



## Għaqda tal-Konsumaturi–Malta Consumers' Association - Malta

### **Proposals by the Consumer Association (Malta) – l-Għaqda tal-Konsumaturi (hereafter 'CA') in relation to the proposed reform of the Constitution**

#### ***1. Amendment to Chapter II of the Constitution***

Background : The inclusion of a new right on consumer protection which we believe will serve to emphasise the commitment of Malta to protect the legitimate interests of consumers. Such a provision would be in line with the measures taken in other countries including Member States of the EU such as Spain which countries have included similar provisions as part of their constitution. We propose the inclusion of a new provision on the following lines:

“The State shall take such measures as are necessary to uphold the defence of the rights of consumer when buying or hiring goods or services. In doing so the State shall in particular ensure that consumers have access to effective redress within a reasonable time, and shall promote and support organisations which represent consumer interests.”

#### ***2. Amendment of Chapter IV of the Constitution***

Background: in recent years various constitutional court judgements have impacted substantially the powers of national regulatory bodies to impose dissuasive sanctions – notably in the form of administrative fines – where persons – whether individuals or legal persons – act in breach of the applicable norms. Reference in particular is made to the Constitutional Court judgement in names Federation of Estate Agents versus Direttur Generali (Kompetizzjoni) et given on the 3rd May 2016. In that judgement the Court held that powers that the Director General Competition ('DG Competition') had under the Competition Act to impose punitive fines against non-compliant persons acting in breach of competition law, were contrary to article 39(1) of the Constitution which article requires that a person accused of a criminal offence is entitled to a fair hearing before an independent and impartial court established by law. The Court decided that once the sanctions imposed by the DG Competition even though these sanctions consisted of 'administrative' fines, were sanctions of criminal nature since they were meant to punish. Therefore in accordance with article 39(1) of the Constitution such sanctions could only be imposed by a court of law. In July 2019 amendments to the Competition Act and to the Consumer Affairs Act came into force whereby the DG Competition and the Director General Consumer Affairs ('DG Consumer Affairs') are, as a result of these amendments required to apply to the Civil Court (commercial jurisdiction) for the imposition of any sanctions – including administrative fines – or for the any order restraining or requiring compliance with competition and consumer protection laws.

CA believes that the measures introduced a step in the wrong direction. Such measures will prolong the taking of effective enforcement measures to stop anti-competitive practices or unfair practices which are of harm to consumers in good time. Rather than addressing the shortcomings of the former regulatory regime, in particular the failure in practice to take immediate action to prohibit detrimental practices in the marketplace.

CA believes that if anything the competent regulatory authorities need to be empowered to take immediate enforcement measures to stop in their tracks any harmful practices that impact consumers. The regime as now revised even in urgent cases requires a minimum of at least seven days before any final decision is taken by the competent authority – in this case the Civil Court – to issue a decision prohibiting such practices. In the opinion of the CA the recent legislative measures introduced as a direct result of the Federation of Estate Agents judgement do not facilitate the taking of measures by the competent authorities in good time to stop abusive behaviour.

Moreover there is the practical consideration that the amendments introduced as Act XVI of 2019 – even if one for the sake of argument – agrees with those amendments and the solutions they provide – address only matters in so far as the enforcement of competition law and consumer law by the DG Competition and DG Consumer Affairs within the Malta Competition and Consumer Affairs Authority (‘MCCAA’) are concerned. No measures were adopted in relation to enforcement powers of other public authorities who as the law stands have the power to impose substantial administrative fines, leading therefore to the possibility if not probability that constitutional lawsuits similar to that undertaken by the Federation of Estate Agents will be undertaken to contest the enforcement and sanctions powers of other diverse public authorities.

CA submits that the applicable constitutional provisions in tandem with other changes to ordinary law – notably in this case – competition law and consumer law – should be reviewed and amended. CA believes that the solutions adopted as a result of the enactment of Act XVI of 2019 are only piecemeal and fail to address matters holistically.

CA firmly believes that what is necessary is to revisit the applicable constitutional norms. CA suggests that the wording of article 39(1) of the Constitution should be amended whereby whilst safeguarding the right of a person to a fair hearing before a court, a public authority set up by law can issue administrative penalties which are subject to the right of review before a court and cannot in any case be imposed before the lapse of the period during which such a right of review can be exercised. If a person against whom an administrative sanction has been imposed by a public authority avails himself within the prescribed period of appeal/review of his right to contest such decision, then the decision imposing the fine will not be enforceable until the case is finally concluded before the competent adjudicative forum.

CA further suggests that in the definition of ‘court’ under article 47(1) of the Constitution is revised to include any other adjudicative forum whereby the decisions of the forum are taken only by the presiding judge or magistrate. This amendment would in practice mean that the Administrative Review Tribunal would also then be considered as a ‘court’ for the purposes of article 39(1) of the Constitution.

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