

DRAFT BILL
entitled

An ACT to amend the Consumer Affairs Act, Cap. 378.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and commencement.
Cap. 378.

1. (1) The short title of this Act is the Consumer Affairs (Amendment No. 2) Act, 2021 and this Act shall be read and construed as one with the Consumer Affairs Act, hereinafter referred to as the "principal Act".

(2) This Act shall come into force on the 28 May 2022:

Provided that any pending investigations commenced, or any judicial proceedings instituted according to the principal Act, prior to the entry into force of this Act, shall continue to be regulated by the principal Act as in force prior to entry into force of this Act.

Part I
Amendments to the Consumer Affairs Act

Amendment of article 12I of the principal Act.

2. Article 12I of the principal Act shall be amended as follows:

(a) the marginal note thereof shall be substituted by the following:

“Appeals to the Court of Appeal and publication of judgements.”;

(b) immediately after the proviso thereof the following new provisos should be added:

“Provided further that the Court of Appeal shall publish any judgement having regard to the legitimate interest of the person concerned in the protection of his business secrets or other confidential information. The Court of Appeal may give the parties concerned the opportunity to specify the confidential parts of the judgement which they want to be excluded from publication:

Provided further that the Court of Appeal shall ultimately decide about which version shall be published:

Provided further that the Director General shall also publish on the website of the Authority the judgement delivered by the Court of Appeal.”

Amendment of article 21 of the principal Act.

3. Immediately after the proviso to sub-article (1) of article 21 of the principal Act there shall be added the following new proviso:

“Provided further that when determining issues in disputes that concern harm suffered by consumers resulting from unfair commercial practices, the tribunal shall order proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract; taking also into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.”.

Amendment of article 51A of the principal Act.

4. Article 51A of the principal Act shall be amended as follows:

(a) immediately after the definition of ‘invitation to purchase’ the following new definition is to be added:

“ “online marketplace” means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers;”;

(b) the definition “product” shall be substituted by the following definition:

“ “product” means any good or service including immovable property, digital service and digital content, as well as rights and obligations;”;

(c) immediately after the definition “professional diligence”, there shall be added the following new definition:

“ “ranking” means the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication;”.

Amendment of article 51C of the principal Act.

5. In paragraph (c) of article 51C of the principal Act, immediately after sub-paragraph (ii) thereof there shall be added the following new sub-paragraph:

“(iii) any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors.”

Amendment of article 51D of the principal Act.

6. Article 51D of the principal Act shall be amended as follows:

(a) sub-paragraph (d) of sub-article (3) thereof shall be substituted by the following:

“(d) the arrangements for payment, delivery and performance, if they depart from the requirements of professional diligence;”;

(b) immediately after paragraph (e) of sub-article (3) thereof there shall be added the following new paragraph:

“(f) for products offered on online marketplaces, whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace.”;

(c) immediately after sub-article (3) thereof there shall be added the following new sub-article (3A):

“(3A) When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material:

Provided that this paragraph does not apply to providers of online search engines as defined in point (6) of Article 2 of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.”;

- (d) immediately after sub-article (4) thereof there shall be added the following new sub-article (5):

“(5) Where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material.”

Amendment of article 106A of the principal Act.

7. Article 106A of the principal Act shall be amended as follows:

- (a) in sub-article (3) thereof the full stop after the word “dissuasive” shall be replaced by a colon; and
- (b) immediately after sub-article (3) there shall be added the following three new provisos:

“S.L. 378.17.

Provided that the Civil Court shall when determining penalties with regard to infringements to Part VII and Part VIII of this Act, and the Consumer Rights Regulations, in addition take into account the following non-exhaustive and indicative criteria:

- (a) the nature, gravity, scale and duration of the infringement;
- (b) any action taken by the seller or supplier to mitigate or remedy the damage suffered by consumers;
- (c) any previous infringements by the seller or supplier;
- (d) the financial benefits gained or losses avoided by the seller or supplier due to the infringement, if the relevant data are available;
- (e) penalties imposed on the seller or supplier for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by the Consumer Protection Cooperation Regulation;

- (f) any other aggravating or mitigating factors applicable to the circumstances of the case:

Provided further that for infringements to Part VII and Part VIII of this Act, and the Consumer Rights Regulations, when penalties are to be imposed in accordance with Article 21 of the Consumer Protection Co-operation Regulation, the Civil Court shall impose a penalty up to a maximum of 4% of the seller's or supplier's annual turnover in the Member State or Member States concerned:

Provided further that where a penalty is imposed in accordance with the preceding proviso, but information on the seller's or supplier's annual turnover is not available, the Civil Court shall impose a penalty up to a maximum of €2 million."

"Amendment of article 114 of the principal Act.

8. Article 114 of the principal Act shall be substituted as follows:

"Prescription for judicial proceedings and for offences.

114. The institution of judicial proceedings and the prosecution of an offence under this Act or any regulations made thereunder, unless a different term is prescribed therefor, shall be prescribed by the lapse of five years from the date on which the infringement or the offence is alleged to have been committed."

Amendment of the First Schedule to the Principal Act.

9. The First Schedule to the Principal Act shall be amended as follows:

- (a) immediately after paragraph 11 thereof there shall be added the following new paragraph:

"11A. Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.";

- (b) immediately after paragraph 23 thereof there shall be added the following three new paragraphs:

"23A. Reselling events tickets to consumers if the trader acquired them by using automated means to circumvent any limit imposed on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets.

23B. Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers.

23C. Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.”.

Part II

Consequential Amendments

Consequential amendment to S.L. 378.09.

10. The Consumer Affairs Act (Price Indication) Regulations shall be amended as follows:

(a) in sub-regulation (2) of regulation 2 thereof:

(i) the definition “annual percentage rate” shall be deleted;

(ii) the definition “consumer” shall be substituted as follows:

“ “consumer” means any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity;”;

(iii) immediately after the definition “consumer” there shall be added the following new definition:

“S.L. 378.17.

“place of business” means any place from where any trade or business is carried out including any stall, or online marketplace as defined in the Consumer Rights Regulations;”;

(iv) immediately after the definition “products sold in bulk” there shall be added the following new definition:

“ “stall” means any vehicle, compartment, bench, board, trolley, table or receptacle or a combination thereof placed in any marketplace for the sale of goods.”;

(b) immediately after regulation 5 thereof, there shall be added the following new regulation 5A:

“Price Reductions.

5A. (1) Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.

(2) The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction:

Provided that for goods which are liable to deteriorate or expire rapidly, the prior price is the one applied immediately before the price reduction:

Provided further that if the goods have been on the market for less than 30 days, the prior price means the lowest price applied by the trader during this period:

Provided further that when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction.”;

(c) regulation 9 thereof shall be amended as follows:

(i) sub-regulation 2 thereof shall be substituted by the following:

“(2) Proceedings in respect of an offence against these regulations shall be commenced within one year from the commission of the offence.”

(ii) paragraphs (a) and (b) of sub-regulation 3 thereof shall be substituted by the following:

“(a) in the case of a first conviction, to a fine of not less than one hundred and fifty euro (€150) and not exceeding one thousand and five hundred euro (€1500);

(b) in the case of a second or subsequent conviction, to a fine of not less than two hundred euro (€200) and not exceeding two thousand euro (€2000):

Provided that the Court, when imposing a fine, shall take into account the following non-exhaustive and indicative criteria:

- (i) the nature, gravity, scale and duration of the infringement;
- (ii) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (iii) any previous infringements by the trader;
- (iv) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- (v) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by the Consumer Protection Cooperation Regulation as defined in article 2 of the Act;
- (vi) any other aggravating or mitigating factors applicable to the circumstances of the case:

Provided further that with regard to any convictions, the Court shall order the publication in one or more daily newspapers of the judgement, or a statement or summary thereof, passed on the offender:

Provided further that with regard to any convictions, the Director General shall publish the judgement delivered by the Court, or a statement or summary thereof, passed on the offender.”.

Consequential amendments to S.L. 378.17.

10. The Consumer Rights Regulations shall be amended as follows:

(a) in sub-regulation (2) of regulation 2 thereof:

- (i) immediately after the definition “commercial guarantee” the following new definition shall be added:

“S.L.378.20.

“compatibility” means compatibility as defined in sub-regulation (2) of regulation 2 of the Digital Content and Digital Services Contracts Regulations;”;

- (ii) the definition “digital content” shall be substituted as follows:

“S.L.378.20.

“digital content” means digital content as defined in sub-regulation (2) of regulation 2 of the Digital Content and Digital Services Contracts Regulations;”;

- (iii) immediately after the definition “digital content” there shall be added the following new definition:

“S.L. 378.20.

“digital service” means digital service as defined in sub-regulation (2) of regulation 2 of the Digital Content and Digital Services Contracts Regulations;”;

- (iv) immediately after the definition “financial service” there shall be added the following new definition:

“S.L. 378.20.

“functionality” means functionality as defined in sub-regulation (2) of regulation 2 of the Digital Content and Digital Services Contracts Regulations;”;

- (v) the definition “goods” shall be substituted by the following:

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“goods” means goods as defined in sub-article (1) of article 72 of the principal Act;”

- (vi) immediately after the definition “goods made to the specifications of the consumer” there shall be added the following new definition:

“S.L. 378.20.

“interoperability” means interoperability as defined in sub-regulation (2) of regulation 2 of the Digital Content and Digital Services Contracts Regulations;”;

- (vii) immediately after the definition of “off-premises contract” there shall be added the following three new definitions:

“ “online marketplace” means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers;

“personal data” means personal data as defined in point (1) of Article 4 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);”;

“provider of an online marketplace” means any trader which provides an online marketplace to consumers;”;

(viii) the definition “sales contract” shall be substituted by the following:

“ “sales contract” means any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services;”;

(ix) the definition “service contract” shall be substituted by the following:

“ “service contract” means any contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service, to the consumer;”;

(b) in regulation 3 thereof:

(i) sub-regulation (1) shall be substituted by the following:

“(1) These regulations shall apply, under the conditions and to the extent set out in their provisions, to any contract concluded between a trader and a consumer where the consumer pays or undertakes to pay the price. These regulations shall also apply to contracts for the supply of water, gas or electricity, including by public providers, to the extent that these commodities are provided on a contractual basis.”;

(ii) immediately after sub-regulation (1) there shall be added the following new sub-regulation (1A):

“(1A) These regulations shall also apply where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by

the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital service in accordance with these Regulations or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.”;

(iii) point (k) of sub-regulation (3) shall be substituted by the following:

“(k) for passenger transport services, with the exception of regulations 9(2), 21, 23 and 24;”;

(iv) point (m) of sub-regulation (3) shall be substituted by the following:

“(m) concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, Internet or fax established by a consumer;”;

(v) immediately after point (m) of sub-regulation (3) there shall be added the following new point (n):

“(n) for any goods sold by way of execution or otherwise by authority of law.”;

(c) in regulation 4 thereof:

(i) point (e) of sub-regulation (1) shall be substituted by the following:

“(e) in addition to a reminder of the existence of the legal guarantee of conformity for goods, digital content and digital services, the existence and the conditions of after-sales services and commercial guarantees, where applicable;”;

(ii) points (g) and (h) of sub-regulation (1) shall be substituted by the following:

“(g) where applicable, the functionality, including applicable technical protection measures, of goods with digital elements, digital content and digital services;

(h) where applicable, any relevant compatibility and interoperability of goods with digital elements, digital content and digital services that the trader is aware of or can reasonably be expected to have been aware of.”;

(d) in regulation 5 thereof:

(i) point (c) of sub-regulation (1) shall be substituted by the following:

“(c) the geographical address at which the trader is established as well as the trader’s telephone number and email address; in addition, where the trader provides other means of online communication which guarantee that the consumer can keep any written correspondence, including the date and time of such correspondence, with the trader on a durable medium, the information shall also include details of those other means; all those means of communication provided by the trader shall enable the consumer to contact the trader quickly and communicate with him efficiently; where applicable, the trader shall also provide the geographical address and identity of the trader on whose behalf he is acting.”;

(ii) immediately after point (e) of sub-regulation (1) there shall be added the following new point (ea):

“(ea) where applicable, that the price was personalised on the basis of automated decision-making.”;

(iii) point (l) of sub-regulation (1) shall be substituted by the following:

“(l) a reminder of the existence of a legal guarantee of conformity for goods, digital content and digital services.”;

(iv) points (r) and (s) of sub-regulation (1) shall be substituted by the following:

“(r) where applicable, the functionality, including applicable technical protection measures, of goods with digital elements, digital content and digital services;

(s) where applicable, any relevant compatibility and interoperability of goods with digital elements, digital content and digital services that the trader is aware of or can reasonably be expected to have been aware of.”;

- (e) immediately after regulation 5 thereof, there shall be added the following new regulation 5A:

“Additional specific information requirements for contracts concluded on online marketplaces.

5A. (1) Before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall, without prejudice to the provisions in Part VIII of the Act, provide the consumer with the following information in a clear and comprehensible manner and in a way appropriate to the means of distance communication:

- (a) general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, on the main parameters determining ranking, as defined in Article 51A of the Act, of offers presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters;
 - (b) whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace;
 - (c) where the third party offering the goods, services or digital content is not a trader, that the consumer rights stemming from European Union consumer protection law do not apply to the contract;
 - (d) where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace, such information being without prejudice to any responsibility that the provider of the online marketplace or the third-party trader has in relation to the contract under other European Union or national law.”;
- (f) in regulation 8 thereof, sub-regulation (3) shall be substituted by the following:

“(3) Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, to begin during the withdrawal period provided for in regulation 10(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make such an express request on a durable medium and request the consumer to acknowledge that, once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.”;

(g) in regulation 9 thereof:

(i) sub-regulation (4) shall be substituted by the following:

“(4) If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on or through that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract, as referred to, respectively, in regulation 5(1)(a), (b), (e), (h) and (o) except the model withdrawal form set out in Part B of the Schedule referred to in point (h). The other information referred to in regulation 5(1), including the model withdrawal form, shall be provided by the trader to the consumer in an appropriate way in accordance with sub-regulation (1).”;

(ii) sub-regulation (8) shall be substituted by the following:

“(8) Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, to begin during the withdrawal period provided for in regulation 10(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make an express request and request the consumer to acknowledge that, once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.”;

(h) in regulation 10 thereof:

(i) the following proviso shall be added to sub-regulation (1):

“ Provided that for contracts concluded in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the withdrawal period of fourteen (14) days is extended to thirty (30) days.”;

(ii) sub-regulation (2) shall be substituted by the following:

“(2) Without prejudice to regulation 12, the withdrawal period referred to in sub-regulation (1) shall expire after fourteen (14) days or, in cases under the proviso of sub-regulation (1) after thirty (30) days from:”;

(i) in regulation 12 thereof, sub-regulation (2) shall be substituted by the following:

“(2) If the trader has provided the consumer with the information provided for in sub-regulation (1) within twelve (12) months from the day referred to in regulation 10(2), the withdrawal period shall expire fourteen (14) days, or in cases under the proviso of sub-regulation (1) after thirty (30) days, after the day upon which the consumer receives that information.”;

(j) in regulation 15 thereof, immediately after sub-regulation (3) the following sub-regulations shall be added:

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(4) In respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) and the Data Protection Act.

(5) The trader shall refrain from using any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:

- (a) has no utility outside the context of the digital content or digital service supplied by the trader;
- (b) only relates to the consumer’s activity when using the digital content or digital service supplied by the trader;
- (c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or
- (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.

(6) Except in the situations referred to in sub-regulation (5)(a), (b) or (c), the trader shall, at the request of the consumer, make available to the consumer any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader.

(7) The consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.

(8) In the event of withdrawal from the contract, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer, without prejudice to sub-regulation (6).”;

(k) in regulation 16 thereof,

(i) immediately after sub-regulation (2) the following sub-regulation shall be added:

“(2A) In the event of withdrawal from the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties.”;

(ii) sub-regulation (4)(b)(i) shall be substituted by the following:

“(i) the consumer has not given prior express consent to the beginning of the performance before the end of the fourteen (14) day or thirty (30) day period referred to in regulation 10;”;

(l) in regulation 18 thereof:

(i) paragraph (a) shall be substituted by the following:

“(a) service contracts after the service has been fully performed but, if the contract places the consumer under an obligation to pay, only if the performance has begun with the consumer’s prior express consent and acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader;”;

(ii) paragraph (m) shall be substituted by the following:

“(m) contracts for the supply of digital content which is not supplied on a tangible medium if the performance has begun and, if the contract places the consumer under an obligation to pay, where:

- (i) the consumer has provided prior express consent to begin the performance during the right of withdrawal period;
- (ii) the consumer has provided acknowledgement that he thereby loses his right of withdrawal; and
- (iii) the trader has provided confirmation in accordance with regulation 8(2) or regulation 9(7);”;

(iii) immediately after paragraph (m) there shall be added the following proviso:

“Provided that for contracts concluded in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the exceptions from the right of withdrawal set out in points (a), (b), (c) and (e) shall not apply.”;

(m) in the Schedule thereof:

(i) the second paragraph under ‘Right of withdrawal’ in Part A shall be substituted as follows:

“The withdrawal period shall expire after 14 days from the day [1]. (For contracts concluded in the context of unsolicited visits by the trader to a consumer’s home or excursions organised by the trader with the aim or effect of promoting or selling products to consumers, the withdrawal period will expire after 30 days.)

(ii) the third paragraph under ‘Right of withdrawal’ in Part A shall be substituted as follows:

“To exercise the right of withdrawal, you must inform us [2] of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post or email). You may use the attached model withdrawal form but it is not obligatory. [3]”.

(iii) point [2] under “Instructions for completion” in Part A shall be substituted as follows:

“[2.] Insert your name, geographical address, telephone number and email address.”

(iv) The first indent in Part B of the Schedule shall be substituted as follows:

“To [here the trader’s name, geographical address and email address are to be inserted by the trader]:”.

Objects and Reasons

The Objects and Reasons of this Bill are to transpose and implement Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, and to introduce necessary and consequential amendments with regard to subsidiary legislation made under the Consumer Affairs Act.

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