

COMMERCIAL COURIER
LEGAL DEVELOPMENTS AFFECTING YOUR BUSINESS

This column looks at new laws and regulations which will have an impact on your business.

**COMPLIANCE ORDERS AND ENFORCEMENT UNDER THE
CONSUMER AFFAIRS ACT**

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Introduction

In this rather sleepy month of August we will conclude our examination of the new provisions of the Consumer Affairs Act by looking at Parts IX and X of the Act dealing with Compliance Orders and Enforcement respectively.

Compliance orders

Compliance orders may be issued by the Director of Consumer Affairs (referred to here as “the Director”) if he feels it reasonably appropriate or necessary in the public interest. When issuing a compliance order the Director is not required to prove actual loss or damage, or actual recklessness, negligence or fault on the part of the person against whom the order is made. The Director is however required to attempt “voluntary compliance” before proceeding to issue the compliance order.

The Director can act of his own initiative or on a written application to him by a consumer association. Interestingly enough, when making such an application the consumer association is not required to have or to prove an interest in, or be affected by, the matter or act in issue.

However it is still at the Director’s discretion to issue a compliance order on the request of a consumer association, and he has fifteen days to do so from the day the application is made. If the Director refuses to issue the order, the consumer association may within fifteen days from the date of notification upon it of the decision of the Director not to issue a compliance order, institute an action before the Courts of Magistrates in their civil jurisdiction for the issue of an order requiring the Director to issue a compliance order. The persons against whom the compliance order is requested to be made shall be parties to the suit, and it is the duty of the consumer association to notify such persons accordingly.

The first type of compliance order is related to unfair terms in consumer contracts (see

the February edition of the Commercial Courier). Here the Director may require any person:

- (i) to delete or alter those terms in a consumer contract which the Director considers to be unfair to consumers in accordance with Part VI of the Act; and
- (ii) to incorporate those terms in a consumer contract which the Director considers to be necessary for the better information of consumers, or for preventing a significant imbalance between the rights and obligations of the parties, and this to the benefit of consumers.

The second compliance order gives the Director the power to require any person engaging, promoting or undertaking, or proposing to engage in or undertake or promote any advertising which is misleading or is not permitted comparative advertising in terms of Part VI of the Act, to discontinue or refrain from such advertising (see the March and April editions of the Commercial Courier for articles on Misleading advertising and comparative advertising).

Whilst the first two compliance orders are specific and deal with particular aspects of the Act, the third and fourth types are extremely generic. The Director may require any person to take any measures specified in the compliance order, within the time specified in the compliance order, to ensure that the Consumer Affairs Act or any regulations made under the Act, or any other law dealing with consumer rights and protection which is specifically designated, are complied with. Finally the Director may require any person to cease or desist from committing an offence against the Act or any regulations made under it or of any other law dealing with consumer rights and protection which is specifically designated. In actual fact the fourth type of order seems to be included in the third type. The net effect is that the Director of Consumer Affairs has been given a very effective means of combating potential or actual breaches of the Act.

Procedure to issue Compliance Orders

When the Director issues a compliance order he is required to serve a copy of the compliance order on each person against whom the order is made. However, the compliance order comes into force with immediate effect, possibly when it is issued and not when it is served. A compliance order must contain in brief the reasons why the Director has issued it. It is served on each person against whom the order is made and on any consumer association on whose application the compliance order is issued. The order should also refer to the recipient's rights to contest it by instituting proceedings before the courts (see below). However the Director cannot be stopped from issuing a compliance order through any precautionary warrant or other order of any court or tribunal under any other law.

It is also important to note that the Director or any public officers acting under his direction or control in the performance of their functions under this Act, or any regulations made thereunder, are not liable for any loss or damage suffered by any person by reason of anything done or omitted to be done in good faith in the course of the administration of the Act or any regulation made thereunder.

Contesting a Compliance Order

A person against whom a compliance order has been made may, within fifteen days of the notification of the compliance order on him, institute an action before the Courts of Magistrates in their civil jurisdiction for a revocation of the compliance order. Such action may be made only on the following grounds:

- (a) on a material point of law; or
- (b) if the making of a compliance order is grossly unreasonable or unjustified.

It would seem that the grounds to contest a compliance order are more restrictive than the grounds to contest administrative action in general. In effect the Director must either have breached the law or else required something which is unheard of. The court may confirm, change or cancel the compliance order on any terms or conditions it considers appropriate.

Although where an action to contest the compliance order is instituted, the order is put in abeyance pending the outcome of the case, the Director may, if he considers it appropriate or necessary in the public interest, request the court to make an "interim compliance order" which, subject to such modifications as the court may in the interim compliance order determine, continues in force pending the final determination of the case. An interim compliance order of course expires upon the final determination of the case.

Publication of Compliance Orders

In order to eliminate or reduce the continuing effects of any non-observance of any provisions of the Act, regulations or of any other law dealing with consumer rights and protection, the Director may by notice in writing require any person -

- (a) to publish a copy of the compliance order, in full or in part and in such form as he considers to be appropriate and adequate; and
- (b) to publish a corrective statement in relation to any contravention of the Act, regulations or against any other law dealing with consumer rights and protection as may be designated.

Publication shall be made in at least two daily newspapers within seven days from receipt of the notice and shall be at the expense of the person served with such notice. Where such publication is not effected as aforesaid, the Director may proceed to effect publication himself, in which case he shall have the right to recover from the person on whom the notice is served, any expenses incurred, as a civil debt.

So here the offender has to publicly state that he has received a compliance order, and of course pay the newspapers for the publicity. This power to request publication of a compliance order seems to be a separate power from that to issue the order itself. If that is the case, one could have a situation in which even though the recipient of the compliance order is contesting it before the courts, the Director may still have gone public about it.

Enforcement

For the purpose of discharging his functions under the Act, the Director may -

- (a) enter and search any premises other than premises used exclusively as a place of residence;
- (b) make any inspection, conduct any test and on paying or making tender therefor, take any goods; and
- (c) take any books, documents or records however kept or stored (including computer records).

No entry and search shall be effected between seven in the evening and seven in the morning, unless the Director has reason to believe that delay could cause the loss of necessary information. In the course of any entry and search, the Director may request the assistance of the Police.

Where the Director takes any book, document or record, he may retain that book, document or record for as long as it is necessary to enable it to be inspected and copies of extracts from it to be made or taken, or, if it is required as evidence in proceedings for an offence under this Act or any regulations made thereunder.

If the Director keeps the original of any book, document or record, he must allow the owner thereof to have reasonable access thereto or to a copy thereof as soon as practicable.

The Director must give to the person from whom anything has been taken, a receipt for what has been taken.

The Director may also require any person to provide any information in any manner, including:

- (a) by answering any questions, orally or in writing; or
- (b) by producing any books, documents or other records as the Director may consider to be necessary.

A person shall not be required to answer any question if the answer may subject him to criminal proceedings.

Offences

Any person who -

- (a) wilfully obstructs, assaults, threatens, resists or interferes with the Director or a public officer in the exercise of his duties, or attempts so to do; or
- (b) uses threatening, abusive or insulting language to the Director or a public officer in the course of his duties,
- (c) fails to comply with a compliance order issued under the Act or regulations made thereunder;
- (d) refuses or fails to furnish information as required under the Act or else provides false or misleading information,

is guilty of an offence which carries a fine of not less than one hundred liri and not more than ten thousand liri. The court may also order any person to pay a fine of not

more than fifty liri for each day of non-compliance with an order of the Director made under the Act.

Where the court finds that a person has committed an offence under the Act or regulations made thereunder, the court may, without prejudice to any other order it may make under any other law -

- (a) order the restitution of any money, property or other consideration given by the consumer;
- (b) make an order of specific performance against that person; and
- (c) make any other order the court considers appropriate.

The prosecution of an offence under the Act shall be prescribed by the lapse of three years from the date on which the offence is alleged to have been committed.

Conclusion

When all the provisions of the Consumer Affairs Act come into force, dealing with consumers will become quite a risky business. Traders are therefore actively encouraged to prepare themselves adequately for the new legal scenario of doing business. This may be a good opportunity to conduct a thorough revision of the sales process, not only to make it compliant with the new provisions but also to improve the performance of the business.