LAW & PRACTICE

ISSUE 1 DECEMBER 2000

THE MALTA CHAMBER OF ADVOCATES

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THE SALE OF COMMODITIES (CONTROL) REGULATIONS 1972

A note on price control and price Indications under current law and the EU directive on price indications

By David Fabri LL.D.

As part of the Consumers and Health Protection Chapter (chap. 23) of the EU Acquis, one finds a directive on Price Indications (Directive 98/6/EC). Briefly, this Directive requires the proper indication of the prices of products offered to consumers. It establishes a general obligation on traders to clearly indicate both the selling price and the unit price.

The indication of the price of a product offered for sale to a consumer either inside a shop or in a shop window is a basic right that every consumer may reasonably expect. Being properly informed of the price beforehand, consumers may avoid nasty surprises and potentially embarrassing situations as well as some mistaken purchasing decisions. The provision of clear and relevant information is one of the most common and effective techniques in consumer protection legislation. The same reasoning lies at the heart of several European Union measures in favour of consumers.

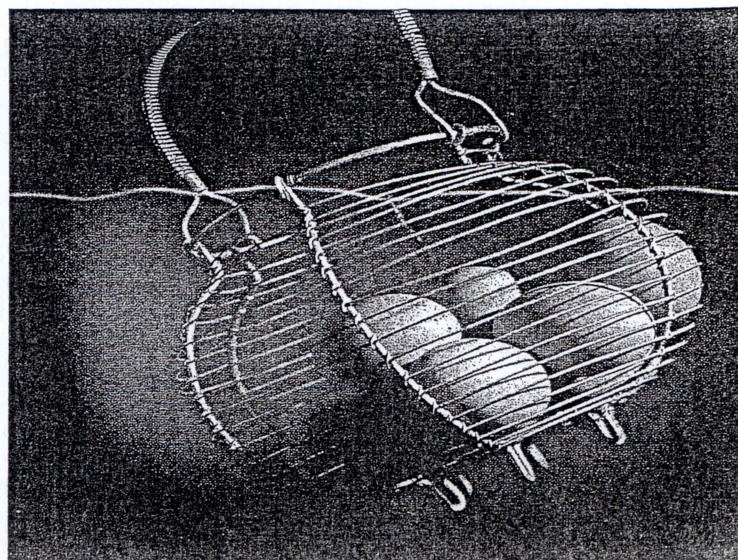
As part of the Consumers and Health Protection Chapter (chap. 23) of the EU Acquis, one finds a directive on Price Indications (Directive 98/6/EC). Briefly, this Directive requires the proper indication of the prices of products offered to consumers. It establishes a general obligation on traders to clearly indicate both the selling price and the unit price. Government's intention is to implement this Directive by the end of the current year, a "short–term priority" commitment confirmed on page 181 of the recently published National Programme for the Acceptance of the Acquis, in short the NPAA which was issued on the 1st September 2000.

The 1998 Directive had replaced two earlier directives on price indications, namely Directive 79/581/EEC which governed the price of foodstuffs and Directive 88/314/EEC which related to non-food items. The Directive requires the indication of both the selling price and the unit price. Think of a sealed packet of cheese or ham which is usually priced at the cost per kilo. The packet would be expected to show clearly to any consumer interested in buying it two separate prices: first the actual price of the particular packet offered for sale with its particular weight, and secondly the price of the commodity per kilo. This requirement promotes greater price transparency and facilitates price comparisons. Our current law does not require the indication of the latter price. Nevertheless, some retail outlets have already started printing both sets of prices.

Perhaps the most appropriate place to locate this new obligation on traders is in the Sale of Commodities (Control) Regulations 1972 that had been issued under the Supplies and Services Act of 1947. These regulations, which had replaced the original regulations issued in 1952, are only one of a long series of regulations issued under the 1947 Act. But they are possibly the most far-reaching and most well-known regulations. They were last amended in 1998.

The 1972 regulations require traders to properly indicate the final selling price to a consumer, which should be inclusive of all relative charges and Vat. This seeks to ensure that a consumer does not find himself surprised by the addition of extra or hidden charges. To the extent that they establish a general broad obligation on traders to fix adequate price indications on all goods offered to consumers, these regulations already partially implement the Directive. The implementation of the remaining parts of the Price Indications Directive can be undertaken by way of suitable amendments to the 1972 regulations. Or should the 1972 regulations simply be repealed and replaced in their entirety?

The 1972 regulations deal with both price labelling and the imposition of extensive controls on the prices of commodities. They are perhaps better known to us for the strict price control regime that they set up. In fact, on their strength, price control was for many years an ordinary day-to-day fact of life for consumers and traders living in Malta during the seventies and eighties. At one point a notorious price-freeze was established. Numerous price orders have in fact been issued over the years under the 1972 regulations and many are still in effect, at least notionally. There is no provision for the expiry of these price orders after a lapse of some defined



period. Unless expressly repealed, they remain in force indefinitely. The philosophy underlying these regulations is that every commodity must have a corresponding certificate of costings and have a pre-established maximum price before it can be placed on the market. It was made a criminal offence to sell a consumer product without affixing the price or to overcharge.

More provisions on price control or price indications are found in other legislation. The Agricultural Produce Marketing Regulations 1952 are analogous to the 1972 regulations but – as the name correctly indicates – they refer solely to agricultural products. The EU directive no longer makes this distinction between the nature of products offered for sale and now practically all products are equally subject to the price indications requirement.

The regulations under the Supplies and Services Act are not the only price control mechanism available in our law. Various other legislation have provided for the fixing of maximum prices for specific goods or services. Regulations have been made in terms of the Hotels and Catering Establishments Act 1967 (currently in the course of being repealed by the Malta Travel and Tourism Services Act 1999) in respect of the maximum permissible rates for hotel accommodation and the price that may be charged for food and drink offered in bars, restaurants and hotels. Many of these regulations have now been revoked. Other maximum tariffs are fixed for a number of services in terms of our Code of Police Laws (Chapter 10 of the Laws of Malta). This quaint Code provides for the maximum prices that may be charged for such services as the hiring of boats, karrozzini, cars and funeral hearses. Additionally, scattered in our legislation are a number of separate provisions which permit the official fixing of prices for Zurrieq boat-trips, entrance to cinema and football stadium matches, building stone, fees chargeable by doctors, lawyers, architects and tourist guides.

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When the 1972 regulations were issued, there was very little that could have passed for consumer and fair competition legislation. The commercial sector has undergone tremendous changes since 1972 and consumer expectations have now become much more sophisticated. The strict price control regime envisaged by the regulations is archaic. It needs to be re-vamped and reshaped in the light of more recent enlightened policy which states that as far as possible market forces, operating within the new comprehensive framework of consumer and competition rules, should primarily determine the price of commodities. This exercise would require the repeal of a number of price orders which have been superceded by the passage time and by the evolution of different commercial policies. Existing price controls in respect of certain identified products, such as flour, bread, cigarettes, fuel, pasteurised milk, could be retained in view of possible social and political needs.

In view of Malta's current wide-ranging negotiations in connection with eventual EU membership, account has to be taken of developments in related areas where specific references have made to the 1972 regulations. These include the proposed amendments to the Competition Act and the policy decisions underlying Malta's position on the Free Movement of Goods chapter of the NPAA (Chapter 3, pages 24-26). It may be noted that some price controls may be considered anti-competitive measures if they have the effect of acting as a barrier to the free flow of foreign imports. However the EU Acquis does not expressly prohibit all forms of price control. It would seem that any price control measures would need to be justified, and one would need to show that the measures are

- reasonable and proportional to the desired objective;
- the least restrictive for the free movement of goods with particular reference to the importation of goods from other EU countries;
- non discriminatory.

In this context, it would be relevant to consider stated government policy on the subject. Indeed, the NPAA (page 25) expressly promises the repeal of price orders "that are no longer being enforced", the retention of orders on essential items such as grains, and the adjustment of "the present price control system to become more in line with community practices in this area".

It is probably not advisable to scrap the 1972 regulations as a whole and simply replace them by a shorter set of rules merely reflecting the requirements of the Acquis. The interesting point is that the 1972 regulations - popularly referred to as the "price control" regulations – actually lay down a number of significant rules and concepts completely unrelated to price control or price indications. For this reason, it would probably be more reasonable to amend these regulations, rather than repeal them and start from scratch.

Besides punishing failures to properly show the price of consumer products and overcharging, the 1972 regulations create a number of other commercial offences. These make interesting reading and include:

- hoarding;
- unreasonably refusing to sell a reasonable quantity of a product to a customer;
- imposing conditions in a sale to a customer;
- the making of restrictive (anti-competitive) agreements on prices etc;
- the unjustified closure of a shop;

- purchasing products from an unknown source;
- possession of false weights and measures.

It may reasonably be claimed that some of these principles, nowhere so clearly stated in our law as in these humble regulations, still play a relevant part in our general trading and consumer law, a part for which they have received little credit. Some of the principles are still valid today and should be retained. However, parts of the 1972 regulations, especially the rule prohibiting the sale of any product in Malta unless and until its maximum price has been established, need to be repealed. They make no commercial sense and offer no effective shelter to consumers.

Interestingly, the 1972 regulations also require every restaurant to show a price-list at its entrance. This list should be "easily and clearly read by members of the public without the need of entering therein." Recent regulations issued under the Consumer Affairs Act impose an equivalent obligation on operators of bars, kiosks, school tuck shops and factory canteens to "prominently" display "price-lists of meals, snacks, and other items of food or drink" (Legal Notice 97 of 1997 - Display of price-lists in bars and kiosks Regulations).

Price orders may now also be issued in terms of section 11 of the Competition Act 1994. The Director for Fair Competition may issue price orders prescribing the "maximum price at which products, which he may consider to be essential goods and services, may be sold or offered for sale". These include food, drink, pharmaceuticals and clothing. The same section makes provision for the term of validity of any such price orders and the possibility of their review by the Commission for Fair Trading. Orders are valid for six months.

Regrettably, the Competition Act makes no reference to the 1952 or 1972 regulations. This may mean that we now have at least two different and separate regimes for the establishment of price controls administered by different authorities. The position has not been adequately streamlined whereas the underlying government policy on this matter is not easily discernible. On this point, the 1993 White Paper had this to say:

"Price control orders are intended to facilitate the transition to a market regulated by fair competition principles. Until business adapts to a competition culture promoted through the prohibition of restrictive agreements and abuse of dominant position, a measure of direct intervention along traditional lines may be required."

The provisions of the Competition Act did not necessarily imply that the 1972 regulations were now completely superseded or repealed. As shall be argued below, there may still be scope for price orders under the 1972 regulations or similar, irrespective of the introduction of the Competition Act in 1994. This view is grounded on the following: the Competition Act only tackles price control because the high price of a particular product may be the manifestation of an abuse of dominant position or the consequence of a cartel or similar restrictive practice, which are prohibited by the Act.

It would appear that under the 1994 competition legislation, the intervention of the competition authority may only be justified if a competition issue was at stake. However, there may still be some scope for providing for the possibility of state intervention to ensure an orderly market, in circumstances not caught under the competition legislation. It may therefore follow that a residual power to exercise price controls could remain vested in the Department of Trade, being the authority overseeing internal trade. In this way, it could intervene in special or exceptional cases in the public interest and to safeguard the general consuming public. Possibly, this residual power could be exercised in consultation with the Director for Fair Competition. This move would be one step towards streamlining the procedures that currently exist side by side.

The NPAA makes this comment in the Competition Chapter (page 64) under heading C (c):

"The price order regime of section 11....will be reviewed to better reflect the Acquis, taking into account the specific realities of the domestic small economy."

This review is promised as a medium term priority. Since the details of the envisaged review have not been made public, it is not possible to assess whether and how they may have an impact on the 1972 regulations.

But what about the notorious Supplies and Services Act itself? This law was adopted in the immediate post-war years as an emergency measure against food hoarding and shortages and black market is still on the books. It is indeed a useful tool which successive administrations have used, often wrongly perhaps, along the years. To give some illustrations, rationing regulations were issued on the strength of this Act in 1948 (Legal Notice 616) and 1956 (Legal Notice 556). In 1956, rationed commodities included bread, sugar, edible oil, flour, pasta and tinned milk. Other regulations have dealt with the sale of fish (Legal Notice 374 of 1957), eggs (Legal Notice 113 of 1970), and meat and meat products (Legal Notice 198 of 1990).

The Act assigns to the Minister of Trade extensive enabling powers to regulate most activity relating to the sale and distribution of products and services, practically without limitation. Despite its rather negative image, it remains a useful piece of legislation. It would be unwise for the state to surrender the powers that permit interventions in the market to correct abuses and to ensure a good deal to consumers in any unforeseen or extraordinary circumstances that may arise.

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