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False Starts and Broken Promises: Some mishaps in the development of Maltese Consumer Law

This paper reflects the legal position as at 1st September 2006. Following the presentation of this paper for publication the Metrology Act 2002 was brought into force with effect from the 15th September 2006 (Legal Notice 195 of 2006).

PRELIMINARY

Consumer protection has become an integral part of our law. This was not always the case and significant consumer protection laws have only been adopted during these last 20 years. This subject is best viewed against the backdrop of the fundamental objectives of law. One objective is to protect weaker parties in situations where their weakness could be unfairly exploited. Consumer law is the recognition that unregulated market forces are insufficient to prevent undesirable consumer loss and dissatisfaction.

Consumer protection, as we now know it, was more or less in-existent until the start of the 1990's. Roman law never developed a notion of the "consumer". In the 19th century, the Napoleonic Code Civil re-stated but retained the fundamental concepts of the Roman law of sale. Our Civil Code, like other codification efforts that preceded it, made no reference to the concept of "consumer". The Maltese Civil Code has not changed much since its original introduction in the late 19th century. This partly explains why our Civil Code still fails to recognize the consumer. Instead, references to the consumer are now found in several important local laws, but not in the Civil Code. The Civil Code may not exactly be "hostile" to the consumer but it is certainly "indifferent". The same applies to the Commercial Code. One must therefore look elsewhere to find where and how Maltese law has recognized the concept of "consumer".

Since 1990, Malta has registered considerable achievements and remarkable progress in this area. One can point to a number of important landmark events, including the 1991 White Paper "Rights for the Consumer", the establishment in 1992 of a new government department dedicated exclusively to consumer affairs, the highly innovative Consumer Affairs Act 1994 which inter alia introduced the Consumer Claims Tribunal, the concept of moral damages and the regulation of pyramid schemes, and finally the Product Safety Act of 2001 and the Metrology Act



Dr David Fabri LL.D., Senior Lecturer in Consumer Law, University of Malta

The writer acknowledges an interest and involvement in several of the matters discussed in this paper. He assumes responsibility for the comments and views expressed herein, which are entirely his own.

¹ Chapter 117 of the Laws of Malta

² Chapter 182 of the Laws of Malta

³ The Trading Stamps Act of 1964 was broadly inspired by the UK Trading Stamps Act of 1964. See Gordon Borrie and Aubrey Diamond, *The Consumer, Society and the Law*, 1973, Pelican, 3rd ed., pg 100-1

⁴ pages 27-8

⁵ Chapter 293 of the Laws of Malta

⁶ overseen by the unlikely Difensuri tax-Xerreja

⁷ Chapter 2

⁸ Chapter 313 of the Laws of Malta

⁹ Parliamentary Question no. 4899 of 1992 asked the Minister of Trade how many prosecutions had been initiated under the Trade Descriptions Act. The reply, given on 12 October 1992, unearthed this remarkable statistic: one prosecution in 1987; four in 1989; one in 1990. One prosecution was pending at the time of the reply. No prosecutions were recorded in 1988 and 1991. Regrettably, there was no information

of 2002. Despite these positive reforms, there is still a case for suggesting that consumer law in Malta is less than the seamless and coherent systematic sequence of triumphant and successful initiatives that the official and orthodox view would have us believe. The truth is quite different and this brief paper shall review some misadventures where things were done badly or have not quite succeeded as intended. These events constitute landmarks in their own right, and deserve to be highlighted perhaps for the wrong reasons; witnesses to inexperience, lack of preparation, incompetence or folly.

1. THE SUPPLIES AND SERVICES ACT 1947¹

This immediate post-war draconian law is a truly incredible phenomenon. It seems that we cannot have enough of it. While not strictly a consumer law, this Act has very extensive implications for trading and commercial practices, which directly affect consumers and the public. Its provisions reflect a society and an economy torn by war still afflicted by hoarding of essential goods and by black market practices. It assigns huge discretionary powers to government to intervene in almost unlimited ways in the importation, circulation and sale of any goods or services in Malta.

This law has been used and abused over the past sixty years. The 1947 framework is no longer acceptable with its preference for price control mechanisms and price orders. One doubts how far this law is compatible with the free movement of goods principles under EC law, especially the provision requiring any imported product to have a costing certificate and to have a maximum price order issued in its respect before it may be sold on the Maltese market. This law should have been put to rest long ago. Instead it survives undaunted by the huge steps made towards further market liberalization, EU membership..... and the fact that the Second World War

ended some sixty years ago.

It may surprise many readers to discover that in 2003 a law was passed through all stages of Parliament to replace this law in its entirety (Act No IX of 2003 Part IV). The new law was to replace the old Act by a more modern measure, which would sweep away various draconian provisions adopted since 1947. Once more, the bill was described and promoted as an act of modernization and market liberalization reflecting the needs and values of a developed society with a regulated free market and ensuring a more EU-compatible framework. Five years later, this new law remains shelved in suspended animation. To make matters worse, as with some other legislation reviewed in this paper, this 1947 oddity is only sporadically and selectively enforced.

2. THE TRADING STAMPS SCHEMES (RESTRICTION) ACT 1964²

Originally well-intentioned but badly crafted, it was a reaction to the green stamps phenomenon in the early sixties when consumers were found to be buying items not for their intrinsic worth or use, but for the number of stamps awarded.³ Stamps were collected in a booklet and buyers became eligible to participate in a gift scheme. The provisions of this law were intrinsically ambiguous, possibly aimed at protecting some vested interests. Article 3 prohibited trading stamps schemes in general and the operation or marketing of a scheme was made a criminal offence.

However, and this is where a major flaw of the Act lies, article 6 suspiciously carved out certain schemes making them perfectly legal. This weakened the impact of the legislation. In the past the authorities used to take energetic steps to halt any infringements, but in more recent years, this law is not being enforced. The authorities now look the other way, even in the face of blatant violations of this Act.



The 1991 White Paper⁴ had promised the complete overhaul or repeal of the 1964 Act; this has never been done. This strange little Act remains in force. The penalties imposed for breach of the Act have remained unchanged since 1964. The maximum fine is LM10. The law also envisages terms of imprisonment of up to three months. This provision enjoys mere symbolic value as criminal prosecutions are practically non-existent in the context of this and other consumer laws. Having legislation in force but not enforced by the authorities responsible at law to administer them and ensure they are obeyed raises serious rule of law implications outside the scope of this present review. However, concerns on lack of enforcement of legislation through lack of resources, lack of will or by design bedevils most discussions on consumer law.

3. THE CONSUMERS PROTECTION ACT 1981⁵

If a law deserved to be described a *missed opportunity*, this was it. This Act qualifies as the classical false start for consumer law in Malta. Late in 1981, a few months prior to the general elections, held in December 1981 when it was re-elected, the Labour government was under pressure to take some pro-consumer initiatives. A new consumer organization had been set up and consumer complaints and expectations were becoming more frequent and vociferous in the local press.

In 1981, local trade policy was largely State-dictated largely on the basis of stringent price controls, extensive price indications rules⁶ extensive licensing requirements, import substitution and bulk buying. These measures created a structure of restrictions, which may have given some the illusion that the Maltese consumer was being adequately protected. Very strict price controls were considered the first priority and the primary concern for consumers. These control systems were

regarding the success rate achieved in this truly minuscule number of prosecutions.

¹⁰ Chapter 454 of the laws of Malta

¹¹ Chapter 39

¹² Legal Notice 312 of 2001

¹³ Chapter 427 of the Laws of Malta

¹⁴ Directive 92/95/EEC, later replaced by Directive 2001/95/EC

¹⁵ See Part VII of the Consumer Affairs Act. Passed by Parliament in 2000, the product liability provisions were only brought into force in January 2003; see Legal Notice 46 of 2003

¹⁶ Report in *The Times*, 22 May 1998. See also Calls for consumers to be protected by an independent authority, *The Independent* on Sunday, 11 October 1998.

¹⁷ At the time of writing, the situation has been aggravated by the Director also doubling as the Ministry's Permanent Secretary, a highly political post. Even trade associations have criticized government for failing to appoint a director to head the Division. In the opinion of this writer, this confusion of roles again confirms the present government's negligible interest in consumer policy and protection.

¹⁸ Chapter 317 of the Laws of Malta

¹⁹ translated from Maltese

²⁰ See report in *The Malta Independent*, 13 July 2000

²¹ See report in *The Times*, 13 July 2000

²² translated from Maltese

Official Publications of the Maltese Government: Rights for the Consumer, August 1991, White Paper Fair Trading...the next step forward, November 1993, White Paper The National Programme for the Adoption of the Acquis (NPA), September 2000 The National Programme for

operated by government officials under close ministerial scrutiny and involvement giving rise to much suspicion, insinuation, inefficiency and perhaps corruption. The consumer's position was aggravated by officially sanctioned, monopolistic or quasi-monopolistic situations operating in various sectors of economic life.

In this situation, the protection of consumers was inadequately articulated, lacked any proper structure or public profile. Officials forming part of what was then the Department of Trade carried out ineffective and non-transparent enforcement. An excellent occasion presented itself in 1981, just before the general elections, when Government moved the Consumers Protection Act. This was an opportunity to take stock of the situation, to seize the initiative and introduce a coherent blue print for the introduction of consumer law in Malta. The occasion was ingloriously missed. Unfortunately, government and its advisers just did not have a clue.

Despite its promising title, the Act was barely two pages long and was poorly drafted and conceived. It signalled a poor beginning for Maltese consumer law and revealed the futility of passing isolated consumer-related measures in the absence of any systematic approach or supporting enforcement or compliance structures. The Consumers Protection Act of 1981 contained one of the very first uses of the term "consumer", which however it failed to define. The Act also gave too many discretionary powers to the Minister of Trade. By itself, it constituted a bad ideological approach to consumer policy.

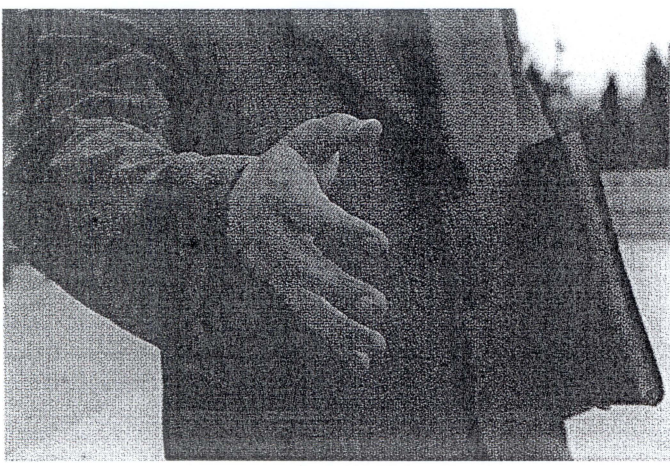
The 1991 White Paper⁷ eventually called for a "radical overhaul" of the Act. The Consumer Affairs Act of 1994 eventually repealed it. The 1981 Act failed as an effective legislative effort because essentially it was a hurried and superficial product, which attempted to

shore up the then Labour government's dismal consumer record just months prior to a general election. The 1981 Act could have represented a breath of fresh air and a breakthrough. Instead it will be largely remembered as a missed opportunity and a false start.

4. THE TRADE DESCRIPTIONS ACT 1986⁸

Very little local craftsmanship went into the drafting of this Act as it is practically a copy of the now outdated UK original of 1968. The local version is so similar it is embarrassing. UK legislation on trade descriptions has been developed further on several occasions since 1968. Our version has instead remained unchanged and undeveloped. What is also worrying is that the enforcement of this Act is conspicuously weak and lacking. The public will be excused for not noticing that this Act is part of our law. People still write letters in the local press saying that certain abuses would not happen had Malta had a Trade Descriptions Act.

Placing this Act in a broader political context, the Labour government elected in 1981 failed to create a structured consumer policy. Between 1981 and 1987, it only found time to pass two unconnected consumer-related laws. This was hardly an impressive record. Like the Consumers Protection Act of 1981 before it, the style of the 1986 Act betrayed the poverty of thought underlying these early efforts. Both the 1981 Act and the Trade Descriptions Act of 1986 were badly designed and poorly drafted. The 1986 Act was a rather shameless act of plagiarism of the original UK Act by the same name. Simply no attempt was made to re-shape it into a truly Maltese law. The five years that had passed since the 1981 Act had evidently produced no intellectual refinement or clear conceptual direction. The two Acts are



just piecemeal efforts, with no common elements connecting them, and not surprisingly both proved ineffective and were relative failures. The 1981 Act was eventually repealed by the Consumer Affairs Act 1994. The Trade Descriptions Act remains with us but only a handful of prosecutions have been initiated since 1986, a very poor record indeed.⁹

5. THE METROLOGY ACT 2002¹⁰

This sad mystifying story behind this important piece of legislation is still unfolding. This Act was duly passed by Parliament some years ago, when it was described as a major consumer measure. To this day, this Act has not been brought into effect. The ministerial order it still requires has never been issued. Inexplicably, this important measure remains shelved and forgotten by an indifferent government.

The Metrology Act is a modern law, which reflects best practice in the field we would normally refer to as weights and measures. Indeed this new Act was intended to replace the very old Weights and Measures Ordinance¹¹ adopted by the British Colonial government way back in 1910. The new Act was passed through Parliament and touted as representing high European Union standards, enabling us to become even more European. Following EU accession, government seems to have caught cold feet and is hesitant to bring it into force. Presumably, another instance where government fears disturbing commercial sensitivities and pockets. Naturally, it is the unsuspecting public, which inevitably loses from government's inaction. A Metrology Directorate had been formally established by regulations¹² issued under the Malta Standards Authority Act specifically to administer the Metrology Act and to ensure compliance. This Directorate still exists but is unable to fulfil its public interest functions properly and coherently so long as the law is not brought into force.

the Adoption of the Acquis (NFPA), January 2001
Reports on the Working of Government Departments (for the years 1970-1990)

EU Reports:
Commission Avis on Malta's Application, 1993
Regular Report on Malta's Application 1999, updated in 2000

Relevant Maltese Legislation
(a) Primary laws:
Weights and Measures Ordinance 1910
Supply of Goods and Services Act 1947
Trading Stamps Schemes (Restriction) Act 1964
Consumer Protection Act 1981
Trade Descriptions Act 1986
The Door-to-Door Salesmen Act 1987
The Door-to-Door Salesmen (Amendment) Act 2001 (hereinafter designated the Doorstep Contracts Act 1987)
Consumer Affairs Act 1994
Consumer Affairs Act (Amendment) Act 2000
Consumer Affairs Act (Amendment) Act 2001
Product Safety Act 2001
Metrology Act 2002 (not yet in force)
Supplies and Services (Amendment) Act 2002 (not yet in force)

(b) Regulations
Consumer Affairs Act 1994:
Price Indicators Regulations 2002

Supplies and Services Act 1947:
Sale of Commodities (Control) Regulations 1972
Sale of Agricultural Produce Regulations 1972

Related papers by the author:
From Trilogy to Trinity, thoughts on consumer protection in Malta and the recent White Paper, The Sunday Times (Malta), 22 September 1991

Maltese consumer policy and the EU Directives: the good news and the bad news, brief article featured in the EU - consumer awareness section of Consumer Service Column, the Sunday Times (Malta), 20 December 1998

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

The Sale of Commodities (Control) Regulations 1972: a note on price control and price indications under current law and the EU Directive on price indications, Law and Practice, Vol 1, December 2000

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

Maltese Consumer Policy and Regulation Before and After EU Membership
A short note on the Development of Consumer Policy and Law in Malta

Address to the Seminar "Promoting consumer interests" on the occasion of World Consumers Rights Day, 16 March 2006.

Adventures in screening and transposition - A Case study: the EU Consumer Protection Acquis 1990 - 2004 (subtitled A note on consumer policy and law in the context of the EU accession and transposition process - 1990 to 2004 and beyond) Address

Incredibly, therefore, our weights and measures law remains the outdated 1910 Ordinance, whose enforcement too is conspicuous by its absence.

6. PRODUCT SAFETY LEGISLATION

Chapter 26 of the 1991 White Paper promised the adoption of a law to prohibit and punish the sale of unsafe products. It is a national disgrace that we had to wait until 2001 to have a law specifically stating that consumers have a right to goods that are safe and that the placing of dangerous products on the market is illegal and punishable as a criminal offence. This Product Safety Act of 2001¹³ was a major step forward but it plainly came too late. This is the reason why this subject merited inclusion in this worst ofcompilation.

It is sad to reflect that this law - like several other recent good legislations - is not attributable to official concern and interest in consumer safety, but to the need to tick another item off the considerable EU-accession negotiations checklist. The 2001 Act satisfied the (perfectly legitimate and welcome) demand from the EU for a timely transposition of its General Product Safety Directive.¹⁴ The Thalidomide disaster, the Ford Pinto and other similar incidents had focussed civilized minds in the UK, the USA and elsewhere on the dangers of unsafe products since at least the seventies, leading to strong legislative and judicial reactions in the product safety and product liability fields; but not in Malta. Despite government having promised a product safety law in its 1991 White Paper, it took ten more years and EU accession to make up for this broken promise. Locally, product liability rules too were introduced late and then again only as part of the EU accession process in 2000.¹⁵

7. A MERGER OF SORTS AND THE AUTHORITY THAT NEVER WAS

In August 1998, the short-lived Labour Government of 1997-99 drafted legislation for the setting up of a new autonomous public authority to assume and merge the functions of the consumer affairs and competition departments. A Bill was finalized and circulated for consultation. However, the project was shelved following general elections and a change in government. The new authority was never brought into being.¹⁶ Had the former government lasted a further few months, the law could have passed and might have proved a workable success. We can never know. However, one major proposal was actually implemented a few years later. Following a report submitted by a government-appointed consultant, in 2000 government decided to proceed with the administrative merging of the two departments dealing respectively with competition law enforcement and consumer protection, effectively bringing them under one roof. They are in fact now located in one office and headed by one director, effectively filling the posts of Director for Consumer Affairs and the Director for Fair Competition. The two departments were amalgamated and are now called the Consumer and Competition Services Division. No empirical evidence exists to suggest that this merger has been a success and that consumers are receiving a better deal. Possibly the consumer office has had its restricted resources spread even more thinly and has suffered a serious loss of focus in its operations.

This administrative merger of sorts remains incomplete without evidence of any tangible benefits of synergy. At law, everything has remained unchanged and the two Departments remain separate and distinct, regulated under



their respective legislation, namely the Consumer Affairs Act and the Competition Act. These two Acts have not been amended to give legislative legitimacy to this de facto merger. The two departments have simply been physically placed together in a bigger building than before, and they now share common administrative facilities. As ordinary government departments, their operational and policy-making capability lacks autonomy and remains largely unfulfilled. One director now fills the two separate statutory roles respectively relating to consumer affairs and competition.¹⁷

8. A SMALL POINT ON CONSUMER SERVICES

It will probably come as no surprise to find that the initial half-hearted legislative attempts at consumer protection ignored consumer services and focussed limitedly on the supply of goods ignoring other significant consumer concerns, such as product safety and consumer choice. They also missed the growing significance of consumer services. This was the case with the unsatisfactory Consumers Protection Act of 1981, now thankfully repealed. The Trade Descriptions Act of 1986 was clearly more concerned with misdescriptions in sales of goods, reproducing the rules of the original Trade Descriptions Act of the UK, where services were only partly tackled as an after-thought. The original Door-to-Door Salesmen Act of 1987¹⁸ too referred almost exclusively to the sale of goods before it was extensively updated, improved and renamed in 2000. The lack of attention given to consumer services symbolized the conceptual vacuum that provided the backdrop to the early hesitant days of consumer law development in Malta. A change of direction was heralded in the 1991 White Paper. Later, legislation starting with the Consumer Affairs Act of 1994 showed greater understanding of the intended legislative aims and techniques

to Malta European Studies Association (MESA) seminar held on 20 April 2006. Paper available on the MESA website.

A brief descriptive note on some of the main laws referred to in this paper: Supplies and Services Act 1947 - the sale of goods and services to consumers in post-EU membership Malta is still subject to the truly massive delegated powers granted to the Minister by this war-time measure intended to regulate all aspects of such sales, including prices, conditions of purchase, cartels, hoarding and black market. It was enacted as a broad response to various unfair trade practices reflecting a destroyed economy with huge scarcities of essential supplies. The Act sets out the legal basis for the enforcement of price controls by the issue of price orders whereby goods offered for sale to consumers may be subject to maximum prices or fixed margins or percentages of profit. The National Programme for the Adoption of the Acquis (NPAA) had promised that this law would be extensively modernized to bring it in line with the needs of a modern liberalized economy and the free movement of goods principle. The legislation was passed by Parliament before EU accession but, in typical Maltese fashion, has not been brought into force. The undertaking remains unfulfilled.

Trading Stamps Schemes (Restriction) Act 1964 - this special law regulates situations where sellers or other distributors offer to their customers stamps or vouchers in return for the purchase of goods. The stamps or vouchers would then be exchangeable for gifts. Schemes organized by one importer or supplier are legal.

Trade Descriptions Act 1986 - traders who give consumers materially false promises or descriptions in the course of selling their goods or services may find themselves guilty of a criminal offence. Some of the main provisions of this Act have now been duplicated by the transposition of the Misleading Advertising Directive through provisions in the Consumer Affairs Act.

Weights and Measures Ordinance 1910 - the sale of goods based on weight or measurement is subject to rules on standard weights and measures and the use of only correct instruments. This law fails to address the needs of a modern developed society and is outdated and poorly enforced. In the NPAA, government solemnly undertook to replace it by a modern Metrology Act which reflects EU expectations and business best practice. Weights and measures regulation constitutes one of the earliest evolved consumer protection measures.

Metrology Act 2002 - this law sought to update our weights and measures legislation by establishing a much improved EU standard structured system of control and verification of instruments used to measure goods sold to consumers. Once brought into force, it will be administered by the Metrology Directorate of the Malta Standards Authority. The NPAA promised its implementation in good time prior to Malta's accession to the EU in typical Maltese fashion, it was passed by Parliament but then not brought into force - yet another broken promise.

of consumer protection, and consumer services were placed at par with consumer goods.

9. THREE FINAL FRAGMENTS

This part is taken up by three selected snippets, which support certain views expressed in this paper. Although unconnected, these fragments reveal a common thread of superficiality or mystification in the way certain politicians and others react to consumer protection.

(a) Consumers and price control

"The control of the cost of living should be the cornerstone of consumer protection"¹⁹. Dr Censu Moran, Shadow Minister for Social Welfare, was thus quoted in the newspaper *Orizzont* of 25 September 1992, in the course addressing a press conference on the consumer, in an apparently overdue initial reaction to the White Paper published in August 1991. This remarkable statement implies that even in 1992, the Labour Party had no credible consumer policy and seemingly still embraced the stiff price controls and trade restriction policies it applied in its long years in government during the seventies and eighties. Some years had to elapse before the Party evolved a fresh approach to consumer protection.

(b) Consumers and stereotypes

During the debate in Parliament on the bill amending the Consumer Affairs Act, Labour MP, Mr Joe Debono Grech was quoted as having stated in the 11 July 2000 sitting²⁰ "This law is fine, but how will consumers really be defended? How will the housewife be defended by the bill?". Not to be undone, the very next day, during the 12 July 2000 sitting, then Nationalist MP Dolores Cristina was reported as having said: "Women were...the biggest consumers, and she was pleased that the National Council of Women had announced the setting

up of a consumer association." She did however add that "Such organizations should not be solely for women."²¹

(c) Consumers and traders

The November 1991 editorial of *The Retailer*, the official organ of the General Retailers and Traders Union, a leading business association, had this perplexing reaction to the White Paper published three months earlier:

"At the end of the day, each one of us is a trader. Thus the worker, when he offers his work to whoever offers him the highest wage and conditions. Thus the farmer when he sells his produce, as well as the professional when he receives remuneration for services he has rendered. That is how everybody is a trader as well as a consumer."²²

CONCLUSION

The development of consumer law in Malta, like many other areas of economic activity and law, has enjoyed its ups and downs, and may be seen as a tale of achievements and misadventures. This brief paper has, hopefully in an interesting manner, focussed on a few of what I have termed, with some liberty, mishaps, false starts, and broken promises. Although the misadventures analysed here are quite diverse, they seem to collectively show that our law may contain more contradictions and incoherencies than one would expect. They suggest that local consumer law is still in some respects a collection of unconnected or badly connected measures, rather than the product of a well-defined and pre-planned programme. The current legal framework may be less cohesive, consistent and effective than is officially claimed. These negative events also point towards the sad conclusion that post-EU membership Malta no longer has a coherent consumer policy of its own.