



# The Implementation and Enforcement of European Union Law in Small Member States

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A Case Study of Malta

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*Edited by*  
Ivan Sammut · Jelena Agranovska

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## PREFACE

This book is the result of an academic project to study the impact of EU law on Maltese law, undertaken by the Department of the European and Comparative Law within the Faculty of Laws of the University of Malta. The project was closed in October 2020 and does not take into account developments that occurred after this month. The main objective of this work is to examine how the legal order of Malta, which is the European Union's smallest Member State, manages to cope with the obligations of the EU's *acquis communautaire*. As far as the legal obligations are concerned, it does not make a difference whether you are from a Member State of around half a million or a Member State of over 80 million people. Smaller Member States have the same obligations as the largest Member States, yet they have to meet these same obligations with very fewer resources. This work looks at the marriage between Malta's legal order, which is a mixed legal order based mainly on the civil law tradition but heavily influenced by the common law tradition. It examines how the Maltese legal system manages to fulfil its obligations both in terms of the primacy of EU law, as well as how the substantive European Union law is transposed and implemented. It also examines on how Maltese courts look at EU law and how they manage or not manage to enforce it within the context of national law. The first chapter deals with the relationship between EU law and the Maltese constitutional order, which is mainly based upon the Westminster model. It then looks at how substantive EU law, mainly through directives, is implemented into Maltese law. This is

followed by some case-studies dealing with specific examples on the implementation of substantive law into the Maltese legal system such as Consumer law, Company law or Criminal law, among others. This work can serve as a model to demonstrate how EU law is being implemented in the EU's smallest Member State and can serve as a basis to study the effectiveness of European Union law into the domestic law of its Member States in general.

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# The Transposition of the EU Consumer Protection Directives in Maltese Law: A Study Under Twenty Headings

*David Fabri*

## 1 INTRODUCTION AND SCOPE

When Malta applied for membership in 1990, both EU consumer law and Maltese consumer law were in their infancy and in a state of evolution. In late 1998, the European Commission allowed Malta to re-ignite its accession application, which had been suspended by the new incoming Labour party government in 1996. As a result, Malta had to start in earnest and haste the negotiation and transposition of an extensive compendium of Directives, decisions and other measures comprised in 29 of the 32 chapters into which the *acquis communautaire* was conveniently arranged for accession purposes. The other three chapters were institutional and were not negotiable or transposable. A chapter of EU law dealt with consumer protection, and most of the measures were in the form of minimum

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directives.<sup>1</sup> New important measures were being adopted at Union (at that time Community) level even while the island's accession procedures were slowly progressing. The directives which required transposition by Malta before accession are listed in Table 6.1 below. While retaining its primary focus on the measures comprised in this Consumer Protection chapter of EU law, this study makes several references to other consumer measures which might arise from other parts and chapters of the *acquis*. The reference to Metrology under section 15 of this chapter is a case in point.

This chapter is constructed under twenty headings (sections) which collectively go a long way in explaining how Maltese consumer law and policy developed from the date of Malta's application to join the EU in 1990 to subsequent membership in 2004. These years marked the formative years both of Malta's relationship and ever closer ties with the then Community and of the Union's own increasing interest in pursuing consumer protection policies and legislation. The Accession-related transpositions are the main interest of this chapter. However, it also examines some relevant developments post-membership. Indeed, the new Consumer Rights Omnibus Directive came into force on 7 January 2020. This new Directive<sup>2</sup> amended several EU consumer protection legislation, namely: Directive 93/13/EEU (unfair contract terms), Directives 98/6/EU (price indications), 2005/29/EU (unfair commercial practices) and 2011/83/EU (consumer rights).<sup>3</sup>

These twenty different headings highlight a series of circumstances, events, pressures, difficulties, weaknesses and other factors which have influenced the transposition of this chapter and other consumer measures. Together they offer a useful case-study from both academic and practical perspectives, of potential interest to students and academics from the other Member States and especially from new candidate countries. This study may also prove useful for students undertaking small-island studies, especially in the fields of law-making and policymaking.

<sup>1</sup> The current *acquis* is today divided in 35 Chapters. As part of the Accession programme, Malta was required to screen and transpose the Consumers and Health Protection Chapter, then Chapter 23 of the *acquis*. Currently the consumer chapter is designated as Chapter 28.

<sup>2</sup> EU/2019/2161.

<sup>3</sup> <https://www.ethics-compliance.ch/2020/01/24/consumer-rights-enhanced-by-new-directive-of-the-european-union/>; <https://globalcompliancenews.com/get-ready-for-the-new-deal-consumer-rights-enhanced-by-the-omnibus-directive/> last accessed on 1 February 2020.

**Table 6.1** The EU Consumer Directives which Malta was required to transpose before accession

1. Council Directive 84/450/EEU of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, (amended by Directive 1999/34/EU of the European Parliament and of the Council)
2. Council Directive 85/374/EEU of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
3. Council Directive 85/577/EEU of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises;
4. Council Directive 87/102/EEU of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, amended by Council Directive 90/88/EEU and by Directive 98/7/EU of the European Parliament and of the Council
5. Council Directive 90/88/EEU of 22 February 1990 amending Directive 87/102/EEU for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
6. Council Directive 90/314/EEU of 13 June 1990 on package travel, package holidays and package tours
7. Council Directive 92/59/EEU of 29 June 1992 on general product safety (which was replaced by Directive 2001/95/EU of the European Parliament and of the Council of 3 December 2001)
8. Council Directive 93/13/EEU of 5 April 1993 on unfair terms in consumer contracts
9. Directive 94/47/EU of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis
10. Directive 97/7/EU of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, amended by Directive 2002/65/EU of the European Parliament and of the Council
11. Directive 97/55/EU of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEU concerning misleading advertising so as to include comparative advertising
12. Directive 98/6/EU of the European Parliament and of the Council of 16 February 1998 on Consumer Protection in the indication of the prices of products offered to consumers
13. Directive 98/7/EU of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEU for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
14. Directive 98/27/EU of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests
15. Directive 99/34/EU of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEU on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products
16. Directive 99/44/EU of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
17. Directive 2001/95/EU of the European Council and of the Council of 3 December 2001 on general product safety
18. Directive 2002/65/EU of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEU and Directives 97/7/EU and 98/27/EU

## 2 SETTING THE SCENE

The history of consumer law in Malta is a recent one. To some degree, it has been a peculiar story comprising highs and lows, with short periods of initiatives followed by bouts of indifference and inconsistencies. When Malta had applied to join the European Union in 1990, Maltese consumer law was at best patchy, and a few unsatisfactory pieces were all that had been produced. The administrative set-up was equally inadequate, and few public resources were dedicated to Consumer Protection. For many, the adoption of the Trade Descriptions Act in 1986<sup>4</sup> coupled with the extensive and restrictive price control regime that had been in place and regularly refined since the Second World War constituted sufficient guarantees for the safeguarding of the vital interests of consumers. It was felt that these two measures provided a sufficient safety-net for Maltese consumers and that little else was needed. Two events then intervened. First, the new Nationalist Government elected into office in 1987 published the first-ever official consumer policy and strategic document.<sup>5</sup> Later, as an applicant country, Malta was handed a list (and a copy) of the EU consumer Directives which it was required to transpose into national law and to ensure their effective enforcement, as soon as possible. The two projects had to be merged and integrated into one coherent roadmap. Overall, at that stage, the local consumer protection position fared poorly when compared to the EU framework, which was then largely composed of so-called Minimal Directives on a variety of consumer concerns. These directives, one must clarify, did not amount to a complete and comprehensive framework of consumer law; that was not their objective. They represented the extent of the political consensus that could be reached between the Member States at that moment in time.

The European Commission's regular reports on Malta's application starting from 1993 onwards repeatedly highlighted the substantial lacunae and weaknesses in Maltese consumer law, at least in comparison with EU law.<sup>6</sup> Accession added significant fresh impetus and unexpected challenges to Maltese consumer law. The obligation to transpose the EU directives

<sup>4</sup> Chapter 313 of the Laws of Malta.

<sup>5</sup> White Paper, Rights for the Consumer, Department of Information, August 1991.

<sup>6</sup> Commission, Opinion (Avis) on Malta's Application for Membership (Bulletin of the European Communities) Supplement 4/93, June 1993. Subsequent to the original 1993 Avis, the full list of Commission Reports on Malta's application to join the EC leading to the Treaty of Accession reads as follows:

specifically helped to shore up national consumer law development to a significant level, and Maltese consumer law probably reached its highest point in the years 2000–2001 when important new consumer laws were adopted.<sup>7</sup>

In this present context, it must be noted that 1994 was a very productive and valuable year in Maltese law-making, including a new Consumer Affairs Act<sup>8</sup> and the first-ever Competition Act.<sup>9</sup> Both laws had been originally launched in the 1993 White Paper “Fair Trading—the next step forward”.<sup>10</sup> 1994 also saw the introduction of new laws on banking, investment services and other modern financial laws. In their own way, these laws boldly reformed and strengthened the regulation of financial services in Malta and added new structures and remedies for consumers in that sector. Notwithstanding the importance of financial services regulation and oversight for consumers, particularly small depositors and investors, this chapter does not examine this part of the subject, primarily for manageability and space reasons. Another reason is that these measures fell outside the Consumer Protection directives that had to be transposed and were instead largely classified under the chapters dealing with the freedom to provide services and freedom of establishment.

### 3 UNPREPAREDNESS

In 1990, and for several years thereafter, Malta was unprepared for membership and for the massive transposition requirements this project would entail. Lack of training and expertise was only too evident both in the public service as well as in the private sector. The European Union was still viewed as a foreign and distant institution largely disconnected to Maltese

Commission Report [COM(1999)69 final]

Commission Report [COM(1999)508 final]

Commission Report [COM(2000) 708 final]

Commission Report [SEC(2001) 1751]

Commission Report [COM(2002) 700 final]

Commission Report [COM(2003) 675 final—SEC(2003) 1206]

These Reports were not published in the Official Journal.

<sup>7</sup> Act XXVI of 2000 effected various significant amendments to the Consumer Affairs Act 1994 which were largely but not exclusively Directives-derived.

<sup>8</sup> Chapter 378 of the Laws of Malta.

<sup>9</sup> Chapter 379 of the Laws of Malta.

<sup>10</sup> White Paper, Department of Information, November 1993.

affairs. 'Experts' were lacking. This meant that, out of necessity, learning by doing became the normal practice. No time was available for study and research. Officials dealing with the transpositions were learning the Directives in the course of implementing them. Persons in Malta formally qualified in European law studies were very few and were in any case engaged in other areas of the huge *acquis*. The adoption of the consumer *acquis* was not preceded or supported by any substantive studies and preliminary report and research.

Another peculiar feature was that while one section the Commission was chasing the Maltese side to transpose the Directives, another division of the Commission was busy changing them and seeking to add new ones. This made the task more complicated and difficult to manage to see the transpositions were required with some urgency. The EU's *acquis* became a moving target and continued to evolve and change while Malta and the other candidate countries were still struggling to understand it and implement it. By 1996, Malta had done little by way of transpositions and aligning to structures and expectations. A blow to aspiring membership was delivered when the anti-membership Labour Party, freshly elected to govern in 1996, immediately took steps to suspend Malta's application. The position was only restored in late 1998, at a stage when other candidate countries had already embarked on negotiating and closing various chapters of the *acquis*.

The Commission's experts made it repeatedly clear to the Maltese authorities that it was not enough to show a willingness to transpose the required measures. Still, they had to show also that they understood the *acquis* and were capable of effectively implementing it. They seemed particularly concerned by the lack of any legislation or structure that could prevent unsafe products from coming to, or remaining on, the market.

#### 4 AN EASY CHAPTER

When Malta's accession process with the Commission's Enlargement experts finally started in earnest in 1999, the Maltese Government tried its best to catch up with the other candidate countries which had enjoyed a head start and had already closed some chapters on their way to eventual membership. Malta had fallen way behind as a result of the suspension of its application between 1996 and 1998. To make up for this delay, the Maltese accession negotiating team tried to identify which were the possibly easy chapters that could be concluded relatively fast, thereby creating



the perception of a successful momentum to the process. They identified the consumer protection chapter as one of a few that appeared potentially easier to negotiate and close, compared to some other chapters which presented difficulties or complications. It helped that in this context agreement was secured at an early stage with the local experts that no transitional arrangements would be requested from the Commission for any of the transposable directives. This meant that the Maltese Government was formally committing itself that at the date of eventual membership, should this happen, the consumer Directives would have been fully transposed and implemented. This approach ensured that the chapter was among the first to be successfully screened and negotiated. The EU Commission's Enlargement officials had warned the Maltese Government's negotiators that any transitional arrangements or exemptions requested by Malta would delay the negotiation and accession processes and might probably cause Malta to miss out on the next following enlargement.

Just for the sake of comparison, Company law was another chapter which too had been correctly deemed easier to negotiate. This was the case because the Companies Act of 1995 had more or less transposed the entirety of the company law directives in advance. Indeed, it was one of the very first chapters to be successfully negotiated and 'closed.'<sup>11</sup>

The assertion that a particular chapter was 'easy' was predicated on at least four assumptions: (a) that the Directives in question would not present conceptual or legal difficulties; (b) that the drafting of the necessary transposition measures would be a straightforward process from a technical angle; (c) that the draft legislation and its passage through Parliament would be uncontroversial and uncomplicated, and (d) that the Maltese authorities would request no transitional arrangements or derogations.

## 5 TRADE LOBBIES TRY TO DELAY TRANSPOSITIONS

Several trade associations lobbying for different vested interests too were caught unprepared to master and comprehend the massive *acquis* that the country was rushing to transpose. Many Directives affected their members' interests, but it was not always immediately clear to them how this would play out. It would have been a daunting task even had the transposition been carried out at a gentler pace. Two of the consumer Directives

<sup>11</sup> See *Government satisfaction at opening of nine Chapters*, front page, The Malta Independent, Malta, 6 July 2000.

raised particular concerns and objections. The banks forcefully attacked the swift implementation of the Unfair Contract Terms Directive arguing—whenever the opportunity presented itself—that their standard consumer contracts and terms needed years of study and examination before they could be brought into line with the Directive. They also clamoured for a ten-year transitional delay for the introduction of a Bank depositor compensation scheme which fell outside the consumer chapter but was a pro-consumer measure. On their part, the General Retailers and Traders Union, one of the leading trade associations on the island, primarily directed its hostility and objections in the direction of the Product Liability Directive arguing in panic mode that the measure would put many Maltese retailers out of business. It insisted on an impact assessment which Government conceded to carry out—with no apparent advantage to anyone. The transposition of the consumer Directives was mostly carried out in time, and the measures received the Commission's approval except on a few inconsequential matters of detail. Both measures were in force on the date of Malta's official date of entry into the EU, and it is safe to say that neither the unfair terms rules nor the product liability measures led to any business failures.

By and large, the trading community held the view that competition was the best form of consumer protection and that no scope existed for additional specific statutory protection for consumers. Traders repeatedly insisted that the consumer directives should be applied in the most minimal manner possible and that more favourable rights should not be introduced. Seeing they were largely in favour of EU membership, they gradually and rather grudgingly accepted the consumer directives as a kind of necessary evil. This price had to be paid in order to enjoy the undoubted benefits of membership.

## 6 THE OPPOSITION IN PARLIAMENT

The Labour Party in opposition during the accession period was vehemently opposed to EU membership and favoured other less intensive association arrangements with the EU. The Labour Government in power between 1996 and 1998 suspended Malta's application to join the EU. After 1998, it persisted in raising negative and alarmist objections to EU membership. Nonetheless, one notes that in Parliament it offered only weak opposition to the extensive adoption of transposition measures in Maltese law. In this particular field under review, the Labour Party

spokesmen generally argued that consumer protection measures being transposed would have been welcome even if they were not linked to EU membership. They criticised the Nationalist Government for slavishly copying what came out of Brussels, and for failing to consider consumer protection models originating outside the EU. During the relative parliamentary debates, the laws transposing the EU directives largely passed without any dissenting vote.

Overall, the Labour Party in Opposition played a mainly negative role in the accession process and did not provide much constructive input into the extensive transposition exercises. Its representatives refused to participate in the official structures and mechanisms established by the government to coordinate the transposition and accession process and thereby to forfeit the opportunity to make a constructive contribution to the vast law-making exercise. For several years after Malta's accession, the Malta Labour Party remained steadfast in its opposition to EU membership. It was only in the months leading to the 2013 general elections that the party finally shed its objections and formally accepted that EU membership was there to stay. At that juncture, the Labour Party started supporting Malta's EU membership.

## 7 SOME BRIGHT SPOTS

The Commission's reports on Malta's application up to 1999 were never flattering about Malta's level of adherence to the EU's consumer *acquis* and the credibility of its practical implementation. Before 1994, consumer law in Malta was in dire straits. Nonetheless, the Commission did find some bright spots which facilitated the eventual implementation of the relevant directives, most of which were till then unrepresented in Maltese law. The positive elements that the Commission found were (a) that the Maltese Government had addressed consumer protection policy some years earlier in a White Paper published in 1991 which was updated in 1993; (b) that, as a result, the Government had passed a Consumer Affairs Act in 1994; and (c) that the Government had in 1992 established a new department solely dedicated to the promotion and protection of consumer rights and interests and tasked with oversight of consumer law. The Commission was positively impressed that national policy and a national legal and administrative framework already existed and had been in operation for several years. These factors also meant that a cadre of expertise in the area was developing and that the Maltese side was not starting from

scratch, as was the case with various East European candidate countries. The Commission admitted that at that time, even within the EU itself, very few Member States if any, had a publicly funded agency dedicated to protecting consumer interests similar to the Maltese model. These encouraging developments may have had no direct bearing on the EU directives, but they certainly supported and facilitated the competent and timely transposition of the Directives, especially from 2000 onwards.

Clearly, on a more general level, some factors worked subtly in Malta's favour as compared to the position in certain other candidate countries. The fact that in Malta, English was widely known and spoken was an advantage that accelerated the accession processes. Others were not so lucky and relied on time-consuming translators and interpreters. Further, Malta had already, before the start of the accession procedures, addressed consumer protection policy and had already implemented some home-grown legislative proposals. This fact certainly helped the EU negotiators develop a more positive perception of the island as a potential Member State. The knowledge probably enhanced that image that since 1994, Malta had also had a comprehensive competition law framework, a relatively sophisticated financial services regulatory framework and modern company legislation based on the latest UK model. This was far from being the case in certain other applicant countries, a few of which did not make it to the 2004 enlargement.

## 8 THE EU CONSUMER LAW TASK FORCE

The Maltese Government found itself obliged to establish procedures and teams to organise, handle and transpose the massive *acquis* that the EU had developed over more than twenty years. In the consumer protection field, the government chose not to rely on the ability and competence available within the Department of Consumer Affairs which it found unconvincing. It instead opted to appoint a team from outside the department. These included persons who had proven experience in the law and practice of consumer protection. As the focal point for the transposition of this chapter, the Task Force organised several consultations and information meetings for different sectors of society, including the business sectors, about the EU policies towards consumer protection and explaining the various directives. In this exercise, perhaps the most difficult to explain and get across were the Consumer Credit Directives.

The responsibility for the transposition of certain directives fell outside the Task Force's remit. Product Safety was delegated to the Malta Standards Authority, while the Timeshare and Package Tours Directives fell under the direct responsibility of the newly established Malta Tourism Authority in 1999.<sup>12</sup> The Task Force headed the so-called Screening Meetings for Chapter 23 with the Commission in Brussels on 7–8 October 1999 on behalf of the Maltese Government.<sup>13</sup>

## 9 THE EFFECT ON THE CODES

It is remarkable that in a jurisdiction, which nominally had a continental codified system of law, the transposition of various consumer Directives of a private law nature, such as guarantees in the sale of goods and unfair contract terms, were adopted in their entirety in a special law and no reference to it was made in the Civil Code<sup>14</sup> which still contained the bulk and the core of private law rules in Maltese law. Even today the Civil Code does not refer to the various matters of private law interest adopted since at least 1999.

The Consumer Directives were a great addition to national consumer legal remedies, and it is a pity that no reference is made to them in the Civil Code. But then even significant strides in competition law and sectoral pillars of the economy like financial services and gaming, which entail multiple contracts and investor and player concerns, remain unacknowledged in the Code. As a result, the Code seems increasingly insulated, if not isolated, from all recent modern legislation adopted during these last forty years.<sup>15</sup>

<sup>12</sup> See the Malta Travel and Tourism Act, 1999, Chapter 409 of the Laws of Malta.

<sup>13</sup> Fabri David, *From application to accession: the Interplay between the EU. Consumer Directives and Selected Areas of National Consumer Law and Policy – a case study from Malta (1990–2004)*, Ph.D. thesis, University of Malta (2015), A copy of the minutes of these meetings were reproduced in Appendix 4.

<sup>14</sup> Chapter 16 of the Laws of Malta.

<sup>15</sup> Fabri David, *From application to accession: the Interplay between the EU. Consumer Directives and Selected Areas of National Consumer Law and Policy – a case study from Malta (1990–2004)*, Ph.D. thesis, University of Malta (2015). A copy of the minutes of these meetings were reproduced in Appendix 4. A detailed examination of the continued relevance of the Codes is found in Chapter 5 of the 2015 Thesis.

## 10 CONSUMER CREDIT

The Directives dealing with consumer credit were the last to be transposed.<sup>16</sup> The transposition measures were introduced in 2005. Why is this significant? It is significant because, contrary to what the Commission had been constantly promised, the transposition was finalised late and only after the date of membership.<sup>17</sup> The relative regulations were adopted a year after membership. Their late implementation finalised the transposition of Chapter 23, then comprising the consumer protection *acquis*. The regulations were extended to apply to home loans, which was not a directive requirement.

The very topic of consumer credit was probably the least familiar to the Maltese side, and they decided to leave it for last. Interest in the subject was weak both before and indeed also after transposition, and the enforcement of this measure lacks any enthusiasm and is practically absent even today. It may be suggested that consumer credit is the area where the consumer *acquis* has been the least effective. Awareness and enforcement of these regulations remain low and problematic to this day.

## 11 TIMESHARE

Since the Seventies, timeshare had gradually become a fast-growing sub-sector of the tourism industry in Malta. Careful lobbying ensured that no new law specifically regulated this complex subject. Operators deliberately made the timeshare arrangement as complex as possible to discourage consumers from exercising their rights or pretensions. The arrangements often included trusts constituted overseas and proper foreign laws, foreign arbitration clauses and the like. These placed the often unwary consumers at huge disadvantages.

Within this lucrative and unregulated business, an army of well-drilled timeshare touts descended on the more popular local tourist resorts to push or pull or otherwise entice unsuspected tourists to make their way to timeshare resorts where trained salesmen badgered them into signing contracts they did not need, desire or afford. They were inevitably subjected to pressure and unfair treatment. No law on the subject as ever

<sup>16</sup> Indeed the transposition was carried out after accession and membership had already been achieved.

<sup>17</sup> Consumer Credit Regulations, Legal Notice 84 of 2005.

introduced. Several reasons explain why this did not happen: (a) the industry was bringing in foreign income and served to push up the tourism figures; (b) there was no local outcry at this abuse seeing that at that time timeshare touts principally targeted foreigners, especially older couples coming from the UK; (c) the timeshare purchasers were unorganised and isolated, and some were too old to complain or take action in any systematic manner. The legislators, therefore, failed these people.

Incredibly the only regulation of the timeshare agreement, and the way it may be sold, are still largely derived from the timeshare Directives emanating from Brussels. The timeshare Directive only became part of national law as a requirement of EU membership. No other regulation exists. Thus rather than harmonising Maltese law with EU law, the transposition helped to introduce new law where none previously was in place.

## 12 PRODUCT SAFETY

This section argues that the transposition of the Product Safety Directives in Maltese law is a useful lesson in how transpositions can be carried out badly and how they can be undertaken successfully. The adoption of a product safety law was earmarked 'for end of 1999', but this did not happen. The first draft submitted to the Commission experts was deemed unsatisfactory and of poor quality. In its review, the Commission experts expressed the view that it failed to focus sufficiently on the core safety issue. They recommended that rather than try to salvage it through amendments, the drafting exercise should be started newly. It was unfortunate evidence that the cliché 'haste makes waste' still held true.

The law eventually adopted in 2001 by the Maltese Parliament managed to transpose in advance the revisions to the original directive on the subject.<sup>18</sup> It also ably merged the new rules on product safety with the main body on consumer law which had been reformed just a year earlier, in 2000. The proper regulation of the safety of consumer goods filled one of the most significant gaps in Maltese law up till 2001. Before then, the matter had relied largely on self-regulation, and no proper supporting and enforcement legal structures existed—a grave dereliction by the authorities for so many years. Fortunately, the transposition obligations forced the Maltese authorities to address the issue and adopt the comprehensive

<sup>18</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4.



and sophisticated EU framework. The relevant law was finally adopted by the Maltese Parliament in 2001, transposing not one but two directives in the process.<sup>19</sup>

### 13 UNINTENDED CONSEQUENCES

Perhaps the worst unintended consequence of EU membership was the complete absence of any further interest or initiative by the Maltese authorities in the consumer protection field in the years following membership up till the present day. EU membership seems to have offered a false sense of security and completeness, and Government officials were found only too willing to claim, falsely, that Malta should henceforth only follow what comes out from Brussels and should not try to be 'holier than the Pope' or 'more European than the Europeans'. After the extensive beneficial reforms that came with accession, Maltese national consumer law development fell into a rut and effectively ceased. Although accession initially produced undoubted benefits for consumers in this new Member State, post-membership indigenous consumer law and policy has struggled and has indeed largely failed to survive the advent of ever more European directives.

### 14 EARLY CASUALTIES

The transposition of the consumer directives had another unfortunate consequence as Government, rightly or wrongly, repealed useful original national consumer Protection rules on the ground that they were incompatible with EU law. No study was ever drawn up or presented. The rules that were sacrificed in this way are the Trade Descriptions Act of 1986, and the rules prohibiting pyramid schemes and controlling gift offers that had been inserted in the Consumer Affairs Act of 1994 as amended in 2000. It was thought that these, had been superseded by the transposition of the Unfair Commercial Practices Directive in 2008. The Doorstep Contracts Act adopted in 1987<sup>20</sup> was repealed following the

<sup>19</sup> The rather turbulent history of the Product Safety Act is described in Chapter 6 of the 2015 Thesis, which also analyses its provisions and how these co-exist with the Consumer Affairs Act.

<sup>20</sup> Chapter 317 of the Laws of Malta.



implementation of the Consumer Rights Directive,<sup>21</sup> which is considered further under heading number 17.

## 15 THE STRANGE TALE CONCERNING METROLOGY

Protecting shoppers from false or deceptive weights and measures is one of the earliest consumer protection safeguards known in history. The condemnation of false weights and measures is repeatedly condemned in the Old Testament evidence that sharp, practice was as rampant as it was abusive even in those early days. The need to have nationally established standard weights and measures are specifically mentioned in the Magna Carta and in the US Constitution, which is partly inspired. Malta had an old law on the matter since 1910 called the Weights and Measures Ordinance.<sup>22</sup> When Malta was negotiating its entry into the EU, it was found that the Ordinance was no longer adequate and did not fit with the quality of the rules, expectations and principles that EU membership would imply, especially in the retail trading sector. EU law on the matter was quite detailed and sophisticated.<sup>23</sup> Malta obliged itself to update its legislation on the matter through a new and modern Metrology Act.<sup>24</sup>

Although a law was passed, it took years for the authorities to bring it into effect, partly due to obstruction from vested interests and to Government's lack of will to enforce this new framework and a reluctance to impose new burdens on the business sector. The law was only brought into effect on the 15 September 2006.

## 16 PRICE CONTROLS PROVE RESILIENT

For many in authority in Seventies and Eighties Malta, strict price control on practically every commodity was the be-all and end-all of consumer protection. A closed market suffocated by importation restrictions, bulk-buying by government and import substitution contributed to a generally

<sup>21</sup> Act No. VI of 2014 repealed the Trade Descriptions Act and the Doorstep Contracts Act.

<sup>22</sup> Chapter 39 of the Laws of Malta.

<sup>23</sup> See Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (Text with EEA relevance). This was deemed to more relate to free movement of goods rather than to consumer protection.

<sup>24</sup> See the Metrology Act, 2002, Chapter 454 of the Laws of Malta.

low standard of living. Competition, choice, safety and quality were not priority concerns. It was painful to observe and more painful to experience.

Price control meant that every item which was to be offered on the Maltese market to retail customers had to have its price fixed by the authorities. Most items had a fixed price which was published in the Government Gazette.<sup>25</sup> These ranged from soft drink bottles to toilet papers to cars. Where no fixed price was published, the retailer could not charge beyond a pre-established fixed percentage of profit. During the accession negotiations, the Maltese authorities acknowledged that these extensive price controls were incompatible with the EU freedom of goods and liberalisation of the markets policy and promised to reform the sector. An attempt was made to considerably reduce these controls and to restrict them to a few sensitive and essential goods which were considered necessary for the well-being of the Community, where competition is inexistent or is found to be ineffective in that particular area. Parliament passed a new law to this effect through all its stages, but incredibly it has never been brought into force and remains in abeyance, seemingly forgotten. What is surprising here is that the whole framework of price controls has remained in place even after EU accession, but it is not being enforced except on a selective basis.<sup>26</sup>

## 17 THE TRANSPOSITION OF THE CONSUMER RIGHTS DIRECTIVE OF 2011/83/EU

The Consumer Rights Directive came into force on the 12 November 2011 and EU member states had until 13 December 2013 to implement the Directive. The Directive was transposed into Maltese law through ministerial regulations, namely LN 439 of 2013 which were issued under the Consumer Affairs Act. The regulations are called the Consumer Rights Regulations and came into force on 13 June 2013. The regulations

<sup>25</sup> See especially the Sale of Commodities (Control) Regulations, Legal Notice 117.15 of 1972, issued under the Supplies and Services Act, Chapter 117 of the Laws of Malta.

<sup>26</sup> See generally David Fabri, *A Decade After EU Membership: Price Control Law in Malta Revisited*, [https://www.um.edu.mt/library/oar/bitstream/123456789/18762/1/David%20Fabri%20\(1\).pdf](https://www.um.edu.mt/library/oar/bitstream/123456789/18762/1/David%20Fabri%20(1).pdf); Reflections on a Decade of EU Membership website: [http://www.um.edu.mt/europeanstudies/projects/reflections\\_on\\_a\\_decade\\_of\\_eu\\_membership\\_expectations\\_achievements\\_disappointments\\_and\\_the\\_future](http://www.um.edu.mt/europeanstudies/projects/reflections_on_a_decade_of_eu_membership_expectations_achievements_disappointments_and_the_future) last accessed on 1 February 2020.

faithfully transpose the Directive.<sup>27</sup> Later, in 2016, through LN 124 of 2016, the local regulations were amended to effect a few corrections.

As a result of this transposition, the Distance Selling Regulations of 2001 were repealed. This was done by Article 28 of the 2013 regulations. The 2001 regulations had been issued under this same Act and had implemented the Distance Selling Directive. Following the adoption of the 2013 Regulations, the Doorstep Contracts Act of 1987 was also repealed. Act No. VI of 2014 did away with this pioneering piece of local consumer law on the ground that it was no longer compatible with the Consumer Rights Directive, a maximal harmonisation measure.

The writer is not aware of any judicial decisions regarding the implementation of the Consumer Rights Directive or how effectively the transposing regulations are being enforced by Malta's leading national central consumer authority, the Malta Competition and Consumer Affairs Authority (MCCAA).<sup>28</sup>

## 18 THE TRANSPOSITION OF THE REVISED PACKAGE TRAVEL DIRECTIVE OF 2015

Directive 2015/2302/EU of the European Parliament later amended Directive 2011/83/EU and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EU) No 2006/2004 and repealing Council Directive 90/314/EEU. This repealed Directive was Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEU) which were repealed with effect from 1 July 2018 and the Member States had until that same date to apply these measures. This meant that the original package travel transposition regulations introduced in Maltese law before accession was repealed in 2018.

The original Package Travel, Package Holidays and Package Tours Regulations were introduced on 1 November 2001 by LN 157 of 2000, as amended by Legal Notices 258 of 2001, in good time before accession in 2004. These ministerial regulations were issued in terms of the Malta Travel and Tourism Services Act. They were eventually repealed by LN 94

<sup>27</sup> file:///C:/Users/University%20User/Downloads/document%20(5).pdf last accessed 1 February 2020.

<sup>28</sup> See the Malta Competition and Consumer Affairs Act 2011, Chapter 510 of the Laws of Malta; and <https://mccaa.org.mt/> last accessed 1 February 2020.

of 2018, by the Package Travel and Linked Travel Arrangements Regulations, 2018. Additionally, one should note the Package Travel Insolvency Funds Regulations which came into effect on the 4 October 2016 through LN 315 of 2016. Regulation 2 stated that the objective of these regulations was “to partially transpose the provisions of the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EU) No 2006/2004 and Directive 2011/83/EU of the European Parliament and the Council and repealing Council Directive 90/314/EEU.”

## 19 PUBLIC STATUTORY ADMINISTRATIVE AUTHORITIES

When in 1990 the Maltese Government embarked on a wholesale review of the state of consumer protection in Malta, it was rightly advised that it would not be sufficient to pass substantive consumer law unless a publicly-funded efficient administrative agency tasked with overseeing and enforcing them was also in place. The independent Consumer Protection Agency envisaged in the 1991 White Paper was not set up, and instead, a new Government department was established in 1992 for roughly those same purposes. The status and functions of this department were in due course specifically recognised and confirmed in the Consumer Affairs Act of 1994. Contrary to the proposal contained in the Molony Committee Report on Consumer Protection presented to the UK Parliament in 1962, the local department was charged with meeting consumers and provide them with advice and information and to assist them with their grievances against traders.<sup>29</sup>

Before the 1994 Act, the only administrative entity which played a generic consumer protection role was a little-known section within the Department of Trade which was broadly responsible for the administration of the Trade Descriptions Act and the then Door-to-Door Salesmen Act. Its resources were thin, its level of enforcement was unsatisfactory, and it kept a very low profile largely detached from the public. The 1991 White Paper kick-started interest in improving the institutional framework. Apart from the new department, the 1994 Act also created two new

<sup>29</sup> See Final Report of the Committee on Consumer Protection, presented to Parliament by the president of the Board of Trade by Command of Her Majesty: Board of Trade (Cmnd 1781, 1962).

structures: a Consumer Affairs Council conceived as a permanent advisory and policy think-tank, and a new Consumer Claims Tribunal. In 2011 the Malta Competition and Consumer Affairs Authority was established. This new authority has suffered from a chronic lack of expert resources and may have suffered from internal conflicts and political interference. It has yet to leave its mark on the development or growth of a national policy and legislative initiative in the consumer protection field.

## 20 FINAL NOTE: POST-ACCESSION

Post-accession Malta has so far had no problem in transposing EU consumer directives in a largely correct and timely fashion. Regrettably, recent transpositions have proved no more than faithful cut-and-paste exercises.

The immediate post-accession years also witnessed the demise of two remaining consumer laws from the Eighties, namely the laws on doorstep contracts and trade descriptions. This process has already been analysed elsewhere. The two laws were repealed as they deemed to be incompatible with the new EU directives on consumer rights and unfair business practices. As a result, the three original pioneering consumer statutes, namely the poor Consumers Protection Act of 1981, the unoriginal Trade Descriptions Act of 1986 and the more effective Doorstep Contracts Act of 1987 have all been repealed. In this context, it is also useful noting that the use of criminal law in support of consumer rights has proved ineffective. The Trade Descriptions Act hardly saw one successful prosecution in its 30-year existence and the criminal offences created under the Doorstep Contracts Act, as later amended, remained on paper. The authorities have generally demonstrated very little appetite for pursuing business wrongdoers through the criminal process.

Two recent post-membership consumer mechanisms may be highlighted at this point. One measure, the Collective Proceedings Act of 2012<sup>30</sup>, set out a formal procedure allowing aggrieved consumers to initiate class actions, provided their claim arose from the Consumer Affairs Act, the Product Safety Act or the Competition Act, but not from any other law. Luckily, the first law mentioned is very substantial and comprises the bulk of the consumer Directives transposed to date. Later, 2016 saw a new consumer protection mechanism through the establishment of the Office of the Arbiter for Financial Services, an inexpensive and

<sup>30</sup> Chapter 520 of the Laws of Malta.

consumer-friendly mechanism for the benefit of consumers who had grievances against financial services operators including banks, investment services advisers and insurance companies.<sup>31</sup> The majority of decisions taken by the Arbiter have related to mis-selling of financial products. This measure was not strictly related to EU law, but it introduced an alternative dispute mechanism in terms of the recent Directive.<sup>32</sup>

Whereas EU law has heavily influenced the direction and content of Maltese consumer law and will continue to do shortly, Maltese law has failed to influence the development of EU consumer law and policies. Original national measures and solutions to enhance local consumer welfare are absent. The position today is that purely domestic consumer law and local creative policy initiatives remain in hibernation, seemingly abandoned. In pro-business Malta, consumer associations have remained weak. They are often ignored as consumers fail to recognise the long-term benefits of pursuing collective interests through a well-supported bargaining and representative entity.

The EU does not provide consumers with a comprehensive fool-proof protection system, and this admittedly was never its intention. The Commission continues to monitor the status and effectiveness of its consumer measures. Indeed, in recent years, it has taken a series of initiatives to update and improve legal protection for European citizens.<sup>33</sup> Steps have also been taken to measure public opinion on how directives may be made more relevant and effective.<sup>34</sup> Improvements started being considered in various fields which include class actions, unfair contract terms, product safety, unfair commercial practices and price indications. It also planned to amend the recent Consumer Rights Directive of 2011. On 11 April 2018, the Commission adopted the New Deal for Consumers package composed of two proposals for Directives and a Communication.<sup>35</sup> At the time of writing, the Commission has just finalised and published a new so-called

<sup>31</sup> See The Arbiter for Financial Services Act 2016, Chapter 555 of the Law of Malta.

<sup>32</sup> See Annual Reports 2106–2019 published by the Office of the Arbiter for Financial Services.

<sup>33</sup> [https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers\\_en](https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en) last accessed 1 February 2020.

<sup>34</sup> [https://ec.europa.eu/info/sites/info/files/summary\\_main\\_results\\_public\\_consultation\\_eu\\_consumer\\_law\\_1.pdf](https://ec.europa.eu/info/sites/info/files/summary_main_results_public_consultation_eu_consumer_law_1.pdf) last accessed 1 February 2020.

<sup>35</sup> <https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/cu-to-modernise-law-on-consumer-protection/> last accessed 1 February 2020.

Omnibus Consumer Directive, the impact of which will only become clear in the future.

All these measures and relative documentation are all conveniently documented and reproduced on the Commissions Europa website and may be consulted there. Another useful examination of the state of fitness of EU consumer law is found in a study published in 2016 by BEUC, the international consumer association.<sup>36</sup> This study addressed each Directive individually and highlighted perceived weaknesses and scope for improvements. Interestingly, BEUC here also addressed the Volkswagen diesel engines abuse case, remarking critically that individual court cases against the big German company have proved “expensive, complicated, time-consuming and intimidating for many, and even more so in cross-border cases”. It argued in favour of the introduction of collective redress mechanisms in EU consumer law which would have made it easier for consumers to obtain compensation for the loss suffered as a result of Volkswagen’s unlawful practices.

Despite the undoubted developments and improvements in EU consumer law over these past thirty years, the consumer remains in many ways vulnerable and subject to the good faith and care, sometimes lacking, of the corporate world. One need only consider the dicey ingredients that often make up the products that we eat, the cheating and fraud perpetrated on hundreds of thousands of consumers by Volkswagen, and the unexpected failures by Boeing which occasioned the death of hundreds of passengers, to realise just how much the consumer is no king at all, but is still very much a stranger abroad. Despite the various Directives, consumers often find it difficult to enforce their rights efficiently, swiftly and inexpensively. With business still holding the upper hand, its continued regulation is thoroughly justified and accordingly, the continued relevance of consumer protection measures and the need for constant vigilance and the active pursuit of consumer interests remain high.

<sup>36</sup> [https://www.beuc.eu/publications/beuc-x-2016-081\\_csc\\_fitness\\_check\\_of\\_eu\\_consumer\\_law\\_2016\\_beuc\\_position.pdf](https://www.beuc.eu/publications/beuc-x-2016-081_csc_fitness_check_of_eu_consumer_law_2016_beuc_position.pdf) last accessed on 1 February 2020.

