participants in the market and not as antagonists.

## REMEDIES AND PENALTIES

New legislative measures in favour of the consumer shall not serve their purpose

- if they are not adequately known;
- if they are not continuously and properly enforced;
- if they impose inadequate penalties on defaulting traders;
- if they do not provide consumers with a satisfactory remedy.

This brief note considers a few ideas on remedies and penalties that may be introduced in order to make consumer law more effective and credible.

1. A consumer who has suffered an unjust loss finds little comfort where a defaulting trader is prosecuted and punished under the criminal law. It may be time therefore to supplement the traditional criminal law sanctions with some form of award of compensation to a consumer who has successfully initiated proceedings. The award may be subject to a limit equivalent to the maximum competence of the Court of Magistrates. The compensation order rewards the consumer who has bothered to take the time and the trouble to undertake

the initiative against a breach of the criminal law. The award shall therefore not simply compensate the consumer limitedly for actual financial loss incurred, but it shall take into account the discomfort, distress and trouble of persisting in taking the trader to Court. The successful outcome of the criminal action would benefit not merely the individual complainant but all the consumers generally - for this he should be rewarded.

Moral damages are not recoverable under the normal principles of the Civil Law. Failing the general reversal of this exclusion, the law could allow the award of moral damages in consumer law cases not as an exception but as an initial attempt to gradually introduce the concept as part of the general law.

2. A heavy sanction should be imposed to discourage traders from persisting in acts detrimental to consumers. Under the Sale of Commodities regulations issued under the Supplies and Services Act 1947, the closure of the defaulting trader's business premises is indicated as one of the penalties that can be ordered by the Court.

It is suggested that persistent disreputable activity should become punishable by the withdrawal - temporarily or indefinitely - of the trader's operating licences issued by the Police and Trade Authorities. Possibly the law may stipulate that it shall be an

implied condition in every Police and Trade licence that the licensee undertakes not to indulge in acts detrimental to consumers and binds himself to comply promptly with any orders that may be issued by the Consumer Protection Authority.

Needless to add, close cooperation and coordination between the Authority and the Trade and Police authorities would be vital for any such sanction to work. Ludicrous fines or other soft-hearted penalties will render useless any criminal laws promoting consumer protection, no matter how well drafted and well intentioned these may be.

The primary objective will always remain deterrence rather than prosecution but exemplary action should periodically be taken to discourage others. Any exemplary action should be convincing, effective and adequate; lacking this the laws will be reduced to a complacent illusion.

3. It is often proposed that a proper legal consumer protection regime requires the setting up of special consumer courts or of so-called 'small claims courts' to which an aggrieved consumer could have recourse for a swift and cheap remedy. There is a valid objection to this proposal: inexpensive, swift and efficient justice is a right and expectation belonging to each and every person. It is not or should not be reserved for any special category of persons.

4. In this White Paper, there have been various recommendations for creating new criminal offences and for defining stricter penalties. One may consider the creation of new offences as a disconcerting development. One need not be unduly distressed however because their main objective is preventive rather than punitive. Their aim would be achieved only if they succeed in halting the recurrence of the prohibited acts or omissions; it is this deterrent effect which would secure maximum benefit to the consumer, rather than the actual punishment of individual wrong-doers.

## A COMPREHENSIVE CONSOLIDATED ACT

It is proposed that one single comprehensive Act shall be prepared which shall incorporate most of what can be described as constituting our consumer law. This Act shall incorporate the proposals contained in this White Paper and other useful suggestions which may result from the consultations to follow the publication of this document.

The comprehensive consolidated Act shall contain the following matters:

- (a) a general declaration of the rights of the consumer;
- (b) the setting up of a Consumer Protection Authority;
- (c) principles regulating trade descriptions and advertising;
- (d) principles regulating the activities of door-to-door salesmen;
- (e) principles regulating standard form contracts and unfair contractual terms;
- (f) principles regulating product liability;
- (g) principles regulating the recognition of voluntary consumer associations.

The exercise should guarantee for the various laws and regulations a recognizable pattern and sense of direction and purpose, resulting in a properly termed "Consumer Protection Act", a true charter of consumer rights.

## CONCLUDING NOTE

This White Paper has been an attempt to tackle the several grave deficiencies in our existing law, a proposal for a radical reappraisal of the policies which the law should henceforth strive to achieve. The Civil Law can no longer remain neutral but will have to accommodate new principles which safeguard the consumer and which redress the imbalance existing between the individual consumer and manufacturers, suppliers and other traders. The criminal law shall continue to play a vital role in protecting consumer interests in various situations.

However it cannot be sufficiently emphasized that the real purpose will not be so much to guarantee adequate compensation to an injured user of a defective product or to punish fraudulent tradesmen, as to increase the sense of responsibility and quality-consciousness of the manufacturer, the supplier and other traders who provide services to consumers and to reduce the risk of defective products, accidents, contractual injustices or basic poor value for money. The law will be more concerned with preventing malpractices than with punishing them, more interested in preventing economic and physical harm to consumers than in developing an systems of redress.

Naturally, no amount of legislative reform can automatically transform a nation of shoppers into prudent and sensible consumers. Much more than new legal rules is required and this should principally consist of continuous and comprehensive consumer information. In this field there is a lot of scope for initiatives to be undertaken by consumer associations, by the communication media and possibly also by schools and other educational authorities.

In any case, the proposals for legislative reforms incorporated in this White Paper should now pave the way to what will be the most comprehensive measure ever passed to protect the interests of consumers.