

CONSUMER LAW

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Session 9

OVERVIEW

- Consumer policy in the EU and Malta
- Legal sources of consumer law in EU and Malta
- Focus on specific aspects of consumer protection such as: Unfair Contract Terms, Unfair Commercial Practices (Advertising), Product Safety, Product Liability; Sale of Goods and Guarantees, the New Deal for Consumers
- Understanding the impact of consumer policy on business
- Enforcement and dispute resolution, private claims and collective action
- The MCCA, Consumer Claims Tribunal

INTRODUCTION



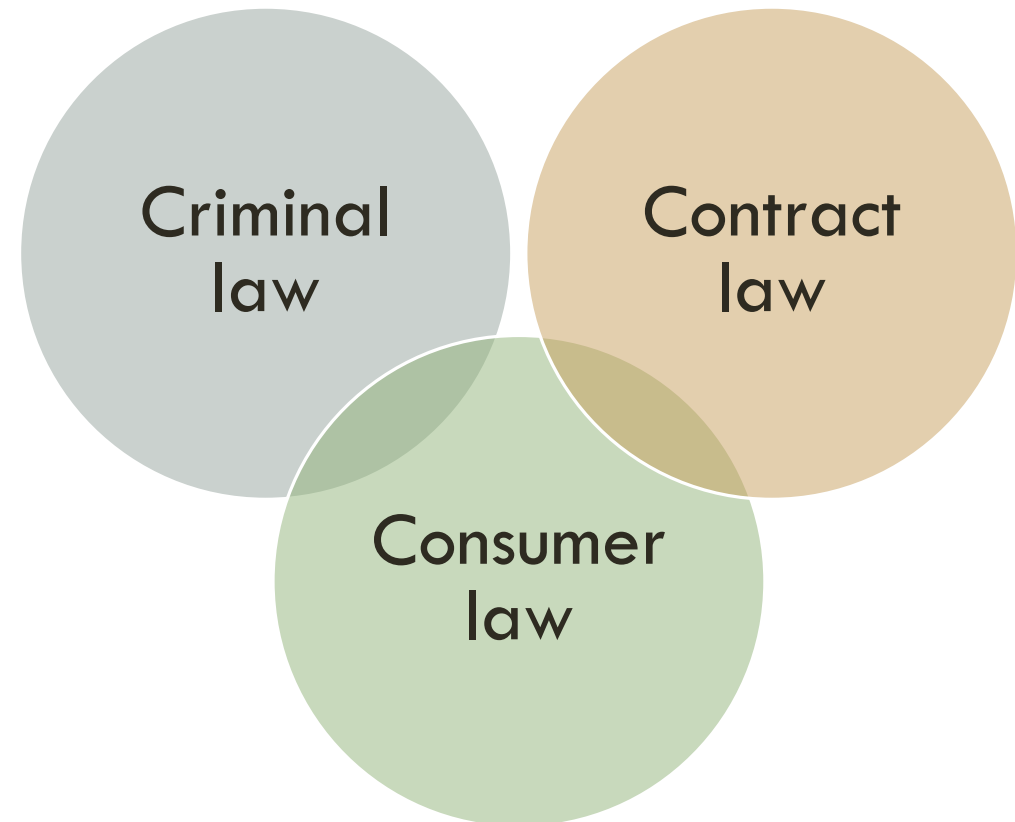
INTRODUCTION

- Contracts are an expression of the will of the parties
- There is therefore a presumption that the parties are on a **level playing field**, and are negotiating freely.
- This presumption is not always present in consumer transactions, resulting in an **imbalance** between the consumer and trader



INTRODUCTION

- Isn't that what contract law is meant to achieve?
- Cannot we use criminal law to punish fraudsters?
- How efficient are the remedies available?



CONSUMER POLICY



CONSUMER POLICY

On March 15, 1962, President John F. Kennedy presented a speech to the United States Congress in which he listed four basic consumer rights, later called the Consumer Bill of Rights.

- the right to safety,
- the right to be informed,
- the right to choose,
- the right to be heard.

In 1985, the United Nations through the United Nations Guidelines for Consumer Protection expanded these into eight rights:

- the right to satisfaction of basic needs,
- the right to redress,
- the right to consumer education,
- the right to a healthy environment.

CONSUMER POLICY

- In the Treaty of Rome (1957) there was no reference to the notion of “consumer” as we know it today. the only clauses which made reference to it were: Articles 39,40, 85(3), 86, 93 (2) (a).
- EU Consumer Policy started off as soft-law in the 1970s by means of Council Resolutions
- The first consumer laws were adopted under Article 100 EEC:
 - **The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market.**

CONSUMER POLICY

- The Single European Act (1987) introduced Article 100A and for the first time we have an explicit reference to the “**consumer**” as we know it today:
 - **The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.**
- This Article was based on Qualified Majority Voting rather than unanimity, thus accelerating Community legislative action.
- The European Community self-imposed the deadline of 1992 as the establishment for the ‘internal market’; created a driver for the enactment of a number of Consumer Directives.
- The Treaty of Maastricht (1992) introduced a new Article 129A specially on consumer matters

CONSUMER POLICY

- Minimum harmonisation rules allowed flexibility where compromise was difficult to achieve
- Allows a multi-faceted Union, based on different cultural traditions and consumer expectations.
- Promoted consumer protection - Malta
- Downside: Created distortion within the Internal Market
- Recent trend – shift for maximum measures



CONSUMER POLICY



Latin for "buyer beware" meaning that the buyer could not recover damages from the seller for defects in the goods that were sold.

Let the buyer beware!

Maxim of early common law, which is why consumer law is a relatively young area of law

Today's complex transactions require a shift in approach

The Weights and Measures Ordinance, Door-to-door Salesman Act and Trade Descriptions Act were the first consumer laws in Malta

CONSUMER LAW



CONSUMER LAW

The idea behind consumer policy, is that through legislative intervention, the consumer is empowered and balance is restored.

How?

- Restoring the Information “gap”
- Right of Withdrawal
- Simplified procedures for private claims
- Public enforcement



CONSUMER LAW

Consumer Protection Act, 1981 (very limited)

Consumer Affairs Act, 1994 (introduced the office of the Director of Consumer Affairs, the Consumer Claims Tribunal and the Consumer Affairs Council)

Substantial amendments in 2000 to introduce a number of EU Directives

Post EU accession, we are still seeing an influx of changes from the EU (now as a Member State participating in all Council meetings)



CONSUMER AFFAIRS ACT (CAP. 378)

Who is a “consumer”?

(i) any **individual** who is acting for purposes which are not related to his trade, business, craft or profession; and

(ii) any other **individual** not being the immediate purchaser or beneficiary, and whether or not a member of the consumer’s household, who having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by a trader acting in the course of a trade, business, craft or profession, including goods or services provided as part of gift schemes and similar or analogous inducements; and

(iii) any **other class or category of persons whether natural or legal** as may, from time to time, be designated as "consumers"

N.B: - for the purposes of Unfair Commercial Practices the definition of "consumer" shall only consist of paragraph (i) above

CONSUMER AFFAIRS ACT (CAP. 378)

What are my rights?



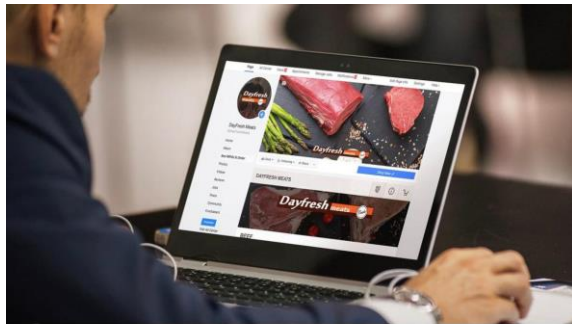
What if I buy a mobile for business use?


CONSUMER AFFAIRS ACT (CAP. 378)

Who is the trader?

- (i) any **person**, including **any body corporate or incorporate** who in relation to any transactions or other matters covered by this Act or regulations made thereunder is acting for purposes relating to his **trade, business, craft or profession**;
- (ii) any **public body**, whether corporate or un-incorporate, which provides goods or services to consumers for a fee;
- (iii) any person to whom article 4 of the **Commercial Code** applies:

CONSUMER AFFAIRS ACT (CAP. 378)



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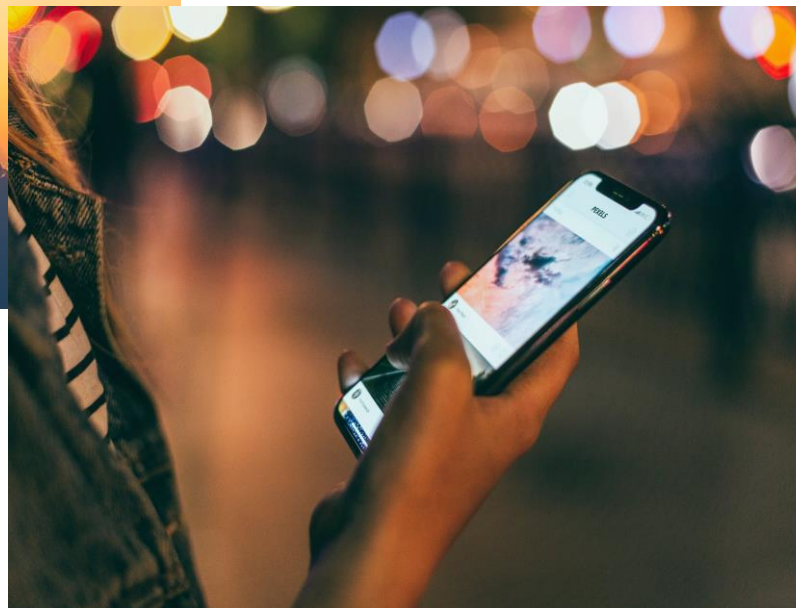
CONSUMER AFFAIRS ACT (CAP. 378)

DECLARATION OF PRINCIPLES

Consumers shall be entitled:

- (a) to have adequate access to basic essential goods and services at reasonable prices and to be able to choose from a diverse range of goods and services;
- (b) to be protected against goods, production processes and services which are harmful to health;
- (c) to have adequate access to information about goods or services which is clear, correct and does not mislead;
- (d) to form and join consumer associations and to have consumer interests represented in the making and execution of government policy, and in the development of goods and services;
- (e) to protection from unlawful or unfair trading practices;
- (f) to receive a fair settlement of just claims including adequate compensation for misrepresentation, shoddy goods or unsatisfactory services; and
- (g) to effective, quick and inexpensive means of redress in disputes they may have with traders

WHAT IS COMMON BETWEEN THEM?



CONSUMER AFFAIRS ACT (CAP. 378)

UNFAIR CONTRACT TERMS

- An unfair term means any term in a consumer contract, which on its own or in conjunction with one or more other terms –
 - (a) creates a **significant imbalance** between the rights and obligations of the contracting parties to the detriment of the consumer; or
 - (b) causes the performance of the contract to be **unduly detrimental** to the consumer; or
 - (c) causes the performance of the contract to be **significantly different** from what the consumer could **reasonably expect**; or
 - (d) is **incompatible** with the requirements of **good faith**.
- Take into account: nature of goods/time of conclusion of contract/other circumstances (bargaining power, undue pressure, advantage on a consumer)
- If a clause is written in clear language, the law will not get into fairness of a term on the main subject matter/price

CONSUMER AFFAIRS ACT (CAP. 378)

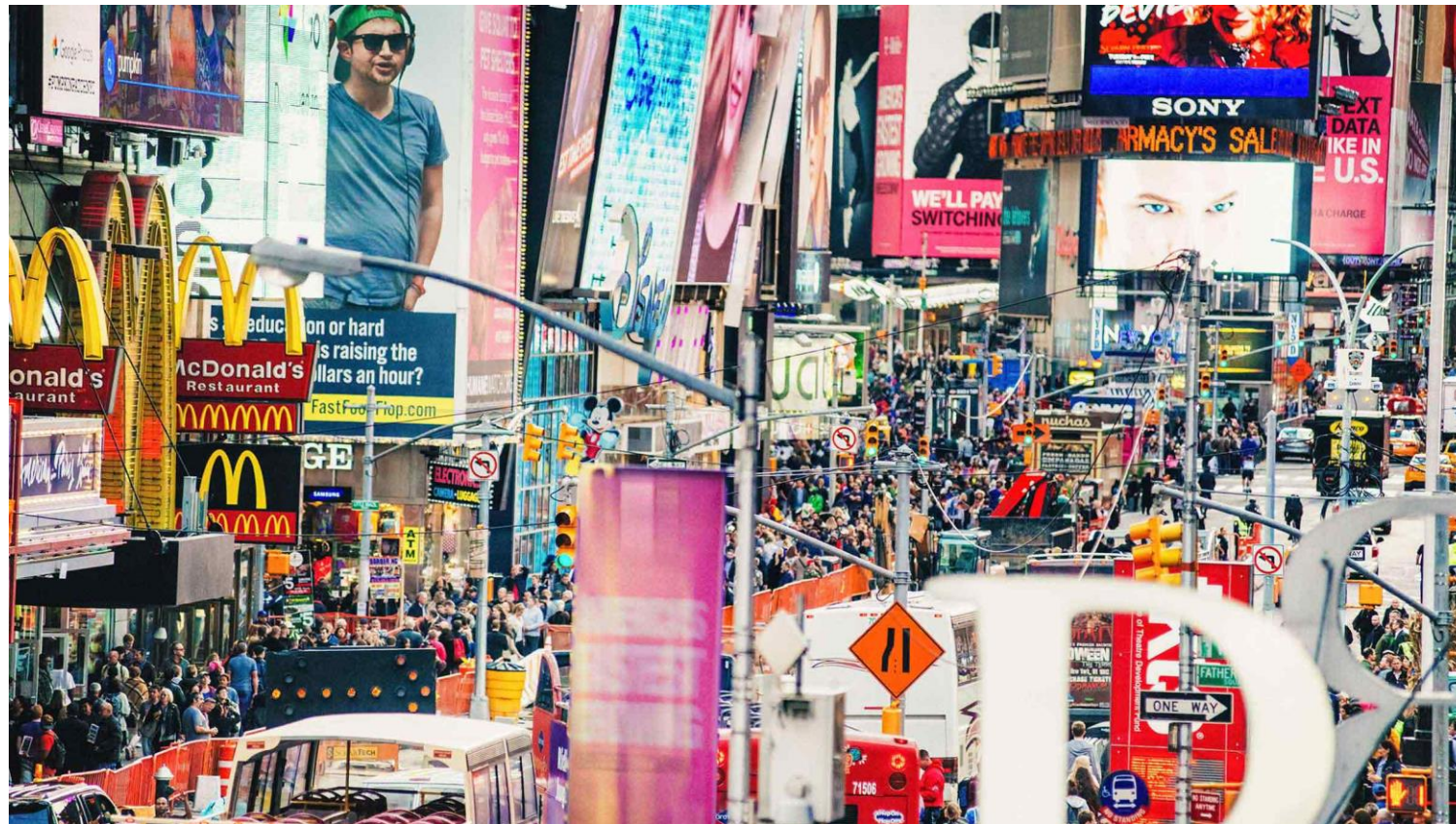
UNFAIR CONTRACT TERMS

It is unlawful in consumer contracts to use **unfair terms**, in that they have as an **object or effect** any of the objects and effects referred to in sub-article (2) – **non exhaustive list**

- excluding or limiting the liability of a trader by reason of his own fraud or gross negligence or that of his employees or agents, or by reason of any failure to fulfil an obligation constituting one of the fundamental elements of the contract;
- establishing an unreasonably short period for notifying the trader of any defects;
- excluding or limiting the legal rights of a consumer against the trader in the event of total or partial non-performance
- binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- enabling the trader to alter the terms of a contract unilaterally, without a valid reason which is specified in the contract;
- enabling the trader to alter unilaterally, without a valid reason, any characteristics of the product or service
- using the price to vary by reference to factors depending only on the will of the trader

Some
examples

ADVERTISING IS EVERYWHERE



CONSUMER AFFAIRS ACT (CAP. 378)

UNFAIR COMMERCIAL PRACTICES

- Unfair commercial practices shall be *prohibited*.

"commercial practice" means any **act, omission, course of conduct or representation, commercial communication** including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers; whether it takes place **before, during or after** a commercial transaction in relation to the product.



CONSUMER AFFAIRS ACT (CAP. 378)

UNFAIR COMMERCIAL PRACTICES

A commercial practice shall be **unfair** if:

(a) it is contrary to the requirements of **professional diligence**, and

(b) it **materially distorts** or is likely to materially distort the **economic behaviour** with regard to the product, of the **average consumer** whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers:

- Provided that, other than the advertising practice of making exaggerated statements or statements which are not meant to be taken literally, commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.

CONSUMER AFFAIRS ACT (CAP. 378)

UNFAIR COMMERCIAL PRACTICES

Misleading actions:

A commercial practice is misleading if it either:

- Contains false information and is therefore untruthful, or
- in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is correct **and**
- causes or is likely to cause him to take a transactional decision that he would have otherwise not taken.

Misleading Omissions:

It is misleading to:

- omit material information that the average consumer needs, according to the context, to take an informed transactional decision;
- hide or provide material information in an unclear, unintelligible, ambiguous or untimely manner;
- fail to identify the commercial intent of the commercial practice if not already apparent from the context.

CONSUMER AFFAIRS ACT (CAP. 378)

UNFAIR COMMERCIAL PRACTICES

Aggressive Commercial Practices:

- A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.



CONSUMER AFFAIRS ACT (CAP. 378)

UNFAIR COMMERCIAL PRACTICES

Misleading

displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.



Aggressive

creating the impression that the consumer cannot leave the premises until a contract is formed.

including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them

explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

CONSUMER AFFAIRS ACT (CAP. 378)

SALE OF GOODS



CONSUMER AFFAIRS ACT (CAP. 378)

SALE OF GOODS

- Every product bought by consumers must be free from any hidden defects
- Goods purchased by consumers must be as described by the trader, fit for the purpose and have the qualities and performance which are normally found in goods of the same type.
- If not, consumer is entitled for a:
 - Repair
 - Replacement
 - Part or full refund
- Consumers would not be entitled for these remedies, if the defect in the product is the result of some kind of misuse.
- In the first 6 months, if the product is defective, it will be considered as a latent defect (existing at point of sale), unless the trader does not prove otherwise.

CONSUMER AFFAIRS ACT (CAP. 378)

SALE OF GOODS

Limit during which a consumer may claim a remedy is
2 yrs from possession

Repair first (unless it causes inconvenience or take
unreasonably long)

Period of the guarantee will be suspended until the
product is repaired and given back to the consumer

Legal guarantee does not start again if a product is
replaced

A consumer may request a full refund when the lack
of conformity is only minor or insignificant or when the
product has been used for quite some time.



CONSUMER AFFAIRS ACT (CAP. 378)

SALE OF GOODS

Commercial Guarantee/Warranty is not obligatory, but given to the consumer voluntarily by the seller

The commercial guarantee should provide the consumer with additional benefits.

It needs to be written clearly, in plain language, in either Maltese or English and should include the following details:

- The name and address of the guarantor
- The length of the commercial guarantee and when it starts
- Description of the goods and services that are covered by the warranty
- Contents, including territorial scope if limited
- Instructions on how the consumer should claim remedy under this guarantee and an address where claims can be sent
- The remedies offered to the consumer under the guarantee if there is a defect
- Declaration of whether the consumer can transfer the guarantee to others – if not specified, subsequent owners will have the right to avail themselves of the guarantee.

CONSUMER AFFAIRS ACT (CAP. 378)

PRODUCT LIABILITY



- The **producer** shall be liable for damage caused by a defect in his product.

- '**product**' means all movables even if incorporated into another movable or into an immovable. 'Product' includes electricity

- The **injured person** shall be required to prove the damage, the defect and the causal relationship between defect and damage.

CONSUMER AFFAIRS ACT (CAP. 378)

PRODUCT LIABILITY

(1) A product is defective if it fails to provide the safety which a person is entitled to expect, taking all circumstances into account including:

(a) the presentation of the product, how it was marketed, and any directions and warnings provided,

(b) the use to which it could reasonably be expected that the product would be put, and

(c) the time when the product was put into circulation.

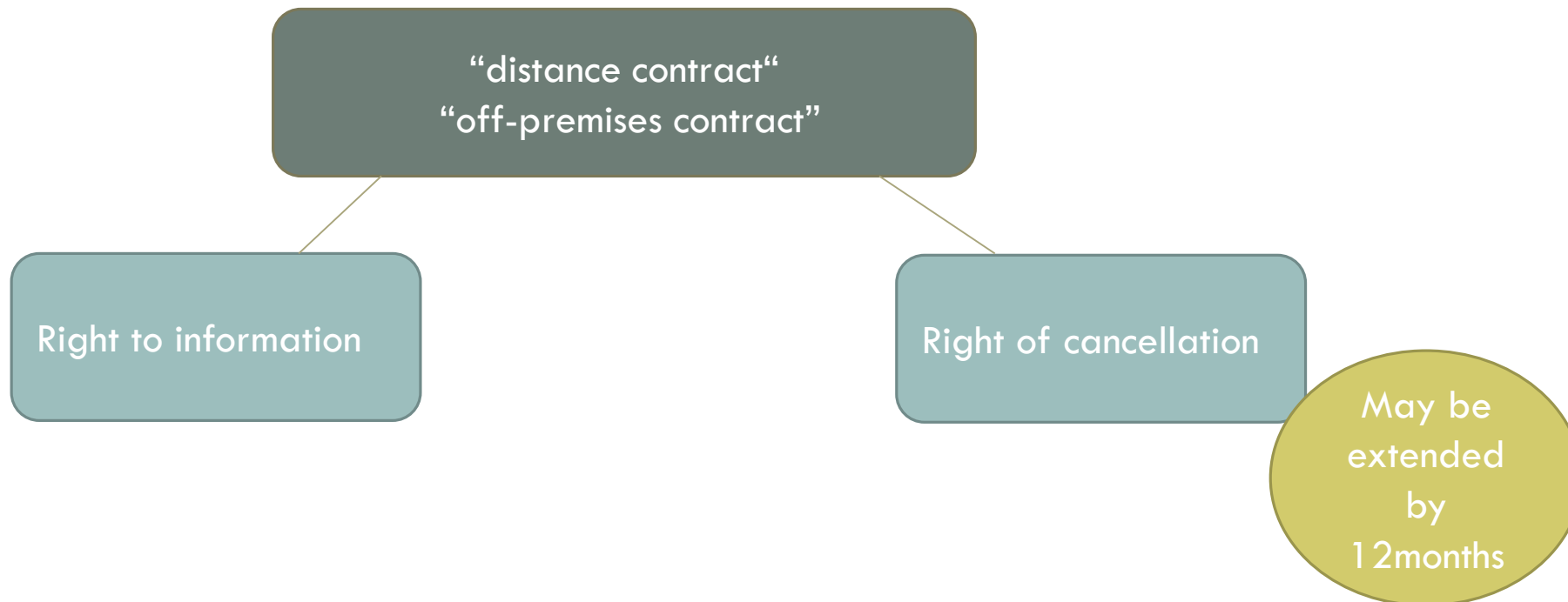
(2) A product shall not be considered defective only because a better product is subsequently put into circulation.

(3) A product shall be considered defective if it does not provide for the safety which is usually provided for by other models of the same type.

CONSUMER AFFAIRS ACT (CAP. 378)

S.L. 378.17 – CONSUMER RIGHTS REGULATIONS

Transposes the Consumer Rights Directive.



CONSUMER AFFAIRS ACT (CAP. 378)

S.L. 378.17 – CONSUMER RIGHTS REGULATIONS

- Traders shall not charge consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means
- Contact numbers operated by traders cannot be premium numbers
- Risk passes to consumer upon delivery. However, if a carrier is chosen by the consumer, then risk is of the consumer.
- Extra payments need to be consented to
- These rights cannot be waived, and apply everywhere in the EU

PRODUCT SAFETY ACT (CAP.427)

- Falls within the remit of the Technical Regulations Division within the MCCA
- Producers shall be obliged to only place safe **products** on the market (both manufactured in or imported into Malta)

▪ How?

- Harmonised technical specifications;
- System of attestation of conformity for each product family;
- Framework of notified bodies;
- CE marking

PRODUCT SAFETY ACT (CAP.427)

"**product**" includes any manufactured article, item or substance which is intended or offered for use by consumers or is likely to be used by consumers, supplied whether for consideration or not in the course of a trade or business and whether new, used or reconditioned

Excludes:

- second-hand products supplied as antiques
- products which are to be repaired or reconditioned prior to being used (advised by supplier)
- Medicinal products
- Foodstuffs

PRODUCT SAFETY ACT (CAP.427)

“**safe product**” means any product which, under normal or reasonably foreseeable conditions of use, including duration, and, where applicable, putting into service, installation and maintenance requirements does not present any risk or only the minimum risks, compatible with the product’s use, which are considered as acceptable and consistent with a high level of protection for the safety and health of persons



Characteristics

Effects on
other
products

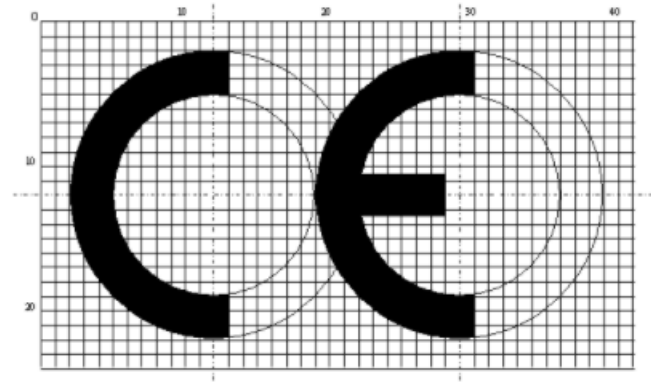
Presentation
and labelling

Categories
at risk

PRODUCT SAFETY ACT (CAP.427)

6 steps to affix a CE marking:

1. Identify the applicable directive(s) and harmonised standards;
2. Verify product specific requirements;
3. Identify whether an independent conformity assessment (by a notified body) is necessary;
4. Test the product and check its conformity;
5. Draw up and keep available the required technical documentation;
6. Affix the CE marking and draw up the EU Declaration of Conformity.



PRODUCT SAFETY ACT (CAP.427)



Market
surveillance



Product recalls
RAPEX



Public
Statements

<https://mcaa.org.mt/Section/index?sectionId=1063>



A NEW DEAL FOR CONSUMERS

Directive on better enforcement and modernisation of EU consumer protection was adopted by the European Parliament and the Council on 27 November 2019.

- Transposed by 28 November 2021 – Effective from 28 May 2022
- *Unfair commercial practices directive*
- *Unfair contract terms directive*
- *Injunctions directive*
- *Consumer rights directive*
- *Price indication directive*

Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers

A NEW DEAL FOR CONSUMERS

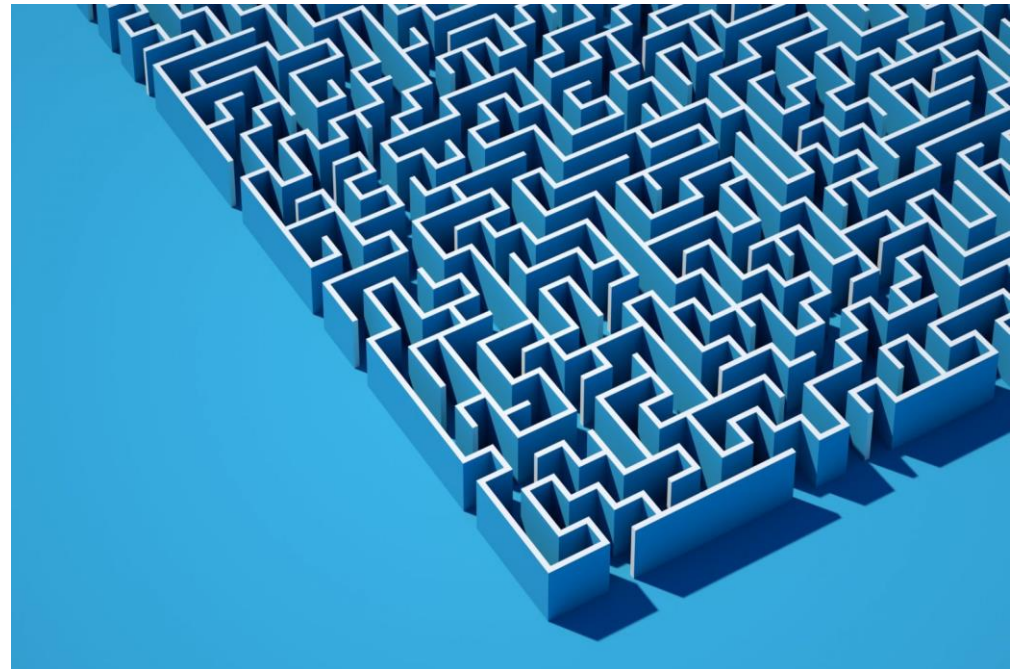
SOME EXAMPLES OF CHANGES IN THE NEAR FUTURE

- Same consumer rights for free digital services (you can cancel subscriptions to social media apps which may be free but which will monetise your data)
- Transparency when you are buying online from individuals (not traders)
- Booking platforms will have to inform consumers about the ranking criteria used for search results
- Traders required to take reasonable and proportionate steps to confirm that only genuine users can review their products online
- Directive prohibits traders from reselling event tickets bought through bots and breaching the limits or other rules set by the primary ticket seller.
- Sellers will have to indicate as reference price the lowest price applied within a period of at least 30 days preceding the price reduction announcement.

CONSUMER POLICY IN BUSINESS

CONSUMER POLICY IN BUSINESS

- Customer management is a cost to the business
- Customer management is time consuming/complex
- Compliance can be seen as a burden (benefit is not immediately perceived)
- Compliance can be a barrier to entry to certain markets



CONSUMER POLICY IN BUSINESS

Customer Retention
Increased Revenue
Word of Mouth
Product improvement



ENFORCEMENT



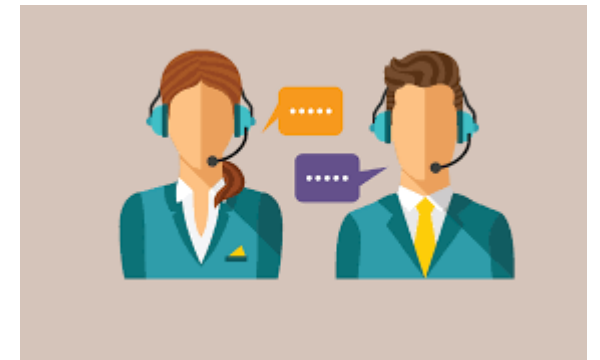
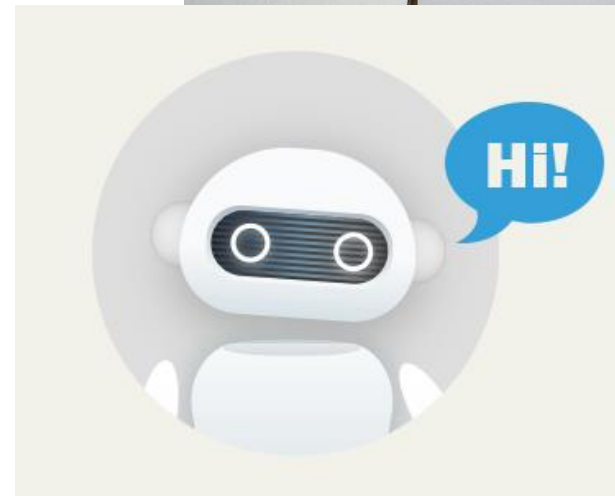
ENFORCEMENT

MANAGING COMPLAINTS

Consumers who are not happy with a service/product will usually speak to the trader first

- Call centres
- Email/Phone/Letter
- Website (chatbot)

Recommended to do it in writing



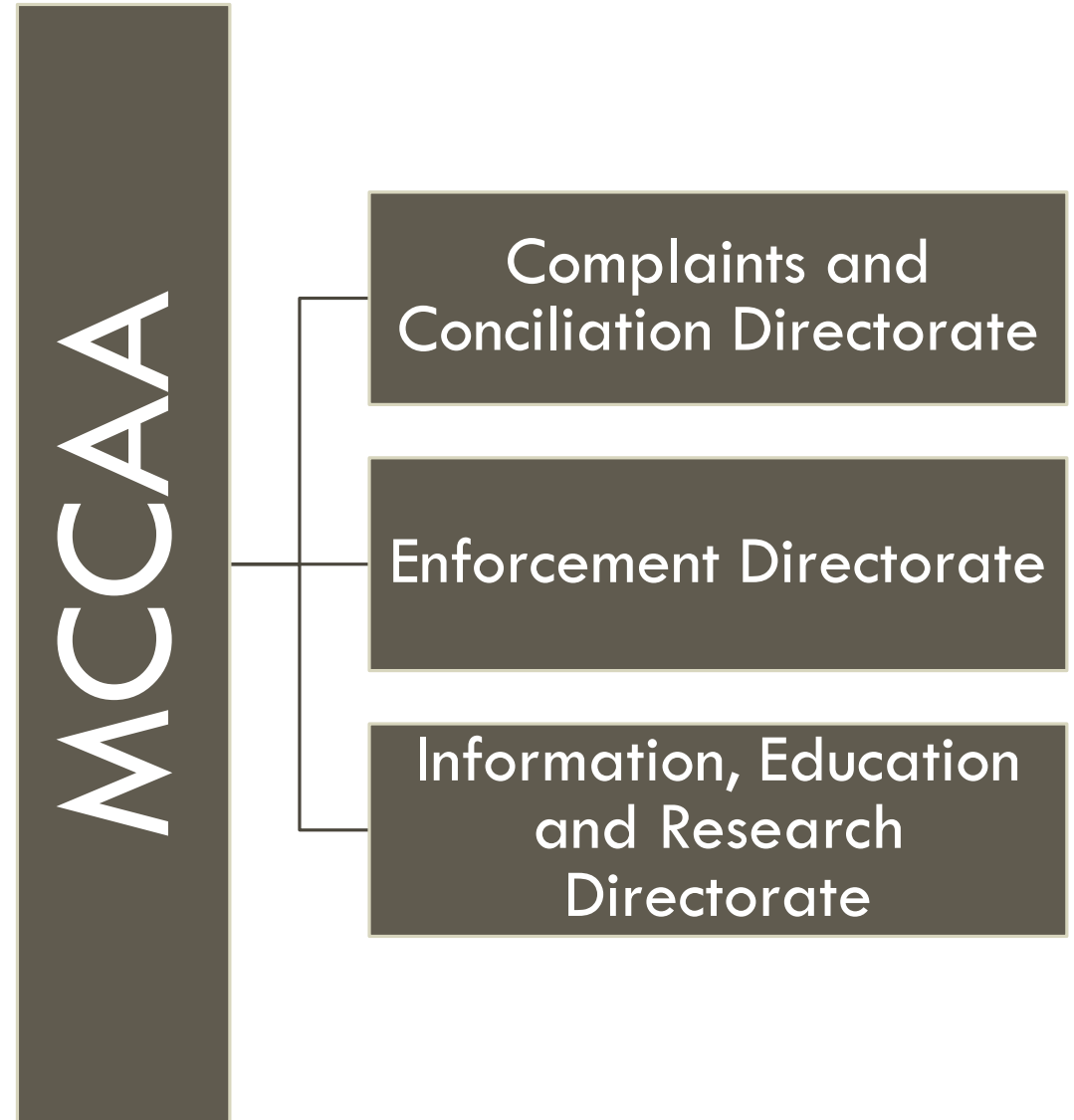
ENFORCEMENT

UNSUCCESSFUL COMPLAINTS

If a customer does not resolve his complaint, he would escalate the matter to the MCCA/MCA/MFSA/MGA

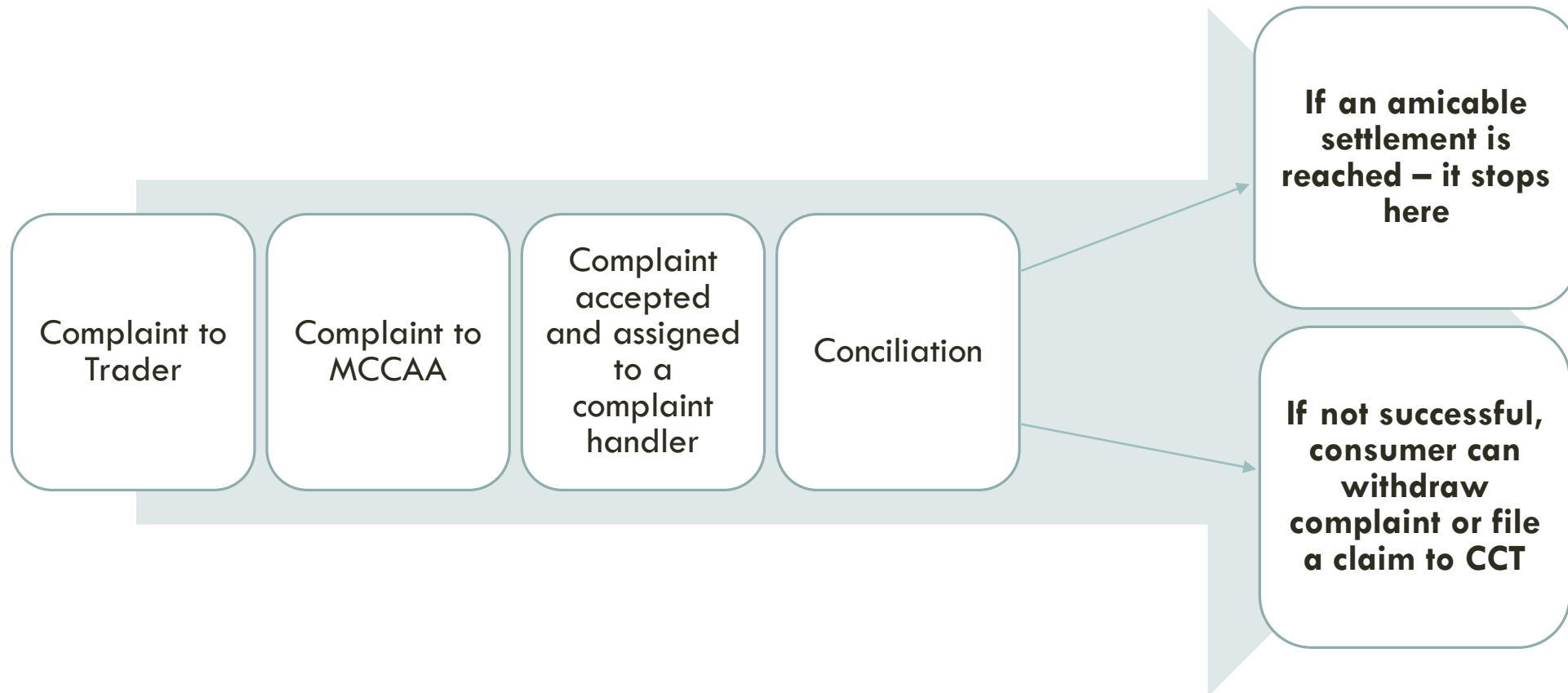
The MCCA has wide application, but in certain areas has MOU with other authorities to manage certain markets

Primary aim is education, but also 1 to 1 complaint management and enforcement



ENFORCEMENT

UNSUCCESSFUL COMPLAINTS



ENFORCEMENT

CONSUMER CLAIMS TRIBUNAL



- The Tribunal has jurisdiction to hear and determine claims where the value of the claim (exclusive of interests and costs) does not exceed €3,500
- Tribunal can award moral damages up to €500
- Trader is advised and can file a reply
- The case is heard by an Arbiter (typically one sitting)
- There is limited appeal for claims up to €1,200. Appeal on all grounds for value above that
- A CCT decision may be enforced like any other court decision through the applicable civil remedies.

ENFORCEMENT

COLLECTIVE REDRESS

- 2011 - Collective Proceedings Act (Cap. 520)
- Before this - if a number of consumers are affected by a faulty product, they all needed to seek remedy individually, going into separate expenses
- This law would allow them to join each other in one case.
 - Only breaches of the Consumer Affairs Act, Product Safety Act, Competition Act
- Two types of class actions are possible.
 - group action & representative action through registered consumer organisations
- The court may give up to five months time for people to join a class action, even though proceedings would have started. If the necessary justification is presented, court may also allow it after the five months' period

ENFORCEMENT

PUBLIC ENFORCEMENT

The Enforcement Directorate (MCCAA) focuses on public enforcement of consumer rights by:

- investigating unfair trading practices and unfair contract terms;
- ensuring price transparency and compliance with other information requirements;
- ensuring observance of consumer-related legislation within the remit of the office

Director has the power to investigate alleged breaches of the laws within its remit, either at its own motion or upon receiving a reasonable allegation.

ENFORCEMENT

PUBLIC ENFORCEMENT

If *prima facie* there is a breach, the Director will institute judicial proceedings before Civil Court to request:

- Imposition of a penalty
- Compliance Orders (injunctions)
- Any other remedy stipulated in the law or as ordered by the Court

Alternatively, the Director may require undertakings from traders which may be published on a local newspaper. If these undertakings are not honoured, the Director may file proceedings in court.

“In cases of urgency due to the risk of immediate and serious harm to the collective interests of consumers” the Director may file an application in court and ask for interim measures

