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CONSUMER LAW IN
POST-ACCESSION MALTA:
A critical review of price control regulation
and the Supplies and Services Act 1947*

"The control of the cost of living should be the cornerstone of consumer protection." (Dr C Moran, Shadow Minister for Social Welfare, 1992) ¹

"...the present price control system would have to be dismantled upon Malta's entry into the European Union..." (Dr Joe Borg, Head of the EU Directorate at the Ministry for Foreign Affairs, 1992) ²

The Notion of Price³

In the sale of goods, price is extremely important. Price is what the buyer obliges himself to pay. It constitutes his single major obligation under the law of sale.⁴ And receiving the price is usually the main objective of the vendor. The price is so essential to every contract of sale that in the absence of an express clear mutual agreement on the price, a contract of sale cannot come into existence. It is therefore no surprise that the law has over the years given very keen attention to price and has made various efforts, using different techniques, to try to ensure that a buyer gets a fair deal for the price he

has paid. Different legal provisions have promoted price transparency and have created safeguards against over-pricing and misleading prices. Consumers cannot fail to be interested in legal controls over the price of goods offered for sale to them. The obligation to show the correct and final price to consumers prevents surprises.⁵ Mandatory price transparency facilitates the detection and punishment of over-charging, applying misleading prices and the promotion of false sales.⁶ A successful price control framework requires and relies on mandatory price indications rules. Over-pricing is of course the underlying abuse at the heart of price-fixing cartels, black-market activities and hoarding at times when supplies are scarce usually in the event of an emergency. Such acts have now been further prohibited particularly through recent competition legislation.⁷

The Supplies and Services Act 1947

Recently Price Order No. 1 of 2007⁸, issued under the Sale of Commodities (Control) Regulations, 1972,⁹ established the “*maximum prices of Maltese type bread*”.¹⁰

There can be no doubt that price controls still form an integral part of our law.¹¹ The 1972 regulations, issued on the strength of the Supplies and Services Act 1947, constitute the most significant set of price and trade restrictive rules in Maltese law.

2007 marks the fiftieth anniversary of the Supplies and Services Act, which is still the principal source of price regulation in relation to consumer goods sold to consumers in Malta. This paper investigates and comments on the role that this unlikely law continues to play in the rapidly changing landscape of Maltese law, particularly following EU accession in 2004.

Price controls originally introduced to deal with an extraordinary emergency situation have survived in the Maltese legal system recently much reformed to fully embrace the EU *acquis communautaire* including its well known principles of trade liberalisation and free movement of goods.¹² Both the law and various trade restrictive regulations made under it have survived unscathed the accession negotiations and the reforms linked to transposition of EU law, as well as three full years of membership.

Although this paper concentrates on the Supplies and Services Act price control framework, it should be clarified at the outset that this law is just one strand in an intricate web of price restraints scattered within the Maltese legal system that affect different sectors of commercial and professional activity. Price controls have been introduced under such diverse laws as the Code of Police Laws as well as legislation regulating such matters as hotels and restaurants and public transport. Minimum wages result from employment law while interest restraints arise under the Civil Code.

From a war-time measure intended to deal with serious black market and hoarding abuses, the 1947 Act gradually began representing official trade policy applicable also to periods of normalcy. The Act refused to follow the Second World War into history, remaining the most important, extensive and complex source of trade restrictions. Regulations passed on the strength of the extensive enabling powers assigned by the Act to the Minister responsible for trade, especially the 1952 and 1972 regulations, are as important as the primary Act itself, and in some respects perhaps even more. As amended over the years, the 1972 regulations have constructed a truly impressive compendium of restrictions and barriers that did not allow

free competition and consumer choice to develop through the normal workings of a market economy.¹³

In Malta, price controls have for many years been popularly perceived as the cornerstone of consumer protection. Few viewed them as potential counter-productive trade barriers and mischief makers. Certainly, many business operators despised them. Even today, despite the adoption of much modern consumer and competition legislation since 1994, the authorities seem reluctant to abandon price controls as an anti-inflation and pro-consumer measure. As we have already seen, price orders are still being issued.

The 1947 Act permits stringent price controls in relation to sales of goods to consumers: not just essential goods, but any item whatsoever. The Act is anachronistic, and some of its legal provisions do not seem to fit too easily with the island's commitments attached to EU accession and membership. These commitments have failed to materialise, whereas the price control rules have proved more resilient. Rules that one would have reasonably expected not to last out the millennium have instead survived decades of extensive legal social, economic and political reforms, including substantial trade liberalization measures carried out since 1987. This paper traces selected official documentation which reveal how at the immediate pre-accession stage, the 1947 rules were considered archaic and ripe for repeal or total reform.

The need for effective price control seems to be ingrained in the minds of the Maltese public. Perhaps primarily because for too many years politicians themselves thought price controls were the most legitimate and effective form of consumer protection. However, today, the strict price control legislation sits very uncomfortably with the modern, complex and sophisticated consumer and competition laws

and mechanisms introduced into Maltese law since 1994. A large part of these legal reforms were imported into the island through the pre-accession transposition exercise.¹⁴

Price control has been a constant feature in the Maltese trading environment since even before the start of the Second World War. One can find that even some legal enactments of the Knights of Malta contained restrictions on the price of certain commodities deemed essential, including meat and fish.¹⁵ The seventies and the eighties saw the extensive and suffocating utilization of price restraints and other clumsy trade restrictions, such as bulk-buying, import substitution, import controls and import quotas. These measures reflected misinformed and superficial notions of consumer protection.¹⁶ Indeed, for many years¹⁷, price controls and consumer protection appeared synonymous. For many, even today, consumer protection largely means widespread price controls, price indications and relative price monitoring and enforcement. The Maltese public seems in thrall of the unbounded benefits that strict price controls can bring. Price, it would seem, and not quality or safety, is what matters most of all.

Like several pockets of local law and administrative practice, Maltese trading and consumer law is still apparently caught in the often traumatic transition from the old to the new. Since 1994, although Maltese consumer and trading laws have been substantially reformed and brought broadly in line with the laws of other EU member states, some areas of law and practice have resisted the advent of these reforms. They may be testimony of a nostalgic hankering for the outmoded but familiar bureaucratic solutions of the past.

The Problem with the 1947 Act

It is time to investigate briefly how the Supplies and Services Act allowed such apparently unbridled use of price orders affecting every consumer product, no matter how non-essential. The two principal rules are the definition of "*essential goods*" and article 3. The definition adopts a subjective test and the Minister responsible for Trade has complete discretion to decide to which goods the Act applies. While initially the impression is that the law was intended solely for essential goods and services (regarding which there would have been little controversy), the second part of article 3(1)(a) dramatically extends the Minister's wide intervention to "*articles of any description, and, in particular, for controlling the prices at which such articles may be sold*". This slight change facilitated the widespread issue of price orders in relation to non-essential items. Many of them are still in force today.

Just to make doubly sure, the same article 3 emphasised that the Minister's powers in relation to all items could be used "*in particular, for controlling the prices at which such article may be sold.*" This leaves no room for doubt or interpretation regarding the intention of the legislator. Somebody somewhere took the fateful decision to extend the draconian restrictive ministerial powers to all items without limitation. The 1947 Act is not restricted to goods, but also applies to "*essential services*" and "*essential work*".¹⁸ In these two latter areas, the 1947 law has predictably proved a total failure.

Regrettably, the ill-advised and practically unlimited ministerial powers in the 1947 Act, relating to any aspects connected to or arising from the supply of any goods and services, provided a tool for government to use whenever political expediency suited it. This intervention may have

been provoked by industrial action or by certain sectors not being sufficiently ideologically aligned to the government's own inclinations. Thus we find regulations being adopted under the Act to control (and to an extent also punish) bakers¹⁹, tugboats and lighters²⁰ as well as the maximum fees that may be charged by private schools.²¹

Once the law was extended to all commodities, whether essential or not, the temptation to then proceed to control too much could not be avoided. The consequence was a massive over-use of official mandatory price orders affecting practically all consumer items, no matter how non-essential. A few actual examples of price orders will quickly highlight the problem: orders have affected such diverse non-essential goods as "*good quality Franka stone*" slabs²², a particular brand of scouring cream²³, a particular brand of safety razor blades²⁴, a particular brand of ice-creams²⁵, and colour televisions²⁶.

A 1972 Report on the new Regulations

The Supplies and Services Act spawned a number of important regulations, but none so interesting as the Sale of Commodities (Control) Regulations of 1972. These regulations constructed probably the most complete price control framework ever devised in the Maltese legal system.

The 1972 regulations are quite evidently based on the fundamental assumptions that consumer prices are there to be controlled and constantly monitored; and that prices are to be shown clearly both by marking individual items and by affixing price lists outside or inside business premises. They imposed various restrictions and requirements on traders that included stringent price indication rules, various costing, reporting and record-keeping obligations,

as well as convoluted rules how the maximum permitted profit was to be calculated. They also contained some of the earliest prohibitions against anti-competitive price-fixing agreements, hoarding of supplies and refusals to provide goods or services to consumers. Most of these regulations remain in force today. Breaches of the regulations amount to a criminal offence.²⁷

Other regulations issued under the 1947 Act hampered trade by means of mandatory import and export licences. These regulations are worthy of attention and their significances should not be underestimated. But like the 1947 Act, they are emblematic of their time. The Act reflected a need to bring some order to a dramatic war situation; the regulations were typical of an unimaginative Labour government intent on controlling practically all aspects of trade. When issued in 1972, the trade organisations protested loudly.

In April 1972, a joint written report was drawn up by the island's then leading private sector organisations, included the Chamber of Commerce, the General Retailers and Traders Union and the Federation of Malta Industries.²⁸ This report was submitted to the Minister responsible for Trade of the then Labour government. The joint submission strongly objected to the new wide-ranging regulations that had just been issued and published in terms of the Supplies and Services Act. New and very stringent and extensive price controls and other significant trade restrictions were being introduced. It was reported that the organisations *"deplored the fact that the Government had thought fit to move backwards to, instead of away from, the 1939-46 war-time conditions which might have justified the introduction of the original price controls."*²⁹

The report concluded with the claim that *".....the quality of life and standard of living will be denuded or eroded. Businessmen*

will be subjected to unprecedented Government interference". It emphasised that "the new regulations were only suitable in crises conditions".

Thirty five years later, these maligned regulations remain solidly in place. Since 1972, many things have changed and consumer protection is now an integral part of Maltese law, moving far beyond traditional price controls. These past 35 years have seen the publication of two consumer-oriented White Papers, the adoption of significant new consumer legislation, the introduction of new consumer rights and remedies and the establishment of consumer-friendly administrative and judicial structures. 2004 brought Malta into the European Union involving the full transposition of the EU *acquis*. The economic and political environment in 2007 bears no comparison to the 1972 situation. Some may therefore be excused for being rather surprised and bemused that the extensive 1972 price control regulations remain in force.

The 1992 Government Activities Report

*The Report on the Working of Government Departments for the Year 1992*³⁰ contains one of the first ever sections specifically dedicated to Consumer Affairs in these annual official reports. This Report announces that new legislation was being drawn up and that a new Consumer Affairs Bill had, during the year under review, "*been presented to Parliament*".³¹ As if in a time-warp, the section dealing with the activities of the Department of Trade continued to reflect the considerable restrictions under which trade had been labouring for so many years. The Report cheerfully records the number of import and export licences issued during the year by the Licensing Division, and elaborates on the

operations of the Price Monitoring Division, the Costings and Bulk Buying Division Sections as well as the Price Control Section. Two statistical appendices were attached to the Trade Department's account of its activities in 1992. One happily records the number of physical inspections carried out in retail premises by the Price Control Division while the second enthusiastically details the "*Outcome of Price Control Sitzings*".³²

Nothing in these sections betrays any intention to do away with all or any of these anachronistic approaches. The 1992 Report is nevertheless evidence of a growing conceptual clash between the discredited negative control-based methods of the past with the new more positive rights-based approaches to consumer protection.

The European Commission gives its opinion

In October 1999, the European Commission organised the so-called *screening session* where the various consumer protection directives were matched against Malta's consumer laws.³³ During this session, price control was not discussed because price controls have no place and do not form part of the EU's consumer strategy.³⁴ Indeed EU has no specific rules regarding price control which remains a matter for the national law of the member states.³⁵

Some years earlier, in June 1993, the EC published its first *Avis*³⁶ on Malta's EU membership application. Both the original *Avis* and its subsequent regular updates contain interesting comments relevant to our present subject. The *Avis* adjudged Maltese consumer law to be inadequate and far below EC standards. It is also very revealing of the Commission's thinking on the extensive restrictions and controls under which local business was still operating:

"The Maltese economy is covered by an administrative and regulatory framework which tends to swell production costs and hamper the business sector's ability to adapt and compete.

The restrictive measures include:

- rigorous control of prices and profits, currently considered essential by the Maltese authorities to curb the monopolistic tendencies of certain firms that are a consequence of the lack of competition in the Maltese market.....

The need for reforms

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 requires so many changes in traditional patterns of behaviours that what is effectively involved is a root-and-branch overhaul of the entire regulatory and operational framework of the Maltese economy."³⁷

The Opinion also considered the state of play of competition legislation concluding that *"Maltese anti-trust law is incomplete.....There is no specific legislation and no central supervisory department or agency. The authorities realise that competition will come to play more of a part in the economy and are considering ways of rectifying the situation."³⁸*

Following Malta's re-activation of its membership application in September 1998, the EC was requested by Council to *"present an update of the 1993 Opinion"*.³⁹ This 1999 update examined in detail what progress was achieved, sector by sector, since the original 1993 Opinion. Eventually, the EC published its Regular Report on the 13 October 1999. Here it commented negatively that:

“Concerning free movement of goods, major institutional arrangements regarding the implementation of the acquis... are missing or not yet finalized... In general terms, Malta lacks legislation in line with the EU acquis in the area of free movement of goods and should consider adopting an internal market approximation programme... No substantial progress has been made since February and Malta should make the internal market its priority.”⁴⁰

No doubt this was also an allusion to the negatively impressive price regulations in place.

The 2000 Regular Report was generally more upbeat about Malta’s preparations for membership, but the tone changes when the existing price control framework was assessed: *“The remaining price controls distort relative prices and produce an inefficient allocation of resources. The influence of the state in the economy is still too high in some areas”*.⁴¹

Government Documents and Official Promises

The two consumer White Papers published in 1991 and 1993 both specifically addressed the future repeal of the existing price control framework and of price orders issued in terms of the 1972 regulations. Several other official documents and statements show the Maltese government had started committing itself in earnest to overhaul the situation which was considered (a) unsustainable in view of imminent EU membership, and (b) no longer justified in the light of significant reforms undertaken in consumer rights and fair competition legislation. This paper will now consider two important policy documents.

The National Programme for the Adoption of the Acquis (NPAA)

The first document is the hefty NPAA which described in detail the Maltese government's EU law implementation position as at January 2001.⁴² It constituted Malta's detailed programme of commitments to the EC to align with EU laws by the end of 2002.⁴³ Chapter 3 of the 2001 NPAA deals with Malta's obligations with regard to the internal market and free movement of goods in particular.⁴⁴ This section contains an explicit straightforward and unambiguous statement on price controls:

"Price Control

*The system of price control on the sale of commodities includes the setting of maximum margins of profit as well as the regulation of prices through price orders on certain essential commodities. Amendments to the Competition Act (Cap.379) were adopted by Parliament in November 2000. These amendments provide for the application of interim measures with regard to fixing maximum prices on essential goods and services. New legislation to replace the Supplies and Services Act (Cap 117) and the Sale of Commodities (Control) Regulations 1972 (LN 21/72) is being drafted. The main scope of this legislation is to adjust the present price control system to become more in line with Community practices in the area, as well as to transpose Directive 70/50/EEC."*⁴⁵

Later, the NPAA spells out the commitment even further:

"The Supplies and Services Act (Cap.117) and the Sale of Commodities (Control) Regulations (LN 21/72) will

be amended by the third quarter of 2002 to transpose Directive 70/50/EEC (abolition of measures that have an effect equivalent to quantitative restrictions on imports). Existing price controls will be adjusted in line with Directive 70/50/EEC on accession.”⁴⁶

The November 2003 Report

In November 2003, the Ministry of Finance and Economic Affairs submitted to the EC its first “*Report on Economic Reforms: Product and Capital Markets*”. This report was described as “*part of the integration of the process of the integration of the acceding countries into the Community’s economic policy co-ordination process*”.⁴⁷ The 25-page document specifically addressed the issue of price controls⁴⁸. It makes interesting reading:

“Price Controls

The Maltese economy has been characterised by relatively low consumer price inflation in the past years and indeed the inflation rate has been close to the EU average in recent years. It is government’s economic policy that prices should, as far as possible, be determined through market forces, whilst taking into account the specific realities of the small domestic market. The imposition of price controls is regarded as leading to misallocation of resources and economic inefficiency as economic agents base their decisions on prices that do not reflect the true market value of the commodity in question. In this regard, during 2003, substantial amendments to the Supplies and Services Act (Cap.117) were enacted, which will repeal the price orders that were issued under the previous Act. The new law envisages a system whereby temporary price

orders may be issued in response to abnormal or exceptional situations or where it is manifested that market forces are not working. This new legislation would align the Maltese legislation to the provisions of Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports."

The clear vision and the reforming determination emanating from this document seems to have been relegated to a footnote in history. The price regulation regime which the report explicitly promised to sweep away has, instead, survived.

The new Supplies and Services Act of 2003 and the post-1994 Legislative Framework

The Labour governments that governed Malta between 1971 and 1987 continued to rely on a series of very unimaginative and restrictive trade policies comprising severe price controls, bulk-buying importation of many products, and import substitution. These measures reduced competition and led to poor consumer choice. Three unsatisfactory and patchy consumer-oriented laws were passed between 1981 and 1986.⁴⁹ These could not dislodge price control as the primary consumer protection mechanism which continued to be very extensively enforced.

In 1991, the Nationalist government elected in 1987, after long years in opposition, launched an innovative White Paper on consumer rights. This innovative document set out a long term programme intent on introducing modern and effective consumer law principles and structures to Malta. The idea was also to gradually start replacing the traditional price and other trade restrictions

still disguising themselves (badly) as *bona fide* tools of consumer protection.⁵⁰

1993 saw Government issuing a second White Paper where consumer law reforms were considered jointly with new sweeping reforms in competition law. The Fair Trading White Paper led to the adoption of the first ever Competition Act, an extremely important law which introduced a new legal framework incorporating new rules for the issue of price orders and for the prohibition of abusive price-fixing agreements. This new framework was intended to replace the archaic and unloved 1947 Act and many of its regulations.

The Consumer Affairs Act of 1994 was a new and refreshing start in consumer legislation, introducing credible and effective rules and structures promoting consumers within a cohesive framework. The Act was a massive step forward for the legal recognition and protection of consumer rights in Malta. The fragilities and the incoherence of state measures that sought to protect consumers indirectly by severely restricting trade activities through price and other dubious administrative controls were, it seemed, about to be finally relegated to history. But that did not happen.

With a view to bringing price control within the newly reformed legal framework, a Bill to redress the 1947 anomaly was presented to Parliament and passed through all the stages in 2003, just months ahead of accession.⁵¹ Regrettably, this new law has not been brought into force and has remained shelved, seemingly forgotten.⁵²

In its issue of 10 July 2003, under the title "*19 laws being aligned to EU acquis*", The Times reported that government had presented a Bill which *inter alia* "*practically repeals the Exchange Control Act and the Supplies and Services Act.*". Paraphrasing a statement in Parliament made by Minister

John Dalli⁵³ who was piloting the Bill, the Times reported optimistically that:

"The Supplies and Services Act, which gave the government draconian powers in areas such as price orders, was being amended extensively to the point that it was practically repealed. The government, however, would be able to take drastic action in case of emergencies to protect consumers as in the case of acute shortages of particular products. The government may issue temporary price orders to stabilize the situation when problems arose.

Mr Dalli said experience had shown that price orders did not work, with many ways being found around the system. The government would continue to guard against abuse but his view was that the best way of control was through competition."

Act No. IX of 2003 is clearly a landmark event for the subject covered by this paper. It sought to reform the price control regime, and convert the Supplies and Services Act of 1947 into a leaner and more acceptable tool. It paved the way for the repeal or radical overhaul of the 1972 regulations.⁵⁴

Speaking during the debate on the Bill, Parliamentary Secretary Mr. Edwin Vassallo confirmed that the objective of the Part IV amendments was to allow the issue of price orders exclusively in exceptional circumstances and to restrict them to products that were truly essential for the daily life of a society, "*such as bread and fuel*". The aim, he explained, was to shift towards a more objective basis for intervention thereby reducing the subjective discretionary powers enjoyed by the Minister and the Director of Trade. He described the current law as constituting "*a barrier to trade*", particularly in view of the burdens it imposed on

importers. The 1947 law was not in line with EC law, gave the Minister too wide discretionary powers and wrongly extended its restrictions indiscriminately to all commodities placed on the Maltese market, whether manufactured locally or imported. He declared that all these negative features were being rectified by the adoption of the new legislation.

The most important provision of the new Act is article 4 which empowers government to intervene in the market and impose maximum prices or price margins only in "*abnormal or exceptional circumstances*" or where competition "*is not functioning in a reasonably effective manner*". In these special instances, the most that the Director of Trade can do is to issue a temporary price order for a duration not exceeding six months.⁵⁵ The order may be extended for six month periods by specific order published in the Government Gazette - a far cry from the indefinite duration of price orders issued under the 1972 regulations, many of which remain technically effective until today, not having ever been specifically repealed. Article 5 then assigns authority to the Minister to make regulations to establish price control over essential goods or services deemed "*essential for the life and well-being of the community*", which he would be obliged to list in the Government Gazette.

The 2003 legislation was the promised and long overdue re-vamp of the 1947 measure. The circumstances under which the two laws were adopted could not have been more different. The 1947 Act was devised to resolve a post-war emergency involving poverty, severe shortages and black marketing. To the contrary, the backdrop to the 2003 reform was the imminent membership of the EU with its highly liberalized internal market during a stage of relative economic prosperity. The 1972 regulations were adopted at a time when consumer and competition

law had not yet been conceptualized, let alone developed. Instead, the 2003 reform was undertaken when consumer and competition law were already well developed and functioning. The new rules sought to allow market forces to act as the main factor in securing fair prices and wider consumer choice. Government's role was redefined and reduced to making sure that the market does in fact function properly, particularly through the operation of the Competition Act of 1994.⁵⁶ The 1947 Act and 1972 regulations envisaged government intervention as the norm. The 2003 Act limited official intervention to extraordinary situations where the market and competition law mechanisms have broken down and failed. In such cases, government could intervene to secure supplies, and to prevent over-charging and hoarding. Extraordinary circumstances could include a national emergency, the aftermath of a war in the region, an earthquake, a pandemic outbreak, scarcity of some particular product as a result of economic factors extraneous to the island. These circumstances warrant government intervention to protect legitimate public interests. The new Act had the necessary flexibility to permit the swift implementation of extraordinary measures to address abnormal situations. Safeguards were put in place to prevent arbitrary or grossly disproportionate action by government.

The 2003 law was predicated on three inter-related propositions:

1. The first is that it was right that government should retain residual rights to intervene in extraordinary situations which could cause serious hardships to consumers.⁵⁷ This aspect of the 1947 Act was a worthy employment of law and administrative power. It was not in the public interest for government to simply sign away its responsibility to intervene in the market to protect the public when

- crisis situations warrant it or when competition fails.⁵⁸
2. The second is that, unlike the 1947 Act, the 2003 initiative does not consider Malta to be in a permanent state of economic crisis.
 3. The third observation is that in the wrong hands, the 1947 Act proved a dangerous piece of armoury which was easy to over-use or otherwise misuse. This represented a negative feature of the Act which warranted rectification. It was in the public interest that these discretionary administrative powers should be adequately curtailed and controlled.

Regrettably, the 2003 Act has not been brought into effect. The failure to bring the new Supplies and Services Act (replacing the 1947 Act) into force is a worrying development which breaches specific official NPAA and EU membership commitments.

Price Orders in 2006

Any person inclined to believe that price controls were a thing of the past may, in April 2006, have felt justifiably perplexed to find the government threatening to issue price orders in order to curb inflation which it felt may have been caused by price-fixing and cartels in certain sectors. The Parliamentary Secretary in the Ministry of Finance was quoted as warning that *"if certain prices, particularly those of imported foodstuffs and medicine, keep failing to reflect market trends, the government would be forced to introduce price orders."*⁵⁹ Not surprisingly, the GRTU and other trade organisations strongly objected to government's threat to introduce price orders of certain imported foodstuffs and medicines. The GRTU was reported as describing

the threatened price orders as “*definitely unacceptable in a liberalised, free market economy*”.⁶⁰ The same *Times* report also had an unnamed spokesman for the European Commission explaining to it that EU law does not prevent a national government from introducing ‘*maximum price*’ legislation, adding that:

“However were a national government to introduce particular measures, the Commission would look carefully at any such measures to determine whether they are in all their aspects compatible with competition and single market rules, for example that they are not discriminatory.”

The government eventually relented and withdrew the threatened publication of price orders under the 1947 Act. But the incident nevertheless proved that old habits die hard.

CONCLUSION

This paper has focused on the Supplies and Services Act of 1947 and the regulations issued thereunder, particularly the Sale of Commodities Regulations of 1972. The present enquiry has asked whether the continuation in force of the 1947 Act and the 1972 regulations make any more sense now that (i) Malta has since 1994 been introducing modern legislation and structures for the promotion of fair competitive trade practices and consumer rights, and (ii) Malta has since 2004 formed part of the European Union with its significantly liberalized internal market fuelled by the free movement of goods principle. The paper suggests that the retention in the Maltese legal system of the 1947 Act, the 1972 regulations, together with the numerous

disparate price orders issued thereunder, is incongruous: a monument perhaps to incoherence and ineptitude.

Various official documents and statements of policy, particularly during the four years immediately prior to EU accession, repeatedly reveal that government was convinced that the 1947–1972 price control framework was no longer sustainable and was incompatible with the new EU legal context. This is the position resulting from the negotiating positions agreed between the Maltese government and the EC, from the NPAA commitments and from Act IX of 2003.

Price control is important but it is also a source of controversy. Very often widespread price regulation is a simplistic and administratively very costly and burdensome mechanism. It may also be a politically convenient reaction to increasing inflation, as it shows government doing something immediate which the public will readily understand, and in a true emergency, may even appreciate. Regardless of the controversy surrounding governmental price restrictions, it is felt unwise for a government to absolutely renounce to the power to intervene and regulate prices of essential goods and services. The state should therefore retain a residual measure of power to deal effectively and urgently with emergencies and with possible artificial shortages and abuses which competition authorities may be unable to resolve quickly or effectively. Government price regulation should therefore be based on two principles:

- (i) it should not extend beyond goods and services which are truly essential to the proper well-being and functioning of a modern society; and
- (ii) it should come into play sparingly and only in extraordinary situations where competition between suppliers and the protective mechanisms of competition

law fail to provide the required guarantees of adequate supplies of essential goods and services at reasonable prices.

The Consumer Affairs Act of 1994 Act has expressly recognized that a consumer has a right *“to have adequate access to basic essential goods and services at reasonable prices and to be able to choose from a diverse range of goods and services.”*⁶¹ This consumer right now finds itself effectively re-stated in new article 3 introduced by the 2003 amendments which declares that:

“Consumers have the right to be placed in a position to purchase adequate and reasonable quantities of any goods or services that are made available on the market in order to satisfy their normal requirements.”

The history of consumer legislation in Malta is inexorably intertwined with the history of price and other trade controls. In both contexts, the 1947 Act has played a principal role. Price control and other trade restrictive measures were for too long confused with consumer protection. This had negative consequences. It meant that it took Malta far too long to realize that consumer protection is more than just keeping prices low, and that other serious consumer concerns such as product safety, unfair contract terms and consumer credit and other abuses needed to be addressed.⁶²

For a long time, consumer protection was deemed sufficiently served by assigning to public authorities various discretionary powers to intervene in the market and dictate prices and practices. Extensive price controls were more easily justified when fair competition and consumer rights legislation had not yet been sufficiently developed. Whether price controls are an efficient legal-economic tool for the

protection of the public, particularly the poorer sectors, from abusive pricing by unscrupulous traders, will be left to others more expert to tackle. There seems to be evidence that where price controls are employed inefficiently, they may regrettably help fuel shortages of supplies resulting in less consumer choice. They may therefore prove counter-productive, becoming part of the problem rather than the solution. The problem is compounded by a public administration behaving as though consumer protection simply means more and more price controls. By so doing, it fails to take more useful and meaningful measures to raise the standards of quality and safety of consumer products, to safeguard contractual fairness, and to ensure consumers receive adequate remedies and easy access to the judicial process.

The 1947 law may be a useful lesson in how supposedly temporary measures introduced to deal with emergencies often become permanent outlasting the emergencies they intended to resolve. Indeed, one need not study the whole history of price control restrictions in the various stages of Maltese history to come to the conclusion that the Supplies and Services Act of 1947 and the 1972 regulations are an anomaly whose time seems to be truly up. Price control and other trade restrictions in our law remain evidence of a past that refuses to go away and make way for the new.

References

Official Publications of the Maltese Government

1. 'Rights for the Consumer', August 1991, White Paper, Department of Information;
2. 'Fair Trading.....the next step forward', November 1993, White Paper, Department of Information;
3. The National Programme for the Adoption of the Acquis (NPAA), September 2000;
4. The National Programme for the Adoption of the Acquis (NPAA), January 2001.

EU Reports on Malta

1. Commission Avis on Malta's Application, 1993 ;
2. Regular Report on Malta's Application 1999, updated in 2000.

Maltese Legislation

Primary legislation

1. Supply of Goods and Services Act 1947;
2. Competition Act 1994;
3. Consumer Affairs Act 1994;
4. Supplies and Services (Amendment) Act 2003 (not yet in force).

Secondary legislation (regulations)

1. Supplies and Services Act 1947:
 - i. Sale of Commodities (Control) Regulations 1972;
 - ii. Sale of Agricultural Produce Regulations 1972.
2. Consumer Affairs Act 1994:
 - i. Display of price-lists in Bars and Kiosks Regulations 1997;
 - ii. Price Indications Regulations 2002.

Related papers by the author

1. 'Adventures in Screening and Transposition - a case study: the EU Consumer Protection Acquis 1990 - 2004', an address delivered to a Malta European Studies Association (MESA) seminar on the 20 April 2006;
2. 'A Note on Consumer Policy and Law in the context of the EU Accession and Transposition Process- 1990 to 2004 and beyond', published on the MESA website and still available at http://home.um.edu.mt/edrc/ mesa/consumer_protection_paper.PDF;
3. 'A note on price control and price indications under current law and the EU Directive on price indications', Law and Practice, Malta Chamber of Advocates, December 2000;
4. 'False Starts and broken promises: Mishaps in the development of consumer law in Malta', Law and Practice, November 2006;

5. *Lifting the Screen: Welcome to the Silent Revolution*, The Accountant, (cover story), March 2000;
6. *'Maltese Consumer Law and Policy before and after EU membership - the good news and the bad news'*, address to a conference organized to launch the European Consumer Centre on 7 December 2005;
7. *Maltese Consumer Law and Policy before and after EU membership (with particular reference to the sale of goods to consumers)*, address (with power-point presentation) to the World Consumers Rights Day annual conference on "Protecting Consumer Interests" held in Malta on 16 March 2006 (organised by the International Association of Consumer Law and the Consumer Affairs Council (Malta). The power-point presentation is still accessible on the Council's website: <http://www.mcmp.gov.mt/pdfs/consumers/Mar05Seminar/DevelopmentConsumerPolicy.pdf>;
8. *The Evolution of a Maltese Consumer Policy: a look at the last twenty years and beyond*, address to a national conference on the theme *The Consumer First – Striking a Balance in a Market Economy*, organized by the Consumer Affairs Council on 15 March 2000.

Notes

- * The paper reflects the position as at September 2007.
- 1 (Translated from Maltese), "L-Orizzont", 25 September 1992, quoted in *False Starts and Broken Promises: some mishaps in the development of Maltese consumer law*, published in *Law and Practice*, official journal of the Malta Chamber of Advocates, October 2006.
 - 2 "Regulation of Trading Practices in Malta", paper published in 1992. Dr Borg is currently an EU Commissioner.
 - 3 This applies equally to the supply of services, but this paper is only concerned with the sale of goods to consumers.
 - 4 Civil Code, The Law of Sale, articles 1346-1439.
 - 5 One example is Legal Notice 97 of 1997, The Display of Price-Lists in Bars and Kiosks Regulations 1997.
 - 6 Article 13 of the Trade Descriptions Act, 1986.
 - 7 Competition Act 1994, in particular articles 5 and 9.
 - 8 Published in the Government Gazette on 7 September 2007.
 - 9 Legal Notice 21 of 1972.
 - 10 In terms of this Order, loaves weighing more or less 600 grams cannot be sold at a price higher than 20 cents.
 - 11 This paper is based on Maltese law as published on the Ministry of Justice website www.gov.mt in September 2007
 - 12 See generally article published in *Law and Practice*, December 2000, which already probed the compatibility of price controls and the 1972 regulations with the EU *acquis*.
 - 13 The 1947 Act was a very useful tool but it also made almost unlimited powers available to politicians and public administrators to intervene and meddle in the market, sometimes to good and sometimes to bad effect.
 - 14 See generally paper published in *Law and Practice*, November 2006.

- 15 Phone-ins by consumers on local radio station programmes dealing with consumer complaints - often in distressingly superficial style - provide yet more contemporary testimony of how much price control continues to be ingrained in the minds and hearts of Maltese consumers.
- 16 These measures were devised with tremendous and at times almost hilarious meticulousness and led to bureaucracy of the most inefficient kind, and worse.
- 17 And for too many persons in authority who should have known better.
- 18 See definitions in article 2.
- 19 Legal Notice 134 of 1957, Requisition of Bakeries Regulations and Legal Notice 2 of 1980, Bakers' Licences Regulations.
- 20 Legal Notice 9 of 1975, which authorized the Minister to requisition and take control over any tugboat or lighter.
- 21 Legal Notice 67 of 1982, the Control of Private School Fees Regulations.
- 22 Price Order No. 71 of 1977.
- 23 Price Order No. 219 of 1979.
- 24 Price Order No 2 of 1980.
- 25 Price Order No. 68 of 1980.
- 26 Price Order No. 35 of 1982.
- 27 The 1972 regulations replaced and effectively consolidated and expanded the provisions of the earlier original regulations enacted in 1952 and which had undergone numerous amendments in the intervening years. Many price orders were issued during the sixties, including a general price freeze imposed to curb price hikes resulting from the Arab-Israeli war and the devaluation of the pound. See Legal Notices 38 and 392 of 1967.
- 28 This was a rather rare show of unity highlighting the importance of the issue at stake.
- 29 The Times of Malta on 19 April 1972 carried a page-long feature on this matter under the title "*Joint submissions on new price controls*".
- 30 An annual Department of Information publication which reviewed the activities carried out by all the various government departments during the previous year. See in particular the section dealing with the newly formed Department for Consumer Affairs, pages 210-211, and the section covering the performance of the Department of Trade on pages 262-263. These annual reports are a mine of information regarding the development of government policies and departmental activities over the years.
- 31 This must have been a reference to the so-called 'first reading' of what eventually became the Consumer Affairs Act of 1994. The actual Bill only appeared in print in November 1993, appended to the White Paper "*Fair Trading...the next step forward*".
- 32 "*Sittings*" here refers to judicial proceedings instituted before the Magistrates Court dealing with the criminal prosecution of traders found to have breached the price control regulations.
- 33 And vice-versa. See Article published in the Accountant 2000.
- 34 Very briefly, price controls are allowed in EU member states provided that they are non-discriminatory and do not obstruct the free movement of goods across borders. The issue of the validity of price controls introduced by member states was tackled by the European Court of Justice in various cases. Howells and Wilhelmsson have described ECJ's approach to national

price regulation measures as one which does not declare any: "general prohibitions or restrictions on national price regulation measures. Only if the measures are practiced in a discriminatory way or lead to discriminatory effects are they to be considered to violate the Treaty; for example, if the prices are fixed at such a level that it becomes impossible or more difficult to sell imported products, the measure will be considered to have an equivalent effect to a quantitative restriction of trade." (EC Consumer Law, Geraint Howells and Thomas Wilhelmsson, Dartmouth Publishing Company Limited, 1997, page 87; See also Oliver, Free Movement of Goods); See also generally Peter Oliver, *Free Movement of Goods in the European Community*, Sweet and Maxwell, 3rd edition, 1996, especially pages 161 to 171.

- 35 On the other hand, price indications were discussed and "screened" as they are regulated by an EU Directive (Directive 98/6/EC of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers).
- 36 The EU's official opinion on the qualification and preparedness of an applicant country for eventual EU membership.
- 37 Opinion 1993, pages 16-17.
- 38 Opinion 1993, page A/15. A Competition Act was adopted in the second half of 1994.
- 39 Report Updating the Commission Opinion on Malta's Application for Membership, EC, February 1999.
- 40 Pages 17-21.
- 41 Ibid.
- 42 *Malta: National Programme for the Adoption of the Acquis, as at January 2001*, Ministry of Foreign Affairs, Malta, available at www.mic.org.mt/Malta-EU. The first NPAA had been published in February 2000.
- 43 This was based on government's projected (or virtual) date of accession of 1 January 2003.
- 44 Pages 24 to 39.
- 45 Page 24.
- 46 Page 26.
- 47 Foreword, page iii.
- 48 Pages 3-4.
- 49 These have already been reviewed in paper published in Law and Practice, November 2006.
- 50 Important statements of policy on pricing of consumer goods and the future of the 1972 regulations were made in the 1991 and 1993 White Papers. See "Rights for the Consumer" White Paper, Chapter XIII on 'Pricing', pages 30 - 31, Department of Information publication, August 1991; and "Fair Trading: the next step forward" White Paper, Department of Information publication, November 1993, Part III, pages 15 - 18.
- 51 Part IV of Act No. IX of 2003 published in the Government Gazette on 2 September 2003.
- 52 Thereby effectively thwarting Parliament's declared intentions. The adoption of the Bill was specifically highlighted in the November 2003 report on economic reforms.
- 53 Then Minister for Finance and Economic Services.
- 54 The Bill had its Third Reading before Parliament on the 16 July 2003, sitting

- number 4, Parliamentary Committee for the Consideration of Bills.
- 55 Article 4(3) of Part IV of Act No. IX of 2003.
- 56 Administered by the Director for Fair Competition.
- 57 See entry on "Price gouging" in Wikipedia on www.en.wikipedia.org/wiki/Price-gouging.
- 58 A recent illustration of how this can come about was described in a CNN.com report dated 26 December 2001. Headlined "*Hotel fined for post-Sept 11 price gouging*", it narrated how in the days immediately after the 11 September incidents, hotels in New York over-charged stranded air passengers exorbitant rates, even up to 285% more than the normal price. The CNN.com wrote: "*New York's anti-gouging law prohibits 'unconscionably excessive' prices of essential consumer goods during a state of emergency.*" The hotel in question was fined and ordered to affect refunds to its customers.
- 59 The Times, 26 April 2006. See also Medical Association website www.mam.org.mt/newdetail report dated 26 April 2006 on the same controversy.
- 60 Former Labour Trade and Finance Minister and currently a newspaper columnist, Lino Spiteri, found the threat to issue price orders "*ironic*" - probably recalling the extent to which his Ministry had been savaged for its extensive resort to price orders in the early eighties.
- 61 Consumer Affairs Act, article 43(2)(a).
- 62 Many of these problems were only properly addressed by the law thanks to the transposition of the EU consumer *acquis*.