



GOVERNMENT OF MALTA

Government response to the Consultation on the proposed Bill entitled “An Act to provide for representative actions for the protection of the collective interests of consumers, and to carry out other consequential amendments” to transpose and to implement Directive (EU) 2020/1828 (hereinafter referred to as the Directive) of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

28 December, 2022

*Ministry for Inclusion, Voluntary Organisations and Consumer Rights
Palazzo Francesco, 89, Sir Ugo Mifsud Street, Lija LJA 1056.*

This publication (excluding Logos) may be re-used free of charge in any format or medium provided that it is re-used accurately and not used in a misleading context. This material must be acknowledged as Government of Malta and the title of the publication specified.

Any queries regarding this publication should be sent at: onlineconsultations@gov.mt.

Published by the Ministry for Inclusion, Voluntary Organisations and Consumer Rights

Contents

Contents	3
Executive Summary	4
Introduction and overview	4
Responses to the consultation and process used to seek stakeholder views	5
Summary of responses and decisions	5
Implementation	9
Contact Details.....	10
Annex A: List of respondents	10

Executive Summary

Introduction and overview

1. A brief introduction about the subject.

The proposed Bill entitled “An Act to provide for representative actions for the protection of the collective interests of consumers, and to carry out other consequential amendments” (hereinafter referred to as the proposed Bill) is to transpose and to implement Directive (EU) 2020/1828 (hereinafter referred to as the Directive), and to introduce the necessary and consequential amendments with regard to various laws. The entry into force of the proposed Bill is on the 25 June 2023.

The aims of the Directive are “to ensure that at Union and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers in all Member States.” (Recital 7 of the Directive).

The Directive is intended to enable “qualified entities that represent the collective interests of consumers to bring representative actions for both injunctive measures and redress measures against traders that infringe provisions of Union law. Those qualified entities should be able to request that such infringing conduct be ceased or prohibited and to seek redress, as appropriate and available under Union or national law, such as compensation, repair or price reduction.” (Recital 8 of the Directive).

The Directive repeals Directive 2009/22/EC with effect from 25 June 2023 without prejudice to Article 22(2) of this Directive (namely Directive EU 2020/1828), that states in the said Article 22(2): “Member States shall apply the laws, regulations and administrative provisions transposing Directive 2009/22/EC to representative actions that are brought before 25 June 2023.”

Malta already has the Collective Proceedings Act (Chapter 520), that applies to infringements to the Competition Act, the Consumer Affairs Act and the Product Safety Act. By means of the proposed Bill, the Collective Proceedings Act will now apply only to the competition field since the Directive does not include EU Competition law within its scope.

Part I of the proposed Bill transposes the Directive. Parts II to VIII respectively introduce consequential amendments with regard to the Consumer Affairs Act (Chapter 378), the Collective Proceedings Act (Chapter 520), the Malta Competition and Consumer Affairs Authority Act (Chapter 510), the Civil Courts (Establishment of Sections) Order (Subsidiary Legislation 12.19), the Civil Code (Chapter 16), the Malta Communications Authority Act (Chapter 418), and the Electronic Commerce Act (Chapter 426).

2. The public consultation date.

Include the objective and purpose of the public consultation.

On the 11th November 2022 the Government published a consultation with regard to the proposed Bill entitled “An Act to provide for representative actions for the protection of the collective interests of consumers, and to carry out other consequential amendments”:

- to transpose and implement the Directive; and
- to introduce the necessary and consequential amendments with regard to various laws.

3. This consultation sought views on:

- the transposition and the implementation of the Directive; and
- the amendments with regard to the necessary and consequential amendments of various laws.

Responses to the consultation and process used to seek stakeholder views

This document is the Government Response to this consultation and sets out the Government's decisions on these matters.

4. The closing date of the public consultation. Which methods were used to receive the feedback. The total amount of responses. From whom you received the feedback.

The consultation process closed on the 25th November, 2022. The consultation document and the reply form were available online and responses were accepted electronically and on paper. In total, there were eight responses. The responses were from a national administrative authority, a consumers' association, three telecommunications service providers, a government directorate, the US Chamber of Commerce and the European Justice Forum.

The respondents are indicated in Annex A.

5. Include (if any) meetings with stakeholders and list who the stakeholders were.

No meetings were held during the consultation period.

Summary of responses and decisions

The following is a summary of the consultation responses received. We would like to thank all those who took the time to respond to the consultation and participate in stakeholder meetings around the consultation exercise.

6. Statistics.

- Total feedback received: 8
- Total feedback received by individuals: 0
- Total feedback received by organisations: 3
- Total feedback received through email: 8
- Total feedback received through online form: 0
- Total feedback received by post: 1 (already received by email)

7. Summary of feedback received.

The respondents provided a 65% favourable response.

8. Your assessment and the Government's decision (list the Government's decisions).

Submission 1

Following this submission from the Malta Communications Authority, it has been considered that Articles 8 (1) (a) and 9 (7) of the proposed Bill are to be updated to respectively clarify better:

- a. the procedure to be adopted for representative actions for redress and injunctive measures;
- b. the provisions where national administrative authorities are empowered by regulations under the Act or by or under any other law that regulates the procedure concerning such requests to have injunctive measures brought before them instead of being brought before the Civil Court; and
- c. that manifestly unfounded applications before the Malta Communications Authority are to be dismissed.

Submission 2

The U.S. Chamber of Commerce – Institute of Legal Reform presented a report highlighting the following 12 recommendations for the implementation of the EU Directive on Representative Actions:

1. 'Domestic' qualified entities should be subject to the same criteria as 'cross-border' qualified entities
2. 'Grandfathered' qualified entities should also comply with the Directive's criteria
3. Member States should insist on opt-in mechanisms
4. A certification procedure should be put in place
5. Public information systems about representative actions should be closely supervised to ensure that are not used to force settlements from defendants
6. Contingency fees should be prohibited
7. Additional safeguards for third party litigation funding should be considered
8. Parties to a collective action should be incentivised to settle
9. Punitive damages should be prohibited
10. Payment of 'undistributed damages' should be prohibited
11. Disclosure obligations should be proportionate to the needs of the case
12. Alternative Dispute Resolution (ADR) mechanisms should be at the heart of any domestic regime to provide consumers with redress

These recommendations have been noted and it has been considered that a number of them are already included in current legislation or the draft Bill. In particular, the proposed Bill:

- applies the same criteria to domestic and cross-border qualified entities - other than national registered consumer associations that still have to abide to the criteria in Part IV of the Consumer Affairs Act (Chapter 378); and
- adopts the opt-in mechanism.

Submission 3

The Consumers' Association (CA) provided an overview on the advantages and disadvantages of both the opt-in and opt-out procedures and suggested that both procedures should be catered for in the proposed Bill.

It has been considered that:

- the opt-in mechanism is already adopted in the Collective Proceedings Act;
- national legal tradition does not cater for opt-out mechanism;
- opt-in mechanism as provided for in the draft Bill provides different stages when affected consumers can join a representative action; and
- it is not excluded that in future the opt-out mechanism may be considered.

Submissions 4, 6 and 8

With regard to Part I of the proposed Bill

The three telecommunications service providers have separately highlighted a number of concerns for which amendments to Part I of the proposed Bill are being considered as follows:

- the wording "manifestly unfounded cases" that are not included in the proposed Bill are being considered to be included in article 8(6) relative to 'Admissibility' by the Civil Court;
- the defendant's right to raise justified concerns regarding the qualified entity is being considered to be included in article 8(9) of the proposed Bill to allow the defendant to file an application to the Civil Court on these grounds;
- an amendment to article 9(2) of the proposed Bill is being considered to allow an aggrieved party to file an appeal from a provisional measure.

The telecommunications service providers also separately presented a number of other concerns for which clarifications are provided as follows:

- the prohibition of double compensation is already addressed in sub-article 8(13) of the proposed Bill;
- Article 11(4) of the Directive with regard to redress settlements is being fully transposed by means of articles 8(1)(b) and (c); (2)(ii), (5)(b) and (10) and 12 of the proposed Bill;
- the automatic designation of national consumer organisations (upon their request), as qualified entities, is within the spirit of the Directive;
- the criteria for the registration of consumer associations is relatively similar to the criteria for qualified entities in the proposed Bill and these consumer associations were already designated as qualified entities under the Injunctions Directive;
- ad-hoc qualified entities need to satisfy the criteria within the proposed Bill;

- the five months established in the proviso to article 8(8) on ‘Decree ordering the continuation of proceedings’ of the proposed Bill that allows consumers to join a representative action within five months following the Civil Court’s decree, and the publication of such decree on different media are reasonable given the issue of court procedures and this already exists within the Collective Proceedings Act. In addition, the timeframe is of a maximum of five months and thus sufficient leeway is given to the Court;
- the eight days established to contest the request for provisional measures in article 9(2) relative to injunctive measures reflect the requirement that injunctive measures are to be dealt with due expediency;
- the definition of “national administrative authority” has to be wide in order to encompass any authority having the powers established in their respective legislations (as to injunctive measures), in the light of the extensive list of EU Directives and Regulations in the Schedule to the proposed Bill;
- clarifies that the only entity that assists and regulates consumer associations according to Cap. 378 is the Consumer Affairs Council.

With regard to Part II of the proposed Bill

The interruption of prescription introduced in the Consumer Affairs Act (in Part II of the proposed Bill [Article 31]) reflects a principle that is already established in the Maltese legal system and thus is being applied in this field as well.

With regard to Part VII and VIII of the proposed Bill

With regard to submissions relative to Parts VII and VIII respectively relative to the amendments to the Malta Communications Authority Act and the Electronic Commerce Act, the Malta Communications Authority (MCA) notes that:

- the submission of one telecommunications service provider that the provision referring to the faculty of the competent courts/authorities to dismiss ‘manifestly unfounded cases’ appears to be valid and a new sub-article (7) to article 31A (reflected in clause 50 of the proposed Bill) will be accordingly added to address this requirement;
- the question by one telecommunications service provider on the proposed amendments to Part VIII, namely that the reference to ‘qualified entities’ are being deleted, is to eliminate completely the current provisions under Cap. 426 in so far as these relate to the transposition of Directive 2009/22/EC (the Injunctions Directive). MCA notes that the approach taken is that the effective transposition of the relevant parts of the Directive, in so far as these relate to injunctive measures, are now being reflected as per the proposed amendments in Part VII of the proposed Bill;
- the role of national administrative authorities is in line with the Directive, namely as expressly stated in recitals 11 and 19;

- as provided in the Directive, the purpose of enabling qualified entities to apply for injunctive measures is to request the competent court or national authority to issue an order to stop or prohibit infringements of one or more of the EU laws listed in the Annex to the Directive, and it is up to Member States to determine whether such orders are to be issued by a Court or an administrative authority; and
- the legislative measures proposed in Parts VII and VIII of the proposed Bill are to implement measures to reflect the effective enforcement tools and redress remedies in relation to the diverse EU laws in Annex I of the Directive within the responsibility of MCA.

Submission 5

The Office of the Director – Environmental Health questioned the role of the Consumer Affairs Council as competent authority and how the Council can designate a qualified entity for a representative action in the food sector. It is being clarified that qualified entities, for the purposes of bringing representative actions, have to comply with the criteria established by the Directive, and as adopted in the draft Bill, that mainly concern the structure, activities, independence and transparency of the entity.

Moreover it was underlined that the proposed Bill is intended to enable qualified entities that represent the collective interests of consumers to bring representative actions for both injunctive measures and redress measures against traders that infringe provisions of Union law. Redress measures will entail judicial proceedings, whilst injunctive measures can either be filed before the Civil Court (Commercial Section) or, in line with sub-article 9(7) of the proposed Bill, before a national administrative authority.

Submission 7

The European Justice Forum (EJF) welcomed the provisions in article 8(6) of the proposed Bill relative to admissibility of representative actions by the Civil Court indicating this provision as an important path in the right direction when referring to the “Ontario Formula” which only allows the “state’s expensive judicial resources to be used in collective actions only if the use of such action is judged by the court in charge to be superior to all other reasonable available options that can award relief”.

EJF suggested that further safeguards for third party litigation funding should be considered, in particular referring to publicly organised special funds for this purpose.

Implementation

9. When you intend to implement the decisions

The Bill will be reviewed as soon as possible prior to the Parliamentary process.

Contact Details

If you have any questions regarding this response, please contact:
publicconsultation.mcaa@mcaa.org.mt

Annex A: List of respondents

Organisation
1. Malta Communications Authority
2. U.S. Chamber of Commerce, Institute for Legal Reform, Washington D.C.
3. Consumers' Association - Malta
4. GO plc
5. Office of the Director Environmental Health, Ministry for Health
6. Melita Limited
7. European Justice Forum
8. Epic Malta Communications Limited