

**From application to accession:  
the interplay between the EC Consumer Directives  
and selected areas of national consumer law and policy  
– a case study from Malta (1990-2004)**

**DAVID FABRI LL.D.**

**Thesis submitted in fulfilment of the degree  
of Ph.D.**

**Faculty of Laws, University of Malta**

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ta' Malta

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# ABSTRACT

Included in the 2004 enlargement, Malta is one of the EU's newer and smaller Member States. It had applied to join in 1990.

This thesis tries to make an original contribution to knowledge of how Maltese consumer law and policy evolved in the fifteen year period which opened with Malta's application to join the EU in 1990 and ended with its accession and consequential membership. These fifteen exciting years marked the formative years both of Malta's relationship and ever closer ties with the Community and of its own burgeoning interest in consumer protection policy and legislation. In 1990, both EU consumer law and Maltese consumer law were in a state of flux and evolution. New important measures were being adopted at Community level even while the island's accession procedures were slowly progressing.

Accession transposition obligations have considerably helped shape and determine the content of Maltese consumer law up to membership in 2004 and beyond. The thesis addresses fundamental questions that cumulatively throw light on how successfully domestic consumer law inter-played with EU consumer Directives, and the various contexts in which this happened. These include:

- (a) the state of play of Maltese consumer law in 1990 and how it evolved in the period under review and how it embraced Community law;
- (b) the debt owed by Maltese consumer law to Community law; how and where the Community Directives were transposed, and how well the transposition measures integrated with the local legal system;
- (c) how the highly divided and confrontational local political scenario influenced the development of domestic consumer law and the accession transpositions;
- (d) the role played by the Civil Code in this process;

- (e) other factors that have helped shape the development of the legislation and the nature and quality of the transpositions; and
- (f) the fate of national initiatives in consumer law and policy before and following accession.

The findings suggest that, at least in the case of Malta, accession considerations and the EU Directives specifically helped to shore up national consumer law development to a significant level. Maltese consumer law probably reached its highest point in the years 2000-2001. By the end of the accession process, indigenous consumer law and policy struggled to survive the advent of ever more European Directives. Accession initially produced undoubted benefits for consumers in this new Member State, but may have later had unintended negative consequences. Originally introduced as a by-product of the accession project, the EU Consumer Directives today increasingly make up the essence of Maltese consumer law.

This thesis states the law as at 31 December 2014.

## ACKNOWLEDGMENT AND THANKS

In 1979 I presented my first doctoral law thesis to the University of Malta on the subject of 'Consumer Protection and the Law', then considered an obscure and incomprehensible title. National consumer law was then meagre and of poor quality. I made no references to EC consumer law partly because there was not any, but also because I knew nothing then about the EC and its ways. They were very early days.

Consumer protection had not been my original research subject. My first interest was in freedom of contract and the various inroads made to it by the law in various exceptional situations. I was soon (correctly) advised that this subject was too wide and that I should instead focus on a particular area. Inspired by a few good books, I opted for consumer protection in Maltese law.

So I take the opportunity to record here my personal debt to books that have had an enriching effect on my relationship with the study of law. In the late seventies, I was lucky to stumble on Borrie and Diamond's pioneering work 'The Consumer, Society and the Law' (1976) (The publications mentioned here are detailed in the Bibliography) and Wolfgang Friedmann's 'Law in a Changing Society' (1972). These two very readable and inspirational books exposed the formerly well-kept secret that law could be a very dynamic and useful instrument capable of generating public benefit and other civilizing results. Ross Cranston's 'Consumers and the Law' (1978) showed that consumer law was capable of being explored and explained systematically. Its suggestion that consumers need more, not less, public law intervention and remedies still rings true today.

Fast forward to 1999, to screening rooms in cold and wet Brussels for discussions on the Consumer Protection Chapter of the *acquis*. Here the first editions of Stephen Weatherill's 'EC Consumer Law and Policy' (1997) and Howells and Wilhelmsson's

'EC Consumer Law' (1997) proved constant and reliable companions. Their challenging and openly critical style proved a great introduction to the evolution and the ups and downs of European Union Law and policy and managed to make the consumer Directives that required transposition seem more human, flawed and interesting.

To these five books and their authors, I gladly record my humble indebtedness and my sincere appreciation.

Thirty-six years later, I submit this thesis on how Maltese consumer law has embraced and interplayed with the consumer protection Directives, particularly in the years leading to EU membership. The work shall hopefully prove useful for students of Maltese consumer law and of the political realities of local law-making, as well as students interested in the accession processes more generally.

Since 2004, Malta has been a member of the European Union. Both national and EC consumer law have been formally taught at our University since the early nineties. Times have changed and considerable literature has since been published on consumer issues. These have indeed been 'fascinating times for all of those who are interested in consumer law.'<sup>1</sup>

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<sup>1</sup> Ewoud Hondius, The Notion of Consumer: European Union versus Member States, Sydney Law Review, vol. 28.89, 2006 available at [sydney.edu.au/law/slr/slr28\\_1/Hondius.pdf](http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf)

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My heart-felt thanks go to all those who in some way helped me finalise this thesis, particularly Dorianne Mifsud and Victoria Camilleri whose assistance with multiple proof-reading and corrections of the ever-changing text proved indispensable, as was their ongoing support. I also cannot fail to record my deep appreciation of the encouragement, guidance, wisdom, knowledge and human kindness of my external adviser, Guido Alpa, to whom I owe a lot. Thanks are also due to my colleague and local supervisor, Prof. Andrew Muscat for his often sharp criticism and for his unfailing expert advice, support and friendship during all these years. I must also acknowledge the expert help given to me at crucial stages of this thesis by two legal colleagues, Annalies Azzopardi and Veronica Perici Calascione in reviewing parts of the evolving work and its adherence to the applicable regulations.

Finally I would like to thank all my examiners, namely the external examiners, Prof. Stephen Weatherill and Prof. Geraint Howells, and Prof. Kevin Aquilina, Dean of the Faculty of Law for his exemplary encouragement, support and well-intended criticism, Prof. Peter G. Xuereb and Dr Ivan Sammut, as the three local examiners (local examiners) whose suggestions helped improve this final text. I have to mention my friends and professional colleagues, Andrew, Godfrey, Albert, Anton, Vanessa and Andre' who all in their own way contributed in different ways to the completion of this task.

Naturally I assume responsibility for all opinions expressed herein and for any mistake that may have escaped the numerous reviews and revisions.



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# INTRODUCTION

'Two of the most important legal developments in Western Europe in the second half of the twentieth century have been, on the one hand, the growth of EC law, and, on the other hand, the development of special rules to protect consumers.'

Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Preface, Ashgate 1997)

'European consumer law is one of the parts of European law where the citizens of the European Union may experience the positive consequences of the European integration themselves.'

Marco B. M. Loos, *Review of the European Consumer Acquis*, (Introduction, Sellier European Law Publishers 2008)

## 1. The subject, the objectives and preliminary matters

Malta formally applied for membership of the European Community on 16 July 1990<sup>1</sup> and became a member on the 1 May 2004, fourteen years later.<sup>2</sup> Malta joined nine other countries in the largest enlargement exercise ever undertaken by the Community.

The thesis examines the consumer protection aspects of the accession process Malta had to undergo as the price for eventual membership. It explores the extent and forms of interaction between Community consumer law initiatives and national law reforms in selected important areas of consumer protection. As a direct result of the accession programme and requirements, Maltese consumer law enjoyed swift and spectacular growth. However one may indeed wrongly assume that a

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<sup>1</sup> <[http://ec.europa.eu/malta/abc/malta\\_eu/chronology/index\\_en.htm](http://ec.europa.eu/malta/abc/malta_eu/chronology/index_en.htm)> accessed on 10 January 2014

<sup>2</sup> European Parliament Legislative Resolution on the application by the Republic of Malta to become a member of the European Union (AA-AFNS 1-6 — C5-0121/2003 — 2003/0901F (AVC)) [2003] OJ L236/46. The Treaty of Accession was signed on 16 April 2003 and entered into force on 1 May 2004. See Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia [2003] OJ L236/46

Mediterranean island state like Malta simply delayed and waited for the accession transpositions to commence and then simply borrowed the entire Community consumer policy and strategy off the shelf and made it its own. In reality, Malta did not have to 'wait for Community Directives to arm itself with a legislative strategy aimed at protecting the consumer.'<sup>3</sup> A strategy for a comprehensive domestic consumer law programme had been launched in 1991, years before and independently of the screening and negotiation stages of accession. This thesis critically chronicles these developments and events and examines their complementarities and inter-connectivity. It seeks to unravel the often intricate and complex relationships between the adoption of national policies and initiatives and the transposition of the EU consumer Directives into the national legal order. The Chapters of this thesis focus on laws, measures, events and Directives which raised the most interesting and challenging issues; they are examined in their relevant social, political and legal contexts. Primarily, this thesis seeks to place the transposition of the considerable consumer legislative *acquis* within the context of the evolution of Maltese consumer law and policy and of Maltese party politics, deeply divided on the very question of EU membership.

The island's accession process, concluded successfully with membership of the European Union, saw the adoption of the entire *acquis communautaire* including a full Chapter dealing with consumer protection. This thesis examines the growth, nature and quality of national consumer laws and policies as they were evolving during this important decade and a half in Malta's recent history. The main enquiry focuses on how and to what degree Maltese consumer laws and policies were influenced and changed as a direct or indirect consequence of the process leading to membership of the European Community.<sup>4</sup> This thesis seeks to present sensible researched conclusions on the nature and quality of the interaction and the degree of convergence between national and EU law.<sup>5</sup> The present research is predicated on

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<sup>3</sup> Agnès Chambraud, Patricia Foucher and Anne Morin, *The Importance of Community Law for French Consumer Protection Legislation*, in Norbert Reich and Geoffrey Woodroffe (eds), *European Consumer Policy after Maastricht* (Kluwer 1994, pp209-223, opening sentence)

<sup>4</sup> <[http://ec.europa.eu/malta/abc/malta\\_eu/history/index\\_en.htm](http://ec.europa.eu/malta/abc/malta_eu/history/index_en.htm)> accessed on 10 August 2013

<sup>5</sup> On this issue generally, though not specifically focussed on consumer protection, see Ivan Sammut, *The EU and Maltese Legal Orders: What kind of Marriage between them?* in *European Union membership: Five Years on and Looking to the Future*, (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, Peter Xuereb (ed), University of Malta, 2009)



the proposition that the accession and the related transposition processes warrant academic research. It hopes to further the understanding of the legislative and policy impact and implications of the accession procedures on new Member States. For many reasons, the entire accession procedures put in place by the Commission to pave the way for new members inside the Community is a truly fascinating subject. This thesis is focussed on how Malta managed its acceptance of the consumer protection section of the Community *acquis* and how this influenced and interacted with local consumer law and policies during what was a particularly productive period for consumer rights in Malta.<sup>6</sup> The Directives brought new concepts, requirements and techniques largely alien to domestic law. The years which propel a candidate country from application stage to eventual accession constitutes a special and indeed unique period of preparation analysis and learning for both sides in terms of clearly defined schedules and time-frames. They form a peculiar transitional period of preparation and legislative reforms during which an applicant State transforms itself in carefully pre-set stages to meet Community standards and expectations and to pass the several legal, economic and political tests set out by the European Commission. The accession procedures make it an intensely busy period for the candidate State as it becomes gradually familiar with the legislation and administrative structures of the EU and begins adopting the considerable *acquis* by aligning its national laws and practices accordingly. With its Chapter-by-Chapter screening, negotiation and transposition sequence of procedures, the road to accession was a valuable and unique experience for Malta as a candidate country. It involved an intensively instructive process for both sides engaged in the negotiations, and it forced Malta to introduce great reforms in many areas of law and administration. In the consumer law field, candidate countries, like Malta, were pushed to introduce significant new laws in favour of their consumers.

The EU's website currently summarises the situation as follows:

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See also Hans-W. Micklitz, *The Relationship between National and European Consumer Policy – Challenges and Perspectives* and Jac G J Rinkes, *European Consumer Law: Making Sense*, both papers found in Christian Twigg-Flesner, Geraint Howells, Deborah Parry and Annette Norhausen (Eds), *The Yearbook of Consumer Law 2008, Markets and the Law Series*, (Ashgate 2007, Part 1, pp 35–66 and pp3-18, respectively)

<sup>6</sup> Stephen Weatherill and Paul Beaumont, *EU Law*, Penguin Books, 1999, p1031 rightly suggested that consumer protection in the EC offered 'an intriguing insight into the relationship between Community and national activity.' Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate Dartmouth1997) p339, have described the relationship between national and EC law as being 'at its best' an evolving one. (n 14)

## Joining the EU

Becoming a member of the EU is a complex procedure which does not happen overnight. Once an applicant country meets the conditions for membership, it must implement EU rules and regulations in all areas. Any country that satisfies the conditions for membership can apply. These conditions are known as the 'Copenhagen criteria' and include a free-market economy, a stable democracy and the rule of law, and the acceptance of all EU legislation, including of the euro. A country wishing to join the EU submits a membership application to the Council, which asks the Commission to assess the applicant's ability to meet the Copenhagen criteria. If the Commission's opinion is positive, the Council must then agree upon a negotiating mandate. Negotiations are then formally opened on a subject-by-subject basis. Due to the huge volume of EU rules and regulations each candidate country must adopt as national law, the negotiations take time to complete. The candidates are supported financially, administratively and technically during this pre-accession period.<sup>7</sup>

The pre-accession procedures allow the European Commission sufficient opportunity to get to know intimately the applicant State and to verify its ability to accept the entire *acquis* and implement it successfully. For a candidate country, the procedures also imply having to handle numerous questionnaires, checklists, form-filling, deadlines, preparation of drafts, consultation meetings and peer reviews. The Commission employs this interim period to prepare for a further enlargement of the Community and the addition of a new member. On the other hand, the period between application to accession may also involve a degree of uncertainty where, as was the case of Malta, the pursuit of membership was a divisive question and had to be subjected to a national referendum whose outcome could not be easily predicted. This uncertainty factor gave a certain edge to the present subject.<sup>8</sup>

The referendum was approved both in terms of vote cast (52.87%) and valid votes (53.65%). In terms of conventional interpretation of referenda, a majority of Maltese supported Malta's entry in the European Union.

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<sup>7</sup> <[http://ec.europa.eu/malta/abc/malta\\_eu/chronology/index\\_en.htm](http://ec.europa.eu/malta/abc/malta_eu/chronology/index_en.htm)> accessed on 6 February 2012. An early analysis of Malta's relationship with the EU and the significance of the 1993 *Avis* and the implications of membership can be found in Tarcisio Zammit, *The Evolution of EU-Malta Relations: Economic and Political Aspects*, in Xuereb Peter G. and Pace Roderick, Editors, *The State of the European Union 1994* (European Documentation and Research Centre, University of Malta, Progress Press 1994) pp56-69

<sup>8</sup> See 'Malta first in EU referendum race' (BBC News World Edition, 29 January 2003) <<http://news.bbc.co.uk/1/hi/world/europe/2707317.stm>> accessed on 10 August 2013

Malta proved to be the most Eurosceptic of the ten acceding countries, but at the same time its referendum was the one with the highest turnout among nine referenda that were held among the countries in question. (Cyprus did not hold a referendum.)<sup>9</sup>

This study explores documentation and legal and other factors that, in their own way, helped shape the development of Maltese national consumer law and policy during these important fifteen years, characterised by fierce political contention regarding the very notion of EU membership.<sup>10</sup> This vital issue was definitely resolved as a result of a referendum and the subsequent General Elections both held during 2003. The election results returned the Nationalist Party in Government thereby also re-confirming the referendum result in favour of membership.<sup>11</sup> For so long as Dr Alfred Sant remained its leader, the Malta Labour Party's opposition to EU membership persisted even after membership.<sup>12</sup> The Labour Party parliamentarians voted unanimously against Malta's accession treaty.<sup>13</sup>

These political considerations form part of the background to this study. The development of consumer law in Malta cannot be fully explained or understood divorced from its historical, economic, social and political contexts. It is difficult not to agree with Howells and Wilhelmsson<sup>14</sup> that:

law can never be deeply understood disconnected from its roots in a particular society and culture ... a study of Community law without any national perspective is a study of law disconnected from society. Such a study can obviously give only a superficial and even misleading picture of the law....<sup>15</sup>

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<sup>9</sup> <[www.michaelbriguglio.com/PostscriptJanuary2004.pdf](http://www.michaelbriguglio.com/PostscriptJanuary2004.pdf)> accessed on 11 June 2008

<sup>10</sup> Dominic Fenech, *The 2003 Maltese EU referendum and general election* (2003) 26(3) West European Politics p163

<sup>11</sup> The referendum was held on the 8 March 2003 and the General Elections were held on the 12 April.

<sup>12</sup> <[www.doi.gov.mt/en/elections/2003/04/default.asp](http://www.doi.gov.mt/en/elections/2003/04/default.asp)> accessed on 9 February 2012

<sup>13</sup> For a comprehensive and critical narrative of Malta-EU Relations from 1987 to 2000, see generally Roderick Pace, *Micro-State Security in the Global System: EU-Malta relations*, Midsea Books, 2001, especially Chapter 4, pp199-288, and materials cited and referred to therein.

<sup>14</sup> Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate Dartmouth 1997)

<sup>15</sup> *Ibid.* p20

A law-in-context approach may be applied to any branch of the law,<sup>16</sup> but this present work is limited to the development of national consumer policy and law and to its dynamic relationship with the substantive aims and objectives of Community law.

## **2. The scope: what this thesis is about and what it sets out to do**

The thrust of this present work is to investigate how Maltese law was influenced by EU law during the fifteen years under review, and the various contexts that helped shape the process whereby EU law gradually entered and merged with Maltese law. This is a significant area of research for a number of reasons.

First, it investigates how the accession transposition obligations and Community Directives have influenced local consumer law and policy, and how local Maltese law and legal culture reacted, adapted and adjusted to the transposable consumer measures.

Secondly, this work explores how the transposition of the legislative consumer protection *acquis*, as an integral part of the accession process, was influenced by the peculiarities of local factors and circumstances, including the ebbs and flows, strengths and flaws of Maltese politics and the charged political controversy surrounding EU membership.

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<sup>16</sup> The law in context approach is useful to understand both national laws and the EU legislative *acquis*. A recent publication has explored the transposition of the company law Directives by the new Member States: Janet Dine, Marios Kotsias and Michael Blecher, *Company Law in the new Europe: the EU acquis, comparative methodology and model law* (Edward Elgar Publishing Limited 2007). The book examines the transposition implications for the developing countries which formed part of the 2004 enlargement, especially in the specific context of their company law development and their obligatory transposition of the company law Directives. See also generally William Twining, *Law in Context: enlarging a discipline* (Clarendon Press Oxford, 1997)

Thirdly, this research presents a useful case study of an accession transposition exercise based on one particular Chapter of the *acquis* as undertaken by one of the Community's smallest members, smaller in size even than Cyprus or Iceland.<sup>17</sup>

Consumer law in Malta has had a relatively short and interesting history and only recently acquired acceptance as a new area of law meriting academic study and research in its own right.<sup>18</sup> A seminar paper presented in 2006 made this telling remark on consumer law development in Malta:

Consumer protection, properly so called, probably started in 1990, a landmark year when things changed for the better. That year saw the launching of two parallel processes that have led to a substantial amount of good quality consumer legislation that would have been unheard of in or before 1990.<sup>19</sup>

The same theme was elaborated in another paper presented to an international conference later that year by the same writer.<sup>20</sup> This elaborated on the two processes happening between 1990 and 2004 namely the development of national consumer law and policy on the one hand, and the influence and impact exercised by the accession procedures and transposition obligations, on the other. The paper asked: 'do they inter-act and converge?'

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<sup>17</sup> Literature and academic interest in island states are on the rise. See for example Godfrey Baldacchino and Robert Greenwood, *Competing Strategies of Socio-Economic Development for Small Islands* (The Institute of Island Studies 1998). The University of Malta offers a Masters Programme in Islands and Small Island Studies, <<http://www.um.edu.mt/islands>> accessed on 9 April 2014. Also helpful on how Malta's small island status affected its EU accession is Julia Neumeyer, *Malta and the European Union: a small island state and its way into a powerful community*. (*Ibid.em*-Verlag, Stuttgart 2007)

<sup>18</sup> This point has been much debated: 'Consumer law is not a self-contained set of legal rules. It concerns the impact of many forms of law and commercial activity on those who buy...': Geraint Howells in *Foreword – Consumer Law's Place* in *The Yearbook of Consumer Law 2007* (Ashgate 2007) p xv. On the other hand: '...consumer law is now a mature area of law. Most jurisdictions have a reasonably well established body of law which falls broadly under this heading,' in Preface by C Twigg-Flesner to *The Yearbook of Consumer Law 2008* (Ashgate 2007).

<sup>19</sup> David Fabri, *Adventures in screening and Transposition: a case study – The EU Consumer Protection Acquis 1990-2004* (Jean Monnet Seminar, Malta, April 2006)

<sup>20</sup> David Fabri, *Maltese consumer policy and legislation before and after membership* (International Consumer Law Conference on World Consumers Day, Malta, March 2006)

National initiatives serve to suggest and to influence Community actions, pushing them to achieve higher levels of consumer protection. However, a different outcome is possible:

EC involvement in consumer policy has the potential to have a negative impact. The fact the EC is discussing an idea can put national reforms on hold. The modest solutions adopted at the EC level may be taken as a signal for Member States to resist progressive ideas or even repeal more protective national laws. Thankfully, however, there are few concrete examples of the EC having such a negative impact.<sup>21</sup>

The prospect of Malta becoming one such example had been raised at a conference held in Malta in March 2000 on the occasion of World Consumers Day. The EU accession negotiations and the transposition processes were then in full swing occupying practically the entire legislative and political agenda. A paper presented to the conference remarked that '[t]he current accession process has forced government to give immediate attention to an area in which its interest has often been inconsistent and not sufficiently motivated',<sup>22</sup> and suggested possible negative implications of EU membership on the future development of national policies and legislative proposals:

What shall be the impact of Malta's quick move towards EU membership? What shall be the influence of the EU dimension on our own evolving consumer policy? Will we henceforth merely copy what the EU does, and stop there? Will there still be scope for a home-grown consumer policy?<sup>23</sup>

These questions and others are addressed in this thesis.

A complete coherent history of consumer law in Malta has not been written and no text book on Maltese consumer law is yet available. Equally lacking is a comprehensive study of the impact of European Union law on the laws of Malta, before and after accession. This thesis tries to fill a small part of this gap.

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<sup>21</sup> Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Dartmouth 1997) p338

<sup>22</sup> David Fabri, *A Short Note on the Development of Consumer Policy and Law in Malta 1980-2005* (Promoting Consumer Interests Conference, Malta, 16 March 2006)

<sup>23</sup> *Ibid.*

This thesis was originally submitted in 2014 which marked the tenth anniversary of Malta's accession.<sup>24</sup>

### **3. Outside the scope: what this thesis does not set out to do**

At this juncture it is important to clarify what this thesis does not do. For a start, it does not and cannot seek to address the entirety either of Maltese consumer legislation or of the Community Consumer Directives. A number of Directives and areas of consumer interest have been omitted from this present study due to lack of space and word count restrictions that inevitably condition a work of this nature.

Directives that did not make it into this present work include measures taken in respect of package travel, timeshare, distance selling, injunctions, price indications and consumer credit. The exclusion of these subjects, regrettable as it may be, has allowed the writing of this thesis to move to a conclusion in a manageable and sustainable fashion while remaining faithful to its title and scope.

Consumer protection is an extensive multi-faceted field of study and research. In her preface to her excellent study on Community consumer law, Vivienne Kendall had indeed warned readers that 'The scope of the book is [...] very wide and, and I hope that in making it so I have indicated just how diverse, and important, the interest of consumers are.'<sup>25</sup> The consumer protection *acquis* which Malta was required to transpose in the latter part of its accession negotiations was indeed substantial and varied, certainly if compared to the state of Maltese consumer law at

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<sup>24</sup> 2014 also happened to be the UN International Year of Small Island Developing States. See Prof. L. Briguglio, *The Times* (Malta), 29 June 2014: '2014 is year of small island states,' Classified, p1. This article explains that Malta was a member of the Alliance of Small Island States, but had to cease membership upon entering the EU in 2004 as it was no longer considered a developing country. See also <<http://www.un.org/en/events/islands2014/#&panel1-1>> and <<http://www.timeanddate.com/year/2014/small-island-developing-states.html>>, both accessed on 29 June 2014

<sup>25</sup> Vivienne Kendall, *EC Consumer Law* (Wiley Chancery 1994) pviii. See also general discussion on consumer law and policy in the 1991 White Paper, pp 6-7 and pp32-33 in Final Report of the Committee on Consumer Protection 'The Molony Report' (Cmnd 1781, 1962) Part 1 'The Scope and Nature of the Enquiry.'

the time. Accordingly, the thesis necessarily limits its investigation to selected measures and events in Maltese national policy and legislation and to selected Directives which, more than others, have given rise to interesting conceptual and drafting challenges and solutions during the period leading to accession.

By design, this thesis will also avoid re-stating what each of the relevant Directives does or means, or how it started and developed. The actual Directives themselves, and their origins, strengths and weaknesses remain outside the scope of this work. Extensive and analytical studies and literature on each of the Community's Directives, their content and objectives, are already available. It is also outside the scope of this work to identify exactly where and how every single provision of a Directive was transposed into Maltese law. This exercise has indeed already been carried out by the Maltese authorities who were (and still are) required to draw up a detailed transposition table for every Directive as it is transposed. The local transposition of a Directive would not be accepted by the Commission unless it is accompanied by a detailed transposition table officially submitted by the Maltese authorities. By means of these tables of equivalence, a Member State explains to the Commission where, when and how the transposition of each individual Directive has been completed. This work will not be duplicated here.<sup>26</sup>

In this study of policy and legislative developments, judicial decisions have played a relatively minor and insignificant role. This explains why practically no references to decided cases will be made in this work. This thesis will also refrain from examining in any detail those Directives and legislation which deal with the institutional structures and judicial redress mechanisms for the protection of consumer rights. Access to justice and jurisdictional and procedural issues lie beyond the scope of this thesis and so the Directive on Injunctions for the Protection of Consumer Interests,<sup>27</sup> though it formed part of the legislative *acquis* to be implemented by Malta, is not dealt with here. Their transposition has not produced any substantive issues of note. Administrative structures too are of only indirect and lesser interest

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<sup>26</sup> In Malta, Transposition Tables are not published, unlike countries like Belgium where it is felt that the public has a right to be able to find where and how a Directive has been implemented into national law.

<sup>27</sup> Council Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] OJ L166/51



to this thesis. These may be usefully delineated here very briefly. Before the 1994 Act,<sup>28</sup> the only administrative entity with a generic consumer protection role was the Department of Trade which was broadly responsible for the administration of the Trade Descriptions Act<sup>29</sup> and the Door-to-Door Salesmen Act.<sup>30</sup> Its resources were slim, its level of enforcement was unsatisfactory, and it kept a very low profile largely detached from the public. Interest in improving the institutional frameworks was kick-started by the 1991 White Paper which recommended the setting up of a Consumer Protection Agency. Eventually a new fully fledged Department for Consumer Affairs was established officially in 1992. The 1994 Act also created two new structures: a Consumer Affairs Council conceived as a permanent advisory and policy think-tank, and a new Consumer Claims Tribunal.<sup>31</sup> In 2011 the Malta Competition and Consumer Affairs Authority was established.<sup>32</sup>

#### **4. Structure of the thesis and layout of the Chapters**

This part describes the structure and lay-out of the thesis, and briefly describes the subject and objectives of each Chapter.

**The Introduction** describes the subject of this present research and sets out its broad objectives and scope, and the self-imposed limitations and exclusions. It introduces the various legal and political factors which have influenced and shaped the adoption of local transposition measures, particularly in the pre-accession phase. The final sections of this Introduction explain the organisation and lay-out of the thesis. To supplement the analysis in this part and in Chapter 1, a detailed Comparative and Chronological Table compares and briefly annotates the significant developments and landmarks in Community and national consumer laws and policies in the period under examination.

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<sup>28</sup> Consumer Affairs Act, Act XXVIII of 1994, Chapter 378 of the Laws of Malta

<sup>29</sup> Chapter 313 of the Laws of Malta

<sup>30</sup> Chapter 317 of the Laws of Malta

<sup>31</sup> Both of these entities survive till this day

<sup>32</sup> Chapter 510 of the Laws of Malta

**Chapter 1** carries on the discussion commenced in the Introduction and seeks to compare and elaborate on the broad Community and Maltese consumer policy and law contexts. Setting the scene for the subsequent Chapters of the thesis, it introduces various aspects of the relationship between Community consumer law and national consumer law. The Chapter examines the various relevant stages of the accession process, including the screening and gap analysis undertaken jointly by the Community experts and the Maltese authorities, and the series of pre-accession transpositions whereby Maltese consumer law became ever more closely aligned to EU consumer law.

**Chapter 2** is the first Chapter to examine a specific Directive. It investigates the significance of the local Doorstep Contracts Act of 1987<sup>33</sup> in the context of transposing the Community rules on consumer contracts concluded outside business premises. This particular law provides an interesting uncommon instance of a law that anticipated Malta's application to join the Community in 1990. The 1987 Act offers a useful opportunity to consider the 'accidental' transposition of a Community Directive even prior to the membership application. This Part suggests that the law as revised in 2000 represents a reasonably instructive and creative method of transposition and merits attention accordingly. This Chapter uses this particular Directive to reflect on the potential beneficial nature of minimum Directives and the space they allow for national creativity and discretion.

**Chapter 3** examines the significance of the publication of the two important milestones in the history of Maltese consumer policy, namely the seminal White Papers of 1991 and 1993, and the extent and nature of their relationship with EU consumer law. These two official documents introduced modern consumer law concepts to Malta and indirectly facilitated the eventual transposition of the Community rules. The 1991 consumer policy White Paper<sup>34</sup> provided a comprehensive, objective and unflattering picture of the state of play of consumer protection at that point. It also proposed a fairly detailed and precise programme for legislative reforms in favour of consumers. A second White Paper followed in

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<sup>33</sup> Chapter 317 of the Laws of Malta

<sup>34</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991)

1993<sup>35</sup> cementing the status of the 1991 proposals as official Government policy. The thesis investigates these two White Papers, traces their background and what they signified within the prevailing political and legal contexts. It also examines their relevance and implications in relation to the island's preparations for EU membership. These two landmark documents laid down the foundations of Maltese consumer policy and paved the way to the adoption of the Consumer Affairs Act of 1994,<sup>36</sup> exercising a huge influence on its content.

**Chapter 4** examines the objectives, salient features and significance of the Consumer Affairs Act 1994 and identifies the background and the contexts which explain how and why this law came about and examines its position in the accession venture. The Consumer Affairs Act, a product and the principal accomplishment of a process begun in 1990, marked a conceptual and legislative turning point. It later absorbed various Community Directives and greatly benefitted from the alignment programme. The Chapter examines the role this Act has played both in the evolution of a Maltese national consumer policy and in the implementation into national law of Community Directives. As membership drew near, the importance of this Act increased. Each of these lines of enquiry stresses the catalyst role played by the Consumer Affairs Act of 1994 in the years under review.

This Chapter also re-appraises the 1998 attempt by the Labour Government to reform the 1994 Act and to re-shape the existing structures by establishing a new public authority which merged oversight responsibility for both consumer and competition affairs. The short-lived draft Bill contemplated the setting up of this new consumer protection and competition authority as part of the Eurosceptic Labour Government efforts to articulate an autonomous consumer policy agenda after having earlier suspended Malta's membership application.

**Chapter 5** examines the significance and context of the 2000 amendments to the Consumer Affairs Act 1994 and the implementation into local law of various

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<sup>35</sup> Department of Information, *Fair Trading...the next step forward. Proposals for Legislative Reforms* (White Paper, 1993)

<sup>36</sup> Chapter 378 of the Laws of Malta

Community consumer Directives. This included new rules on product liability, guarantees in the sale of goods, unfair contractual terms and distance selling, measures of considerable Civil Code<sup>37</sup> relevance. This Chapter provides a suitable opportunity for examining the relevance and role of the Civil Code and the Commercial Code<sup>38</sup> in a fast evolving society, their relationship to the *acquis* and the transposition experience. The development of Maltese consumer law and the transposition of EU consumer law is analysed in the context of the codified character of the Maltese legal system.

**Chapter 6** focuses on product safety regulation and the relationship between Community and national law on the subject, and investigates the challenges that this particular transposition encountered. The transposition of the product safety Directives offers useful lessons on the method, techniques and challenges of transposition. It shows how European Union membership may act as a motor for the introduction of important new consumer protection rules which might otherwise not have been introduced in national law. Indeed, the Maltese Product Safety Act<sup>39</sup> is very much the fruit of EU membership. The Chapter also analyses the broader contexts and background to the adoption of this Act and of other new laws regulating aspects of consumer safety which too were adopted as part of the accession process.

**The Conclusion** articulates the various general and specific findings resulting from the preceding Chapters. The various findings of the thesis offer an opportunity for a final reflection on the importance of contexts, mainly political and legal, to this study. The Conclusion also reflects on possible directions for future research on accession and transposition issues and the nature of their interaction with and influence on national consumer law.

**List of Appendices:** a number of important documents, most never before published, have been placed in this section. Seven appendices include unpublished

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<sup>37</sup> Chapter 16 of the Laws of Malta

<sup>38</sup> Chapter 13 of the Laws of Malta

<sup>39</sup> Chapter 427 of the Laws of Malta

Bills from 1992 and the agenda and minutes of the Screening meetings on the consumer legislative *acquis* in 1999 and the results thereof.

**List of Tables:** Three Tables have been compiled. Table A is by far the most important and should be considered an integral part of the text. It offers a comprehensive and unique comparison and contrast between the evolution of the EU consumer policy on one side and the evolution of Maltese consumer law on the other. Such a detailed year by year comparison has never been attempted before. Table B lists national legal measures in the consumer protection field, whereas Table C lists the relevant Community consumer protection Directives. All the three Tables have been deliberately compiled in chronological order to permit comparative understanding of the evolution and increasing interplay between Maltese and EU consumer law.

## 5. Post-membership developments

In principle, this thesis is not concerned with the post-membership Community impact on national consumer law and policy. Legal and other relevant developments which occurred after the 2004 membership date lie beyond its scope, and are considered only exceptionally. For this reason, some important post-membership legislation and developments may not receive the attention otherwise amply deserved had this thesis covered a more extensive period. An important transposition measure, such as Act II of 2008 which amended the Consumer Affairs Act 1994 to transpose the Unfair Commercial Practices Directive<sup>40</sup> would surely have merited more space and attention. The transposition of this Directive involved the insertion of new Articles 48 to 55A to the 1994 Act. Another significant recent law is Act No. VI of 2011 which established the aforementioned Malta Competition and Consumer Affairs Authority

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<sup>40</sup> Council Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (Unfair Commercial Practices Directive)

which assumed the role and functions of the Department set up in 1992 (and later regulated by the 1994 Act).<sup>41</sup>

Nonetheless, the Conclusion highlights a select number of more recent post-membership developments of significant relevance to fundamental issues and concerns addressed in these Chapters. Though outside the fifteen year span of the title, these updates successfully complement this present study and crucially test its findings.

## **6. A note on documentation**

This thesis traces and reviews seminal local reports and other documentation of relevance to the development of Maltese consumer law which are out of print or difficult to access or have never been published. In most instances, they have been inadequately considered in the literature. The Community's own documentation is of course extensively available on the 'europa.eu' website and other internet sources. Foreign literature on Community consumer law is today considerable and it would be useful to test its findings against the Maltese experience. Few foreign publications have addressed the Maltese accession and transposition experience. A detailed Bibliography accompanies this work.

To some degree, this thesis has been hampered by the lack of accessibility to official Government files which may have better explained the background to certain local legislation and the true thinking behind the measures, their objectives and sources. In some cases, the files have become untraceable through inadequate archiving practices. Old Government files on the subject are especially difficult to access, and official documents are not always published for general circulation. In some instances, rather than proceed to publish for general information, Government engages in restricted selective consultations with industry and other interests. The research focuses on unchartered areas of Maltese consumer law and policy, and

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<sup>41</sup>Consumer Affairs Act 1994, Chapter 378 of the Laws of Malta, Article 3

has sought to unearth lesser known local political decisions, newspaper articles, speeches and other sources, which have so far escaped academic attention.

The debates of the House of Representatives remain a very valuable source of insights into the official law-making process. The debates reveal both official thinking behind legislative measures proposed as Bills as well as the criticism offered by the Labour Party Opposition in relation to transposition measures originating from an accession process which it vehemently contested throughout the period covered by this thesis.<sup>42</sup>

## **7. Some terminology and language issues**

### **(a) Terminology**

- (i) References to the 'EEC', 'EC', 'European Union', 'EU' and 'Community' and similar and equivalent terms are here used more or less inter-changeably, and no big attempt is made to distinguish between these historically different designations.<sup>43</sup> These technical distinctions and nuances may be relevant in other contexts but not so much within the scope of the current thesis. In most instances, the generally preferred terms are the 'EU' and the 'Community'.
  
- (ii) Maltese laws are numbered in strict chronological sequence by way of 'Chapters'. Once enacted, each new law receives the next due Chapter number. Accordingly, references to Maltese laws would usually consist of its statutory short title and the number of the relevant Chapter of the Laws of Malta.

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<sup>42</sup> Naturally these debates refer to Bills and not also to ministerial regulations which are very rarely debated in Parliament.

<sup>43</sup> The semantics are explained in G Howells and S Weatherill, *Consumer Protection Law*, (2nd edn, Ashgate 2005) p101. The distinctions are also drawn clearly in the Commission's website: <[http://europa.eu/about-eu/basic-information/decision-making/treaties/index\\_en.htm](http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm)> accessed on 29 June 2014.

- (iii) Ministerial regulations are enacted on the strength of enabling powers in primary legislation. They are published in the official gazette and a set of regulations is often also designated as a 'Legal Notice' or 'L.N.'
- (iv) 'NPAA' refers to the National Programme for the Acceptance of the *Acquis*. Three NPAA's were published in 2000, 2001 and 2002 respectively.

## **(b) Language**

- (i) Laws, regulations and Official Government White Papers are, with very few exceptions, published in English and Maltese, both being 'official' languages in terms of Article 5 of the Constitution of Malta.
- (ii) Maltese text is produced in its equivalent English language translation and indicated as '(in trans.)'. The writer guarantees and assumes full responsibility for the correctness of the translations. Texts in other languages have been faithfully paraphrased in English and integrated as normal text. As a result, the thesis is being presented in its entirety in English.
- (iii) In the absence of extensive books and papers on the subject, much useful information may be gleaned from local newspapers. As a result, various articles from local newspapers are cited in this thesis. The leading Maltese daily is *The Times*, with a Sunday version, *The Sunday Times*, both published in English. Other papers include the *L-Orizzont*, a Union and generally pro-Labour Party newspaper published daily. The Sunday version is called *It-Torca*. Both are published in Maltese. *In-Nazzjon* is the official Maltese language organ of the Nationalist Party which was in government both when Malta applied to join the EC in 1990 and when it joined in 2004. Other newspapers cited are *The Malta Independent*, a daily, and *The Malta Independent on Sunday*, a weekly, both of which are published in English.



- (iv) As Maltese academic papers and University dissertations on relevant consumer and European affairs have invariably been published in English, they did not require translation.

# CHAPTER 1

## THE EU AND NATIONAL CONTEXTS: THE JOURNEY BEGINS

'The significance of the *acquis* is most obvious when new member states join the Union. They are legally obliged to accept not only the Treaties, but all previous legal decisions taken by the various Union institutions, all agreements within and between those institutions about their operation, and all international agreement concluded by the Union.'

Definition of 'acquis communautaire' in Timothy Bainbridge, *The Penguin Companion to European Union* (2nd ed, Penguin 1998) p4

'It is important for students of law to situate the legal doctrine of the EU in its historical and political context. EU law does not emerge in a vacuum, however devoid of context the legislative texts and judgements may at times appear. Periods of political change have significantly affected the nature of law-making within both the political institutions and the Court, as well as the reception of such law into the Member States.'

Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials* (3rd ed, OUP 2008) p4

### 1. Preliminary – law in context

Building on the introduction made in the first Chapter, this Chapter expands the analysis of how Malta adapted to the unfamiliar Community's legislative realities and peculiar structures, rules, procedures, priorities and requirements. The EU progressively exercised greater influence on the island's laws, administrative practices and priorities, including national consumer law. The impact of EU

legislation, both during the accession period and after membership, may be described as momentous, and today Maltese consumer law can only be correctly evaluated and understood within this context.

## 2. The European Union context

### (a) Preparing for 1990: a brief note on the Community 1980 position

The evolution of the Community's interest in adopting a consumer policy and the history of its legal competence in the field is already well documented in textbooks and academic papers and will not be repeated here.<sup>1</sup> When Malta filed its application for membership in 1990, the Community's consumer policy was still largely work in progress and indeed, in one commentator's words, was rather 'patchy'.<sup>2</sup> In her paper presented in Malta in 1995,<sup>3</sup> Monique Goyens criticised the gaps and limitations of EU consumer law at the time. She rightly highlighted that the approach currently taken by the European Community towards consumer policy differs from that of the Maltese legislator and that consumer policy in the EC must head for a new lease of life. She also criticised the fragmented nature of the institutional framework for the implementation of an EC consumer policy.<sup>4</sup>

For a better historical perspective, it is indeed fortunate that in 1980, the European Commission ordered a comprehensive study on the state of play of consumer protection in each of the then nine EEC Member States. A few years earlier, the

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<sup>1</sup> Stephen Weatherill, *EU Consumer Law and Policy* (2<sup>nd</sup> edn, Elgar European Law 2005); Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate-Dartmouth 1997); Vivienne Kendall, *EC Consumer Law*, (Wiley Chancery 1994), are but a few authors whose works have comprehensively chronicled this history, often very critically. The Community's own documentation and reports and its excellent Europa website are also indispensable sources on this subject.

<sup>2</sup> Stephen Weatherill, *EC Consumer Law and Policy* (1st ed, Longman 1997) <sup>2</sup> The same writer has more recently referred to the 'unsatisfactory messy legislative *acquis*.' (Weatherill 2013) p193. See Table A which compares consumer law developments in Malta and the EU.

<sup>3</sup> Monique Goyens, *EU Consumer Protection Legislation and the New Maltese Legislation*, in Economic and Social reform in Malta, papers from The State of the Union Conference, Peter Xuereb and Roderick Pace editors (EDRC Publications, University of Malta Press, 1995) pp352- 379

<sup>4</sup> Ms Goyens was the first foreign expert to comment on Malta's new consumer legislation of 1994, dealt with in Chapter 4. Her timely paper analysed the Act and the degree of its convergence with the Community's own legislative *acquis*.

historic Council Resolution of 14 April 1975<sup>5</sup> had set out one of the first wide-ranging commitments and policy statements on consumer protection at Community level. A number of national reports were produced in the aftermath. A general report grouping the results from the various national studies was eventually published in book-form under the name: *Consumer Legislation in the EC Countries: a Comparative Study*.<sup>6</sup> This work provides a revealing picture of the state of consumer law in Member States countries at the time. Briefly stated, the main finding was that in 1980 consumer law across Europe was still largely in its infancy. The Report also concluded that: 'It is still a question in the EC countries whether a special consumer law has been developed or is in the process of evolution.'<sup>7</sup> It was also reported that, although no country had a comprehensive code of consumer protection, '...there is a strong reform movement in most EC countries sponsored to some extent by EC draft directives...or emanating from the relevant forces of consumer policy.'<sup>8</sup>

Analysing the state of consumer law in Italy, Gustavo Ghidini commented: 'So far, the Italian legislator has protected consumer interests very poorly.'<sup>9</sup> This assessment fits the position in Malta where in 1980 the state of consumer protection was similarly undeveloped and unsatisfactory.<sup>10</sup> In 1990, at the start of the period under examination in this thesis, EC consumer policy was still in its formative stages and was developing largely in a series of three-year Action Plans. The first Action Plan launched that year<sup>11</sup> focussed on consumer information, safety, representation and

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<sup>5</sup> Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1

<sup>6</sup> Norbert Reich and Hans-W Micklitz, Reinhold Van Nostrand, *Consumer Legislation in the EC Countries: a Comparative Study* (Van Nostrand Reinhold Company 1980)

<sup>7</sup> *Ibid.* p10

<sup>8</sup> *Ibid.* See Table A (n 2)

<sup>9</sup> Gustavo Ghidini, *Consumer Legislation in Italy: a study prepared for the EC Commission* (van Nostrand Reinhold 1980, p1). Ghidini also remarked that pioneering legal writers including Alpa, Bessone and Ghidini himself, had started writing and making concrete proposals 'towards the improvement of present institutional means and structures designed to realise consumer protection.' (*Ibid.* p1) In his preface to the book, editor Prof Norbert Reich wrote that 'These books present the first comprehensive analysis of consumer law in the nine EC countries. Their main emphasis is on the presentation and evaluation of legislative activity and reform movement which have resulted in many new – however divergent – solutions.'

<sup>10</sup> See Appendix 1 and Table A. On the development of consumer protection policy in the Community see generally Thierry Bourgoignie, Mauro Cappelletti and David M. Trubek, *Consumer law, common markets and federalism in Europe and the United States* (W. de Gruyter 1987). See also European Commission, 'Inventory of Community Acts relating to consumer affairs and consumer health protection'(1999) <[http://ec.europa.eu/dgs/health\\_consumer/library/legislation/leg01\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/library/legislation/leg01_en.pdf)> accessed on 25 June 2013.

<sup>11</sup> Commission, 'Three year action plan of consumer policy in the EEC' (1990-1992) COM (90) 98 final

protection in financial transactions. It led to legislation on product safety, unfair contract terms, package travel and package tours, labelling and presentation of foodstuffs which were adopted during the period covered by the Action Plan. Work also commenced on what would evolve into new legislation regulating distance selling, liability of suppliers of services, comparative and misleading advertising and timeshare contracts.<sup>12</sup>

### **(b) The *acquis*, the accession process and the enlargement**

By the time Malta reached the final stages of its accession negotiations, the consumer Directives had grown into a more substantial body of law, though a fragmented one. For the purposes of the accession negotiations leading to the 2004 enlargement, the EU *acquis communautaire* was arranged in thirty-two Chapters. The Commission had sensibly divided the *acquis* into identifiable and manageable compartments. The division of the extensive and wide-ranging *acquis* into a definite number of Chapters helped move the screening and negotiation programmes forward in a structured and sustainable manner.<sup>13</sup> The screening stage was conducted by the Commission and preceded the actual negotiations. Once the screening was concluded, Malta, as a candidate country, submitted its negotiating position whereupon the Commission later drew up its draft common position. On 19 February 2003, the Commission issued a formal opinion recommending the accession in 2004 for ten candidate members, including Malta.<sup>14</sup>

This compartmentalisation greatly facilitated the structured negotiations between the Commission and new accession countries during the enlargement exercise in which Malta participated. Membership negotiations followed the orderly opening and closing of the Chapters comprising the *acquis*. New members had to conclude successful negotiations on twenty-eight of these thirty-one Chapters. Three Chapters were non-negotiable as they established the Union's constitutional

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<sup>12</sup> Ibid.

<sup>13</sup> Enlargement of the European Union- March 2003: The European Parliament in the Enlargement Process - An Overview DV/492865. EN

<sup>14</sup> Commission Opinion on the Application for Accession to the EU by the applicant countries (February) COM (98) 712 Final

foundations, principal structures and basic laws.<sup>15</sup> The consumer protection Chapter did not and does not comprise every single consumer measure adopted at EU level.<sup>16</sup> Consumer measures could be found in such Chapters as Free Movement of Goods (Chapter 1), Competition policy (Chapter 6), Agriculture (Chapter 7), and Transport Policy (Chapter 14).<sup>17</sup>

Following various gradual enlargements, the size and scope of the European Union has significantly increased.<sup>18</sup> The 2004 enlargement included Malta. Other new member States have joined since, namely Bulgaria, Rumania and Croatia.<sup>19</sup> It has indeed been correctly remarked that:

...the difficulties of drawing up legislation for so disparate a group of countries (unless it is so permeated with opt-outs, derogations and special conditions as to be meaningless) are immense. The future coherence of the Union is likely to depend not on new legislative action but on the enforcement of legislation already in place...<sup>20</sup>

In its policy programme blueprint 'Agenda 2000 - for a stronger and wider Union',<sup>21</sup> the Santer Commission defined its strategy in preparation for the next influx of new members. The 1300-page document which was published on 15 July 1997 assessed the preparedness of the various applicant countries and the level of transposition each had achieved till that date. The document had identified 2003 as the earliest next likely date of accession. Malta was excluded from this report as the

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<sup>15</sup> Chapters 29-31

<sup>16</sup> G. Borrie and A. Diamond, *The Consumer, Society and the Law* (3<sup>rd</sup> edn, Pelican 1976) p326, have remarked that: 'Law is not divided in watertight compartments. For convenience, related topics must be treated together, and similar concepts dealt with in conjunction with each other. But certain ideas run through the law, however its subject-matter is arranged.'

<sup>17</sup> The Chapter numbers indicated in this paragraph are the respective chapter numbers as officially listed at the time of Malta's accession. The current *acquis* is different and is now divided in 35 Chapters. As part of the Accession programme, Malta was required to screen and transpose the Consumers and Health Protection Chapter, then Chapter 23 of the *acquis*. Currently the consumer chapter is listed as Chapter 28. See

<[http://ec.europa.eu/enlargement/archives/enlargement\\_process/future\\_prospects/negotiations/eu10\\_bulgaria\\_romania/chapters/index\\_en.htm](http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/chapters/index_en.htm)> accessed on 27 June 2013

<sup>18</sup> A very useful description of the enlargement process and its implications is available in Thomas Bainbridge, *The Penguin Companion to the European Union* (2nd edn, 1998) pp148-155

<sup>19</sup> See generally Allan F. Tatham, *Enlargement of the European Union* (Kluwer Law International 2009)

<sup>20</sup> Timothy Bainbridge, *The Penguin Companion to European Union* (2nd edn, Penguin Books Ltd 1998), Preface, pp xii-xiii

<sup>21</sup> Commission 'Agenda 2000 – For a stronger and wider Union'. Document drawn up on the basis of COM (97) 2000 final, 13 July 1997' Bulletin of the European Union, supplement 5/97

Euro-sceptical Labour government elected in the 1996 general elections had suspended Malta's application.

The meeting of the European Council in Copenhagen in 1993 established three major criteria for membership of the Union. These related to stable institutions, democracy and respect for the rule of law and human rights; a functioning market economy able to cope in a competitive scenario; the ability to assume the obligations of membership, the adoption of the *acquis* and acceptance of the Union's political and economic objectives.<sup>22</sup>

For the purposes of this Chapter, the most interesting of the Copenhagen criteria is the successful complete adoption of the *acquis*. This body of rules and principles, including Directives, had been gradually built up and developed over many years, reflecting the political agendas, needs, interests and the political and economic development of the Member States. The new approach taken by the European Council ruled out the possibility that accession could henceforth be achieved on the strength of only a partial or incomplete adoption of the *acquis*. The only elbow room allowed to candidate States was to try to negotiate transitional periods or, with greater difficulty, argue for outright derogations from specific Community rules. A strong case and justification would have to be made for any such request. In practice, and very exceptionally, only limited derogations were generally negotiated by Malta, but these were greatly discouraged and largely contested by the Commission, particularly because such requests would take a long time to process further delaying the date of possible accession. Besides, they would have set an unwelcome precedent that other aspiring members could be tempted to copy. Unsurprisingly, the Commission was not favourably inclined towards allowing too many transition and adjustment periods.

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<sup>22</sup> See Marie Soveroski, 'Agenda 2000: A Blueprint for Successful EU Enlargement?' EIPASCOPE (1998) p1. See also Commission Opinion on Iceland's application for membership of the European Union, SEC (2010) 153 which summarises the applicable condition for membership, which include the ability to correctly and timely implement EU law. Apart from these criteria, the Treaty on European Union (TEU) required that Member States had to be European. [Consolidated version of the Treaty on European Union [2012] ] OJ C326/13

By way of historical background, the European Council's historical Copenhagen Declaration of the 7 and 8 April 1978<sup>23</sup> had introduced a number of parameters for new members, but it had not originally included the explicit obligation and the ability to implement the full *acquis*. In 1992 the Commission reported to the Council<sup>24</sup> proposing the introduction of new criteria for membership requiring 'the applicant state's acceptance of the *acquis* and its capacity to implement it'. This criterion was reproduced almost verbatim in the well-known Copenhagen Criteria of 1993, mentioned earlier, which unambiguously required new Member States to accept the *acquis* in its entirety.<sup>25</sup> The maintenance of the *acquis* had become a fundamental principle of the EU in line with the Maastricht Treaty provision that one of the European Union's objectives is 'to maintain in full the *acquis communautaire* and build on it.....ensuring the effectiveness of the mechanisms and the institutions of the Community (Article B TEU).'<sup>26</sup> The integration and implementation of the *acquis* into the national legal system as a pre-condition of membership was the context in which Malta started negotiating its accession. Malta soon discovered that the transposition of the considerable *acquis* was an enormous and difficult undertaking.<sup>27</sup>

The Community's first tentative steps towards a consumer policy is only traceable to the mid-seventies, and the Maastricht Treaty finally accorded consumer protection a more respectable standing as one of the Community's constitutional objectives.<sup>28</sup>

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<sup>23</sup> Commission, 'Economic and sectoral aspects. Commission analyses supplementing its views on enlargement.' Communication from the Commission, sent to the Council on 20 April 1978. COM (78) 200 final/Part I, 22 April 1978. Bulletin of the European Communities, Supplement 3/1978

<sup>24</sup> European Commission, 'Report to the Council, Europe and the Challenge of Enlargement Brussels' (24 June 1992) p53

<sup>25</sup> European Council Copenhagen, 21-22 June 1993. This stand was confirmed in the meeting of the European leaders in Madrid in 1995 (Madrid European Council, 15-16 December 1995). See entry under 'enlargement' in *The Penguin Companion to the European Union* (n 18); also relevant are the entries in the same publication on the 'Copenhagen criteria' and 'Agenda 2000'. Agenda 2000 was accepted by the European Council meeting in Luxembourg as 'an appropriate working basis for further negotiations.'

<sup>26</sup> An interesting analysis on the implications and process of the 2004 EU enlargement is found in Janet Dine, Marios Koutsias, and Michael Blecher, *Company Law in the New Europe; the EU Acquis, Comparative Methodology and Model Law* (Edward Elgar Publishing Limited 2007) part 1 of page 142. Although the text is mainly interested in company law, the analysis is relevant also to other areas of the *acquis*, including consumer protection.

<sup>27</sup> David Fabri, *Transposition Tables, Toil and Tears...Tales from the Accession* in Peter Xuereb (ed), *European Union Membership: Five Years on and Looking to the Future*, (EDRC publications, 2009) and Sacha Prechal, *Directives in EC Law*, (2nd edn, Oxford EC Law Library 2005) pp168-185

<sup>28</sup> This history has already been fully explored and expertly analysed by writers such as Weatherill *The evolution of consumer policy in the European Union*.



The setting up of a separate administrative unit within the Commission structures, known as the Consumer Policy Service, occurred as late as 1989. The unit became a fully-fledged Directorate-General in 1995. In comparison, Malta's first substantial White Paper on consumer policy was issued in 1991 and a Government department for consumer affairs was set up as early as 1992.<sup>29</sup> The direction taken by the Community in 1994 with respect to measures to support and promote its new consumer vocation has already been ably chronicled in Professor Howell's succinct description which may also serve as a useful stock-take of the position at the time:

Opponents of consumer protection have justification to view the European Community with annoyance. The Community has with very few resources, in both financial and in terms of legal authority, ensured that consumers within Europe have minimum protection in areas such as product liability, product safety, unfair contract terms, consumer credit, doorstep sales, misleading advertising and package holidays. The Consumer Policy Service has some very important projects in hand on topics such as timeshare, guarantees and after sales service, distant selling, service liability and safety and improved access to justice.<sup>30</sup>

To conclude this part, the EU's own website today provides this interesting description of the current consumer protection Chapter of the *acquis*:

#### Chapter 28: Consumer and health protection

The consumer protection *acquis* covers the safety of consumer goods as well as the protection of the economic interests of consumers in a number of specific sectors. Member States need to transpose the *acquis* into national law and to put in place independent administrative structures and enforcement powers which allow for effective market surveillance and enforcement of the *acquis*. Appropriate judicial and out-of-court dispute resolution mechanisms as well as consumer information and education and a role for consumer organisations should be ensured as well. In addition, this chapter covers specific binding rules in the area of public health.<sup>31</sup>

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<sup>29</sup>See European Commission, 'Malta Country Profile' (October 2009) <[http://ec.europa.eu/consumers/overview/country\\_profile/MT\\_web\\_country\\_profile.pdf](http://ec.europa.eu/consumers/overview/country_profile/MT_web_country_profile.pdf)> accessed on 27 June 2013

<sup>30</sup>Geraint Howells, *What Type of Future is there for Consumer Law?* (1994) 2 (1) Consumer L.J. Editorial

<sup>31</sup><<http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis>> accessed on 27 June 2013

The Consumer Protection Chapter which Malta had to convert into Maltese legislation was characterised by the legislative device of minimum harmonisation Directives. Directives have first to be correctly transposed and then effectively implemented. Sacha Prechal<sup>32</sup> has stressed the obligation to effectively implement Directives after their transposition, explaining that at a second stage the attention shifts:

... from adequate transposition into national law to their application and enforcement in practice. The requirement that directives are fully effective may entail additional obligations for the Member States which are beyond the actual text of the directive at issue.<sup>33</sup>

Regarding the future of minimum Directives in future Community law, Prechal remains confident that:

[d]espite all the problems discussed (...) 'the directive', as an instrument of EC intervention and the concept it embodies, has proved its usefulness (...) It functions as a crucial element in giving shape to the sui generis Community legal order. By its character of two stage legislation it forms an important transmission belt between the European and domestic level.<sup>34</sup>

On the same subject, Professor Alpa has sensibly explained that:

...until now, Community consumer law was entrusted to 'minimum directives', which, having established a 'minimum common denominator' consisting of mandatory principles to be implemented in all the national legal systems, allowed individual legislatures to raise the level of protection. This system had the advantage of not lowering the protection of rights in the legal systems in which it was stronger compared to the legal systems offering less protection of civil rights, and at the same time of allowing the latter to gradually adapt to the stronger models, in the sectors considered on different occasions. However, two negative aspects were found: the legal treatment of relationships with consumers end up being different, and the level of protection they were guaranteed varied from country to country. Complete harmonisation, proposed by the Commission, is pressed for by professionals, who currently have to face significant transactional costs due to the variety of applicable rules, and by consumer associations, who on each occasion should advise their

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<sup>32</sup> Prechal (n 27) See generally Chapter 5, 'Implementation of Directives', pp73-91

<sup>33</sup> Ibid.

<sup>34</sup> Ibid. p320

members on which law, of the two in consideration is the best to apply to the contract. This however implies a kind of restriction of the sector, whose evolution will exclusively depend – if the proposal [the then proposal for a Consumer Rights Directive] is approved – on Community legislation, which will therefore limit domestic decisions.<sup>35</sup>

### **(c) A Southern European dimension?**

An unusual perspective on Malta's adoption of the consumer Directives was articulated by an external expert during a TAIEX Seminar organised by the European Commission in Malta on 21 November 2000. Mr Jens Karsten from the Centre de droit de la consommation, Université Catholique de Louvain, Belgium presented a paper where he compared the situation of Malta with Cyprus:

From an outside perspective, Malta and Cyprus as candidate countries have certain things in common. Different to the countries of central and eastern Europe, their countries are no economies in transition that have to implement a market economy; that condition for accession is already provided. Both countries are strongly influenced by Britain which provides a rich source for comparisons between the legal systems of an existing Member State and future ones. For the same reason, both countries have English speaking staff on all levels of the administration which facilitates very much communication in the day-to-day work of integration. Furthermore, I assume that both countries face similar challenges when it comes to implementation of the EU concept of consumer protection. I understand that the aim of this seminar is to resolve some of the problems and to respond to some of the questions related to this particular part of the *acquis communautaire*.<sup>36</sup>

At that time, Malta was embarking on an extensive transposition involving a number of various Directives, a subject examined in Chapter 5.

Surprisingly, leading authors have suggested a similar geographical-political dimension to consumer law development, namely that: 'Southern Europe in general had less developed consumer regimes and like Eastern Europe, its consumer policy

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<sup>35</sup> Guido Alpa, *Markets and Comparative Law* (British Institute of International and Comparative Law 2010) p11

<sup>36</sup> TAIEX seminar organised by the European Commission in Malta on 21 November 2000

has benefitted from the impetus given by membership of the European Union.<sup>37</sup> One questions whether a peculiar Southern European approach to consumer protection does actually exist, and indeed it is not a proposition that shall be considered further in this thesis.<sup>38</sup>

### 3. The Maltese accession project

#### (a) Some general issues

The mandatory transposition of the entire Community *acquis*, including the consumer protection Chapter, meant that Malta and the other applicant countries in line for the next enlargement were obliged to undertake, what was to them, a peculiar, challenging and novel form of law-making.<sup>39</sup> The number of Directives in question and the haste in which transpositions were being undertaken in Malta regrettably ensured that several transpositions were predictably faithful cut and paste jobs – with a few exceptions.<sup>40</sup> On the positive side, the accession procedures and the consequential transposition obligations revitalised the flagging interest of the Maltese authorities in the further development of consumer legislation. The Maltese authorities had to surmount a number of often perplexing legal and drafting

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<sup>37</sup> Geraint Howells, Iain Ramsay, Thomas Wilhelmsson and David Kraft, *Consumer law in its international dimension* in Handbook of Research on International Consumer Law (Edward Elgar Publishing 2010) p9. Certainly Maltese consumers, like others, benefitted from this fresh impetus.

<sup>38</sup> The proposal to extend EU membership to the two small islands in the southern Mediterranean, Malta and Cyprus, had not been free from controversy and political concerns: Roderick Pace, *Microstate Security in the Global system: EU – Malta Relations*, Midsea books, 2001, pp223-239

<sup>39</sup> In *A fresh look at the state of play of Consumer Protection in Malta: coherence, confusion or a bit of both?* (Seminar address to Chamber of Advocates, 28 May 2008) the present writer severely criticised the poor drafting evident in the local transposition of the Unfair Commercial Practices Directive. See also *Transposition Tables, Toil and Tears...Tales from the Accession*, in Peter Xuereb, Editor, *European Union membership: Five Years on and Looking to the Future* (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta, 2009), where other specific instances of poor transposition efforts in local consumer legislation are identified.

<sup>40</sup> During the accession screening and negotiations, Commission experts strongly encouraged that the exact terms and concepts used in the EU Directives be literally replicated in the local transposition measures, for two reasons: first to make the verification work simpler and therefore also faster: and secondly, to guarantee a stronger probability of correct implementation.(Writer's personal experience)

difficulties in their efforts to transpose the EU consumer Directives. Although not always readily acknowledged officially by the Maltese authorities, the obligation to effect a complete and correct transposition of the Directives in Malta prior to accession was fraught with difficulties, and not solely in the consumer protection sector. The project was hampered by the lack of local expertise in certain specialised fields of law, including EU law generally. Time to build such expertise was not available and the project often advanced on the basis of doing the best in the circumstances using whatever skills and knowledge could be mustered. The physical deficit in local capabilities mobilized to handle the task of legislating, in a few years, a programme that would normally have taken ten or twelve years to implement, is not an event that could have been undertaken without risk or stress.

Writing from his personal experiences, Professor Baldacchino has produced an amusing but insightful account of the accession procedures and on the emergence of experts and so-called experts on Community law at this stage of the accession. He notes:

Ever since the re-elected Nationalist government re-activated Malta's bid for EU membership in Autumn 1998, the country has found itself on a roller-coaster of meetings, deadlines, implementation, legal drafting, administrative reform, impact assessments and so on, all associated with Malta's self-appointed obligation to conform to the EU *acquis* by a deadline of 1 January 2003. Meanwhile, most local, social, political and economic players are engaged in an intensive media campaign to shift the electorate either for or against membership, in the run-up to a keenly anticipated referendum on EU membership, due late in 2002.<sup>41</sup>

Baldacchino also wryly comments on Malta being the smallest of the countries seeking membership and facing:

the strongest official opposition to EU membership among all applicant states, as well as one trying to undergo the transition to qualify for membership in a fairly short time ...<sup>42</sup>

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<sup>41</sup> Godfrey Baldacchino, *But what exactly does the Directive say?: The Role of EU Acquis Experts in Industrial Relations* (2001) 7(2) *European Journal of Industrial Relations* pp137 - 139

<sup>42</sup> *Ibid.*

What increased the difficulties was the partisan political divide over EU membership and the political commitment that a popular referendum would be held to approve or reject the negotiations concluded with the Commission. The referendum was scheduled to be held when all the negotiating positions on all the Chapters of the *acquis* had been finalised. The public could then evaluate and judge the package attached to Malta's membership. What this also effectively meant was that most of the *acquis* was transposed during a period of uncertainty about eventual membership.<sup>43</sup> To complicate matters, the Directives had to be transposed without making any reference to the Directives themselves, to the European Union, to the notion of transposition, and generally to similar and related matters so as not to pre-judge the referendum issue. Drafters of the transposition measures were required to labour within these abnormal and demanding confines. Maltese legal texts had to transpose EU Directives without being allowed to acknowledge that the true objective was in fact a transposition.

The transposition of so many EU laws into Maltese legislation in the space of five years prior to actual membership was a sizeable legislative undertaking. Two Maltese academics have written on the subject. Professor E Buttigieg has commented that on the peculiar challenges that faced Malta:

Notwithstanding its size, except for the derogations and transitional periods that were obtained during the negotiations, Malta is obliged to take on board the entire *acquis* and set up appropriate mechanisms for its enforcement. Thus, although the national parliament is very limited in its resources, it must discuss and transpose the same number of community measures as the legislative of larger states.<sup>44</sup>

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<sup>43</sup> See insightful comments in Roderick Pace, *The effects of EU Enlargement on Malta* in Graham Avery, Anne Faber and Anne Schmidt (eds), *Enlarging the European Union: Effects on the new member states and the EU* (Trans European Studies Association 2009), available at <[http://www.um.edu.mt/\\_\\_data/assets/pdf\\_file/0017/71054/Enlarging\\_the\\_European\\_Union.pdf](http://www.um.edu.mt/__data/assets/pdf_file/0017/71054/Enlarging_the_European_Union.pdf)> accessed on 27 June 2013

<sup>44</sup> Eugene Buttigieg, *Challenges facing Malta as a Micro-State in an Enlarged EU*, Bank of Valletta Review No. 29 Spring 2004. This paper offers additional background to the various difficulties small countries like Malta face in dealing with the massive accession requirements. Similarly useful are the insights in John Redmond, *Cyprus, Malta and the European Community: Accession, Association or Partnership?* (The European Community Studies Association, Third Biennial Conference, Washington, 27-29 May 1993). Writing before the publication of the Commission's 1993 *Avis* regarding Malta's application, Redmond stressed the negative impact of the lack of bipartisan support and the hostility of the Malta Labour Party. He pointed to the lack of human resources: 'The basic question is whether a small country such as Malta has sufficient technicians, professionals and bureaucrats to cope with

In turn Dr Harwood has more recently written on the impact of Malta's size in the context of accession and on how:

the issue of how size impacts a country's experience of EU membership, in particular its ability to control the implementation on EU policy (...) In terms of Europeanisation, small states adopt flexible arrangements to manage membership (...)<sup>45</sup>

Dr Harwood has suggested that:

In understanding the mechanisms of Europeanisation one begins to understand why countries adapt to the Union in different ways. The principal impulse for Europeanisation is considered to be the EU's policy output and its compatibility with domestic policy.<sup>46</sup>

A recent official guide prepared by the Commission and available on the EU's website makes this articulated comment on the quality and effectiveness of the transposition obligation:

In order for Community legislation to be better understood and correctly implemented, it is essential to ensure that it is well drafted. Acts adopted by the Community institutions must be drawn up in an intelligible and consistent manner, in accordance with uniform principles of presentation and legislative drafting, so that citizens and economic operators can identify their rights and obligations and the courts can enforce them, and so that, where necessary, the Member States can correctly transpose those acts in due time.<sup>47</sup>

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what EC membership entails.' (p10). In his book, *The Next Mediterranean Enlargement of the European Community: Turkey, Cyprus and Malta?* (Dartmouth 1993, p105), Redmond had further warned that: 'If the Nationalists get their way and accede to the EC quickly then they will not be the first to join in haste and repent at leisure – the Greek experience is the obvious example that Malta would not seek to repeat.'

<sup>45</sup> Mark Harwood, *Malta's Europeanisation Experience: how smallness enables a state to minimise the monitoring of its implementation of EU policy by third parties* (December 2012) 4(6) *Journal of Public Administration and Policy Research* p130-139

<sup>46</sup> See also by the same author, Harwood, M. 2006, *The Potential for Change: Europeanisation, Civil Society and Ethics in The Family, Law, Religion and Society in the European Union and Malta*, ed. P. Xuereb, Dormax Press, Malta, <[www.um.edu.mt/europeanstudies/books/CD\\_CSP2/.../rak-mharwood.pdf](http://www.um.edu.mt/europeanstudies/books/CD_CSP2/.../rak-mharwood.pdf)> accessed on 6 July 2013

<sup>47</sup> <<http://eur-lex.europa.eu/en/techleg/index.htm>> accessed on 6 July 2013

On a similar note, just a short time before the 2004 enlargement, a timely Commission assessment report was published which recorded the level of transposition progressively achieved by the countries seeking membership:

The acceding countries and the Commission's departments have co-operated well in identifying the remaining gaps in preparedness. All efforts must now focus on resolving the outstanding issues in the transposition and implementation of the *acquis*, so that all remaining gaps may be closed by the time of accession. Although the Commission's departments will work constructively with the acceding countries in order to identify ways and means of achieving this aim, it is the task and responsibility of the acceding countries themselves. There are only a few months left.<sup>48</sup>

A negative aspect of the local transposition project was the imposition of very stringent deadlines which excluded serious detailed examination, comparative research or proper consultation. No White Papers or other policy discussion papers were published during the accession phases. The unfamiliarity and novelty of the transposition process added a new challenge. In Malta, transpositions and accession matters occupied most of the legislative and public administration agenda particularly from 1998 to 2004. Accession involved a complex, extensive and time-consuming project the likes of which will likely never be repeated, certainly not in the foreseeable future. For these reasons, Malta is an interesting case study of this peculiar form of law-making as undertaken by a small applicant country having to complete the transposition of practically the entirety of EU body of law into national law, and this within (and despite) the confines of its own general legal system, laws and traditions and administrative capabilities, in a very short period of time. Klaus Goetz has commented as follows on the effects of the transposition and accession processes:

The experience of integration and Europeanisation of the ten new members has, therefore, so far been one of a phased process of gaining entry to the EU, on the one hand, and 'anticipatory and adaptive Europeanisation' (Ágh 2003), on the other. The nature of their relationship to the EU has been that of applicants, candidates, negotiating partners, and acceding countries rather than of full members. The patterns of Europeanisation that have emerged up to now are likely to reflect their 'outsider' status. Thus, they were, until recently, primarily 'downloaders' of

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<sup>48</sup> European Commission 'Comprehensive Monitoring Report (2004) of the European Commission on the State of Preparedness for EU Membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia' COM(2003) 675 final



EU law, policies and practices, i.e., ‘policy-takers’, with only limited opportunities for ‘uploading’ country-specific preferences and priorities as ‘policy-makers’. Accordingly, ‘impositional’ Europeanisation is more likely than in member states that have been able to influence, if not determine, the *acquis communautaire*. Following full membership, this pattern is set to change, especially in policy areas of central concern to the new members.<sup>49</sup>

Member States were keen to convince the European Commission that they were fast implementing the reforms identified during the screening exercise. An undeclared state of competition existed between the candidate countries.<sup>50</sup> In this competitive scenario, legislation was often passed by the Maltese Parliament with basic preparatory studies and minimal public debate and awareness. The number of laws passed in such a short time with so little resources may be deemed extraordinary.<sup>51</sup>

A peculiar risk encountered in the course of the transposition and membership negotiations, and which is often overlooked, was of Directives being changed mid-stream or of new Directives coming into force during the advanced accession phase. New Directives amending or replacing earlier Directives on the same subject during the accession-transposition processes was a challenge which new candidate countries still encounter to this day. Malta faced two such instances in the consumer Chapter, namely the Guarantees in the Sale of Goods Directive of 1999<sup>52</sup> and the 2001 Directive which replaced the original General Product Safety Directive.<sup>53</sup> These two measures were adopted after the Screening sessions had already been concluded and negotiations on Consumer Chapter had been closed and the parties

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<sup>49</sup> Klaus H. Goetz, *The New Member States and the EU* in Simon Bulmer and Christian Lequesne (eds). *Member States and the European Union* (OUP 2004). Available at <[http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/1/teamB-reader/Goetz\\_The%20new%20member%20states%20and%20the%20EU.pdf](http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/1/teamB-reader/Goetz_The%20new%20member%20states%20and%20the%20EU.pdf)> accessed on 6 July 2013

<sup>50</sup> The pursuit of EU membership was often popularly likened to a ‘regatta’ (a traditional local boat race) where contending countries raced, competed and compared their respective performance and successes in the screening, negotiating and closing of the different *acquis* Chapters and in the transposition of legislation. Negotiations with the Czech Republic, Cyprus, Estonia, Hungary, Poland and Slovenia had been opened on 31 March 1998. The Helsinki European Council of December 1999 decided to open negotiations with Malta (together with Bulgaria, Lithuania, Romania and Slovakia) in February 2000.

<sup>51</sup> Baldacchino (n 41)

<sup>52</sup> Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12

<sup>53</sup> Directive 2001/95/EC of the European Council and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4

had agreed on the way forward for the transposition of the existing (previous) *acquis*.<sup>54</sup>

The issue had been raised in the 'Report by the EC Directorate to the Prime Minister and Minister of Foreign Affairs regarding Malta's membership of the European Community'.<sup>55</sup> This important early Report warned that the accession process would involve huge strains on the public administration which would have to re-organise itself to meet the challenges of accession and eventual membership. It also stressed pointedly that: '[t]o make matters worse, new Community measures, either amending existing ones or completely new, are issued at a phenomenal rate...'<sup>56</sup>

Malta's participation in the Screening sessions with the Commission was described in a paper published at the time by the writer:

...all the meetings and discussions throughout the screening process have served as an intensive learning course in various aspects of EU institutions, laws and procedures. There is no doubt whatsoever that the next three years will constitute another landmark period in the evolution of our corporate, financial services and consumer law. As we approach membership, our professional and business classes will have to learn to come to terms with a new regulatory regime the likes of which we have never experienced. Our legal system is learning to cope with the influx of numerous new sets of rules and novel unfamiliar concepts. The EU accession process is adding a major new dimension to our existent legislation and institutions. Things can never be the same again. Indeed, we are witnessing a silent revolution.<sup>57</sup>

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<sup>54</sup> Ironically, as it turned out, Malta completed the transposition of these new *acquis* measures some time before the respective deadlines.

<sup>55</sup> Department of Information, *Report by the EC Directorate to the Prime Minister of Foreign Affairs regarding Malta's membership of the European Community* (1990); see particularly Chapter 6, Political and Social Issues of Membership

<sup>56</sup> *Ibid.* p191

<sup>57</sup> David Fabri, *Lifting the Screen: welcome to the silent revolution* [March 2000] *The Accountant - Journal of the Malta Institute of Accountants* (cover story, p55). This paper explains in some detail the procedures adopted at the Screening meetings, describing the two-day consumer chapter session as 'the toughest and possibly also the most instructive session.' p22

## **(b) Some strategic domestic legal issues that had to be resolved**

With Maltese authorities about to embark on the transposition of the EU consumer protection *acquis*, a number of important choices had to be addressed at the outset. Scarce skills and ‘expertise’ had to be identified and recruited to undertake the task.<sup>58</sup> This led to the mobilizing of some of the existing ‘expertise’ and the formal setting up of an EU Consumer Law Task Force in 1999 to handle and manage the whole process on behalf of the Government and to secure the successful and seamless screening and negotiation of the consumer protection Chapter with the Commission.<sup>59</sup> Other strategy issues had then to be considered:

- (i) One question was where to locate the transposition of the Directives and what role would or should be assigned to the Civil Code. Various Directives involved principles and rules of a private law nature, which in Malta are still largely comprised in the Code. Could this Code embrace and incorporate the transposition of Community rules on measures such as those governing unfair contractual clauses, the responsibility of manufacturers and guarantees in sales of goods? This subject is specifically addressed in Chapter 5;<sup>60</sup>
- (ii) The Consumer Affairs Act enacted in 1994 was identified as a more suitable instrument for transposing a number of consumer Directives;<sup>61</sup>
- (iii) New Acts of Parliament were resorted to for transposing particular Directives which could not be comfortably accommodated within the structure of the 1994

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<sup>58</sup> Baldacchino (n 41)

<sup>59</sup> The Task Force completed its mandate with the transposition of the Consumer Credit Directive in 2005. A copy of its first and only annual report is found as document 6 in the Appendix section.

<sup>60</sup> Chapter 5 analyses the extensive 2000 amendments to the Consumer Affairs Act which introduced these new legal measures into Maltese law.

<sup>61</sup> The 1994 Act is examined in Chapter 4

Act. The new Product Safety Act 2001<sup>62</sup> and a re-vamped Supplies and Services Act 2002<sup>63</sup> were two such cases.

On a more positive note, Malta did not commence the accession transposition obligations with a blank page. Maltese law already had years earlier introduced rules which in certain respects mirrored similar or equivalent rules in the Consumer Directives. In some respects, local provisions had anticipated the *acquis* and its eventual transposition, often by a considerable number of years. The Trade Descriptions Act of 1986<sup>64</sup> anticipated some of the provisions of the Misleading Advertising Directive.<sup>65</sup> The Door-to-Door Salesmen Act<sup>66</sup> already satisfied most of the minimum requirements of the Doorstep Selling Directive.<sup>67</sup> Moreover, the Civil Code provisions on certain remedies and guarantees available to purchasers under the Law of Sale<sup>68</sup> already anticipated in part the harmonised rules on consumer guarantees introduced by the Guarantees Directive of 1999.<sup>69</sup> These local measures appreciably facilitated the eventual transposition and acceptance of the consumer *acquis*. The framework and institutional structures set up by the Consumer Affairs Act of 1994,<sup>70</sup> also helped, although nothing in the Act itself was directly connected to the transposition of Community Directives.<sup>71</sup>

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<sup>62</sup> Chapter 427 of the Laws of Malta, discussed in Chapter 6

<sup>63</sup> Various Laws (Amendment) Act, Act No. IX of 2003 Part IV. Regrettably and remarkably not yet brought into force, this new law was intended to revamp Malta's price control framework which has remarkably survived EU membership intact.

<sup>64</sup> Chapter 313 of the Laws of Malta

<sup>65</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17, (amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1999] OJ L141/20)

<sup>66</sup> Chapter 317 of the Laws of Malta, later re-named Doorstep Contracts Act

<sup>67</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31

<sup>68</sup> Civil Code, Chapter 16 of the Laws of Malta, Title VI, sections 1346 to 1439

<sup>69</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12

<sup>70</sup> Chapter 378 of the Laws of Malta

<sup>71</sup> See Chapter 4

### **(c) Maltese consumer law in a political context**

The election of a more economically liberal Nationalist Government in 1987 opened the way to significant political and trade liberalisation reforms, eventually culminating in important White Papers and new laws on consumer rights and fair competition. Three years after being elected to office, the new Government applied to join the EU. Since 1987, the pursuit of European Union membership had been the core objective of the Nationalist Party's political programme and of the Nationalist Government's legislative and policy agenda. This persisted until membership was achieved in May 2004. In the first years immediately following the island's membership application, no practical impact was felt and the public remained largely detached from the evolving new relationship with the EU, at that early stage largely still perceived as a distant complex phenomenon reserved to a handful of specialised academics.

Modern Maltese consumer policy was effectively launched in 1991. The intention to undertake new consumer protection initiatives was heralded in the Budget Speech given by Dr George Bonello Du Puis, the then Minister of Finance, on the 30 November 1989. The Minister admitted that:

Consumer protection and fair trading have never been given their rightful importance in this country. The present government wants consumers to gain certain rights, to have their interests safeguarded and wants to make sure that they are able to satisfy their need and wants. It is clear that this is a new subject for our country. It is also very vast...In the light of this situation, government will shortly publish a White Paper which should lead to the setting up of the best possible structure in the best interest and benefit of the consumer.<sup>72</sup>

He also stated that Government would be seeking advice from consultants knowledgeable on the subject. Soon, new ideas and legislative initiatives aimed at

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<sup>72</sup> Parliamentary sitting number 314, 30 November 1989, paragraph 3.2

enhancing consumer protection in Malta started being considered.<sup>73</sup> In broad terms, these measures supported and accompanied important market liberalisation steps taken by Government since its election in 1987. Indeed, there was a growing understanding that with the opening up of the market, public expectations on product choice, safety and quality were now running at a higher level than previously. A new consumer society had started tasting the first fruits of economic liberalisation after many years of extensive state control over all aspects of the economy. Consumers were becoming more assertive. In 1990, the little consumer legislation that existed was piecemeal, unstructured and incomplete. No central administrative set-up existed and enforcement was ineffective and insufficient. The same speech referred to the 'exaggerated restrictions and bureaucratic obstacles to trade' which Government had managed to remove thereby giving more space to the private sector. These moves, added the Minister, gave a consumer 'the right to choose himself what he wishes to buy and not buy what government wants him to.'<sup>74</sup>

Government may also have been conscious that eventually Malta would have to adopt the consumer *acquis* of the Community, whatever that comprised. A policy and strategy decision was taken at the highest political level, at the Cabinet of Ministers, that the country needed a coherent consumer protection policy and a legislative programme. In this spirit and in pursuance of this objective, the Cabinet commissioned a White Paper to propose a new framework for consumer law reforms.<sup>75</sup> Work on a draft document commenced in December 1990.<sup>76</sup>

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<sup>73</sup> Government's intellectual mentor in this endeavour was the Rev Prof Fr Peter Serracino Inglott (initially as advised to the author by Mr John Camilleri, private secretary to the then Prime Minister Eddie Fenech Adami, in November 1990 and later confirmed in meetings held in 1991 attended Prof Serracino Inglott, Mr Camilleri and Dr Michael Frendo, who had been appointed in 1990 Parliamentary Secretary with responsibility for consumer affairs (in the presence of the writer).

<sup>74</sup> Budget speech for 1989 (n 72) paragraph 3.2

<sup>75</sup> As advised to the author by Prof Serracino Inglott during various conversations during 1990-91

<sup>76</sup> In brief, this initiative led to the drawing up of a preliminary study which in turn formed the basis of the White Paper *Rights for the Consumer* published in August 1991 which directly paved the way for the adoption of the Consumer Affairs Act in 1994. This Act later served as the main platform for the transposition of the EC consumer *acquis*. See Chapters 4 and 5

#### **(d) The state of national consumer policy 1991- 2001**

One can venture to broadly trace at least three stages in the development of Maltese consumer law and policy:

- (i) the early days, up to the publication of the 1991 White Paper;
- (ii) the mature years, from the 1991 White Paper to the 2000 amendments to the 1994 Act and the new Product Safety Act 2001;
- (iii) the later days, the post-EU membership scenario.

The period under review in this present work starts with the application to join the Community in 1990, followed by the publication of the first White Paper on consumer rights in 1991.<sup>77</sup> A 2006 paper by this writer suggested that up to 1990, the position revealed a still immature piecemeal approach, lacking a central unifying policy and long-term programme and a central oversight and co-ordinating authority.<sup>78</sup> The paper also commented that:

A series of landmark events and legislative initiatives make the decade from 1991 to 2001 the most productive in Maltese consumer law and policy making. The 2000-2001 reforms mark the point of highest convergence between Maltese national consumer law development and the island's move towards EU accession.<sup>79</sup>

Two White Papers published in 1991 and 1993 introduced consumer protection policy and legislative strategy to Malta and decisively laid the groundwork for the most important consumer legislation ever passed in Malta, the Consumer Affairs Act in 1994. A law that for the first time comprehensively regulated fair competition was also passed in 1994. The Competition Act of 1994<sup>80</sup> was debated and passed by Parliament in the same session, immediately after the passage of the Consumer

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<sup>77</sup> See more on the development of consumer policy in Malta in David Fabri, *False Starts and Broken Promises: Some Mishaps in the Development of Maltese Consumer Law* [2006] Law and Practice, pp20-26 (Malta Chamber of Advocates)

<sup>78</sup> David Fabri, *A Short Note on the Development of Consumer Policy and Law in Malta 1980-2005*, (Promoting Consumer Interests Conference, Malta, 16 March 2006) See also Appendix 1

<sup>79</sup> *Ibid.*

<sup>80</sup> Chapter 379 of the Laws of Malta

Affairs Act. The Consumer Affairs Act of 1994 Act did not transpose any EU Directive. The transposition of Directives was still some years away. By 1994, Malta's accession efforts had picked up very little steam. Formal negotiations on accession with the EU Commission had not yet commenced and the considerable transposition process only started in earnest between late 1999 and early 2000. The transposition exercise proved another milestone in the evolution of Maltese consumer law and policy; only this time, the main impetus for change came from outside Malta. It has been noted that:

The development of a consumer policy in Malta has been a slow, gradual and definitely a recent phenomenon. It is not a simple tale with a beginning, a middle part and a happy ending. It is a more complex subject, tinged with some controversy (...) Initially, consumer protection efforts were inadequately co-ordinated and lacked a common conceptual basis. At that stage, the figure of the consumer was improperly identified and consumer protection was not yet considered as a subject that warranted study in its own right. Consumer protection therefore still largely resulted as a by-product of measures intended to promote trader-to-trader relationships, to protect public order or to implement often restrictive trade practices.<sup>81</sup>

Upon completion, these reforms satisfied the Commission with respect to the full and timely transposition of the relevant EU *acquis* in fulfilment of the country's commitments with the Commission in pursuance of the National Programme for the Adoption of the *Acquis*. The first NPAA was published in September 2000, and was then updated and last published in 2001 and 2002.<sup>82</sup>

#### **(e) Other aspects of the local political scenario**

A particular factor that coloured the accession process was the Malta Labour Party (MLP) strong opposition to the island joining the EC. The MLP adopted an uncompromising anti-EU stand throughout the years covered by this thesis, from

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<sup>81</sup> Fabri (n 77)

<sup>82</sup> See Joe Borg, *Negotiating membership terms with the EU – the case of Malta*, in Peter Xuereb (ed), *Challenges of Change* (EDRC, Malta 2000)



date of application for membership to date of accession and for years thereafter.<sup>83</sup> The MLP preferred an alternative partnership arrangement that would fall short of membership.<sup>84</sup> The bitter political divide over EU membership affected the accession transposition exercise.<sup>85</sup>

The Commission's reports and its spokesmen repeatedly declared that the lack of political consensus was a regrettable obstacle that rendered accession much more problematic. Eventually only a referendum and subsequent general elections which confirmed the 'yes' (to membership) vote finally laid the matter to rest, at least as far as the official Maltese Government position was concerned. During the accession, it was relatively easy to draw and to market the consumer *acquis* in unduly positive and optimistic terms. The EU was generally portrayed as favourably inclined towards the consumer, and had taken various initiatives in favour of consumer rights still not found in national law. Consequently, EU membership must be good for Maltese consumers. The Maltese Government was required to implement a whole set of Directives. The consumers stood to gain from these measures. Opposition came from the trading and industry representatives who saw the EC Directives as a threat to their businesses and livelihood, and repeatedly pressed Government to commit itself to a minimum implementation of the Directives (already themselves of a minimal nature) and to negotiate various transitional arrangements.

The debates in Parliament on the various consumer transposition measures generally confirm the surprising fact that while the Labour Opposition strongly dissented on the fundamental question of whether Malta should join the EC, and often objected to and voted against particular provisions, it refrained from raising insurmountable obstacles

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<sup>83</sup> See generally John Redmond, *The Next Mediterranean Enlargement of the European Community: Turkey, Cyprus or Malta?* Dartmouth, 1993 (Chapter 4, *Malta*). Redmond questioned Malta's 'suitability' (p100) for membership, reflecting wide concerns about 'the lack of a political consensus within Malta in favour of EC membership and implicitly the fear that a re-elected Maltese Labour Party may take the island out of the Community (or, worse still) stay in and create havoc.' He concludes that 'Malta's accession is likely to be delayed for some time.' (p135); and that it faced a 'long, hard haul' before it can become a full member (p138).

<sup>84</sup> The now re-named Labour Party's new official position is different and the island's membership of the EU is no longer in contention, at least officially.

<sup>85</sup> See Roderick Pace, *The European Union's Next Mediterranean Enlargement- Challenges and Uncertainties* (1997) Jean Monnet Chair of European Comparative Politics, Department of Political Studies - University of Catania <[http://www.um.edu.mt/data/assets/pdf\\_file/0004/186520/1997-JM Paper, University of Catania-Med Enlargement.pdf](http://www.um.edu.mt/data/assets/pdf_file/0004/186520/1997-JM Paper, University of Catania-Med Enlargement.pdf) > accessed on 2 July 2013

to the adoption of the individual measures themselves and did not unduly delay or vote against the adoption of the transposition measures. On the other hand, the business sector tried hard to restrain the transposition of consumer measures, insisting on minimum transposition. Their main protest related to the proposed introduction into local law of two Directives on subjects till then unknown to Maltese law. The first was the measure that seemed intended to burden manufacturers and distributors with new responsibilities, namely the Product Liability Directive.<sup>86</sup> The second measure that raised concerns was the Unfair Contracts Terms Directive<sup>87</sup> which implied that numerous pre-printed contracts, long drafted and in use for many years in various commercial sectors, mainly retail, services and banking, would have had to be reviewed and adequately revised in order to reflect a better balance between the interests of traders and the consumers. During the negotiating stages, local business representatives lost little occasion to demand official commitments not to implement Consumer Directives beyond the minimum degree possible. They also insisted that Government should negotiate transitional periods, often quoted as high as ten years, for the slow implementation of the Directive measures. The greatest objection to the unfair terms regulation came not so much from the general trade and retail sector, but from the banking lobby. The manufacturers, importers and distributors of consumer products were more disturbed by the implications of the Product Liability Directive.

## **4. Interplay - Malta and the European Union**

### **(a) More on the accession negotiations and transpositions**

The successful completion of the complex legislative and administrative accession process placed Malta and nine other candidate states in pole position to be accepted

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<sup>86</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29

<sup>87</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29

as new members of the European Community in 2004.<sup>88</sup> Dr Grech has commented on the accession negotiations in the following terms:

Malta's EU membership will be the most significant economic and political event since Malta attained its independence in 1964. The implications will be wide-ranging and very fundamental. (...) A thorough understanding of the EU is a requirement for all prior to negotiations, during negotiations, in the run up to accession and in acting as members. This is the re-learning that our society needs to go through (...)<sup>89</sup>

The transposition of Community Directives in the course of Malta's fourteen year application-to-accession procedures could not fail to exercise a strong influence on local consumer law, and they have indeed greatly enhanced its content, remedies and techniques. The accession commitments pushed the Maltese authorities to re-appraise and revise national laws and in several instances forced them to introduce new ones. Accession directly led to the first ever Maltese legislation on such important issues as product liability, timeshare agreements, package tours, distance selling, unfair contract terms, product safety, comparative advertising and consumer credit.

In 2004, Malta formed part of 'the biggest and most dramatic enlargement in the history of the EU'.<sup>90</sup> Membership was the seal to a huge enterprise completed over a span of fifteen years. When in 1993 the European Commission published its first opinion on Malta's application to join the EC, it had already starkly pointed out that accession would necessitate extensive and radical changes in Malta's laws, structures and mentality:

The reforms which imply Malta's adoption of the 'acquis communautaire' affect so many different areas (tax, finance, movement of capital, trade protection, competition law, etc.) and require so many changes in the

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<sup>88</sup><[http://ec.europa.eu/malta/abc/malta\\_eu/history/index\\_en.htm](http://ec.europa.eu/malta/abc/malta_eu/history/index_en.htm)> and <[http://ec.europa.eu/malta/abc/malta\\_eu/chronology/index\\_en.htm](http://ec.europa.eu/malta/abc/malta_eu/chronology/index_en.htm)>, both accessed on 2 July 2013. See also discussion in Tatham (n 19) pp117 - 126 which analyses Malta's negotiations on accession with the Commission

<sup>89</sup>Dr John C. Grech, *Introduction* in Simon Busuttill (ed) *Malta, the EU and YOU: a Practical Guide*, [Publishers Enterprises Group (PEG) Ltd, San Gwann, Malta 1999] See also Fabri (n 27)

<sup>90</sup> Paul Craig and Grainne De Burca, *EU Law, Text, Cases and Materials* (3rd edn, OUP 2008) p3. See also entry under '*enlargement*' in Bainbridge (n 18) pp148 - 155

traditional patterns of behaviour that what is effectively involved is a root-and-branch overhaul of the entire regulatory and operational framework of the Maltese economy.<sup>91</sup>

The Commission's periodical reports on Malta's membership application invariably commented on the island's state of preparedness to successfully implement and enforce the Consumer Protection Chapter. They provide a useful commentary on the extensive legal and administrative reforms as they were evolving in line with the *acquis* requirements. These reports must be treated with some circumspection as it was not the task of the Commission to undertake a full and objective audit of Malta's consumer law structures and framework.<sup>92</sup> The Commission Reports are a useful indicator of Malta's slow but gradual progress in aligning its legislation to Community law, the pace of the transpositions and the establishment of new administrative capacity. The Commission's Report issued in October 1999 predictably warned that Maltese consumer protection law fell far short of the *acquis*:

In the field of consumer policy Maltese legislation is still not in line with the *acquis* regarding Product Liability, Misleading Advertising, Unfair Contract Terms and Distance Selling. The same applies to the Directives on Dangerous imitations and General Product Safety and the Package Travel Directive as well as Consumer Credit, Timeshare or Comparative Advertising. Considerable work still needs to be done to ensure transposition of the *acquis*.

During the suspension of Malta's accession for two years, the legislative agenda changed and no further Directives were transposed. Transposition efforts were restarted in earnest in 1999. The Commission Report of October 2002 recorded that considerable progress had been accomplished and that Maltese law had by then

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<sup>91</sup> Commission, Opinion (*Avis*) on Malta's Application for Membership (Bulletin of the European Communities) Supplement 4/93, June 1993, paragraph 34

<sup>92</sup> Subsequent to the original 1993 *Avis*, the full list of Commission Reports on Malta's application to join the EC leading to the Treaty of Accession reads as follows:92

1. Commission Report [COM(1999)69 final]
2. Commission Report [COM(1999)508 final ]
3. Commission Report [COM(2000) 708 final]
4. Commission Report [SEC(2001) 1751]
5. Commission Report [COM(2002) 700 final]
6. Commission Report [COM(2003) 675 final - SEC(2003) 1206]

These Reports were not published in the Official Journal

become largely in line with the consumer legislative *acquis*. The Report confirmed that negotiations on the consumer protection Chapter had been provisionally closed and noted that the Maltese authorities had not requested any transitional arrangements. The Commission Report of October 2003, published just a year before membership, noted that Malta fulfilled most of the requirements of the Community *acquis* and was ready for membership. It noted that work remained pending in relation to the adoption of several general product safety measures. Surprisingly it failed to mention that Malta had not yet transposed the EC consumer credit rules. The adoption of the Consumer Credit Regulations in 2005<sup>93</sup> finally completed the transposition of the consumer protection *acquis*. The remit of the Reports was to gauge the extent to which Malta had dutifully and correctly adopted the EU *acquis*. The degree of adherence to the applicable *acquis* was all that mattered at that stage. The first Commission Report of 1993 had contained very basic, almost simplistic, comments on the state of consumer protection legislation in Malta and awarded it a very low mark. The assessment was undoubtedly justified as the standard of consumer legislation in Malta in 1993 was not impressive and lagged far behind standards achieved elsewhere in Europe. The 1993 *Avis*<sup>94</sup> had warned that consumer law in Malta required extensive radical reforms to reach Community levels.

The Compendium of Transpositions compiled for the Commission in 2008 broadly assessed pre-transposition Maltese consumer law in Malta as falling short of Community consumer law. Maltese law, it found, 'was not comparable to the one laid down in the Directives.'<sup>95</sup> No doubt this was a correct assessment particularly taking into account solely the EC Directives and ignoring domestic consumer law on subjects that lay outside the range of these Directives. In the course of an address in early 1994, the then Maltese Prime Minister Edward Fenech-Adami explained the imminent legislation reforms:<sup>96</sup>

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<sup>93</sup> See David Fabri, 'And, finally, the (long overdue) regulation of consumer credit.' The Sunday Times (Malta, 17 April 2005, p12) <<http://www.timesofmalta.com/articles/view/20050417/business/and-finally-the-long-overdue-regulation-of-consumer-credit.93191>> accessed on 2 July 2013

<sup>94</sup> ( n 91)

<sup>95</sup> Hans Schulte-Nolke, Twigg-Flesner C and Martin Ebers (editors) EC Consumer Law Compendium – Comparative Analysis (University of Bielefeld, 12 December 2006)

<sup>96</sup> Address on *Malta in the European Union* to the Paul-Henri Spaak Foundation, Brussels, Belgium on the 3 February 1994 (Release by the Office of the Prime Minister) p3

In the first half of 1994, we shall present to our House of Representatives no fewer than 16 legislative measures in the field of financial services, competition, consumer protection, companies, and other aspects of our economic set up. They will incorporate the latest directives enacted by the Union into our legal system. They will also provide the legal framework within which economic operators can plan ahead in a climate of stability and relative certainty.

Another interesting point was made by Alfred Mifsud in his book 'Malta's relations with the EU – a realistic way forward',<sup>97</sup> where he argued that irrespective of the type of relationship Malta entered with the EU, including a relationship falling short of membership, the Community's consumer policies (reflected in the various Directives) 'should be adopted locally even if we are not admitted to membership and should not be an issue...'<sup>98</sup> Mifsud referred generically to the absorption of the *acquis communautaire* into Maltese law within three years as 'shock therapy'.<sup>99</sup>

The negotiations on the consumer Chapter of the *acquis* with the European Commission, and the related Screening and transposition procedures, were a very precise exercise with an intrinsically limited and defined objective of ensuring that the applicant country transposed the EU Directives in a timely, correct and complete fashion. The objective was not to assess Maltese consumer law as such, or to pass an impartial judgement thereon, but primarily to assess the extent and quality of the transposition and implementation of the Directives. For this reason, the 1991 White Paper offers a more complete and balanced overview of the position of consumer law at the time than do the various early Commission reports and evaluations.

No points were awarded by the Commission for any domestic consumer measures which were more effective, more progressive or more creative than the Community's own bundle of measures. Malta clearly lagged behind in most matters covered by the Directives and this fact was consistently highlighted in the Commission's opinions on Malta's membership application. Implementation of the Directives was all that mattered in the circumstances. What had been adopted in domestic

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<sup>97</sup> Alfred Mifsud, *Malta's relations with the EU – a realistic way forward* (Publishers Enterprises Group, San Gwann, Malta 1999)

<sup>98</sup> *Ibid.* pp89-90

<sup>99</sup> *Ibid.* p25

legislation beyond the Directives was not of direct relevance to the Commission experts except to the extent of ensuring that these provisions did not fall foul of the four freedoms, the Treaty or of the Community's consumer Directives themselves.

Nevertheless, during the Screening phase, the Commission officials expressed satisfaction that Malta had already adopted a Consumer Affairs Act, with its Consumer Claims Tribunal, a specialised consumer department and the possibility of awarding moral damages to injured consumers, the advisory Consumer Affairs Council, a framework for consumer associations, a provision on vicarious responsibility and other features unknown to Community consumer law. The Commission understood that the existing local laws and structures offered a suitable platform on which the transposition of the consumer Directives could be satisfactorily constructed. During Malta's accession procedures, the Consumer Protection *Acquis* (then Chapter 23) was seen as an easy chapter to negotiate; indeed no transitional arrangements or derogations were requested by the Maltese side. The consumer Chapter was included in the second batch of Chapters negotiated in 2000. The final Report on the Accession Negotiations on the consumer *acquis* was tabled before the House of Representatives by the Hon. Dr Joseph Borg, then Minister for Foreign Affairs, on the 24 October 2000.<sup>100</sup> The swift screening and transposition helped make up for lost time in the commencement of the accession talks, and this achievement significantly accelerated the pace of the negotiations with the Commission.<sup>101</sup>

### **(b) The Screening meeting**

A pivotal event in the period under review was the Screening meeting on the consumer *acquis* organised as an integral part of the accession negotiations with every candidate country. The Screening<sup>102</sup> of the consumer protection *acquis* was held over two days

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<sup>100</sup> Parliamentary sitting number 406, 24 October 2000

<sup>101</sup> See *Government satisfaction at opening of nine Chapters*, front page, The Malta Independent, Malta, 6 July 2000

<sup>102</sup> 'Screening' is defined in the 1999 Commission Regular Report on Malta (p5) as 'the analytical examination of the *acquis*.' It was carried out in two stages, first by multilateral meetings attended by all the applicant countries where the *acquis* was explained, and later more focussed bilateral

in Brussels between the 7 and 8 October 1999. The records of this meeting make very interesting reading and in view of their importance to this study, the detailed agenda of the meeting, the official minutes taken by the Maltese side and the Commission's own conclusions may be found as documents 3, 4 and 5 in the Appendix section. They have never been published or considered before in the literature.

The Screening meeting had two principal aims: didactic and analytical. The didactic part meant that Commission specialised technical representatives explained the development and the underlying objectives and philosophy of the EU's consumer policy, and made presentations regarding each of the various Directives that needed to be transposed. The Maltese side were invited to submit questions and then proceed to introduce the basic tenets of its national consumer law and policy. The second part constituted a gap analysis whereby the two parties identify the extent to which Maltese law fell short of the Community Directives and more or less agreed how and when the shortfall was to be rectified. The two sides discussed the extent to which Maltese law may have already partly satisfied the Community requirements. During the meeting, the Commission also conveyed its official reaction to draft transposition measures submitted to the Commission in advance of the Screening exercise. The Commission Screening experts focussed on ensuring that the aspiring new member would gradually come in line with all the various Directives, provision by provision. Every Directive had to be imported fully into national law and each transposition measure was immediately notified to the Commission for its technical assessment. At the time of the 1999 Screening meetings, the consumer Directives were mostly of a minimum nature. This allowed a degree of flexibility to the national authorities which could introduce legislation that provided higher levels of protection than the minimum safeguards required by the Directives. The form and method of transposition remained within the discretion of the national authorities. The Directives that had to be transposed were largely of a minimum nature. The only two maximum harmonisation Directives were those dealing with product liability and comparative

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meetings where only the Commission and the individual countries participated. For a local analysis of the procedures and implications of screening and negotiating the various *acquis* Chapters with the Commission, see Godfrey Baldacchino, The first real test in EU negotiations, The Malta Independent on Sunday, 25 June 2000, p19. He described these processes as a 'courting phase' where 'the partners-to-be need to develop durable bonds and dynamics of cooperation.' (Ivan Sammut has described the interplay between domestic and EU laws generally as a 'marriage of sorts'. See n138, Chapter 5)



advertising. The Commission staff encouraged the Maltese authorities to seek to develop higher levels of consumer protection while respecting and implementing all the requirements of the Directive.

This approach was noted by Professor Howells, who has advised:

Minimal harmonisation was originally the dominant philosophy of consumer policy in the EC. This was combined with mutual recognition of national standards, unless receiving states could justify imposing higher standards under EC law. It was recognised that some areas needed to be totally harmonised, but for the most part Europe saw its role as creating a floor of rights on which Member States could build.

Indeed for many years the European Commission encouraged states to develop more protective rules so that other Member States could benefit from these experiences. The model was one under which European consumer rights could progressively be improved by building on best practice from the Member States. This has all changed. The Commission now believes that consumers can only be delivered the benefits of the internal market if businesses can trade with ease across borders. In their opinion this demands that no national rules be more protective than European laws. Businesses should not be put off by the risk of being exposed to laws other than those found in their own legal system.<sup>103</sup>

The Screening meetings proved hard but precious training for national experts present in Brussels and gave them a rare and useful opportunity to discuss drafting problems and consumer issues over two full days with much more experienced Commission experts. Such an opportunity could hardly ever repeat itself. The Screening session on consumer protection discussed a list of Directives which made up the Commission's so-called 'A' list. These needed to be transposed. Another complementary 'B' list was presented to the Maltese authorities largely for the purpose of guidance and information. In this case, the Maltese side was simply required to note and to consider the obligations arising from these complementary measures, which were not subject to either specific screening or transposition.

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<sup>103</sup> Geraint Howells, *The Rise of European Consumer Law - Whither National Consumer Law?* [2006] 28 Sydney Law Review p63

The screening process required the Maltese authorities to design ways of negotiating this Chapter, to complete a comparative (or gap) analysis and to arrange for the complete transposition of the relevant Directives into domestic law, where necessary and as appropriate. This unprecedented and unparalleled exercise, and the intensity and alacrity with which this peculiar enterprise had to be pursued and successfully concluded, will never be repeated. Evarist Bartolo, then Opposition spokesman, had some scathing general criticism of the process:

Top civil servants have been complaining that they cannot devote a lot of time to the screening exercise and run their departments at the same time. So they are cutting corners. Malta can bluff its way in the screening exercise but the bluffing will have to stop some day. All members have to abide by the one-size-fits-all legislation of the EU (...) the Maltese will have to adopt and enforce the existing EU laws that they have had no say whatsoever in shaping according to their needs.<sup>104</sup>

When it negotiated and screened the consumer protection Chapter in October 1999, Malta did not request any transitional arrangements or derogations. Such arrangements and derogations were requested in respect of other Chapters and some were conceded, particularly in the acquisition of immovable property by non-residents and certain obligations arising under the Environment Chapter. Indeed Malta launched its position at the Screening sessions in Brussels by formally declaring that:

- (i) It was aware and accepted the *acquis*;
- (ii) It was not requesting any derogation or transitional period;
- (iii) It was capable of administering the *acquis* in this sector.

This formula was more or less standard and was repeated in the negotiation of those Chapters of the *acquis* where the Maltese authorities did not plan to request any transitional arrangements or derogations. This facilitated and accelerated the conclusion of the negotiation of the Chapter in question. The minutes of the

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<sup>104</sup> Evarist Bartolo, *Bluffing and Screening*, The Sunday Times (Malta) 23 May 1999, p10

Screening meetings, attached as Appendix 4, confirm Malta's position that no problems were foreseen in accepting the *acquis*.

## CHAPTER 2

### THE TRANSPOSITION OF THE EU DOORSTEP CONTRACTS DIRECTIVE OF 1985 AND THE SIGNIFICANCE AND CONTEXT OF THE DOORSTEP CONTRACTS ACT OF 1987

'Mr O'Conaill<sup>1</sup> gave a presentation on the Doorstep Selling Directive, and ... pointed out the fact that the Member States would envy the existing provision in the Maltese draft where the Director of Consumer Affairs had the power to suspend the licence of the tradesman.'

Extract from the official minutes taken by the Maltese side of the Screening Session with the Commission experts on the Consumer Protection Chapter held in October 1999, p8.<sup>2</sup>

'The right of withdrawal is not an invention of the European Union.'

Micklitz Hans-W, Jules Stuyck, Evelyn Terryn (eds), *Cases, Materials and Text on Consumer Law*, Ius Comune Casebooks for the Common Law of Europe (Hart Publishing 2010) p241

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<sup>1</sup> Cathal O'Conaill, (expert on Economic Interests of Consumers) DGXXIV, EU Commission

<sup>2</sup> A full copy of the minutes is included as Appendix 4.

## 1. Introduction to the 1987 Act and its local political and legislative contexts

Enacted in 1985, the Directive on doorstep sales<sup>3</sup> was one of the earliest of the European Community's legislative measures for the protection of consumers. This Chapter focuses on the Maltese law on the subject, the Doorstep Contracts Act of 1987<sup>4</sup> and examines the noteworthy part it played in the evolution of national consumer law and policy and in the accession-related transposition of the Directive.<sup>5</sup>

The 1985 Directive harmonised legislation on doorstep contracts throughout the Community and all Member States were obliged to transpose its minimum level of regulation. Member States which until then had no law on doorstep contracts were now obliged to have one. The EU Compendium on Transposition finalised in 2008 observed that from the ten candidate countries forming part of the 2004 enlargement, only Malta had a doorstep sales law prior to transposing the EU Directive.<sup>6</sup>

The 1987 Act was one of the first consumer legislative measures in Malta. The island had a law regulating doorstep contracts even before it applied for EU membership. The original name of the Act was the Door-to-Door Salesmen Act.<sup>7</sup>

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<sup>3</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985]0 OJ L 372/31

<sup>4</sup>Chapter 317 of the Laws of Malta, Act VII of 1987

<sup>5</sup> European Commission, Commission consultation document on the possible revision of the Directive <[http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/door\\_sell/index\\_en.htm](http://ec.europa.eu/consumers/cons_int/safe_shop/door_sell/index_en.htm)> accessed on 10 January 2014. This Directive was one of eight directives included in the recent Review of the Consumer *Acquis*.

<sup>6</sup> For a detailed analysis of the transposition of the 1985 Directive in the Member States, see Hans Schulte-Nölke and Christoph M. Scheuren-Brandes, *Part 2: Transposition of the individual Directives: A. Doorstep Selling Directive (85/577)* in Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers (eds), *EC Consumer Law Compendium Comparative: the Consumer Acquis and its transposition in the Member States* (European Law publishers 2008) available at <[http://www.eu-consumer-law.org/consumerstudy\\_part2a\\_en.pdf](http://www.eu-consumer-law.org/consumerstudy_part2a_en.pdf)> accessed on 1 March 2012. The 2008 Compendium pointed out (pp175-6): 'Legislation in the Member States before transposition of the Doorstep Selling Directive: The Member States had no coherent legislation concerning consumer protection in the case of door-to-door sales before Directive 85/577 entered into force....As the only exception, Malta enacted the Door-to-Door Salesmen Act in 1987.'

<sup>7</sup> For purposes of political correctness, in 2000, the word 'salesmen' was considered inappropriate. Rather than re-word it clumsily to 'Door-to-Door Salespersons Act', as was being suggested, a more neutral alternative phrasing was eventually opted for.

By 1987, abuses by doorstep sellers had resulted in numerous court cases being initiated against buyers refusing or otherwise failing to pay for what effectively they neither wanted nor needed. Ordinary buyers, often poor, vulnerable and illiterate, were being sought out and enticed into contracts they could not even afford. Little redress was available for such customers as the ordinary civil law was not in their favour; indeed it was indifferent. Contracts were binding once they were duly signed, and the parties had agreed on the object and the price. No special provisions or concessions extended to consumers buying in a doorstep context. At that point, consumer law did not exist and the problem was generating social and political concern. Indeed, it was well known that numerous court proceedings were being instituted by a particularly aggressive encyclopaedia salesman. Many customers whom he had persuaded to purchase expensive sets of books found that they did not need the expensive books and, worse, could not afford them and wished to withdraw from the ill-advised contracts.<sup>8</sup> Parliament could not ignore the public discomfort on the matter, and eventually heeded the call and acted. The 1987 Act was a national legislative and political response to a growing domestic problem enacted by a Labour Government not interested in pursuing EU membership.

The Door-to-Door Salesmen Act was brought into force in stages between February and March 1987.<sup>9</sup> The Act has been described as the final part of a 'trilogy' of early consumer measures adopted between 1981 and 1987 by the then Labour Government.<sup>10</sup> The Act is arguably the best of this short series of unrelated initiatives, due in part to its own merits as a socially useful legal measure with a clear consumer protection objective, and in part due to the inherent weaknesses and proven ineffectiveness of the other two laws. These laws were the inauspicious Consumers Protection Act of 1981,<sup>11</sup> and the plagiarised Trade Descriptions Act of 1986.<sup>12</sup> The 1987 Act played a significant role in the early

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<sup>8</sup> See inter alia *Godfrey Aquilina vs Vincent and Giuliana Borg*, First Hall (Civil) 10 March 1997. In *Godfrey Aquilina on behalf of the Commonwealth Educational Society Ltd vs Ivan and Daniela Mallia*, Court of Magistrates, 17 March 1994, the court accused Mr Aquilina of exercising trickery and deceit on his prospective customers.

<sup>9</sup> Legal Notice 9 of 1987 brought some provisions of the Act into force on the 11 February 1987, whereas the remaining provisions were brought into force on the 15 March of the same year.

<sup>10</sup> David Fabri, *From Trilogy to Trinity; thoughts on consumer protection in Malta and the recent White Paper*, *The Sunday Times* (Malta, 22 September 1991) p14

<sup>11</sup> Chapter 293 of the Laws of Malta, discussed in Chapter 4

<sup>12</sup> Chapter 313 of the Laws of Malta, discussed in Chapter 5

development of Maltese consumer law being the first law to directly challenge the traditional well-established civil law principles regarding the binding effect of a contract freely entered into, the so-called sanctity of contracts, discussed further in Chapter 5. This saw the introduction of the so-called cooling-off period, a concept and device till then unfamiliar to Maltese law and commercial practice.

## **2. Some foreign context**

### **(a) Commission study of 1980**

Prior to the 1987 Act, consumers in Malta were in a very vulnerable position at law when confronted by the hard-selling techniques adopted by sharp experienced door-to-door salesmen. Consumers enjoyed no special protection when they signed a contract and had no right of withdrawal under the civil law. The pre-EU Directive position in several Member States, but not all, was similarly weak. Luckily, an analysis of the pre-1985 position is available thanks to a detailed report prepared for the EC Commission. This historically useful report analysed the legislation on consumer protection, including door-to-door sales, in each of the Member States as at 1980 prior to the launch of the Directive.<sup>13</sup> It examined the different laws and approaches adopted in the various Member States, pointing out that ‘the approximation and reform of law in the EC countries could be achieved if the EC draft directive on door-to-door sales and related forms (of sale) came into force.’ The legal position in the different countries showed significant variances. The Netherlands, Belgium, Denmark, France and the Federal Republic of Germany all had specific legislation on doorstep contracts and had already introduced a cooling-off period.

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<sup>13</sup> Norbert Reich and H-W Micklitz, *Consumer Legislation in the EC Countries: a Comparative Study*, A study prepared for the EC Commission (Van Nostrand Reinhold Company, 1980)

Explaining the position in the then Federal Republic of Germany, Reich and Micklitz<sup>14</sup> reported that the Bundesrat in 1980 was actively considering a new bill to regulate the cancellation of door-to-doors sales. They compared this bill with the draft proposal published by the European Commission around the same time. These two proposals differed substantially. The report explained that whereas the Directive would impose an agreement in writing, the German draft had no such requirement.<sup>15</sup>

The German rules were intended both for safeguarding public order, particularly to avoid annoyance, as well as for consumer protection.<sup>16</sup> They prohibited the sale of various products on a door-to-door basis, such as domestic appliances, poisonous substances, securities, watches and certain alcoholic drinks. In some cases (e.g. the prohibition of doorstep sales of watches), the restrictions were more intended to protect certain businesses operating through shops rather than to protect customers.<sup>17</sup> In Italy, doorstep contracts were not yet regulated specifically and the EC Directive was eventually transposed very late. This delay in transposing the Directive led to the facts and decision in the much quoted Faccini-Dori case.<sup>18</sup>

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<sup>14</sup> Ibid. p180

<sup>15</sup> Ibid. p13

<sup>16</sup> See N Reich and H.-W. Micklitz, *Consumer Legislation in the EC Countries: A Comparative Analysis* (Van Nostrand Reinhold Company, 1980), pp67-60 on *Door-to-Door Sales*, The authors explain that in German law as at 1980 the main doorstep contracts rules were contained in the Industrial Code of 1869, where under Title 3, 'itinerant trade', doorstep sales are described as 'a special subject on consumer protection from several points of view.'pp104-111

<sup>17</sup> See also November 1999 Report on *Door-to-Door Selling - Pyramid Selling - Multi-Level Marketing* commissioned by the European Commission accessible at <[http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/door\\_sell/sur10\\_01.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/door_sell/sur10_01.pdf) > accessed on 20 January 2014. It points out on p 61 that the decision whether to exempt financial services from the revised doorstep and distance selling directives is a political decision. They also comment on the reality that consumer law enforcement tends to be weak (Germany in 1980) and they warn against attributing to the consumer 'a type of prudence which is often in contrast to social circumstances and with respect to the poor consumer may result in a denial of justice.' (p358 'Conclusion'). The project manager was Prof. Micklitz.

<sup>18</sup> See judgment of the European Court of Justice of the European Communities of 14 July 1994 Case C-91/92. *Paola Faccini Dori v Recreb Srl*. [1994] ECR I-3325; and commentary on this case in R. Schultze, H. Schulte-Nolke and J. Jones, eds, *A Casebook on European Consumer Law*, Hart Publishing, 2002, pp137-149, and in G Howells and S Weatherill, *Consumer Protection Law*, 2nd edn, Ashgate, 2005, pp143-144. Italy eventually transposed the Directive by Decreto Legge No 50 of 1992.



## **(b) The Molony Committee Report of 1962<sup>19</sup>**

Going back considerably in time, one may also usefully complete this contextual background to doorstep selling regulation by making the very briefest reference to the Molony Report, a landmark event in the evolution of modern consumer law. This 1962 Report examined consumer protection in the United Kingdom dedicating several pages to the problems caused to consumers by door-to-door salesmen.<sup>20</sup> Reviewing the legal position governing consumer credit and hire purchase, the Molony Committee mooted the advantages of allowing consumers a mandatory cooling off period and a right of withdrawal of up to seventy-two hours in certain contracts. Such measures would serve 'as a check on the excesses of salesmanship' in favour of 'those whose weak sales-resistance is overcome by practised artifice.'<sup>21</sup> Acknowledging that the proposal was 'radical in conception', the Report advised against trying to rope in the excess of salesmanship by introducing a licensing system. Its final recommendation was unambiguously and surprisingly negative: 'a licensing system for door-to-door salesmen would not provide a markedly beneficial instrument of consumer protection.'<sup>22</sup>

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<sup>19</sup> *Final Report of the Committee on Consumer Protection*, presented to Parliament by the president of the Board of Trade by Command of Her Majesty: Board of Trade, (Cmnd 1781, 1962)

<sup>20</sup> See especially pp263 to 265, where door-to-door salesmen were described as 'giving rise to a social problem justifying the creation of a licensing system which would eliminate the more undesirable and subject the rest to a degree of continuous supervision.' Paragraphs 802 - 810 go on to expand on the Committee's reflections and proposals for a new licensing system: 'The activities of some of some of these men have provoked a greater wrath and indignation...than any other single subject.' (p243, paragraph 741, 'Section B. Sales Practices')

<sup>21</sup> Molony Report (n 19), pp171-174, paragraphs 520-526

<sup>22</sup> *Ibid.* paragraphs 809-810. Paragraph 525 refers to doorstep selling as a 'greater evil.' Nevertheless, the Report re-iterated that 'it is impossible effectively to restrain the salesmen themselves by means of a personal licensing system.' In paragraph 520, the Report commented - rather weakly - that the suggestion that 'a bargain having been made, one party should be at liberty to cancel it, is novel and not inherently attractive.' This lack of foresight does not detract from the importance of the Molony Committee Report which remains a high point in the history and evolution of consumer law and policy. See also Iain Ramsey, *Consumer Protection: Text and Materials*, (1st edn, Hart Publishing) [1989] pp337 - 340. The Molony Report anticipated the EC Directive by more than twenty years.

### 3. The salient features of the 1987 Act

The Door-to-Door Salesmen Act of 1987 Act, the first ever law to regulate doorstep selling in Malta, introduced a number of interesting features:

- (i) a right of withdrawal: consumers entering into a doorstep agreement enjoyed a right of cancellation exercisable within fifteen days (Article 8), a new radical remedy that challenged the traditional finality of contracts in terms of the Civil Code.
- (ii) cancellation: a specific obligatory cancellation form was laid down in the Schedule to the Act. This set form proved highly detrimental to consumers who often instead communicated their intention to withdraw from the agreement by other means, including by telephone, fax, telex or letter (Article 8).
- (iii) private writing: a doorstep seller was obliged to provide the consumer a comprehensive private agreement containing various mandatory disclosures detailed in the law (Article 7).
- (iv) an annual licence: doorstep sellers required an annual licence from the Director of Trade (Article 4). Door-to-Door Salesmen (Licences) Regulations 1987,<sup>23</sup> were also enacted; they have now been repealed. Unfortunately neither the Act nor the regulations provided for the suspension or cancellation of the licence in the event of proven unfair, deceitful or coercive conduct by the seller.
- (v) use of criminal law: acting as a doorstep seller without a licence became punishable as a criminal offence (Article 5).
- (vi) a doorstep contract with an unlicensed salesman was null: a consumer had to exercise this right of action within a month from delivery of the item (Article 5).

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<sup>23</sup> Legal Notice 22 of 1987, now repealed

- (vii) no reference to the Civil Code: the Act did not attempt to connect or integrate its provisions to the Civil Code rules governing contract and the law of sale, but it simply superimposed its innovative measures over the Civil Code provisions without any attempt to harmonise them.
- (viii) prohibition of advance payments: sellers were prohibited from requesting any payment from consumers before the lapse of the 15-day cancellation period (Article 9).
- (ix) the Director of Trade: originally the Act was administered by the Director responsible for trade (Articles 2 and 4), but in 1992, the responsibility for the Act was assigned to the new post of Director for Consumer Affairs.<sup>24</sup>
- (x) exclusion of services: services were not covered by the Act (Article 3).
- (xi) excluded agreements: the law exempted certain doorstep agreements from its reach, including contracts for the sale of drinks, food stuffs or immovable property, sales concluded in shops, stalls at fairs and markets, notarial deeds, contracts concluded at the sole initiative of the buyer and contracts below a certain minimum value.<sup>25</sup>

#### **4. The Parliamentary debate on the 1987 Act<sup>26</sup>**

The Parliamentary debate proved constructive and conveyed valuable insights into the origin of the 1987 Act and the factors that influenced its content. The Bill was passed in the months leading to the General Elections of 1987 that eventually led to

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<sup>24</sup> Consumer Affairs Act, Chapter 378 of the Laws of Malta, originally Article 43, later re-numbered Article 111 by the 2000 amendments

<sup>25</sup> Lm 20 (equivalent to €46.60) (Article 3)

<sup>26</sup> Parliamentary sittings number 434 to 439 held between 15 and 30 January 1987, pp 1059 - 1083

a new Government with a pro-EU membership agenda. Parliament debated the Bill between January and February 1987. Piloting the Bill, Trade Minister Mr Lino Spiteri recalled that the proposal to introduce legislation on doorstep contracts had originally been raised during the debate on a Bill regulating trade descriptions during the previous year.<sup>27</sup> Indeed there had been an attempt by Dr Joseph Brincat from the Government bench to amend the 1986 Bill so as to incorporate additional provisions to control abuses in doorstep contracts. Mr Spiteri had then expressed the view that the proposed 1986 Act was not the appropriate measure to regulate doorstep contracts, but promised to shortly present a separate bill before Parliament on the matter, which he did a year later.

The 1987 Act was debated at a rather peculiar time. It was squeezed in the middle of a debate on highly sensitive and important constitutional amendments in a Parliament divided on almost every issue and with a very hotly contested and uncertain General Election scheduled to be held just a few weeks later. The discussion on this Bill was perfectly serene and non-controversial, a rare refreshing show of bipartisanship. Mr Spiteri stressed that 'Measures that seek to protect consumers should not arouse controversy.'<sup>28</sup> The Government side readily accepted various amendments proposed by the Opposition and the Bill was adopted by consensus. The Door-to-Door Salesmen Act was one of the very last legislative measures passed by the outgoing Labour Government prior to the very heated General Elections held later in 1987. During the debate, Dr Brincat<sup>29</sup> criticised the 1987 Bill for having been submitted too late and for failing to protect consumers from the use of small print and exemption from liability clauses. He insisted on concrete measures to protect the numerous people who were being dragged to court to pay for items sold to them by doorstep salesmen. The Minister agreed: 'We should protect consumers not only in the field of descriptions but also from certain forms of salesmanship.'<sup>30</sup> The Opposition members broadly agreed with the objective of protecting consumers from undue pressure and harassment, but cautioned against

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<sup>27</sup> See further below, p 69, 'The 1986 debate on the Trade Descriptions Act'

<sup>28</sup> Parliamentary sitting number 434 (Second Reading), 15 January, p1066

<sup>29</sup> Ibid. pp1072 - 73

<sup>30</sup> Ibid. p1066

introducing excessive or complicated regulation that could render doorstep selling, which they described as a normal trading activity, impossible to carry out.

It has been often suggested that the 1987 Act was the first Maltese consumer law at least partly based on a Community Directive.<sup>31</sup> A recent publication has repeated the notion that the 1987 Act had been modelled on, indeed 'inspired', by the Community Directive.<sup>32</sup> This may be a convenient narrative but it is incorrect. The same assumption is repeated in the section on Malta included in the Compendium on the Transposition of Directives prepared by the Commission in 2008<sup>33</sup> which erroneously proclaims that: 'By enacting the Door-to-Door Salesmen Act...in February 1987, the Maltese legislator took the European Directive as a model.' However a simple reading of the debates immediately excludes that the Maltese law was to any extent modelled on or inspired by the Directive. The two texts were indeed very different and the Minister piloting the Bill did not mention the Directive during his explanation of its objectives and provisions. At no stage did he refer to the Directive to justify the proposed new legislation. No documentary exists to point to any particular source for the 1987 law.

Indeed, the Bill originally required a letter of confirmation of the doorstep contract by the consumer within one month, rather than a cooling-off period. This was not in line with the EC Directive's approach. During the Second Reading, Minister Lino Spiteri who was piloting the Bill,<sup>34</sup> agreed to an Opposition suggestion that the original provision requiring a consumer to confirm a doorstep contract within a month, should be substituted by a new provision allowing a consumer a cooling-off period of fifteen days to withdraw from the contract.<sup>35</sup> What is of particular interest here is that in the course of the debate, none of the supposedly pro-EU Nationalist Opposition

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<sup>31</sup> Paul E., Micallef *The future of consumer law: reflections on a regulatory framework for a small island state* in Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen (eds), *The Yearbook of Consumer Law 2008 (Markets and the Law)* (Ashgate 2007)

<sup>32</sup> Paul E., Micallef *Maltese Consumer Law: a reflection of diverse legal cultures* (Mediterranean Legal Hybridity Symposium, Malta, 12 June 2010)

<sup>33</sup> Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member States* (European Law Publishers, 2008) p53

<sup>34</sup> Parliamentary sitting number 434, 15 January 1987, p1066 (n 28)

<sup>35</sup> See Parliamentary sitting number 438, 29 January 1987, p1389; This was the only provision 'borrowed' from the Directive and it helped introduce the consumer's unilateral right of cancellation in Maltese law.

spokesmen made a single reference to the European Community or to its consumer policies, despite the existence of a specific Directive on the subject. One would have expected the Opposition to call for closer alignment of the proposed law to the Community Directive. That this did not happen may be evidence that the pro-membership party was itself not so well versed in Community laws and policies at that stage. The Parliamentary debate therefore seems to exclude that the Doorstep Contracts Directive of 1985 influenced the 1987 Act. In February 1987, local interest in EU membership and EU affairs was quite low. The membership issue had yet to enter the complex local political agenda, then more concerned with fundamental issues of democracy, human rights and political and trade restrictions.

## **5. The 1986 Parliamentary debate on the Trade Descriptions Act<sup>36</sup>**

It has already been remarked earlier that interesting insights on the making of the 1987 law may be found in the Parliamentary debate on the Trade Descriptions Act a year earlier. Indeed, the need for a law on doorstep selling had been raised during the Parliamentary debate on the Trade Descriptions Act between May and June of 1986. In the course of the debate, the Hon. Dr Joseph Brincat requested legislative action to protect consumers from hard-sell salesmen and harsh terms in doorstep agreements. He proceeded to propose specific amendments to the 1986 Bill on trade descriptions so as to incorporate articles whereby consumers would have a month long withdrawal period when purchasing goods on a doorstep basis.<sup>37</sup> He explained that the proposed amendment could serve as a stop-gap measure until the promised law specifically on doorstep selling would eventually be enacted. However, Dr Joseph Fenech, a former Nationalist Minister harshly criticised 'this mode of legislating.'<sup>38</sup>

Minister Lino Spiteri shared Dr Brincat's concern for consumers who were being sued for items acquired after considerable harassment by unduly persistent

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<sup>36</sup> Chapter 313 of the Laws of Malta. See in particular sittings number 346 to 352, held between 26 May 1986 to 9 June 1986

<sup>37</sup> Parliamentary sitting number 350, 3 June 1986, p874

<sup>38</sup> Ibid. p 878-880

salesmen, but he disagreed that doorstep selling should somehow be regulated in a trade description law. He promised<sup>39</sup> that a draft new ad hoc law would be drawn up and presented to Parliament before the next General Elections. Indeed, he added, a working paper had already been drawn up for this purpose.<sup>40</sup> Eventually Dr Brincat withdrew his proposed amendments. Historically, this remains the first ever attempt in the Maltese Parliament to legislate against the unfair practices of doorstep sellers. The debate saw Parliament broadly agreeing that door step contracts raised a number of consumer problems and warranted legal intervention as a matter of urgency. The doorstep selling law was eventually adopted in 1987. Two laws in two years was a satisfactory record but, as Dr Brincat had implied, it was a case of doing too little too late. Nonetheless, it remains remarkable that the Door-to-Door Salesmen Act of 1987 owed its origin to a 1986 Parliamentary debate on a trade descriptions law.

## **6. Doorstep contracts in the 1991 and 1993 White Papers**

The White Paper, Rights for the Consumer, published in 1991, contained a whole Chapter to an analysis of the 1987 Act on doorstep sales, proposing specific corrections and revisions for improving its effectiveness in favour of consumers. These amendments only became law in 2000.<sup>41</sup> The 1991 White Paper dedicated two pages to proposed reforms of the 1987 Act.<sup>42</sup> The relevant passages listed and explained the proposed changes as follows:

41. It is proposed to amend this law in order to:

extend its operation to services rather than just to goods;

place on the salesperson the obligation to explain to the consumer his legal rights relating to cancellation of the contract;

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<sup>39</sup> Ibid. p 875

<sup>40</sup> Ibid. p 890

<sup>41</sup> The 2000 amendments are discussed in Chapter 5

<sup>42</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991) pp12 -13

enable the consumer to give notice in writing in any form with regard to cancellation, provided that the intention to cancel results clearly rather than having to fill in the specific form currently prescribed;

provide for disqualification from ever holding such a licence for any person repeatedly found guilty of having acted as an unlicensed door-to-door salesperson;

introduce a general principle explicitly obliging salesmen not to indulge in coercive practices, exercise undue pressure on customers or resort to deceptive practices.

42. 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.

These amendments were not related to any concern to align with EC law and were purely home-grown reforms targeting the practices of local salesmen and the difficulties faced by local consumers. Two years later, the 1993 White Paper, rather surprisingly, announced that a brand new law on the subject was being finalised.<sup>43</sup> It promised a new law that would ‘completely replace the Door-to-Door Salesman Act and shall significantly reinforce the legal position against practices that may be committed by itinerant salesmen.’ This new law never materialised and the 1987 Act was instead only revised and reformed as part of the accession transposition exercise in 2000.<sup>44</sup>

Most of the non-EC related improvements had already been identified and listed in the 1991 White Paper, and were incorporated in the draft short-lived Bill that had started the process for setting up a new autonomous Fair Trading Authority

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<sup>43</sup> Department of Information, *Fair Trading...the next step forward. Proposals for Legislative Reforms* (White Paper, 1993) p14

<sup>44</sup> Consumer Affairs Act (Amendment) Act, Chapter 378 of the Laws of Malta, (Act No XXVI of 2000)



circulated for public consultation in August 1998.<sup>45</sup> Progress on this Bill was cut short by the 1998 General Elections.

## **7. 2000 - transposing the Directive and improving the law**

Neither the 1991 nor the 1993 White Paper had hinted at a possible future plan or need to align the text of the 1987 Act to the requirements of the Directive on the subject. The 1991 White Paper did not make any reference to the 1985 Directive or to the transposition of Community Directives, but instead it proposed improving the 1987 Act in various respects. This shows that a determined policy in favour of effectively aligning Maltese legislation with Community directives was not yet being implemented. The 1991 policy document is evidence that at that stage the Maltese accession programme was progressing at snail's pace, and the transposition notion had yet to enter the local legal and political vocabulary. Practical steps towards the effective transposition of the Directive under review only started in earnest in 1999 when preparations for the Screening Session on the consumer Chapter were underway. The screening of the consumer Chapter of the *acquis* was held over two days, the 7<sup>th</sup> and 8<sup>th</sup> October 1999. In the weeks prior to the meetings, the Maltese side submitted to the Commission experts a draft of proposed amendments to the 1987 Act. These amendments sought to complete the transposition of the Doorstep Directive while also implementing the reforms identified in the 1991 White Paper. The minutes compiled by the Maltese side recorded a member of the Commission<sup>46</sup> remarking that '...unlike other countries, Malta possessed reasonable legislation on the subject that was at par with that of the Member States.' The minutes further recorded that the 'Commission commented that this was a very good draft...'<sup>47</sup>

The Maltese law of 1987, introduced only two years after the introduction of the Community Directive of 1985, served as the platform for the eventual transposition of

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<sup>45</sup> See more in Chapter 4

<sup>46</sup> Cathal O'Conaill formed part of the Directorate-General on Health and Consumers (DG Sanco)

<sup>47</sup> See Appendix 4: Minutes of the Screening of Chapter XXIII, Consumer and Health Protection, 7-8 October 1999, p8 (n 2)

the Directive. Several provisions of the original law - by accident rather than design - were already largely in line with the core requirements of the Directive. The 1987 law certainly facilitated the transposition of this particular Community measure. The Maltese legal text was fully aligned to the Directive in 2000. The Directive itself was a rather sparse document drafted in a very minimalist style. Its principal aim was to introduce a cooling off period and to lay down mandatory consumer information requirements. In later years, similar withdrawal rights were introduced in measures such as the Timeshare Directive<sup>48</sup> and the Distance Selling Directive.<sup>49</sup> In 1987, the right of withdrawal was an exceptional technique still alien to Maltese law.

Following the 2000 amendments, the Act provided for levels of consumer protection higher than the minimum content of the Directive and included the following additional features:

- (i) a licence requirement was imposed on all doorstep sellers wishing to exercise their trade in Malta;
- (ii) consumers were specifically protected against possible trespassing or nuisance (Article 5A);
- (iii) a salesman was obliged to disclose his status and to 'properly identify himself' (Article 8.4);
- (iv) a salesman was now obliged to 'explain' to the consumer his rights of cancellation (Article 8.4);
- (v) a prohibition against advance deposit or payments was introduced (Article 9);

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<sup>48</sup> Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83

<sup>49</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19, amended by Directive 2002/65/EC of the European Parliament and of the Council Of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16

- (vi) the consumer was given several more grounds on which to cancel the agreement (Articles 6, 10);
- (vii) the fifteen day cooling-off period is considerably longer than the 7-day minimum (Article 8);
- (viii) the contents of the mandatory private agreement were more extensive (Article 7);
- (ix) the law sets out certain probative presumptions in favour of the consumer (Article 12); and
- (x) criminal law sanctions supported the legal obligations imposed on salesmen (Articles 5 and 5A).

Other provisions restricted the parties' freedom of contract to exclude or reduce the statutory rights given to consumers. Article 11(c) rendered void any attempts to 'remove or reduce any of the rights given to the consumer by any of the provisions of this Act.' This clearly implied that the fifteen-day cooling off period fixed in the local Act could not be reduced or renounced; it could instead be increased by agreement between the parties.<sup>50</sup> Article 4 of the Doorstep Contracts Directive required the vendor to supply the consumer with a written notice of the right to cancel, together with the name and address of the person against whom the cancellation is to be exercised. The notice had to be dated and 'shall state particulars enabling the contract to be identified.' The equivalent transposed rule in the Maltese legislation, Article 7, is more demanding and sets ten different heads of information that the seller is obliged to list to the prospective customer in writing, on pain of nullity of the agreement.

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<sup>50</sup> Indeed, Article 8 refers to 'such longer period as may be stipulated in the private writing.'

In his paper 'Maltese Consumer Law' presented to the State of the Union Conference of 1995,<sup>51</sup> Eugene Buttigieg examined the Maltese 1987 Act and confirmed that in some respects the Act actually goes beyond the Doorstep Contracts Directive, whereas some other elements were not in line with the Directive. He also highlighted the reference in the 1993 White Paper to a proposed new draft law on doorstep contracts, which, as already pointed out earlier, never saw the light of day.<sup>52</sup> At the same conference, Ms Monique Goyens presented her excellent paper on the subject: 'EU Consumer Protection Legislation and the new Maltese Legislation.' Ms Goyens concluded her comparison between the Maltese 1987 Act and the Community 1985 Directive in the following terms:

In comparison to the Directive, the Maltese Door-to-Door Salesmen Act contains interesting provisions: while its scope is limited to sales at home (and not at the workplace), it however includes insurance services, which represents an important improvement with regard to the Directive. Also, advance payments are prohibited under the Act, which represents an important improvement with regard to the Directive.<sup>53</sup>

Pointedly, she also remarked that Member States had made extensive use of the minimum harmonisation principle, adding that: 'The different legal solutions adopted at national level, some of which are innovative and interesting, would justify that the current Directive be submitted to a revision process...'.<sup>54</sup>

The amendments made to the Act in 2000 satisfied the transposition requirements and ensured that the law was fully compliant with the Directive. Mistakes and gaps in the original domestic 1987 Act were also rectified by the 2000 measure. Act XXVI of 2000 therefore broadly introduced two categories of amendments: first, those aiming to ensure complete and full transposition of the EU Directive, and, secondly, changes aimed at improving the domestic law provisions or rectifying drafting defects

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<sup>51</sup> Buttigieg Eugene, 'Maltese Consumer Law', in Economic and Social reform in Malta, papers from The State of the Union Conference, Peter Xuereb and Roderick Pace eds, (European Documentation and Research Centre, University of Malta Press 1995) pp331-335, 1995

<sup>52</sup> Department of Information, *Fair Trading...the next step forward . Proposals for Legislative Reforms* (White Paper, 1993)

<sup>53</sup> Monique Goyens, 'EU Consumer Protection Legislation and the New Maltese Legislation' in Economic and Social reform in Malta, papers from The State of the Union Conference, Peter Xuereb and Roderick Pace editors (EDRC Publications, University of Malta Press 1995) pp 372-373

<sup>54</sup> Ibid.

identified since 1987. Most of these latter amendments had been foreseen in the White Paper 'Rights for the Consumer' ten years earlier; indeed Chapter III, (pages 12 to 13) had proposed a number of similar revisions.

## 8. Interplay with the Civil Code

Neither the 1987 Act nor the 2000 amendments made any reference to the Civil Code. Yet it was clear that the right to withdraw from a duly signed contract, the first such right in local law, had extraordinary civil law significance.

In her thesis *The Effects of the Consumer Affairs (Amendment) Act (XXVI of 2000) on some aspects of the Law of Obligations*, Claudine Zarb has examined in detail the private law implications of the 2000 amendments.<sup>55</sup> More specifically, she has compared the special legal framework for doorstep contracts with the general Civil Code rules. The main divergence was found in the special right of cancellation, an exception to the general rule in the Code which instead stressed the binding nature of signed agreements.<sup>56</sup> She also investigated the differences in relation to the formation of contracts and the external requirements of contracts, two areas where doorstep contracts are subject to special requirements supplementary to the more generic civil law principles. The mandatory contents of the private writing imposed by Article 6 to Article 8 went much further than the Civil Code requirements.<sup>57</sup> Setting aside the freedom of contract principle in order to safeguard consumers' rights, Article 11 prohibited and rendered void a number of certain clauses that might otherwise have been inserted in doorstep agreements. This provision had been in the original 1987 Act and constituted an early prohibition (before the Unfair Contract terms Directive and its transposition) of clauses deemed unfair to consumers. Article 11 was later expanded in 2000 to prohibit any contractual clause purporting to remove or reduce any of the rights given to the consumer by any of the provisions of

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<sup>55</sup> Claudine Zarb, *The Effects of the Consumer Affairs (Amendment) Act (XXVI of 2000) on some aspects of the Law of Obligations* (LL.D Thesis, University of Malta 2002) pp25-51

<sup>56</sup> Civil Code, Chapter 16 of the Laws of Malta, Articles 960-966

<sup>57</sup> Chapter 16 of the Laws of Malta, Article 1233

this Act, or to limit or remove the competence of local courts or tribunals,<sup>58</sup> thereby giving more protection to unwary consumers.

Article 10 creates 'for a just cause' as an additional ground for cancelling a doorstep contract. Though potentially an additional armoury for consumers, the concept lacks a concrete meaning and remains uncertain, untested in practice. No attempt was made to link it to the causes of invalidity of contracts specified in the Civil Code. The concept originated in the 1987 Act and was retained following the 2000 amendments. To a limited degree, it constitutes an element of disharmony and inconsistency between the Act and the Code, though it favours consumers.

In a recent paper on 'Consumer Protection and the Civil Code', Carmel Galea placed the doorstep legislation within the context of the Civil Code and examined and commented on the often complex coexistence between the two very different sets of rules. He has analysed the higher degree of consumer protection that special legislation such as the doorstep contracts legislation has super-imposed on the civil law rules. However he also looked at the reverse situation: 'even if the trader manages to escape the clutches of that special legislation, he can still be caught by the general principles set out in the Civil Code if his negotiations with the consumer are not carried out and executed in good faith.'<sup>59</sup> An interesting court judgement recently ruled on the inter-play between remedies arising from the special law on doorstep contracts of 1987 and the general remedies arising from the Civil Code.<sup>60</sup> One of the points at issue involved contracts concluded in 'premises away from the trader's business premises' in terms of Article 2 of the 1987 Act. In *Thomas Azzopardi vs Platinum International (Malta) Limited et* decided by the Court of Magistrates on 20 July 2007, the Court had to decide whether the contract in question was a doorstep contract and if it was, whether it breached the 1987 Act.

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<sup>58</sup> Article 11(c)

<sup>59</sup> Carmel Galea, *Consumer Protection and the Civil Code* (Conference on The relevance of the Civil Code for Commercial Law practitioners (with particular reference to company law, financial services and consumer law), Malta, February 2013). In his paper, Dr Galea was primarily concerned with the significance of special laws passed in recent years outside the Civil Code, and not with the transposition of EC Directives. However it is evident, though many of the special laws he reviewed (relating to doorstep contracts, guarantees in sales of goods and product liability) all originated in EC law and were effectively transposition measures.

<sup>60</sup> The role of the Civil Code is explored in Chapter 5

Deciding in the affirmative, the contract in dispute was annulled on the basis of the doorsteps contracts law. The Court of Appeal overturned the decision, determined that the agreement did not after all amount to a doorstep agreement and consequently the remedies under the 1987 Act did not apply. However, the Court still cancelled the agreement on grounds of fraud in terms of the Civil Code. The decision arrived at the same conclusion using a different route.<sup>61</sup>

## **9. The case of services**

The question of services provides an interesting exercise of the potential interplay between national choices and EU law requirements. The 1985 Directive applied both to goods and to services. Article 1 opens with this statement: 'This Directive applies to contracts under which a trader supplies goods or services to a consumer...' The original 1987 Act had specifically excluded services; indeed a 'door-to-door salesman' as described in Article 2 referred exclusively to a person who offers goods for sale in homes.

The 1991 White Paper proposed to extend the Act to cover services generally. Seven years later, the 1998 Bill prepared under the Labour Government too included this provision as part of the extensive reforms planned for the 1987 Act. The idea of extending the Act to services in these two measures had not been motivated by any EU Accession concerns but by the need to protect local consumers from salespersons who were also offering services, besides goods, for sale at homes and elsewhere. The amendments first proposed in the 1998 Bill eventually found their way into the important amendments introduced in 2000 at a time when EU transpositions practically monopolized the Parliament's legislative programme. As a result, and quite by accident, the local agenda to extend the Act to catch services coincided with and anticipated the obligation to transpose the 1985 Directive requirement which extended protection to both goods and services.

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<sup>61</sup> The Court of Appeal judgement was given on 30 April 2008

## 10. Post-2004 amendments

Legislative developments after 2004 are not within the scope of this work, but two relevant measures will be noted here for reasons of completeness. Act II of 2008 eventually corrected and completed the transposition by including the following statement in the last Article of the Act:

### Purpose of this Act

15A. The purpose of this Act is partly to implement the provisions of Council Directive 85/577/EEC of the 20th December, 1985 to protect the consumer in respect of contracts negotiated away from business premises and the respective provisions of this Act shall be applied and interpreted accordingly.

This now satisfied the requirement of Article 9 of the 1985 Directive. The statement had been missing from the original local transposition measure of 2000 due to the blanket drafting ban on Community related references. In 2009, the licensing requirement provisions of the Act were repealed.<sup>62</sup> These amendments were effected by Act XXIII of 2009<sup>63</sup> which sought to bring the Act in line with the new Directive on the free movement of services and service providers.<sup>64</sup> The regrettable result was that the original licensing requirements of the 1987 Act which had been amplified and strengthened in the 2000 reforms outlined in Chapter 5 were now considered a hindrance and an obstruction to the freedom to provide services.

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<sup>62</sup> Articles 6, 6A and 7. Due to poor drafting a few references to the licence have remained in the text.

<sup>63</sup> See especially Article 44 to Article 50

<sup>64</sup> The full name of this Act is 'An Act to establish general provisions facilitating the exercise of freedom of establishment for service providers and the free movement of services in the internal market and to implement Directive 2006/123/EC.' The Door-to-Door Salesmen (Licences) Regulations, 1987, Legal Notice 22 of 1987 and Door-to-Door (Licence Fees) Regulations, 1987, Legal Notice 12 of 1987 have been repealed and replaced by Legal Notice 83 of 1996.



## 11. Conclusion: a liberal style of transposition

Certain transpositions are more interesting and are more susceptible to analysis than others. The 1987 Act as revised in 2000 offers an interesting case study of how the transposition of a minimum directive may be fruitfully combined with home-grown additions and solutions.<sup>65</sup> This liberal approach to transposition has in a number of areas helped push consumer rights in Maltese law above the low minimum level set in the Directive, thereby supplying an instance of instructive and healthy inter-play between local legislation and EU law. During the accession negotiations, the Commission negotiators and experts regularly encouraged the Maltese side to adopt consumer protection standards higher than the minimum requirements of the consumer directives, including the Doorstep Contracts Directive.

The authorities decided to retain the 1987 Act already in existence and to amend and update it. The end result was a framework that improved the skeletal legal minimum set out in the Directive, displaying drafting experimentation that ignored trade sector pressures to adopt the mere minimum content. It stands out as an exemplary transposition which shows (a) how a national law that pre-existed the accession process can be positively influenced by an accession-related Community Directive on the same subject, and (b) how the content of a Directive may be competently and sensitively inserted into the existing national legal framework. For this reason, the post-2000 Doorstep Contracts Act, with its mix of national and Community law, is an interesting measure which proves that good transpositions may be accomplished by a judicious merger of the Community principles with the existing national law framework. This objective may be best achieved where the Community measure is a minimum Directive which allows greater scope for national creativity and flexibility in drafting forms and methods.

The cooling-off period and related right of withdrawal started as an exceptional device in favour of consumers and has gradually become a familiar feature in national consumer law, and this development is largely attributable to EU

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<sup>65</sup> In C. Joustra 's words: 'to suit their own national situation,' in *Consumer Law, Towards a European Civil Code* (2nd edn, Kluwer Law International 1998) p148

membership. The right of withdrawal is today well entrenched in other Maltese consumer laws which transpose Community Directives. Nevertheless, it remains an extraordinary legal remedy offered by specific provision of law in defined circumstances where the purchaser of goods or services is for some reason at a disadvantage and unable to adequately protect his rights under the Civil Code.<sup>66</sup>

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<sup>66</sup> The Doorstep Contracts Act 1987 was repealed in 2014; a late development described in the Conclusion.

## CHAPTER 3

# THE 1991 AND 1993 WHITE PAPERS: THEIR SIGNIFICANCE IN THE EVOLUTION OF MALTESE CONSUMER POLICY AND FOR THE ACCESSION PROGRAMME

'The proposals for legislative reform incorporated in this White Paper now pave the way for the most comprehensive legislative and administrative programme ever passed to protect the interests of consumers in Malta.'

*Rights for the Consumer*, White Paper, Department of Information 1991, concluding paragraph, p33

'...the time is ripe to take more ambitious steps, and to commence the implementation of a substantial legislative programme for the promotion of consumer welfare at more than one level. The agenda is considerable, and must necessarily be implemented in stages.'

*Fair trading...the next step forward*, White Paper, Department of Information 1993, General Introduction, p2

### 1. Introduction and scope

This Chapter examines the legal, political and historical significance of two seminal White Papers on consumer policy published by the Maltese Government in 1991 and 1993. Comparing their main features, significance and objectives, it analyses their respective influence on the development of Maltese consumer policy and on Malta's evolving accession relationship with the Commission and consequential

Europeanisation of Maltese consumer law.<sup>1</sup> The two policy documents are evidence that, at least between 1990 and 1993, an autonomous Maltese consumer policy was emerging in its own right, without any Community law guidance or stimulation. They both offer interesting insights into the early evolution of Maltese consumer legislation and policy during the first four years of Malta's fifteen year-long accession programme.

## **2. Malta's first and future Commissioner in 1990**

Prior to Malta's application to join the Community in 1990, Government requested Dr Joseph Borg (later Malta's first EU Commissioner with responsibility for the maritime and fisheries sectors) to compile a detailed Report regarding the implications of Malta's membership. The Report was published in March 1990. The only reference to consumer protection consisted of an isolated paragraph located in the section dealing with the free movement of goods. This paragraph is worth citing in full as a context for the subject of this thesis:

### The Effect on the Maltese Consumer

The final aspect connected within this whole issue relating to the effect of the import of Community products into Malta concerns the consumer. In this regard, the Consumer will surely have nothing to grumble about. The complete liberalisation of the internal market, the complete freedom to import in Malta Community made goods, can only bring about a situation whereby the consumer will be given a much better choice – a wider variety of goods, quality and prices. Besides, increased competition tends

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<sup>1</sup> For general comments on the 1991 White Paper, see paper by Paul E. Micallef ,2000, *Unfair Terms in Consumer Contracts - The Maltese Perspective*, an undated paper available on the local Consumer Association website:

<<http://www.camalta.org/Documents/pdf/Unfair%20Contracts.pdf>>accessed on 2 August 2013, Paul E. Micallef expressed the view that: 'The 1991 White Paper may be considered as a milestone in consumer affairs in Malta. This was the first occasion when a Government undertook a fairly comprehensive look at consumer affairs in Malta, examining the then existing situation and proposing changes both at law and at structural level.'

to lead to better quality products at cheaper prices which are always available on demand.<sup>2</sup>

What this statement does is confirm the lack of awareness or appreciation (or both) by the political class of what consumer protection was about, at both domestic and EU levels. This may also explain why in late 1990, the Nationalist Government commissioned a White Paper from external sources, in part no doubt for its own education, to draw up a coherent and comprehensive approach to consumer protection. Steps were finally taken in December of that year to take things forward and to publish the first ever national consumer protection strategy. This initiative culminated in the publication of two White Papers in the following three years.

### **3. 1991- The first White Paper: Rights for the Consumer**

#### **(a) The Budget Speech for 1990**

The Nationalist Party's Electoral programme for the 1987 General Elections<sup>3</sup> contained a promise to establish a new 'National Consumers Council', whose functions would extend to testing consumer products, verifying advertisements and providing information to the public.<sup>4</sup> At the time, this may have been a positive step but hardly a remarkable one. Fortunately, the measures as later articulated proved much more extensive and ambitious than this meek electoral proposal. The history of the 1991 White Paper and, indeed, of Maltese consumer policy may probably be deemed to have been launched with the budget speech proposals for 1990. The first clearly articulated official policy statement on consumer policy is traceable to the speech made before Parliament in 1989 by the Minister of Finance while presenting his budget for the following year.<sup>5</sup> During the course of his speech, the Minister issued a notice of intent relating to the consumer protection reforms that were to

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<sup>2</sup> Report by the EC Directorate to the Prime Minister and Minister of Foreign Affairs Regarding Malta's Membership of the European Community, published by the Maltese Government in March 1990, Department of Information (Chapter 7) p243

<sup>3</sup> PN Information Office, Progress Press, March 1987

<sup>4</sup> Ibid. Part III, p17

<sup>5</sup> Dr George Bonello Du Puis, 30 November 1989, Parliamentary sitting number 314, pp453-465

follow. In view of its historical importance, the relevant extracts merit being cited in full:

The consumer should be able to have a choice and be able to purchase products that he wants at fair prices and of good quality...similarly to the situation in other countries, Government shall be giving special importance to matters connected to the protection of consumers and fair trading practices.....

It is this Government's intention to enact laws in the light of the Directives of the European Community and of laws existing in other countries. It is planned that in the course of next year a comprehensive bill shall be drawn up that will introduce controls over the quality of products and services (including simplified procedures where the consumer is requesting the payment of damages), controls in respect of health and product safety and controls over prices.....

In Malta, consumer protection and fair trading have never been given the importance they deserve. The present Government wants the consumer to acquire certain rights, that his interests be safeguarded and that his needs and desires be satisfied.....

In the light of this situation, Government shall in a short time publish a White Paper, so that its findings could lead to the setting up of the best structures to promote the interests and well-being of consumers.<sup>6</sup>

This speech sets the scene for three significant landmarks in consumer protection history in Malta: first, the appointment in 1990 of a Parliamentary Secretary whose designation specifically referred to consumer protection; secondly, the publication of a White Paper on consumer rights in 1991;<sup>7</sup> and thirdly, the setting up of a Government department devised exclusively to promote consumer interests in 1992.

An editorial which appeared in *The Times* in early 1991,<sup>8</sup> had correctly predicted that a White Paper on the subject was about to be published and that the 'indications are

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<sup>6</sup> Ibid. All extracts have been taken from the Budget speech given by the Minister of Finance pp462-463 (in trans.) In his reply to this speech, the then Leader of the Opposition, Dr Carmelo Mifsud Bonnici, spoke of many things but consumer protection was not one of them. (Parliamentary sitting number 327, 7 December 1989) pp326-356

<sup>7</sup> The reference in the speech to the EC Directives here is interesting, but in reality these eventually exercised any material influence on the two published White Papers, where they barely received a mention.

<sup>8</sup> Editorial, *Consumer Protection*, *The Times*, 1 January 1991, p4

that consumer affairs could feature prominently during the coming year in public discussion and also in Parliament.’ It also commented rather too optimistically that: ‘The coming white paper on consumer affairs will also have as one of its objectives the bringing together of all laws and regulations on the subject’.<sup>9</sup>

## **(b) The Objectives and Conceptual Basis of the 1991 White Paper**

The White Paper *Rights for the Consumer* was published in August 1991. It marked the first official systematic approach to consumer protection as an autonomous field of conceptual and legislative interest. The published document doubled as a discussion paper and as a programme of specific legislative reform proposals. This ground-breaking event signalled a definite departure from the former unsatisfactory attempts to protect consumers largely by the imposition of stringent price controls, extensive licensing restrictions, import substitution, and State and private monopolies, which invariably led to lack of consumer choice and poor quality of goods. The document was a springboard for a series of concrete reforms which ensured that consumer protection would no longer comprise a handful of unconnected measures and instead would gradually evolve into a coherent legal framework and a legitimate new field of study.<sup>10</sup>

The White Paper explained why consumer protection was necessary, identified what may qualify as basic consumer rights and suggested how such rights could best be protected in the local context. Much more than a mere discussion paper, its analysis and programme of legislative proposals were designed to serve as the principal

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<sup>9</sup> Ibid. The editorial also commented: ‘In recent months, a ray of hope seemed to emerge when it was reported that some public officials in the Parliamentary Secretariat with responsibility for consumer affairs had proved quite successful and efficient at redressing transactions in which consumers suffered losses.’ Another article, *White Paper on Consumer Affairs out shortly*, which appeared in *The Times*, 17 December 1990, p20, quoted Minister of Trade, Dr Emmanuel Bonnici, promising that a white paper was to ‘be published shortly, increasing consumer protection and bringing together all laws and regulations on consumer affairs.’

<sup>10</sup> The first comprehensive academic analysis of the 1991 White Paper was Eugene Buttigieg, *Maltese Consumer Law* in Peter Xuereb and Roderick Pace (eds), *The State of the Union Conference 1995, Collected Papers* (European Documentation and Research Centre, University of Malta Press, 1995): ‘...I think the White Paper has set the evolution of consumer protection in Malta in the right direction.’ The paper also provided a very useful commentary on the Consumer Affairs Act of 1994, setting Maltese consumer legislation within the context of Community Consumer Directives.

reference point for any discussion on consumer law development in Malta for several years thereafter. This objective was successfully achieved and the document ignited an irreversible process which over the years has borne substantial legislative benefits for consumers. The extent of the role played by the 1991 White Paper in the build-up for the eventual transposition of EU consumer protection Directives is a more complex issue. It would clearly be wrong to overstate its EU credentials or its influence on the accession procedures. The 1991 White Paper did not make any direct reference to the need to adopt or to align with Community consumer law. Had the 1991 White Paper been planned as a first step towards the eventual accession transposition, the document would simply have specifically said it. The White Paper did not mention Malta's membership application submitted just a few months earlier or the future transposition expectations. It made no reference to basic relevant Community notions like the internal market, free movement of goods or, more strikingly, to the EC Directives on Doorstep Contracts and Misleading Advertising already in force at that point. The only exception was the Product Liability Directive of 1987 which the relative White Paper proposals relied heavily upon. As for the remainder of the document, the silence, as the cliché goes, was deafening.<sup>11</sup>

The main objective of the 1991 White Paper was to give consumer protection in Malta a fresh start, both in form and in substance. The short term objectives were to give consumer protection a structure and a shape and to introduce new rights for consumers. Some of the issues it addressed have become part of the law, while others have regrettably remained unregulated.<sup>12</sup> Several reforms proposed in the White Paper eventually only found their way into Maltese law as a result of the latter's accession-related alignment with Community law, with product safety,

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<sup>11</sup> While the White Paper was being drawn up in 1991, the consumer policy of the EC was itself not yet well-defined or sufficiently matured. Howells and Wilhelmsson in the Epilogue of their 1997 publication (Howells and Wilhelmsson, *EC Consumer Law* (Ashgate-Dartmouth, 1997) were still arguing that 'What is missing is a clear vision of what EC consumer policy should aspire to.' (p337), that 'There is a need for the Community to rethink its consumer policy.' (p340), and that their 'provisional conclusion must be that it is too early to say whether the EC will enhance consumer protection for its citizens.' (p340). Writing in the same year, S. Weatherill queried the measures adopted that far by the EC in these terms: 'Although there is a collection of EC legal material which affects the consumer, is it straining analytical coherence to describe this as 'consumer policy'? Is it really no more than an erratically conceived grouping of general trade practices law?' (S. Weatherill, *EC Consumer Law and Policy* (1st edn, Longman 1997) p152

<sup>12</sup> One of the latter issues is estate agency (Department of Information, *Rights for the Consumer* (White Paper, 1991) *Purchasing a House*, p29, paragraphs 127-131) a subject which remains largely unregulated despite the proposals.



product liability and unfair contractual terms supplying perhaps the clearest examples.<sup>13</sup>

The underlying conceptual basis of the 1991 White Paper may be described in terms of the following propositions:

- (i) that consumer law was multi-faceted and extended beyond exercising control over prices, trade descriptions and doorstep selling;
- (ii) that consumer law cannot be legislated in fragmented and piecemeal fashion;
- (iii) that consumer protection benefits from a conceptually sound definition of 'consumer';
- (iv) that consumer law requires an effective administrative and enforcement framework;
- (v) that consumer law is not a phenomenon frozen in space or time but requires periodical development and renewal;
- (vi) that consumer protection was an ethical necessity;
- (vii) that the time was ripe for Malta to introduce comprehensive consumer protection legislation.

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<sup>13</sup> Chapter VIII (pp65 to 75) of the 1991 White Paper contains one of the earliest analysis of how unfair contract clauses could be tackled within the existing framework of Maltese law. 'It is relevant to note that these proposals were made at a time when the EU itself had not as yet enacted the Directive on unfair terms. The legislative measures on unfair terms enacted in October 2000 had the advantage of being based on a Directive which had been in place for seven years and of referring to the experience of various EU Member States which had after 1993 enacted laws to implement the Directive. Therefore the delay in enacting a law on unfair terms had at least the side benefit that the Maltese legislator could learn from the experience of other countries which had already implemented the Directive, thereby avoiding some pitfalls in the process.' Paul E. Micallef, *Unfair Terms in Consumer – the Maltese perspective* <<http://www.camalta.org/papers-contracts.html>> accessed on 2 August 2013

The 1991 policy document included subjects often ignored or marginalized in most general discussions on consumer rights, such as the employment of trading stamps, the use of false weights and measures, problems connected with purchasing a house, retail price regulation and the setting up of small consumer tribunals. The vision launched by the White Paper is succinctly described in its last two pages. Foreseeing a single consolidated Act enjoying ‘a recognisable pattern and sense of direction and purpose,’ the ‘far-reaching’ substantive reforms in the various areas were planned to be adopted ‘in stages.’ The document further explicitly spelt out its ambitious objectives: to tackle ‘the grave deficiencies in ...existing law;’ to push the legal system to ‘accommodate new principles which safeguard the consumer;’ to propose ‘a radical reappraisal of the policies which the law should henceforth strive to achieve;’ to ‘pave the way for the most comprehensive legislative and administrative programme of measures ever passed to protect the interests of consumers in Malta.’<sup>14</sup>

The 1991 White Paper assessed the consumer legislation, remedies and structures existing at the time and found them wanting in various respects. It concluded, for instance, that the Consumers Protection Act 1981 had served little purpose and was too badly drafted to warrant being reformed. Indeed it was a disruptive Act, poorly conceived and largely ineffective. As it could have no role or place in the new consumer protection framework being launched, a policy decision was taken to repeal it. The White Paper reviewed the Trade Descriptions Act and the Doorstep Contracts Act and concluded that they too needed to be amended and improved. The document listed a number of specific proposals for amendments to both laws. None of the proposed amendments was related to the Community consumer policy.

The 1991 White Paper was published in a context of a new political administration, only recently elected to power, intent on dismantling the restrictive structures and practices of the past and on introducing various trade liberalisation measures. The change in Government in 1987 had far-reaching effects and the initial years of the new administration ushered in a flow of White Papers and consultation documents on a scale previously unimaginable. This forms part of the national political context

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<sup>14</sup> (n1) pp32 - 33

in which the 1991 White Paper has to be understood and evaluated; it was very much a product of its time.<sup>15</sup>

When the 1991 and 1993 White Papers were published, the local legal and administrative position in the local consumer protection field was still in a relatively poor state, reduced to an incoherent series of unrelated piecemeal measures administered by a confusing assortment of authorities and Government departments.<sup>16</sup> In 1991, consumer protection was going nowhere and had to be refreshed and re-shaped.<sup>17</sup> The 1991 document placed Government in a position to further mature and develop its own thoughts on consumer protection within a new planned legal structure that would gradually embrace future substantive rules on important different consumer concerns.

### **(c) The Political Context**

Consumer Protection is a political subject, and consumer reforms in any country usually owe much to individual politicians who decide to make a difference. The 1991 White Paper is linked to the appointment during the previous year of a Parliamentary Secretary<sup>18</sup> who for the first time in Maltese political history was assigned explicit competence for consumer protection.<sup>19</sup>

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<sup>15</sup> It is not the objective of this part to analyse in detail the whole of 1991 White Paper for its own sake. The document was comprehensive and the list of consumer issues raised was extensive even in the shortened version that was edited for publication.

<sup>16</sup> Cunningham had similarly observed that prior to the 1973 Act, consumer protection law in the UK was 'piecemeal, in the sense that it related only to particular aspects of transactions or to particular goods. There was no branch of the law dealing specifically with consumer protection as such.' See generally James Cunningham, *The Fair Trading Act 1973: Consumer Protection and Competition Act 1973* (Sweet & Maxwell, 1974)

<sup>17</sup> This implied that Government had more or less to start with a clean state, often an advantageous starting point for law-making.

<sup>18</sup> Equivalent to a junior minister

<sup>19</sup> Dr Michael Frendo carried out his functions under the general responsibility of the Minister of Education. He soon set up the first ever Government-funded consumer complaints service. The service was free but lacked structure and was poorly resourced; but it represented a start for receiving and mediating consumer complaints. The authorities encouraged consumers to make use of this new facility and by 1992, the service grew and improved.

Dr Frenco addressed the objectives and features of the White Paper in a very revealing interview.<sup>20</sup> The heading of the four-page spread announced triumphantly that the 'best ever structures that consumers have had are to be set up.' In the interview, Dr Frenco stated that following the publication of the White Paper, Government would embark on the preparation of one comprehensive Act that would incorporate all the laws that protect the consumer. He envisaged 'a Code that will comprise all consumer rights and will provide for their enforcement...This does not however mean that everything will be done in one stage. We are proposing to achieve this over a period of time...' He revealed that a law establishing the Consumer Protection Council would be the first step. It would be useful, he said, for everyone that 'the consumer would be able to find his rights easily in one single consolidated law.' His intention was that by March 1992, a new Bill implementing core parts of the White Paper would be published and presented to Parliament. He explained it had been published to fulfil Nationalist Party's 1987 electoral promise to take serious action to protect consumer rights. He responded to the criticism that the White Paper was unduly legalistic:

In reality, the White Paper is not legalistic but it is based on the legislation and on the changes that are required to the laws. We did not wish and we do not intend that the White Paper would contain just empty talk. We wished to address the required reforms in order to set up the infrastructure required to ensure that consumers will soon have the highest possible protection ever in Malta.<sup>21</sup>

Asked whether the White Paper was drawn up with EU considerations in mind, Dr Frenco responded generically that certain EU consumer rules had been taken in consideration because 'We are seeking to establish a level of consumer protection as exists in Member States of the EU...'<sup>22</sup> He explained that the proposed new Consumer Protection Council was intended to centralize and coordinate the administration of all the various bits of legislation that protected consumers in a fragmented manner. He clarified that it was not his intention that the proposed

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<sup>20</sup> *Special Report*, In-Nazzjon Taghna, (Nationalist Party's official organ) 15 October 1991, pp13-16 (in trans.)

<sup>21</sup> (in trans.)

<sup>22</sup> (in trans.) Minister Frenco was at that stage one of only a handful of politicians who had undergone formal studies in European Law. That background made him much more sensitive than many of his Cabinet and Parliamentary colleagues to developments at EU level.

Council would receive and handle individual consumer complaints. This should be the function of voluntary consumer associations:

The Council will be involved in a more general role and would seek to promote consumer protection in a wider and more comprehensive manner, including the formulation of policies that should be adopted, and the laws to be implemented...<sup>23</sup>

This timely interview just two months after the White Paper's publication confirmed various realities: that a novel preliminary consumer handling complaints mechanism had been operating (informally) within the Parliamentary Secretariat since 1991; that the drawing up of a law setting up the proposed Consumer Protection Council was already underway; and that the thinking was to gradually compile one Code comprising all consumer rights in one single consolidated legislation.<sup>24</sup>

This interview on the 1991 White Paper has been quoted at length because it is possibly the most comprehensive 'insider' comment available. Its context, objectives and ambitions are explained by the person politically responsible for its publication and who continued to pilot it until he was promoted to a different Ministerial post following the 1992 General Elections. Little similarly relevant published documentation on the subject is available. Through the publication of this detailed feature in its official organ, the Party in Government was signalling the high priority that consumer protection enjoyed on its political agenda.

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<sup>23</sup> (in trans.) In the same interview, Dr Frendo explained the consumer complaint mechanism he had set up in his Parliamentary Secretariat. He claimed that this first ever domestic complaints mechanism had mediated in consumer disputes with a 65 per cent success rate, and that a new hot line was about to be opened for consumers. He stated that this service shall continue in operation until the new Council and structures, contemplated in the 1991 White Paper, were formally established.

<sup>24</sup> The idea of compiling a white paper on consumer protection was conceived in 1990 during Minister Emmanuel Bonnici's tenure of office as minister responsible for trade. In practice however, the 1991 document may be largely attributed to Dr Michael Frendo, the then Parliamentary Secretary assigned responsibility for consumer protection late in 1990. Dr Frendo was first elected to the House of Representatives of Malta in 1987. From 1990 to 1992 he served as Parliamentary Secretary for Youth, Culture and Consumer Protection. <<http://www.diplomacy.edu/Workshops/MD/faculty.asp>> accessed on 10 January 2013. In December 1990, he commissioned a draft White Paper. The original unedited version has never been published. (Malta University Services Ltd, Unpublished Report *White Paper on Consumer Protection: Proposals for Legislative Reforms* A Report submitted in February 1991) A shortened and less forceful version, containing a few interpolations, was instead officially published months later in August 1991. The original report was considered too long and it was thought that an edited version would be more widely read by the general public. (Author's personal experiences and conversations with Dr Frendo)

#### **4. Selected significant reactions to the 1991 White Paper**

The General Retailers and Traders Union, a leading trade association and business lobby group, issued its reaction to the 1991 White Paper in April 1992.<sup>25</sup> The GRTU insisted that free competition was the consumer's best safeguard and decried the fact that the White Paper was one-sided, seeing that 146 out of 151 paragraphs spoke only of rights of consumers and envisaged more and more obligations to be imposed on traders. It failed, it complained, to sufficiently address also the rights of traders and the obligations of consumers. Moreover, while it dealt with consumer associations, it did not deal with trade associations. The statement complained that consumers were being depicted as victims while traders were depicted as thieves. It protested that the definition of 'consumer' being suggested in the White Paper would exclude end users which were business enterprises.

The progressive left-leaning political grouping known as Alternattiva Demokratika<sup>26</sup> expressed its reaction to the White Paper through various articles published in its official weekly newspaper. An editorial published in 7 September 1991 described the White Paper as a historic 'turning point', but criticised Minister Frendo for over-emphasizing his concern not to offend the commercial community and for trying to please both consumers and traders. Alternattiva Demokratika pointed out that consumers did not enjoy equality with traders and insisted that the laws should be designed accordingly. It stressed that consumer laws already in existence were not being enforced, and expressed the hope that the new law, once in force, would be better enforced. The composition of the proposed Consumer Protection Council was also criticised. The Party however conceded that various proposals in the White Paper were very valid and could improve the position of Maltese consumers. Broadly, the view of the political grouping was that the White Paper was a step in the

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<sup>25</sup> In the April 1992 issue of its publication *The Retailer*. The GRTU organised a public seminar on the White Paper on the 22 November 1991 during which it insisted that the policy document was hostile, unfair and unfair to traders. A detailed report (in Maltese) on the seminar proceedings appeared in *L-Orizzont*, 30 November 1991, p14. During the seminar, Minister for Trade Dr E. Bonnici (n 9) defended the proposals and motives behind the White Paper, while Mr Leo Brincat re-iterated on behalf of the Malta Labour Party that the document was just a pre-election gimmick which would not lead to tangible results for Maltese consumers. Mr Brincat shared the GRTU's criticism that the White Paper discriminated against traders.

<sup>26</sup> Then the third force in Maltese politics. Its popular weekly paper was called 'Alternattiva'.

right direction and presented an opportunity not to be missed. It hoped that the fine words could translate into concrete positive action.<sup>27</sup>

Former president of the Consumers Union and later a leading official of the Malta Labour Party, Mr Jimmy Magro wrote a full-page comprehensive and detailed critique on the White Paper (published two months earlier) in the Sunday Maltese language newspaper *It-Torca*.<sup>28</sup> The tone was generally negative and the writer strongly criticised the timing of the publication, just a few months before Government's term of office was about to expire. He dismissed the document as just 'another means of propaganda in favour of the Government because in the few months remaining, it will surely not be possible to carry out any concrete steps.' The White Paper was described as window dressing, a gimmick intended just for show and which gave no effective new rights to consumers. Mr Magro predicted that nothing would come out of the various measures promised in the White Paper. On the other hand, he expressed his agreement with several of the proposals for legal reforms comprised in the 1991 publication, including the proposed amendments to the Consumers Protection Act, the Door-to-Door Salesmen Act and the Trade Descriptions Act, three laws introduced when his Party was in Government.

## **5. The 1991 White Paper: two related significant and unpublished documents**

### **(a) 'Sketches on Consumer Protection in Maltese Law', April 1990 – the first stock-take**

What is not generally known and has so far not been mentioned in the literature is that the 1991 White Paper had been preceded by an internal preparatory report on

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<sup>27</sup> See *Is the Consumer protected?* (in trans.), *Alternattiva*, (7 September 1991) p4, and *The White Paper on the Consumer* (in trans.) *Alternattiva* (21 September 1991) p2. The negative reaction of part of the business class to the proposed consumer law reforms was criticised in *Traders react to White Paper* (in trans.), *Alternattiva* (30 November 1991) p2.

<sup>28</sup> Jimmy Magro, *The Consumer Protection White Paper*, (in trans.) *It-Torca* (20 October 1991) p9

consumer protection in Maltese law. A first working document headed *Sketches on Consumer Protection in Maltese Law* was finalised and submitted to the authorities in April 1990.<sup>29</sup> The objectives of the 1990 report were to assist Government's own understanding of the state of play of consumer protection in Malta, to list the various unsatisfactory structures and legislation under which consumer protection was labouring, and to broadly suggest a possible way forward.<sup>30</sup>

This report identified the numerous laws which directly or indirectly provided some protection to consumers, no matter how ineffectively. It listed and briefly described each law indicating the administrative authority responsible for administering it. The picture that resulted was one of incoherence in the legal system generally. The findings of this report were valuable and instructive because no similar exercise had been carried out previously.<sup>31</sup> The report indicated that consumer protection laws in 1990 were unsatisfactory and lacked sound conceptual and enforcement foundations. Furthermore, too many different authorities played a part in the confusing patchwork. The report pre-dated Malta's application to join the Community in June 1990 by two months and made no reference to the European Community or to its consumer Directives. The White Paper published in 1991 owed a considerable debt to the findings and suggestions found in the April 1990 stock-take.

#### **(b) The original (and longer) draft White Paper commissioned by Government, February 1991**

A second document which has so far escaped the notice of commentators on the local consumer protection is an original report drawn up for Government early in 1991 as the draft of the proposed White Paper. This report was a more extensive,

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<sup>29</sup> It has never been officially published. An important extract from this document is attached as Appendix 1.

<sup>30</sup> Dr M. Frendo made an indirect reference to the Sketches preparatory study in the course of the interview with the already cited Nationalist newspaper *In-Nazzjon Taghna* (15 October 1991) (n20) where the Parliamentary Secretary gives background to the 1991 White Paper and its objectives and context. At one point he reveals that: 'Immediately upon the establishment of this Parliamentary Secretariat, we started working on a study of the entire situation regarding the position of the consumer in this country as well as to start formulating concrete proposals.'

<sup>31</sup> The earliest review is contained in the writer's *Consumer Protection and the Law* (LL.D. thesis, University of Malta 1979).



detailed and ambitious report. Regrettably, after some consideration, the draft was eventually severely mauled so that the published version in August of that year was a substantially shorter (and regrettably weaker) policy statement. Though retaining the same original structure and sequence of topics, several of the omissions were significant.<sup>32</sup>

In summary, the six most important proposals that went missing or were severely edited in the official White Paper published in August 1991<sup>33</sup> may be listed as follows:

- (i) five full pages of analysis regarding proposed improvements to the Doorstep Contracts Act were reduced to a page and a half;<sup>34</sup>
- (ii) a six page analysis of the Trade Descriptions Act<sup>35</sup> listing a number of proposed changes was reduced to one page;
- (iii) a detailed discussion covering ten pages on the Civil Code rules on the supply of services was badly mauled and significantly weakened and reduced to three pages;
- (iv) the original draft included detailed proposals to tackle the problem of unfair contract terms in Maltese law<sup>36</sup> and proposed specific legislative reforms of the Civil Code. Regrettably less than two pages survived on a subject on which the Community had yet to finalise its own harmonised measure. This must rank among the great missed opportunities in Maltese consumer law development;

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<sup>32</sup> The original 110-page report was titled *White Paper on Consumer Protection: Proposals for Legislative Reforms*, February 1991, Malta University Services Limited. It has never been published.

<sup>33</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991) pp53 - 64

<sup>34</sup> Chapter III, pp24 - 28

<sup>35</sup> Chapter IV, pp29 - 35

<sup>36</sup> Chapter VIII, pp65 - 75

(v) a long and complex Chapter on Product Liability,<sup>37</sup> once again one of the first analysis of Maltese law on the subject and the opportunity for reforms, found itself reduced to four pages in the 1991 White Paper;<sup>38</sup>

(vi) the proposal to introduce moral damages for injured consumers did not make it to the 1991 White Paper.<sup>39</sup>

This unpublished draft<sup>40</sup> is similarly bereft of any Community law influence or inspiration, confirming the proposition that the Europeanisation process had not yet started. As in the officially published version, the only reference to the EU relates to the product liability Directive. The report is very local in style, approach and content. It is a mine of information for students of the origins and conceptual justification of early Maltese consumer protection and law when this was still evolving autonomously and free from any foreign or external stimulus or pressure.

## **6. 1993: a second White Paper: Fair Trading...the next step forward**

‘The Government’s commitment to develop an extensive and comprehensive framework for the promotion of consumer welfare continues unabated,’ declared confidently the 1993 White Paper.<sup>41</sup> This second White Paper provided a useful update of events and intentions since the publication of the original 1991 policy document published barely two years previously. The 1993 Paper was shorter, less ambitious and continued where the 1991 publication left off. Whereas in 1991 all the focus had been on consumer rights, now the attention was shared between consumer protection and fair competition.

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<sup>37</sup> Chapter IX, pp76-88

<sup>38</sup> (n 1) pp22-29: here again rules on the matter were only introduced in 2000 in the form of a mandatory accession transposition

<sup>39</sup> Although it had been raised in the April 1990 Sketches report

<sup>40</sup> As already remarked above, some re-thinking occurred between the first draft of the 1991 White Paper and the version eventually published. This is no surprise as the White Paper was also an essentially political document reflecting the Government’s political, economic and ideological orientation and constituency interests

<sup>41</sup> Department of Information, *Fair Trading...the next step forward.. Proposals for Legislative Reforms* (White Paper, 1993) Introduction, p1

Nowhere in its discussion of new consumer protection measures was a single reference made either to the Community Directives or to Malta's 1990 membership application. References to the Community were exclusively found in the parts dealing with the new proposed legislation on competition.<sup>42</sup> The 1993 White Paper made some predictions which proved fairly incorrect. It predicted the early adoption of unfair terms rules and doorstep contract law reforms and referred to two new laws being prepared on these two subjects.<sup>43</sup> The relative measures came to light much later, not as distinct laws, but as part of the 2000 amendments to the 1987 and 1994 Acts. No reference is made in this second White Paper to three short draft consumer laws that had been completed in early 1992.<sup>44</sup> The legislative agenda (as also the politicians responsible for consumer and competition affairs) had already changed significantly.<sup>45</sup>

## 7. Political and Strategic Objectives of the 1993 White Paper

The 1993 White Paper was not as historically necessary and innovative as the 1991 policy publication had been. Rather than propose new radical legislative measures, it reviewed developments and achievements since 1991, an approach which supplies additional useful insights into early official thinking on new consumer law in Malta.<sup>46</sup> The 1993 White Paper had an overtly political objective and helped Government deflect growing criticism that it was dragging its feet and failing to live

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<sup>42</sup> These references are found on pp 18, 19, 22 and 25: all relate to the EC competition law framework.

<sup>43</sup> (n 40) pp13-14: '...only the finishing touches remain to round off the drafting of two additional measures in favour of consumers. The first shall completely replace the Door-to-Door-Salesmen Act and shall significantly reinforce the legal position of consumers against unfair practices that may be committed by itinerant salesmen. The second measure, representing a radical departure from traditional legal concepts, shall directly and unambiguous combat unfair contract terms which are often unreasonably inserted in consumer transactions. It is envisaged to submit the relative bills before Parliament in the coming months.'

<sup>44</sup> See Chapter 4

<sup>45</sup> By 1993, the three separate legislative drafts intended to kick-start the implementation of the 1991 White Paper programme had become integrated into the draft Consumer Affairs Act attached to the 1993 White Paper. They have not been considered in the literature. (See further in Chapter 5, pp113-114)

<sup>46</sup> A note on the 1993 White Paper appeared in David Fabri, *Malta: Government publishes White Paper on Fair Trading, incorporating proposed legislation on consumer affairs and competition* (1994) 2(1) Consumer Law Journal CS1 pC52

up to its 1991 promises. It sought to reassure the public that new consumer protection legislation was now imminent. Two very advanced draft Bills respectively on consumer and competition affairs were indeed appended to the White Paper.

The new White Paper sought to fill the gap left since the publication of the 1991 White Paper, making up for the delay in converting its considerable proposals into concrete legislative measures. It took pains to explain how much had been achieved since August 1991. The 1993 publication helped to re-focus the minds of legislators, thereby accelerating the submission of new legislation to Parliament. The White Paper device was a good excuse to publish the two new Bills before they were published in the normal manner in the official gazette. It set out their salient features and the underlying Government policy. Its thrust was no longer to encourage discussion and consultation but rather to bring two specific important legislative reforms to an early successful and concrete conclusion.<sup>47</sup> With consumer protection still a concern in public opinion, political gain could be made from being seen introducing progressive laws creating new consumer rights.<sup>48</sup>

The 1993 White Paper also served as an umbrella device which enabled consumer and competition issues to be tackled together for the first time. The political objective of giving the new competition legislation its own White Paper under the new fair trading label was also achieved. Not surprisingly, the 1993 Fair Trading White Paper will be remembered more for launching the new and first proper

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<sup>47</sup> For a useful discussion of the political and social contexts in which the latter Act was enacted see paper by Hon. Justice Silvio Meli, *The Maltese Competition Act: Proposals for Change* (2009) p40 Bank of Valletta Review. Looking back at the ten-year transition between the adoption of the Act and Malta's entry in 2004, the writer describes the transition as having 'involved a major cultural, economic and legal quantum leap.' He further highlights: '...the cultural shock that Maltese society experienced when, from a situation characterised by the sheltering of business against competition, its economy was changed to one fostering and promoting competition...Fair competition first appeared in Malta's statutes in 1994. Its adoption was necessitated as a direct consequence of the liberalisation of the market where it was deemed essentially to establish the necessary legal structure to ensure fair competition in the market. It was also in line with Malta's requirements consequent to its application for accession to the European Community.'

<sup>48</sup> The new Cabinet set up in 1992 saw the departure from the scene of Dr Emmanuel Bonnici, former Minister responsible for trade (who failed to be re-elected), while Dr Michael Frendo became a Minister in a different sector. Mr John Dalli was the new Minister of Industry which explained his involvement in competition issues. On his appointment, Mr Dalli soon started promoting the concept of 'fair trading', a term intended primarily to refer to fair competition heralding the introduction of the new competition law. For this purpose, he commissioned a White Paper on the subject to accompany his Budget Speech to Parliament scheduled for November 1993. He then decided it would be a good idea to also include consumer protection. (Writer's direct knowledge)

competition law in Malta, rather than for having helped further develop consumer law.

It was able to record at least three important developments since the publication of the 1991 White Paper:

- (i) a new Department for Consumer Affairs had been established in 1992 and was already in operation receiving hundreds of consumer complaints;
- (ii) a draft Consumer Affairs Act had been drawn up and would be enacted shortly;
- (iii) a draft Competition Act had been drawn up and it too would be enacted shortly.

These were not inconsiderable achievements although at the time Government seemed to be moving too slow and dragging its feet. The Fair Trading White Paper sought to fill the gap between the ambitious promises published in 1991 and the eventual adoption of promised new consumer legislation in 1994.<sup>49</sup>

Whereas the 1991 document set out a comprehensive panoramic view of the entire Maltese consumer protection landscape shortly after the island had applied to join the EC, the 1993 document was a much less ambitious exercise focussing on the two draft bills which it launched. The Bill on consumer affairs did not cover all the areas dealt with in the 1991 White Paper and concentrated on desperately needed institutional and structural reforms. Many substantive legal reforms promised in 1991 did not make it to the new consumer Bill, and only became law several years later as part of the extensive EU accession series of reforms.<sup>50</sup>

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<sup>49</sup> The new Consumer Affairs Act was passed through Parliament in the latter part of 1994. It is extensively examined in Chapter 4

<sup>50</sup> These reforms were mainly implemented between 2000 and 2001, and included rules on product safety and liability, unfair contractual clauses, as well as amendments to the Door-to-Door Salesmen Act.

Historically the 1993 document also introduced a new policy approach which for the first time viewed consumer protection in relation to fair competition, a relationship described as representing ‘two sides of the same coin.’ However the policy was to keep the two sides separate and distinct:<sup>51</sup>

Nevertheless, though complementary, a clear conceptual and tangible distinction exists between consumer and competition matters. After careful study, Government is proposing to have the two subjects governed and administered under separate laws by distinct specialised regulatory bodies. Both laws however remain inspired by a common pursuit of fair trading in the economic sector.<sup>52</sup>

The 1993 White Paper introduced readers to new concepts later formally incorporated in the Consumer Affairs Bill. These included the setting up of an advisory Consumer Affairs Council,<sup>53</sup> the concept of ‘undertakings’ by traders,<sup>54</sup> Compensation Orders and Moral Damages,<sup>55</sup> the Consumer Claims Tribunal and Vicarious Responsibility.<sup>56</sup> This is evidence that new ideas and techniques, unrelated to the European membership or Directives, were still being developed as part of a national consumer agenda as late as November 1993.

## **8. A comparative assessment of the two White Papers: their context and significance**

When in 1990 it submitted its application for membership to join the European Union, Malta was, in several respects, unprepared for the obligations of membership. Like the other applicant states, Malta faced the daunting task of negotiating accession

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<sup>51</sup> p5

<sup>52</sup> At that time, two different Ministers dealt with the two subjects separately. The merger between competition and consumer affairs was first attempted in the Labour Government’s aborted 1998 Bill to establish a new statutory Fair Trading Authority, at a time when consumer and competition matters were finally assigned to the same Minister. Later, in 2000, with consumer protection and competition matters entrusted to the same Minister, an administrative merger was carried out in 2000. Eventually the Malta Competition and Consumers Affairs Authority was established in 2011.

<sup>53</sup> (n 41) pp6 -7

<sup>54</sup> Ibid. p10

<sup>55</sup> Ibid. pp10 -11

<sup>56</sup> Ibid. p13

and implementing a considerable *acquis communautaire* developed over many years. At that stage, the authorities had only just started taking tentative and preparatory steps to build up administrative capacity and to resolve the awareness gap involving Community matters generally.

The 1991 White Paper may be seen as the creditable product of an administration deciding its own priorities for consumer law reforms. At that stage, many of the Directives, which Malta eventually implemented in the subsequent decade, were not yet in place.<sup>57</sup> During the same time that Malta was finding its feet in the field of consumer protection, the EU had not really advanced all that much. The Directives on product safety, liability for services (later withdrawn) and unfair terms were still at proposal stage.<sup>58</sup>

As already remarked, the White Paper itself had a very minimal and tenuous relationship with the EU Consumer *acquis*.<sup>59</sup> Many of the Directives themselves were still in embryonic stage and only become law years later. Any criticism that the White Paper failed to address all the issues dealt with in the Directives would be misplaced and unfair. Indeed, some of the areas which the White Paper proposed to tackle have not, to date, been addressed by the EU. These include the regulation of estate agency, the award of moral damages to injured consumers, the application of

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<sup>57</sup> It would appear mistaken to attribute a specific EC vocation to the 1991 White Paper as in Paul E., Micallef *The Impact of the European Union on Consumer Policy: a mixed blessing?* The Yearbook of Consumer Law 2009, pp111 -112 (Ashgate 2009). Paul E. Micallef overstates the influence of the EC consumer directives on the content of the 1991 policy document: 'Significantly, the proposals in the 1991 White Paper were also influenced by developments in the EU.' This wrong assumption is not borne out by the text of the White Paper. Indeed Micallef himself concedes that most of the relevant Directives were only adopted many years after its publication. Paul E. Micallef repeats this assertion in his paper *Unfair Terms in Consumer Contracts - the Maltese perspective* already referred to earlier.

<sup>58</sup> See Jantien Findlater, *Consumer Policy – The New EC Trading Environment*, (Irish Centre for European Law, Trinity College, 1991) (Collection of Conference Papers) which sets up a useful comparison. This collection of papers of a conference held in Trinity College in Dublin at just about the same time as the Maltese consumer White Paper is indicative of the state of play of consumer law in the EC. The various papers describe and examine three important Directives which were still at proposal stage. These consisted of the General Product Safety Directive, the Unfair Terms Directive and the Liability for Defective Services Directive. The last proposal as eventually withdrawn but for present purposes it would be useful to remember that two of the major pillars of EC consumer protection had not yet become law. EC consumer law has developed greatly since 1991, as has Maltese consumer law. In 1991 EC consumer law was itself still at a very early stage of its development.

<sup>59</sup> Up to 1991, little was known locally about EC law, institutions and procedures in Malta and this was true of consumer law as well as of other areas. The teaching of EU law at University was then still in its infancy.

equity in the Tribunal for small consumer claims and vicarious responsibility of traders for breaches by their employees.<sup>60</sup>

For almost ten years, the White Paper remained the main inspiration for legal initiatives in consumer legislation in Malta. Its status faded when accession to the EU became the top priority of the Maltese authorities and negotiations with the Union were accelerated. The complex process of bringing Maltese legislation and administrative structures in line with EU standards and requirements was placed on the fast-track in Government's agenda, pursued with the single-mindedness deemed necessary to ensure that Malta entered the EU with the other nine applicant countries whose membership negotiations with the EU had started earlier. The two White Papers show that three years into the application to join the Union, Malta was still insufficiently geared for membership.

The 1991 White Paper made a number of references to the Molony Committee Report<sup>61</sup> and broadly served the same purpose not least by providing a stock-take of consumer protection at a particular point in time and for suggesting a blueprint for future legislative and administrative action. Both Reports successfully added a fresh momentum in favour of consumer protection in the respective countries.<sup>62</sup>

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<sup>60</sup> On the other hand, the White Paper omitted to consider certain areas that were later the subject of EU measures, like timeshare and package tours, probably because they were not perceived as urgent priorities locally.

<sup>61</sup> *Final Report of the Committee on Consumer Protection*, presented to Parliament by the president of the Board of Trade by Command of Her Majesty (Cmnd 1781, HMSO, 1962)

<sup>62</sup> The Molony Committee (Board of Trade Final Report of the Committee on Consumer Protection (Cmnd 1781, 1962) in 1962 noted how much more complex the world had become for consumers than fifty years earlier. See also <<http://hansard.millbanksystems.com/lords/1962/may/29/the-molony-committees-report>> accessed on 10 January 2014; and J. W. A. Thornely, *Final Report of the Committee on Consumer Protection* (1963) 21 CLJ 1-7. Broadly, the 1991 White Paper played the same role in Malta as the Molony Report in the UK. This brief comparison is being presented in the full knowledge that there were also many great differences between the laws and structures of the two jurisdictions and the contexts were and remain quite different in many significant respects. One is therefore cautious not to over-state the points of convergence and similarity regarding how consumer policies were developed and implemented in two very different countries. Following the entry of the United Kingdom into the EU and with Malta starting to transpose the consumer *acquis* in 2000, the legislation of the two countries started to converge in several respects, a process of increasing uniformity directly attributable to their common obligations to transpose EU measures. More convergence should result as a result of Directives, starting with the Unfair Commercial Practices Directive, which are maximum harmonisation measures.



The 1991 White Paper introduced a new approach at an early stage of growth of Maltese consumer law.<sup>63</sup> It was written at a time when concepts of screening, gap analysis and transposition were still largely unknown and indeed none of them is mentioned anywhere in the document. The Commission published its first official opinion (*Avis*) on Malta's membership application in June 1993. This was not very enthusiastic about the state and standards of local consumer law, administrative capabilities and practices. In particular, the *Avis* warned that consumer protection in Malta had much catching up to do to meet the requirements of the EC consumer *acquis*. Published in November of that year, the 1993 White Paper made no reference to Malta's application to the 1993 Commission Report or to its findings on the state of Maltese consumer law. The 1993 White Paper also indicated that Government was passing the responsibility for future new legislative and policy initiatives to the recently created Department and, to a lesser degree, the Consumer Affairs Council.<sup>64</sup>

The two White Papers differed in style and objectives and are interesting for what they said as they are for what they failed to say. Both for instance dealt with price control, then still a highly sensitive political issue. The broad approach taken was that price controls still enjoyed public approval and could not be simply ignored or eliminated. They could be gradually reduced and in the future painlessly substituted by modern state of the art consumer protection and free competition laws administered by new focussed expert enforcement agencies.<sup>65</sup> The 1991 White Paper served as an occasion to share views with the public and to indicate a programmed way forward, and it also proved instructive to Government itself allowing it to learn more about consumer protection and how it could develop. Both White Papers were commissioned from external experts precisely because

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<sup>63</sup> Paul E.Micallef agrees that in a Maltese context, the 1991 White Paper was 'the turning point in the history of consumer legislation' Christian Twigg-Flesner, Deborah Parry, Geraint Howells, Annette Nordhausen, *The future of consumer law: reflections on a regulatory framework for a small island state* (The Yearbook of Consumer Law 2008) p236

<sup>64</sup> The 1993 White Paper seemed to assume that the impetus in favour of consumer rights would continue unabated. It failed to foresee that the establishment of the Director and the Council would instead lead to the unexpected results that consumer law would soon find itself entering a period of inertia. Government had withdrawn its leadership and ownership of the project and stepped back. The future of consumer legislation was now effectively in the hands of a Government department.

<sup>65</sup> The 1993 Paper strongly criticised the old price control regime as ineffective and promised their eventual abolition. Remarkably, the relevant archaic rules survive on the statute book till this day.

Government felt bereft of the necessary expertise and wished to receive objective assistance from persons outside the civil service.

The success of the two White Papers may be measured by the quality of the Consumer Affairs Act of 1994 which may rightfully claim to be the first and best local consumer law. The two complementary White Papers were a welcome novelty and an effective response to the omissions and mistakes of the past, symbolised by the poor legislative effort of 1981, the mis-named Consumers Protection Act, which was repealed by the 1994 law.<sup>66</sup>

## **9. Conclusion**

The Consumer Rights White Paper of 1991 may not have included a draft law but it was brimming with critical analysis and specific reform proposals. Many, though not all, of its proposals have since then been in some form adopted and implemented. It proved a policy turning point and sealed the new enhanced awareness of consumer rights and their concrete recognition at law. 1991 was therefore the year when consumer protection, from a subject of marginal interest, became official Government policy. The 1991 initiative was wide-ranging and set out a consumer law reform programme which in hindsight was too ambitious to achieve in its entirety. In a way, it promised more than could have realistically and politically be achieved in a short while. Nonetheless it led directly to the setting up of the Department for Consumer Affairs and the establishment of the post of Director for Consumer Affairs, the Consumer Affairs Council and the Consumer Claims Tribunal and other concrete measures introduced in the Consumer Affairs Act, most of which remain in force. More importantly it gave consumer protection a legal, academic and intellectual underpinning and respectability.

In 1991, the first White Paper was an original and ground-breaking event. The 1993 White Paper continued where the 1991 White Paper left off even presenting draft

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<sup>66</sup> The 1991 White Paper specifically recommended the repeal of the 1981 Act.

legislation as proof that the promise to introduce legislative measures in favour of consumers was being respected. However, since their publication, society and the law itself have moved on and changed considerably. Malta has in the meantime joined the European Union and has transposed the entire body of EC consumer law which itself continues to evolve. EU membership was a historical event which profoundly altered the legal, administrative and policy landscape, not least of all in the field of consumer rights. Unfortunately, several of the important legislative measures planned in the 1991 and 1993 policy publications<sup>67</sup> were only eventually adopted in the form of mandatory transpositions rather than as autonomous national initiatives. This was indeed a regrettable missed opportunity.

Notwithstanding the passage of so many years, the 1991 document remains the only comprehensive official study of consumer protection and legislative proposals in Malta to date, the fruit of a particular set of political and historical contexts which can never be repeated. Had it been commissioned and compiled today, the White Paper would obviously be very different as the contexts and the objectives would be greatly dissimilar. In 1991, Government was reacting to past political failures, incomprehension and indifference to consumer protection and was amenable to legislative reforms and innovation. The absence of any reference to accession to the EU or to the related transposition obligation marks it as still a pre-accession and pre-transposition product. A consumer White Paper if drawn up today would have to take into account the current, past and future EU policies and Directives.<sup>68</sup> Students of consumer protection are fortunate to have available two different White Papers on consumer protection which in their distinct ways represented to date the highest points in domestic thinking on the nature and future of consumer law. The two White Papers on consumer policy and legislative reforms published in 1991 and 1993 marked a remarkable change of gear in the evolution of a national consumer law, in contrast to the sporadic steps taken in previous years to address unconnected consumer issues, such as in the areas of trade descriptions and doorstep sales. The two policy documents were a striking and novel development in their own right, paving the way for considerable legislative reforms many of which

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<sup>67</sup> Such as the rules on unfair contract terms and product safety. See Table A

<sup>68</sup> In other words, it would have had to be more 'Europeanised'.

survive to this day. This approach helped raise national consumer law and policy to a level never enjoyed before. The measures taken between 1991 and 1993 helped facilitate Malta's eventual acceptance of the EU consumer directives. Written ten years after the ineffective Consumers Protection Act of 1981, the 1991 Paper expressed a new readiness to tackle the subject of consumer protection in a comprehensive manner and to set up a workable framework of structures, remedies and substantive rights. The 1993 follow-up, though less substantial, provides a very useful insight into which and how the promised reforms were being activated in practice. Together they chronicle the origins and political circumstances of what was fast evolving into the island's most significant consumer law.

In hindsight and from a strictly EU membership perspective, the White Papers present readers with a dilemma. They represent a purely national consumer policy initiative developing independently and in parallel with the slow moves towards EU membership that the country had embarked upon. The 1991 document did not even mention that Malta had applied for membership one year earlier. The 1993 document mentioned EU law only in the context of the proposed new Bill on fair competition. Examined in isolation, the landmark 1991 White Paper was nonetheless a truly great step forward offering a sensible plan to reform consumer legislation in a root and branch fashion and a welcome new point of departure for consumer rights in Malta. Its claim to political, cultural and legal significance remains undoubted. That it was created in the absence of any EC accession or transposition motivation or concern makes it even more worthy of attention. The publication of the 1991 policy paper may be seen as marking the 'growth of a political commitment to consumer protection'<sup>69</sup> at the highest national political level. Its contents and proposals provided consumer protection in Malta with an ideological basis and a moral and juridical justification.<sup>70</sup>

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<sup>69</sup> Stephen Weatherill, *EU Consumer law and Policy*, (2nd edn, Elgar European Law 2005)p5

<sup>70</sup> The 1991 White Paper features in David Fabri, *My Brother's Keeper – the Genesis and Ethical Basis of Consumer Law (Notes from a Maltese Perspective)* in *Business Ethics and Religious Values in the European Union and Malta – for a Moral Playing Field* (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta, Peter G Xuereb ed, 2007). The paper argues that the White Paper had a strong ethical basis with 'concepts like fairness and equity, like assuring compensation to persons injured by defective products and the broad underlying aim of avoiding the exploitation of the weak by the strong...'.<sup>70</sup>

The 1991 and 1993 White Papers were the first official publications to examine consumer policy and propose measures in a structured and coherent manner, and they were also the last. They permit us to have a better understanding of the early development of Maltese consumer law and of its complex, evolving and uncertain relationship with Community consumer law and policy. Since 1993, no new official consumer policy document has been published as Maltese legislators adhere faithfully to the choices, priorities and texts established at Community level.<sup>71</sup>

## **10. 1991-1993 White Papers: the Aftermath**

Today, the 1991 and 1993 policy documents no longer guide or inspire the Government's agenda for consumer protection, but their conceptual basis and justification of consumer protection and of consumer law remain valid. It remains remarkable that four years into the accession negotiations with the Commission, neither White Paper pursued any perceivable EU alignment objective. This cannot imply however that the values and the analysis expounded in the 1991 policy document had already become irrelevant before accession or have become irrelevant following membership. If anything, the EC Directives amply validated the foresight and content of the proposals drawn up as far back as 1991. The central role played by the 1991 White Paper as a major source of ideas for reform in domestic consumer law cannot be disputed. The reforms it launched facilitated the consumer protection measures subsequently introduced in pursuance of EU accession.<sup>72</sup>

The next Chapter will consider the important legislative and administrative developments that followed the publication of the two consumer protection White Papers just considered. Chapter 4 will in particular analyse a new consumer law adopted in 1994, and the consequences and implications of this historic measure.

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<sup>71</sup> As EU accession approached, the process inevitably shifted to the relentless and urgent transposition of the mandatory EU directives.

<sup>72</sup> The 1991 White Paper certainly opened the door to exciting new initiatives in favour of consumer rights and to the gradual legislative recognition of consumer protection.

## CHAPTER 4

### THE LAW TAKES SHAPE<sup>1</sup>: THE CONSUMER AFFAIRS ACT 1994 AND THE ATTEMPTED REFORMS OF 1998

'...each country must build its own system on the foundation provided by its legal, commercial, and social welfare structure.'

Final Report of the Committee on Consumer Protection, presented to Parliament by the President of the Board of Trade by Command of Her Majesty, (Cmnd 1781, HMSO, July 1962, better known as the Molony Committee Report, p7, paragraph 17

'The approach currently taken by the European Community towards consumer policy differs from that of the Maltese legislator. This is understandable, because the Community, as a supra-national body, does not have the same powers and attributions as the national legislators. Also, the approach taken by the Community is widely influenced by the legal systems in force in some of the Member States.'

Monique Goyens, *EU Consumer Protection Legislation and the New Maltese Legislation* in Peter G. Xuereb and Roderick Pace (eds) *The State of the Union Conference 1995, Collected Papers*, European Documentation and Research Centre, University of Malta Press, 1995

#### 1. The significance of the 1994 Act

This Chapter focusses on the Consumer Affairs Act<sup>2</sup> of 1994. It examines the context, objectives and significance of a law enacted at an early stage of the complex relationships between Malta and the Community, and between domestic law and European law. Four years after Malta applied for EU membership, the

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<sup>1</sup> 'The Law takes Shape' is the title of Chapter 1 (G. Borrie and A. Diamond, *The Consumer, Society and the Law*, 3rd edn, Pelican, 1973) p15.

<sup>2</sup> Chapter 378 of the Laws of Malta

Maltese Parliament adopted the most important consumer protection measure in the island's legal history, a long-awaited and long-desired legislative event. Chapter 3 has already analysed the build-up to this landmark measure and especially the two complementary and trail-blazing White Papers published in the three years immediately prior to the Act. This Chapter also chronicles and examines reforms drawn up by the Labour Government but thwarted by the calling of snap General Elections later in 1998, and places them in the EU accession context.

The Consumer Affairs Act was brought into force on the 26 January 1996.<sup>3</sup> The direct source of the Act was the 1991 White Paper, *Rights for the Consumer*,<sup>4</sup> whose detailed proposals suggested a conceptual foundation and structural design. The original proposals were later re-confirmed and updated in the 1993 Fair Trading White Paper.<sup>5</sup> The Act took almost four years to write and finalise, involving several attempts and drafts during Parliamentary Secretary Dr Michael Frendo's term of responsibility for the consumer protection portfolio between 1990 and 1992. The task was later concluded by his successors in the post. The Consumer Affairs Act 1994 later consolidated its status as the principal milestone in Maltese consumer protection experience when it provided a convenient platform and framework for the eventual transposition of various important consumer Directives.

## **2. An initial set of three Bills**

Between the publication of the 1991 and 1993 White Papers, and before the 1994 Act, an attempt had been made to start implementing some of the 1991 reform proposals by way of short focussed non-controversial legislative Acts which, it was hoped, would pass quickly through Parliament. This forgotten episode in the early development of Maltese consumer law is worth chronicling and analysing.

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<sup>3</sup> Legal Notice 7 of 1996. The Bill had been published in the Malta Government Gazette on 3 March 1994.

<sup>4</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991)

<sup>5</sup> Department of Information, *Fair Trading...the Next Steps Forward. Proposals for Legislative Reforms* (White Paper, 1993)

Having successfully launched the 1991 policy document with considerable publicity and with new consumer legislation promised as one of the highest political priorities, the then Parliamentary Secretary Dr Frendo quickly moved to the implementation stage. Following the public consultation on the 1991 White Paper, a political decision was taken to finalise three short bills on three core proposals and have them adopted before the General Elections scheduled for 1992.<sup>6</sup> None of these proposals was inspired by or derived from the Community's own evolving package of consumer protection Directives. The Bills had the following objectives:

- (i) 'An Act to provide for the establishment of the Consumer Protection Council, to regulate its constitution and its functions, and to make provision with respect to matters ancillary thereto or connected therewith': this aimed to establish the Consumer Protection Council promised in the White Paper and set out its functions and powers;
- (ii) 'An Act to regulate consumer associations and to provide for other matters connected therewith': this sought to introduce a new framework for the setting up and for the official recognition of consumer associations;
- (iii) 'An Act further to amend the Civil Code': this would have revised the warranties against latent defect provisions of the Civil Code by extending the period during which a buyer may claim a remedy under the *actio redibitoria* and the *actio estimatoria* from one to six months. Additionally, vendors would no longer be allowed to withdraw the warranties from sales of new items.

Hardly had these three Bills been completed and received by Government, that circumstances intervened to stop them from proceeding further. Just when they were about to be officially published in January 1992, the General Elections were called, Parliament was dissolved and these three pioneering Bills did not progress

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<sup>6</sup> These draft Bills were finalised in January 1992. They have never been published. Most of the provisions were eventually incorporated and consolidated in the Consumer Affairs Act. A copy of these Bills is found in Appendix 2.



any further. Political attention instead shifted to the immediate political goal of fighting and winning the imminent General Elections which were held in early 1992.

### **3. General Elections in 1992**

Consumer protection remained high on the political agenda during the 1992 elections. Government spokesmen, including the Prime Minister, repeatedly stressed and promised that on re-election a new consumer law would be passed immediately after the elections as a matter of priority. The White Paper published just a few months earlier probably proved useful to try to convince electors that the outgoing administration was serious about consumer protection.<sup>7</sup>

The February 1992 General Elections confirmed the Nationalist Party in Government and Mr Lawrence Gatt was appointed the new Minister with responsibility for consumer protection, apart from agriculture, fisheries and food. He inherited the task of finalising the consolidated comprehensive consumer protection law promised in the 1991 White Paper. Mr Gatt decided to discontinue with the three separate Bills prepared by his predecessor and to replace them by one more substantial consolidated Act. As already explained in the previous Chapter, a first draft version of a new extensive Consumer Affairs Act was attached to the 1993 White Paper, *Fair Trading...the next step forward* in November 1993. A few amendments, additions and adjustments later, this version was officially published and was passed by Parliament in the latter part of 1994. The Consumer Affairs Act was a comprehensive piece of legislation though it does not quite qualify as the code originally envisaged when the

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<sup>7</sup> Responsibility for consumer protection was shifted to the Ministry led by Mr Lawrence Gatt (an architect by profession) as Dr Frenzo was promoted to the Cabinet as the new Minister responsible for transport. This promotion may have been in part a reward for having successfully launched the consumer law project. His direct involvement in consumer law effectively ended there. This lack of continuity and the need for adjustments and settling in caused several delays. However, consumer protection had featured highly during the electoral campaign and the promised consumer rights law had, for political reasons, could not afford delays. See also Chapter 4

1991 White Paper was being conceived; nor was it an all-inclusive law incorporating the entire consumer protection legislative framework.<sup>8</sup>

The 1994 Act was largely based on the detailed long-term programme outlined in the White Paper Rights for the Consumer published in August 1991, already amply analysed in Chapter 3. This White Paper did not incorporate a draft law and was designed as a point of departure for future discussions on the subject, which it successfully provoked. Comprehensive proposals were made for both administrative and substantive reforms. The 1993 White Paper had clearly explained that the measure that later became the 1994 Act was no longer envisaged as an all-inclusive consolidated law but was 'mainly concerned with establishing adequate legal and administrative infrastructure', that was to be followed in future stages by 'layers of substantive consumer protection laws'.<sup>9</sup> Launching the first draft version of what became the 1994 Act, the 1993 White Paper felt the need to justify and describe afresh the imminent measures in favour of consumer protection and what they were seeking to achieve. It introduced and described the structure and motivation of the draft Bill in the following terms:

Consumer Protection is often understood as referring to those laws and regulations which acknowledge the bargaining weakness of the individual consumer and seeks to avoid such weakness being unfairly exploited.<sup>10</sup> The First Bill, explained more comprehensively in Part II, seeks to establish modern and adequate machinery and remedies for consumers. It has long been established that private or civil law remedies are not enough, and that a degree of state intervention is necessary to weed out unfair trade practices from the market and to install appropriate redress and compensation mechanisms.<sup>11</sup>

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<sup>8</sup> For general comments on the structures established by the 1994 Act as compared to the Consumer Protection Agency proposed in the 1991 White Paper, see Paul E.Micallef, *Regulatory Structures in Consumer Affairs – an evaluation* (National Conference, Malta, March 2000)

<sup>9</sup> (n 5) p7

<sup>10</sup> The ethical basis of the 1994 Act is discussed by the writer in *My Brother's Keeper – the Genesis and Ethical Basis of Consumer Law* in Peter G Xuereb (ed), *Notes from a Maltese Perspective in Business Ethics and Religious Values in the European Union and Malta – for a Moral Playing Field* (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta, 2007): 'Several aspects of the Consumer Affairs Act directly reflect ethical values.'

p63

<sup>11</sup> (n5) p3

## 4. A new Government Department

One significant early result of the publication of the 1991 White Paper was the implementation of the Government's promise to create a new public agency to handle consumer matters. In 1992, soon after his appointment, the new Minister, Mr Lawrence Gatt held a press conference to confirm his determination to implement the proposals of the White Paper published the previous year. He was quoted as reiterating that 'consumer affairs were high on the Government's list of priorities'. The Minister promised that before finalising the draft law, the proposals and suggestions received from various quarters following the White Paper would be considered. He also expressed the hope that 'when the draft law establishing the Consumer Protection Council has been finalised, it will be given priority over other Bills.'<sup>12</sup> Minister Gatt revealed for the first time that the composition of the new Council would be different from the way originally suggested in the White Paper. He announced that as an immediate interim measure a new Government department would be set up that would receive and deal with consumers' complaints and promote consumer policies.<sup>13</sup> In the course of describing and implementing these promises and measures, not a single reference was made by the Minister to Community consumer protection Directives or requirements.

This early establishment of a new publicly funded Government department centrally located in the capital city and dedicated exclusively to consumer affairs was a huge step at the time.<sup>14</sup> This was the most immediate and somewhat surprising result that flowed from the 1991 White Paper. A novelty unforeseen in the 1991 policy blueprint, it was certainly not an idea borrowed from Community law or from the practice in Member States. The new Department replaced what had till then operated as a small low-key and informal 'Consumer Protection Unit'.

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<sup>12</sup> *An Office for Consumers in Valletta* (in trans.), L-Orizzont (a Maltese language newspaper) 6 April 1992, p19

<sup>13</sup> *Consumer protection office to be opened shortly*, The Times, 3 April 1992, p20. The Minister also advised that informative leaflets on consumer rights were about to be delivered to every household in Malta, whereas a new consumer claims tribunal was being set up to deal with small consumer disputes.

<sup>14</sup> See *Consumer department unit to become Government department* (The Times, 27 May 1992, p5) where Minister Gatt is quoted explaining that the Consumer Protection Unit (set up by his predecessor) was now housed in the capital city Valletta and that between March and mid-May it had received 88 consumer complaints, even though its services had not been actively advertised.

The 1991 White Paper had foreseen the establishment of a Council that would enjoy operational autonomy and not be subject to undue ministerial control. This principle was sacrificed and a Department was instead set up in 1992.<sup>15</sup> Several other structural reforms promised in the White Paper were eventually implemented. These include the small claims tribunal and the new framework for consumer associations. Other promised reforms to address local consumer concerns have remained on paper and are now primarily of historical interest.

## **5. Innovative features in the 1994 Act**

The 1994 Act introduced a number of new unfamiliar principles and innovative approaches to Maltese consumer law. Like all significant legislation, it should not be considered in a vacuum but in the light of developments and measures adopted in the years immediately preceding its adoption. As amply pointed out by the 1991 White Paper, the general consumer protection situation at law at the time was unsatisfactory and deficient in several respects. In particular, the absence of a central agency to promote consumer rights, enforce the relevant legislation and serve as a point of reference to the public on consumer matters was keenly felt. The 1994 Act was to be the great leap forward, a springboard and a framework for the adoption of more extensive measures in different areas on consumer interest in the future. The 1994 Act introduced new concepts of ‘consumer’ and ‘trader’.<sup>16</sup> It adopted the position that a trader cannot also be considered a consumer, while a consumer is defined as an individual who acquires goods or services for his private and domestic needs. The thinking behind this was that scarce resources should be channelled where they are most required, namely for the vulnerable, the uneducated and the illiterate. Tradesmen can be allowed to fend for themselves as, unlike

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<sup>15</sup> The Department survived until 2011 when the newly established Malta Competition and Consumer Affairs Authority assumed the functions formerly exercised by the Department. The same objective had already been almost achieved through the draft bill proposing a new autonomous authority for fair trading and competition which was being piloted by the then Minister responsible for consumer protection, the Hon Mr Leo Brincat, during the last weeks of Dr Sant’s Government, in August 1998. This episode is described later in this Chapter.

<sup>16</sup> Consumer Affairs Act, Chapter 378 of the Laws of Malta, Article 2

consumers, they tend to be well-organised, experienced and enjoy closer connections to the political class.

The Act acknowledged and formally recognised the establishment of the Department of Consumer Affairs and the appointment of a Director of Consumer Affairs,<sup>17</sup> a senior Government official appointed by the Prime Minister, and listed their respective functions and responsibilities. The Department had been established in 1992 on the strength of an administrative decision and formed an integral part of the central Government. The main responsibility of the Director was to head and manage the day-to-day running of the Department and to administer the 1994 Act. The Department was also assigned specific statutory responsibility for the administration of the Trade Descriptions Act 1986,<sup>18</sup> the Door to Door Salesmen Act 1987,<sup>19</sup> and the Weights and Measures Ordinance 1910.<sup>20</sup> In this manner, the 1991 White Paper proposal to set up a Consumer Protection Council was effectively shelved. The Department survived until 2011 when the new Malta Competition and Consumer Affairs Authority assumed all the functions of the Director and the Department including the duty to receive and resolve consumer complaints. This entity did not owe its origin to a Community law requirement. The Molony Report on Consumer Protection of 1962 had specifically discouraged the introduction of a similar complaints function.<sup>21</sup> In the local context, political necessity dictated that members of the public would receive a free Government-subsidised complaints procedure; public expectations were clearly in that direction.

Instead of the Consumer Protection Council foreseen in the 1991 White Paper, the Act created a Consumer Affairs Council.<sup>22</sup> This entity was established as an independent advisory and monitoring body which raised and debated policy matters and then submitted legislative and other proposals to the Minister. Its role was to oversee the general position of consumers in Malta, to advise Government and to

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<sup>17</sup> Ibid. Article 3

<sup>18</sup> Chapter 313 of the Laws of Malta

<sup>19</sup> Chapter 317 of the Laws of Malta

<sup>20</sup> Chapter 39 of the Laws of Malta

<sup>21</sup> Final Report of the Committee on Consumer Protection to Parliament (Chairman: J.T. Molony) presented to Parliament (UK) by the President of the Board of Trade by command of Her Majesty, (Cmnd 1781, HMSO, 1962), July 1962

<sup>22</sup> Consumer Affairs Act, Article 4

recommend legislative proposals and other measures. It was mainly composed of non-executive outsiders who had worked in consumer affairs or business. The Council's sole executive power was to register and monitor consumer associations for the purposes of the Act. The shifting of this responsibility onto the Council, and not to allow it to be exercised by the Director and the Department, was justified by removing these decisions from Government officials. This remains the only executive power exercisable by the Council. It was a clear departure from the misguided absolute discretionary power assumed by the Minister of Trade through the unsatisfactory Consumers Protection Act of 1981.

The 1994 Act introduced and protected the issue of public warning statements. These could be issued by the Director in the general interest of consumers. In this respect, the Director and the officials of his Department were exempted from civil and criminal liability, except where a statement was issued recklessly or in bad faith.<sup>23</sup> The rule had originally been introduced in the 1981 Act and is the only provision which has survived it. It was not borrowed from Community law. Another purely domestic rule was the attempt to attach criminal vicarious responsibility on an employer whose employee has been found guilty of an offence against one of the designated consumer laws. In such cases, the employer would be deemed equally guilty.<sup>24</sup> The presence of a vicarious responsibility provision in the 1994 Act recalls the decision in the Tesco Supermarkets case.<sup>25</sup> There, stated very briefly, an employer was being charged with a breach of trading law. The company had argued its innocence successfully before an English court by shifting the blame onto its own manager even though the latter, by his acts, was not seeking a personal benefit, and only his employer stood to gain therefrom. The manager, but not also the employer, had then been found criminally responsible.

Moreover, the Department was given a new power to accept a written undertaking from an offending trader in lieu of commencing a criminal prosecution. This

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<sup>23</sup> Ibid. Article 8

<sup>24</sup> Ibid. Article 10

<sup>25</sup> Tesco Supermarkets v. Nattrass [1972] AC 153. This new rule on vicarious responsibility was first mentioned in the 1993 White paper, p13

approach was meant to encourage voluntary compliance.<sup>26</sup> No Community law influence had a bearing on this provision, which has been very rarely used, and then mainly in relation to alleged breaches of the Trade Descriptions Act. An exceptional measure introduced in the Act was the possibility of an award of ‘compensation orders’ in the course of criminal proceedings for offences against laws administered by the Director of Consumer Affairs. The presiding Magistrate could order a convicted defendant to pay to the complainant financial compensation up to Lm250 (equivalent to €582.50) and moral damages up to Lm100 (equivalent to €233.30).<sup>27</sup> This certainly did not reflect an EU measure. The 1994 Act also introduced the concept of moral damages into Maltese law, again without any prodding from EU law. This constituted one of the most significant legislative innovations domestically and allowed moral damages to be awarded to injured consumers in certain criminal and civil cases listed in the Act. The introduction of this provision was not greeted with universal approval in view of the Maltese Civil Code’s traditional negative attitude towards non-material damages. Eventually a compromise was reached whereby moral damages were allowed to stay in the Act but only on condition that the award would be strictly capped and indeed a very low maximum of LM100 (equivalent to €233.30) was fixed in the law. A minimum amount of LM10 (equivalent to €23.33) was also inserted in the law and the objective was to avoid spurious awards: not an entirely satisfactory beginning perhaps, but a start nonetheless. The maximum amount was revised upwards in the 2008 amendments. Moral damages in consumer claims had originally been proposed in *Sketches on Consumer Protection in Malta, April 1990*<sup>28</sup> and was later re-iterated in the 1993 White Paper.

Another significant local development which had been suggested in the 1991 White Paper was the setting up of a special small claims tribunal with competence exclusively dedicated to consumer claims. The main features of this Consumer Claims Tribunal, established under Part III of the Act, were:

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<sup>26</sup> Consumer Affairs Act, Article 12

<sup>27</sup> Consumer Affairs Act, Article 14

<sup>28</sup> *Sketches on Consumer Protection in Maltese Law, April 1990*: a preliminary explorative study drawn up for Government in preparation for the White Paper published in August 1991 (never officially published). See excerpt in Appendix 1, as well as brief discussion in Chapter 3.

- (i) The competence extended to claims not exceeding Lm500 (equivalent to €1,165.00);
- (ii) The claims could relate to any dispute regarding goods or services acquired by a consumer from a trader;
- (iii) Where possible, the Tribunal would give a same day judgement;
- (iv) It could award moral damages up to Lm100 (equivalent to €233.30);
- (v) Its awards were to be based on substantive justice and equity;
- (vi) The Tribunal's competence was optional and non-exclusive: consumers were free to pursue their claims in the ordinary courts;
- (vii) Only limited grounds were allowed for an appeal to a higher court.

The Act also created a brand new domestic framework for the official recognition of voluntary associations committed to the protection of consumers thereby recognising their important role in consumer protection. The salient features of the regulation of Consumer Associations under the Act are that they should have a minimum of 250 members, have their objects restricted to protecting consumers and not seek profit as their main object. They were required to be independent from political parties and trade unions, have an annually democratically elected governing committee and they were registered and monitored by the Consumer Affairs Council. Finally they were granted exemptions both from the payment of and from possible civil or criminal liability for issuing fair and objective statements regarding malpractices by traders (Part IV of the Act). These rules were clearly a response to the controversial discretionary provisions of the ineffective Consumers Protection Act of 1981 which they were designed to replace. The 1981 Act was repealed by the 1994 Act.

One of the most significant innovations of the Consumer Affairs Act was the establishment of a coherent framework equipped with structures and organs on the



strength of which consumer law could develop and flourish in a systematic fashion. The Consumer Affairs Act benefitted from being constructed around a clear policy and vision for the development of consumer law in Malta promoted in the 1991 White Paper. For the first time, a coherent conceptual platform had been articulated; clear objectives and achievable targets for the legislation had been identified; and the required infrastructure equipped with the necessary tools was established. None of the structures and mechanisms introduced in the Act revealed any influence of EC consumer law and policy. That an Act enacted four years after Malta's application to join the Union owed nothing to Community law is remarkable. If anything, this Act stands apart for the stark and conspicuous absence of any Community law influence. A few years later the inevitable shift occurred and Maltese consumer law was forced to accept the advent and local adoption of Community law. The considerable 2000 amendments to the same 1994 Act helped to transpose a large portion of the Community consumer protection legislative *acquis* in time for planned membership. These important amendments form the subject of Chapter 5.

## 6. The 1994 Act in the words of the commentators

The first published academic paper to analyse the provisions of the 1994 Act was Dr E. Buttigieg's<sup>29</sup> paper *Maltese Consumer Law*<sup>30</sup> published in 1995. This timely paper described the salient features and structure of the 1994 Act and usefully placed it and other local consumer laws in the context of Community consumer law. Professor Buttigieg recognised the two-step approach intrinsic to the design of the 1994 Act, which he described as a 'framework law' that would 'establish an organisational structure' so that subsequently various laws to protect the consumer's health, safety and economic interests 'would be drafted and enacted in stages and incorporated in this framework law – thus ensuring that this consolidated piece of

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<sup>29</sup> Now Associate Professor

<sup>30</sup> Eugene Buttigieg, *Maltese Consumer Law* in Peter G Xuereb and Roderick Pace (eds), *The State of the Union Conference 1995, Collected Papers* (European Documentation and Research Centre, University of Malta Press 1995) pp331-351. The paper remarks favourably both on the 1994 Act and the 1991 White Paper that preceded it.

legislation together with the revised existing legislation will adequately safeguard the consumers'(...) basic rights...' <sup>31</sup>

Another important and insightful paper from the same conference was presented by Ms Monique Goyens who compared the Maltese 1994 Act with the Community's own initiatives. Ms Goyens pointed out a major difference in direction between the Maltese approach to consumer policy and the Community approach which is worth quoting in full:

...one may state that the Community has focused on 'material' law, aiming at defining consumer rights with regard to marketing practices surrounding those products and services, while the Maltese legislator has, through the adoption of the Consumer Affairs Act 1994, rather taken the option to set the structures making it possible to define and implement consumer policy, without defining precise consumer rights. The establishment of a Director of Consumer Affairs and of the Consumer Affairs Council, as well as the institution of a consumer claims tribunal indeed represent important elements for the enforcement of an efficient consumer policy. This institutional aspect of consumer policy has not been tackled by the Community, namely for reasons linked to the distribution of competences between the Community and its Member States: enforcement is in principle considered to be a competence of the Member States.<sup>32</sup> The writer proceeded to note that the 1994 Act facilitated and laid the groundwork for the introduction of substantial consumer rights:

...from the perspective of a foreign observer, the drafting of the Malta Consumer Affairs Act leaves a lot of freedom and of initiative to the Minister and to the Director of Consumer Affairs in the definition of priorities and of consumer rights in specific areas.<sup>33</sup>

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<sup>31</sup> Ibid. pp331-332

<sup>32</sup> Monique Goyens, *EU Consumer Protection Legislation and the New Maltese Legislation* in Peter G Xuereb and Roderick Pace (eds), *The State of the Union Conference 1995, Collected Papers* (European Documentation and Research Centre, University of Malta Press, 1995) p352

<sup>33</sup> Ibid.

## 7. The Consumer Affairs Act and Community Law

The Consumer Affairs Act of 1994 was a purely domestic law: it owed no direct debt to any foreign law or Community Directive or requirement. The Screening and transposition obligations were still a distant challenge and Malta was still taking its first tentative steps in the long road towards accession. Paul E. Micallef<sup>34</sup> has suggested that the 1994 Act was partly based on EU requirements and that the 1991 White Paper too was partly built around EU policy. No factual basis for either suggestion exists, no matter how logical and attractive they may sound. The only EU reference in the 1991 White Paper was made in the section dealing with product liability. Indeed, the EU consumer policy and measures are hardly mentioned and this absence is very evident. The 1991 White Paper was not intended to pave the way to entry into the EU or to launch the transposition of the *acquis*. In 1991, these were not immediate concerns. The Commission had yet to pronounce itself for the first time on Malta's fitness and preparedness for membership. The Commission's first Opinion was published in 1993.

For various reasons, one should credit the 1991 White Paper and the 1994 Act as having together ignited a minor silent revolution in consumer law development in Malta. The Act was certainly highly innovative for its time and the inclusion of provisions detailing the functions and powers of the Director and the Department for Consumer Affairs, its introduction (albeit limited) of moral damages, its formal complaints procedure, its special consumer tribunal, its advisory and policy council operating side by side with the Director and his Department, were all unusual features at the time. None of them was responding or related to any Community requirement.<sup>35</sup>

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<sup>34</sup> Paul E. Micallef, 'Maltese Consumer Law: a reflection of diverse legal cultures' (paper presented to the Mediterranean Legal Hybridity Symposium, Malta, June 2010)

<sup>35</sup> Paul E. Micallef, Regulatory Structures in Consumer Affairs - An Evaluation (Malta, 15 March 2000) < <http://www.camalta.org/PAPERS-REGULATORY.HTML> > accessed on 20 July 2013

## 8. The 1994 Act – a summing up

The 1994 Act, like the 1981 Act before it, did not introduce substantive rights for consumers. Both were largely concerned with structures and institutional arrangements. The 1981 law was however a much inferior effort and may be rightly described as a false start. Even by the low standards of the time, the law was inadequate and disappointing and the authorities should have done much better. Instead, the 1994 Act represented a welcome fresh start. It was preceded by formal comprehensive studies which enabled the authorities to identify the legal reforms and innovations Maltese consumers deserved. Although it implemented only a small part of the extensive 1991 White Paper proposals, the Act was a great legislative step forward. As noted elsewhere by this writer:

The Consumer Affairs Act of 1994 was both a significant legal development as well as an ethical milestone. I say this for two reasons. First, the 1994 Act was a completely home-grown effort and was not adopted because of external pressures or requirements. It sought to provide tailor-made remedies to local problems and circumstances. Secondly, the Act was constructed around a new definition of 'consumer' and clearly distinguished him from other categories of persons who could safely remain protected by current private law.<sup>36</sup>

Despite its successes, the Consumer Affairs Act too proved in part a false start, as it was not followed up by the projected additional phases of substantive reforms which would assign specific rights to consumers, as had been the original plan. During the Parliamentary debate on the 1994 Bill, the Government side refuted Opposition claims that the proposed Bill was incomplete as it failed to mirror the expansive and detailed White Paper legislative reform programme published three years earlier. Government spokesmen repeatedly assured the House that having put the administrative and regulatory structures in place, substantive law would follow in stages. Paul E. Micallef has rightly observed that the 1994 Act was just a beginning:

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<sup>36</sup> David Fabri, *My Brother's Keeper – the Genesis and Ethical Basis of Consumer Law (Notes from a Maltese Perspective)* in Peter G. Xuereb (ed), *Business Ethics and Religious Values in the European Union and Malta – for a Moral Playing Field*, (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta, 2007) p65

whilst it is true that the 1991 White Paper made proposals which in many respects were more far-reaching than was actually enacted in the Consumer Affairs Act, 1994, I view this law as simply the first in a series of measures to implement what was proposed in the White Paper.<sup>37</sup>

## **9. Labour Government Reform Initiative of 1998**

### **(a) The political context**

The Nationalist Party lost the 1996 General Elections to the Malta Labour Party which opposed membership of the EU. Almost immediately, the new Government informed the European Commission that the membership application and the accession negotiations were being suspended. The discontinuation of the negotiations could not fail to affect consumer law development in Malta. This Part examines how the new anti-EU Labour Government, elected at a time when the accession negotiations had already started, side-stepped the Community's consumer *acquis* and instead went about implementing its own electoral programme for domestic consumer law reforms.

### **(b) Objectives and scope**

In his first address to the Consumer Affairs Council, the new Minister responsible for consumer affairs laid down as official policy the implementation into legislation of his Government's electoral agenda.<sup>38</sup> The preliminary work carried out by the Department under the previous administration to prepare for the eventual transposition of the EU consumer directives was to be discontinued. New agenda priorities would be pursued. Between March and April 1997, a Working Committee made up of seven lawyers and public officials involved in the fields of consumer or competition affairs were asked by the Minister to draw up a series of concrete

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<sup>37</sup> Paul E. Micallef, *Clarification over consumer protection*, The Malta Independent on Sunday (Malta, 4 October 1998, p10)

<sup>38</sup> Information obtained during a meeting attended by the writer.

proposals to implement the pledges listed in the Electoral Programme for the 1996 General Elections. On 21 May 1998, the then Minister of Finance Leo Brincat spoke on the draft bill when addressing an international conference on competition law and policy in small jurisdictions at the Foundation for International Studies (which then formed part of the University of Malta).<sup>39</sup> He specifically confirmed that the project would involve the dissolution of the Office for Fair Competition and the Department of Consumer Affairs. He explained further that the actual bill was to be published soon and 'the constituted bodies will soon be invited to give their comments and suggestions thereon.'<sup>40</sup> No reference whatsoever was made to any EU consumer Directive or policy.

The Bill was drawn up after more than a year of consultations, meetings and preparatory reports. As it progressed, the project became more ambitious and comprehensive. The final draft was drawn up by a small Steering and Drafting Group and submitted to the Minister responsible for consumer affairs in July 1998. In their letter accompanying the final draft, the working group clarified that its objective was not limited to suggesting a number of amendments but to give shape to a milestone legislative measure that could equal among other important legislative measures undertaken in the consumer law field.<sup>41</sup> The Minister presented it at a press conference held for the purpose on the 10 August 1998.<sup>42</sup> He explained that Government's ultimate objective was 'strengthening and placing the protection of consumers on the same levels as in European countries'<sup>43</sup> - an ironic comment in the light of the Labour Government's strident anti-EU position. Nonetheless, like the 1994 Act and the 1991 and 1993 White Papers before it, the Bill was a home-grown effort responding to local circumstances and political choices. Following the change of Government and the defeat of the Labour Government in 1998, an article

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<sup>39</sup> *Plans for setting up of authority for fair trading, consumer affairs*, The Sunday Times, 22 May 1998, p 55

<sup>40</sup> *Ibid.* See also *Conference on Quality Management: a new Authority for Fair Trading to be set up...as well as a Consumer Ombudsman*, In-Nazzjon, 14 November 1997, p5

<sup>41</sup> Correspondence dated 9 June 1998 seen by the author.

<sup>42</sup> *Proposed fair trading law envisages consumer affairs ombudsman*, The Times, 11 August 1998, p16

<sup>43</sup> *Ibid.*

published in the weekly *Malta Independent on Sunday*, contained some interesting observations on the proposed Bill.<sup>44</sup>

Both the Consumer Affairs Council and the Consumer Association believe that consumer affairs protection should move out of the control of a government department, join the Consumer Affairs Council and the Office of Fair Competition, to become an independent, publicly financed authority answerable to Parliament. They also believe there should be a consumer ombudsman as well.

A draft law incorporating these changes was presented for discussion to business and media by former Finance Minister Leo Brincat days before the last election. Association member Benny Borg Bonello who also sits on the Consumer Affairs Council thinks the proposed law should not be controversial and the new government might well go ahead and implement it since the present consumer protection department had come in for a lot of political flak.

Leaving consumer affairs protection in the government's grip becomes more ludicrous when one considers that the law now allows it to take action against other government departments and government corporations like Enemalta, Maltacom and the Water Services Corporation. It is impossible to imagine a government department taking action against another government department or other government utilities especially when it is answerable to a government minister! And making it answerable to Parliament? 'It would prevent it becoming a State within a State like the much maligned Planning Authority has been accused of being. The Consumer Association wants to have a transparent, accountable and proactive authority which is answerable to Parliament,' said Mr Borg Bonello.

Mr Borg Bonello's optimism that the Bill would be uncontroversial and therefore also acceptable to the new incoming Nationalist Government proved to be misplaced.

### **(c) The features of the 1998 reform plan**

The new Bill was not intended to replace the Consumer Affairs Act though it did seek to amend and improve it. The two laws would have co-existed and complemented

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<sup>44</sup> Gillian Bartolo, *Call for consumers to be protected by an independent authority*, The Malta Independent on Sunday (11 October 1998) 7

each other. The new Bill aimed to set up a new public independent agency to take over the functions of the Department of Consumer Affairs and the Office for Fair Competition, unifying the two functions for the first time. The consolidation of consumer affairs and competition had been expressly ruled out by the 1993 White Paper and the Bill represented a radical reversal of policy. The main statutory function of the proposed new agency was ‘to promote fair trading and consumer protection and develop relative policies for Government’.<sup>45</sup>

The Authority for Fair Trading and Consumer Affairs would have assumed and fused the responsibilities of the Department for Consumer Affairs and the Office for Fair Competition. The proposed law envisaged the appointment of a Consumer Ombudsman and the appointment of sectorial regulators to monitor public utilities. The specific duties of the Consumer Ombudsman would have been to head the Office for Consumer Affairs, to advise the authority on consumer policy formulation, to provide information to consumers and to investigate complaints from consumers.<sup>46</sup>

By setting out a precise plan to establish a public independent authority, the Labour Government was also signalling its dissatisfaction with the performance of the consumer and competition structures both established statutorily in 1994 which operated separately and distinctly as Government departments. The Director for Fair Competition would have been replaced by a Director for Fair Trading as ‘the head of the Office for Fair Trading’. The Director of Consumer Affairs would have been replaced by a Consumer Ombudsman who would handle the day-to-day consumer protection function as ‘the head of the Office of Consumer Affairs’.<sup>47</sup> Both the Director for Fair Trading and the Ombudsman would have been responsible and accountable solely to the governing board of the new Authority, rather than to Government ministers as had been the position at law since 1994.

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<sup>45</sup> Article 7(1)(a)

<sup>46</sup> Article 8(6)

<sup>47</sup> Article 8(3)



#### **(d) The 1998 Bill – a summing up**

The 1998 Bill deserves attention as an interesting, though incomplete, milestone in the development of national consumer policy. The Bill proposed local measures and solutions to domestic consumer problems which effectively bypassed the Communities consumer priorities, past achievements and Directives. The 1998 effort constituted an overdue response by the Labour Party in Government to the innovations and reforms carried out between 1991 and 1994 by successive Nationalist Governments. The Labour Government was finally attempting to free itself from its former piece-meal approach to consumer protection and starting to design a coherent and workable consumer policy direction of its own, a policy which owed nothing to EU law and policy. Politically, this draft Bill could have boosted the Labour Party's credentials in consumer policy, confirming its newly found confidence to seize the initiative on consumer law reform.

This Bill was not officially published in the Gazette and did not make it to Parliament as the new Nationalist Government elected to office in 1998 ignored it, effectively abandoning it. In the highly charged political climate at the time, the new Government was not about to give credit to the out-going Labour administration toppled after a very acrimonious electoral campaign or to acknowledge that it may have had sensible ideas for improving consumer protection structures in Malta.<sup>48</sup> This unpublished draft bill has to date received only passing attention and it is being analysed and placed within its proper political context here for the first time.

## **10. Conclusion**

The 1994 Act may have represented a watershed event whereby Maltese consumer law finally started becoming a reality, but it would be an exaggeration to suggest that

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<sup>48</sup> See more on this aborted initiative in David Fabri, *False Starts and Broken Promises: Some Mishaps in the Development of Maltese Consumer Law* (2006) Law and Practice, (Chamber of Advocates, Malta) pp20-26

the 1994 law steered Maltese consumer law to full maturity. Six more years had to pass before substantial content was added to the Act and by then the irresistible force of the accession transpositions had practically taken over. Twenty years later, and despite the undisputed progress achieved in the meantime, Maltese consumer law is today still in transition. The 1998 Bill was one of the last initiatives of the outgoing Labour Government, whose failure to last the full legislature term opened the way for Malta to restart negotiations with the Commission, to enter the European Union in 2004, and to adopt the whole gamut of consumer protection Directives.

## CHAPTER 5

### ACT XXVI OF 2000: A TRANSPOSITION TURNING POINT AND THE ROLE OF THE CIVIL CODE

'In the field of consumer policy Maltese legislation is still not in line with the *acquis* regarding Product Liability, Misleading Advertising, Unfair Contract Terms and Distance Selling. The same applies to the Directives on Dangerous Imitations and General Product Safety and the Package Travel directive as well as Consumer Credit, Timeshare or Comparative Advertising. Considerable work still needs to be done to ensure transposition of the *acquis*.'

Commission, Report Updating the Commission Opinion on Malta's application for Membership COM (99) 69 final, paragraph 3.17 'Consumer Policy'

'The only criticism has been that we are doing all this work because we are taking orders from Brussels. They agree with the law but add that we don't need to join the EU to enact such legislation. My response is: 'If that were the case, then surely the EU cannot be the bad proposition the MLP make it out to be.'

George Hyzler, Parliamentary Secretary responsible for consumer protection, interviewed shortly after the adoption of the 2000 legislative reforms which he had piloted: *Power to the Consumer*, interview in IQ (Insurance Quarterly June 2001) p36

#### 1. Subject and scope

The detailed analysis of the significance of the 1994 Act in the previous Chapter sets the stage for an examination of the important amendments made to the Act in 2000. This Chapter will show that on the strength of these amendments, the Act was taken to a higher level and Maltese consumer law effectively re-invented itself into a more

EU-based framework. Enacted in 2000, Act XXVI<sup>1</sup> remains the single piece of legislation that transposed most Community consumer protection Directives in one go. It occupies a very important place in this study of the relationship and interaction between Maltese and EU consumer law during the accession transposition process.<sup>2</sup> The Act was a turning point for Maltese consumers, not only in that capacity, but also in their broader evolving role as new citizens of the European Union. In 2000, on the strength of this law, Community law started exercising an ever increasing impact on the content and intellectual underpinning of consumer rights and laws in Malta, which continues till this day. This legislation launched the integration of Community consumer Directives into domestic Maltese law. However, the amendments comprised more than transposition measures.<sup>3</sup> A series of local initiatives that had been announced and detailed in the 1991 and 1993 White Papers too finally became law through the same instrument.<sup>4</sup>

The amendments made to Maltese legislation by the 2000 law represent the first, and at that stage certainly also the highest, point of encounter between the transposition of EU consumer Directives and the principles and provisions of Maltese law including in particular the Civil Code.<sup>5</sup> The completion of these transpositions guaranteed the timely adoption of a critical mass of Directives at a crucial stage in Malta's involvement in the Union's enlargement process. Politically, Malta was sending a positive signal to the Commission that it could satisfactorily honour the commitments undertaken in the Screening Session concluded in Brussels in October 1999 and in the National Programme for the Adoption of the *Acquis* (NPPA) published in 2000.<sup>6</sup>

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<sup>1</sup> Consumer Affairs (Amendment) Act, Act XXVI of 2000

<sup>2</sup> These factors explain the relative length of this Chapter

<sup>3</sup> See Paul E. Micallef, *Publication of a Bill amending the Consumer Affairs Act*, (2000) Consumer Law Journal, Volume 8, number 1, a note in Current Survey, 2000

<sup>4</sup> The EC Consumer Law Compendium (2008) compiled for the Commission had remarked that Maltese pre-transposition consumer law had no rules on unfair clauses in consumer contracts and that general provisions of the Civil Code alone applied. (EC Consumer Law Compendium-Comparative Analysis, University of Bielefeld, Schulte-Nolke Hans in cooperation with Twigg-Flesner C and Ebers Martin (editors) Prepared for the European Commission under Service Contract no 17.020100/04/389299 '*Annotated Compendium including a comparative analysis of the Community consumer acquis*', this comparative study was restricted to the transposition of eight selected Directives. It was published on 12th December 2006, and revised in April 2007 and February 2008)

<sup>5</sup> Chapter 16 of the Laws of Malta

<sup>6</sup> See extracts from two NPAs in Appendix 7

The original Act of 1994 had sufficiently satisfied the intended objective of establishing national institutional and administrative organs capable of supporting a future consumer protection agenda.<sup>7</sup> These oversight and compliance structures guaranteed an adequate foundation for later more substantive consumer measures. The 2000 amendments constituted a second phase, where the fusion of accession transposition innovations and national consumer legislative initiatives generated significant new consumer rights and remedies.<sup>8</sup>

## **2. ACT XXVI – salient features and principal objectives**

A Commission report of 1999 carried this description of the draft Bill which was eventually published as Act XXVI of 2000:

A draft Bill to implement a number of related EU consumer protection Directives has been prepared taking into account the points raised by the Commission during Screening. It is awaiting Ministerial approval prior to being referred to Cabinet. This Bill, which amends the Consumer Affairs Act (Cap 378) and the Door-to-Door Salesmen Act (Cap 317), covers the following matters: misleading advertising, comparative advertising, product liability, doorstep selling, unfair contract terms, sale of consumer goods and associated guarantees. The draft Bill is expected to be approved during the current year and will be brought gradually into force in stages. It is envisaged that it will be fully in place by mid-2002.<sup>9</sup>

The Act was a substantial piece of legislation by any standard, covering no less than forty-three pages and eighteen articles. As a result of these additions, the 1994 Act more than doubled in size. By itself, Article 15 added new Parts V to X (consisting of

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<sup>7</sup> See Paul E. Micallef, *Unfair Terms in Consumer Contracts - The Maltese Perspective* available at <[http://www.iaclaw.org/Research\\_papers/unfairterms.pdf](http://www.iaclaw.org/Research_papers/unfairterms.pdf)>, (undated) and <<http://www.camalta.org/papers-contracts.html>> accessed on 27 February 2012

<sup>8</sup> See generally Paul E. Micallef, *The Impact of the European Union on Consumer Policy in Malta* (The Yearbook of Consumer Law 2009, Ashgate, 2008) pp109 - 145, which briefly chronicles the impact of EU Directives on the development of Maltese consumer law even in areas not considered in this thesis, such as package tours, timeshare, air passengers rights, the Injunctions Directive and the regulation of unfair commercial practices.

<sup>9</sup> Extract from a Commission Document: *Screening Results: Chapter 23 – Consumer Policy* issued on 25 February 2000, which officially records the mutually agreed results of the Screening sessions held with the Maltese experts the previous October. The full document is attached as Appendix 5.

more than sixty new Articles) to the Consumer Affairs Act.<sup>10</sup> These Articles transposed an impressive number of consumer Directives, several of which had undeniable private law implications. They were truly substantial and significant and covered a number of subjects:

- (i) Misleading Advertising<sup>11</sup> – prohibited misleading or incorrect statements in advertisements for goods or services;<sup>12</sup>
- (ii) Comparative Advertising<sup>13</sup> – established the conditions under which traders can resort to this type of advertising;<sup>14</sup>
- (iii) Product liability<sup>15</sup> – introduced the notion of strict liability of the producer for damage caused by defects in his product to persons or property;<sup>16</sup>
- (iv) Unfair Contract Terms<sup>17</sup> – prohibited the use of unfair terms in consumer contracts and required the use of plain language;<sup>18</sup>
- (v) Sale of Consumer Goods and Associated Guarantees<sup>19</sup> – introduced new warranties and remedies for the consumer and extended to two years the period during which claims can be raised,<sup>20</sup>

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<sup>10</sup> Articles 43 to 110

<sup>11</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, (amended by Directive 1999/34/EC of the European Parliament and of the Council) [1984] OJ L250 of 19/09/1984

<sup>12</sup> Article 48

<sup>13</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21

<sup>14</sup> Articles 49 to 50

<sup>15</sup> Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29

<sup>16</sup> Articles 56 to 71

<sup>17</sup> Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29

<sup>18</sup> Articles 44 to 47

<sup>19</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12

<sup>20</sup> Articles 72 to 93

(vi) Injunctions to protect consumer interests<sup>21</sup> – introduced administrative and judicial procedures for the better implementation of a number of EU consumer Directives such as those regulating unfair contract terms and advertising.<sup>22</sup>

### 3. Transposition by Regulations

To further facilitate future transpositions, Article 7 (1) was revised so as to assign new powers to the Minister responsible for consumer protection to make regulations on a variety of consumer issues, particularly regulations that would later successfully transpose three other outstanding Directives.<sup>23</sup> This innocuously sounding provision sent a useful signal to the Commission enlargement officials that the transposition of these three Directives too was underway and that the deadlines and commitments accepted by the Maltese Government in the NPAA dated 1 September 2000<sup>24</sup> would likely be respected. In this manner, the 2000 amendments directly transposed EU consumer law while providing the enabling powers required for the early issue of regulations (subsidiary legislation) for the implementation of the remaining consumer Directives<sup>25</sup> without having to go back to Parliament.

Ministerial regulations issued in terms of the revised Article 7 of the Act subsequently transposed three other Directives which dealt with the following subjects:

(i) Price indications: regulations were issued in 2002.<sup>26</sup> Maltese consumers and traders had long been used to mandatory price indications for all retail goods as they had been a staple element of consumer protection (as it was then

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<sup>21</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51

<sup>22</sup> Articles 94 to 101

<sup>23</sup> These related to price indications, distance selling and consumer credit – see (n 25)

<sup>24</sup> NPAA 2000, pp181-182

<sup>25</sup> EU consumer Directives not transposed through the Consumer Affairs Act included the measures relating to doorstep contracts, general product safety, package holiday tours and timeshare. The last two mentioned Directives, not discussed in this thesis for reasons of space, were transposed by regulations issued under the Malta Travel and Tourism Services Act of 1999 (Chapter 409 of the Laws of Malta): they were (and are) administered by the Malta Tourism Authority set up under that Act, rather than by the Department for Consumer Affairs.

<sup>26</sup> Consumer Affairs Act (Price Indication) Regulations, Legal Notice 283 of 2002

understood) for many years in Malta, especially through the extensive Sale of Commodities Regulations of 1972<sup>27</sup> which remarkably remain in existence, giving rise to a clumsy overlap of measures.

- (ii) Distance Selling: regulations issued in 2001 created a framework under which contracts concluded at a distance were regulated and included a cooling-off period. This was the first ever measure taken by Maltese law to specifically safeguard the rights of consumers who purchase goods and services at a distance.<sup>28</sup>
  
- (iii) Consumer credit: regulations issued in 2005 introduced measures to protect consumers entering into credit arrangements with suppliers of goods and services. They were the first ever, and greatly overdue, legal measures relating to consumer credit in Malta.<sup>29</sup>

#### **4. The Parliamentary debate on the 2000 Bill**

When on the 16 March 2000, *The Times* reported that 'proposed legislation is being drawn up in line with the European Union consumer policy directives', the reference was clearly to the measure eventually published as Act XXVI of that year.<sup>30</sup>

The Parliamentary debate on the 2000 amendments makes instructive reading and merits analysis.<sup>31</sup> The EU origin of many of the proposed amendments was readily

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<sup>27</sup> Sale of Commodities (Control) Regulations, Legal Notice 117.15 (issued under the Supplies and Services Act, Chapter 117 of the Laws of Malta)

<sup>28</sup> Distance Selling Regulations, Legal Notice 186 of 2001. The transposition was largely faithful to the Directive, both in style and in language. Once again, a cooling off period found itself inserted in Maltese law and what was noteworthy was the duration of the cooling off period or right of withdrawal allowed to consumers. Whereas the Directive established a minimum of 'seven working days' (Article 6), the transposing measure set it out at fifteen days.

<sup>29</sup> Consumer Credit Regulations, Legal Notice 84 of 2005. The regulations were adopted a year after membership. Their belated adoption finally completed the transposition of Chapter 23, then comprising the consumer protection *acquis*. The regulations were remarkable for having extended the new requirements to home loans, which was not a Directive requirement.

<sup>30</sup> *New consumer protection law being drawn up*, *The Times of Malta* (16 March 2000) p7



acknowledged by Parliamentary Secretary George Hyzler who was piloting the proposed amendments. He paid tribute to the 1991 White Paper as the intellectual origin of several of the reforms. Throughout his considerable contributions to the debate, Dr Hyzler made a brave attempt to keep the Opposition on his side and to give it credit for past consumer initiatives. He also tried to head off any potential criticism that the proposed reforms were being pursued exclusively under Commission imposition and pressure. He did this mainly by claiming a direct unbroken continuity between the 1991 White Paper, the 1994 Act and the 2000 amendments. Dr Hyzler stressed that although EU law was a 'strong foundation' on which to build new national consumer laws: 'we are not implementing these EU directives simply because it is the policy of the present administration to become members.'<sup>32</sup>

Opposition spokesman Mr Leo Brincat<sup>33</sup> seized the occasion to speak at some length on the draft law he had drawn up and circulated for consultation in August 1998, just weeks before the Sant Government fell. He claimed that while nominally appreciating his initiative, the Nationalist Government had nevertheless abandoned it simply because it was a Labour Government initiative. The former Labour Government, he argued, could not be accused of not having had a consumer strategy when this was clearly evidenced by the draft bill of 1998.<sup>34</sup> During the same sitting, he criticised the Bill as primarily 'intended so as to hasten the alignment of Maltese law with the laws of the European Union', and he enquired whether the authorities were really in a position to handle and administer all the new consumer laws that had been listed in the NPAA. He criticised the delay in the adoption of the long-promised Product Safety Act<sup>35</sup> and commented on the weakness of the single existing consumer association established on the island. He stated that the European Union's purported respect for consumer rights was late in developing and he traced the history of the legal basis for consumer measures. Interestingly, in the same speech, he expressed the view that:

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<sup>31</sup> Of particular note are Parliamentary sittings numbers 335-344 held between 4 and 11 July 2000

<sup>32</sup> Parliamentary sitting number 335, 4 July 2000, pp566-573 (n 31)

<sup>33</sup> Mr Brincat had been Minister responsible for consumer protection during the short-lived Government led by Dr A Sant between 1996 and 1998.

<sup>34</sup> Mr L. Brincat, Parliamentary sitting number 337, 5 July 2000, pp644-651 (The 1998 Bill is analysed in Chapter 4)

<sup>35</sup> See Chapter 6

...there cannot be a consumer law, no matter how well written, that will remain static. It is important that such laws remain fresh and are updated regularly. One should not commit the mistake of legislating in haste so as to conform as quickly as possible with the EU rules and then fail to update them according to future needs.<sup>36</sup>

Mr Brincat also stated that his Party was studying the legislation of non-EU countries in search of fresh alternative consumer law proposals. He criticised the Government side for following blindly the EU agenda without really addressing the true needs of local consumers. Opposition social affairs spokesman Ms Marie-Louise Coleiro conceded that the EU's consumer protection policy was not a bad one, but argued that rather than pursue the direction dictated by the EU, Government should identify and resolve real social and economic problems that Maltese consumers were facing. She insisted that 'it would be wrong to think that to have an effective policy in favour of the consumers, it was necessary to join the EU.'<sup>37</sup> Dr Jason Azzopardi (Nationalist Party MP) responded to the Opposition criticism and declared that if it had to be the EU accession that strengthened Maltese consumer law 'then so be it'. He argued that the core issue was that local consumers would become 'better off' with the new measures, some of which had been introduced in the EU Member States fifteen years earlier. He expressed confidence that the new Bill would raise Maltese consumers to the same level as, and possibly even higher than, European consumers.<sup>38</sup>

Broadly, other members from the Government side emphasised the positive impact that EU accession was having on accelerating improved consumer protection measures in Malta. Opposition members registered their objection to the haste and single-mindedness with which the Government was pursuing EU membership and expressed scepticism as to how effectively the new legislation would eventually be enforced.

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<sup>36</sup> Ibid. (n 34)

<sup>37</sup> Parliamentary sitting number 336, 4 July 2000 pp573-586 (n 30). Ms Coleiro had expressed more or less the same sentiment during the seminar *The Consumer First* held to mark Consumer Rights Day on 15 March 2000: 'She said there would not be any need to join the EU to have an effective consumer policy if the government took the necessary initiatives for policy implementation.' (Quoted in *Striking a Balance in Market Economy*, article in The Malta Independent, 16 March 2000, p8)

<sup>38</sup> Ibid. (Parliamentary sitting number 337, 5 July 2000) pp 654-657

The 2000 amendments to the Consumer Affairs Act were eventually approved unopposed in Parliament, and the Euro-sceptical Labour Opposition did not hinder or delay their passage through the Parliamentary stages.

## **5. Private law: a focus on three transposition-related reforms of 2000 in the context of the Civil Code**

This part shall consider a select group of important private law Directives transposed by Act XXVI of 2000. These transpositions raised interesting legal and drafting challenges which merit a comparison with the position still prevailing in the Maltese Civil Code. A detailed analysis of their content or objectives is not within the scope of this thesis, and the Directives themselves are, in any event, already too well known. The object of this part is primarily to place them within the context of the main source of Maltese private law, the Civil Code, and of other relevant legal and policy developments.

## **6. Product Liability**

Relevant Civil Code provisions:

'Of Torts and Quasi Torts', Articles 1029 to 1051

Consumer Affairs Act 1994, Articles 56 to 71

### **(a) General**

The Product Liability Directive<sup>39</sup> was adopted in 1985 and was amended in 1999.<sup>40</sup> The Directive, as so revised, was transposed into Maltese law by means of a new

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<sup>39</sup> (n 15)

<sup>40</sup> Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1999] *OJ L 141/20*

Part VII added to the Consumer Affairs Act in 2000 under the heading 'Liability for defective products.'<sup>41</sup>

The product liability rules introduced into Maltese law in 2000 constituted a long awaited and overdue measure. Its introduction was attributable more to Malta's obligation to transpose the Directive than out of any official concern with consumer safety and private rights to compensation for injury caused by unsafe products. Official interest in product liability law had been consistently low, apart from a section with recommendations on the subject in the 1991 White Paper. The only direct reference in the 1991 White Paper to Community law was found in the section dealing with product liability. The White Paper did not propose any original ideas but simply suggested that the Community Directive could serve as a legislative model for Maltese law.<sup>42</sup> The subject was not mentioned in the 1993 White Paper and appears to have swiftly disappeared from the political agenda shortly thereafter. In this context, the transposition of the Directive served to introduce producer and supplier liability rules into Maltese law rather than harmonise them. The transposition obligation forced the Maltese Government to re-address the issue and to finally introduce the Directive provisions in national law in good time prior to accession.

When the time finally arrived for their transposition, the rules on product liability were not transposed in the Civil Code which would probably have been their most obvious legal home. They were instead included in the 2000 amendments to the consumer law of 1994. The sensitivities and complexities of incorporating the Directive within the Civil Code structure were circumvented. Clearly, the authorities considered it more convenient to implement them as amendments to the Consumer Affairs Act quickly and faithfully so that the stringent accession deadlines would be respected. This approach was efficient though inelegant and left the Civil Code provisions on tort and quasi-tort intact and unscathed.

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<sup>41</sup> See Articles 56 to 71.

<sup>42</sup> All the other sections of the policy document presented original ideas for reforms. The White Paper made no reference to membership of the EC, the transposition of the Directives or to their likely beneficial or negative consequences to Maltese consumers.

In her 2002 thesis dedicated to the Civil Code implications of the 2000 amendments, Claudine Zarb dedicated a full chapter to the new product liability framework.<sup>43</sup> The thesis analysed the new rules on the liability of producers and suppliers of defective goods and placed them within the context of the general Civil Code rules on liability, particularly Articles 1031 and 1501, and highlighted the valuable protection gained by consumers.<sup>44</sup>

### **(b) 1979: an early local product liability proposal of sorts**

An early recognition that the safety of products and the responsibility of producers and distributors had to be addressed and that concrete action was needed may be traced to 1979. In that year, a leading Minister in the Labour Government announced his intention to tighten up legislation concerning the safety requirements of consumer products.

On 10 August 1979, the then Minister responsible for Justice, Dr Joseph Brincat summoned a press conference to announce plans to draw up legislation whereby the law would facilitate legal action against the suppliers and importers of domestic electrical appliances should these cause injury. He said that under current law, a person injured by a defective domestic appliance would have to sue the vendor and the importer at his own risk and expense and he proposed to change the burden of proof. His speech made front page news.<sup>45</sup>

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<sup>43</sup> Claudine Zarb, *The Effects of the Consumer Affairs (Amendment) Act (XXVI of 2002) on some aspects of the law of obligations* (LL.D Thesis, University of Malta 2002) Chapter 4, *Liability for Defective Products*, pp114-140. The analysis is detailed and covers most of the relevant differences between the general Code provisions and the special product liability rules.

<sup>44</sup> An extensive analysis of the subject is found in the writer's *Consumer Protection and the Law* (LL.D. Thesis, University of Malta 1979) Chapter 4, *Product Liability*, pp129-211, which critically analysed the difficulties which consumers injured by a defective product faced when trying to claim damages from the manufacturer or seller in terms of the Civil Code. The unsatisfactory legal position remained unchanged until it was finally superseded by the transposition of the Product Liability Directive into Maltese law in 2000. The criticism made in the 1979 (pre-Directive) study was reiterated in the 1991 White Paper which specifically recommended the adoption of rules based on the EC Directive.

<sup>45</sup> *Toy guns to be prohibited* (in trans.), L-Orizzont (a pro-Malta Labour Party Trade Union newspaper), front page, 11 August 1979. Dr Brincat also promised the prohibition of toy guns.

With the new law, this situation would change and the importer and the vendor will be held responsible before the criminal and civil laws, unless they prove the contrary. In this way, importers will be forced to exercise greater care what products to place on the market and will make sure they are not unsafe. Dr Brincat explained that this would also apply to similar products manufactured in Malta. The products in question include chandeliers, light bulbs, switches and any other product that operates on electricity.<sup>46</sup>

Unfortunately, this interesting early initiative was not followed up.<sup>47</sup> With hindsight, the measure proposed by the Hon. Dr Joseph Brincat to attach legal responsibility to importers and sellers of defective electrical appliances now appears half-hearted and unsophisticated, representative of the stop-start approach to consumer protection typical of the period. No legislative instrument on the subject ever saw the light of day and the proposal was quickly forgotten.<sup>48</sup>

This rather quaint effort was classified as an issue of civil responsibility of distributors for damages arising from the lack of safety standards in electrical domestic products. The producers themselves were not mentioned or targeted by the proposal. It represented not so much coherent Government policy as a statement of intent by an individual Minister for an initiative which was never followed up.

Meanwhile, within the Community, the question of civil liability for defective products was only finally and belatedly addressed in 1985 by the adoption of the Product Liability Directive.<sup>49</sup>

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<sup>46</sup> (In trans.)

<sup>47</sup> See critical analysis on this proposed measure in Fabri, (n44) pp208-9 and Concluding Note. The press conference was also reported in *The Times: Electrical appliances and war toys – New Laws Proposed*, 11 August 1979, p3.

<sup>48</sup> Indeed Dr Brincat may have failed to muster support from his own Cabinet colleagues at the time, some of whom had showed little interest to legislate on this and other consumer matters.

<sup>49</sup> (n15) A Community Directive on general product safety took much longer and was only adopted in 1992. (Product safety is dealt with in Chapter 6)

### (c) Product liability rules in the 2000 amendments

Like French law,<sup>50</sup> the Maltese civil law did not have a general concept of product liability. The Civil Code, based largely on the French original, drew a distinction between liability in tort and in contract. Based on fault, both were not favorable to the victim who had the burden of proving the alleged fault. However, the French courts have, where possible, generally given favourable consideration to victim's claims.<sup>51</sup> Following the Directive, the victim had only to prove the damages suffered, the defect in the product and the causal link between the two - a somewhat lightened burden of proof. The Directive was not integrated into the Maltese Civil Code but in special legislation. As a consequence, Maltese law now has two different sets of rules governing producer liability operating at different levels, lacking harmonisation and coherence.

The product liability rules added in 2000 to the Consumer Affairs Act were a largely faithful reproduction of the Directive. In certain respects, the transposition adopted the highest standard of protection to consumers allowed by the Directive. The Maltese transposition did not cap the aggregate total financial liability that a producer may risk as a result of a particular defective product. It also exercised the option to include agricultural produce before this became mandatory by amendment to the Directive.<sup>52</sup> A drafting anomaly was caused by the political uncertainty surrounding eventual accession because a provision of the Product Liability Directive required Member States to attribute liability for defective products which caused harm to the first importer of the products into the European Union area. Since at that stage,

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<sup>50</sup> A. Chambraud, P. Foucher, A. Morin, *The Importance of Community Law for French Consumer Protection Legislation*, in *European Consumer Policy after Maastricht*, ed N. Reich, G. Woodroffe, Kluwer Academic Publishers, 1994, pp216 - 219

<sup>51</sup> *Ibid.* p219

<sup>52</sup> The Chapter on product liability in Fabri (n 44) pp162-207 had already shown the great difficulties encountered in trying to successfully pursue a claim for damages for injury or loss suffered as a direct consequence of a defective product. The ordinary rules of tort modelled on rules originating from the Napoleonic Code were found insufficient to deal with the new problems arising from an increasingly consumerist society. They symboliseuropeanized the failure of the Maltese legislator to adequately react to the injustices being created by rules that no longer reflected the needs of consumers living in a developed industrial society. Article 1429 of the Code includes a limited rule which comes close to product liability, but is more akin to *seller* liability rather than producer liability: 'If the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages to the buyer.'

national legislation had to avoid mentioning the Community or its Member States, the transposing measure instead had to refer to the first importer of the product into Malta. Indeed the original Article 71 added by Act XXVI stated that ‘This Part shall apply to products which are put into circulation in Malta after the coming into force of this Act.’ This defect in the original transposition measure was rectified years later by Act II of 2008.<sup>53</sup>

Today, the Civil Code still makes no reference either to producer liability generally or to the relevant rules introduced in 2000. On the other hand, the product liability provisions in the 1994 Act make three references to the Civil Code.<sup>54</sup> Article 65 refers to Article 1051 of the Code in order to determine the liability of the producer where the injured party has contributed to the damage. Article 67 extends the Civil Code rules on the prevention, suspension and interruption of prescription.<sup>55</sup> Finally, and perhaps most importantly, Article 69, introduced in 2000, orders that the product liability rules shall not exclude or limit any rights or remedies available to the injured person under the Civil Code or any other law. This was an admirable but rather limited attempt to connect and bridge the special 1994 Act provisions to the general Civil Code rules on torts and quasi-torts, at least formally if not in substantive law.

## 7. Unfair Contract Terms

Relevant Civil Code provisions:

‘Of Obligations in General’, Articles 959-1235

‘Of Contracts’, Articles 960-1011

Consumer Affairs Act 1994, Part VI, ‘Unfair Practices’, Articles 44 to 47

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<sup>53</sup> Articles 36 to 38 of the 2000 Act made the amendments necessary to rectify the transposition of the Directive. Responsibility now correctly extends to the first importer of the defective goods into the Community, rather than Malta, as had been originally stated in the pre-accession version.

<sup>54</sup> The Civil Code does not define ‘producer’, a term that is instead defined in Article 56 of the Consumer Affairs Act

<sup>55</sup> Limitation period



The Unfair Contract Terms Directive<sup>56</sup> too was transposed in the Consumer Affairs Act. The Directive was transposed through the 2000 amendments which added a new Part VI to the Act.<sup>57</sup>

Paul E. Micallef has rightly pointed out that when the authorities came to transpose the Unfair Terms Directive, they found they ‘had various options.’<sup>58</sup> In the first instance the legislator could either use primary legislation or have regulations issued in virtue of the ministerial powers already granted by Article 7(2) of the Consumer Affairs Act. The rules were however considered too important and weighty to be relegated to ministerial regulations.<sup>59</sup> To implement the Directive by primary legislation, the legislator enjoyed at least three options:

- (i) integrate the Directive within the provisions of the Civil Code; or
- (ii) enact an ad hoc law on unfair contract terms; or
- (iii) integrate the Directive within the Consumer Affairs Act and include it with other planned amendments.

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<sup>56</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] *OJ L95/29*. A useful summary from the Commission’s website: ‘The Unfair Contract Terms Directive (1993/13/EEC) introduces a notion of ‘good faith’ in order to prevent significant imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. This general requirement is supplemented by a list of examples of terms that may be regarded as unfair. Terms that are found unfair under the Directive are not binding for consumers. The Directive also requires contract terms to be drafted in plain and intelligible language and states that ambiguities will be interpreted in favour of consumers. Member States must make sure that effective means exist under national law to enforce these rights and that such terms are no longer used by businesses.’ <[http://ec.europa.eu/consumers/rights/gen\\_rights\\_en.htm](http://ec.europa.eu/consumers/rights/gen_rights_en.htm)> accessed on 10 January 2014

<sup>57</sup> The relevant Articles were Articles 44 to 47. Ample literature now exists on the subject: see for instance: Guido Alpa, *Markets and Comparative Law* (British Institute of International and Comparative Law, 2010) Chapter 7: *A glance at unfair terms in Italy and England*; N Lockett and M Egan, *Unfair Terms in Consumer Agreements: the new rules explained* (John Wiley & Sons, 1995); T Wilhelmsson, *Control of Unfair Contract Terms and Social Values: EC and Nordic Approaches* in N Reich and G Woodroffe (eds) *European Consumer Policy after Maastricht* (Kluwer Academic Publishers, 1994); and the textbooks listed in the Bibliography. The insertion and the effect of unfair terms in pre-formulated contracts generally, and their form and content, were also analysed in G Caruana Demajo, *Standard Form Contracts* (LL.D. thesis, University of Malta 1981); *The Unfair Terms’ Directive, five years on: evaluation and future perspectives* (Conference organised by the European Commission, Brussels, July 1999)

<sup>58</sup> (n 7)

<sup>59</sup> Writer’s personal knowledge

Considerations of haste and practicality militated in favour of the third option. Again, as with the new product liability rules, placing the new rules on unfair terms in the 1994 Act averted any possible controversy arising from the sensitivity of tampering with the old Civil Code provisions.

Like the product liability rules, the control over unfair contractual clauses posed unusual challenges to an area of law traditionally covered by the Civil Code, particularly the parts dealing with contracts and obligations. The two most relevant Civil Code provisions are Article 992 which stipulates that 'Contracts legally entered into shall have the force of law for the contracting parties' and Article 993 which orders that 'Contracts must be carried out in good faith...'. Viewed in the context of these two fundamental principles, the transposition measure introduced by Act XXVI does not contradict them but rather extends their underlying objectives to a particular category of contracts.

A 1979 study had already explored various inroads found in Maltese law to freedom of contract and called for legislative intervention against unfair contractual clauses inserted in one-sided agreements.<sup>60</sup> The study listed a number of exceptions to the so-called sanctity of contract which were found scattered in the provisions of the Civil Code<sup>61</sup> concluding that 'this preoccupation with safeguarding the weaker party is a theme that permeates the whole Code without being specifically enunciated in a particular provision.'<sup>62</sup>

Following the transposition of the Community Directive, Maltese consumers for the first time enjoyed a degree of protection from unfair contractual clauses inserted by

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<sup>60</sup> (n 44)

<sup>61</sup> These included instances where the Code sought to 'protect persons whose weaker position may be abused of' (p124) as in the protection of minors, protection of the pledgee, the prohibition of usurious interests and the protection of the married women in the law of suretyship. Other specific exceptions to freedom of contract are made in the laws which regulate the landlord-tenant, the employer-employee relationships, the protection of minors, and the potential abuse by the salvor in the law of salvage.

<sup>62</sup> (n 44) p125. The problems created by adhesion contracts and abusive one-sided clauses had been noted and debated long before the Community started taking an interest in the subject. See, for instance, Nicholas Wilson, *Freedom of Contract and Adhesion Contracts* (1965) 14 *International and Comparative Law Quarterly* (ICLQ) pp172-193, and Vera Bulgar, *The Contract of Adhesion; a comparison of theory and practice* (1972) 20 *The American Journal of Comparative Law* (AJCL) pp 53-78

traders, particularly in pre-printed forms where the drafting initiative is monopolized by the trader. The implementation of this Directive was the only response launched by Maltese law against the rampant abuse of the contractual form by Maltese traders, especially by manufacturers and financial services firms. It was a very late response. Clearly the obligation to transpose the Directive as an accession precondition pushed the local authorities to finally take steps to combat terms deemed unfair to consumers. From this perspective, as in other areas of consumer interest, this transposition exercise was a very positive development for Maltese consumers.

In several respects, the transposing measure happily departed from the minimum terms of the Directive.<sup>63</sup> The Maltese transposing strategy for this Directive was to legislate beyond the minimum allowed and to establish a higher degree of protection for consumers, wherever considered possible. The transposition is more favourable to consumers in at least three significant respects:

- (i) the inclusion of a blacklist of unfair terms as against the indicative 'grey list' set out in the Annex to the Directive;<sup>64</sup>
- (ii) protection against unfair terms was extended to all 'consumer contracts,' and not only to contracts which were not individually negotiated;<sup>65</sup>
- (iii) the rules also applied to consumer contracts involving immovable property.<sup>66</sup>

The Civil Code largely modeled directly or indirectly on the Napoleonic model offered very little support to consumers confronting unfair clauses in one-sided trader-

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<sup>63</sup> (n 4) A detailed examination of how Malta and other Member States transposed this Directive is found in the EU-commissioned EC Consumer Law Compendium – Comparative analysis (2008) pp341 - 437. The Unfair Contract Terms Directive was one of eight directives reviewed in the context of the Review of the Consumer Acquis. See Loos M, 2008, Chapter 5, *The responses pertaining to the revision of the unfair contract terms directive*, pp40 - 43

<sup>64</sup> Article 44

<sup>65</sup> Articles 44 and 45. 'The benefit here is that consumers cannot lose their rights on the ground that they may have had an opportunity to negotiate at least part of the contract.' - in Paul E. Micallef, *Unfair Terms in Consumer Contract - The Maltese Perspective* (n 7)

<sup>66</sup> Article 44(5)

formulated contracts.<sup>67</sup> Oblivious to the phenomena of standard contracts, it failed to adequately respond to the growing trend of organised traders drafting agreements in their sole interest thereby eliminating any bargaining or negotiation.<sup>68</sup> To this day, the Civil Code broadly deems contracting parties to be equal and makes no concession to the weaker party. It stubbornly withholds any reference to unfair contractual terms, to possible imbalance between the rights and obligations of the contracting parties, to exemption from liability clauses, or indeed to consumers generally. The unfair terms provisions in the Consumer Affairs Act of 1994 were amended and revised in 2009 as they were found by the Commission not to be perfectly in line with the Directive. Indeed Act No. XIV of that year added five new paragraphs to Article 44 which now contains five more clauses deemed unfair to consumers.<sup>69</sup>

## 8. Guarantees in Sale of Goods Directive

Relevant Civil Code provisions:

'Of Sale,' Articles 1346-1484

'Of Warranty in respect of Latent Defects of the Thing sold,' Articles 1424-1432;

Articles 1390 and 1407: where thing sold is not of 'quality promised.'

Consumer Affairs Act 1994, Part VIII, 'Sale of Goods to Consumers,' Articles 72 to 92

The White Paper of 1991 had made specific proposals to improve the rights and remedies of consumers who having bought a product found it defective in a material aspect. The Civil Code remedy in the law of sale provisions basically re-stated the

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<sup>67</sup> (n 4) The EU Transpositions Compendium, 2008, 367 offers this description: 'Before the transposition of Directive 93/13, there were no express legal norms dealing with unfair terms in consumer contracts. However, in practice, the provisions of the Civil Code were utilized by the Maltese courts as a legislative tool for regulating the use of unfair terms by traders especially with respect to the exemption of liability clauses.' In this writer's opinion, the claim that the Civil Code provided a basis for consumer protection seems unduly optimistic. Any such protection was at best accidental and patchy.

<sup>68</sup> See Fabri, 1979 (n 44) Chapter 3, *Freedom of Contract, the Consumer and Contracts of Adhesion*, pp102-128. See also Zarb (n 43) Chapter Four, *The Effects of Act XXVI of 2000 on Standard Form Contracts*, pp52-108

<sup>69</sup>The Commission took nine years to discover that five clauses listed in the Directive were not perfectly transposed into Maltese law.

Roman Law approach to latent defects. The Civil Code remedy is generic and applies to all contracts of sale entered into between sellers and buyers.<sup>70</sup> The Consumer Affairs Act remedy (in compliance with the Directive) instead applied exclusively to contracts of sale concluded between traders and consumers.<sup>71</sup> If the buyer is not a consumer or the seller is not a trader,<sup>72</sup> then only the Civil Code warranties may be availed of. The Civil Code rules on the law of sale include the *actio redibitoria* which has to be availed of by a buyer within six months that run from when a hidden defect is (or can be) detected. The notion of hidden or latent defect is at the core of this Civil Code remedy. Originally this remedy had to be availed of within a period of one month which was non-extendable. Happily, this unduly short period was increased to six months in 1996, when the Consumer Affairs Act came into force.<sup>73</sup>

One of the three aborted Bills drafted immediately in the aftermath of the 1991 White Paper had proposed to remove the possibility of consumers being deprived of the warranty even when purchasing a new item.<sup>74</sup> Regrettably this second proposal was abandoned following trade opposition and the Civil Code rule has remained unchanged. Wherever the warranty against latent defects applies, the vendor today still retains the right to reduce or remove the warranty even in respect of new items. The legal warranty in the Civil Code still suffers from this fundamental weakness: it can be restricted, limited or even totally excluded by agreement between the parties.<sup>75</sup> Although this approach nominally respects the freedom of contracting, a principle at the heart of the Code, it allows vendors to impose conditions that may

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<sup>70</sup> See Article 1408 and Article 1424

<sup>71</sup> See Article 73

<sup>72</sup> Examples: a trader who is buying for purposes of re-sale or a professional purchasing office equipment

<sup>73</sup> A vendor in bad faith is also responsible for any damages caused by the defective product.

The present writer analysed the background to this remedy and its weaknesses from a buyer's perspective in his 1979 law thesis (n 44). Years later, the 1991 White Paper took up the discussion and called for extending this short 'forfeiture' period. As seen in Chapter 4, a brief draft bill had been drawn up in 1992 to amend the Civil Code provision so that the one-month period would be extended to six months, as had been suggested in the White Paper of 1991. This draft bill remained unpublished and the amendment was eventually inserted in the Consumer Affairs Act in 1994.

<sup>74</sup> '...it is proposed to introduce a new legal principle to the effect that where an article being sold is new, then the legal warranty against serious legal defects cannot be reduced or excluded.' (paragraphs 80 - 81). The draft Bill sought to implement this objective by adding this proviso to Article 1426 of the Civil Code: 'Provided that it shall not be possible to exclude or to limit the warranty where the thing is being sold as new. Any agreement to the contrary shall be void and of no effect.' See Appendix 2 which reproduces the draft Bill in question.

<sup>75</sup> Civil Code, Chapter 16 of the Laws of Malta, Article 1426

not be in the best interests of buyers. To the contrary, the transposed warranty introduced in the 1994 Act cannot be so excluded or limited, and Article 81 protects consumers from possible oppression by stronger traders and from subterfuge or trickery. The rights arising under special laws operate in addition to and do not replace the rights arising from the Civil Code.<sup>76</sup> The warranty against hidden defects set out in the Code<sup>77</sup> is much narrower than the more recent EU-derived concept of lack of conformity in the Consumer Affairs Act.<sup>78</sup> The legal remedies available under the Civil Code provision are limited to a choice between two remedies: (a) cancellation of the sale, return of the item sold and return of the full price; or (b) obtaining a proportionate refund reflecting the hidden defect while retaining the item bought.<sup>79</sup> The Directive and the relative transposition measure provide four remedies, namely return of the item sold with a full refund of the price, a partial refund proportionate to the defect with retention of the item bought, replacement or repairs.<sup>80</sup>

Dr Carmel Galea has recently compared the Code remedy in the law of sale that revolves over the notion of 'latent defect' with the new rules in the 1994 Act which revolve around the new concept of 'lack of conformity.' He has identified certain advantages that the Civil Code provisions have over the special rules derived from the Directive, and vice versa. The older civil law warranty remains superior in at least two respects. Its period of validity runs not from the date of delivery or earlier, but from the date when the defect was or could have been discovered. Moreover, in the Civil Code, the buyer is not obliged to give the seller notice by registered mail,

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<sup>76</sup> Article 92 of the 1994 Act, introduced in 2000, is relevant in this context as it helpfully (though admittedly rather vaguely) states that the provisions transposing the guarantees Directive 'where they are more favourable to the consumer, shall prevail over the provisions of any other law.' The reference to 'any other law' must be a reference to the Civil Code rules on the law of sale. What is the position of a consumer where a provision of the Civil Code is found to be more favourable than certain provisions of the transposed Directive? Can the consumer choose to have the relevant Civil Code rule prevail over the guarantees provisions in the 1994 Act?

<sup>77</sup> See generally Articles 1424 to 1427

<sup>78</sup> Chapter 378 of the Law of Malta, Article 73

<sup>79</sup> Chapter 16 of the Laws of Malta, Article 1427 which specifically describes the *actio redhibitoria* and the *actio aestimatoria*

<sup>80</sup> Consumers Affairs Act, Chapter 378 of the Laws of Malta, Article 74. The Civil Code Law of Sale does not give buyers the right to have the defective product repaired or replaced.

within two months, as is stipulated in the 1994 Act guarantee. This unfortunate provision in the Directive may place many consumers in a difficult position.<sup>81</sup>

The Civil Code warranty extends to both movable and immovable property, whereas the 1994 Act only referred to movable items. Article 72 defined goods as 'any tangible movable item of property.' On the other hand, the Code does not create any presumption similar to that envisaged in Article 80 of the 1994 Act; nor does it have any specific provisions on commercial guarantees.<sup>82</sup> The Civil Code remedies for products flawed by hidden defects remain available to consumers. There may still be instances where purchasers might prefer the latent defect remedies to the more recent lack of conformity framework added in 2000.<sup>83</sup>

## 9. Civil Code - action on quality

The Civil Code itself gives a two year period of warranty where a seller supplies goods to a buyer which are not of the quality or type that had been agreed between them.<sup>84</sup> This remedy is available to the purchaser and is restricted to disputes on quality which is conceptually different from the notion of latent defect. Roman law clearly distinguished disputes on the agreed quality *qualita' patuita* from disputes on defective products.

A good thing about the Directive warranty is the two years period of limitation. The bad news is the two years start to lapse from the date of the contract, and not from the date of delivery or from the date when the lack of quality was determined. To the

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<sup>81</sup> Carmel Galea, *Consumer Protection and the Civil Code*, paper presented to Conference on The relevance of the Civil Code for Commercial Law practitioners (with particular reference to company law, financial services and consumer law) organised by the Chamber of Advocates and the Department of Commercial Law, February 2013

<sup>82</sup> Consumer Affairs Act, Chapter 378 of the Laws of Malta, Articles 82 to 91

<sup>83</sup> (n 8) In his *Impact of the European Union on Consumer Policy in Malta*, 'The Impact of the European Union on Consumer Policy in Malta: a Mixed Blessing?' (Ashgate, 2008) Paul E. Micallef highlighted a positive feature of the transposing measure: 'The transposition of this Directive reflects one of the few instances where the Maltese legislator, in implementing the EU consumer *acquis*, opted to include measures giving consumers more extensive protection.'

<sup>84</sup> Chapter 16 of the Laws of Malta, Articles 1390 and 1407

contrary, the two year period under the lack of conformity rules in the 1994 Act starts from the date of delivery, a time factor which offers greater safeguards to consumers seeing that precious time may elapse between the date of the conclusion of a contract of sale and the date of delivery of the item. The result of these developments is that two different remedies with different limitation periods now apply and consumers and their advisors need to very carefully navigate exactly which remedy is available, to whom and when.<sup>85</sup> The forced co-existence of the guarantee under the 1994 Act and the Civil Code warranty is the clearest example of parallel situations which may not have been entirely and satisfactorily resolved, throwing up new challenges of application and interpretation. Article 92 of the Act states that where a transposing measure contained in the Act is more favourable to consumers, it shall prevail over any other legal provision, including any relevant Civil Code provision. One may need to compare the two sets of texts in order to determine which remedy would be the more favourable. It may happen that a Code provision prevails over the more recent guarantees transposition measure; a rather peculiar scenario which it seems cannot be totally excluded. Future court judgements will hopefully throw more light on how this Article will operate in practice.

## **10. Consumer Protection, the Transpositions and the Civil Code**

At this juncture, this Chapter must reflect on the role and significance of the Civil Code and, to a lesser extent, of the Commercial Code,<sup>86</sup> in the context of the transposition of the Community consumer protection Directives. Many of the transposition-related innovations added by the 2000 legislation involved private civil law rights and remedies with implications particularly for the law of obligations and contract of sale framework set out in the Civil Code. Ten years earlier, the 1991 White Paper had already addressed the question of how the Civil Code provisions could be revised and updated to become more consumer-friendly and give

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<sup>85</sup> S. Weatherill and P. Beaumont, *EU Law* (Penguin Books, 1999) p1041, predicted that as a result of the EC private law Directives, 'EC lawyers, accustomed to a largely public law existence, may be forced to grapple with private law concepts' and that 'assuming themselves largely immune from "communitarisation", can no longer suppose their territory inviolable'

<sup>86</sup> Chapter 13 of the Laws of Malta



consumers new rights.<sup>87</sup> It had commented that: 'The Civil Law...still does not recognise the figure of the consumer or the notion of a consumer transaction...';<sup>88</sup> and that 'The Civil Code is not hostile to the consumer, nor is it friendly. It is simply indifferent.'<sup>89</sup> The White Paper concluded that: 'Our code has not yet reflected a society where economically powerful industrial set-ups or distribution chains are confronting a myriad of individual consumers acquiring in haste.'<sup>90</sup>

Nothing came from the generic promise to transform the text of the Civil Code into a more pro-consumer framework. Perhaps the proposal proved too difficult to implement, interest may have faded and pro-business lobbying may have instead prevailed.<sup>91</sup> Ten years later, the underlying assumption of the 2000 legislation under review is that the Civil Code was not the adequate place to locate the transposition of Community measures of a private law nature. This seems to have remained the unwritten and unstated policy in the transposition of other post-membership consumer directives, notably the Unfair Commercial Practices Directive which too was implemented through the Consumer Affairs Act.<sup>92</sup> As a result of this approach, the text of the Maltese Civil Code has not yet been affected by EU consumer law. Indeed at best it may be claimed that the Civil Code does not consciously ignore the consumer, nor consciously expresses indifference towards the consumer, but rather it has been kept unaware of the consumer. The Civil Code was devised as a more or less complete collection of private law regulation of property, contractual, personal and succession rights and relationships. Through lack of adequate updating, it has failed to recognise, whether directly or indirectly, the role and rights of the consumer and to make the important statement that certain

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<sup>87</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991) Chapters VII to X, paragraphs 72 to 110

<sup>88</sup> *Ibid.* p 7 paragraph 18

<sup>89</sup> *Ibid.* p18, paragraph 72

<sup>90</sup> *Ibid.* p 7, paragraph 16

This is still the position at the time of writing. The Civil Code makes no reference to consumer rights. Subjects already dealt with amply elsewhere like the provisions regulating unfair contractual terms, product liability and guarantees in the sale of goods will not be repeated here. Carmel Galea, 2013, placed the Civil Code remedies for latent defects and the *actio redhibitoria* against the transposition measure for the 1999 Directive on guarantees in the sale of goods. (n 81)

<sup>91</sup> The success of pro-business lobby groups in determining legislative content and choices is a sensitive subject in Malta and has regrettably not been studied and is still little understood. Most lobbying is informal and does not take place in the light of day. The consumer lobby is practically non-existent.

<sup>92</sup> Act II of 2008

rules apply differently in transactions involving consumers. The tricky question whether and how Community consumer measures should be integrated within a Member State's Civil Code was not an entirely novel legal issue and had already been tackled elsewhere. In his 'Il Diritto dei Consumatori',<sup>93</sup> Prof. Alpa has studied the position of consumer rights in domestic Italian law, reflecting on whether and how consumer protection regulation, including the juridical recognition of the consumer, should be integrated within the Italian Civil Code. His preference is firmly that the *Codice Civile* should incorporate consumer law. He has concluded that it makes no sense today for a civil code to ignore consumers and that a civil code should preferably incorporate all the legal rules that protect consumers.<sup>94</sup>

A brief comparison between the Maltese and Italian Civil Codes today reveals fundamental divergences in structure, content and scope. While broadly pertaining to the same codification tradition, they have clearly evolved in their own separate directions reflecting their respective unique historical, juridical and political contexts and vicissitudes. While its pre-eminence in the private law field cannot be underestimated, the Maltese Civil Code struggles to retain its former undoubted relevance in the context of a vastly changed and fast evolving modern society and needs to be updated and refreshed. The Maltese Civil Code has not been updated to integrate or even acknowledge the recent national and Community consumer measures, some of which have important private law implications.<sup>95</sup> Hans-W Micklitz

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<sup>93</sup> *Il Diritto dei Consumatori*, Editori Laterza, 3rd edn, 2002, Chapter 1, p82

<sup>94</sup> *Ibid.* p82. More recently, Alpa has once again addressed the question of how consumer law and consumer Directives are or are not integrated within a country's Civil Code: see his book *Competition of Legal Systems and Harmonisation of European Private Law*, Sellier European Law Publishers, 2013, pp83-96. C. Joustra has remarked that 'consumer law is now one of the most important examples of the European Union's influence on private law', and he too favours the integration of consumer private law within the national Civil Code: see Chapter 9 on *Consumer Law* in *Towards a European Civil Code*. 2<sup>nd</sup> ed., eds A Hartkamp, M. Hesselink, E. Hondius, C Joustra, E. du Perron, Kluwer Law International, pp133-148

<sup>95</sup> An early analysis of the Civil Code provisions from a consumer protection perspective is available in *Consumer Protection and the Law* (n 44) This work examined the various Civil Code rules in the law of sale, supply of services, standard contracts and unfair terms, product liability and the extent to which they provided protection and rights to consumers. A useful review of the civil law aspects of consumer protection law in Malta was included in the 1991 White Paper. More recently, a law thesis has analysed the impact of Community law on the Maltese Civil Code: Claudine Zarb in her already above-quoted LL.D. thesis (n 43) examined the important civil law implications of the 2000 Act (which transposed various important Directives) and their specific effects on and overlap with the rules of the Civil Code. Issues examined include the law of sale, the law of contracts, unfair contract terms, standard form contracts, the right of withdrawal from doorstep contracts and liability for defective products. These studies are essential reading for an understanding of the Maltese Civil Code setting of various important legal and transposition issues discussed in this Chapter. Their analysis and

has assessed the interplay between civil and consumer law in more colourful terms: he has written that for many years:

consumer law has been seen as an area of law dealing with questions placed in the fringe of civil law. For traditional civil lawyers all over Europe consumer law was no more than a *quantite' negligeable* which, if anything, endangering the foundations of traditional private law, autonomy and self-responsibility. However, the debates in legal doctrine did not reach a level where consumer law was taken seriously.<sup>96</sup>

The text of the Commercial Code too has remained unaffected and to the present day remains unaware of the existence of the consumer. It has failed to acknowledge, and has therefore also failed to build upon, the various significant consumer rights introduced and developed during these past twenty years. A Code designed to serve as a comprehensive rule-book for dynamic trading relationships and their legal consequences and modalities appears seriously flawed when it no longer adequately reflects the underlying economic and market reality.<sup>97</sup> While the world around them has changed, the two Codes continue to reflect nineteenth Century assumptions, tools and solutions and face serious inadequacies in dealing with the true problems of trading practices and public expectations in modern day Malta.<sup>98</sup> The pre-accession transpositions surprisingly failed to have any effect on

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conclusions cannot be duplicated here. The Bibliography lists other theses that have examined other aspects of the law on unfair contract terms and product liability.

<sup>96</sup> *The Relationship between National and European Consumer Policy* in The Yearbook of Consumer Law, 2008, p55 where he states that consumer law was often seen as marginal and as possibly distorting the civil law: 'Consumer law was the *Schmuddelkind*, the mucky child of private law.' He suggests that following more recent legislative *initiatives* by the EU, consumer law has turned 'from an ugly duck into a beautiful swan'. (ibid.) Micklitz revisited the difficulties certain Member States have encountered in integrating the consumer protection Directives in their Civil Codes in his paper, *The Necessity of a New Concept for the Further Development of the Consumer Law in the EU*, German Law Journal, Vol.04, No. 10, 2003, available online at [http://www.germanlawjournal.com/pdfs/Vol04No10/PDF\\_Vol\\_04\\_No\\_10\\_1043-1064\\_European\\_Micklitz.pdf](http://www.germanlawjournal.com/pdfs/Vol04No10/PDF_Vol_04_No_10_1043-1064_European_Micklitz.pdf) accessed on 4 May 2014

<sup>96</sup> See paper on the role of consumer law within commercial law: Ewoud Hondius, *Commercial Law: is it Special?*, in Commercial Law Challenges in the 21st century: Jan Hellner in memoriam, Stockholm Centre for Commercial Law: Juridiska institutionen (2007)

<sup>97</sup> David Fabri et, Conference organised jointly by the Department of Commercial Law of the University of Malta and the Chamber of Advocates on *The Relevance of the Civil Law to Commercial law and Practitioners*, 15 February 2013

<sup>98</sup> Both Codes originally provided a comprehensive and coherent set of rules and solutions to the society for which they were devised. Society has changed beyond recognition since then. If they are to retain their significance, the Codes need to be appreciably re-thought, refreshed and re-launched. If this painful process is successfully carried out, they may preserve their role as the most important legislative response to the changing values, aspirations, realities and needs of a new economic, social and legal landscape

the two major private law Codes.<sup>99</sup> The Maltese Civil Code remains the most important source of private law, including the rights of purchasers of goods and services. Adopted during the latter half of the 19<sup>th</sup> century, it was designed as the main source of private law. As the Code remains blissfully unaware of the consumer, consumer protection in Maltese law has been achieved through special legislation.<sup>100</sup>

Today, neither the Civil nor the Commercial Code makes any reference to consumers, consumer transactions, unfair commercial practices, or to the new regulatory frameworks for consumer credit, package tours, timeshare contracts, distance-selling and doorstep contracts.<sup>101</sup> The detachment of the Civil Code in this context is particularly striking, and perhaps also disturbing. The ease with which it has been repeatedly evaded over the years by resorting to ad hoc special laws places in doubt its status as the principal source of suitable solutions and remedies to private law issues and disputes in today's modern society. This phenomenon also highlights the failure of past legislators to adapt and update the Civil Code to preserve its continued relevance to societal changes and to evolving legal, political and economic circumstances.<sup>102</sup> The Civil Code played no part at all in the implementation of important Community rules which directly affect and alter the provisions on contract, sale and responsibility for defective products. The 2000 amendments challenged the completeness and relevance of the codified private law of Malta. On the other hand, the 1991 White Paper had promised to compile and

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<sup>99</sup> In this context, Alpa (n 93) p81 warns that if the civil codes are to remain relevant, action is required to ensure they continue to mirror and address today's social economic realities, and this necessarily implies addressing the position of consumers. If consumers are omitted from the codes, that would amount to a significant lacuna.

<sup>100</sup> David Fabri, *Adventures in Screening and Transposition: a case study – The EU Consumer Protection Acquis 1990-2004* (Seminar paper presented as part of the Jean Monnet Seminar Series, Malta, University of Malta, 20 April 2006)

<sup>101</sup> More recently, the Commercial Code has housed the transposition of the Late Payment Directive (Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions [2000] OJ L200/35).

<sup>102</sup> See Ewoud Hondius, *The Notion of Consumer: European Union versus Member States* (2006) 28:89 Sydney Law Review <[sydney.edu.au/law/slr/slr28\\_1/Hondius.pdf](http://sydney.edu.au/law/slr/slr28_1/Hondius.pdf)> accessed on 10 January 2014. This important paper enquires whether consumer law should be incorporated within a Civil Code or in a separate Consumer Code on the Italian and French models. Hondius expresses his preference for the former option as it 'keeps an important part of civil law in the Civil Code', thereby giving consumer law a sense of 'permanence', adding that: 'since consumer contracts have to do with everyday relations between citizens, a Civil Code seems the natural place to regulate it.'(pp97 - 98)

group all consumer rules into a single consolidated consumer law.<sup>103</sup> This laudable objective started gradually becoming a reality, initially with the 1994 Act and later when the 2000 amendments were added to the Act, effectively doubling its size and adding much substantial law to the original 1994 structures.<sup>104</sup> These measures were all implemented outside the Civil Code.

## 11. Provisions in the 1994 Act not related to transposition

The 2000 amendments to the Consumer Affairs Act 1994 Act are also interesting because they comprised significant new national consumer protection law improvements completely unrelated or indebted to EC accession strategy or requirements. These included the first ever domestic Declaration which attempted a fresh re-statement of the basic rights of consumers;<sup>105</sup> new rules to govern gift schemes;<sup>106</sup> the first ever attempt to rein in pyramid schemes and other unfair trading activities;<sup>107</sup> a brave attempt in Article 2 to introduce a novel workable definition of 'services' and a rather complex but extensive definition of 'trader' for all purposes of the Act; an amendment to the procedure for issuing public warnings to consumers;<sup>108</sup> the increase in the monetary competence of the Consumer Claims

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<sup>103</sup> '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 in this White Paper and other useful suggestions which may result from the consultations to follow the publication of this document. The exercise shall guarantee for the various laws and regulations a recognisable pattern and sense of direction and purpose, resulting in a properly termed 'Consumer Protection Act', a true charter of consumer rights.' (Department of Information, *Rights for the Consumer*, White Paper, 1991) Chapter XV - A Comprehensive Consolidated Act, p32, paragraphs 144-146)

<sup>104</sup> In the years following the period under examination in this thesis, the Act has continued to grow in size and importance as it was used to transpose the Consumer Protection Co-operation Regulation (Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national consumer authorities responsible for the enforcement of consumer protection laws [2004] OJ L364/1) and the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22).

<sup>105</sup> Consumer Affairs Act, Chapter 378 of the Laws of Malta, Article 43, discussed further below

<sup>106</sup> Ibid. Article 51

<sup>107</sup> Ibid. Article 52

<sup>108</sup> Ibid. Article 5

Tribunal up to 3500 Euros;<sup>109</sup> a new rule requiring evidence before the Tribunal to be given on oath;<sup>110</sup> and a lowering of the minimum required number of members of registered consumer associations from 250 to 100 persons.<sup>111</sup> These reforms and others not listed here helped to improve and complete the 1994 legislative framework.

## **12. Further interplay between EU law and national law – selected specific instances**

Act XVI of 2000 highlights the importance of identifying the interplay between national and Community law during the time when a country is negotiating membership in the Community. To simply assume that the 2000 Act was a pure transposition measure would be very wrong. The next Part shall focus on three particular areas which hopefully demonstrate the benefits of having, and retaining, national law choices.

### **(a) A Declaration of Consumer Rights: an innovation in national legislative drafting style**

A Declaration of Rights was an unusual and uncommon feature in Maltese legislation. The Declaration of Consumer Rights section of the Consumer Affairs Act 1994 added in 2000 was the first ever general statement of the rights of consumers in Maltese law.<sup>112</sup> The statement is not of mere declaratory value, as the law specifically requires it to be ‘adhered to’ and implemented in practice. While the authorities might not themselves be subject to court action for failing to implement these rights through legislation, the provisions of the 1994 Act and of regulations issued under it, have to be interpreted and applied taking these rights into account. This may amount to indirect enforcement, but it qualifies as enforcement

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<sup>109</sup> Ibid. Article 9

<sup>110</sup> Ibid. Article 11

<sup>111</sup> Ibid. Article 13

<sup>112</sup> Ibid. Article 43 is headed ‘Declaration of Principles’ while the marginal note refers more precisely to ‘Consumer rights’

nonetheless. This obligation to implement it and adhere to it extends to the conduct of the Director, the Department and the Consumer Affairs Council, the Consumer Claims Tribunal as well as the Courts and traders.

This formula goes a step beyond the Declaration of Principles in the Maltese Constitution<sup>113</sup> on which it was clearly modeled. This new formulation was also used in the Product Safety Act, the Price Indications Regulations and the 2003 Act intended to replace the Supplies and Services Act of 1947. The constitutional Declaration of Principles is specifically unenforceable.<sup>114</sup> Naturally, the feature that renders it interesting for this present work is that it was not EC-motivated or a transposition measure, but was a local addition which helped enhance the quality of the 1994 Act.<sup>115</sup> The Declaration is reminiscent of President John F Kennedy's famous 1962 speech which highlighted four basic consumer rights.<sup>116</sup> The Maltese re-statement has added other rights and adopted new formulation and emphasis, and lists seven basic rights, bringing it closer to the more recent models adopted by United Nations Guidelines<sup>117</sup> and Consumers International.<sup>118</sup>

## **(b) Comparative advertising – a policy that had to give way**

The minutes of the Screening meeting on Chapter 23 of 7- 8 October 1999<sup>119</sup> record the Commission as explaining that:

Unlike all the other directives, the one on comparative advertising is a directive of Maximal harmonisation. Therefore Member States are not

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<sup>113</sup> Chapter 1 of the Laws of Malta, Chapter II, Articles 7-21

<sup>114</sup> Ibid. Article 21

<sup>115</sup> The minutes of the Screening meeting on Chapter 23 of 7-8 October 1999 record the Maltese delegation explaining that 'the Maltese legislation would include a declaration of principles intended as guidelines for the courts, based on UN and EU principles.' See copy of minutes in Appendix 4.

<sup>116</sup> John F. Kennedy, *Special Message to the Congress on Protecting the Consumer Interest* (The American Presidency Project, 15 March 1962) <[www.presidency.ucsb.edu](http://www.presidency.ucsb.edu)> accessed on 10 September 2013. See comments by Ewoud Hondius, *The Innovative Nature of Consumer Law* (2012) 35(2) *Journal of Consumer Policy* <<http://link.springer.com/article/10.1007%2Fs10603-012-9190-0/fulltext.html>> accessed on 10 September 2013

<sup>117</sup> United Nations Guidelines for Consumer Protection <[http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf)> accessed on 10 September 2013

<sup>118</sup> 'Consumer Rights' <<http://www.consumersinternational.org/who-we-are/consumer-rights/>> accessed on 10 September 2013

<sup>119</sup> p6

allowed to retain or adopt provisions going beyond the rules stipulated by the directive...This directive had proven to be the subject of serious polemic within the Member States, due to different practices. The UK, Ireland, Spain and Portugal allow comparative advertising, whilst other countries like Germany prohibited it, or else did not have legislation in this respect....the Commission emphasized the need to stick to the directive...<sup>120</sup>

Directive 84/450/EEC of 10 September 1984 on misleading advertising was amended by Directive 97/55/EEC of 6 October 1997 to include comparative advertising.<sup>121</sup> The transposition of the misleading and the comparative advertising Directives was made in 2000 by way of amendments to the Consumer Affairs Act.<sup>122</sup> This was the first occasion when Maltese law specifically dealt with the controversial subject of comparative advertising. Till then, the matter was largely considered as an unfair competition issue between traders and the principal applicable rules were Articles 32 to 37 of the Commercial Code, which are still in force today.<sup>123</sup> The matter of comparative advertising obtained a clear mention in the 1991 White Paper<sup>124</sup> which actually proposed its prohibition: 'In advertising, regulation would .... (ban) comparative advertising.' This is all one finds on the subject in the 1991 White Paper. Regrettably it did not elaborate. Luckily, the reasons were more comprehensively explained in the original draft version, which was considerably edited before publication:<sup>125</sup>

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

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<sup>120</sup> See Appendix 4

<sup>121</sup> An earlier draft of the 1984 Directive had included rules on comparative advertising but these were eventually deleted from the final version. (Stephen Weatherill, *EC Consumer Law and Policy*, Elgar European law, 2005, p177)

<sup>122</sup> Chapter 378 of the Laws of Malta, Articles 48 to 50, which formed part of Part V1, added by the 2000 amendments. This Part included the transposition of the unfair contract terms rules, the misleading and comparative advertising Directives and added new non-EU related rules introducing controls over gift offers, pyramid schemes and other offers detrimental to consumers

<sup>123</sup> Some early disputes resulting from unfair comparative advertising or conduct were dealt with by Maltese courts in terms of these provisions

<sup>124</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991) p7 paragraph 65

<sup>125</sup> Malta University Services, *White Paper on Consumer Protection: Proposals for Legislative Reforms* (February 1991) Ch. VI, 'Advertising', paragraphs 50-51. Regrettably, this entire section was omitted from the published version. See Chapter 4



the products or the services of competitor 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 down 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.

In 1995, the Commission decided that comparative advertising was to be harmonised throughout the Member States by means of a Directive in the form of a maximal measure so that the same rules would apply identically throughout the Community.<sup>126</sup> By 2000, Malta had not legislated on the subject of comparative advertising despite the preference expressed in the 1991 White Paper.<sup>127</sup> When the time came to legislate in 2000, the policy favouring prohibition had to give way as Malta implemented the Community rules on comparative advertising.<sup>128</sup>

Comparative advertising was accordingly allowed but was subjected to specific conditions listed in the Directive which were intended to ensure that any such comparison would be fair and truthful. The transposition was a verbatim reproduction of the Directive provisions. Comparative advertising was considered as a useful technique for keeping customers informed about competing products and could not be banned as a marketing technique. This policy disagreement on the merits and acceptability of comparative advertising illustrates the potential conflict between EU and national consumer policy. Malta could no longer pursue its own stated policy against comparative advertising once the Community decided that comparative advertising had to be allowed, albeit subject to certain stated mandatory conditions to be complied with by all Member States on a one-size-fit-all basis.<sup>129</sup>

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<sup>126</sup> See Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate Dartmouth 1997) pp143-146 under 'Comparative Advertising' and S. Weatherill, *EU Consumer Law and Policy* 2nd edn, Elgar European Law (2005) pp176-182 under the heading 'Comparative Advertising'

<sup>127</sup> Chapter VI 'Advertising', p17 (n122)

<sup>128</sup> These were transposed in the 1994 Act by new Article 50 added by Act VI of 2000

<sup>129</sup> Geraint Howells, *Minimum / Maximum harmonisation and the Internal Market Clause* in *European Fair Trading Law*, Ashgate (2006) pp29-30: referring to this and other maximal Directives, he interestingly commented: 'It is clear that the Commission intends to stop Member States tending their own 'consumer gardens'. The more the Community plans to regulate the internal market, the less it can tolerate solo efforts'.

### **(c) The transposition of the Directive on Misleading Advertising and the role of the Trade Descriptions Act**

The Trade Descriptions Act<sup>130</sup> was one of the first local laws to regulate advertising and labelling. It was largely based on the well-known UK original from 1968.

The provisions of the Consumer Affairs Act which transposed the Misleading Advertising Directive<sup>131</sup> overlapped, at least partly, with this 1987 Act. Keeping very faithful to the style and drafting of the Directive, the authorities failed to address the duplication of prohibition of misleading advertising arising from the two separate and unconnected legislative measures, both of which punish breaches as criminal offences. The matter was indeed raised by the Commission during the Screening sessions held in October 1999, but no further action was taken to streamline and harmonise the situation.<sup>132</sup> Remarkably, the Trade Descriptions Act remained unaffected by the transposition of a Directive which dealt with more or less the same subject matter, namely the wrongful description of goods to the detriment of consumers – an instance of rather clumsy duplication. In practice, since its adoption, the Act has had little effect and its enforcement has been very weak.<sup>133</sup> The Act had to some degree anticipated the Misleading Advertising Directive. When the time to transpose the Directive arrived, a number of options should have been addressed by the Maltese authorities, namely whether to:

- (i) repeal the 1986 Act and transpose the Directive in a different instrument; or
- (ii) amend the 1986 Act and use it to transpose the Directive; or

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<sup>130</sup> Chapter 313 of the Laws of Malta

<sup>131</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17

<sup>132</sup> (n 120) The minutes record the following: 'The Commission asked for a clarification on the relation between the Consumer Affairs (Amendment) Act and the Trade Descriptions Act. Given the existence of previous legislation on misleading advertising in Malta, a thorough revision was required.' The same difficulty affects the 1987 Act's compatibility with the Unfair Commercial Practices Directive. Arguably even the Trading Stamps Schemes (Restriction) Act of 1964 (Chapter 182 of the Laws of Malta) is now probably, at least partly, incompatible with the 2005 Directive.

<sup>133</sup> Less than a handful of prosecutions have been instituted in the twenty years that the Act has been in force. Not surprisingly, the 1991 White Paper reserved some of its most scathing comments to this law; See (n 124) pp13-14, paragraphs 43-48

(iii) retain the 1986 Act and transpose the Directive elsewhere.

The third option was implemented leaving the position open and ambiguous. The 1987 Act remained unchanged while the Directive was transposed within the ever-expanding framework of the 1994 Act. This was a convenient approach but did not ensure complete coherence or harmony between the two laws. Admittedly, the transposition of the Directive was accomplished in the most direct, literal and less time-consuming fashion with only one cursory reference to the 1986 Act.<sup>134</sup> Article 55 states that 'article 48, a transposition measure, shall prevail over anything to the contrary contained in the Civil Code, the Commercial Code and the Trade Descriptions Act.' With this convenient and unscientific device, any risk that the 1987 might be incompatible with the Directive and might obstruct its application or interpretation was removed. Evidently, the Commission found this solution acceptable.<sup>135</sup>

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<sup>134</sup> See generally, Richard Bragg, *Trade Descriptions, A study of the Trade Descriptions Act 1968 and Part III Consumer Protection Act 1987* (Clarendon Press Oxford, 1991). Bragg wrote one of the earliest text-books and guides to the Trade Descriptions Act of 1968, which was a direct result of the Molony Committee report recommendations. He too agrees that the Trade Descriptions Act should be re-considered in view of the implementation of the Unfair Commercial Practices Directive which is a maximal Directive. Richard Bragg, *Trade Descriptions after the Unfair Commercial Practices Directive*, pp341-346. The Yearbook of Consumer Law 2008, investigates and offers a number of suggestions why the Act may not be fully in line with this Directive, which specifically requires that 'no domestic legislation may be in force providing for stricter coverage than that in the Directive itself') See also an annotated Act in *Encyclopaedia of Consumer Law*, Sweet & Maxwell (loose-leaf), 1980, general editors W.H. Thomas and Cowan Ervine. Since its enactment in Malta, the Trade Descriptions Act of 1986 has been a problematic and controversial piece of legislation. Its full legal title reads: 'An Act to make provisions prohibiting misdescriptions of goods, services. Accommodation and facilities provided in the course of trade; to prohibit false information or misleading indications as to the price of goods and for other matters connected therewith or ancillary thereto.' The scope of the Act was much wider than the Misleading Advertising Directive. Had the Act been simply repealed, certain protection it nominally provided might have been lost. A complex exercise would have been necessary to identify which precise provisions were not in line with the Directive.

<sup>135</sup> This Act was passed shortly before the 1987 General Elections in an unsuccessful bid by the then Labour Government to shore up its weak credentials in the area of consumer protection. It was more or less copied from the Trade Descriptions Act passed by the UK Parliament in 1968 following the submission of the findings of the Molony Committee. No effort was made to adjust and re-mould its provisions to fit the local legal language and local requirements and expectations. Whereas it can rightfully claim to be one of Malta's first consumer laws, it supplies yet more proof that no proper coherent consumer policy existed in 1986 just as none existed in 1981 when the Consumers Protection Act was enacted. The 1986 Act represented the superficial short-cut approach to legislating typical of its time. This Act is criticised in David Fabri, *False Starts and Broken Promises: some mishaps in the development of Maltese Consumer Law* [2006] Law and Practice. (The Act was repealed in 2014: see Conclusion, part 6.)

#### **(d) Pyramid schemes – a welcome prohibition that was reversed**

Prior to 2000, pyramid schemes were unregulated and indeed unknown to Maltese law, though they were familiar in practice, and some schemes had already caused financial loss to members of the public. None of the extensive financial services laws adopted in 1994 dealt with or covered pyramid schemes. A policy decision was taken to tackle the issue not as a financial services matter but as a consumer issue that warranted regulation under consumer legislation. The 2000 amendments to the Consumer Affairs Act was the first occasion where the existence of pyramid schemes was acknowledged by local legislation and the approach adopted was the simplest one. The main provision of the new Article 52 in the new added Part VI prohibited pyramid schemes in no uncertain terms:

(i) All forms of pyramid selling schemes however described shall be prohibited. Schemes or activities in which a significant or material element consists of a pyramid selling activity shall also be considered as a pyramid selling scheme for the purpose of this article.

(ii) A person who establishes, operates or promotes a pyramid selling scheme shall be guilty of an offence against this Part of this Act.

This attempt to halt the proliferation of unregulated pyramid schemes was novel to the Maltese legal system and did not reflect anything which the Community was working on at the time. It was a pure home-grown initiative addressing a growing local problem. Regrettably, this approach was later reconsidered in the course of transposing the new Community provisions on pyramid and similar schemes flowing from the Unfair Commercial Practices Directive.<sup>136</sup> Indeed, the original Article 52 introduced in 2000 was deleted and pyramid and similar promotional schemes are now governed by new Article 52A and Article 53 and paragraph 14 of the First Schedule<sup>137</sup> to the 1994 Act. The transposition of the Unfair Commercial Practices Directive diluted the original clear prohibition against these schemes. Unfortunately

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<sup>136</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22

<sup>137</sup> Equivalent to paragraph 14 of Annex 1 to the Directive

the new provisions in the Act make rather laborious reading and distinguish between various forms of schemes, some of which are no longer prohibited. In this way, a local consumer safeguard was negatively affected and the original 2000 blanket prohibition of such schemes has been partially reversed in the course of transposing the recent Community maximum harmonisation measure.

### **13. Integration of EU law into Maltese law: a marriage of sorts**

The 2000 consumer law amendments constituted the first and most significant occasion where the interplay between Maltese consumer law and EC consumer law had to be addressed and managed in concrete terms, presenting the novel challenge of integrating Community laws and concepts into the Maltese legal system. By 2000, with the working target membership date of 1 January 2003 approaching ever closer, the impact of EU accession on actual legislation could no longer remain exclusively notional or theoretical or stay within the confines of bilateral and multilateral meetings, multiple questionnaires, academic articles, seminars and checklists. Laws had to be passed and Directives effectively transposed in order to definitely and successfully close the many Chapters in which the Community *acquis* was divided. The 2000 amendments to the 1994 Act played a valuable role in accomplishing this objective adding a number of radical novel legal concepts and a new language into local consumer law, and pushing the contact between EU law and Maltese law to a new more complex and sophisticated plane. The two streams of law-making could no longer remain apart developing in parallel; a relationship, a *modus vivendi*, for the integration of EC law into national law, had to be devised.<sup>138</sup>

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<sup>138</sup> See Ivan Sammut, *The EU and Maltese Legal Orders: what kind of marriage between them?*, in Peter Xuereb (ed), *European Union membership: Five Years on and Looking to the Future* [European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta (2009)] pp97-111. This paper investigates 'how the Maltese and EU legal orders can integrate together given their differences and similarities' and concludes that 'Like any other 'marriage', the one between the Maltese legal order and the EU legal order has its successes and failures...Malta has so far managed to adapt its legal regime to take on the *acquis communautaire* as other Member States have done before it. ...it does not mean that there is no room for improvement.'

This Chapter has attempted to show how this integration process worked and whether it was fully successful. Certainly it was a success from a political perspective as the Government's main aim was to close the consumer protection Chapter to the Commission's satisfaction, step up the accession process and move closer to eventual membership. The Commission does not query or dictate where and how the transposition of the Directives is undertaken, provided the result is legally valid and complete. From a purely legal perspective, the local position was (and is) not entirely intellectually coherent or satisfactory. Three arguments support this proposition:

- (i) The Civil Code remains strangely unaffected despite the enactment in special legislation of such private law institutes as the elimination of unfair contract clauses, new legal guarantees in consumer sales agreements, and a different framework for establishing the civil responsibility in tort of the producer and distributor. The content of the Directives have simply been superimposed on the civil law rules without any real inter-connectedness between the two. The Civil Code provisions have remained intact in their original state so that two parallel sets of rules are now in operation. As a result, legal practitioners have to navigate very carefully to determine which rules apply to which transaction or circumstances and which set of rules offers the best remedy for consumers;
  
- (ii) No attempt was made to re-assess the status of the Trade Descriptions Act in the light of the transposition of the Misleading Advertising Directive;<sup>139</sup>
  
- (iii) The style and wording employed in transposing the Directives were generally too faithful to the text of the Directives and consequently often jarred with the traditional legal language and style of drafting legislation employed locally.<sup>140</sup> Insufficient attention was given to fully integrate the Directives in the substance of

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<sup>139</sup> Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17

<sup>140</sup> Colin Scott and J. Black, *Cranston's Consumers and the Law* (Developing countries have laws which fall within the consumer protection rubric.... Such legislation is more likely to succeed where it organically developed from the local legal system, rather than being transplanted from other systems 3rd edn, Butterworths 2000)

Maltese laws and legal culture. The Maltese texts tended to be particularly disappointing and poorly written.<sup>141</sup>

#### **14. World Consumers Day Conference 2001**

As the date of membership approached, Parliamentary Secretary Dr G. Hyzler addressed a National Conference held on the occasion of World Consumers Day 2001. In his speech, Dr Hyzler insisted that:

it is not our intention to enact these different consumer laws simply to be in line with the various EU consumer policy directives. Our primary goal...is to implement those measures which we genuinely believe can contribute towards a fair marketplace where the rights of consumers and honest traders are adequately safeguarded. We retain that the implementation of the various EU consumer policy directives offers a strong foundation on which to achieve this goal. Moreover in drafting these laws we have not limited our horizons to the European Union context.<sup>142</sup>

Dr Hyzler also promised that despite the progress made, there were 'more pinnacles to reach...we have reached a plateau from where other more challenging heights may be viewed...my wish is that the coming year will serve to improve upon that which has already been achieved.' The Parliamentary Secretary responsible for consumer protection had recently successfully piloted the necessary transpositions and harboured high hopes that interest and impetus in consumer law development would continue to flourish. As he was no longer responsible for the sector when

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<sup>141</sup> Invariably, drafting is undertaken in English and then translated into Maltese. Laws and regulations in Malta are published in both these official languages and unless stated otherwise, the Maltese text prevails in case of any inconsistency. (See Article 5 of the Constitution of Malta.) For obvious reasons, the Commission experts invariably work on the drafts drawn up in the English language.) Transposition drafting has been criticised by the writer in *Transposition Tables, Toil and Tears...Tales from the Accession* in Peter Xuereb, Editor, European Union membership: Five Years on and Looking to the Future,(European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta 2009) and address to the Chamber of Advocates in 2008: *A fresh look at the state of play of Consumer Protection in Malta: coherence, confusion or a bit of both?*

<sup>142</sup> Held on 14 March 2001, *The Maltese Consumer at par with European Counterparts*

membership was achieved in 2004, he bears no responsibility for the regulatory fatigue that followed.

## **15. Final considerations**

Much literature and academic analysis have been published on the Directives referred to in this Chapter and transposed into Maltese law by Act XXVI of 2000. Various papers, books and other studies produced overseas as well as in Malta are listed in detail in the Bibliography. This Chapter has analysed where and how, for the first time, Community consumer Directives were transposed in Maltese law. Indeed, Act XXVI of 2000 introduced Community consumer Directives to the Maltese legal system. With very few exceptions, the method and the style of the transpositions were very faithful to the respective Directives. This approach served to assure the Commission enlargement experts and accelerated the completion of the accession procedures. This largely verbatim approach frequently adopted was unfortunate but probably inevitable in the circumstances of haste that conditioned the transposition exercise. In some rules, valiant attempts were made to adopt higher protection to consumers than was allowable by the minimum content of the Directives. Three significant instances were the application of the unfair terms rules to all consumer contracts and the black list of terms deemed unfair, and the extension of the sale guarantee rules to second hand goods.

Chapter 4 has examined how the 1994 Act was constructed on the over-arching belief that the introduction of new consumer rights would prove ineffective unless adequately supported and enforced by efficient publicly-funded administrative oversight bodies and redress mechanisms. The 1994 Act had successfully accomplished this objective and the necessary structures were established. The 1993 White Paper (see Chapter 3) had predicted that this measure would be followed by the enactment of substantive measures shortly afterwards, including new legislation on unfair contractual terms. These promises did not materialise as the momentum for additional reform stalled, with the new Department for Consumer



Affairs established in 1992, concentrating its resources on resolving hundreds of complaints received from the public. Operating largely at a micro level, it failed to promote quality policy proposals or to stimulate new substantial consumer law reforms.<sup>143</sup> This was the local context in which Act XXVI was born. The impetus for new reforms in Maltese consumer law came from the accession requirements and undoubtedly the primary goal of the 2000 amendments was to implement an impressive variety of transposition measures. Happily, the instrument presented a useful and timely opportunity to resurrect the development of (purely) national consumer protection law. Many of these non-Community related amendments in the Act may be traced to the 1991 White Paper and to the Labour Government's aborted 1998 legislation. In 2000, they finally became law. The 2000 legislative reforms mark the point where national consumer law and policy reforms had to come to terms with the pressing political priority to focus on completing the transposition of the Community's consumer Directives. In the circumstances in which they had been compiled, the results may be broadly considered sufficiently effective and beneficial to consumers.<sup>144</sup> Consumers gained many new rights through the 2000 amendments, while the Maltese Government and the Commission enlargement and consumer law experts could proceed to tick off some boxes on the accession checklist of pending transpositions.

The amendments introduced by Act XXVI complemented the rules contained in the Civil Code, and the new obligations imposed on traders and the new rights given to consumers were not inconsiderable. The special legislation sought to redress the imbalance existing between traders and consumers, thereby effectively side-stepping and leaving untouched the Civil Code with its underlying notions of freedom of contract, the sanctity of contracts and the equality of the contracting parties. Despite these difficulties in its relation with the Civil Code, consumer law has gained

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<sup>143</sup> To a large degree, the Department proved the Molony Committee right when the latter strongly recommended that the new proposed Consumer Council should focus on research and policy making and should not find its resources and attention diverted and distracted by a daily intrusion of consumer complaints.

<sup>144</sup> Echoing the Commission's own ambitions in this regard at about the same time: 'The next three years will see consumer policy coming of age as consumer interests, together with other issues that directly affect ordinary citizens, become increasingly important.' - opening words of the Commission's Consumer Action Plan 1999-2001. See also Geraint Howells and Thomas Wilhelmsson, 'EC Consumer Law: has it come of age?' (2003) 28(3) *European Law Review* pp370-388.

its place as an integral part of the Maltese legal system, worthy of academic attention in its own right. In 2000, Maltese consumer law was transformed into a more substantial and identifiable body of law, set on its long hard road to maturity. In the process, the stature of the Consumer Affairs Act as the most important source of consumer protection rules and consumer rights in Malta was further enhanced and for the foreseeable future its central and pivotal role seems secure.

## CHAPTER 6

# THE TRANSPOSITION OF THE PRODUCT SAFETY DIRECTIVE: FINALLY A LAW TO ENSURE THE SAFETY OF CONSUMER PRODUCTS

'The first consideration for the protection of consumers is that they should not risk health or safety by use of a product or service.'

Vivienne Kendall, *EC Consumer Law* (John Wiley & Sons, 1994) p37

'The development of a harmonised Community system of product safety regulation 'on paper' is far less problematic than harmonisation in other sectors. It is hardly controversial to assert that there should be a requirement throughout the Community that unsafe products should not be placed on the market.'

Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing, 2005) p118

# 1. Introduction

## (a) Scope and objective

The Product Safety Act of 2001<sup>1</sup> transposed Council Directive 92/59/EEC of 29 June 1992 on general product safety which was replaced by Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on the same subject.<sup>2</sup> Product safety is the subject of one of the more important Community consumer protection measures. The Directive was designed to oblige producers generally to place only safe goods on the market and to require Member States to take preventive and enforcement action to ensure this happens. Adopted in 1992, the Directive had to be implemented by the Member States by 29 June 1992. This measure formed an important part both of the Commission's consumer policy and of its legal framework for the internal market.<sup>3</sup> The EU product safety *acquis*<sup>4</sup> sought to establish a common framework for ensuring the safety of products sold or offered for use by consumers also with a view to enabling the free movement of safe products throughout the Community. The Directive applied generally to all products, but by express provision excluded food items, antiques and several other designated products.

Product safety legislation arrived late in Malta.<sup>5</sup> This Chapter analyses the contexts in which the Community Directive on product safety was transposed into Maltese law and the relationship between the local and the Community measures. EU accession obligations ensured that Malta had to finally address product safety and to rectify a

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<sup>1</sup> Chapter 427 of the Laws of Malta, Act No. V of 2001

<sup>2</sup> For product safety legislation in the EU see generally Peter Cartwright, *The General Product Safety Regulations 2005: Implementing Directive 2001/95-EC in the EU* in *The Yearbook of Consumer Law 2007*, Ashgate (G. Howells, A. Nordhausen, D Parry and C. Twigg-Fleischer eds, 2007) pp309-326; Peter Cartwright, *Regulation of Product Safety* in G. Howells (ed), *The Law of Product Liability* (Butterworths Common Law Library, 2000) See also, S. Weatherill, *EU Consumer Law and Policy* (Elgar European Law 2005) Chapter 9, Product Safety Regulation; P. Cartwright, *Enforcement, risk and discretion: the case of dangerous consumer products* (2006) University of Nottingham Legal Studies, published on behalf of the Society of Legal Scholars, Volume 26 Issue 4, pp524-543

<sup>3</sup> In her book *EC Consumer Law* (1994), V. Kendall 1994 opens her analysis of EC substantive consumer law with an excellent Chapter on *Product Safety and Personal Safety*, whose opening words have already been quoted above (pp37-78)

<sup>4</sup> Then included as part of Chapter 23 for the accession and screening purposes

<sup>5</sup> The Product Safety Act (Act No. V of 2001) Chapter 427 of the Laws of Malta, was brought into effect on 1 March 2001 by Legal Notice 33 of 2001. It repealed and replaced the Quality Control (Export, Imports and Local Goods) Act, Chapter 225 of the Laws of Malta

disturbingly long-standing gap in local legislation.<sup>6</sup> Although the safety of products is one of the principal and perhaps most obvious concerns of consumers, for many years the Maltese authorities lacked the will, the leadership, the determination and perhaps also the legal and technical competence to introduce an effective legislative framework for ensuring the standard of safety of consumer products.<sup>7</sup> Promises to introduce legislation on the subject had been made in the 1991 White Paper, but they were not followed up. Eventually, the EU accession obligations forced Malta to introduce a comprehensive and effective framework, covering practically all aspects of the safety of products offered for sale to consumers, in compliance with the 1992 Directive. A similar situation had arisen with regard to product liability. Specific rules to determine aspects of the civil law responsibility of manufacturers and distributors for placing or retaining defective goods on the market were only introduced in Malta in 2000 through the transposition of the 1985 Community Directive on the subject.<sup>8</sup> The adoption of product safety and product liability legislation in Malta is emblematic of the potential beneficial effects of EU membership for consumers of new Member States like Malta.<sup>9</sup>

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<sup>6</sup> In his 1995 dissertation on the state of consumer protection legislation in Malta, (p13), T. Briguglio had already correctly observed that 'Unfortunately, there are some important spheres, such as unsafe products, where consumer protection is completely lacking'.

<sup>7</sup> The authorities appear to have failed to adequately conceptualize consumer protection and appeared too distracted and content creating complex systems for controlling prices as the highest priority action. One cannot exclude possible elements of regulatory capture by business interests

<sup>8</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. This transposition was included in the 2000 amendments to the Consumer Affairs Act

<sup>9</sup> For comparative purposes, see Roland Rowell, *Physical Safety: General Product Safety and Liability for Defective Services* in J Findlater (ed), *Consumer Policy – The New EC Trading Environment* (Irish Centre for European Law, Trinity College, Dublin 1991). This book contains a collection of conference papers given on various consumer issues placed within a European context by legal writers and senior public officials in Ireland. Ireland was then already a member of the EC. The timing of this book is particularly interesting as it was practically contemporaneous with the 1991 White Paper published in Malta in the same year. The book discusses and sets out three proposed Directives, being measures being proposed at EC level on General Product Safety, Liability for Defective Services and Unfair Contract terms. These Community initiatives were still under discussion in 1991 and the proposal for a Directive for Liability for Defective Services was eventually abandoned. The General Product Safety Directive became law in 1992 while the Unfair Contract Terms Directive became law in 1993

## **(b) Timeline and a bit of history and context**

The short history of product safety legislation in Malta is best seen from the following brief selective chronology of relevant legislation and administrative structures:

- (i) **1965** - The Malta Board of Standards Act which set up the Malta Board of Standards (Chapter 187);
- (ii) **1971** - The Quality Control (Exports, Imports and Local Goods) Act (Chapter 225);
- (iii) **1972** - The Food Drugs and Drinking Water Act which set up the Food Standards Board (Chapter 231);
- (iv) **1996** - The Malta Standardisation Authority which replaced the original Malta Board of Standards (Act XIX of 1996);
- (v) **2000** - The re-named Malta Standards Authority (MSA) is reformed and upgraded and assigned new important standard-setting, product safety and quality roles (Legal Notice 213 of 2000);
- (vi) **2001** - The Product Safety Act (Chapter 427, repealed the 1971 Act);
- (vii) **2011** - The MSA is absorbed by and becomes part of the new Malta Competition and Consumer Affairs Authority (Chapter 510).

The Malta Standardisation Authority was set up in 1996 on the foundations of what had formerly been the Malta Board of Standards. This Board had been originally established in 1965 by the Malta Board of Standards Act<sup>10</sup> which also set out a quality standard mark for local goods that local manufacturers could apply for. One of the functions assigned to the Board was to draw up and disseminate industry standards, but these were in effect largely of a voluntary nature. In 1971, the Quality Control (Exports, Imports and Local Goods) Act was enacted. This law empowered the Malta Board of Standards to issue minimum quality standards for imported, exported and locally produced goods. It also introduced labelling requirements and codes of practice on design, safety and quality control.<sup>11</sup> Nothing substantial or effective came out of these soft law measures. Enacted at a time when the notion of consumer protection was still largely novel and insufficiently articulated, their provisions and structures were weak, lacked teeth and resources. Product safety still depended to a large extent on the choices and the good will of producers and market operators. The idea of strong Government intervention in the market to properly monitor and to exclude dangerous products had not yet taken root.<sup>12</sup> Stringent price controls were still the more favoured consumer protection mechanism. For too many years, product safety was not on the political agenda as more attention was given to keeping the price of goods low and affordable through the regular issue of price orders, import quotas and licensing systems and other trade restrictions. Less attention was given to the quality and safety aspects of consumer products.<sup>13</sup>

The accession obligations providentially and radically transformed the political and legislative priorities. The first significant reforms arrived in 2001: firstly, the legal status and powers of the Malta Standards Authority were substantially

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<sup>10</sup> Chapter 187 of the Laws of Malta

<sup>11</sup> See generally *Sketches, 1990* under the *Chronology* section (unpublished) discussed in Chapter 3

<sup>12</sup> '...ordinary consumers are better protected by public law measures than by business self-regulation or the private law.' Ross Cranston, *Consumers and the Law*, (Wiedenfeld & Nicolson, Preface to the 1st edn, 1978)

<sup>13</sup> Considerable resources were devoted over the years to construct an extensive legal and administrative system to control practically all aspects of the pricing of goods offered for sale to consumers in Malta, and to establish importation and export restrictions. An examination of these price controls and their EU context is not included in this thesis solely for reasons of space. On the other hand, quality and safety of goods were at least treated as marginal concerns and given little attention and resources

strengthened;<sup>14</sup> and, secondly, a first product safety law was finally enacted. The newly reconstituted Authority was assigned more duties including responsibility for all aspects of standardisation, conformity assessments, accreditation, metrology and the issue of mandatory standards. The reform and strengthening of the legal status, functions and powers of the former Malta Board of Standards complemented the adoption of the Product Safety Act,<sup>15</sup> which indeed was largely piloted by the new Authority's own technical experts. The Authority handled the technical workings of product safety law and co-ordinated its activities with the Director for Consumer Affairs, the Director of Market Surveillance, the Commission and with fellow EU Member States particularly through the important Rapex mechanism.<sup>16</sup>

## 2. Product Safety in the White Papers of 1991 and 1993

The White Paper published in 1991 had contained a whole Chapter dedicated to precise proposals for new rules on product safety.<sup>17</sup> The White Paper observed that at the time 'there are few specific rules which deal with product safety under our present law.'<sup>18</sup> Indeed, the law offered unsatisfactory and outdated rules dealing mainly with food and medicines that had been borrowed from UK legislation many years previously.<sup>19</sup> In those very early days in Maltese consumer law history, the 1991 White Paper in summary proposed:

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<sup>14</sup> Malta Standards Authority Act, Chapter 419 of the Laws of Malta. For more general background on the Authority, see Francis Farrugia, *The Role of the Malta Standards Authority in the Economic Development of Malta*, in Peter G. Xuereb Editor, *Malta and the EU: Together in Change?* (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta, 2001, pp199-230)

<sup>15</sup> Which came into force on 1 March 2001

<sup>16</sup> See generally <[http://ec.europa.eu/consumers/safety/rapex/index\\_en.htm](http://ec.europa.eu/consumers/safety/rapex/index_en.htm)> accessed on 10 January 2014

<sup>17</sup> Department of Information, *Rights for the Consumer* (White Paper, 1991) Chapter XI, Product Safety, pp26-7

<sup>18</sup> Ibid. p26 paragraph 111

<sup>19</sup> Ibid. Chapter I, p26, paragraph 112: '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.'



- (i) that the law would specifically prohibit traders from offering for sale products that can endanger the safety or health of the user;
- (ii) that strict criminal liability would attach to traders who commit the offence of offering such products for sale;
- (iii) that the new consumer agency (proposed in the White Paper) would be given powers to access a trader's premises and records; to monitor and investigate the safety of products; to prohibit the sale of such products; to publish statements and warnings about them; to order their confiscation or destruction; to order the trader to recall the offending products; and to impose product labelling and marking requirements.<sup>20</sup>

The Community's own General Product Safety Directive was only adopted a year later, in June 1992.<sup>21</sup> In 1992, the new Government Department set up exclusively to deal with consumer affairs was not given the legal or administrative framework to combat unsafe products.<sup>22</sup> The 1993 White Paper *Fair Trading: the next step forward*.... made no reference to product safety, an omission that suggests that, in barely two years, consumer safety had already been pushed to the margins. The Consumer Affairs Act of 1994 did not give the new department any specific responsibilities, resources or powers in the field of product safety. Although many proposals described in the White Paper were eventually included in the Consumer Affairs Act of 1994, the promised rules on product safety never surfaced. No new measures or structures were introduced in the field of product safety and official interest in the subject eventually waned. Years later, the Maltese Government was forced to re-address the issue, and this time take concrete and verifiable legislative

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<sup>20</sup> The White Paper also proposed to extend the same rules to the provision of unsafe services

<sup>21</sup> In dealing with proposals for new product liability rules, the White Paper did acknowledge inspiration from the EC measure on the subject in place since 1985. The UK Molony Report on Consumer Protection 1962 did not tackle product safety issues, restricting its interest largely to the correct advertising and labelling of products

<sup>22</sup> The Department for Consumer Affairs remained in place until it was replaced by the new Malta Competition and Consumer Authority in 2011

and administrative steps to come in line with the Community's consumer *acquis* template.<sup>23</sup>

### **3. Commission Report of 1993**

The European Commission's first Opinion on Malta's application to join the European Union was issued in 1993. It was a highly awaited *Avis*. In the section dealing with the state of consumer law, the Opinion expressly highlighted the lack of product safety legislation in Malta: 'Product Safety – Maltese legislation will need to be re-cast to bring it into line with Community legislation.'<sup>24</sup> This was clearly too vital a measure not to be specifically referred to by the Commission's experts. The Opinion considered consumer safety a priority issue and as a pillar of EU consumer policy. A signal was out to the Maltese authorities to take product safety legislation more seriously.<sup>25</sup> As the accession negotiations progressed, subsequent Commission Reports kept on highlighting the lack of product safety legislation and oversight administrative structures in Malta until the legislation was finally passed in 2001.

### **4. 1999 – First reading of a First Bill to transpose the Directive**

The introduction of the Product Safety Act in Malta sheds light on how the challenge of the accession transposition phenomenon may play out in practice. In 1999, at the start of the accession transposition process, the Maltese authorities decided that the first transposition measure under Chapter 23 would be a new Act that would for the

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<sup>23</sup> See more on this point in David Fabri, *False Starts and Broken Promises: Some Mishaps in the Development of Maltese Consumer Law* [2006] Law and Practice, Malta Chamber of Advocates, Part 6, 'Product Safety Legislation', p24

<sup>24</sup> Commission Opinion on Malta's Application for Membership Application, 1993, Part Two, p24, under 'Consumer Policy'

<sup>25</sup> None of the Commission's Reports on Malta made any reference to the two White Papers published by the Maltese Government

first time regulate consumer product safety. The Commission was informed accordingly and the transposition was scheduled for adoption by the first quarter of 2000.<sup>26</sup> A first reading was tabled before Parliament early in 1999 and a Bill was drawn up seemingly destined for trouble-free passage through Parliament. However, circumstances intervened which stalled this optimistic commitment.

The consumer protection Chapter was considered by the Maltese authorities to be relatively uncontroversial and plain-sailing compared to more difficult Chapters such as those dealing with competition, free movement of capital and the environment. The successful transposition of the General Product Safety Directive, a major pillar of the consumer *acquis*, at such an early stage in the accession negotiations, was intended to impress the Commission and to demonstrate the Maltese Government's resolve and ability to fulfill the stiff accession requirements without delay. A copy of the draft law on product safety was presented to the Commission experts for their review, in good time, prior to the commencement of the Screening meetings scheduled for October 1999.<sup>27</sup> Unhappily, the submitted proposed transposition measure failed to satisfy the Commission experts.<sup>28</sup> During the Screening session, the Maltese representatives were officially informed that the draft bill fell short of the Commission's expectations. The official minutes taken by the Maltese side duly record this turn of events:

The Commission was not satisfied with the draft General Product Quality and Safety Act, in that it lacked clarity and order...The draft did not transpose the scope of the Directive on General Product Safety. Maltese law should state clearly the purposes and the aim of the Directive that only safe products should be placed on the marketplace. The concept of prevention must prevail throughout the legislation.<sup>29</sup>

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<sup>26</sup> See NPAA, September 2000, pp 29 and 181

<sup>27</sup> Writer's own experience. These formal sessions aimed to identify gaps in Maltese legislation, and to plan and monitor the successful transposition of the *acquis*

<sup>28</sup> In particular, Ms Yvonne Stein, National Expert, Legal Matters, DG XXIV, EU Commission, who led the substantial part of Screening Session on behalf of the Commission

<sup>29</sup> Minutes of the Screening of Chapter XXIII, Consumer and Health Protection, 7-8 October 1999, pp7-8. (See Appendix 4). The Maltese side was encouraged to completely re-draw the proposed law as the draft submitted was deemed beyond repair, a result probably caused by undue haste, pressure and lack of drafting experience. This was practically the only seriously negative comment received in the course of the two-day Screening Session in relation to draft consumer laws that the Maltese authorities had submitted beforehand to the Commission experts. As recorded in the same minutes, drafts of legislation transposing the unfair contract terms, guarantees in sales of goods and product

The Commission was right. The Maltese authorities and the accession project suffered a disappointing and embarrassing setback. The law had to be re-written; it was back to the drawing board.

## **5. A new Product Safety Act 2001**

### **(a) Original Bill abandoned and replaced**

Unusually, therefore, notwithstanding its first reading before Parliament, the original draft Bill, earmarked for adoption late in 1999, was withdrawn.<sup>30</sup> It was replaced two years later by a freshly re-designed and better crafted drafting effort. This later version satisfied the Commission experts and became law as an exemplary and more coherent transposition of the Directive into Maltese legislation. It has survived, practically intact, till this day as the principal national legislation on the safety of consumer goods.<sup>31</sup> The Product Safety Act was adopted by Parliament in 2001 and was primarily intended to implement the EU Council Directive 92/59/EEC of 29 June 1992, commonly referred to as the General Product Safety Directive. An examination of the 2001 Act shows that greater care was taken to ensure that its provisions would dovetail effectively with the framework of existing Maltese law, particularly the 1994 Act. The new Act focused on the neutralisation of unsafe products and the introduction of stronger ad hoc preventative and enforcement measures. It stood out as an illustration of how a Directive could be effectively and coherently transposed into national legislation.

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liability Directives were instead favourably received. This episode is recorded and elaborated in the writer's *Transposition Tables, Toils and Tears... True Tales from the Transposition*, Peter Xuereb (ed), European Union Membership: Five Years on and Looking to the Future, (EDRC publications 2009)

<sup>30</sup> It had not been officially published. Bills presented before Parliament are only published in the Malta Government Gazette prior to when the second reading is scheduled to commence. The first reading is only a notification of an intention to present a Bill on a particular subject at a future sitting

<sup>31</sup> 'For the well-functioning of the Internal Market correct transposition is as important as transposition on time.' Commission, 'Internal Market Scoreboard no 18' (Commission Staff Working Paper) SEC(2009)134 final

## **(b) Salient provisions of the Act**

The Product Safety Act defined a safe product, set out a framework for assessing and safeguarding safety and required, more specifically than ever before, that products supplied to consumers had to be safe, irrespective of whether a consideration was paid or not. It also assigned important powers to the Director of Consumer Affairs. These were quite significant, and included:

- (i) power to issue public statements regarding unsafe products;
- (ii) power to take samples of offending goods;
- (iii) power to conduct criminal proceedings;
- (iv) power to accept written undertakings in lieu of prosecuting;
- (v) power to withdraw unsafe products from the market.

The 2001 Act established new legal parameters of what safety standards the public are entitled to expect when they purchase goods. The Act assigned to the Director of Consumer Affairs the power (subject to a prior Magistrate's warrant) to enter and search premises and to seize goods. The Product Safety Act also laid down a method how the safety of a product had to be assessed. Under Article 9, a product was to be considered safe when it met any specific safety rule issued in its regard.<sup>32</sup>

This Act was a public law measure and did not give rise to any new civil or private law rights. It was primarily concerned with setting up and strengthening administrative mechanisms and with creating new criminal offences in line with the Directive requirements. The civil liability aspects remained largely catered for more

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<sup>32</sup> Where this was not available, it would have had to satisfy 'voluntary national standards giving effect to a European standard' or 'any relevant European technical specifications' or other national standard

directly by the rules on product liability and on guarantees in sale of goods recently transposed within the Consumer Affairs Act in 2000.<sup>33</sup>

### **(c) Cohesion between the 2001 and the 1994 laws**

The delay in the enactment of the Product Safety Act allowed the drafters to borrow and integrate techniques and mechanisms recently introduced in the 2000 amendments to the Consumer Affairs Act 1994. Had the Product Safety Act been adopted in 1999 as originally planned, it would likely have been a different and less cohesive piece of legislation. As re-drafted, the 2001 Act co-existed more efficiently with the content and structures of the improved 1994 Act.<sup>34</sup> The 2001 Act made various specific cross references to the role and powers of the Director of Consumer Affairs under the Act.<sup>35</sup> Article 11 specifically applied Articles 97, 98 and 99 of the Consumer Affairs Act. The 2001 Act also considerably extended and strengthened the role and powers of the Director of Consumer Affairs now responsible also for product safety.<sup>36</sup> Part III set out the new duties and powers and the central role assigned to the Director: 'The Director shall be responsible for the administration of this Part of the Act...'<sup>37</sup> and '...enforcement of the provisions of this Act or any regulations made thereunder, shall vest in the Director.'<sup>38</sup> This Part also dealt with the relevant enforcement measures, including the new powers of seizure and the right to issue public statements. The Act also created the post of Director of Market Surveillance whose functions were set out in Article 27. The office-holder was required to establish risk-based sector-specific surveillance programmes. Although operationally independent, he was expected to operate in close collaboration and in conjunction with the Director of Consumer Affairs. The Director of Marketing Surveillance was to play a leading auditing role in the new surveillance framework

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<sup>33</sup> Chapter 5

<sup>34</sup> The Product Safety Act and the Consumer Affairs Act 'should be viewed as complementary to each other': Roberta Lepre, *Product Safety and Product Liability in the light of recent Maltese Legislative Developments* (LL.D thesis, University of Malta 2003) especially Chapters 1 and 4

<sup>35</sup> Product Safety Act, Chapter 427 of the Laws of Malta, Parts III *Product Control and Enforcement* and Part IV *Proceedings*

<sup>36</sup> A post that had originally been launched in 2002 when the new Department of Consumer Affairs was *de facto* set up and was then later granted *de jure* recognition in Part II of the Consumer Affairs Act 1994

<sup>37</sup> Chapter 427 of the Laws of Malta, Article 15

<sup>38</sup> *Ibid.* Article 16(1)

being established.<sup>39</sup> The Act also introduced new rules for the issue of public statements and warnings by the Director of Consumer Affairs acting in conjunction with the Director of Market Surveillance.<sup>40</sup> Article 28 which dealt with 'Issue of public statements' built on and re-formulated the rule on 'Public warning statements' in Article 8 of the 1994 Act. These provisions assigned to the authorities the power to issue public statements on matters of concern to consumers and exempted such statements from any possible criminal or civil liability.

One other noteworthy provision was the new explicit statement of the consumer's legitimate expectations with regard to the safety of products.<sup>41</sup> This statement borrowed the pattern adopted years earlier in the Consumer Affairs Act.<sup>42</sup> The right set out in Article 3 is effectively an extension of the Declaration of Rights recently added to the 1994 Act,<sup>43</sup> which had declared the consumer's right not to be harmed by defective products in these terms: 'Consumers shall be entitled... to be protected against goods, production processes and services which are harmful to health.'<sup>44</sup>

The Product Safety Act was a new law and was not constructed on any previous legislation. Happily, its provisions converged successfully with the recent reforms to the Consumer Affairs Act and the Malta Standards Authority Act. This interaction was carefully managed and it facilitated (a) the local implementation of the Community's harmonised and intricate product safety framework, and (b) coordination with and enforcement by other relevant administrative bodies and institutions.<sup>45</sup>

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<sup>39</sup> The principal functions assigned to this post were modelled on the EU proposal for a new Directive

<sup>40</sup> Rather than with the Consumer Affairs Council or its Chairman, as is now the position after the 2000 amendments to the 1994 Act

<sup>41</sup> The specific statement of a consumer's right to be protected from unsafe products was not a Directive requirement

<sup>42</sup> As new Part V of the Act: see Act XXVI of 2000, Article 15. This technique was also used in the Price Indications Regulations, 2002

<sup>43</sup> By virtue of Act XXVI of 2000

<sup>44</sup> See Chapter 378 of the Laws of Malta, Article 43(2)(b). The Act also borrowed the definition of 'consumer' from the 1994 Act

<sup>45</sup> See Josef Bonnici, *Dissemination of Standards – an ongoing process* in The Business Times, Malta, 27 June - 3 July 2001, p6. The Act specifically provided for collaboration and cooperation between the Authority and the Department for Consumer Affairs

## 6. The Parliamentary debate, the NPAA's and other useful sources

### (a) The Parliamentary debate

The Parliamentary debate on the Product Safety Act is extremely revealing about the growing interplay between domestic and European law in the consumer protection field and make interesting reading.<sup>46</sup> The debate was characterised by the sharp divide between the two main political parties on the issue of membership. The Euro-sceptical Labour Party Opposition criticised Government for slavishly following EC law and remedies rather than seeking inspiration from robust legislative models, specifically mentioning the case of Norway and the United States. The Opposition also accused Government of introducing an important legislative measure in haste simply to meet its accession and NPAA deadlines and to please the European Commission.<sup>47</sup> It alleged that the necessary administrative preparations to ensure the effective practical implementation of the proposed legislation were not in place. During the Second Reading, Opposition spokesman, Mr Leo Brincat<sup>48</sup> clarified that his objection to membership of the Community did not imply that he thought whatever the Community did was wrong. He singled out consumer affairs as an area where the Community had made great progress, adding however that Malta could adopt similar measures even without becoming a member.

During the same sitting, and reacting to the Opposition members' criticism, Dr George Hyzler, then Parliamentary Secretary responsible for consumer protection, stressed that he saw no wrong in copying the Directive on product safety in the proposed Bill, as even this Directive sought to provide a high level of consumer protection. He rebutted the suggestion that other non-Community models should have been considered instead:

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<sup>46</sup> See generally Second Reading, held on 23 October 2000, Parliamentary sitting number 403, pp 85-106

<sup>47</sup> See National Programme for the Adoption of the *Acquis*, 1 September 2000, pp29-30 and pp181 - 182

<sup>48</sup> Parliamentary sitting number 403, 23 October 2000, pp 96-98



My reply is very simple. We have looked at the laws prevailing in Europe and we are now implementing Directive 92/59 of the European Community, which is a minimum Directive and, in fact, we have even taken the opportunity to insert additional provisions.<sup>49</sup>

He explained that he was not ashamed to admit that the Bill was based on the Community Directive and voiced his satisfaction that the Community was pushing Malta to adopt ever higher standards of consumer protection. He expressed the hope that it would push Malta even harder to achieve higher levels of consumer protection also in other areas. He noted that despite having previously been in power for so many years,<sup>50</sup> the Opposition had failed to produce a similar law. The Opposition voted against particular articles during the Committee Stage,<sup>51</sup> but the Bill itself was eventually passed and approved through all the Parliamentary stages without any vote against.

#### **(b) The National Programmes for the Adoption of the Acquis – 2000, 2001 and 2002**

In the three NPAA's published by Government, product safety was invariably treated both as a consumer protection measure and as a free movement of goods issue. The first NPAA<sup>52</sup> carried a fairly long discussion on the complex Community product safety and standards framework which Malta was then striving to implement in stages. It revealed legislative activity in over-drive:

Continue working on the amended version of the Malta Standards Authority Act (Cap.187); the General Product Safety Act, repealing the Quality Control (Exports, Imports and Local Goods) Act (Cap.225), and the Metrology Act, repealing the Weights and Measures Ordinance (Cap.39), and the Food Act.<sup>53</sup>

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<sup>49</sup> Dr George Hyzler speaking in Parliament during sitting number 403, 23 October 2000, p101

<sup>50</sup> Between 1971 and 1987

<sup>51</sup> Parliamentary sitting number 59, 9 January 2001 and Parliamentary sitting number 6, 15 January 2001

<sup>52</sup> Ministry of Foreign Affairs, National Programme for the Adoption of the *Acquis*, September 2000

<sup>53</sup> *Ibid.* See especially p 29 in the free movement of goods section under the heading *Short term priorities (2000)*

In the Consumer and Health Protection section,<sup>54</sup> the same NPAA listed the enactment of a new Product Safety Act as a 'short term priority'<sup>55</sup> and refers to on-going efforts to establish a Market Surveillance Directorate. Later, the 2001 NPAA<sup>56</sup> recorded the enactment of the Product Safety Act and briefly described its scope and objectives and of the recent amendments to the Malta Standards Authority Act and setting up of the Market Surveillance Directorate.<sup>57</sup> The 2002 NPAA<sup>58</sup> confirmed Malta's achievements in the area of transposition and ancillary new legislation during the previous two years.

### **(c) Other Published Material<sup>59</sup>**

- (i) A few weeks after the 2001 Act was passed, Dr Josef Bonnici, the then Minister for Economic Services, who had piloted the Bill before Parliament,<sup>60</sup> revealed interesting background details in an article headed 'Dissemination of Standards – an on-going process' :

The Malta Standards Authority has been instrumental in helping....introduce the concept of Product Safety as defined within the European Union. Each product placed on the market must be safe, when used for its intended purpose. The Product Safety Act came into force on 1<sup>st</sup> March 2001, repealing the Quality Control (Exports, Imports, and Local Goods) Act of 1971. It implements the EU Directive 92/59/EEC of 29 June 1992, popularly referred to as the General Product Safety Directive. This measure forms part of the EU *Acquis* Chapter 23 that deals with Consumer Protection and seeks to establish a common framework for ensuring the safety of products sold or offered for use by consumers.<sup>61</sup>

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<sup>54</sup> (n 52) pp 181 -182

<sup>55</sup> Targeted for enactment during the first half of 2000, which deadline was amply missed

<sup>56</sup> Ministry of Foreign Affairs, National Programme for the Adoption of the *Acquis*, January 2001

<sup>57</sup> Ibid. pp29 - 37: roughly the same statements are repeated in the consumer protection section at 234-236 which however also highlight the respective roles of the consumer affairs department and of the Malta Standards Authority in the enforcement of the new product safety legislation and market monitoring.

<sup>58</sup> Ministry of Foreign Affairs, 'Malta: National Programme for the Adoption of the *Acquis*' January 2002

<sup>59</sup> As local publications and material on the subjects under consideration are scarce, these revelations by two insiders merit being quoted extensively.

<sup>60</sup> Together with Mr Edwin Vassallo, his Parliamentary Secretary

<sup>61</sup> Josef Bonnici, *Dissemination of Standards – an on-going process* *The Business Times* (27 June – 3 July 2001, p6)

Dr Bonnici also took the occasion to explain that:

The cross-reference between the Product Safety Act and the Malta Standards Authority Act, and in conjunction with the Consumer Affairs Act, The Accreditation Legal Notice, the Metrology (draft) Act and the Food Safety (draft) Act, ensures consistency and coherence...<sup>62</sup>

- (ii) The European Commission's 2002 Regular Report on Malta's Progress towards Accession was published in October of that year.<sup>63</sup> On the subject under consideration, and reflecting on the undoubted progress achieved in the meantime, the Commission concluded on a positive note far-removed from the tentative tone of its first report of 1993:

Since the 1999 update of the Opinion, Malta has made steady and important progress in setting up an appropriate framework for the New and Global Approach and food safety directives. The process of bringing Malta's structures in relation to standardisation, accreditation and market surveillance into line with the *acquis* has developed satisfactorily. Malta is at an advanced stage in terms of transposition of the *acquis* and administrative capacity in the field of free movement of goods.

- (iii) Even more revealing was a paper, 'Product Safety: the Maltese perspective', presented at a seminar held on 17 February 2003 by Mr Anthony Camilleri, at the time Head of the Consumer and Industrial Goods Directorate at the Malta Standards Authority and also one of the co-drafters of the 2001 Act.<sup>64</sup> Mr Camilleri described the Act as 'a cornerstone of consumer protection legislation' which served as a safety-net ensuring that no product could be placed on the market without satisfying the minimum safety requirement introduced by the Act. He stressed the complementarity achieved between this Act and the 1994 Consumer Affairs Act, stressing two principles on which the law had been based, namely the consumer's right to purchase only safe

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<sup>62</sup> See *MSA drafting legislation*, article in The Malta Independent (19 June 2000) which reported that 'At present, the Malta Standardisation Authority is drafting legislation on the subjects listed below: Primary legislation...(omissis)... Standardisation Authority Act (Cap. 187); General Product Safety Act; Metrology Act; Accreditation Act.' The Authority was calling on interested parties to make their suggestions thereon. It was anticipated that the 'relevant draft legislation will be ready by 1 September' of that year.

<sup>63</sup> Commission, 'Towards the Enlarged Union, Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries' COM (2002) 700 final 41

<sup>64</sup> Copy in writer's possession

products and his right to receive adequate information. The writer explained that the Maltese authorities had been compelled to introduce many institutional and structural changes to match the complex and sophisticated system of assessments and controls put in place by the Commission and other Member States. Apart from the Act itself, other important auxiliary measures on metrology, accreditation, CE marking and conformity assessments were implemented. These measures promoted higher standards of safety and quality of goods available on the market, while safeguarding the objectives and the principle of free movement of goods within the Community.<sup>65</sup>

The writer argued that the Product Safety Act could not be fully understood or appreciated in isolation from these complementary legislative and administrative measures. The Act was certainly the most visible part of an intricate and complex structure which safeguarded consumer safety and the free movement of goods. The 2001 Act also had to be viewed in conjunction with the two other safety-oriented laws, the Food Safety Act and the Medicines Act passed in 2002 and 2003 respectively. Ministerial regulations issued in terms of the Act would gradually regulate more detailed aspects of safety and quality of consumer products. The significance of Mr Camilleri's paper lay in its content, in its timing and in the important post that he then occupied. His constant concern was to place the new Act within the broader context of the Community's application of the free movement of goods principle. Coming so soon on the heels of the 2001 Act, and published just before membership date,<sup>66</sup> his concluding comments, as a co-drafter of the Act and as a principal 'insider' within the Authority, deserved attention:

Now that this legislative framework for Malta's proper (and active) participation in the European Single Market is complete, the MSA<sup>67</sup> will

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<sup>65</sup> In brief terms, conformity assessment means the ability to demonstrate that a product (or even a service) being supplied actually meets the requirements specified or claimed). It may also apply to activities such as testing, inspection and certification. 'Accreditation' is a specialised form of conformity assessment as it applies to the conformity assessment bodies and their competence to carry out specific conformity assessment tasks) (MSA EN ISO/ IEC 17000:2004.) The assistance given by Mr Anthony Camilleri, later Chief Executive of the Malta Standards Authority is acknowledged.

<sup>66</sup> Still a hypothetical event at that stage

<sup>67</sup> The Malta Standards Authority

continue and intensify its efforts during 2003 so as to stimulate, and oversee that there is, an ongoing process of improvement, which involves proper enforcement of the rules, making sure regulations are easy to understand and apply, and strengthening Malta's Single Market participation in all sectors. From the consumer perspective, over the past couple of years, Maltese consumer legislation and the associated administrative structures have been radically transformed and brought in line with current practices and the expectations and demands of consumers. The Product Safety Act is one example of this transformation, but certainly one which, from my everyday work experience, is proving to be of immense benefit, not just to consumers but also, through the beneficial effect on consumer confidence and competition, to business operators as they strive to adapt to a fast changing market.

## **7. Important post-accession implementing regulations**

After 2001, various regulations were issued to complete the product safety framework and bring it fully in line with the wide-ranging Community requirements. Further adjustments were becoming necessary as the country geared up for imminent accession. Regulations helped fill several transposition gaps left by the Product Safety Act.<sup>68</sup> This part shall only briefly deal with two important sets of regulations.

### **(a) The Further Provisions for Product Withdrawal and Recall Regulations, 2004<sup>69</sup>**

The transposition effected by the 2001 Act was arguably skilful and convenient, but by no means perfect or complete. As originally drafted, the Product Safety Act did not make an express reference to the Rapex system. Admittedly, as a candidate country Malta could only enter and participate in the system upon membership, which was still three years away. Under the prevailing drafting restrictions, the Act

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<sup>68</sup> The Product Safety Act regulations today cover a multitude and variety of products. They include lifts: see The Regularisation of non-CE Marked Lifts Regulations, 2010, Legal Notice 346 of 2010 These have made additions to the rules introduced by The Lifts Regulations 2002, Legal Notice 370 of 2002, and by The Inspection of Lifts Regulations, 2007, Legal Notice 231 of 2007

<sup>69</sup> Product Safety Act, Legal Notice 323 of 2004

could not specifically refer to Rapex which was a Community mechanism; it only referred to it obliquely and indirectly. This deficiency was eventually resolved by way of subsidiary regulations which referred to it by its proper name. Legal Notice 323 of 2004 resolved the former drafting restrictions and helped to complete the legal framework and the transposition of other related pending Directives. This set of rules was brought into effect a mere month after date of membership.<sup>70</sup>

Product safety remains a pillar of EC consumer and internal market law, and the various Directives and Regulations and regular reports confirm the Commission's constant concern and vigilance in this area. The Rapex Annual Report for 2009<sup>71</sup> highlighted the striking increase in the number of reports on unsafe goods being reported by Member States through the EU's exchange of alerts system since its inception in 2004. This was evidence of a rise in the number of dangerous products being detected.<sup>72</sup>

## **(b) The Product Contact Point (Designation) Regulations**

As the successor institution to the Malta Board of Standards, the Malta Standards Authority's leading role in the drafting and enforcement of product safety legislation

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<sup>70</sup> Regulation 3 now expressly defined Rapex because the primary legislation while making an indirect reference to it was not allowed to be more specific at the time it was enacted. The regulations also made direct reference to the General Product Safety Directive of 2001, which could not be mentioned in the law which had transposed it. The new post-accession regulations were now replete with references to EU-related terms, including: the 'Community', the 'Commission', 'Member States', 'Regulation (EEC) No 793/ 93/(3)' - words and concepts that had been taboo in local legislation prior to the accession referendum. This made the drafting work much simpler.

<sup>71</sup> Directorate-General for Health & Consumers, 'Keeping European Consumers Safe, 2009 Annual Report on the operation of the Rapid Alert System for non-food products' (Publications Office of the European Union, 2010)

<sup>72</sup> Commission, 'Annual RAPEX Report 2008' IP/09/594: Consumer Commissioner Meglena Kuneva said: 'This report sends a very clear message that there is no room for complacency when it comes to safety. The biggest challenge for 2009 is to make sure that product safety is not set aside during this period of economic crisis, that business continues to respect their duties toward consumers and that Member States allocate sufficient resources to enforcement. Safety is not a luxury. This report sets out clearly the significant challenges we face and sends a clear signal that there is no place for cost cutting or cutting corners when it comes to safety. On the contrary, in times of economic crisis when price becomes a very prominent factor in consumer spending, we need to step up our efforts and keep our vigilance especially high...'

See The National Market Surveillance Programme for Malta 2010 (September 2010) <<http://msa.org.mt/marketsurveillance/national%20market%20surveillance%20programme/2010%20-%20NMSP.pdf>> accessed on 10 January 2014. In Malta, the Market Surveillance Directorate is the contact point for Rapex.

cannot be doubted.<sup>73</sup> Authority experts co-ordinated and participated in the drawing up of the Product Safety Act of 2001 and of the various regulations spawned by the Act on specific areas like lifts,<sup>74</sup> toys,<sup>75</sup> and cosmetics.<sup>76</sup> Legal Notice 191 of 2009, published on the 16 June 2009, further emphasized the central role played by the Malta Standards Authority in putting in place and managing the administrative and regulatory framework for product safety in Maltese law.

## 8. Complementary legislation: Medicine and Food Safety

The Community consumer safety framework is complex, sophisticated and extensive. As a direct result of the EU accession, Malta not only adopted the general consumer safety rules through the Product Safety Act 2001, but also two major complementary legislation, the Food Safety Act 2002 and the Medicines Act 2003.<sup>77</sup> In three short years prior to membership, no less than three different laws dealing with the three main areas of consumer safety concern were adopted – making up for decades of general indifference and lack of action. Together the three laws created an extensive net of preventative safeguards and administrative structures and remedies intended to minimise the risk that pharmaceuticals, food and other consumer products will prove unsafe and harm consumers' health and property.<sup>78</sup> From a drafting perspective, the Food Safety Act and the Medicines Act

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<sup>73</sup> See generally <<http://www.msa.org.mt/>> accessed on 10 August 2011. It now forms part of the recently constituted Malta Competition and Consumer Authority.

<sup>74</sup> The Lifts Directive (Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts [1995] OJ L213/1) implemented by The Lifts Regulations, 2002 (Legal Notice 370 of 2002)

<sup>75</sup> The Toys Directive (Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys [1988] OJ L187/1) amended by Directive 93/68/EEC implemented by the Safety of Toys Regulations, Legal Notice 373 of 2002. Council Directive 88/378/EEC was amended by Council Directive 93/68/EEC of 22 July 1993.

<sup>76</sup> Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products ('Cosmetics Directive') [1976] OJ L262/169. The Cosmetics Directive was transposed by the Cosmetics Products Regulations, Legal Notice 424 of 2004 (as amended).

<sup>77</sup> See generally Joshua Grech, *An Analysis of the Product Safety Act, Food Safety Act and Medicines Act and their inter-play as a tool in Consumer Protection* (LL.D thesis, University of Malta 2008) and specific Directives and materials cited therein.

<sup>78</sup> This legal framework too needs to be seen in the context of free movement of goods as, broadly stated, products which meet the EU safety standard are assured liberty of cross border trade. Other

largely reproduced the framework and approach introduced successfully in the Product Safety Act. As already indicated earlier, due to the drafting restrictions then current prior to accession, these texts made no references to the Directives or to other Community concepts and mechanisms.

### **(a) Medicines – a brief note on the legal framework<sup>79</sup>**

The Medicines Act,<sup>80</sup> was brought into effect between November and December 2003.<sup>81</sup> The original text made no references to EU related matters although this was later rectified when the 2003 Act was amended in 2004<sup>82</sup> and 2007.<sup>83</sup> Its objective was described in the Act itself as:

An ACT to make provision for matters connected with the manufacture, preparation and assembly, wholesale distribution, storage, destruction, disposal, advertising and authorisation of medical products and any activity connected therewith and the regulation of the sale of medicinal products, pharmacies and related pharmaceutical activities and for any other matters ancillary thereto or connected therewith.

The Medicines Act 2003<sup>84</sup> is still today the main enactment which regulates the production, regulation, sale and advertising of medicinal products in Malta. The law establishes the Medicines Authority and appoints the Superintendent of Public Health as the Licensing Authority one of whose functions is to establish standards to ensure the quality, safety and efficacy of medicinal products and is responsible for the issue of marketing authorisations for any medicinal products before they can be placed on the market.<sup>85</sup>

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Community measures provide for the affixing of the EC mark, accreditation and metrology. These matters are beyond the scope of this thesis.

<sup>79</sup> For a comprehensive description of the state of medicine regulation in the EU, see: <[http://ec.europa.eu/health/documents/eudralex/index\\_en.htm](http://ec.europa.eu/health/documents/eudralex/index_en.htm)> accessed on 10 January 2014, <[http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/general/general\\_content\\_000178.jsp&mid=&jsenabled=true](http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/general/general_content_000178.jsp&mid=&jsenabled=true)> accessed on 10 January 2014, <<http://www.mhra.gov.uk/Howweregulate/Medicines/ReviewofEUmedicineslegislation%282001Review%29/index.htm>> accessed on 10 January 2014

<sup>80</sup> Medicines Act, Act No. III of 2003, Chapter 458 of the Laws of Malta

<sup>81</sup> Legal Notice 358 of 2003 and Legal Notice 359 of 2003

<sup>82</sup> Act No. III of 2004, Part VIII

<sup>83</sup> Act No. XI of 2007

<sup>84</sup> Chapter 458 of the Laws of Malta, Act III of 2003

<sup>85</sup> Various significant regulations have been made in terms of this Act. These include:



## **(b) Food Safety – a brief note on the legal framework<sup>86</sup>**

The Food Safety Act,<sup>87</sup> entered into force on the 13 September 2002. The full title of the Food Safety Act is:

To make provision for any matter related to food safety and to establish a Food Safety Commission, to introduce new provisions for enforcement in relation to food, and to repeal the Food, Drugs and Drinking Water Act.

Part II of the new Act established the Food Safety Commission assigning to it important consumer protection functions including the administration of:

an efficient and effective system for rapid alert, product recall and product withdrawal in order to protect the consumer from any risk that may have been identified or suspected for products already available to the consumer.

Article 6 required this Commission to ‘monitor, co-ordinate and keep under review all practices, operations and activities relating to food ...’ and it could issue public warnings and information as well as emergency prohibition orders. The Commission was just one of a number of central supervisory, coordinating and monitoring agencies set up in Malta in different fields of activities in the course of acceding to the EU and as a direct result thereof. The Commission was given wide powers of

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The Medicinal Products (Labelling and Packaging) Regulations, 2005, Legal Notice 393 of 2005. (These replaced the 2003 regulations, Legal Notice 401 of 2003)

The Prescription and Dispensing Requirements Rules, 2006 (Legal Notice 292 of 2006)

The Medicines (Marketing Authorisation) Regulations, 2007, (Legal Notice 324 of 2007). These regulations are of explicit EU origin. They lay down a mandatory authorisation regime for any new medicinal product being placed on the market and provides for the mutual recognition of such authorizations

The Pharmacy Licence Regulations (Legal Notice 279 of 2007) made under the Medicines Act regulates the pharmacist profession, the opening of pharmacies and imposes standards and requirements in the interest of public health

The Medicinal Products (Advertising) Regulations, 2005 (Legal Notice 380 of 2005) which transposes Directive 2004/ 27/ EC. These regulations regulate various aspects of advertising of medicinal products, the giving of gifts and free and samples and hospitality, the conduct of sales representatives, (These replaced the 2003 regulations, Legal Notice 400 of 2003)

The Manufacture and Importation of Medicinal Products for Human Use Regulations, 2005, Legal Notice 381 of 2005 (These replaced the 2004 regulations, Legal Notice 143 of 2004)

<sup>86</sup> See generally Nadine Fraselle ‘*Consumer Protection and its integration in Community Policy on Food: general Approach, Principles and Evaluation*’ (1994) 2 Consum. L.J.17

<sup>87</sup> Chapter 449 of the Laws of Malta, Act XIV of 2002

inspection, search and entry, as well as powers to seize food items deemed unfit for human consumption. The Act prohibited the sale of foodstuffs that may cause or risk injury to health, and requires the registration of food premises, laying down strict obligations on the monitoring of the safety of food. The Food Safety Act mirrored in several respects the structure of the Product Safety Act passed by Parliament just a year earlier, including, for instance, the power to recall unsafe food products. Article 9 of the 2002 Act even established a direct formal link between the two laws: 'For the purposes of Article 27(2) (d) of the Product Safety Act, the Director of the Market Surveillance Directorate shall periodically advise, supervise and audit the functions of the Commission.'

The Food Safety Act applied to all food products, whether produced in Malta, imported into Malta, and whether intended for sale on the local market or intended for export.<sup>88</sup> The Act defined what qualifies as 'food' for the purpose of the Act and set up the Food Safety Commission.<sup>89</sup> Articles 7 and 8 made provision for rapid alert, product recalls, product withdrawals and the issue of public warnings and information very much in line with similar rules in the Product Safety Act.<sup>90</sup>

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<sup>88</sup> Food Safety Act, Chapter 449 of the Laws of Malta, Article 3

<sup>89</sup> *Ibid.* Article 5

<sup>90</sup> Food Safety Act (Act XIV), 2002 transposing Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1

Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs [2004] OJ L139/1

All legislation can be accessed from <<http://www.health.gov.mt/fsc/fschome.htm>> accessed on 10 January 2014

The Labelling, Presentation and Advertising of Foodstuffs Regulations, 2004 (Legal Notice 70 of 2006) which amended the original regulations of 2004 (Legal Notice 483 of 2004 and Legal Notice 339 of 2005) These regulations transpose Directive 2005/ 26/ EC and Directive 2005/ 63/ EC. These regulations provide an extensive framework for the regulation of labelling of foodstuffs, a matter of great relevance in consumer protection.

The Hygiene of Food Regulations, 2002, Legal Notice 264 of 2002, as amended by Legal Notice 105 of 2004

Other important regulations made under the Food Safety Act refer to the use of additives, the Additives in Food Regulations (Legal Notice 89 of 1994) and the Permitted Food Additives Regulations (Legal Notice 54 of 2005) Attention may also be drawn to regulations relating to particular foodstuffs, such as the Fruit Juice and Similar Products Regulations (Legal Notice 301 of 2004).

See generally Department for Environmental Health Malta, 'Food Safety Legislation Explained' (November 2007) available at

<<http://www.sahha.gov.mt/showdoc.aspx?id=760&filesource=4&file=FSLegENG.pdf>> accessed on 9 February 2012

## 9. Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety

When in early 2001, Maltese authorities and drafters were busy transposing the 1992 Directive, the Community was busy launching a brand new Directive on the same subject to replace it.<sup>91</sup> Member States were required to transpose the new Directive by 15 January 2004.<sup>92</sup> This gave rise to a dilemma because after Malta transposed the 1992 Directive, it could have found itself soon after required to repeal and replace it even before signing the accession instrument. Malta resolved this difficulty by advancing the transposition of this second Directive and including the future necessary revisions and improvements into the same transposing instrument originally intended for the 1992 Directive.<sup>93</sup> The 2001 Directive<sup>94</sup> described itself as a 're-casting' of the earlier Directive and sought to 'complete, reinforce or clarify some of its provisions in the light of experience...' This feature facilitated the incorporation of its provisions in a draft instrument seeking to transpose the original Directive.

The new Directive was adopted too late to be included and reviewed in the Screening procedures already closed in 1999. In the momentum generated in the preparation of a new law following the abandonment of the first draft, the occasion was also taken by the drafters to also implement as many provisions of the new Directive as possible in anticipation of its future transposition deadline. This approach served to avoid having to revise the new law again soon after in order to align it once more with the newly adopted measure. Accordingly, several innovative rules contemplated in the new Directive were introduced into local law at a very early stage. At that stage, the new proposed Directive did not strictly form part of the mandatory transposable *acquis* for the new candidate countries awaiting the date of accession. Had the 1992 Directive been a maximal harmonisation Directive in the

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<sup>91</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4

<sup>92</sup> Upon which date, the original 1992 Directive would be repealed. See Articles 21 and 22 of the 2001 Directive

<sup>93</sup> The core elements of the 2001 Directive were implemented in Maltese law before it entered into force and before other existing Member States had implemented it. Both Directives ended up being implemented in the 2001 Act, originally intended to transpose solely the 1992 Directive.

<sup>94</sup> (n 91) Recital (1)

perfect sense, this initiative by the Maltese authorities might not have been permissible.<sup>95</sup> As a result, the new Directive of 2001 was not separately transposed and was indeed transposed at quite an early stage. In effect, the 2001 Act remarkably transposed the two Directives.<sup>96</sup>

## 10. Conclusion

Malta's accession experience shows how consumers of a candidate or new Member State may enjoy tangible benefits from membership of the Community. In the field of product safety Malta seems a classical instance where Directives have prompted not so much the need to harmonise as an obligation to legislate.<sup>97</sup> This study of how and when product safety legislation was introduced in Malta has been an attempt to demonstrate the importance of examining the contexts in which the transposition of Community law is carried out. In 2001, Malta was rushing to complete commitments given to the Commission in order to catch up with the other candidate countries and make it to the next membership enlargement. The adoption of the Product Safety Act was an important part of this process. The national transposition of the Community's product safety framework showed how a national legal instrument may efficiently merge local home-grown rules with EU rules thereby confirming the value and potential of minimum Directives for national law-making processes. The making of the 2001 Act throws further light on how mandatory EU rules interact with national priorities or legislative inertia, as the case may be. Before the accession

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<sup>95</sup> A proposal to insert a whistleblowing provision in the Product Safety Bill of 2001 was rejected by the authorities. This event is recorded and described as a 'missed opportunity' in D. Fabri *Whistleblowing in Malta: a note on recent developments, proposals and missed opportunities* (2002) *The Company Lawyer*, Vol 23, no 1, p30. The provision could have facilitated the detection and prevention of unsafe products and would have increased consumer safeguards in a manner compatible with EC law taking into account the minimum character of the Directive.

<sup>96</sup> The revised General Product Safety Directive, adopted on 3 December 2001, improved the original 1992 measure, and inter alia closed certain loopholes, and extended its application also to 'a product that is supplied or made available to consumers for their own use in the context of providing a service.' It also clarified the obligation of manufacturers and distributors to 'immediately inform' the competent authorities and to issue a product recall notice when they become aware that a product has proved unsafe.

<sup>97</sup> Sacha Prechal, (Directives in EC Law, 2005, Chapter 1, pp13-39) rightly commented that Directives originally 'meant as a means of Community intervention to achieve the harmonisation of laws', in practice more often served as an instrument of regulation rather than harmonisation.

negotiations, Government was displaying no interest in adopting product safety legislation. The accession agenda forced the subject on to the local Parliamentary agenda, a fact that various Government members freely admitted during the Parliamentary debate on the Bill. Fortunately, at the second attempt, the definitive Product Safety Act proved to be a more sensible and satisfactory transposition. The first aborted attempt is interesting evidence that national transposition measures may sometimes fail the Commission's test.

As a result of the Commission's rejection of the original draft, the transposition of the Directive suffered a two-year delay. This delay produced unexpected beneficial consequences, not immediately discernible:

- (i) Useful lessons were learnt from the painful drafting mistakes that afflicted the first version and two additional years of much needed experience in drafting and transposition work (on other measures) were gained in the meantime;
- (ii) The freshly revised draft law was much more mature, complete and comprehensive. It benefitted from the knowledge about the proposed new Directive, and from the substantially strengthened and improved Consumer Affairs Act and Malta Standards Authority Act, legislation with which the proposed new Act was to be closely inter-connected;<sup>98</sup>
- (iii) The two-year delay allowed the new draft to incorporate elements from the newly published revised General Product Safety Directive of 2002 (intended to eventually replace the original Directive then being transposed).

The need to transpose the Directive required the Maltese authorities to adjust their legal and administrative priorities and accept that public authorities have to start intervening more directly than ever before to keep the market safe from dangerous

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<sup>98</sup> Consumers stand to benefit from good quality and clear legislation and correct transpositions. This case also confirms that good transpositions require specialised drafting skills.

products<sup>99</sup> and to be held accountable in fulfilling its Community obligations in this respect. The 1991 White Paper had already articulated the proposition that product safety required more than the application of private law. Regrettably, decades had to elapse before a product safety activating the vigilance of the state and the intervention of public administrative and enforcement agencies was put in place. Rather than the reflection of autonomous national policy, the measure entered Maltese law by way of an accession transposition. State intervention to safeguard shoppers and users from unsafe consumer products is necessary and is hopefully here to stay. This particular transposition implied a shift from faith in the operation of the market and of private law to a conviction that public administrative intervention was inevitable and necessary.<sup>100</sup> Product safety is no longer a matter that can be exclusively dealt with by the techniques and remedies of private law or left to the good intentions and enlightened self-interest of manufacturers and distributors. The old remedies of consumer choice, contract law and competition, have, by themselves, been found wanting.<sup>101</sup>

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<sup>99</sup> Recalling W. Friedmann's prediction of a 're-ordering of priorities and a correspondingly increased coercive role of the state' to safeguard the core needs of consumers and society. (Law in a Changing Society, Penguin, 1972, p522)

<sup>100</sup> Ross Cranston, Consumers and the Law, (Butterworths 2000) The section on *Private Law as a Technique of Consumer Protection and Public Regulation* in the Concluding Chapter, pp512-51 refers to the 'lamentable inadequacy of private law remedies' and makes a skilful case on the superiority of administrative action where societal resources are applied to safeguard consumer rights over private law.

<sup>101</sup> Well known product safety cases such as the Thalidomide and Ford Pinto scandals should have long alerted and provoked the Maltese legislators to look more closely at the problem in the best interests of consumers. Clearly no lessons were learnt from these and other foreign experiences.

# CONCLUSION

## FINAL PERSPECTIVES, CONTEXTS, POLITICS, MAJOR FINDINGS AND SCOPE FOR FUTURE RESEARCH

'At its best the relationship between national and EC law can be seen as being an evolving issue. The EC puts topics on the Community agenda. A discussion ensues which results in a modest harmonisation of laws. The implementation leads to improvements in the position of consumers in those states with little existing consumer protection..... In line with the subsidiary principle EC regulation does not impose Community solutions, but aims at achieving a high level of protection within the Community through the co-ordination of national experiences.'

Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (Ashgate Publishing Company 1997) p339

'The trick - the dream! - is to find different but complementary roles for EU and national consumer law so that they serve as mutually reinforcing elements in the shaping of an EU internal market that serves and protects the consumer. This should not be a model of either EU law or state law, but rather a model that values and deploys both levels of governance to integrate and to regulate the market.'

Stephen Weatherill, *EU Consumer Law and Policy* (Elgar European Law, 2d Ed. 2013) p316

### **1. A final examination of context and politics**

This thesis has critically chronicled the various important legislative events and policy decisions that contributed to the Maltese accession transposition experience in the consumer protection field. A major objective of this thesis has indeed been to

identify and examine the various contexts in which the accession transpositions were undertaken in the relevant years 1990 to 2004, and which helped Maltese consumer law develop and thrive as never before; an illustration of local law-making in context. The Conclusion highlights final perspectives, contexts, politics and tentative findings that throw a final light on the circumstances in which Malta's accession and transposition programme commenced and progressed. At this juncture, it would be useful to group the various contexts which have characterised the Maltese accession and national transposition experience and which have left their mark on the issues addressed in the preceding Chapters.

## **2. Re-statement of the important contexts**

The pre-membership transposition of the EU legislative *acquis* in Malta did not happen overnight or in a vacuum, but was an undertaking completed within a number of important, often inter-connected contexts, which will now be grouped and summarised. These six inter-connected contexts have already been identified or hinted at in the course of the previous Chapters, particularly in Chapter 1.

- (i) The first study on consumer protection submitted in 1979 had concluded that at that stage consumer protection was certainly 'not a specific part of the law.'<sup>1</sup> Fortunately this is no longer the case, and the EU legislative *acquis* deserves a large part of the credit. The accession requirements forced Maltese consumer law to make a great leap forward. The evolution of the important Consumer Affairs Act is a clear instance of an accession-driven transformation of a purely national law into a more complex, comprehensive and mature compendium of consumer rights, guaranteeing Maltese consumers a much higher level of protection than ever before.
  
- (ii) The political decision to apply for membership of the Community was not universally greeted on the island of Malta and gave rise to political controversy

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<sup>1</sup> David Fabri, *Consumer Protection and the Law* (LL.D thesis, University of Malta 1979)



with two opposing and strongly held positions on membership as well as the conditions and price being paid for it. This internal political conflict and consequential lack of public consensus inevitably coloured the Maltese accession and transposition process. Indeed, the popular referendum and General Elections held in 2003 might have spelt the end of Malta's accession, at a stage when practically the entire *acquis* had already been implemented and integrated into domestic law. The political situation eventually changed and the General Elections held ten years later, in March 2013, marked the first local political contest fought in a context of consensus regarding membership of the Union.

- (iii) By 1994, Malta already had some consumer law and was slowly developing a coherent domestic consumer policy of its own which also dealt with subjects that went beyond the Community Directives. The core issues involved in the protection of consumers were already known and were being introduced outside the accession context. In the consumer field, Malta was therefore reasonably well-placed and equipped to start implementing the numerous Community Directives in a correct and timely fashion. Malta was not considered a problematic candidate country by the Commission experts.<sup>2</sup> The Consumer Affairs Act of 1994, adopted as a direct result of the 1991 White Paper, provided a useful administrative structure and a legal framework that facilitated the implementation of many consumer Directives.
- (iv) The transposition process, necessary to transform Directives into Maltese domestic law, and also necessary to permit Malta to enter the EU, introduced the Maltese legal class and legal system to the wonderful device of the Directive, and especially in its worthiest form, the minimum Directive. The implementation of the consumer *acquis* followed an orderly programmed and planned accession procedure, which was led and overseen by the Commission enlargement and technical experts. These experts encouraged, indeed exhorted, the Maltese

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<sup>2</sup> See David Fabri, *Transposition Tables, Toil and Tears... Tales from the Accession*, in Peter Xuereb (ed), *European Union membership: Five Years on and Looking to the Future* (European Documentation and Research Centre, Jean Monnet European Centre of Excellence, University of Malta, 2009, pp85-95) Other applicant states were considered more problematic.

authorities and technical experts to legislate beyond the minimum content of the Directives and to aim at higher levels of protection for Maltese consumers.<sup>3</sup>

- (v) During the period from Malta's initial application to final membership, the EC's consumer *acquis* continued evolving and changing. New additional Directives were periodically enacted; these too needed to be transposed without delay.
- (vi) The transposition of the consumer Directives formed part of a larger exercise to implement practically the entire Community *acquis* within a few years. The complex and extensive accession roadmap required the Maltese legislator to adopt and comply with legislative choices and priorities established by the Community covering many subjects and activities. This gave rise to an unusually intensive law-making undertaking, the final prize for which would be membership in the European Union.<sup>4</sup> The enterprise constituted a massive challenge that needed to be properly managed and coordinated. Although there is no hiding the possibility that several transposition efforts were inadequate and often carried out in undue haste, without sufficient preliminary research or study, the overall Maltese accession transposition experience may be considered as a moderate success.

### **3. Final focus on politicians and political events**

After re-visiting the diverse contexts in which EU consumer legislation gradually started being integrated into Maltese consumer law, itself then still in its early stage of development, this section will now consider the part played by local General Elections and by various politicians.

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<sup>3</sup> Addressing a conference *The Consumer First* held in Malta to celebrate World Consumers Day on 15 March 2000, Mrs Yvonne Stein was quoted as telling the audience: 'EU Directives are just the minimum. Member States can enter into deeper legislation without creating problems for the internal market.' Ms Stein, a National Legal Expert in DGXXIV of the European Commission, had led the Screening Session with Malta the previous October.

<sup>4</sup> In the case of Malta, membership could not be deemed a foregone conclusion in view of the local political divisions and the holding of a referendum on the matter. Disagreement was however keener on the broader issue of European Union membership than on the introduction of significant improvements to national consumer law itself.

Maltese consumer law policy took many years and great effort to develop satisfactorily. The then Minister responsible for consumer protection, Mr Censu Galea, admitted in 1994 that 'political parties in the past have not been sufficiently aware of consumer affairs.'<sup>5</sup> For a long time the position was unsatisfactory, fragmented and incomplete, only improving slightly on the strength of a few piecemeal efforts introduced by the Labour Governments in the eighties. These comprised the Consumers Protection Act 1981, the Trade Descriptions Act 1986, and the Door-to-Door Salesmen Act 1987, all adopted within a policy and infrastructural vacuum. The turning point undoubtedly occurred in 1991 with the publication of the first long-term White Paper policy programme, which in turn led to the enactment in 1994 of the most important domestic consumer law. Political decisions and political determination were necessary to push the concept and measures through the doubts, scepticism and lack of interest of many. Indeed, consumer law in Malta grew as a result of the enthusiasm and personal interest of individual politicians. The contributions made by specific politicians, Dr M. Frendo, Mr L. Gatt, Mr L. Brincat and Dr G. Hyzler, to the development of Maltese consumer law and policy deserve to be recognised. Indeed one may reflect on how far local consumer law history has depended on the efforts of individual politicians who made a difference and how it has been materially influenced by local political events. Marco Loos has rightly remarked that 'Legislation ultimately is a political activity...'<sup>6</sup> Indeed, successive General Elections in Malta have exercised interesting and often curious effects on the subject under review.

### **The Impact of General Elections**

- (i) The 1987 General Elections brought to an end a Labour Government that had failed to grasp the concept of consumer protection, confusing it with stringent price controls. It badly messed up its first legislative attempt in 1981 which could

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<sup>5</sup> Quoted in *Labour leader's suggestions on consumer protection*, The Times (Malta, 12 November 1994) p20. See also Appendix 1 which shows the confused legal and administrative position as at 1990.

<sup>6</sup> Marco Loos, *Review of the European Consumer Acquis*, (Sellier European Law Publishers, 2008) p4

have been a turning point but instead proved a great disappointment. The new Nationalist Government applied to join the EU and went on to pass modern legislation on consumer protection and fair competition, opened up the markets and published the first ever consumer rights White Paper.

- (ii) The 1992 General Elections halted the progress of three Bills that would have separately tackled core proposals drawn from the 1991 White Paper. In their stead a more comprehensive and consolidated legislation was eventually compiled (also incorporating the original three proposals) which culminated in the Consumer Affairs Act of 1994. The newly appointed Minister responsible for consumer affairs soon established the first ever Government department dedicated exclusively to consumer protection.
- (iii) The 1996 General Elections removed the Nationalist Party from power and immediately Malta's negotiations with the Commission were suspended by the new Labour Government, derailing the whole accession enterprise. The new Labour Government soon went about seeking to implement its own consumer law agenda as described in its electoral programme, before time ran out.
- (iv) The snap 1998 General Elections removed the anti-membership Labour Government from office and restored a Nationalist Government which immediately resuscitated Malta's EC membership application, which had been held for two years in abeyance. The impressive Labour Government draft Bill that would have introduced a new Fair Trading Authority and Consumer Ombudsman and other beneficial reforms was regrettably shelved. All focus and energy were instead directed towards completing the extensive accession negotiations, screenings and transpositions.
- (v) The 2003 General Elections once again returned the Nationalist Government, confirmed the consultative referendum result in favour of EU membership so that Malta could safely proceed to conclude the accession programme and become a member of the European Union as part of the May 2004 enlargement.

(vi) The 2003 General Elections also brought into sharper relief the Malta Labour Party's shifting and uncertain positions with regard to consumer protection, EU membership and the adoption of the consumer Directives.<sup>7</sup> For the February 2003 General Elections, vital for Malta's membership in the EU, the Malta Labour Party published a detailed blueprint explaining its preferred 'Partnership Agreement' relationship with the EU as an alternative to the 'full' membership then being pursued relentlessly by the Nationalist Party in Government. Broadly stated, the position of the Labour Party was that membership was against Malta's economic and political interests. The section dealing with consumer protection merits being quoted at length in view of the novel political approach it advocated:

The laws on consumer rights should be strengthened independently of the standards applicable in the EU but rather as a result of the autonomous efforts of the Maltese authorities. The consolidation of the Competition and Consumer Divisions is still not sufficient to meet the needs of Maltese society, independently from the question of whether membership or partnership should be pursued.....Consumers' rights (in Malta) may be improved both by following EU principles as well as by adopting the standards of the US and other progressive countries.<sup>8</sup>

The policy document also warned against implementing under pressure from the Commission new rules as well as costly administrative and oversight bodies and structures which were not suitable to the Maltese local circumstances.

#### **4. Tentative findings**

This final Chapter has reiterated the importance of context, the role of individual politicians and of political events, and the impact of political General Elections on the

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<sup>7</sup> As late as 1992, the Malta Labour Party shadow Minister, Dr Vincent Moran, was still repeating the old chestnut that the best form of consumer protection was stringent retail price regulation: 'The control of the cost of living should be the cornerstone of consumer protection'. [Quoted in L-Orizzont, 25 September 1992, p11, addressing a press conference on consumer protection - in an overdue initial reaction to the August 1991 White Paper (in trans.)]

<sup>8</sup> Its programme for the February 2003 General Elections was indeed named 'Partnership the Better Choice', Malta Labour Party, Information Department, Marsa Press, February 2003 (in trans.)

island's accession experience generally, and on the development and improvement of consumer law in particular. They explain why the current national consumer legislation is what it is and how it came about, and also what might have been. Selected important perspectives and opinions have offered novel ways of approaching and comprehending aspects of the interplay between EU and Maltese consumer law. The stage is now set to attempt to draw a number of conclusions that flow from the foregoing Chapters.

In summary, the major findings of this thesis may be described in five general and six specific propositions.

### **Findings of a general nature**

- (i) Maltese consumer policy was launched in 1991 independently of the Community's own consumer policies and Directives and free of any other external pressure. This national consumer law and policy programme was conceived and drawn up at about the same time that Malta applied for EU membership. The two events were largely unconnected. For a few years, national initiatives flourished and blossomed, producing two White Papers and an important piece of legislation in 1994.
  
- (ii) The accession alignment project greatly influenced the development of Maltese consumer law, taking it into the Community fold and effectively Europeanising it.<sup>9</sup> Since at least 2000, European consumer law has significantly determined the content, choices and priorities of Maltese consumer law.

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<sup>9</sup> Hondius has argued that consumer law has served as an 'engine for the Europeanisation of the law' in Europe. Hondius Ewoud, *The Innovative Nature of Consumer Law*, Journal of Consumer Policy, Editorial Note, Vol 35, issue 2, 2012; published online: 16 February 2012, available at <<http://link.springer.com/article/10.1007%2Fs10603-012-9190-0/fulltext.html>> accessed on 10 September 2013

- (iii) The transposition of EU law into domestic law was an unparalleled and unfamiliar mode of law-making, with Commission consumer and enlargement experts effectively shepherding Malta's progress through a complex, pre-established template comprising the Screening, planning and implementation of the Directives over a number of years. The transpositions made a hugely positive contribution to Maltese consumer law development reaching a high point during the years 2000 – 2001.
- (iv) Most transpositions have been faithful reproductions of the Directives and only a few instances showed a determination to creatively merge and align the text of the Directives with the rest of Maltese legislation in a stylistically coherent manner. The best transpositions relate to the doorsteps contracts and product safety Directives. The introduction of Community law into the Maltese legal system was often patchy and superficially researched. Several transpositions were often crudely superimposed over existing Maltese law with little conceptual or stylistic consistency. This was largely due to the haste in which the transposition and accession process was being pursued and to the lack of expert resources. As a result, some transpositions were better than others. Unintended and undesired delays in finalising a correct product safety transposition measure had unexpected beneficial consequences as the final text was more satisfactory, coherent and effective.
- (v) The sharp political divisions in the country influenced the drafting and style of the transposition measures, but did not unduly prejudice or diminish the substantial gains made by Maltese consumers as a result of the implementation of the Directives. The Malta Labour Party in Opposition was forcefully against EU membership but it did not obstruct or hinder the transposition of the Community consumer protection Directives. Nonetheless, when Malta embarked on its roadmap towards EU membership, the political controversy rendered the final outcome on actual membership uncertain, even while the relevant Directives in the consumer and all the other fields were being transposed into law.

## Findings of a specific nature

- (i) The Doorstep Contracts Act of 1987 was not modelled on the 1985 Directive on the same subject. The Maltese Act was designed for the local situation prompted by mis-selling by certain salesmen. In 2000, it provided a useful platform for the successful and exemplary transposition of the Directive.
- (ii) The original Consumer Affairs Act of 1994 was a response to local needs and a new point of departure for Maltese consumer law, unrelated to Community law. In 2000, it was employed for the transposition of various Directives.
- (iii) The EU's consumer Directives first came into contact with Maltese consumer law in 2000, ten years after Malta's application to join the Union. The 2000 legislation effectively started the Europeanisation of Maltese consumer law.
- (iv) Most of the consumer Directives were transposed into Maltese law between 2000 and 2001. Some transpositions were largely verbatim but sporadic efforts to introduce elements of higher levels of protection are also evident.
- (v) EU membership concerns prompted the enactment of a product safety law. The transposition proved challenging but the final product was another exemplary transposition of the relative EU legislative *acquis* properly coordinated with other national laws.
- (vi) The provisions of the Civil Code have remained unaffected by the advent of Maltese consumer legislation and of so many consumer protection Directives of a private law nature.



## 5. The post-membership position and future research

The accession legislative experiences have shown that the transposition phenomenon is a complex subject which brings together national legal systems and cultures and EU legal harmonisation initiatives. Malta's accession to the European Union in 2004 was a unique event constructed around a series of formal programmed steps and procedures that should continue to be properly monitored and analysed for the benefit of future researchers. Accession added significant fresh dimensions and unexpected challenges to the development of Maltese consumer law. Malta's membership of the EU ensured that today a considerable portion of Maltese consumer law is Directive derived and driven.

Throughout the Maltese accession experience, Directives played a decisive role not so much in harmonizing legislation as in forcing the Maltese authorities to introduce significant new legally enforceable consumer rights. The principal instrument to be credited with this achievement was the minimum Directive which allowed candidate countries to adopt and adapt EC law in accordance with their domestic preferences and political development, with their legal, cultural and linguistic style; it also allowed wide scope for creativity and higher degrees of protection. Minimum Directives proved a marvellously simple and useful technique and politically acceptable device created by the Commission many years prior to Malta's accession. This current work is being compiled at a time when the very existence of these minimum measures is being placed into question.

Prechal has recognised the mounting threats posed to this resilient legal device, but has optimistically insisted that:

the directive is certainly not going to be abolished and that on the contrary. '(...) it survives gloriously all discussions and measures concerning the quality of EC legislation, the hierarchy of norms, the classification of acts, the perceived need for less and better legislation and alternative means of EC regulation.'<sup>10</sup>

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<sup>10</sup> Sacha Prechal, *Directives in EC Law* (2nd edn, Oxford EC Law Library 2005) p320. See also <[www.raadvst-consetat.be](http://www.raadvst-consetat.be)> accessed on 4 June 2011

Despite certain limitations and criticism, minimum Directives have by and large served Maltese and other European consumers well. Future studies should scrutinise the validity and advisability of moves for greater harmonisation and sameness at EU level at the expense of diversity and innovation at national level.<sup>11</sup>

While Community law has heavily influenced the direction and content of Maltese consumer law and will continue to do in the near future, Maltese law has failed to exercise any influence on the development of Community consumer laws and policies. Ideally, the interaction between national and EU law should in future be founded on a more fruitful balance, between on the one part the objective of transposing Directives in a way as to maximise benefits for European consumers, and on the other, the objective of creatively promoting supplementary measures and solutions at a purely national level to enhance local consumer welfare even further. The need for a balanced dynamic continues unabated even after the attainment of membership.<sup>12</sup>

Today, post-membership Malta stands as an illustration of how momentum for reform and innovation in the consumer protection field may be lost. Nonetheless, in post-membership Malta, space needs to be found for national consumer law to continue to develop and forge ahead as it had been doing particularly between 1990 and 1994, before the EU consumer programme gradually replaced the national consumer agenda during the pre-accession transpositions. National consumer law initiatives in other Member States have in the past richly contributed, and in the future will still have much to offer, to the continued development and enhancement of consumer rights at European Union level. Malta has so far had no problem in transposing EU consumer Directives in a largely correct and timely fashion. Regrettably, recent

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<sup>11</sup> 'Community measures and their application at national level raise some special problems of their own.....The existence of relevant Community law is capable of affecting domestic initiatives.' G. Howells and S. Weatherill, *Consumer Protection Law* (2005) p137

<sup>12</sup> Pro-business interests often express a different view which considers consumer protection measures as a hindrance to business that only serves to increase administrative 'burdens' and costs, and undermine the island's 'competitiveness'. This view-point sees nothing wrong in Malta not having a consumer policy of its own and indeed objects to Malta trying to be 'more European than the Europeans'. National measures are dismissed and derided as unnecessary and fanciful and almost illegal 'gold-plating'. Accordingly, they add, Malta should limit itself to implementing the mandatory EU Directives in the most minimal manner possible. By their nature, maximal Directives now preclude any gold-plating on the issues that fall within their scope. The current Labour Government, elected in 2013, has repeatedly described itself as 'unashamedly pro-business'.

transpositions have been no more than faithful cut-and-paste exercises. Whether the future will ever see Malta offering valuable contributions to the continued innovative development of European consumer law remains to be seen. Finally, more attention also needs to be devoted to the future place of consumer law within the country's private law, and to the roles that will be played by the Civil and Commercial Codes, themselves in a state of uncertain flux and suffering an identity crisis, in future transpositions of a private law nature.

## **6. Developments in 2014**

This part briefly chronicles and evaluates recent important post-membership events that touched core issues examined in this thesis. Of particular interest is Act No. VI of 2014 which became law on 25 March 2014. These developments offer a final opportunity to observe the evolving interplay between Maltese and EU consumer law.

### **The Trade Descriptions Act 1986**

The continued existence (and usefulness) of the controversial Trade Descriptions Act, briefly discussed in Chapter 5, seems to have been finally re-assessed. In fact this Act was suddenly and quietly put to rest by Act No. VI of 2014. This repeal does not occasion any great practical or sentimental loss as the 1986 Act had proved ineffective ever since its adoption as a clone of the UK 1968 original. This 1987 Act played no role in the accession transposition enterprise and the question really was: what should be the fate of this Act – should it be retained or should it be repealed? The implementation of the Misleading Advertising Directive in 2000 had already replicated some of its provisions. Later, the maximum harmonisation Unfair Commercial Practices Directive transposed in 2008 more emphatically placed into doubt the continued legitimacy of the Act. Those questions now seem to have been answered.

While piloting the second reading on the Bill, Consumer Affairs Minister Helena Dalli explained that the Trade Descriptions Act was being repealed because its provisions were found to be inconsistent with the Unfair Commercial Practices Directive.<sup>13</sup> She added that the Commission had pointed out that this amounted to an incorrect transposition and the Bill was now correcting a five-year old error.<sup>14</sup>

### **The Doorstep Contracts Act 1987**

The recent Act No. VI of 2014 has also repealed the Doorstep Contracts Act of 1987, a law which played a fundamental role in the early stages and development of Maltese consumer law and in the accession-related transposition and screening processes.<sup>15</sup> Chapter 2 has examined how this purely domestic legislation enacted before EU membership served as a platform for the efficient transposition of the relative Community Directive.

As this thesis was being finalised in late 2014, important changes in this area of EU law were taking place.<sup>16</sup> With effect from the 13 June 2014, the new Directive on Consumer Rights of 2011 replaced Directive 85/577/EEC as well as Directive 97/7/EC on the protection of consumers in respect of distance contracts.<sup>17</sup> The Directive was transposed into Maltese law by way of Legal Notice 439 of 2013

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<sup>13</sup> Transposed by Act XII of 2008

<sup>14</sup> Parliamentary sitting number 115 held on 3 February 2014. The Minister did not explain which specific provisions of the 1986 Act had been deemed to breach the Directive, or how or why, and simply repeated that the measure rectified a 'drafting error' committed under the previous Government.

<sup>15</sup> Doorstep Contracts Act, 1987, Article 13(1) is emphatic: 'The Doorstep Contracts Act is hereby repealed'

<sup>16</sup> See Marco M.B. Loos, *Review of the European Union Acquis* (Sellier European Law Publishers, 2008) especially Chapter 8: Revision of the doorstep selling Directive); and <<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/126/12604.htm>> accessed on 24 April 2014, and material and documentation referred to therein

<sup>17</sup> European Commission, 'The Directive on Consumer rights' <[http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index\\_en.htm](http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm)> accessed on 24 April 2014, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64

designated the 'Consumer Rights Regulations'. The implementation of this new maximum harmonisation Directive forced the regrettable repeal of the Doorstep Contracts Act, sweeping away all the provisions which had for many years given consumers levels of protection higher than EU law.

Minister Helena Dalli, piloting Act No. VI of 2014 through Parliament, explained that the Consumer Rights Directive, a maximal harmonisation measure, dictated the dismantling of the national rules comprised in the doorstep contracts law of 1987 which were now found not to be fully in line with the Directive.<sup>18</sup>

### **The Product Safety Act 2001**

At the time of writing,<sup>19</sup> important changes were being proposed to re-vamp the Community's legal framework for product safety and market surveillance. A new Product Safety and Market Surveillance Package has been published consisting primarily of (a) a Proposal for a new Regulation on Consumer Products Safety<sup>20</sup> which would repeal the 2001 Directive, and (b) a Proposal for a single Regulation on Market Surveillance of Products.<sup>21</sup> The package was adopted by the Commission in February 2013 and is expected to come into force between 2015 and 2016. The direct application of the new Regulations and the repeal of the 2001 Directive will likely exercise a big impact on the current 2001 Act which had so efficiently transposed it. The days of the Product Safety Act, a huge achievement as a Maltese consumer law and as a transposition measure, seem numbered. The replacement of such an important Directive by a Regulation has significant implications and makes

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<sup>18</sup> Parliamentary sitting number 115 held on 3 February 2014

<sup>19</sup> October 2014

<sup>20</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC' COM (2013) 78 final. See [http://europa.eu/rapid/press-release\\_MEMO-13-93\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-93_en.htm), accessed on 5 May 2015;

<sup>21</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC, 2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council' COM (2013) 75 final

this present study of how the milestone legislation of 2001 came into being even more useful and timely.

## **A Final Observation**

The foregoing Chapters of this thesis have been constructed on a conviction that national experiences have been, and shall hopefully remain, a valuable source of ideas and innovation which complement the EU's own legislative *acquis*. The very recent changes described in this concluding part appear to further validate the need for the present case-study. Ten years into membership of the EU, consumer law in Malta finds itself once again in a state of flux as it responds to new mandatory Community requirements and challenges. The repeal of the Trade Descriptions Act of 1986 and the Doorstep Contracts Act of 1987 means that the 'trilogy' of pioneering consumer laws adopted between 1981 and 1987<sup>22</sup> have now all been consigned to history.

These developments support the disappointingly negative finding that national consumer legislation is under pressure and risks being inexorably swept away by an expanding legislative *acquis*, transposed by verbatim replications of the Community measures. They broadly suggest that as the consumer *acquis* expands and becomes more detailed and uniform, the space allowed for culturally different or innovative national legislation is becoming increasingly tighter.

There is no evidence that Maltese legal or policy developments have exercised any influence, whether positively or negatively, on law or policy at Community level. The accession alignment project allowed the Maltese authorities to sit back and effectively cede the agenda for future consumer action to directions from Brussels. Accession may have therefore led to the unintended consequence of undermining the continued evolution of national consumer laws and policies. What started as a

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<sup>22</sup> The third measure was the Consumers Protection Act of 1981 which was repealed and replaced by the Consumer Affairs Act of 1994, examined in Chapter 4.

complex and intricate relationship gradually regressed into a fairly simple relationship of subservience. The development of a national consumer policy, so promising, original and encouraging in its first years, with a high point traceable to 2000, seems to have proved a false dawn. Today no autonomous Maltese consumer policy seems to be in place.

Weatherill, Howells and Wilhelmsson have stoutly promoted the complementary role and potential of national laws and diversity in the face of maximum harmonisation measures which allowed 'no scope for local upgrading of protection.'<sup>23</sup> However, given the opportunity, would all Member States readily undertake autonomous consumer initiatives, or is this an instance of misplaced optimism? No doubt some Member States would dynamically pursue local diversity, but not all Member States might demonstrate equal enthusiasm to continue developing national initiatives. Harmonisation at EU level, especially through maximum harmonisation Directives, may over the years progressively induce intellectual stupor and legislative inertia. Some Member States, including Malta, may grow too accustomed to relying on the Commission's own consumer agenda. After all, off-the-shelf solutions do have their attractions. Where official interest in consumer protection and local competent technical resources may be lacking, maximal Directives which genuinely promote high levels of protection may yet prove beneficial to local consumers.<sup>24</sup> Nevertheless, the lingering concern today is whether it may ever come to pass that

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<sup>23</sup> S. Weatherill, *EU Consumer Law and Policy*, (Edward Elgar Publishing, 2<sup>nd</sup> edn, 2013) p 317 Howells and Wilhelmsson have strongly argued for 'a continued national input into consumer legal policy' and that it is 'simply not possible to leave consumer policy entirely in the hands of Europe' Geraint Howells and Thomas Wilhelmsson, 'EC Consumer Law: has it come of age?', (2003) 28(3) *European Law Review* pp370-388.

<sup>24</sup> In reality, consumers now have to rely on the Community to become the engine of the development of a consistent and comprehensive consumer policy, not only at E.U. level, but also in domestic situations.' Monique Guyens, Editorial, *Consumer Law Journal*, 1993, Vol1 number 6, p126. One should also note the Commission own view in this context: 'The existing consumer protection rules at EU level guarantee core consumer protection in all Member States. In many, they are the cornerstone of national consumer protection regimes.' European Commission 'Communication from the Commission: EU Consumer Policy strategy 2007-2013 'Empowering consumers, enhancing their welfare, effectively protecting them' COM(2007)99final.

Maltese consumer law, with its own individual and indigenous identity, will not survive ten more years of EU membership and will become a thing of the past. Indeed, as EU consumer law becomes increasingly standardised and afflicted by a sameness which limits and conditions innovation and experimentation at national level, this thesis has sought to trace and ‘celebrate where possible the welcome areas of difference and complexity’<sup>25</sup> that have survived the accession and membership templates.

## 7. The end – ‘a journey worth travelling’

Malta was among the newest, smallest and southernmost members of the EU forming part of the 2004 enlargement. This thesis has examined how Malta started coming to terms with the need to introduce and develop national consumer policies and laws in conjunction with its obligation to accept, adopt and transpose the EU’s consumer policy and Directives.<sup>26</sup> Even within the limited confines of the consumer protection *acquis*, Malta offers a useful case-study for other new applicant countries having to navigate the same process. Various useful lessons may be learnt from the Maltese experiences in the organised pattern of negotiations, screening and transpositions which have remained the tried and tested template for accession to the Union.

Malta’s accession to the European Union in 2004 was constructed around a series of formal deliberate steps and procedures that deserve to be identified, described, analysed and recorded. The accession alignment obligations injected a new sense of purpose and urgency into national consumer law-making in Malta, as in most of the other new Member States.<sup>27</sup> They refreshed and re-energised Maltese consumer law, propelling it into areas where the Maltese authorities would otherwise

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<sup>25</sup> John Simpson, *A Mad World, My Masters* (Pan Books 2001)

<sup>26</sup> See David Fabri (n 2) and generally Sacha Prechal, *Directives in EC Law* (n 10)

<sup>27</sup> David Fabri, *Transposing the consumer acquis at pre-membership stage: current candidate and others* (2012) II *Elsa Malta Law Review*, p169 which reviews how new candidate countries were managing the transposition of the consumer Directives compared to Malta’s own experiences.



have hesitated to venture. This present research has analysed the political and legal backdrop to the pre-membership transposition of the consumer protection *acquis* within the broader context of the ups and downs of Maltese national consumer policy development.<sup>28</sup> The period between 1990 and 2004 provided the occasion when, in a formal, planned and highly structured manner, EU consumer law and policy first encountered and started interacting with local consumer law and policy, often with mixed results. As explained in the Introduction, this thesis has not sought to achieve completeness on the subject but has, for manageability and space reasons, selected laws and landmark documents and events which posed the most interesting challenges. This study has hopefully contributed to a better understanding of how consumer law and consumer protection policies have developed in Malta since 1990, of the impact of the EU Directives, and finally of how effectively national and EU law collaborated to increase and enhance the rights of Maltese consumers.

The adoption of the *acquis* in the years immediately prior to accession expanded and modernized Maltese consumer. One need only recall the inadequate and misnamed Consumers Protection Act of 1981 to measure just how far Maltese law evolved and improved beyond recognition in the subsequent twenty years. By the end of a transposition programme designed to ensure Malta's preparedness for accession, consumer law in Malta has developed from a marginal uncertain notion of sorts into a more comprehensive, better rounded new legal discipline. Yet it remains a new area of law and optimistic declarations regarding its coming of age are probably premature. European law has played a vital and indelible role in helping it to grow, but this thesis has hopefully shown that Maltese consumer law is still work in progress and far from full maturity.<sup>29</sup> What has justified the writing of this thesis is the uniqueness of the accession and transposition project, and its effects on a Member State's consumer legislative and policy development. The transposition of the EU *acquis* as part of a pre-accession programme proved an unrepeatable legislative and learning

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<sup>28</sup> David Fabri, *False Starts and Broken Promises: Some Mishaps in the Development of Maltese Consumer Law*, Law and Practice, pp20-26 (Malta Chamber of Advocates, October 2006)

<sup>29</sup> Ewoud Hondius, *The Internal Market and the Consumer: Has EU Consumer Law come of age?* (2014) p22 European Review of Private Law, Issue 1, pp165-168. Stephen Weatherill has provocatively suggested that EU consumer law may be undergoing its mid-life crisis. (EU Consumer Law and Policy (2013), p317)

phenomenon for all recent and new Member States.<sup>30</sup> As new candidates seek membership of the EU,<sup>31</sup> and prepare themselves for the formal accession procedures, studies of how different countries have approached, managed and undertaken their considerable accession and transposition commitments, shall remain necessary:

...new countries continue to apply to join the European Union. In this context, the transposition of the EC Directives and *acquis* at the pre-accession stage remains a relevant subject for academic examination.<sup>32</sup>

The accession negotiations and transposition procedures carried out between 1990 and 2004 have had a significant effect on local legal culture, policy and administrative practices and deeply coloured Malta's early evolving relationship with the European Community and the Commission. Former Consumer Protection Commissioner Meglena Kuneva, who was closely involved in Bulgaria's accession negotiations, has elegantly described the process in these terms:

As a former Chief Negotiator and Minister for European Affairs of Bulgaria, I am fully aware that joining the EU is a complex process and will take time, several years. The EU integration process is neither easy and nor always smooth...But if the history of the European Union and its enlargement tells us anything, it is that the journey is worth travelling and that the destination of EU membership is the ultimate guarantee of lasting peace and social progress.<sup>33</sup>

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<sup>30</sup> (n 14)

<sup>31</sup> See insights on this point in Allan F Tatham, *Enlargement of the European Union*, (Kluwer Law International, 2009)

<sup>32</sup> (n 14)

<sup>33</sup> The occasion was a conference launching the new Law on Consumer Protection of Serbia on 1 September 2009.

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## **LIST OF APPENDICES**

**(in chronological order and with explanatory notes)**

### **Appendix 1 - (1990)**

**A list of Maltese legislation up to 1990 which directly or indirectly protected consumer interests.**

**Note:** Appendix 1 reproduces an important excerpt from the 1990 preparatory work 'Sketches on Consumer Protection in Maltese Law', April 1990, (unpublished), which assisted the Maltese Government in its earliest stage of its interest to pursue consumer law reforms. These four pages summarised the legislation existing as at 1990 and identified the various relevant administrative and enforcement agencies involved. Compiled in the year which opens the period covered by this thesis, it revealed a confusing and unsatisfactory situation for Maltese consumers. The work paved the way for the publication of a comprehensive White Paper in 1991, with which it shares a number of features and proposals. Reference to this document is made in Chapter 3.

# Appendix 1

## CHRONOLOGY

LAW	NATURE OF PROTECTION (actual or potential)	ADMINISTERING AUTHORITY
Auctioneers Law <b>1832</b> Chapter 4 <i>(repealed)</i>	Imposes a licence requirement and fixed tariffs.	Prime Minister
Code of Police Laws <b>1854</b> Chapter 10	Imposes various licence requirements; prescribes minimum standards of upkeep of hotels and shops; prohibits passage boat keepers from refusing a reasonable request for service; provides for the fixing of a fixed tariff for passage - boats and porters; prohibits use by shopkeepers of unjust or unstamped scales and weights and measures.  The Code attempts to regulate a variety of matters. Substantial segments are clearly inappropriate to our times. Some sections have been superseded, often duplicated, by later statutory enactments.	Minister responsible for Police; Commissioner of Police
Medical and Kindred Professions Ordinance <b>1901</b> Chapter 31	Imposes a licence requirement. Provides for the fixing of fees for medical and ancillary services. Medical Practitioners not to have any interest in any dispensary. Prohibits apothecaries from retaining deteriorated substances and expired medical substances. Provides for regulations to control manufacture, sale, labelling and marking of drugs and chemical products.	Medical Council; Minister responsible for Health; Superintendent of Public Health
Weights and Measures Ordinance <b>1910</b> Chapter 39	Prescribes uniform weights and measures. Provides for Inspector to verify correctness of weights and measures used by traders.	Minister responsible for the Police; and Commissioner of Police
Goldsmiths and Silversmiths Ordinance <b>1920</b> Chapter 46	Imposes licence requirement. All gold and silver articles are to bear artificer's mark, Government stamp indicating standard of fineness, and a label indicating local or foreign manufacture. Prohibits manufacture and sale of imitation filigree works.	Comptroller of Customs; Consul or Goldsmiths and Silversmiths; Minister responsible for Finance

Traffic Regulation Ordinance 1931 Chapter 65	The Motor Vehicle Regulations issued under this Act impose construction, safety, cleanliness and other requirements on public buses. Prescribes rules for taxis incorporating cleanliness and safety, constructional requirements, display of tariffs, mandatory installation and sealing of taxi meters approved by Police authorities.	Commissioner of Police
Public Lotto Ordinance 1932 Chapter 70	Imposes licence requirement for all public lotteries/tombolas. Director can impose conditions. No apparent action is taken to prevent or punish abusive practices in lotteries and prize schemes. More concerned with the raising of revenue for Government.	Director of Public Lotto
Supplies and Services Act 1947 Chapter 117	Authorises a very wide range of regulations governing sale of commodities generally.	Minister responsible for Trade; Prime Minister
Broadcasting Ordinance 1961 Chapter 165	Provides for control over advertising on the broadcasting media, but no memorable initiatives have followed.	Broadcasting Authority; Prime Minister; The President of Malta
Trading Stamps Schemes (Restriction) 1964 Act Chapter 182	Restricts trading stamps schemes and similar promotions, permitting some prohibiting others.	The Commissioner of Police
Malta Board of Standards Act 1965 Chapter 187	Establishes the Malta Board of Standards and a quality standard mark for local goods.	Minister responsible for Industry
Tourist Guide Services Act 1965 Chapter 190	Imposes licence requirement. Prescribes tariffs, prohibiting charging less or more. Prohibits acts to the detriment of tourists.	Minister responsible for Tourism
Hotels and Catering Establishment Act 1967 Chapter 197	Establishes the Hotels and Catering Establishments Board and regulates classification and licensing of hotels and catering establishments after ensuring premises have satisfactory structure and hygiene. Punishes vaunting by licensee of a higher classification. Board may fix minimum and maximum rates for hotels and catering establishments, regulate publicity	Minister for Tourism

	material, appoint inspectors. Prices to be exhibited outside premises. Board serves as a watchdog and a standards board.	
Wine Act 1969 Chapter 211	Regulates production, quality, labelling and advertising of local and imported wine. Prohibits artificial wine.	Minister responsible for Agriculture
Banking Act 1970 Chapter 215	Imposes licence and minimum financial requirements, provides for appointment of bank inspectors. Bank licence can be withdrawn if it acts in a manner detrimental to depositors. There is no other reference to depositors or the other ordinary users of Banking services.	Central Bank of Malta; Minister responsible for Finance
Quality Control (Exports, Imports and Local Goods) Act 1971 Chapter 225	Empowers the Malta Board of Standards to prescribe minimum quality standards for imported, exported and local goods, as well as labelling requirements and codes of practice on design, safety, quality control etc.	Minister responsible for Trade and Industry
Food, Drugs and Drinking Water Act 1972 Chapter 231	Controls marketing of food and drugs. Prohibits sale of drugs and food unfit for human consumption. Establishes a Food Standards Board and provides for control by health inspectors. Empowers Minister to regulate importation, quality, preparation, sale, advertising of food articles. Prohibits adulteration of milk. Requires inspection of animal prior to slaughtering for consumption.  Act and regulations lay down stringent hygiene requirements for the handling of food, the premises where food is served, the equipment used, delivery vans, production of ice cream etc. Important Food Hygiene Regulations were enacted in 1969.	Minister of Health
Travel Agencies and Hotel Services Act 1976	Establishes licence and bank guarantee requirements for travel agents; provides for regulations to govern their professional conduct and for cancellation of licence in cases of unfitness, breach of ethics etc. Cannot refuse a bona fide request for services and cannot impose unreasonable conditions. Prohibits overbooking by hotel and other holiday premises keepers, imposing duty to provide equivalent alternative	Minister responsible for Tourism, Chairman of the N.T.O.M.

accommodation.

Insurance Business Act 1981	Imposes licence and minimum financial requirements of insurance companies. Such licence can be withdrawn for inability to meet obligations. Imposes authorisation requirement for insurance brokers and salesmen which can be withdrawn for misrepresentation of policy conditions. The Minister is empowered to make regulations on codes of conduct, insurance policies, obligations of insurance companies, brokers and salesmen. However, the individual policy holder finds no specific mention or rights in this Act.	Minister responsible for Finance
Consumers Protection Act 1981	Provides for the official recognition of consumer organisations granting them 'inter alia' immunity from liability for bona fide publications or other communications to the public.	Minister responsible for Trade
Trade Descriptions Act 1986	Prohibits false and misleading descriptions and advertisements of goods for sale, services, accommodation and facilities offered to the public.	Minister responsible for Trade
Door-to-Door Salesmen Act 1987	Imposes licence requirements. Controls doorstep contract. Prescribes a 15-day cooling off period.	Minister responsible for Trade

reports/chronogy



## **Appendix 2 - (1992)**

**The three draft and hitherto unpublished Bills prepared by the Parliamentary Secretariat responsible for consumer protection in January 1992.**

**Note:** These three separate measures were meant to herald the implementation of core proposals of the 1991 White Paper. Had the General Elections not intervened a few weeks later, these three early drafts could well have become law. They were later consolidated with other proposals to make up the Consumer Affairs Act enacted in 1994. Although drawn up two years into Malta's accession programme, these three draft Bills made no attempt to adopt or transpose any EU measure. These three Bills are briefly reviewed in Chapter 4.

## Appendix 2

D R A F T

**MALTA**

AN ACT enacted by the  
Parliament of Malta

AN ACT to provide for the  
establishment of the Consumer  
Protection Council, to regu-  
late its constitution and its  
functions, and to make provi-  
sion with respect to matters  
ancillary thereto or connected  
therewith

An Act to provide for the establishment of the Consumer Protection Council, to regulate its constitution and functions, and to make provision with respect to matters ancillary thereto or connected therewith.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:

Short title      1. This Act may be cited as the Consumer Protection Council Act 1992.

Establishment of the council      2. There shall be a Council, to be known as the Consumer Protection Council.

Composition of the Council      3. (1) The Council shall consist of:

- a) a Chairman,
- b) two public officers who are actively performing duties relating to consumer protection, one of whom shall serve as the executive head of the administrative structure of the Council;
- c) two other members from outside the public service chosen from among consumers, who have had experience of and showed capacity in dealing with matters relating to consumer protection;
- d) two public officers nominated by the Minister responsible for Trade.

(2) The Chairman and the members listed in paragraph (a), (b) and (c) of the previous sub-section shall be nominated by the Minister responsible for Consumer protection.

(3) The Chairman and the members of the Council shall hold office for such term, being not more than five years, as may be specified in their letter of appointment and shall be reeligible for reappointment.

(4) The Chairman and the members of the Council may not be removed during their tenure of office, except for proved misbehavior or manifest inability to perform their functions.

Functions  
of the  
Council

4. Without prejudice to any other power or function conferred on it by this Act or by any other law, the Council shall have the following functions:

(a) to promote and protect the legitimate short term and long term interests and expectations of the consumer in Malta, and for this purpose to promote and encourage fair trading practices;

(b) to monitor and keep under review all trading and commercial practices relating to the supply of goods and services to the consumer and to collect and compile information on such activities and on the terms on which they are offered to the consumer;

(c) to advise the Minister responsible for consumer protection on consumer affairs and to submit advice and recommendations for legislative and other measures;

(d) to investigate and identify products, services or trade practices which directly or indirectly adversely affect the legitimate interests or expectations of the consumer and to study and propose counter-measures;

(e) to guide and educate the consumer, and in this context to prepare, compile and issue reports or other publications on consumer matters, and to serve as a point of reference for information and assistance in all consumer matters;

(f) to keep under review the workings of laws which directly or indirectly affect the consumer in Malta;

(g) to monitor developments and initiatives in consumer law and practice in foreign countries and to establish contacts with similar bodies or other consumer protection organisations;

(h) to encourage the formation and development of 'bona fide' consumer associations and to study forms of technical and financial support for such associations;

(i) to take all such initiatives and to carry on all such activities as may appear to the Council necessary or convenient to enable it to fulfill its above listed functions, or any of them.

Conduct of  
the affairs  
of the Council

5. (1) Subject to the provisions of this Act, the Council shall regulate its own procedure.

(2) The Council shall meet as often as may be necessary or convenient, but in no case less frequently than once every four weeks. The meetings shall be called by the Chairman either on his own initiative or at the request of any two of the other members.

(3) The Council shall not act unless a quorum consisting of not less than four members is present at the meeting. The Chairman shall be counted for the purpose of establishing the quorum.

Chairman.

(4) The Chairman shall have an original vote. In the event of an equality of votes, the Chairman shall have an additional casting vote.

Substitute  
Chairman

(5) Where the Chairman is temporarily absent from Malta or is otherwise temporarily incapable of performing the functions of his office, the members of the Council may appoint one of their members to act as Chairman during such period of absence or incapacity. Upon such appointment, such member shall enjoy the same rights as the Chairman.

Vacancy

(6) The Council may act notwithstanding any vacancy among its members.

Disqualification of members 6. A person shall not be eligible for appointment or to hold office as a member of the Council if:

(a) he is legally incapacitated; or

(b) he has ever been declared bankrupt or has made a composition or arrangement with his creditors; or

(c) he has been convicted of any crime affecting public trust, or against public trade, or against property and public safety, in terms of titles V, VI and IX of the Criminal Code (Chapter 9); or

(d) he has been convicted of an offence against the Trade Descriptions Act 1986 or the Door to Door Salesmen Act 1987.

Conflict of Interest

7. (1) Every member of the Council shall refrain from creating a situation where his personal interests come into or can come into conflict with the aims, functions and activities of the Council. In the event of a serious conflict, such member shall either remove such conflict or he shall resign from the Council without delay. Where the conflict of interest is a minor or indirect one, the member shall be bound to disclose all the relevant facts and circumstances to the Council at the earliest opportunity.

Obligation of confidentiality

(2) All the members of the Council shall keep its proceedings secret, and shall on no account divulge any confidential information or documents relating to the operation or activities of the Council to unauthorised third parties.

Exemption from liability

8. In the performance of its functions and powers and in carrying out any acts in furtherance thereof or in connection therewith, the Council as well as its members and officials are completely exempt from any liability or responsibility at law. Such exemption shall extend to any other person acting on the authority of the Council.

Consumer  
Protection  
Advisory  
Committee

9. The Council may establish an advisory body to be known as the Consumer Protection Advisory Committee whose function shall be to provide advice to the Council in pursuance of its functions and to compile such reports and recommendations on any matter affecting consumer interests in the short and long term, as the Council may from time to time require.

Establishment  
of Commissions

10. (1) The Council shall from time to time establish a number of Commissions, as it may deem fit. The function of the Commissions shall be exclusively advisory and consultative and its findings or recommendations, if any, shall not bind the Council.

Constitution  
of Commissions

(2) Each Commission shall consist of a Chairman and two other persons representing and nominated by the Council, and two other persons nominated by the representatives of the branch or sector of trade or commerce in respect of which the Commission is established.

Function of  
Commissions

(3) The function of these Commissions is to serve as a channel of communication between a particular sector or branch of trade and commerce and the Council. They shall strive:

(a) to negotiate such Codes of Practice as may be deemed advantageous to consumers;

(b) to improve the terms, conditions and standard of services made available to consumers;

(c) to try to prevent and to resolve possible situations of conflict between traders and consumers.

Powers of  
the Council

11. In pursuance of its functions, the Council shall have the power to summon any person to give information or to produce books or other documents before it and the Chairman, or the member acting in his stead for the time being, shall have power to administer an oath to any person appearing before the Board.

Executive  
Orders

12. In furtherance of its functions and without prejudice to the generality of the provisions of section 4, the Council is empowered to issue executive orders in order:

(a) to ban instances of labelling and advertising which is considered unfair, untruthful, or misleading;

(b) to prohibit the promotion, sale or distribution to consumers of products or services which it considers unsafe or dangerous or otherwise detrimental to consumers;

(c) to prohibit other trading practices which it deems harmful or prejudicial to the interests of consumers. Such practices may relate to the stipulation of unfair contractual clauses, and to the price, mode of payment, and other conditions as well as promotional activities relating to the supply of goods and services to consumers in Malta.

Mode of  
issue of  
executive  
orders

13. (1) Any such executive order shall be issued by the Council acting with the approval of the Minister responsible for Consumer protection after consultation by the said Minister with the Minister responsible for Trade.

Prior  
Notification

(2) Prior to the issue of an executive order the Council may, if it deems it appropriate in the circumstances and at its sole discretion, issue a formal notification to the party or parties concerned requesting the immediate cessation of the act or practice in question.

Publication  
of Legal  
notice

14. Notwithstanding anything contained in the foregoing provisions, the Minister responsible for consumer protection, after having taken the advice of the Council and after consultation with the Minister responsible for Trade, may by Legal Notice published in the Government Gazette, declare particular commercial acts or practices as being detrimental to the interests of the consumers in Malta, and to prohibit the continuation of any such practices. The Legal Notice shall state the date from when the ban shall come into effect, being either the date of publication or any later date as may be specified.



Criminal offence	15. (1) Any person who contravenes or fails to comply with an executive order issued under section 12 and 13 or a prohibition contained in a Legal Notice duly published in terms of section 14 shall commit a criminal offence and shall on conviction be liable to a fine (multa) of not less than two hundred Maltese liri but not exceeding two thousand Maltese liri in respect of every separate breach or omission. In addition the court may order the suspension of the offender's trading licences, or any of them, for up to six months.
Prescription	(2) The prosecution of offences under this Act shall be subject to a prescriptive period of two years from the relevant contravention or omission.
Forfeiture or destruction	(3) In every case of conviction for an offence under this Act, the Court shall also order the forfeiture to Government or destruction of the offending goods or materials, if any, as the Court may consider appropriate in the circumstances.
Inapplicability of Probation	(4) The provisions of the Probation of Offenders Act 1957, shall not be applicable in respect of any offence against the provisions of this Act.
Body corporate	(5) Where an offence against this Act is committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar office of the body corporate, or was purporting to act in any such capacity, shall be deemed to be guilty of that offence, unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the execution of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances. Subject to the foregoing an employer, including a limited liability company shall be liable for the acts or omissions of his employees, officials, salesmen and of any other person acting for the account or on behalf of such employer.
Implied Term	(6) It shall be an implied term of every trading licence that the beneficiary of such licence shall comply fully and immediately with any executive order or prohibitory order issued in terms of the provisions of this Act.

Vesting of  
authority

16. In virtue of this section, the Council is hereby vested with the authority and responsibility to administer and oversee the workings of the Weights and Measures Ordinance (Chapter 39), the Trade Descriptions Act 1986 and the Door to Door Salesmen Act 1987.

Accordingly, all and any rights, powers and authority conferred by the said enactments on the Minister responsible for Trade, the Director of Trade, the Commissioner of Police or any other public official are hereby vested in and henceforth exercisable solely by the Council.

Power to  
make  
regulations

Provided that notwithstanding anything contained in this section, any power to issue regulations or to enact subsidiary legislation shall be exercisable by the Council acting with the prior approval of the Minister responsible for consumer protection.

Delegation  
of Authority

17. The Council may delegate in writing all some or any of its rights, powers and authority to its Chairman or to one or more of its officials, whose acts in pursuance of such delegation shall be considered to be acts of the Council and shall as such bind it.

Annual  
Report

18. (1) The Council shall at the end of every calendar year prepare a full and comprehensive report of its activities and initiatives during that year. The report shall be completed in such format as the Council may deem fit and shall contain such proposals, explanations and other comments as the Council may consider relevant.

(2) The report shall be submitted not later than four weeks following the end of the year in question to the Minister responsible for consumer protection. The Minister shall lay a copy of the report on the Table of the House, following which the report shall be forthwith published and made available to the general public at a reasonable charge.

**D R A F T**

**MALTA**

AN ACT enacted by the  
Parliament of Malta

AN ACT further to amend  
the Civil Code

A BILL TO AMEND THE CIVIL CODE (CHAPTER 16)

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled and by the authority of the same, as follows:-

1. This Act may be cited as the Civil Code (Amendment) Act 1992, and shall be read and construed as one with the Civil Code, hereinafter referred to as "the principal law".

2. Immediately at the end of section 1426 of the principal law, there shall be added the following proviso:

"Provided that it shall not be possible to exclude or to limit the warranty where the thing is being sold as new. Any agreement to the contrary shall be void and of no effect".

3. For the words "one month" in section 1431 of the principal law there shall be substituted the words "six months".

**D R A F T**

**MALTA**

**AN ACT enacted by the  
Parliament of Malta**

**AN ACT to regulate  
consumer associations and  
to provide for other mat-  
ters connected therewith.**

AN ACT to regulate consumer associations and to provide for other matters connected therewith.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:

- Short title. 1. This Act may be cited as The Consumer Associations Act 1992.
- Consumer Protection Act: 1981. 2. The Consumers Protection Act 1981 is hereby revoked and repealed.
- Interpretation: 3. For the purposes of this Act,  
a) a 'consumer association' means a voluntary body of persons whose principal objective is the promotion of consumer protection and education.  
b) a "registered consumer association" means a consumer association which meets all the requirements laid down in section 4 of this Act and has accordingly been officially recognised and registered by the Consumer Protection Council.  
c) "Council" means the Consumer Protection Council established by the Consumer Protection Council 1992.
- Requirements for registration 4. A registered consumer association is a consumer association which satisfies the Council that it complies with the following requirements:  
a) the association must have a minimum paid up membership consisting of two hundred and fifty members of majority age;  
b) the statute of the association must state, in substance, that the principal object of the association is to promote consumer protection and to guide, inform and educate consumers;  
c) the statute must make provision for the association to be managed by organs freely elected by the members in periodical elections;

d) the association must not have the making of profit as one of its objects.

Application  
for registration

5. a) Any consumer association wishing to be recognised as a registered consumer association shall submit an appropriate application in writing to the Council, together with a complete updated copy of the statute, duly certified as such by the chairman of the association or by such other person holding the most senior executive post.

Verification  
by council

b) The Council shall examine and verify whether the requirements laid down in section (4) above have been complied with in their entirety. Where these are verified and confirmed, the Council shall proceed to register the applicant as a registered consumer association, and shall issue a certificate confirming the registration of the consumer association and the date thereof.

Notice of refusal

c) Where the Council refuses to register an association it shall without delay notify such refusal to the applicants in writing giving the grounds thereof.

Refusal  
because of  
Name

d) The Council may refuse to register a consumers association under a name or designation which in its opinion is offensive or otherwise undesirable.

Certificate of  
registration

e) A certificate issued by the Council to the effect that a particular consumer association is a registered consumer association which complies with all the requirements laid down under sub-section (1) hereof shall be valid and conclusive evidence of that fact for all intents and purposes of law.

No fees  
payable

f) No fees shall be charged in connection with the registration of consumer associations with the Council.

Keeping of  
register

6. The Council shall keep a register of all registered consumer associations, indicating their names, date of registration and such other particulars as the Council may deem appropriate.

Such register shall be open to inspection by any person free of charge at all reasonable times.

Obligation to  
keep records

7. Every registered consumer association shall keep an adequate and fully updated record of the names and addresses of its members.

Obligation to submit information to council

8. A registered consumer association shall submit to the Council all such returns and information on its membership and its activities as the Council may from time to time reasonably require. Without prejudice to the foregoing, each registered consumer association shall in every calendar year lodge with the Council a return on its membership as at the 31st day of December.

Council to publish annual list

9. As soon as practicable upon the lapse of each successive calendar year, the Council shall publish for general information in the Government Gazette a list of the registered consumer associations duly registered and recognised by the Council at the 31st December.

Exemption & privileges

10. A registered consumer association shall enjoy the rights, benefits, privileges and exemption granted by the Act for so long as it remains so registered and continues to comply with the requirements of section 4 of this Act.

Exemption from liability

11. a) Notwithstanding the provisions of any other law, a registered consumer association shall be completely exempt from any liability or responsibility, whether criminal or civil, in respect of any of its publications, statements or other communications or activities, provided these are "bona fide" and intended for the better information, education or protection of consumers.

Meaning of "Bona Fide"

b) For the purpose of the above exemption, the said publications, statements or other communications or other activities shall be deemed to be "bona fide" when they are not made recklessly or maliciously.

c) Any person alleging lack of "bona fide" shall have the burden of proving such allegation.

Right to appear as Complainant

12. A registered consumer association may in its own name and on its own behalf submit complaints and reports to the relevant authorities regarding contraventions of the following enactments:

- The Sale of Commodities (Control) Regulations, 1972 (as amended) issued in virtue of the Supplies and Services Act 1947;
- The Trade Descriptions Act, 1986;
- The Door to Door Salesmen Act, 1987;



Right to assist and to appear as the injured party

In the course of criminal proceedings instituted in respect of such contraventions, an official of the registered consumer association, duly authorised in writing for this purpose, may participate and assist in the prosecution of the said contraventions. In addition the association in question shall have the right to be considered as injured party for all the purposes of the criminal proceedings.

Exemption from Income Tax

13. A registered consumer association shall be exempted from the payment of income tax.

Duties of Council

14. a) It shall be the duty of the Council to strive to encourage and to facilitate the establishment of consumer associations.

b) Acting on the advise of the Council, the Minister responsible for Consumer Protection, may grant to registered consumer associations such assistance and facilities as he may deem fit from time to time in order to enable them to exercise their function.

Joint consultation

15. a) In so far as it considers it necessary, advantageous or convenient, the Council shall from time to time consult with registered consumer associations on any matter relating to or arising from the supply of goods and services to consumers in Malta.

Joint Initiatives

b) The Council may also undertake initiatives, efforts or campaigns jointly with registered consumer associations as it deems fit from time to time.

Cancellation of registration

16. The Council may cancel the registration of a registered consumer association in the following cases:

a) when the cancellation is requested by the association itself;

b) if the Council is satisfied that the membership of the association has been reduced to less than two hundred and fifty members;

c) if, for any reason, the rules of the association are not in conformity with the provisions of this Act;

d) if it is satisfied that the association has ceased to exist;

e) if it is satisfied that sufficient proof exists that the registration of the association had been procured by fraud, negligence or serious mistake.

other  
voluntary  
consumer  
Associations:

17. Nothing in this Act shall be construed as obstructing or limiting the right of persons to set up voluntary associations for the protection and promotion of consumer interests without qualifying in terms of section 4 of this Act. In these instances, such associations will not have any right to consultation, assistance or recognition from the Council, or to any other right, privilege or exemption, conferred by this Act on registered consumer associations.

## **Appendix 3 - (1999)**

**The official programme and agenda drawn up by the Commission for the Bilateral Screening Session on Chapter 23 between Malta and the Commission held on the 7-8 October 1999**

**Note:** This very revealing agenda reflects the structured, well-organised and intensive bilateral activity where the Commissioner's experts set out the Community's consumer Directives. National experts explained their local consumer legislation and the national plans to implement the relevant EU law wherever gaps were identified. Reference to it is made in Chapter 1. (unpublished)

## Appendix 3

**Subject: Chapter 23, Consumers and health protection**

**Country: Malta**

**Screening meeting: 7-8 October 1999**

### DAY 1 – 7.10.99

**10h00 General introduction**

**Mr Colin Wolfe, (Malta team)**  
*Enlargement DG*

**10h30 Consumer protection: overview of the relevant “acquis” on consumer policy**

**Mr Mário Tenreiro, Head of Unit,**  
*Health & Consumer Protection DG*

**11h00 Maltese presentation of the development in the field of consumer protection**

**11h30 The relevant “acquis” concerning Consumer contracts:**

- Unfair contractual terms Directive (List A no 8)
- Time-share Directive (List A no 10)
- Package Travel (List A no 6)

**Mr Mário Tenreiro, Head of Unit,**  
*Health & Consumer Protection DG*

**12h30 Screening exercise**

**13h00 Break**

**14h30 The relevant “acquis” on product safety:**

- Product liability Directive (List A no 4)
- Internal Market DG*

**15h00 Screening**

**15h30 The relevant “acquis” on financial services**

- Consumer credit Directive (List A no 4)
- Mr Jens Ring, Deputy Head of Unit,**  
*Health & Consumer Protection DG*

**16h00 Screening**

**16h15 The relevant “acquis” on advertising and information**

- Indication of prices Directive (List A no 3)
- Misleading Advertising (List A no 1)
- Comparative advertising (List A no 15)

**Mr Rafael Cepas, Principal Administrator,**  
*Health & Consumer Protection DG*

**17h00 Screening**

**DAY 2 – 8.10.99**

**10h00 The relevant “acquis” on product safety:**

- General product safety Directive (List A no 7)
- Dangerous imitations Directive (List A no 5)
- Ehllass Decision (List A no 9)

**Mr Erik Hansson, Deputy Head of Unit,**  
*Health & Consumer Protection DG*

**11h15 Screening**

**11h45 The relevant “acquis” on Commercial practices:**

- Doorstep selling Directive (List A no 3)

**Mr Cathal O’Conaill, Administrator**  
*Health & Consumer Protection DG*

**12h30 Screening**

**13h00 Break**

**14h30 The relevant “acquis” on Commercial practices:**

- Distance selling Directive (List A no 14)

**Mr Giuseppe Cacciato, Principal Administrator**  
*Health & Consumer Protection DG*

**15h00 Screening**

**15h15 The relevant “acquis” on Access to justice**

- Injunctions Directive (List A no 18)

**Mr Giuseppe Cacciato, Principal Administrator**  
*Health & Consumer Protection DG*

**15h15 Guarantees Directive ( )**

*Health & Consumer Protection DG*

**Tour de table**

**Closing remarks**

## **Appendix 4 - (1999)**

### **Minutes of the Screening meetings in relation to Chapter XXIII: Consumer Protection and Health Protection, held on 7-8 October 1999**

**Note:** These unpublished minutes were drawn up by Maltese Government side and are a fairly accurate representation of the intensive and wide-ranging bilateral discussions held between the Commission and Maltese officials regarding the various Directives and the manner of their implementation in Maltese law in good time prior to eventual membership. Reference to these minutes is made in Chapter 1, but they are of interest to all the Chapters.

## Appendix 4

FINAL

### MINUTES OF THE SCREENING OF CHAPTER XXIII CONSUMER AND HEALTH PROTECTION 7-8 OCTOBER 1999

**PARTICIPANTS :**

Mr Vincent Galea, Permanent Secretary, Ministry for Economic Services  
Dr David Fabri, MFSC, Consumer Affairs Task Force  
Dr Michael Tanti Dugall, Consumer Affairs Task Force  
Dr Paul Micallef, Consumer Affairs Task Force  
Mr Adrian Muscat Inglott, Consumer Affairs Task Force  
Dr George Abela, MEUSAC  
Mr Antoine Grima, EU Directorate  
Mr Edward Demicoli, Malta EU Information Centre

Ambassador Victor Camilleri, Mission of Brussels  
Ms Michelle Micallef, First Secretary, Mission of Brussels

Mr Lars Erik Forsberg, DG Elarg  
Mr Colin Wolfe, DG Elarg  
Ms Yvonne Stein, Screening Coordinator, DG Sanco  
Mr Mario Tenreiro, Head of Unit (Legal), DG Sanco  
Mr Rafael Cepas, DG Sanco  
Mr Sebastian Bohr, DG Markt  
Mr Erik Hansson, DG Sanco  
Mr Olivier Auburg, DG Sanco  
Mr Cathal O'Conaill, DG Sanco  
Mr Giuseppe Cacciato, DG Sanco

The session kicked off on Thursday morning with the usual introduction by Mr Colin Wolfe who was chairing the session. Mr Wolfe stressed the importance of the screening sessions for the Maltese authorities in order to utilise this as an opportunity to establish and consolidate direct contacts with the Commission services.

The largest advantage of this screening session lay in the fact that the Maltese delegation had already established contacts with Commission officials prior to the screening session, which allowed for very active exchanges between the well-prepared Maltese delegation and the Commission officials. This also allowed the Maltese team to present the Commission officials with various draft pieces of legislation that were then thoroughly examined by them in time for the screening session.

The session was also important for the Maltese delegation to learn about the practical operation of consumer protection in the Member States from the experience the Commission officials had to offer from previous posts they occupied in their own Member States, and from their current work with the Member States in this sphere.

All in all, one could summarise the main elements of this two-day session as follows:

**A. Legislation**

- ❖ the lack of comprehensive consumer legislation was partly of benefit to Malta, since in some cases Malta would not have to go through the process of amending previous legislation and restructuring administrative/enforcement structures;
- ❖ the draft legislation presented by the Maltese delegation was, to a large extent, a faithful copy of the directives in question, which was useful in that the main elements of the directives were fully transposed in most cases. Since the directives in this sector adopted a minimalist approach, Malta should be aware that it could not offer levels of consumer

protection that were less than those described in the directives, however one could always go beyond the provisions of these directives in order to ensure a more comprehensive protection regime for the consumer;

- ❖ the Commission was of the opinion that one should be wary of definitions in the legal texts that were too strict;
- ❖ the clarity of legislative provisions was essential in order to ensure the correct comprehension and interpretation by the judicial authorities, tradesmen and consumers alike;
- ❖ the Commission warned about the order of adoption and coming into force of the various pieces of legislation on consumer protection in Malta

#### A. Administrative and Enforcement Structures

- ❖ In general, it was pointed out that apart from observing the main principles and aims of the directives, it was important to have the necessary structures in place to ensure an optimal functionality of consumer protection in practice. This would include financial, technical and human resources, as well as enabling legislation which would provide the basis for the administrators and enforcers in order to operate rapidly and effectively.

#### A. International Aspects

- ❖ The international aspect of this policy was also discussed in that the operation of a single market presupposes a degree of cross-border purchases in an area of free movement of goods and services. Judicial protection for the consumer in this area is still a matter that is largely in the hands of the Member States, discouraging action by the consumer seeking redress in another Member State due to the high costs of hiring foreign lawyers. Linguistic accessibility was also an issue to be mentioned in this sector;
- ❖ The question of liability in cases of products entering the Union from third countries;
- ❖ Participation in an intra-EU system of notification on dangerous products.

Presentations of the various directives by the Commission were followed by presentations by the Maltese delegations, comments and questions by both sides, and finally screening of the legislation. The Maltese delegation were presented with a copy of Commission documentation on the subject, as well as a copy of all the visual aids used by the Commission officials in their presentations.

#### **General Introduction of the Policy**

Mr Tenreiro gave an overview of the acquis on consumer protection, starting with a brief overview of the principles. Consumer policy was developed on the basis of programmes since 1975, when the first programme was adopted. Five fundamental rights were recognised to ensure consumer protection, i.e. protection of health & safety, protection of interests, education of the consumer, information to the consumer, and the right of representation.

The latest BSE and dioxin crises showed the need to reinforce consumer protection. The reform of Commission service DGXXIV now called Consumer and Health Protection DG, incorporates as from the beginning of this month consumer protection, health and veterinary and phytosanitary issues.

European consumer legislation is now constituted by directives of minimal harmonisation, meaning minimal standards of protection for consumers on the European level. Member States however, may still retain more stringent rules in most cases.

The three main objectives of consumer policy can be listed as:

- to overcome market failures
- Traditional market failures include - concentration between enterprises and restrictive practices, lack of/inadequate information to the consumer, structural imbalances between individual consumers and companies which is directly linked to the high cost of consumer



claims, spillovers of private consumptions not included in the prices, and what is known as the 'free rider' programme, where the consumer associations tend to pursue their own private interests rather than those of society as a whole. The candidate countries were being advised in fact to create independent agencies and strong consumer movements with the support of the state, so that these may push forward the public interest. Mr Tenreiro also mentioned that in the Nordic countries there was the tradition of having a consumer ombudsman.

A fully functional consumer protection policy should seek a fair utilisation of resources, education and information of consumers, reduction of failures, improvement of market function, transparent procedures, improvement in access to justice for the consumer. The directives stress the duty to inform the consumers. On the other hand, companies are obliged by contracts. However, one also sought to ensure fairness and balance in the rights and obligations of the parties.

- to ensure fairness and equity

Fairness and equity should complement a better functioning of the market, and should serve as a final legitimisation of consumer powers. Other jargon associated with these principles include public interest, common good, justice. It was important that one should always look at the social dimension and protect the 'weak' consumers (poor, old, very young, the uneducated).

- to reinforce European citizenship.

Consumer policy is not an easy policy to master due to its horizontal nature. The latter has been reinforced by the Treaty of Amsterdam which states that consumer policy should be integrated into other policies.

At the end of Mr Tenreiro's presentation, Mr Wolfe commented about the growing importance of consumer policy over the years, and asked about Malta's view on the subject. Mr V.Galea replied that Malta was working in the direction of the EU principles in this area.

#### **Presentation on the Situation of Consumer Protection in Malta**

This was followed by a presentation by Dr D.Fabri on the situation of consumer protection in Malta. Dr Fabri outlined the legislation in force and the drafts that are being prepared, as well as the authorities responsible for information and protection of the consumer, enforcement and judicial remedies and penalties. He also stated that the rapprochement to the EU served to prod the legislators to give this area more importance.

Mr Tenreiro stressed the necessity to enforce the legislation, and he stated furthermore that as regards access to justice, consumers were free to choose between for example a Civil Court and a consumer tribunal.

#### **Acquis on Consumer Contracts**

Mr Tenreiro explained that the three directives on unfair contractual terms, timeshare and package travel were all related to consumer contracts. It was pointed out that contracts should be in all Community languages, since the consumer had a right to have a contract in his own language.

##### **i) Directive on Unfair Terms**

This directive requires minimal harmonisation. Mr Tenreiro proceeded by explaining the contents and the aims of this directive, pointing out in particular the definitions of 'consumer' and 'seller/supplier', the extent of consumer protection given the diverse nature of contracts taken into account. He mentioned the limitations and exclusions to this directive, which however are not always respected by Member States in practice. The provision on limitations ought to be interpreted very strictly.

Contractual terms ought to be clear and intelligible, protection must be ensured to the consumer against unfair terms present in contracts they have concluded, and contribute to free the market from unfair terms.

Questions by Maltese delegation:

Answering a question on the issue of warrants by the Maltese delegation, Ms Stein quoted an example of enforcement in her own country. Ms Stein stated that in Sweden the Court could make preliminary orders depending on how serious the infringement was. The Court could issue the tradesman with an order of prohibition/information. If the tradesman signs this order, it would be as binding as a Court order. If not, the case would have to be taken in front of the Court.

Replying to a question by Dr Abela, Mr Tenreiro explained that as yet there was no judgement on a case of contractual terms by the ECJ. He stated however that lists of Member States' case law in this field could be found on the Web page of the Consumer and health protection DG.

Dr Fabri then asked about the impact of unfair terms on financial services, in the sense that the providers of a service, like banks, used standard forms. Mr Tenreiro gave the example of insurance contracts which in themselves represent the product being sold to the consumer. He referred to an opinion published by ECOSOC on insurance contracts and unfair terms. He then mentioned that it would be a good idea, for example, to have a 'code of conduct' in the future for financial services. Finally he referred to the fact that there existed also an obligation to warn the consumer who would be ready to take a cheaper insurance which would exclude some type of insurance not immediately apparent to the one to whom the policy is being issued.

Screening:

It was noted that since the draft bill presented was as yet in its early stages, the enforcement provisions were not included. The definition of the term 'unfair contract' went beyond the definition provided in the directive.

ii) Timeshare Directive

Mr Tenreiro explained the scope and aims of this directive, and stated that a technical report on the implementation of the timeshare directive by the member states was to be published in November. He stated that the timeshare directive excluded immovables.

The basic difficulty with timeshare lay in the fact that in many cases the consumer was buying a product that was not yet finished, so there were no guarantees on the good performance of contracts. This directive too contained the obligation to inform the consumer, and to forbid payment before the cooling-off period. In Spain in particular it was possible for the consumer to ask twice for a refund. He then explained the purchaser's right to withdrawal and cancellation of credit agreements subject to specified time periods.

Comments by Maltese delegation:

Dr Fabri pointed out that timeshare was a significant part of the Maltese tourism industry, and proceeded to explain the position of timeshare in Malta and new developments such as the Tourism Authority which was set up this year. He also stated that the timeshare industry possessed a significant lobby in Malta, and the different types of timeshare offered on the market were sometimes confusing.

Mr Tenreiro then stated that the timeshare directive did not cover all situations, and neither did legislation in the Member States. *He offered to make available a copy of French, Spanish and Portuguese legislation on timeshare, which he considered to be good examples for Malta to follow in this area.*

**Screening:**

It was pointed out that in this case the directive was followed faithfully by the Maltese. However, she pointed out that the directive was weak in ensuring consumer protection, and therefore it would be better to seek ways of strengthening the national legislation beyond the provisions of this directive.

Secondly, it was better to have one coordinating authority, rather than several authorities with diluted powers.

**iii) Package Travel Directive**

The scope and objectives of this directive were also explained. Mr Tenreiro pointed out once again the mandatory obligation to inform the consumer, the rules related to contractual law and those emanating from civil liability, as also the protection of the consumer in case of insolvency of the organiser/retailer.

**Screening:**

Once again the directive was followed closely. The requirement to make a bond ought to be included in the legislation.

**Acquis on Product Liability**

Mr Bohr explained the scope and objectives of the directive on product liability. He also mentioned the recent Commission Green Paper on this subject, and also that a directive was in the pipeline for next year.

Dr Fabri explained the rules of delictual responsibility present in the Maltese civil code. He stated that the legislative provisions in this area needed to be reviewed. Dr Micallef then explained that a specific part on liability for defective products will be included in the consumer affairs act which would be largely based on the directive in question.

Answering a question by the Maltese delegation, Mr Bohr stated that the importer of goods into the Community originating in third countries would be deemed the producer for the purposes of product liability.

**Screening:**

The Commission asked for a copy of sections 1048, 1049, 1050, 1051 of the civil code, which was handed over by the Maltese delegation.

Secondly it was pointed out that the draft did not include the ECU500 threshold (Art.9 of the Directive). The Commission also commented on Section 61 of the draft wherein it referred to 'probability' of defectiveness.

The Commission sought to know whether section 59(iii) sought to transpose the directive, and whether the authors of the draft legislation had taken into account the Green paper in drafting section 62.

The Maltese delegation would get back to Ms Stein regarding the interpretation of the sections pointed out.

**Acquis on Advertising and Information**

Mr Cepas then proceeded with a presentation of the three directives falling under this heading:

**i) Indication of Prices Directive**

This is the most recent directive of the three, and is the result of two former directives concerning foodstuffs and products other than foodstuffs. He explained the objectives of this directive, the two general rules and also the exceptions granted to small retail businesses and cases of bulk buying.

The Commission will submit a report in March next year on the operation of this directive, and this will be utilised as a basis upon which to present a new proposal.

Dr Fabri explained that Malta had not yet started implementing the legislation in this respect.

Screening:

The Commission pointed out that Maltese legislation should carry a description of the penalties to be incurred by the non-respect of this directive. The Maltese delegation replied that this in fact was found in our laws which however needed to be revised.

ii) Misleading Advertising

Again the main objectives were outlined (main objective – to prohibit MA), together with definition of advertising and the features of misleading advertising, followed by measures that should be used to control misleading advertising. In the case of both misleading and comparative advertising, control was compulsory, and may be accompanied by voluntary control by self-regulatory bodies in the Member States. Another feature of this directive is that the burden of proof is reversed, in that it is up to the advertiser to furnish evidence as to accuracy of factual claims.

The main objective corresponded to the need to have an authority (a Court or an administrative authority) that is invested with the power and the means to order and ensure the prohibition/cessation of misleading advertising as rapidly as possible.

Ms Stein stated that in Sweden it was a tradition to check out cases of misleading advertising on groups of people instead of proceeding with the investigation of individual claims. It was also usual to try to achieve an out-of-Court settlement as a first step in trying to solve a case.

Dr Micallef added that Maltese legislation would include a declaration of principles intended as guidelines for the Courts, based on UN and EU principles.

Screening:

The Commission asked for a clarification on the relation between the Consumer Affairs (amendment) act and the Trade Descriptions act.

Given the existence of previous legislation on misleading advertising in Malta, a thorough revision was required.

The Commission pointed out to the fact that the scope of this directive was very wide, so one was obliged to offer protection in all categories.

ii) Comparative Advertising

The objectives were explained (main objective – to harmonise MS practices), as well as what constitutes comparative advertising, the instances when comparative advertising is permitted, measures of control and reversal of burden of proof.

*Unlike all the other directives, the one on comparative advertising is a directive of Maximal harmonisation. Therefore Member states are not allowed to retain or adopt provisions going beyond the rules stipulated by the directive. There are two exceptions to this rule.*

This directive has proven to be the subject of serious polemic within the member states, due to different practices. The UK, Ireland, Spain and Portugal allow comparative advertising, whilst other countries like Germany prohibited it, or else did not have legislation in this respect.

Dr Fabri explained that although there was no specific legislation on comparative advertising in Malta, there existed some rules in the commercial code which were however ambiguous. Malta intended to follow the EU on this matter.

Screening:

The Commission emphasised the need to stick to the directive, and pointed out a minor linguistic error in the use of 'or' in the place of 'and'.

### **Screening of Acquis on Financial Services**

Dr Tanti Dougall explained that Malta did not have legislation on consumer credit before, so therefore a new piece of legislation was being drafted. Dr Tanti Dougall added that there was no intention for the draft to contain a cooling off period and the obligation of possessing a licence for credit facilitators.

The Commission stated that in applying a formula one should stick to one that can actually be applied by tradesmen. The size of the letters in statements furnishing information to the consumer must be clearly legible.

Dr Tanti Dougall was encouraged to contact the Commission again in order to clarify definitions and any other difficulties encountered in drafting the new law.

### **Acquis on Product Safety**

Mr Hansson introduced the subject by stating that there are two main types of legislative acts in this area, the harmonised, and the non-harmonised (national & non-regulated). The main directives covered in this area are the General Product Safety directive, and the dangerous imitations directive. The General Product Safety directive enlists obligations for both Member States and businesses. This directive provides the legislative basis for the operation of the directive on product liability and the specific product directives. Other features of this directive include the safeguard clause, the information on RAPEX (an institutionalised emergencies committee on dangerous products).

Relevant to the area of application of these directives is also the EHLASS system (European Home and Leisure Accident Surveillance System) which was set up in the beginning of the nineties in order to share and report information between selected hospitals in the Member States to the Commission. This system is now integrated into the Injury Prevention Programme. At present member states are obliged to notify to the Commission products that have a great and immediate risk. Since the system is operated on confidentiality, projects involving the candidate countries are still being considered. In December a proposal is expected to modify the directive and make notification quicker and more coherent amongst other things.

The Candidate countries will be gradually integrated into the injury prevention programme. From screening with other applicants, it was discovered that the main problems in this field concerned the adaptation of systems for the control of conformity of products. Most of the CEECs possess a system of state control which constitutes an unacceptable barrier to trade. The Member States must in fact carry out market surveillance once the product is already on the market. Therefore one needs both the necessary legal powers and resources to be able to carry out this exercise.

On this point Mr Hansson answered in some detail a question put by Dr Abela regarding the structures that one has to have in place in order to carry out market surveillance. Mr Hansson pointed out the following:

-the Legal Aspect

- i) the necessity to give legal powers to an agency/Ministry (some governmental institutions must have the duty to carry out surveillance), which
- ii) are then reflected in the legislation in the form of tools for the institution to be able to carry out this surveillance, have access to the premises of the manufacturer/retailer, have the power to recall products, require cessation of trade, assistance by other entities (police etc)

-the Infrastructural Aspect

- i) in the Member States there exist either horizontal agencies or one single agency for surveillance (depending on the product sector)

- ii) the agency must be able to have a product overview of where surveillance is required, and find a rational cost-effective means of organisation
- iii) the agency will serve as a contact point for notification to the Commission and for RAPEX. In some Member States a coordinating body has been set up, for which are required human, financial and technical resources to carry out investigations. If the cost is not borne by the industry, this will result in more expenses for the taxpayer, therefore a state budget provision for this should be foreseen.
- iv) the Member State would need to have laboratory and testing facilities with competent staff and equipment. It is also possible to send material to neighbouring member states to have tests there. There are networks of cooperation between the member states under the New Approach Directive, as well as an organisation named Prosafe for the informal exchange of information between member states. Administrative cooperation between member states is important in this sector, as is equally enforcement at the national level.

The directive on food imitations was also explained.

Mr A.Grima made a presentation on the state of general product safety in Malta and the administrative infrastructures involved.

**Screening:**

The Commission was not satisfied with the draft General Product Quality and Safety Act, in that it lacked clarity and order. Mr Hansson suggested that it would be useful to separate the more general requirements on economic operators from the administrative procedures.

The draft did not transpose the scope of the directive on General Product Safety. Maltese law should state clearly the purposes and the aim of the directive that only safe products should be placed on the marketplace. The concept of prevention must prevail throughout the legislation. The Commission also stated that one should make clear what was standard and what was general in the draft legislation.

The Commission commented that it was not normal for the standardisation authority to be involved in enforcement. In the member states this body retained a restricted function and enforcement is carried out by an independent authority. The Commission also asked for more information about the role of the Malta Standardisation Authority, and stated that its role should be clear cut from that of enforcement.

The Commission also commented on the fact that the draft ought to be more stringent regarding the transposition of Article 3.1 of the directive.

The Commission then moved to the question of the warrant, and the need to be able to act fast in these circumstances. Dr Tanti Dougall stated that a warrant was not necessary for the inspection of commercial outlets. Dr Fabri noted that the provisions concerning the warrant in the draft needed to be supplemented and revised in the draft.

The Commission also pointed out the discrepancy in the dates of adoption of the dangerous imitations act and the enabling act on general product safety. The latter should be adopted first.

**Acquis on Commercial Practices**

**i) Doorstep Selling Directive**

Mr O'Conaill gave a presentation on the Doorstep Selling Directive, and commented that unlike other countries Malta possessed reasonable legislation on the subject that was on a par with that of the Member States.

Dr Fabri made a presentation on the Door-to-Door Salesman Act and took note that the reference to Maltese citizenship should be removed.

**Screening:**

The Commission commented that this was a very good draft, and sought clarification on the implications on Ministerial intervention. The Commission also pointed out the fact that the Member States would envy the existing provision in the Maltese draft where the Director of Consumer Affairs had the power to suspend the licence of the tradesman.

The Maltese side took note of the fact that Maltese law should not provide for less than the directive since this was another minimal requirement directive.

#### ii) Distance Selling Directive

The presentation on this directive was made by Mr Cacciato. Once again he explained the scope and objectives of this minimal directive which also applies to electronic commerce. The OECD issued guidelines on consumer protection which might represent a model for consumer protection in the field of electronic commerce.

He gave a definition of distance contracts as 'Any contract concluded under an organised scheme which makes exclusive use of one or more means of distance communication.' There was no specified geographical delimitation of 'distance'. International private law would come into play in the case of cross-border transactions. He also said that the basic problematic of distance selling was that the consumer had the right to know the physical locality of the commercial premises.

This directive was adopted on 20 May 1997, with implementation expected no later than 3 June 2000. For the moment only Belgium and Italy (by means of a 'decreto legislativo') notified measures adopted to comply. Finland announced adoption, notification is expected soon.

#### **Acquis on Access to Justice**

Mr Cacciato also made the presentation on the injunctions directive. He stated clearly that this directive does not carry substantive provisions due to the fact that it was created as an operative system to make possible the implementation of the acquis on consumer access to justice.

This directive was enforced by national authorities within the national boundaries. One way of getting around the problem of access to justice for consumer across national boundaries was for them to be enrolled as members of consumer associations. Such a public body could solve the problem of costly legal representation. It is up to the member state to designate the authority, and it is also up to the member state to pick out the best method of redress (Court or administrative procedures).

The directive was not applicable in individual cases, but is geared to protect collective interests of consumers as per the existing directives and the national measures of implementation thereof. A definition of 'consumer collective interests' is not a result of a cumulation of individual interests. It is the case law that will determine the 'collective interests' which warrant resorting to this directive. National judicial competence was foremost in this field.

The directive contains an annex with a list of areas where it is applicable and these include the TV without frontiers directive.

Comments by the Maltese delegation:

Dr Micallef raised a query regarding the independence of public bodies involved (Art 3(a)) since in the case of Malta the body involved was a government department. Mr Cacciato was firm on the point that although the degree of independence varies from one country to another, the body in question should have its own independence different from a government department.

The word 'seize' in the directive was clarified as meaning 'may file'. Mr Cacciato also clarified the issue of prior consultation. This was not mandatory. The date of adoption of this

directive was May 1998, of entry into force July 1998, and implementation by not later than end 2000. To date no Member State has implemented this directive.

#### **Guarantees Directive**

The directive on the sale of goods and associated guarantees was presented by Ms Stein. She explained the main elements of this directive, among which :

- conformity with the contract (presumption, public statement, installations)
- rights of the consumer in case of lack of conformity (liability of seller, repair/replacement of goods, price reduction/rescinding contract)
- right of redress
- time limits (EU directive establishes minimum limits)
- guarantees (legally binding – legal guarantee, commercial guarantee)
- exceptions
- guarantees minimum protection to the consumer; member state is free to manoeuvre above minimum elements provided these respect the scope of the directive. Implementation by the member states is expected by not later than January 2002.

Dr Fabri then explained the situation in this respect in Malta, basically the warranty against latent defects (movables/immovables) and quality action (includes other features + time limits with burden of proof on consumer).

The Commission then stated that the directive on guarantees would be re-screened at a later stage.

Mr Colin Wolfe then concluded the session by stating how essential it proved to be for the Commission services to have had the opportunity to study the Maltese drafts in time for the screening session. The Commission officials in general praised the Maltese delegation for their level of preparedness, which according to them, was 'the best out of all the candidate countries we screened'. The Commission will now issue a report on the screening session.

M.Micallef  
09.10.1999

#### **ANNEX**

Drafts forwarded to Ms Stein:

1. Draft of Product Liability Act
2. Draft of Unfair Practices Law
3. Draft Amendments to Door-to-Door Salesman Act
4. Draft General Product Quality and Safety Act
5. Draft law on Package Travel
6. Draft Law on Timeshare

Laws of Malta forwarded to Ms Stein:

1. Trade Description Act
2. Hotels and Catering Establishments Act
3. Tourist Guides Act
4. Malta Travel & Tourism Services Act
5. Supplies & Services Act
6. 1972 Regulations on Sale of Commodities (Control) + Amendments

Draft Legislation to be forwarded to Ms Stein:

Final

10



1. Draft regulation on Product Safety & Dangerous Imitations
2. Draft Law on Distance Selling

And, eventually new legislation on:

1. Consumer Credit
2. Price Indication
3. Draft on Injunctions
4. Draft on Guarantees

## **Appendix 5 - (2000)**

### **Commission Screening Results on Chapter 23 - Consumer Policy dated 25 February 2000**

**Note:** This document drawn up by the Commission records the results of the Bilateral Screening meetings held with Malta. It reveals that the comprehensive screening of Chapter 23 held the previous October (Appendix 4) generally proceed smoothly and raised no obstacle to Malta's continued progress in the accession and negotiation procedures. It is referred to specifically in Chapter 1 but is relevant to all the Chapters.

# Appendix 5

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## MALTA

### SCREENING RESULTS

#### CHAPTER 23 - CONSUMER POLICY

##### **INTRODUCTION**

The wording of sections I-III has been verified with and accepted by Malta. Section IV contains comments of the Commission services.

##### **I. GENERAL REMARKS**

The acquis for the chapter on consumers and health protection is composed of 16 directives covering consumer protection in the fields of product liability; dangerous imitations; product safety; misleading advertising; doorstep selling; consumer credit; package travel; unfair terms in consumer contracts; time-share; distance selling; comparative advertising; price indication; injunctions and guarantees. It also comprises a council decision establishing a Community system of information on home and leisure accidents (EHLASS) and 3 Commission decisions on a consumer committee and scientific committees. Two further Commission decisions concerning on-the-spot checks in the veterinary field carried out by Commission experts in the Member States and in third countries complete the acquis for the chapter.

EHLASS is incorporated into a new Injury Prevention Programme, which should be much broader than the existing EHLASS programme and would cover harmonised information on all accidents. This programme was adopted and entered into force in January 1999.

The Commission decisions concerning on-the-spot checks in the veterinary field are included in this chapter, but veterinary and phytosanitary controls in general will be treated under the agriculture chapter.

This report covers EC acquis up to 1<sup>st</sup> January 1999.

##### **II. ACQUIS ACCEPTANCE PROBLEMS**

Malta accepts the acquis with respect to this chapter and does not intend to request any transitional arrangements. The Maltese authorities consider that there should be no implementation problems for this chapter.

### III. ACQUIS ADOPTION AND IMPLEMENTATION CAPACITY

1. A draft Bill to implement a number of related EU consumer protection Directives has been prepared taking into account the points raised by the Commission during screening. It is awaiting Ministerial approval prior to being referred to Cabinet. This Bill, which amends the Consumer Affairs Act (Cap. 378) and the Door-to-Door Salesmen Act (Cap. 317), covers the following matters: **misleading advertising, comparative advertising, product liability, doorstep selling, unfair contract terms, sale of consumer goods and associated guarantees**. The draft Bill is expected to be approved during the current year and will be brought gradually into force in stages. It is envisaged that it will be fully in place by mid-2002.

The parts of the new draft Bill intends to adopt product liability rules in Maltese consumer legislation raised two points where conformity is questionable (no 500 ECU threshold and an incorrect wording with regard to one of the exemption of the producer's liability). The Maltese authorities accepted these comments by the Commission and have effected the proposed changes to the new draft Bill accordingly.

2. The draft **General Product Safety and Quality** Bill has been finalised taking into account the points raised by the Commission during screening. It is currently awaiting Cabinet approval prior to publication. This law will transpose the EU Directives on general product safety and enable the adoption of Regulations transposing other Directives, including that on dangerous imitations.

The Maltese solution was to create an Act based on the principles of the general product safety. The Malta Standardisation Authority and the Director of Consumer Affairs had been advised to keep the legislation regulating the responsibilities of these authorities separated. In fact, the Commission was informed that the authority responsible for enforcing of the national legislation which will implement the general product safety directive, is the Department of Consumer Affairs. Thus, the independence of the enforcement authority is assured, since the main purpose of the legislation regulating general product safety issues is to protect consumers, while this is not necessarily the purpose of the rules concerning standards and quality.

In this respect amendments to the Malta Standardisation Authority Act have been finalised and are currently awaiting Cabinet approval prior to being published. This amended law will grant the Malta Standardisation Authority the powers necessary to act in accordance with EU Directives.

3. A mandatory order concerning **dangerous imitations** has been drafted by the Maltese Standardisation Authority aimed at transposing the directive on products appearing to be other than they are which endanger the health and safety of consumers. This draft has not been available for analysis. The mandatory order is expected to enter into force in 2000.

4. The existing Door-to-Door Salesmen Act of 1987 is mostly in compliance with the directive on **contracts negotiated away from business premises**. The Maltese Act however contains two limitations in relation to the directive which need to be removed.

The Consumer Affairs Task Force has drafted the necessary amendments. These amendments are expected to enter into force in 2000.

This points raised by the Commission has been taken into account in the new draft Bill - which amends the Consumer Affairs Act (Cap. 378) and the Door-to-Door Salesmen Act (Cap. 317) - awaiting Ministerial approval.

5. The directive on price indications has only been very partially implemented by the Supply and Services Act of 1947. Regulations on **price indication** are being drafted by the Consumer Affairs Taskforce and their enter into force is due to be approved by mid 2002. No draft legislation has been available for analysis.

6. Draft regulations transposing the **Package Travel and Timeshare** Directives have also been prepared, and are expected to be issued later this year as subsidiary legislation under the Malta Travel and Tourism Services Act (Cap. 409).

7. No legislation exists on **consumer credit, distance contracts and injunctions**. Legislation in these fields will be drafted by the Consumer Affairs Task Force and the Malta Tourism Authority and is expected to enter into force in stages. It is expected to be fully in place by mid-2002.

#### **IMPLEMENTATION**

The Department of Consumer Affairs within the Ministry of Economic Services is the responsible authority in the field of consumer policy. Since enforcement is currently very limited the Department will need to be reinforced to cope with implementation issues as a result of compliance with new areas of consumer protection. Staff will need to be trained accordingly. Travel package and timeshare directives should be enforced and administered by the Malta Tourism Authority through its new enforcement directorate.

#### **IV. COMMENTS**

The existing Maltese consumer protection policy is not in line with the *acquis*, but transposition has started, with no major difficulties expected on adoption of legislation. Contacts are taking place between Malta and the Commission services with a view to harmonising any changes to Maltese laws in order to be in line with Community legislation. The Maltese delegation demonstrated a good understanding of the issues included in this chapter.

The existing administrative structures are weak and need to be reinforced. At this stage the administrative infrastructure is not sufficient to monitor and enforce the application of new legislation. An operations review of the structures responsible for the implementation of consumer policies has been commissioned. There is a need to strengthen and improve administrative structures in terms of human resources and to appropriate training of staff.

## **Appendix 6 - (2001)**

### **Annual Report drawn up by the EU Consumer Law Task Force in respect of its activities during 1999 - 2000**

**Note:** The Government-appointed EU Consumer Law Task Force was assigned the responsibility to complete the alignment of Maltese law with EU Directives and to satisfy the relative screening and transposition obligations. It also advised Government and its negotiators with regard to consumer protection legislation and policy. Its assignment was completed with the transposition of the consumer credit Directives in 2005. The bulk of its activities were undertaken during the years 1999-2001. The timing of this Report makes it particularly interesting for the subjects discussed in Chapter 5. This was the first and only such Annual Report and it has never been published.

## Appendix 6

### Annual Report 1999/2000 EU Consumer Affairs Task Force

The Task Force was set up in April 1999. Its terms of reference included the following:

- take stock of existing consumer legislation;
- to prepare for and carry out the screening exercise;
- to assist in the negotiating process;
- to set time frames by which the new envisaged legislation is to be drafted;
- to identify problem areas;
- to carry out consultations with constituted bodies;
- to identify transitional periods/derogation if necessary.

The Task Force met a number of times for the purpose of allocating work responsibilities. It completed all the activities related to the screening of Chapter 23 (Consumer and Health Protection) and also assisted in the drafting of position paper both the purposes of the screening and for the negotiations. It actively participated in the deliberations by MEUSAC on this chapter and responded to additional requests for information/clarifications both from the Ministry and from the EU Commission.

#### Drafting of legislation

The Task Force immediately starting working on a programme for the implementation of legislation in the areas identified as falling short of the acquis. At the of March 2000 a bill was finalised which to a large extent will bring Maltese law in line with that of the EU, while updating Maltese law in other relevant areas. The Bill was published on 16<sup>th</sup> may 2000 and covers the following matters:

1. updating and reviewing the 1994 Consumer Affairs Act and the 1987 door-to-door salesmen act;
2. misleading and comparative advertising;
3. product liability;
4. unfair terms;
5. consumer guarantees in the sale of goods;
6. injunctions for the protection of consumer interests;
7. gift offers and pyramid schemes.

The Act introduces for the first time a declaration of principles on consumer rights and provides for future regulations concerning distance selling, consumer credit and price indications. It is envisaged that these regulations will be finalised by the end of 2000 so that by this date Maltese law will be in line with that of the community.

## **Appendix 7 - (2000/1)**

**Excerpts from the National Programme for the Adoption of the Acquis (relating to the transposition of Chapter 23 of the acquis designated 'Consumer and Health Protection'), published by the Ministry of Foreign Affairs in 2000 and 2001 respectively.**

**Note:** Three NPAAAs were published. No longer currently accessible, they were a very useful tool to measure progress in Malta's gradual adoption of the Consumer Directives during the important years 1999-2001. The NPAAAs listed the measures being adopted locally to transpose the Directives according to a programme agreed with the Commission. In these documents, Government was specifically committing itself with the Commission as to how and when the transposition measures would be completed and when they would enter into legal force and effectively administered before membership. To this day NPAAAs continue to play an important role in the accession programme presented to new candidate countries. They are referred to in various Chapters, but especially Chapter 5.



## Appendix 7



### MALTA: National Programme for the Adoption of the *Acquis*

MINISTRY OF FOREIGN AFFAIRS  
MALTA

1 September 2000

Circulated by



### 3.6.2 Consumer and Health Protection

#### A. Current Status

The main piece of Maltese legislation, which directly protects the general interests of the consumer, is the Consumer Affairs Act (Cap. 378). Its principal aim is to establish and regulate the role of the Department for Consumer Affairs, the Consumer Affairs Council and the Consumer Claims Tribunal. Other laws, which relate to some aspect of consumer protection include the Door-to-Door Salesman Act (Cap. 317), the Trade Descriptions Act (Cap. 313) and the Weights and Measures Ordinance (Cap. 39).

The Consumer Affairs (Amendment) Bill was published in May 2000 and is at the Second Reading in Parliament. The EU consumer protection Directives on misleading advertising (EEC 84/450), comparative advertising (EEC 97/55) and doorstep selling (EEC 85/577) will be implemented upon the entry into force of this Act. The Directives on product liability (EEC 85/374), unfair contract terms (EEC 93/13), the sale of consumer goods and associated guarantees (EEC 99/44) and injunctions (EEC 98/27) are also implemented by provisions contained in the Act. The Act will also comprise enabling powers to permit future regulations to implement directives on distant selling, consumer credit and price indications.

In addition, subsidiary legislation on Travel Package has been issued whilst subsidiary legislation on Timeshare has been drafted.

#### B. Short Term Priorities (2000)

- a) Finalise the drafting of the necessary legislation in order to achieve alignment with the *Acquis*.
- b) Implement legislation to comply with Directive 84/450 (Misleading advertising), Directive 85/577 (Doorstep selling) and Directive 97/55 (Comparative advertising).
- c) The Directives on product liability, unfair contract terms, the sale of consumer goods and associated guarantees, injunctions, consumer credit, distance selling and price indication will be adopted during 2000.
- d) Issue the relevant regulations in respect of the Package Travel and Timeshare Directives.
- e) Transpose the General Product Safety and Dangerous Imitations Directives through the General Product Safety Act.
- f) Although the Product Safety Directive is envisaged for adoption in 2000, the full implementation of its provisions will require the creation of new structures and training. Hence, the implementation of this Directive will be introduced in a series of programmed stages in order to ensure capability of enforcement. The matter is dealt with under Section 3.1.1 (Free Movement of Goods).

#### C. Medium Term Priorities (2002)

- a) The provisions implementing the Injunctions Directive will enter into force during 2001.

- b) The Package Travel and Timeshare Directives will be brought into force by the second quarter of 2001.
- c) The relevant legislative measures to comply with the Directives on product liability, unfair contract terms, the sale of consumer goods and associated guarantees, consumer credit, distance selling and price indication will enter into force by the second quarter of 2002.
- d) The legislation and regulations necessary to comply with the Directives on dangerous imitations and general product safety will enter into force by the fourth quarter of 2002.
- e) Implement a comprehensive educational and informative programme to increase consumer awareness.

#### D. Institution Building Needs

An extensive Operations Review within the Ministry for Economic Services has been carried out in order to establish the necessary elements for the effective implementation and enforcement of the *Acquis*. As a result, a Market Surveillance Directorate is being established within the Ministry, which will have the overall responsibility for the co-ordination of Market Surveillance activities across Government, the development of an annual programme and a year-end review of all surveillance activities. A Surveillance Committee will also be established.

The Department responsible for Consumer Affairs will be largely the main administrative structure responsible for the implementation and enforcement of consumer protection legislation. On the other hand, the Ministry for Tourism and the Malta Tourism Authority are the competent authorities to implement and enforce the new regulations on package travel and timeshare.

<i>Area of Activity</i>		2000	2001	2002	Total
<b>Ministry for Tourism</b>					
	Senior	-	-	-	-
	Middle	-	1	-	1
	Other	-	-	-	-
	Total	-	1	-	1
<b>Ministry for Economic Services</b>					
<i>Market Surveillance Directorate</i>					
	Senior	1	3	-	4
	Middle	3	2	-	5
	Other	-	-	-	-
	Total	4	5	-	9
<b>Consumer Affairs</b>					
	Senior	-	-	-	-
	Middle	-	4	-	4
	Other	-	-	-	-



MALTA: National Programme for the  
Adoption of the *Acquis*, as at January 2001

MINISTRY OF FOREIGN AFFAIRS  
MALTA

Final Draft

### 3.6.2 Consumer and Health Protection

#### A. Current Status

The main piece of Maltese legislation, which directly protects the general interests of the consumer, is the Consumer Affairs Act (Cap. 378). Its principal aim is to establish and regulate the role of the Department for Consumer Affairs, the Consumer Affairs Council and the Consumer Claims Tribunal. Other laws, which relate to some aspect of consumer protection include the Door-to-Door Salesman Act (Cap. 317), the Trade Descriptions Act (Cap. 313) and the Weights and Measures Ordinance (Cap. 39).

The Consumer Affairs (Amendment) Act (Act XXVI of 2000) enacted in October 2000 and came into force in January 2001. This Act incorporates the EU consumer protection Directives on misleading advertising (EEC 84/450), comparative advertising (EEC 97/55) and doorstep selling. These were brought into force in January 2001. The Act also incorporates Directive 98/27/EC on injunctions to protect consumer interests, which will come into force in 2001. During the year 2000, Articles 1-14, 43, 48-55, 94-110 (excluding 94(1)(a) of Clause 15 as well as Clauses 17 & 18), were brought into force (LN267/00). The Consumer Claims Tribunal (Amendments) also amended the fees payable in the Tribunal in view of increase in competence of the said Tribunal (LN2284/00). Furthermore it also includes the legislation to fully transpose Directives regarding product liability (EEC 85/374), unfair contract terms (EEC 93/13), the sale of consumer goods and associated guarantees (EEC 99/44). The Consumers Affairs (Amendment) Act also includes enabling provisions regarding consumers credit legislation.

Draft regulations regarding distance selling were prepared during the last quarter of 2000. Draft new law and new regulations were also prepared during the fourth quarter of 2000 regarding price indications. The Quality Control (exports, Imports and Local Goods) Act (Cap. 225) was repealed by the Product Safety Act (Act V of 2001). The Dangerous Imitations Directive was issued under this Act and adopted in January 2001.

Subsidiary legislation on Package Travel and Package Holidays and Package Tours Regulations 2000 that were modelled on Council Directive 90/314/EEC were published in the third quarter of 2000. The Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations, based on Council Directive 94/47/EC was published in November 2000. These Legal Notices will be brought into force by the last quarter of 2001.

The full implementation of the provisions of the Product Safety Directive require the creation of new structures and training. Hence the implementation of this Directive will be introduced in a series of programmed stages in order to ensure capability of enforcement. During 2000, following the operations review of the Ministry of Economic Services, the necessary structures were established. In July 2000, the parliament approved an Act to amend the Malta Standardisation Act (Cap. 187). These amendments ensure separation of incompatible roles, namely involvement in legislation, enforcement and market surveillance, and bring the Act in line with the *Acquis*. The Malta Standards Authority (MSA) was reorganised through a series of functionally independent Directorates, thus ensuring that the Risk Assessment (advisory) component is covered.

Units were established during the year 2000 in the areas of certification services, metrology, standardisation and notification.

The Consumer and Competition Division was established within the Ministry for Economic Services ensuring that the Risk Management (enforcement) component is adequately covered. The establishment of the Market Surveillance Directorate within the Economic Policy Division of the Ministry for Economic Services covers the co-ordination and auditing functions.

#### **B. Short Term Priorities (2001)**

- a) The provisions on misleading advertising, consumer advertising and doorstep selling will enter into force in the first quarter of 2001.
- b) The provisions implementing the Injunctions Directive will enter into force during 2001.
- c) The Package Travel and Timeshare Directives will be brought into force by the last quarter of 2001.
- d) Enforcement aspects related to package travel and timeshare will be dealt with by the Malta Tourism Authority (Enforcement Directorate), which will achieve full capacity by the first quarter of 2002.
- e) The Product safety Act is expected to be published in the near future.
- f) The structures that have been established within the Ministry for Economic Services will be fully consolidated during 2001

#### **C. Medium Term Priorities (2002)**

- a) The relevant legislative measures to comply with the Directives on product liability, unfair contract terms, the sale of consumer goods and associated guarantees, consumer credit, distance selling and price indication will enter into force by the second quarter of 2002.
- b) The legislation and regulations necessary to comply with the Directives on dangerous imitations and general product safety will enter into force by the fourth quarter of 2002.
- c) Implement a comprehensive educational and informative programme to increase consumer awareness.

#### **D. Institution Building Needs**

An extensive Operations Review within the Ministry for Economic Services has been carried out in order to establish the necessary elements for the effective implementation and enforcement of the *Acquis*. As a result, a Market Surveillance Directorate was established within the Economic Policy Division of the Ministry, which will have the overall responsibility for the co-ordination of Market Surveillance activities across Government, the development of an annual programme and a year-end review of all surveillance activities. A Surveillance Committee will also be established. The Directorate is in the process of recruiting the necessary technical staff.

Following the Operations Review, the Consumer and Competition Division was established. This Division is largely the main administrative structure responsible for the implementation and enforcement of consumer protection legislation. It will also be responsible for the enforcement of the Product Safety legislation. On the other hand, the Ministry for Tourism and the Malta Tourism Authority (MTA) are the competent authorities to implement and enforce the new regulations on package travel and timeshare. The Enforcement Directorate of MTA is being strengthened. The Malta Standards Authority (Establishment of Directorates) order, 2000 CLN 213/00) which was published in October 2000 provides for the setting up of three functionally independent directorates within the MSA - the Consumer and Industrial Goods, the Foodstuffs, Chemicals and Cosmetics and the Standardisation Directorates. A Metrology Directorate and an Accreditation Directorate will be set up during 2001.

<i>Area of Activity</i>			2001	2002	Total
<b>Ministry for Tourism</b>					
	Senior		-	-	-
	Middle		1	-	1
	Other		-	-	-
	Total		1	-	1
<b>Ministry for Economic Services</b>					
<i>Market Surveillance Directorate</i>	Senior		3	-	3
	Middle		2	-	2
	Other		-	-	-
	Total		5	-	5
<i>Consumer Affairs</i>	Senior		-	-	-
	Middle		4	-	4
	Other		-	-	-
	Total		4	-	4

#### E. Financial Requirements

Lm000

<i>Area of Activity</i>			2001	2002	Total
<b>Ministry for Tourism</b>					
	Recurrent		10	10	20
	Capital		-	-	-
	Training		-	-	-
	Total		10	10	20

<b>Ministry for Economic Services</b>					
<i>Market Surveillance Directorate</i>	Recurrent		60	75	135
	Capital		5	-	5
	Training *		30	30	60
	Total		95	105	200
<i>Consumer Affairs</i>	Recurrent		30	30	60
	Capital		-	-	-
	Training		10	5	15
	Total		40	35	75

(\*) Mainly representing training assistance under pre-accession funds.



## LIST OF TABLES

### TABLE A

#### COMPARATIVE AND CHRONOLOGICAL TABLE

##### **Comparative and chronological sequence of relevant Community and Maltese legal measures and events**

This Table, divided in two parts, identifies the landmark events of two separate and parallel law-making processes which were initially unconnected but which eventually converged at an accelerated rate.

This Table traces and compares the development of European consumer law and of Maltese consumer law, and the interplay between them, with a view to facilitating a better understanding of the sequence of relevant measures and events analysed throughout this thesis, especially in the Introduction and Chapter 1. \*

\* The European Commission website carries its own much less extensive Timeline on Malta's relations with the EU  
<[http://ec.europa.eu/malta/abc/malta\\_eu/chronology/index\\_en.htm](http://ec.europa.eu/malta/abc/malta_eu/chronology/index_en.htm)> accessed on 10 May 2014

<b>Chronology of relevant events and developments concerning the development of EU Consumer Policy up to 2005 and beyond (partial list, selectively annotated)</b>	<b>Chronology of relevant events and developments concerning Malta's EU membership bid and the evolution of Consumer Law and Policy in Malta (partial list selectively annotated)</b>
<b>1957</b> Treaty of Rome entered into force in 1958 - originally six members (25 March).	
<b>1968</b> A special consumer affairs unit is established within the Competition Directorate-General.	
<b>1972</b> EC Consumer policy is launched at Paris Summit of Heads of States (20 October).	<b>1970</b> Malta enters into an Association Agreement with the EEC, which enters into force on 1 April 1971 (5 December).
<b>1973</b> UK, Ireland and Denmark become members of the EEC - total of nine members (1 January).	
<b>1975</b> Council Resolution on First Preliminary (4 year) Programme for a consumer protection and information policy (1975 - 1978): first comprehensive policy commitment by the EC (14 April).	
<b>1981</b> Council resolution on a Second (5 year) Programme for a consumer and information policy 1982 - 1986 (19 May).	<b>1981</b> The Consumers Protection Act <sup>659</sup> is enacted. <b>1981</b> The Electoral manifesto of the ruling Malta Labour Party for the 1981 General Elections contains not a single reference to consumer protection. <sup>660</sup>

<sup>659</sup> Chapter 293 of the Laws of Malta. The Act was enacted shortly before the December 1981 General Elections

<sup>660</sup> 'From Good to even Better' (literal and admittedly untidy translation of 'Mit-Tajjeb għall-Ahjar') Union Print, November 1981

<p><b>1984</b> European Parliament passes a resolution on consumer policy.</p> <p><b>1984</b> Directive on Misleading Advertising is enacted (10 September).</p> <p><b>1985</b> White Paper on the Internal Market: makes only a passing reference to consumer protection (14 June).</p> <p><b>1985</b> Communication from the Commission to the Council calling for 'A New Impetus for Consumer Protection Policy'<sup>613</sup> in the Community. (27 June)</p> <p><b>1985</b> Product Liability Directive<sup>614</sup> is enacted (25 July).</p> <p><b>1985</b> Doorstep Selling Directive<sup>615</sup> is enacted (20 December).</p> <p><b>1986</b> Council Resolution concerning the future orientation of Consumer Policy in the Community (23 June).<sup>616</sup></p>	<p><b>1981</b> <b>MALTA GENERAL ELECTIONS:</b> The Malta Labour Party regains a Parliamentary majority despite polling a minority of votes, aggravating political divisions and giving rise to a constitutional crisis.</p> <p><b>1986</b> The Trade Descriptions Act<sup>661</sup> is enacted.</p>
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<sup>613</sup> Commission, 'A New Impetus for Consumer Protection Policy' COM(85) 314 final

<sup>614</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29

<sup>615</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31

<sup>616</sup> Council Resolution of 23 June 1986 concerning the future orientation of the policy of the European Economic Community for the protection and promotion of consumer interests [1986] OJ C167/01

<b>1986</b>	Council Resolution calling for the integration of consumer protection in other EC common policies (15 December). <sup>617</sup>		
<b>1986</b>	Consumer Credit Directive <sup>618</sup> is enacted (22 December).		
<b>1987</b>	European Parliament passes a resolution on access of consumers to justice (13 March). <sup>619</sup> (I only found one dated 1992)	<b>1987</b>	The Door-to-Door Salesmen Act <sup>662</sup> is enacted.
<b>1987</b>	Single European Act <sup>620</sup> comes into force: refers to 'high level of protection' for consumer policy as part of internal market objective (1 July).	<b>1987</b>	<b>MALTA GENERAL ELECTIONS:</b> General Elections bring new Nationalist Government to power. Dr Emmanuel Bonnici, new Minister for the Tertiary Sector, has responsibility for trade and therefore also for consumer affairs.
<b>1987</b>	Council Resolution on future priorities for the development of a consumer protection policy (13 July). <sup>621</sup>		
<b>1989</b>	Council Resolution calls for the 're-launching' of the Community consumer policy and for fresh impetus (9 November). <sup>622</sup>		

<sup>661</sup> Chapter 313 of the Laws of Malta

<sup>617</sup> Council Resolution of 15 December 1986 on the integration of consumer policy in the other common policies [1986] OJ 87 C3/1

<sup>618</sup> Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1986] OJ L42/48. This Directive was subsequently amended by Council Directive 90/88/EEC and by Directive 98/7/EC of the European Parliament and of the Council

<sup>619</sup> European Parliament Resolution of 13 March 1987 on consumer redress [1987] OJ C99/203

<sup>620</sup> Single European Act [1987] OJ L169/1

<sup>621</sup> Council Resolution of 13 July 1992 on future priorities for the development of consumer protection [1992] OJ C186/1

<sup>622</sup> Council Resolution of 9 November 1989 on future priorities for re-launching consumer protection policy OJ C294/1

<b>1989</b>	Creation of an independent Consumer Policy Service.		
<b>1990</b>	Directive amending the Consumer Credit Directive <sup>623</sup> is enacted (22 February).	<b>1990</b>	Report by the EC Directorate to the Prime Minister on the implications of Malta's eventual membership is published (March). <sup>663</sup>
<b>1990</b>	First Consumer Policy three-year Action Plan (1990-1992): <sup>624</sup> identifies key areas for action, and paves way for various measures including product safety, package travel, consumer credit, timeshare and unfair contractual terms (3 May).	<b>1990</b>	'Sketches on Consumer Protection': <sup>664</sup> a preparatory and comprehensive study of the state of consumer protection in Malta is submitted to Government (April).
<b>1990</b>	Package Travel, Package Holidays and Package Tours Directive <sup>625</sup> is enacted (13 June).	<b>1990</b>	Originally a part of the Foreign Affairs Ministry, the EU Directorate is established with its own premises early in 1990. Its task is to lead and co-ordinate Malta's accession procedures.
		<b>1990</b>	Malta applies for membership in the EU (16 July).
		<b>1990</b>	Council notes Malta's application and sets procedures in motion asking the Commission to 'draw up an opinion as required.' (17 September) <sup>665</sup>

<sup>662</sup> Chapter 317 of the Laws of Malta

<sup>623</sup> Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1990] OJ L61/14

<sup>624</sup> Commission, 'Three year action plan of consumer policy in the EEC (1990-1992)' COM (90) 98 final

<sup>625</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59

<sup>663</sup> Department of Information, 'Report by the EC Directorate to the Prime Minister and Minister of Foreign Affairs regarding Malta's membership of the European Community' (Malta, 1990)

<sup>664</sup> 'Sketches on Consumer Protection in Maltese Law', unpublished Report submitted to Government, April 1990

<sup>665</sup> Bulletin of the European Communities Supplement 4/93 <<http://aei.pitt.edu/5761/1/5761.pdf>> accessed on 10 January 2014

<p><b>1991</b> Economic and Social Committee issues first Opinion: examines how consumer protection may be promoted in the single market (26 September).<sup>626</sup></p>	<p><b>1990</b></p>	<p>The Nationalist Government makes consumer policy commitments in 1990 Budget speech (November).</p>
	<p><b>1990</b></p>	<p>Dr Michael Frendo is appointed Parliamentary Secretary under the Ministry of Education with specific responsibility for consumer protection, included in his wide portfolio together with Arts, Culture, Sports and Youth Affairs. A small consumer complaints unit is set up in the Ministry's premises in Floriana.</p>
	<p><b>1990</b></p>	<p>After preliminary studies and following Cabinet direction, Dr M Frendo builds on the earlier 1990 stock-take and commissions the drafting of a first ever official White Paper to propose wide consumer law reforms (December).</p>
	<p><b>1991</b></p>	<p>White Paper 'Rights for the Consumer' is published (August).<sup>666</sup></p>
	<p><b>1991</b></p>	<p>First drafts of three short new laws prepared on the basis of White Paper proposals and received by Government. They do not progress as General Elections are called. The Prime Minister promises the enactment of a comprehensive consumer law as the first priority of a new Nationalist Government should it be re-elected (December).</p>

<sup>626</sup> Opinion on Consumer Protection and Completion of Internal Market [1991] OJ C339/16

<p><b>1992</b> Maastricht Treaty<sup>627</sup> is signed (enters into force in 1993) - makes consumer protection an explicit competence of the EC (7 February).</p>	<p><b>1992</b> <b>MALTA GENERAL ELECTIONS:</b> Nationalist Party is confirmed in power and Mr Lawrence Gatt is appointed Minister for Agriculture, Fisheries, Food and Consumer Protection. After various consultations and the appointment of a working group, he embarks on launching a new Government Department. A new comprehensive law on consumer affairs is planned and drafted. The small Consumer Unit set up by Dr Frendo continues its work until the new Department becomes operational (February).</p>
<p><b>1992</b> European Parliament Resolution in favour of highest possible level of consumer protection, and calls for it to be taken into account in the completion of the internal market (11 March).<sup>628</sup></p>	
<p><b>1992</b> General Product Safety Directive<sup>629</sup> is enacted (29 June).</p>	
<p><b>1992</b> Council Resolution on future priorities for the development of a community consumer protection policy (13 July).<sup>630</sup></p>	
<p><b>1992</b> Presentation of the Sutherland report on strengthening the Internal Market and the role of consumers (28 October).<sup>631</sup></p>	<p><b>1992</b> New Minister Mr Lawrence Gatt assumes responsibility for consumer protection. Legislation is drawn up to implement major core reforms envisaged in 1991 White Paper. A new Government Department for Consumer Affairs is set up in</p>
<p><b>1992</b> The Economic and Social Committee issues its Second Opinion:<sup>632</sup> welcomes the new clearer legal</p>	

<sup>666</sup> Department of Information, 'Rights for the Consumer' (White Paper, 1991)

<sup>627</sup> Treaty on European Union (Maastricht Treaty) [1992] OJ C191/1

<sup>628</sup> European Parliament Resolution on the consumer protection and public health requirements to be taken into account in the completion of the internal market [1992] OJ 94/217

<sup>629</sup> Council Directive 92/59/EEC of 29 June 1992 on general product safety [1992] OJ L228/24 This Council Directive was replaced by Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4)

<sup>630</sup> Council Resolution on future priorities for the development of consumer protection policy [1992] OJ C186/1

<sup>631</sup> Peter Sutherland, 'The Internal Market after 1992 – Meeting the Challenge (Sutherland Report)'. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market, SEC (92) 2044, November 1992 (Brussels, 1992)

<sup>632</sup> Opinion on Consumer Protection and Completion of the Internal Market, 'follow-up' (Additional Opinion) of November 1992, CES 878/92, Official Journal No C 19, 25.1.1993

	basis for consumer action at Community level and higher budget allocated. (24 November).		advance of the imminent legislation.
<b>1993</b>	European Resolution <sup>633</sup> stresses that the application of the principle of subsidiarity should not weaken consumer protection (19 January).	<b>1993</b>	The European Commission issues its first Opinion ('Avis') on Malta's membership application. <sup>667</sup> The Opinion is generally favourable to Malta's application but referred to the need for 'root and branch reforms.' This opinion paved the way to an intensive programme of negotiations with the Commission. The <i>Avis</i> points out that consumer protection in Malta has much catching up to do: 'Accession would therefore give rise to considerable legislative changes. New laws still require to cover such areas as misleading advertising, product safety, unfair contract terms, consumer credit and package travel.'
<b>1993</b>	Unfair Contract Terms Directive <sup>634</sup> is enacted (5 April).		(30 June).
<b>1993</b>	Second Commission three-year Consumer Protection Action Plan 1993-95: <sup>635</sup> 'Placing the single market at the service of European consumers'. Commission lists four priority areas for safeguarding consumer interests, particularly consumer information (28 July).	<b>1993</b>	The White Paper 'Fair Trading...the next step forward' <sup>668</sup> is published to accompany the presentation of the Budget Speech by Minister of Finance Mr John Dalli. It builds on the 1991 White Paper and introduces ground-breaking draft legislation on consumer affairs and fair competition.
<b>1993</b>	Maastricht Treaty - enters into force with a new explicit section on consumer protection, which Member States were now obliged to pursue (1 November).		

<sup>633</sup> Resolution on the application of the principle of subsidiarity to environment and consumer protection policies [1993] OJ C42/40

<sup>634</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L97/29

<sup>635</sup> Commission, 'Placing the single market at the service of European Consumers. Second Commission three-year action plan 1993-1995' COM (93) 378 final



<p><b>1994</b> Timeshare Directive<sup>636</sup> is enacted (26 October).</p>	<p><b>1994</b> Mr Censu Galea takes over as new Minister replacing Mr L Gatt who had resigned.</p> <p><b>1994</b> The new Consumer Affairs Act,<sup>669</sup> piloted in Parliament by Minister Mr C Galea, is officially published in the official Gazette, debated and approved by Parliament in the second half of the year.</p> <p><b>1994</b> The Corfu European Council declares that Malta had concluded satisfactory progress in its application for Union membership and will be included in the next enlargement of the EU (December).</p>
<p><b>1995</b> Consumer Policy Directorate-General is set up within the Commission (March).</p>	
<p><b>1995</b> Commission Decision setting up a Consumer Committee (13 June)</p>	
<p><b>1995</b> Third three-year Consumer Protection Action Plan (1996 - 1998).<sup>637</sup> Commission lists ten areas for priority action (31 October).</p>	

<sup>667</sup> European Commission: 'Opinion on Malta's Application for Membership' Bulletin of the European Communities Supplement 4/93, Com (93) 312 final

<sup>668</sup> Department of Information, 'Fair Trading...the next step forward. Proposals for Legislative Reforms' (White Paper, 1993)

<sup>636</sup> Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83

<sup>637</sup> Commission, 'Priorities for consumer policy 1996-1998' COM (95) 519 final

<sup>669</sup> Chapter 378 of the Laws of Malta

	<p><b>1996</b></p> <p><b>1996</b></p> <p><b>1996</b></p>	<p>The Consumer Affairs Act of 1994 is brought into force in January 1996, a year and a half after Parliamentary approval. A Consumer Affairs Council and a Consumer Claims Tribunal are instituted for the first time (January).</p> <p><b>MALTA GENERAL ELECTIONS:</b> General Elections are held in October and a new Labour Government is elected with a majority of votes. The new Euro-sceptic Labour Government led by Dr Alfred Sant, freezes and places Malta's EU membership application on hold. Malta ceases to remain on a 'pre-accession relationship' with the European Union. The EU transposition project is stopped and MLP government pursues its own home-made agenda for consumer reforms. Mr Leo Brincat is the new Minister responsible for Consumer Protection (October).</p> <p>New Labour Government starts implementing its consumer policy as described in its Electoral Programme. Consumer and Competition to be brought together under a single autonomous public authority, incorporating improvements to the 1994 consumer and competition laws, introducing a Consumer Ombudsman, the regulator of public</p>
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			utilities, and reforms to the Door-to-Door Salesmen Act 1987 <sup>670</sup> (November).
<b>1997</b>	Distance Selling Directive <sup>638</sup> is enacted (20 May).	<b>1997</b>	Minister Mr Leo Brincat sets up a Working Group to draw up a new law to establish an Authority for Fair Trade and Consumer Affairs.
<b>1997</b>	Misleading Advertising Directive <sup>639</sup> is amended to cover comparative advertising (6 October).		
<b>1998</b>	Fourth Three-year Commission Consumer Policy Action Plan (1999 – 2001) (3 January) <sup>640</sup>	<b>1998</b>	EU starts accession enlargement negotiations with the candidate countries, Malta excluded. (31 March)
<b>1998</b>	Communication from the Commission to the Council on future relations between the European Union and Malta, SEC (1998) 154 final (5 February)	<b>1998</b>	A new Bill for establishing a new Authority to regulate consumer and competition affairs, including within its structure a Consumer Ombudsman, is finalised and circulated for consultation to stakeholders. This draft bill is drawn up by a 3-man Working Group appointed by Minister for Finance and Commerce Mr L Brincat. It does not progress further as new General Elections are called (August).
<b>1998</b>	Price Indications Directive <sup>641</sup> is enacted (16 February).		
<b>1998</b>	Commission Staff Working paper – ‘Consumer Policy: Past Achievements’ (26 March). <sup>642</sup>		
<b>1998</b>	Accession negotiations were started with six applicant countries: Hungary, Poland, Estonia, the Czech Republic, Slovenia and Cyprus (31 March)	<b>1998</b>	<b>MALTA GENERAL ELECTIONS:</b> General Elections are held on 5 September 1998. Labour Party loses the elections and new Nationalist Government comes to
<b>1998</b>	Injunctions Directive <sup>643</sup> is enacted (19 May).		

<sup>638</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19. This directive was amended by Directive 2002/65/EC of the European Parliament and of the Council

<sup>639</sup> Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising [1997] OJ L290/18

<sup>640</sup> Commission, ‘Consumer policy action plan 1999-2001’, COM (98) 696 final

<sup>641</sup> Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers [1998] OJ L80/27

<sup>642</sup> Commission, ‘Consumer Policy Past Achievements’ (Staff Working Paper) SEC (1998) 564

<b>1998</b>	Communication from the Commission: <i>Action Plan for Consumer Policy 1999-2001</i> (1 December) <sup>644</sup>	power.
<b>1998</b>	Vienna European Council – consumer protection identified as a future priority (12 December).	Political responsibility for consumer protection is shared between Dr George Hyzler and Mr Edwin Vassallo, both Parliamentary Secretaries under Prof Josef Bonnici, new Minister for Economic Affairs responsible (for the first time) for both consumer protection and competition matters (5 September).
		<b>1998</b> New Nationalist Party Government immediately requests the re-activation of Malta's application for EU membership (10 September).
		<b>1998</b> The Council requests the EC Commission to 'present an update of the 1993 opinion ...' (5 October) <sup>671</sup>
		<b>1998</b> European Parliament expresses its satisfaction that Malta had re-activated its membership application and calls on Council and the Commission to support its accession (8 October). <sup>672</sup>
		Maltese Government binds itself to hold a referendum on the outcome of the accession negotiations.
		Draft Bill for the setting up of the new Authority for Fair Trading and Consumer Affairs held in abeyance,

<sup>643</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/51

<sup>670</sup> Chapter 317 of the Laws of Malta

<sup>644</sup> Commission, 'Consumer policy action plan 199-200'1. (Communication from the Commission) COM (98) 696 final

<sup>671</sup> Reference

<sup>672</sup> Reference

			as focus shifts entirely to the EU Accession and transposition agenda.
<b>1999</b>	Decision of European Parliament and Council establishing a general framework for Community activities in favour of consumers 1999 - 2003 (25 January). <sup>645</sup>	<b>1999</b>	Commission publishes update of original 1993 opinion ( <i>Avis</i> ) published in June 1993: <sup>673</sup> 'Report updating the Commission's original 1993 opinion on Malta Application for Membership' following Malta's September 1998 request for re-activating application. It observes that: 'In the field of consumer policy, Maltese legislation is still not in line with the <i>acquis</i> ....considerable work still needs to be done to ensure transposition of the <i>acquis</i> .'
<b>1999</b>	Commission Report Updating the Commission's Opinion on Malta's Application for Membership, Com (1999) 69 final, Brussels (17 February )		
<b>1999</b>	Commission reports on progress towards membership - European Parliament Report PE 230.174/fin. [A4-0165/99] (30 March)	<b>1999</b>	The Malta EU Steering Action Committee (MEUSAC) is set up to handle policy making and public consultation on the negotiations concerning the Community <i>acquis</i> : it comprises Government officials, independent experts and constituted bodies. The General Affairs Council decides that Screening should start as soon as possible. Malta was requested to draw up its first National Programme for the Acceptance of the <i>Acquis</i> (NPAA) (March).
<b>1999</b>	Guarantees in Sales of Consumer Goods Directive <sup>646</sup> is enacted (25 May).		
<b>1999</b>	Council Resolution on Community Consumer Policy 1999 - 2001 (28 June). <sup>647</sup>		
<b>1999</b>	The Commission recommended Member States to open negotiations with Romania, the Slovak Republic, Latvia, Lithuania, Bulgaria and Malta. (13 October)	<b>1999</b>	

<sup>645</sup> Commission, Decision No 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers [1999] OJ L34/

<sup>646</sup> Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees[1999] OJ L171/12

<sup>647</sup> Council Resolution of 28 June 1999 on Community consumer policy 1999 to 2001 [1999] OJ C206/1

<sup>673</sup> Report updating the Commission Opinion on Malta's Application for Membership (presented by the Commission) Brussels, 17.02.1999 Com (1999) 69 final

	<p><b>1999</b> Screening meetings start, initially in relation to nine Chapters (May).</p> <p><b>1999</b> The Cologne European Council decides that 'on the basis of the Commission's updated opinion on Malta's accession application, it has now been possible to make a start on analytical examination on the Union <i>Acquis</i> with Malta.' (June). Government appoints a EU Consumer Task Force to handle the Screening and transposition of the EC consumer Directives.</p> <p><b>1999</b> EU holds Screening meeting for Chapter 23 (Consumer Chapter) of the <i>Acquis</i> in relation to Malta (7 – 8 October).</p> <p><b>1999</b> Commission publishes 1999 Regular Report on Malta's membership application.<sup>674</sup> Follows pattern of February Report earlier in the year and assesses progress. (13 October). EU Commission Regular report of October 1999 commented on the need for Malta to adopt legislation 'for the implementation of the EU principles on accreditation, metrology and market surveillance ...' (p 19). P 44 contains half a page on 'Consumer policy', commenting on the 'very limited members of staff',</p>
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<sup>674</sup> From the Commission on Malta's Progress towards Accession, 1999 Regular Report  
[http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/1999/malta\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/malta_en.pdf) accessed on 10 January 2014

<p><b>2000</b> Nice Treaty<sup>648</sup> agreed (entered into force in 2003) (7-10 December).</p>	<p>that 'Enforcement is very limited' and that '... until now no Consumer Policy Action Plan is being drafted....The existing administrative structures are weak and need to be built up. At present the administrative infrastructure is not sufficient to be able to fully implement and oversee the working of the new legislation ...' (p 44)</p> <p><b>2000</b> The Screening process with Malta is concluded (28 January).</p> <p><b>2000</b> Formal Accession negotiations are formally opened with Malta (15 February). Malta publishes its first NPAA.</p> <p><b>2000</b> An Act is passed in 2000<sup>675</sup> to add substantial new parts and provisions to the Consumer Affairs Act. The amendments comprise both domestic reforms as well as significant EU transposition measures. The product liability, unfair contract terms, guarantees in sales of goods, misleading and comparative advertising and the injunctions</p>
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<sup>648</sup> Treaty of Nice [2001] OJ C80/1

<sup>675</sup> Consumer Affairs (Amendment) Act, Act XXVI of 2000

	<p><b>2000</b></p> <p><b>2000</b></p> <p><b>2000</b></p> <p><b>2001</b></p>	<p>Directives are transposed.</p> <p>Regular Report from the Commission on Malta's Progress towards Accession.<sup>676</sup> The 2000 Regular report reported on progress since the 1999 Regular Report of 13<sup>th</sup> October 1999. In its review of Malta's progress on Chapter 23 it comments: 'No further progress has been made in terms of legal alignment, although new legislation in this area is under preparation ... The existing Maltese consumer protection policy is not in line with the <i>acquis</i>, but transposition has started .... The existing administrative structures provide a good framework for the implementation of the <i>acquis</i> but they need to be strengthened. This applies in particular to the Department of Consumer Affairs.' (pp 53-54).</p> <p>Government publishes its revised and updated NPAA as at 1<sup>st</sup> September 2000.<sup>677</sup> Consumer and Health Protection are dealt with on pages 181-183.</p> <p>Malta opens and concludes the negotiations on the Consumers and Health Protection Chapter (October).</p> <p>Updated NPAA is published based on a targeted</p>
<p><b>2001</b>                      New General Product Safety Directive<sup>649</sup> is enacted</p>	<p><b>2001</b></p>	<p>Updated NPAA is published based on a targeted</p>

<sup>649</sup> Directive 2001/95/EC of the European Council and of the Council of 3 December 2001 on general product safety[2001] OJ L11/4

<sup>676</sup> 2000 Regular Report from the Commission on Malta's progress towards accession,

<[http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2000/mt\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/mt_en.pdf) > accessed on 10 January 2014



	(3 December).		
		<b>2001</b>	accession date of 1 <sup>st</sup> January 2003. <sup>678</sup> New Product Safety Act <sup>679</sup> is enacted. The 2000 amendments to the Consumer Affairs Act are brought into force.
		<b>2001</b>	Commission Regular Report on Malta's application is published (13 November). <sup>680</sup>
<b>2002</b>	Council Decision on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Malta, which noted Malta's progress in meeting the membership criteria and which encouraged it to 'continue alignment and strengthen market surveillance and enforcement authorities.' (28 January) <sup>650</sup>	<b>2002</b>	Parliament approves the new Metrology Act <sup>681</sup> intended to repeal the Weights and Measures Ordinance of 1910. <sup>682</sup> It is justified and promoted as a transposition of Community requirements.
<b>2002</b>	Commission Communication on 'Consumer Policy Strategy Policy for 2002 – 2006' <sup>651</sup>	<b>2002</b>	Government receives first draft of consumer credit regulations (the adoption of which had been promised for last quarter of 2002) from the EU Consumer Law Task Force (December).
<b>2002</b>	Distance Selling of Financial Services Directive <sup>652</sup> is enacted (23 September).		
<b>2002</b>	Council Resolution on Commission Consumer policy strategy for the years 2002 - 2006 observed that		

<sup>677</sup> 2000 National Programme for the Adoption of the *Acquis* (NPAA), Ministry for Foreign Affairs (original version) (September)

<sup>650</sup> Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Malta [2002] OJ L44/64

<sup>651</sup> Commission, 'Consumer Policy Strategy 2002-2006' (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions) Com (2002) 208 final

<sup>652</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16

<p><b>2002</b></p> <p><b>2003</b></p> <p><b>2003</b></p>	<p>'The enlargement of the EU will have an important impact on the functioning of the internal market, including in the area of consumer policy.' (2 December)<sup>653</sup></p> <p>Accession negotiations concluded with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia (December)</p> <p>Commission Opinion on the Application for Accession to the EU by the applicant countries (February) COM (98) 712 Final</p> <p>Decision 2004/20 - European Parliament &amp; Council agree on a general framework for financing a Community consumer action for the years 2004 – 2007 (8 December).<sup>654</sup></p>	<p><b>2003</b></p> <p><b>2003</b></p> <p><b>2003</b></p> <p><b>2003</b></p>	<p>A new thoroughly re-vamped Supplies and Services Act<sup>683</sup> is approved by Parliament and justified as a transposition-related measure. It envisaged a reduced and modern framework for retail price control in line with the free movement of goods.</p> <p>EU referendum on European Union membership has favourable outcome (8 March).</p> <p><b>MALTA GENERAL ELECTIONS:</b> General Elections: ruling Nationalist Party with pro-membership electoral platform is confirmed in government (12 April).</p>
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<sup>678</sup> 2001 National Programme for the Adoption of the *Acquis* (NPAA), Ministry for Foreign Affairs, (second, updated version) (January)

<sup>679</sup> Chapter 427 of the Laws of Malta

<sup>680</sup> Commission, 2001 Regular Report on Malta's Progress towards Accession SEC(2001) 1751

<sup>681</sup> Chapter 454 of the Laws of Malta

<sup>682</sup> Chapter 39 of the Laws of Malta

<sup>653</sup> Council Resolution of 2 December 2002 on Community consumer policy strategy 2002-2006 [2002] OJ C11/1

<sup>654</sup> Decision No 20/2004/EC of the European Parliament and of the Council of 8 December 2003 establishing a general framework for financing Community actions in support of consumer policy for the year 2004 to 2007 [2003] OJ L5/1

<sup>683</sup> Various Laws (Amendment) Act, Act IX of 2003 Part IV (not yet brought into force)

<b>2004</b>	Enlargement - Malta joins the Union, with nine other members (total of 25 members) (1 May).	<b>2004</b>	Malta becomes an EU member with nine other countries on the 1 May. The Consumer <i>acquis</i> is almost entirely transposed and in force, but consumer credit regulation remains pending.
<b>2005</b>	Communication from the Commission: 'Healthier, more confident citizens: a Health and Consumer protection Strategy' (A proposal for a Programme of Action 2007-2013) (6 April) <sup>655</sup>	<b>2005</b>	Chapter 23 finally transposed in full as new Consumer Credit Regulations <sup>684</sup> are published in April 2005 (but only brought into effect later in the year): more than a year after membership. As a result, the EU Consumer Law Task Force, appointed in 1999, completes its task (April).
<b>2005</b>	Unfair Commercial Practices Directive <sup>656</sup> is enacted (11 May).		
<b>2005</b>	European Parliament resolution on the promotion and protection of consumers' interests in the new Member States (15 December) <sup>657</sup>	<b>2005</b>	A Malta European Consumer Centre is set up (December)
		<b>2006</b>	The Metrology Act of 2002 comes into force. The revised Supplies and Services Act is not yet brought into effect despite passage by Parliament three years earlier.
		<b>2006</b>	The Consumer Affairs Act is amended by Act XV of 2006 to implement EC Regulation on cooperation

<sup>655</sup> Commission, 'Healthier, safer, more confident citizens: a Health and Consumer protection Strategy. Proposal for a Decision of the European Parliament and of the Council establishing a Programme of Community action in the field of health and Consumer protection 2007-2013' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions) COM(2005)115 final

<sup>656</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22

<sup>657</sup> European Parliament Resolution on the promotion and protection of consumers' interests in the new Member States OJ C 286E/497

<sup>684</sup> Consumer Credit Regulations, 2005 Legal Notice 84 of 2005

<p><b>2007</b>                      Communication from the Commission: EU Consumer Policy Strategy 2007-2013 'Empowering consumers, enhancing their welfare, effectively protecting them' (2 March)<sup>658</sup></p>	<p>between national competent authorities responsible for consumer protection.</p>
	<p><b>2008</b>                      The Consumer Affairs Act is amended by Act XII of 2008 primarily to transpose the Unfair Commercial Practices Directive.</p> <p><b>2011</b>                      The Malta Competition and Consumer Affairs Authority Act<sup>685</sup> is enacted</p> <p><b>2014</b>                      Act No. VI of 2014 repeals the Trade Descriptions Act of 1986 and the Doorstep Contracts Act of 1987</p>

<sup>658</sup> Commission, 'EU Consumer Policy Strategy 2007-2013. Empowering consumers, enhancing their welfare, effectively protecting them' (Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee) COM (2007) 99

<sup>685</sup> Chapter 510 of the Laws of Malta

## TABLE B

### THE DEVELOPMENT OF MALTESE CONSUMER LEGISLATION: A SELECTIVE CHRONOLOGY

<b>1910</b>	Weights and Measures Ordinance	Chapter 39
<b>1947</b>	Supplies and Services Act	Chapter 117
<b>1964</b>	<i>Independence from the British Crown</i>	
<b>1964</b>	Trading Stamps Schemes (Restriction) Act	Chapter 182
<b>1971</b>	Food Drugs and Drinking Water Act	Chapter 231
<b>1972</b>	Sale of Commodities (Control) Regulations (issued under the Supplies and Services Act, Chapter 117)	Legal Notice 117.15
<b>1981</b>	Consumers Protection Act	Chapter 293
<b>1986</b>	Trade Descriptions Act	Chapter 313
<b>1987</b>	Doorstep Contracts Act	Chapter 317
<b>1994</b>	Consumer Affairs Act	Chapter 378
<b>2000</b>	Act XXVI of 2000 - amendments to 1994 Act (transposed various Directives)	
<b>2001</b>	Product Safety Act	Chapter 427

- 2002** Metrology Act Chapter 454
- 2003** New Supplies and Services Act - Part IV of Act no IX of 2003  
(not yet brought into force)
- 2006** Act XV of 2006 – amended the 1994 Act to transpose the EC Regulation on co-operation between national consumer protection authorities
- 2008** Act II of 2008 – amended the 1994 Act to transpose the Unfair Commercial Practices Directive
- 2011** Malta Competition and Consumer Affairs Authority Act Chapter 510
- 2013** Consumer Rights Regulations - Legal Notice 439 Of 2013 - transposed the Consumer Rights Directive and repealed the Distance Selling Regulations 2001
- 2014** Act No. VI of 2014 - repealed the Trade Descriptions Act and the Doorstep Contracts Act.

In this Table, 'Chapter' refers to the consecutive number given to Acts in the Laws of Malta.

## TABLE C

### EU CONSUMER DIRECTIVES FROM 1984 to 2005 (AND BEYOND)

- (i) Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, (amended by Directive 1999/34/EC of the European Parliament and of the Council)
- (ii) Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
- (iii) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;
- (iv) Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, amended by Council Directive 90/88/EEC and by Directive 98/7/EC of the European Parliament and of the Council
- (v) Council Directive 90/88/EEC of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
- (vi) Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours
- (vii) Council Directive 92/59/EEC of 29 June 1992 on general product safety (which was replaced by Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001)

- (viii) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
- (ix) Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis
- (x) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, amended by Directive 2002/65/EC of the European Parliament and of the Council
- (xi) Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising
- (xii) Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers
- (xiii) Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
- (xiv) Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests
- (xv) Directive 99/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
- (xvi) Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
- (xvii) Directive 2001/95/EC of the European Council and of the Council of 3 December 2001 on general product safety



- (xviii) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC
  - (xix) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council
  - (xx) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising
  - (xxi) Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws
  - (xxii) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC
  - (xxiii) Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange
  - (xxiv) Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
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ANNEX E

UNIVERSITY OF MALTA  
FACULTY OF LAWS

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NAME AND SURNAME: DAVID FABRI

THESIS/DISSERTATION/RESEARCH PROJECT TITLE: \_\_\_\_\_

FROM APPLICATION TO ACCESSION: THE  
INTERPLAY BETWEEN THE EC CONSUMER DIRECTIVES  
AND SELECTED AREAS OF NATIONAL CONSUMER LAW  
AND POLICY - A CASE STUDY FROM MALTA (1990-2004)

YEAR OF PRESENTATION: 2015

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