

## **CONSUMERS FEDERATION OF KENYA (COFEK)**

### **CONSUMER PROTECTION ACT, 2012**

### **DRAFT CONSUMER PROTECTION REGULATIONS CODE, 2013**

#### **BACKGROUND**

The Consumer Protection Act (CPA-2012) provides for the protection of the consumer, prevents unfair business practices in consumer transactions and for matters connected and incidental thereto. The law was assented to on December 13, 2012 and operationalized by then Trade Minister on March 14, 2013. For ease of implementation, and as per Section 93 of the Act, these regulations are necessary to assist in better carrying out of the Act as well as specify penalties for breaches.

This Code has been developed with the understanding that it must meet the consumer needs, accord due respect to consumer dignity, health and safety, protection of economic interests, improvement of the quality of life as well as transparency and harmony in the consumer relations as based on the following principles:

- (a) acknowledgment of consumers' vulnerability in the market relations;
- (b) government action as to effectively provide protection to consumers through direct initiative; incentives toward the establishment and development of representative associations; ensuring the State presence in the market; and guarantee of products and services within the appropriate standards of quality, safety, durability and performance .
- (c) harmonization of the interests of those who take part in the consumer relations and compatibility between consumers' protection and the need for economic and technological development, so as to make feasible the principles that support the socio-economic policy as based on good faith and balance in the relationship between consumers and suppliers;
- (d) education and information to suppliers and consumers as to appraise them of their rights and obligations with a view to improving the consumer market;
- (e) incentives to suppliers toward the creation of an efficient means of quality control, products and services safety, as well as alternative means for settling potential and emerging disputes ;
- (f) efficient restraint and repression of all abuses in the consumer market relations, including dishonest competition, inadequate use of industrial inventions and creations of trademarks, commercial names and logo-types that might cause losses to consumers;

(g) rationalization and improvement of public services; continuous independent study of the changes in the consumer market.

For the realization of the objectives of the CPA-2012, various tools and structures both at the Judiciary, National and County Governments will need to rely on among others;

(a) availability of good quality and free legal assistance for particularly aggrieved low-income and semi-literate consumer;

(b) formation of compliance, enforcement and prosecution departments for consumers' defense within the Judiciary and County Governments as per Section 90(g) of the Act especially on creation of special courts dedicated to small claims and specialized courts for the solution of consumer disputes;

(c) in consultation with the Inspector General of Police and or County Governments establish police or other oversight departments especially those that are dedicated to assist consumers that are victims of consumer-related criminal infractions

(d) avail incentives for the creation and development of accredited consumer associations for consumer protection.

## **PART 1 - PRELIMINARY**

This Regulations Code establishes rules regarding consumers' protection and defense, pursuant to Article 46 of the Constitution of Kenya 2010 and the CPA-2012. The letter and spirit of these regulations must, at a bare minimum, reflect provisions of the same.

### **Introduction:**

Broadly, the Act seeks to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and provide for matters connected with and incidental to consumers welfare.

The CPA-2012 covers diverse consumer interest areas including: consumer rights, unfair business practices, rights and obligations respecting specific consumer agreements, sectors where advance fee is prohibited, repairs to motor vehicles and other goods, credit agreements, leasing, procedures for consumer remedies and consumer protection advisory committee.

Effective realization of the CPA-2012 requires regulations that will provide guidance on how the Act should be implemented and provide more clarity on the various provisions of the Act. By definition, regulations are rules, order, by-laws, codes

developed by diverse sector stakeholders as will be made operational by the relevant Cabinet Secretary for East African Affairs, Commerce and Tourism (MEAAC&T).

Cofek and other members of the Kenya Consumer Protection Advisory Committee (Kecopac) having played a key role in the formulation of the CPA-2012 must ensure that necessary regulations are put in place to facilitate effective implementation of the Act. Indeed Cofek has already brought together major players on consumer issues in Kenya to form a Technical Committee to review the Act and develop regulations to guide its implementation.

The Technical Committee consist of: Ministry of East Africa Affairs, Tourism and Commerce, Kenya Bankers Association, Law Society of Kenya, Energy Regulation Commission, Anti-Counterfeit Agency, Consumer Unity and Trust Society among others to develop CPA-2012 regulations. The CPA-2012 requires regulations for the following provisions:

## **Section 2:**

Interpretations of the key consumer protection terminologies, applied within the Act. This will need to be clarified and simplified further. New terminologies or wordings may be introduced. Those already existing will need to be made more precise and unambiguous to all cadres of consumers.

A decision will be made, for instance, if the "consumer" shall be limited to an individual or whether it shall be extended to a body corporate which acquires or uses any product or service as an end user. Any group of persons, even if unidentifiable, whose activities might intervene in the consumer relations, may or may not be understood as consumer.

The definition of the "operator" will need to be used interchangeably with a "supplier" again to mean any public or private, national or foreign individual or body corporate, as well as entities without a legal identity carrying on business in the field of production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products, or rendering of any other services. Definition of "product(s)" and "good(s)" will need to be harmonized, for instance, so as to read "any movable or immovable, material or immaterial asset".

Definition of "service" will need to be expounded beyond being seen as merely the opposite to "goods" so that it could be considered as "any activity offered in the consumer market subject to pay (or none at all), including those of banking, financial, credit and insurance nature, except those resulting from a labour relationship."

This section will require to deliberately mention that specific consumer terminologies not defined within this section shall be viewed as defined by the spirit of the CoK-2010, CPA-2012 and any other written Kenyan law and/or precedent set by prevailing interpretation of the Kenyan High, Appeals or Supreme Courts verdicts in related matters.

Section 3: There is need to link this Section to interpretation of the CoK-2010, applicable international law, specific purposes of the Act and powers of the Kenya Consumer Protection Advisory Committee (Kecopac) established under Section 89 of CPA-2012.

## **PART II - CONSUMER RIGHTS AND AREAS FOR CLARIFICATIONS**

4 (1) Consumer Rights:

The Act gives a consumer the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of goods or services to the consumer. This right cannot be removed by any agreement between the parties.

*On 4 (2) the mechanisms of resolving dispute should be clarified and the specific law for dispute resolution stated.*

5(1) A supplier of goods and services is deemed to warrant that the goods and services are of a reasonably merchantable quality. There are additional implied warranties that are deemed to apply notwithstanding any provisions to the contrary in the agreement.

*The term "reasonable merchantable quality" should be defined and clarified*

7 Ambiguities to be interpreted in favour of the consumer: Any ambiguities in a consumer agreement (including oral agreements) shall be interpreted in favour of the consumer.

*There is need to define ambiguity and state what constitutes and what doesn't constitute 'ambiguity' including beyond facts of law so as to possibly include circumstances*

11(1) Internet gaming sites: *There will be need to specify and or define the sites and the laws that make reference to such sites*

15(2) Unfair practices: Again there is need to *specify reasonable penalties for engaging in diverse 'unfair practices' considering either first or repeat offenders*

18. Requirements for future performance agreements – *Prescribe the requirements*

22. Requirements for time share agreement: *Define time share agreement and prescribe the requirements for making the agreement.*
- 24(c) Requirements for personal development services agreement: *Prescribe the requirements for personal development services agreement.*
- 32(3) Copy of internet agreement: *Prescribe the manner in which a copy of the internet agreement should be delivered*
- 34 Requirements for direct agreement: *Prescribe the requirements for making direct agreements*
- 36 Disclosure of information on remote agreements: *Prescribe the information to be disclosed to the consumer and the requirements for disclosing such information*
- 37(1) Copy of remote agreement: *Prescribe the period within which a supplier should deliver the remote agreement consumer.*
- 37(2) *Prescribe information to be included in the remote agreement*
- 37(3) *Prescribe the manner in which the copy of the agreement should be delivered to consumer*
- 39 Requirements for consumer agreements on loan brokering: *Prescribe the requirements for making consumer agreements on loan brokering*
- 40(c) Advance payments prohibited: *Prescribe any other goods and services to be included under this provision*
- 43 Prohibited representations: *Define and prescribe what constitutes prohibited representation*
- 44 Estimates: *Prescribe the requirements that an estimate for repair should meet*
- 46 Authorization required: *Define the form in which the consumer should authorize work or repair*
- 48 Posting signs: *Prescribe the requirements for the signs*
- 50 Invoice: *Prescribe the manner in which the invoice should be delivered to the consumer*
- 51 (5) Warranty for vehicles: *Clarify what constitutes misuse or abuse of parts*
- 53(2) Application of part: *Make the necessary prescription*
- 55 Limiting liability for unauthorized charges: *Prescribe the maximum for an unauthorized charges under credit agreement for open credit*

57 Correcting errors: *Prescribe the requirements for correcting an error*

67(7)(a)(b) Subsequent disclosure on open credit: *Define and describe material change.*

73 Representations: *Prescribe the requirements for making representations.*

74(2) Disclosure statement: *Prescribe the manner of calculating the maximum liability of the lessee.*

76(2) Forms of consumer notice: Prescribe the requirements that the notice should comply with

80(2) Obligations on cancellations: *Prescribe the requirement and manner in which the goods with the consumer should be repossessed. (3) Prescribe the period the consumer should take care of the goods.*

82(2) Illegal charges and payments: *Prescribe the period within which supplier should make a refund.*

83(5)(b) *Prescribe the period*

89 Establishment of Committee: *Prescribe the length of term in office for committee members and the conduct and regulations of the Committee*

93(2)(b) Take note and make necessary prescription as indicated

## **GENERAL PROVISIONS**

### **CONSUMERS' BASIC RIGHTS**

There will be need for the regulations to clarify the following are consumers' basic rights :

(a) safeguard of life, health and safety against risks caused by practices in the supply of products and services considered hazardous or harmful;

(b) education and communication as to the proper use of products and services, enabling free choice and equality in contracting;

(c) appropriate and clear information about the different products and services, and correct specification as to the quantity, characteristics, components , quality and price, as well as to any risks they might involve;

(d) protection against misleading, deceptive, explicit and abusive advertising in public places, and coercive or dishonest business methods, as well as against practices and abusive clauses or those imposed in the supply of products and services;

(d) modification of the contractual clauses that establish unreasonable installments, or their revision in view of subsequent events that make installments excessively burdensome;

(e) effective prevention against and redress for individual, collective or diffuse material and moral damages;

(f) access to the jurisdictional and administrative bodies regarding the prevention or redress for individual, collective or diffuse material or moral damages, being ensured legal, administrative and technical protection to the low-income consumer;

(g) easy defense of the consumer's rights, inclusive with the reversal of the burden of proof in his favor in the civil proceedings when, at the judge's understanding, the allegation is probable or he is at a disadvantage according to the ordinary rules of experience;

(h) appropriate and effective rendering of public services in general and as per Article 46(3)

### **International Treaties**

The rights provided for in this Code should not exclude other consumer rights arising out from international treaties or conventions to which the Republic of Kenya is a signatory, ordinary law and regulations issued by the competent administrative authorities or deriving from the general principles of law, analogy, customs, and equity.

In addition, the regulations need to specify that in the event where the violations or offences are caused by more than one responsible party, all such parties shall be jointly liable for the redress of damages, as provided for in the consumer rules.

## **PRODUCT AND SERVICE QUALITY, PREVENTION AND REDRESS OF DAMAGES**

### **SECTION I**

#### **(a) Health Protection and Safety**

It must be made clear that goods and services offered in the market shall not bring risks to the consumers' health or safety, except those risks which can be understood

as normal or foreseen in view of their nature and possession, being suppliers obliged in any event to provide the necessary and appropriate information about them.

Specifically, the regulations must single out that in the case of industrial products, the manufacturer shall provide labeling and disclosure information through the appropriate printed notes that shall accompany the products.

This should include requiring the supplier of products and services that are potentially harmful or dangerous to health or safety be mandatorily provide noticeable and proper information as to the risk of harm and danger they involve, without prejudice to other measures applicable to each case.

Within the same breadth, suppliers should explicitly not be allowed to introduce into the market products or services they know, or ought to know, are highly harmful or hazardous to consumers' health or safety .

Any supplier of products or services who, subsequently to the introduction of his products or services into the market, realizes the existence of unforeseen risks involved, they shall immediately communicate the same to the competent authorities and warn consumers, through advertising notices including recalls. Such notices shall be widely spread through the press, radio and television, at the expense of the product or service supplier ;

In the event that the National or County Government become aware that some products or services are hazardous to consumers' health or safety they shall without delay warn consumers about the matter.

### **Liability as to the Nature of Goods and Services**

- ✓ It should be clarified that Kenyan and/or foreign manufacturers, producers, constructors, and importers are liable, regardless of the existence of culpability, for the redress of damages caused to consumers by defects from design, manufacture, construction, assembly, formula, handling, presentation or packaging of products, as well as for the improper or incomplete information about their use and risks.
- ✓ While on this, a product should be considered defective when it does not offer the expected safety, subject to consideration the relevant circumstances such as: its presentation; use and risks that can reasonably be expected from it; the time of its introduction into the market; A product shall not be considered defective only because another product of a better quality has been offered to the market.
- ✓ The manufacturer, contractor, producer or importer will not be held responsible just in the case they are able to prove that: they had not

introduced the product into the market; although having had introduced the product into the market, it had no defect; the culpability is exclusive on the consumer or a third party.

- ✓ Dealers shall equally be held responsible in the terms of the preceding article when: the manufacturer, contractor, producer or importer cannot be identified; the product is offered without a clear identification of its manufacturer, producer, constructor or importer; improper handling of perishable goods.
- ✓ The party effecting the payment to the offended party is entitled to exercise his right of recovery against the others responsible, according to his participation in causing the damage.
- ✓ The supplier of services is responsible, regardless of culpability, for the redress of damages caused to consumers for defects related to the rendering of services as well as for incomplete or improper information about their use and risks .

A service is to be considered defective when it does not offer the safety which consumers should expect from it, being considered the relevant circumstances such as: the manner it has been rendered; result and risks that can reasonably be expected from it; the time it has been rendered.

A service is not to be considered defective only because newer techniques have been adopted. The supplier of services will not be held responsible just in the case he is able to prove that: having rendered the service it had no defect; the fault is exclusive on the consumer or a third party; the personal responsibility of independent professionals shall be determined upon verification of the fault.

Suppliers of durable or perishable consumer products are jointly liable for either quality and quantity defects that make them unfit or inappropriate for the use they are designed for, or even diminish their value, as well as for those resulting from any discrepancy with the particulars shown on containers, packages, label or advertisement, with due regard to possible variations in view of their nature, being the consumer entitled to require replacement of the defective parts.

It should be clarified that in the case that the defect is not solved within thirty days of notification, the consumer shall be entitled to demand alternatively and at his choice for: replacement of the product by another of the same type and in perfect conditions; immediate refund of the amount paid, considered the corresponding adjustments, without prejudice to a demand for eventual losses and damages or proportional reduction in the price.

The parties may decide about a reduction or an extension of the term, though not less than seven days and not more than ninety days. In the accession agreements such term should be separately established, through an express statement by the consumer.

The consumer may make immediate use of the alternatives mentioned in the first paragraph of this article whenever, considered the defect extension, the replacement of the defective parts might alter either the product quality or characteristics, diminish its value or in the case it is an essential product.

Having the consumer chosen the alternative I of the first paragraph and being impossible the replacement of the good, it can be replaced by another of different type, brand or model, being added or returned any possible difference of price without prejudice to the established in the alternatives.

In the supply of natural products the immediate supplier shall be held liable before the consumer, except when the producer of the good is clearly identified. The following are improper for use and consumption: products with expired utility; products that are damaged, altered, adulterated, damaged, falsified, tainted, deceitful, harmful to life or health, hazardous or, even, those that do not comply with the regulations on manufacturing, distribution or presentation; products that for any reason show to be inadequate for the use they are intended for.

Suppliers ought to be made jointly liable for the faults in the product quantity when, considered the permitted error ranges due to their nature, its net content is lower than that informed on the container, package, label or advertisement, being the consumer entitled to require alternatively and at his choice: proportional reduction in the price; complementing of weight or measure; replacement of the product by another of the same kind, brand or model, without mentioned defects; immediate refund of the amount paid, considered the corresponding adjustments, without prejudice to a demand for eventual losses and damages.

It is critical that the last (immediate ) supplier shall be held liable when the instrument used for weighing or measuring a product is not adjusted pursuant to the official standards and the prevailing Weights and Measures.

The supplier of services shall be liable for quality defects that make them unfit for consumption or diminish their value as well as for those resulting from any discrepancy with the information shown on the offer or advertising message, being the consumer entitled to require, alternatively and at his or her choice:

- (i) remodeling of the services, with no additional cost to the consumer, when applicable;

- (ii) immediate refund of the amount paid, considered the corresponding adjustments, without prejudice to a demand for eventual losses and damages.
- (iii) proportional reduction in the offer price.

It should be important to clarify that in the supply of services concerning the repair of any product , it shall be implicit that suppliers are bound to apply the proper original and new components (parts), or those which are under the manufacturer's technical specifications, unless otherwise authorized by the consumer with regard to the latter.

In the event of a total or partial non-fulfillment of the obligations referred to in this Code, the concerned parties shall be compelled to fulfill them and to redress in case of any damage caused, as established in this Code.

The supplier's ignorance about quality defects due to the inadequacy of products and services shall not exempt him or her from responsibility.

The legal warranty as to the adequacy of a product or service is independent of any express statement, and the supplier's exoneration by contract is banned.

It shall be illegal as shall be null and void for a supplier to bring up any contractual clause that makes it impossible, or exempts or diminishes the obligation of indemnity provided for in this and in the foregoing sections.

In the case that there is more than one party responsible for causing the damage, all parties shall be jointly liable for the redress established in this and foregoing sections. In the event that the damage is caused by a component or spare part incorporated into the product or service, either manufacturer, constructor or importer and the individual who performed such incorporation are held jointly liable.

## **SECTION 11**

### **THE RIGHT TO COMPLAIN AND LAPSE**

The right to complain against apparent or easily identifiable defects expires within:

- ✓ thirty days, in the case of supply of non-durable services or products; or
- ✓ ninety days, in the case of supply of durable services or products.

The time to exercise the right to complain shall commence upon the effective delivery of the product or conclusion of the service. The right to complain shall be lost if:

- ✓ any verifiable complaint formulated by the consumer to the supplier of products and services until receipt of the correspondent negative reply, which shall be transmitted in unmistakable manner;
- ✓ the establishment of a civil investigation, until it is concluded;
- ✓ In the case of a concealed defect, the time to complain shall count upon said defect is evident;
- ✓ It shall expire in five years the time for claiming for redress of damages caused by nature of products or services as

### **SECTION 3**

#### **DISREGARD OF THE LEGAL IDENTITY**

1. The judge may disregard the legal identity of a company when, to consumers' disadvantage, there is abuse of rights, excessive power, breach of the law, illicit act or fact, or violation of the bylaws or social contract. It shall be also exercised in the event of bankruptcy, insolvency, closing down, or inactivity of the corporate entity resulting from mismanagement.
2. Companies pertaining to corporate groups and controlled companies are subsidiarily liable for the obligations of this Code.
3. Companies in consortium are jointly liable for the obligations of this Code.
4. Associated companies shall be responsible only for culpability.
5. A body corporate may also be disregarded whenever its identity is somehow a hindrance to the reimbursement of losses caused to consumers.

### **PART TWO BUSINESS PRACTICES**

#### **SECTION 4: THE OFFER**

1. Every sufficiently accurate information or advertising, announced by any mode or communication means, concerning products and services offered or presented for sale, shall bind the manufacturer and supplier announcing it or making use of it and shall integrate the contract to be entered into.
2. The offer and presentation of products or services shall ensure a correct, clear, accurate, and noticeable information in English and/or Kiswahili on their characteristics, quality, quantity, components, price, warranty, duration and

origin, among other data, as well as about the risks they might involve to consumers' health and safety.

3. Provided that the manufacturing or import process of a product is not stopped, manufacturers and importers shall ensure that components and spare parts are available for supply.
4. After being stopped the manufacturing or import process of a product such availability shall be kept up for a reasonable period of time, in the terms of the law.
5. In the case of an offer or sale through the telephone or mail order, the manufacturer's name and address shall appear on the packaging, advertising and all printed matters used in the commercial transaction.
6. The supplier of a product or service shall be jointly liable for the acts of his agents or independent representatives.
7. If a product or service supplier refuses to comply with the terms of the offer, presentation or advertising, the consumer may elect, alternatively and at his or her choice:
  - (i) to a compelled performance of the obligation, in accordance with the terms of the offer, presentation or advertising;
  - (ii) to accept another product or the rendering of an equivalent service;
  - (iii) to cancel the contract, with the right of having refunded any amount paid in advance, with the corresponding adjustments, plus indemnity for losses and damages.

## **SECTION 5**

### **ADVERTISING**

1. All forms of advertising shall be disseminated in such a way that consumers will be able to easily and immediately identify with as such.
2. The supplier in advertising his products or services, shall keep, for the proper information to the legitimate interested parties, all the factual, technical and scientific data supporting such advertising message.
3. Abusive or misleading advertising shall be banned.
4. It shall be understood as misleading any kind of information or communication bearing advertising characteristics, which is totally or partially false, or that for

any other reason even by omission, might lead consumers to error with respect to the nature, characteristics, quality, quantity, attributes, origin, price and any other data about the products and services.

5. It shall be understood as abusive, among others, any type of discriminatory advertising that incites violence, exploits fear or superstition, profits from the immaturity in judging and inexperience of children, disregards the environmental or social values, or that can lead consumer to behave harmfully or hazardously with respect to his health or safety.
6. For the effects of this Code, an advertising is misleading by omission when failing to provide the essential data about a product or service.
7. The burden of proof as to the truth and accuracy of the information or advertising communication shall run under responsibility of the party sponsoring it.

## **SECTION 6**

### **ABUSIVE PRACTICES**

1. Among other abusive practices, it shall be prohibited for the supplier of products and services:
  - (i) to condition a product or service supply to the acquisition of another product or service or to a limit in quantity without a fair reason as well;
  - (ii) to refuse to attend a consumer's request, in the exact availability of goods in store in accordance with the general practice;
  - (iii) to send or deliver to consumer any product, or to render any kind of service, without a previous request;
  - (iv) to profit from the consumer's weakness or ignorance, considered his age, health, knowledge or social condition, convincing him toward products or services;
  - (v) to require from the consumer an evidently excessive advantage;
  - (vi) to perform services without a previous cost estimate and express authorization by the consumer, exempted those resulting from previous practices between the parties;
  - (vii) to depreciatively spread information related to any action taken by the consumer in the exercise of his rights;

- (viii) to introduce into the consumer market any product or service that is not consistent with the rules issued by the competent official agencies, or there being no specific rules, with those issued by the Kenya Bureau of Standards or another entity accredited by the Government of Kenya.
- (ix) to refuse the selling of goods or the rendering of services directly to whom is willing to acquire them against prompt payment, exempting those cases in which there are intermediaries, regulated by specific laws;
- (x) to raise the price of products or services without a fair reason;
- (xi) to apply a formula or calculation to readjust the price differently from that legally authorized or established in the contract ;
- (xii) to fail to stipulate a period of time for the accomplishment of his obligation, or to establish alone its initial term, at his own and exclusive criteria;

2. The services rendered and products sent or delivered to consumers shall be held equivalent to free samples, thus not existing an obligation for payment.

3. The services supplier is bound to provide consumer with a preliminary cost estimate specifying the price of labour, materials and equipment to be applied, the payment conditions as well as the dates of starting and conclusion of the services;

- (i) Unless otherwise stipulated, the estimated price shall be valid during a period of ten days, counted from its reception by the consumer.
- (ii) Since the cost estimate is approved by the consumer, it shall bind the parties and only through a free negotiation between them it can be modified.
- (iii) The consumer is not responsible for any charge or additional cost resulting from the hiring of outsourcing services not included in the previous estimate .

4. In the case of supply of products or services subject to control or price monitoring, suppliers shall comply with the official limits , otherwise being responsible for the return of the amount paid in excess with the corresponding adjustments being the consumer entitled to require the transaction cancellation at his choice, without prejudice to other applicable penalties.

## **SECTION 7**

### **COLLECTION OF DEBTS**

For the payment of his or her debts, the consumer in default shall not be held up to ridicule, nor exposed to any type of embarrassment or threat.

If charged for an undue amount the consumer will be entitled to recover the equivalent to two times the amount paid in excess, with the corresponding adjustments plus legal interests, except in the event of a justifiable error.

## **SECTION 8**

### **CONSUMER DATA BASE AND REFERENCE FILES**

The consumer, without prejudice to relevant provisions, shall have free access to any of his own data informed in reference files, index cards, records, personal and consumer data, as well as their respective sources.

Consumers' data and reference files shall be objective, clear, true and comprehensively written, not bearing any negative information concerning a period of time prior to the last five years .

If not requested, the consumer shall be communicated in writing about the inclusion of his name in any reference file, index card, register, personal and consumer data .

Whenever finding any inaccuracy in his data and records, the consumer shall be entitled to require the prompt correction, and the person in charge of such records shall communicate the alteration, within five weekdays, to any possible addressee of the incorrect information.

Consumers' data base, reference files, credit protection services and others related, shall be understood as public entities.

Extinguished the time for collecting consumers' debts, the respective Credit Protection Services shall no longer provide any information that might prevent or make it difficult to consumers a new access to credit operations before suppliers.

Public agencies for consumer protection shall keep an updated list on the well-founded complaints against suppliers of products and services, and shall make it public annually. Such disclosure shall include whether the complaint has been solved by the supplier or not.

Any interested party may have free access to any information included in such list for means of guidance and reference.

## **CHAPTER 3**

### **CONTRACTUAL PROTECTION**

#### **SECTION I: GENERAL PROVISIONS**

Contracts governing consumer relations shall not oblige consumers when they have not been given the chance of previously being acquainted with their contents or when they are written in such a way it is difficult to understand their meaning and scope .

Contractual clauses shall be interpreted more favorably to consumers.

Statements of will included in private written documents, receipts and pre-contracts concerning consumer relations shall bind the supplier, and may also be subject to a specific accomplishment, according to the terms of the article 84 and its paragraphs;

The consumer may give up a contract within a period of seven days from its signature or reception of the good or service, whenever contracting products and services outside of a commercial establishment, especially through the telephone or at his domicile.

If the consumer exercises the right of retraction, the amount possibly paid in advance for any reason during this period of consideration shall be returned promptly with the corresponding adjustments.

The contractual warranty is a complement of the legal guarantee and shall be given in writing.

The term of warranty or equivalent shall follow a standard and appropriately explain what such warranty consists of, as well as the way, period of time and place where it can be exercised, yet any charge at the consumer´s expense and it shall be handed to consumer duly filled in by the supplier upon delivery (of the good or service) accompanied by a illustrated operating instructions handbook, in comprehensive writing .

#### **SECTION II**

##### **ABUSIVE CLAUSES**

1. Contractual clauses concerning products and services supply shall be deemed lawfully void, among others, when they:
  - (i) prevent, exempt or reduce suppliers' liability for defects of any nature in products and services or imply a renouncement or a waiver of rights. In the

- consumer relations between supplier and consumer - body corporate, the indemnity may be limited in justifiable situations;
- (ii) take from the consumer the option for reimbursement of an amount already paid, in the cases provided for in this Code;
  - (iii) transfer responsibility to third parties;
  - (iv) establish obligations understood as unfair, abusive, or that lead the consumer to an unreasonable disadvantage or those that are not consistent with good faith or equity;
  - (v) establish the reversion of the burden of proof against consumers;
  - (vi) determine a compulsory use of arbitration;
  - (vii) impose a representative to conclude or carry out another legal negotiation by consumer;
  - (viii) leave to the supplier alone the option to conclude or not the contract, though obliging the consumer;
  - (ix) make it possible for the supplier to directly or indirectly change the price unilaterally;
  - (x) authorize the supplier to unilaterally cancel the contract without giving the same right to the consumer;
  - (xi) require from the consumer the reimbursement for expenses related to the collection of his debts, without giving the same right to the consumer against the supplier;
  - (xii) authorize the supplier to unilaterally modify the contents or the quality of the contract after it having been entered into;
  - (xiii) infringe or make it possible to violate environmental rules;
  - (xiv) are in disagreement with the consumer protection system;
  - (xv) make it possible a waiver of the indemnity right related to necessary improvements.

2. It shall be understood as an excessive advantage, among others, when it:

offends the fundamental principles of the judicial system it belongs to;

in anyway restricts the basic rights or obligations inherent to the nature of the contract, threatening its purpose or the contractual balance ;

shows to be excessively burdensome to the consumer, considered the contract nature and scope, the interest of the parties involved and other circumstances peculiar to each case;

The nullity of an abusive contractual clause does not invalidate the contract as a whole except when its absence, despite the efforts to reintegrate the contract, might turn it extremely burdensome to any of the parties;

Any consumer or entity representing him is entitled to request that the Attorney General Office takes the legal proceedings as to declare the nullity of a contractual clause that is contrary to the established in this Code, or anyway is unable to ensure a fair balance between rights and obligations of the parties.

Whenever the product or service supply involves the granting of credit or loan, the supplier, among other requirements, shall previously and appropriately advise the consumer about:

- a) the price of the product or service in local currency;
- b) the amount of interest for payment in arrears and the actual annual interest rate;
- c) any legal additional cost;
- d) the number and periodicity of installments;
- e) the total to be paid, with and without financing.
- f) The penalty on late payment resulting from noncompliance with the obligation within its term shall not be superior to two percent of the installment amount.
- g) It is ensured to consumer the early settlement of his debt, totally or partially, subject to the proportional reduction of interests and other extra costs.
- h) In purchase and sales agreements regarding chattels and real properties subject to payment in installments, as well as in fiduciary disposal in guarantee, any clause providing for the total loss of the installments paid, in favor of the creditor who, due to payment default, would require the cancellation of the contract and repossession of the product, shall be deemed lawfully void.
- i) In contracts regarding durable products under a buyers' club system, any compensation or return of the installments paid, as provided for in this article, will have discounted, beyond the economic advantage obtained through the possession (of the good), the losses that the withdrawing or defaulting party might have caused to the rest of the group.

The contracts referred to in this article shall be expressed in local currency.

### **SECTION III**

#### **ACCESSION AGREEMENTS**

An accession agreement is that whose clauses have been approved by the competent authority or established alone by the supplier of products or services, without the consumer being able to discuss or substantially modify its contents.

The insertion of a clause in the form will not change the nature of an accession agreement.

In the accession agreements it is allowed to include a clause providing for the agreement to be void or cancelled due to noncompliance by one of the parties, since it is alternative and at the consumer's choice

The accession agreements shall be written in comprehensive terms , with noticeable and readable characters, allowing an easy understanding by the consumer.

The clauses that may imply a limitation on the consumer's right shall bear ostensible characters thus allowing a prompt and easy understanding.

### **CHAPTER IV**

#### **ADMINISTRATIVE SANCTIONS**

The National and County Governments concurrently and in their respective areas of administrative action, will issue rules for the production, manufacturing, distribution and consumption of products and services.

The National and County Governments shall supervise and control the production, manufacturing, distribution and advertisement of products and services and the consumer market, with a view to consumers' life safeguard, health, safety, information and well-being, issuing the necessary rules therefor.

National and County Governments in charge of supervising and controlling the consumer market shall keep permanent committees in order to draft, review and update the rules referred to in the first paragraph, being mandatory the participation of consumers and suppliers.

The official agencies may send a notification to suppliers, subject to penalty for noncompliance, requiring information on issues of consumers' interest, except those that are related to industrial secrets.

Infractions against consumers' defense rules are subject, according to the case, to the following administrative sanctions, without prejudice to civil and legal sanctions, and those defined in specific rules:

- I. - a fine;
- II. - seizure of the product;
- III. - destruction of the product;
- IV. - cancellation of the product registration at the competent bodies;
- V. - prohibition of the product manufacturing;
- VI. - suspension of the product or service supply;
- VII. - temporary suspension of the activity;
- VIII. - cancellation of the concession or permission of use;
- IX. - cancellation of the license permit for the establishment or activity;
- X. - total or partial closing down of the establishment, work or activity;
- XI. - administrative intervention;
- XII. - determination as to a counter-advertising.

The sanctions provided for under this article will be applied by the administrative authority within its sphere of action, and may be applied cumulatively, inclusive by precautionary measure, preceding or incidental to the administrative procedure.

The penalty of a fine, graduated according to the seriousness of the infraction, to the advantage obtained, and to the economic status of the supplier, will be applied through an administrative procedure being reverted to the Fund Local funds for consumers' protection, the other cases.

The fine amount shall never be less than two hundred and not superior to three million times the amount of the ..., or other equivalent index that might replace it.

Whenever verified defects in quantity or quality due to inappropriateness or unsafety of the product or service, the penalty of seizure, destruction, manufacturing prohibition, supply suspension, registration cancelling, and revocation of concession or permission of use shall be applied by the administrative body through an administrative procedure, being ensured full defense.

Whenever the supplier falls back into the practice of the most serious infractions mentioned in this Code and in the consumer legislation, penalties of cancellation of

the license permit, closing down or temporary suspension of the activity, as well as administrative intervention shall be applied through an administrative procedure, being ensured full defense.

The penalty of cancellation of the concession shall be applied to the concessionaire of a public service when a legal or contractual obligation is violated.

The penalty of administrative intervention shall be applied should the factual circumstances do not recommend the cancellation of the license, closing down or suspension of the activity. Paragraph 3. - If pending any lawsuit in which is considered the administrative penalty to be applied, no event shall be treated as recurrent until the final ruling, without further appeal.

A counter-advertising shall be imposed whenever the supplier incurs in misleading or abusive advertising in the terms of the article 36 and its paragraphs, always being such amendment at the infractor's expense.

The counter-advertising shall be announced by the responsible party in the same way, frequency and size, and preferably using the same means, place, space and time, this way able to undo the harm caused by the misleading or abusive advertising message.