

Benchmarking of existing national legal e-business practices

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Country report - Malta

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Prepd.	Dr Joseph Camilleri & Joe Borg Bartolo

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Malta

1. General information on the national legal system

Malta is a parliamentary representative democratic republic founded on principles laid down in its written constitution. The Head of State is the President of the Republic, who however is vested with limited executive powers. The Executive Power is exercised by the government, headed by the Prime Minister, whilst the unicameral "House of Representatives", made up of up to sixty-five members of Parliament, is vested with the Legislative powers. Malta has been a member of the European Union since 1st May 2004.

There are two main procedures whereby laws and regulations are enacted in Malta. New Acts of Parliament, or Acts amending existing legislation come into force after being approved by a simple majority of the House of Representatives – amendments to certain "entrenched" provisions of the Constitution require a two-thirds Parliamentary majority. On the other hand, "subsidiary legislation" (that is, Regulations enacted under a "principal" or "enabling" Act) is generally enacted by means of a "Legal Notice" issued by the Minister responsible for the matter in question after consultation with the relevant Authority or Authorities. The latter procedure has been held to be very practical in introducing detailed regulations regarding specialised matters, and has been used to implement some EU Directives in Malta. EU Directives are generally transposed into domestic legislation by virtue of an Act of Parliament. Where a Directive concerns an already regulated field, an "amending Act" is generally brought into force to introduce changes in existing legislation. However, if the provisions to be introduced in Maltese legislation are of such a nature as to allow them to be enacted by virtue of Ministerial regulations through the publication of a Legal Notice, this latter approach may also be opted for.

The main sources of law of the Maltese legal system are the Codes and Acts, which are all written and divided into a total of 484 Chapters¹. The Maltese legal system belongs primarily to the civil and Roman law tradition and its main codes on civil matters (the Civil Code, the Commercial Code, the Code of Organisation and Civil Procedure) were originally drafted in the 19th century and consciously based on Continental laws. Later enactments concerning specialised commercial matters (for instance the Companies Act) tended to be influenced by English law and, more recently prior to Malta's entry in the European Union, by EU legislation. Besides in the commercial sector, the influence of English law is most strongly felt in criminal procedural law and administrative law.

¹ May be accessed at www.mjha.gov.mt/justice/legalservices.html

In Malta, Court decisions are also considered important sources of law but there is no doctrine of precedent and courts are not required to follow previous judgments even if originating from a court placed higher in the judiciary system.

The courts of Malta are mainly divided into the Civil and Criminal Courts, with further subdivisions according to the extent and nature of the claim. In civil matters, the lower courts (the Courts of Magistrates) adjudicate claims having a value of up to Lm 5000 while the First Hall of the Civil Court hears matters having a value of more than Lm 5000 or issues relating to rights over immovable property. There is no administrative court, nor is there a specialised commercial court. Decisions at first instance may be appealed to the Court of Appeal which is composed of either one judge (in appeals from decisions of the Court of Magistrates or tribunals) or three judges (in the case of Appeals from judgments of the First Hall of the Civil Court).

There are then a number of minor "specialised" tribunals. These include the "Small Claims Tribunal" (which adjudicates money claims of up to Lm 1500), the Industrial Tribunal (which has the jurisdiction to decide industrial law issues, primarily unlawful termination of employment) and the Rent Regulation Board.

Another forum is the "Consumer Claims Tribunal" which may take cognisance of claims not exceeding the monetary value of one thousand five hundred Maltese Liri (Lm1,500) by consumers against traders in relation to disputes about the hire or purchase of goods or services. The Tribunal may also award the consumer, up to one hundred Maltese liri (Lm 100) compensation for "moral damages" caused by any pain, distress, anxiety and inconvenience suffered. This procedure may potentially extend to transactions concluded with consumers through e-commerce (B to C). A decision of the Consumer Claims Tribunal is enforceable in the same way as any other court judgment (that is, through executive warrants issued after an apposite application to the Courts).

The parties of a contract are also free to choose arbitration for settlement of a dispute. Recent procedural amendments have also established the concept of "mandatory arbitration" whereby certain relatively minor matters (primarily collision claims and condominium disputes) may not be decided by the Courts, but have to be referred to an arbitrator acceptable to all parties to the suit.

There are also a number of Appeals Boards whereby parties to a decision of an administrative body may appeal. This is the case in the electronic communications, postal, competition law, resources, tourism and travel, and planning sectors for example. Appeals exclusively on points of law arising from the decision of the said Appeals Boards may be lodged by aggrieved parties to the Court of Appeal in its inferior jurisdiction.

In Civil Law court cases, the procedure starts with the plaintiff filing an application (which must be confirmed on oath in procedures before the First Hall of the Civil Court) setting out his claims and the grounds on which they are based. The defendant then presents a "note of pleas" and oral proceedings start following the appointment of sittings. As a general rule, evidence is first presented by the Plaintiff, and subsequently, when the Plaintiff declares that he has no further evidence to bring forward, by the Defendant. The evidence should be relevant in the light of the claims and the note of pleas. The parties have the right to cross-examine witnesses presented by the other party. The Court has the authority to regulate and decide what evidence is admissible, and it may also require or direct the parties to bring forward particular evidence to clarify relevant issues. As a general rule, the Court of Appeal does not hear any new witnesses nor does it consider new evidence and the parties merely present written and oral submissions addressing the grounds of appeal.

2. Electronic signatures

2.1 National legislation and administrative practices

Malta has partially transposed Directive 1999/93/EC of a Community framework for electronic signatures by the Electronic Commerce Act, 2001 (Chapter 426 of the Laws of Malta) ("the E-Commerce Act"). The law entered into force as of 10 May 2002. The provisions of this Act would be complemented by means of subsidiary legislation that is presently in discussion stage. According to the Malta Communications Authority, this legislation is expected to be adopted in the near future.² There is no specific Act under Maltese law that regulates electronic signatures exclusively. Moreover, like the Directive, Malta has no regulation concerning the contractual relationship between the parties who use digital signatures.

The E-Commerce Act describes 3 types of signatures: 1) An electronic signature³, 2) An advanced electronic signature⁴, 3) An advanced signature based on a qualified certificate⁵.

² In September 2005, a public consultation document entitled "Proposed regulations under the Electronic Commerce Act (Cap 426)" was launched by the Ministry for Competitiveness and Communications in tandem with another consultation paper by the Malta Communications Authority (the authority that regulates e-commerce in Malta) entitled "Regulating the Information Society Services Sector - Consultation Document". These documents invited the public to comment on a set of draft regulations intended to complete the transposition of the said Directive 1999/93/EC and Directive 2000/31/EC

³ Article 2 of the E-Commerce Act defines this as "data in electronic form which are attached to, incorporated in or logically associated with other electronic data and which serve as a method of authentication"

⁴ Article 2 of the E-Commerce Act defines this as "an electronic signature which meets the following requirements:

Article 6 of the E-Commerce Act transposes Article 5 of Directive 1999/93/EC. It provides that if under any law in Malta the signature of a person is required, such requirement is deemed to have been satisfied if such signature is an electronic signature. Similar to what is provided in Article 5.2 of Directive 1999/93/EC, the said Article 6 of the Act goes on to provide that such an electronic signature is not to be denied legal effectiveness on the grounds that it is (a) in electronic form; or (b) not based upon a qualified certificate; or (c) not based upon a qualified certificate issued by an accredited signature certification service provider; or (d) not created by a secure signature creation device.

Article 6 further contains a proviso which ensures that an electronic signature in the form of an advanced electronic signature that is based on a qualified certificate and created by a secure creation device⁶ is to be presumed, for all intents and purposes of law, to be the signature of the signatory. This means that the authenticity of such a signature cannot be contested at law. The Maltese Act thus creates a legal presumption in favour of the signatory where such signatory uses a qualified advanced signature and shifts the onus on any person alleging otherwise to prove that such person is not the signatory whom he purports to be.

It is relevant to note that under Maltese law signatures are only required to be appended to certain contracts as a precondition for

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- (a) it is uniquely linked to the signatory;
 - (b) it is capable of identifying the signatory;
 - (c) it is created using means that the signatory can maintain under his sole control;
- and
- (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable"

⁵ Section 2 of the E-Commerce Act defines a qualified certificate as a "certificate [an electronic attestation, which links signature verification data to a person and confirms the identity of that person] which meets the requirements established by or under this Act [these are listed in the Second Schedule to the Act which reproduces Annex I of the E-Signatures Directive] and is provided by a signature certification service provider who fulfils the requirements established by or under this Act [these are listed in the Third Schedule to the Act which reproduces Annex II of the E-Signatures Directive]"

⁶ The Fourth Schedule to the E-Commerce Act lays down that Secure signature creation devices must, by appropriate technical and procedural means, ensure at the least that:

- (a) the signature creation data used for signature generation can practically occur only once, and that their secrecy is reasonably assured;
 - (b) the signature creation data used for signature generation cannot, with reasonable assurance, be derived and the signature is protected against forgery using currently available technology;
 - (c) the signature-creation-data used for signature generation can be reliably protected by the legitimate signatory against the use of others;
- and that Secure signature creation devices must not alter the data to be signed or prevent such data from being presented to the signatory prior to the signature process.

the validity of such contracts in specific cases expressly regulated by the said law, for example in those cases where a contract must be published by means of a public deed (that is, published by a Notary and attested by witnesses), such as in the case of a contract of sale of immovable property.

Electronic signatures are not commonly used in business relationships, although some of the larger companies in Malta have sought to introduce a policy mandating the use of advanced electronic signatures in their daily electronic communications with third parties, particularly where sensitive information is transmitted within such communications, as a secure means of identification and authenticity. The effectiveness of such policies will necessarily have to be gauged by the level of compliance and the extent to which mandatory enforcement is carried out. Such effectiveness remains to be seen.

On a national level, the Maltese Government has embarked on a number of e-Government initiatives⁷ aimed at providing a broader range of online services to the public. The Ministry for Investment, Industry and Information Technology⁸ is the Ministry responsible for e-Government and is seeking to implement this initiative. It has declared that this initiative shall have the following objectives: to deliver first-class public service, by ensuring an increase in citizen participation within government decision-making and to streamline public services by realising internal efficiency gains.

The progress achieved by Malta in the provision of e-Government services has been highlighted in a survey conducted by the European Commission⁹. Malta was reported to have achieved the most outstanding progress ever recorded, moving from 16th to 2nd place in the ranking of 28 European countries.

The Ministry has inter alia sought to actively promote the use of Electronic Identity Cards (e-IDs) for all online services provided from Government Department's websites. Such e-IDs, which consist of a password and a Personal Identification Number (PIN) valid for any e-Government services, are obtainable from a number of Local Councils in Malta. A digital certificate is given to the applicant upon his/her ID card being checked and verified.

⁷ This initiative is being addressed through a number of inter-linked parallel implementation streams. Primarily, Government is actively pursuing public-private relationships with the local ICT sector in the light of establishing long-term trust based relationships for the design, development, implementation of a range of electronic services. The core operations of the initiative are being developed within Government's IT Agency, MITTS Ltd, which seeks to provide a common platform and launching pad for all services. The approach seeks to achieve a seamless e-Government, with a cost effective and efficient re-engineering of existing services. Further information can be obtained at www.govt.gov.mt

⁸ <http://www.miti.govt.gov.mt>

⁹ The survey was carried out for the European Commission by consultants Capgemini in 2006 and examined 14,000 web sites in the 25 EU Member States plus Norway, Iceland and Switzerland.
http://europa.eu.int/information_society/eeurope/i2010/index_en.htm

In this regard, the VAT Department is at the forefront, enabling VAT-registered persons to access VAT services remotely¹⁰ through the use of e-IDs.

2.2 Cross border regulatory issues

In line with Directive 1999/93/EC's objective of facilitating cross-border service provision in this field, signature certification services or services related to electronic signatures are not subject to any prior authorisation. Therefore, while such organisations may be asked to notify the Authorities that they have started business, they will not require a licence to operate.

Notwithstanding such principle of 'no prior authorisation', however, the Malta Communications Authority has been designated as the body responsible for the supervision of Signature Certification Service Providers.

The E-Commerce Act does not contain any dispositions concerning the recognition of qualified certificates issued to the public by a certification service provider established in a third country. In accordance with the E-Signatures Directive, there is no prohibition of this either.

3. General elements of electronic contract law

Directive 1997/7/EC on the Protection of Consumers in Respect of Distance Contracts has been implemented through the Distance Selling Regulations¹¹, which regulations were enacted by the Minister after consultation with the Consumer Affairs Council¹² in accordance with his powers under the Consumer Affairs Act¹³.

Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been implemented through the Consumer Affairs Act¹⁴.

Similarly Directive 1998/6/EC on Price Indications has also been implemented as a result of the enactment of the Consumer Affairs Act (Price Indication) Regulations¹⁵ by the Minister after consultation with the Consumer Affairs Council in accordance with his powers under the Consumer Affairs Act¹⁶.

¹⁰ <http://www.vat.gov.mt/docs/eid.pdf>

¹¹ Legal Notice 186 of 2001

¹² The Council is a statutory body appointed by Government in accordance with the Consumer Affairs Act, to advise Government on issues which impact consumers.

¹³ Chapter 378 of the Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_10/chapt378.pdf

¹⁴ Chapter 378 of the Laws of Malta

¹⁵ L.N. 283 of 2002

¹⁶ Chapter 378 of the Laws of Malta

Directive 2000/31/EC on information society services, in particular electronic commerce, has been implemented into Maltese law through the E-Commerce Act 2001¹⁷.

3.1 National legal and administrative practices

The basic principles of Maltese contract law are found in the Civil Code¹⁸ and the Commercial Code¹⁹ and apply to the traditional physical contracts and to electronic contracts alike. The provisions in the E-Commerce Act that regulate electronic contracts supplement the said provisions of the said Codes insofar as electronic contracts generally are concerned. Additionally, insofar as electronic contracts concluded with consumers are concerned, the E-Commerce Act is further supplemented by the provisions of the Consumer Affairs Act and regulations made thereunder (including the Distance Selling Regulations).

In cases where Maltese contract law allows a free form, the parties are free to enter into contracts in such manner and under such terms as they may choose: in writing, verbally or even by implication from their actions. In this category, the mere fact that such contracts are entered into electronically will not affect their contractual validity and any legal issues that may arise may only relate to the manner in which their terms might be evidenced.

Under Maltese contract law, however, some contracts require a solemn written form, either as a private writing or as a public deed, in order that they may be valid. The Maltese Civil Code lists a number of transactions that must, on pain of nullity, be expressed in writing. This list includes any agreement implying a promise to transfer or acquire the ownership or any other right over immovables, any promise of loan, certain leases and the constitution of a civil partnership. The Civil Code provides that, saving the cases where the law specifically requires the instrument to be a public deed, the transactions included therein are to be expressed in a public deed or private writing. Other provisions in the Civil Code and other laws also impose a similar requirement.

Apart from being externally valid, there are a number of internal requisites that additionally need to be satisfied in order that a contract may be deemed valid: the capacity of the parties to contract, the consent of the party who binds himself, the thing that forms the subject matter of the contract, and a lawful "*causa*"²⁰.

¹⁷ Chapter 426 of the Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt426.pdf

¹⁸ Chapter 16 of the Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt16.pdf

¹⁹ Chapter 13 of the Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_2/chapt13.pdf

²⁰ "*Causa*" is the juridical motive for undertaking the obligation contemplated in the particular contract. An example of an unlawful *causa*, which renders the obligation null and without effect, is a *causa* that is prohibited by law or runs counter to morality or

The E-Commerce Act is silent in this regard and therefore it is the Civil Code that regulates these matters.

Article 3 of the E-Commerce Act lays down the general principle that a contract is not to be deemed invalid merely because it takes place wholly or partly by electronic means. In line with Directive 2000/31/EC, this Article 3 of the said Act seeks to ensure that electronic documents are functionally equivalent to ones drawn up by conventional means.

Article 5 of the Act in turn provides that if any law requires or permits information to be given in writing, that requirement shall be deemed to have been satisfied if the information is given by means of an electronic communication.

This rule applies, provided that –

(a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference;

(b) if the information is required to be given to a person, or to another person on his behalf, and the first mentioned person requires that the information be given in accordance with particular information technology requirements, by means of a particular kind of electronic communication, that person's requirement has been met;

(c) if the information is required to be given to a person who is neither a public body nor to a person acting on behalf of a public body, then the person to whom the information is required or permitted to be given, consents to the information being given by means of an electronic communication; and

(d) if the information is required to be given to a person, or to another person on his behalf, and the first mentioned person requires that a particular action be taken by way of verifying the receipt of the information, that person's requirement has been met.

Article 9 of the E-Commerce Act in turn provides that under Maltese law an electronic contract will not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form or has been entered into wholly or partly by way of electronic communications or otherwise. The said Article further provides that for the purposes of contract law any offer, acceptance of an offer or other related communication, including any subsequent amendment, cancellation or revocation of the same may be communicated by electronic means.

to public policy (e.g. a contract between Internet user A and Internet user B, where A is an online merchant who offers prostitution services through his website – such a contract would be deemed null under Maltese law on the basis of a *causa* that is contrary to public policy or morality).

Article 4 of the E-Commerce Act transposes Article 9(2) of Directive 2000/31/EC, which excludes specific types of contracts to be concluded electronically. In the current version of the Act, the said exclusion lies in regard to the following areas and activities²¹:

- (a) the field of taxation;
- (b) matters in relation to information society services covered by any laws relating to data protection including the Data Protection Act, the Processing of Personal Data (Telecommunications) Regulations, 2003 and the Telecommunications (Personal Data and Protection of Privacy) Regulations, 2003;
- (c) questions in relation to agreements or practices governed by competition law;
- (d) the following activities of information society services:
 - (i) the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
 - (ii) the representation of a client and defence of his interests before the courts,
 - (iii) gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions;
- (e) contracts that create or transfer rights over immovable property other than leasing rights;
- (f) contracts of suretyship granted and on collateral security furnished by persons acting for purposes outside their trade, business or profession;
- (g) the law governing the creation, execution, amendment, variation or revocation of:
 - (i) a will or any other testamentary instrument;
 - (ii) a trust; or
 - (iii) a power of attorney;
- (h) any law governing the making of an affidavit or a solemn declaration, or requiring or permitting the use of one for any purpose;
- (i) the rules, practices or procedures of a court or tribunal however so described;
- (j) any law relating to the giving of evidence in criminal proceedings;

²¹ Article 4 of the E-Commerce Act, with reference to the Fifth Schedule of the Act

(k) any law relating to the protection of public health or consumer interests in so far as this protection does not restrict the freedom to provide information society services.

3.1.1 *Electronic invitation to make an offer and submission of an offer*

It is important to note the distinction between the notion of an "offer" and that of an "invitation to treat". The scenarios envisaged by Maltese law to constitute a mere invitation to treat are not as all-encompassing as those under other legal systems. The Commercial Code²² limits such cases to offers made to the public by way of "catalogues or other advertisements". The "exhibition of goods", on the other hand, always constitutes an offer binding the person making the exhibit, provided that "it is accompanied by an indication of the price and all other conditions of the sale".

In the online world one may draw an analogy between commercial communications made via e-mail and circulars in conventional commerce; and a further analogy between websites and shop windows and catalogues. This would lead to the conclusion that both commercial communications made via e-mail and websites constitute mere invitations to treat (not offers). This may be said to be in line with the said restrictive nature of the Commercial Code and it is submitted (although there are to date no Maltese court judgments that have determined this issue) that the Maltese courts would reach this conclusion – at least in the case of websites and e-mail messages that inform Internet users of the availability of goods and services.

Although not expressly stated in the E-Commerce Act, it may be argued that the only exception to this rule would lie in regard to those cases where such websites or e-mail offers are expressly described by the online merchant himself to constitute binding offers rather than mere invitations to treat. It is effectively this intention of the online merchant to be bound that distinguishes an offer from a mere invitation to treat under Maltese law. This is clearly laid down by the Commercial Code, which provides that an offer made to the public by means of catalogues or other advertisements is not binding unless it has been expressly declared to be so. The Commercial Code therefore distinguishes between the "exhibition of goods", which denotes more of a physical presence, as for example goods in a shop window, and offers made to the public by catalogues and similar advertisements. In the case of the former, the idea is that once the goods are there on display then the customer ought to be able to buy them there and then at the price indicated. Although goods may be "exhibited" on a website, the effect is similar to that of goods displayed in an advertisement or a catalogue, and therefore this scenario constitutes a mere invitation to treat.

The E-Commerce Act has attempted to introduce certainty with respect to the notion of 'offer and acceptance' of e-contracts by stating that the e-contract is concluded upon receipt by the customer

²² Section 113

of an acknowledgment of the order placed. Hence, in these terms, if the acknowledgment constitutes the acceptance, the order is the offer, whereas any prior communication by the trader is an invitation to offer.

3.1.2 *Electronic acceptance*

Maltese contract law requires some kind of subjective intent on the part of the contracting parties in order for contractual obligations to arise.

As stated above, by virtue of Article 9 of the E-Commerce Act, acceptance may be communicated by electronic means.

Article 15 of the E-Commerce Act further seeks to cater for the situations where communications, including acceptances, are automatically generated by one of the party's computers. The said Article 15 provides that "(a)n electronic communication between an originator and an addressee shall be deemed to be of the originator if it was sent by an information system programmed to operate automatically by or on behalf of the originator".

3.1.3 *Moment of conclusion of contracts*

Under Maltese law, a contract is deemed to be concluded when offeror A is informed of acceptor B's acceptance of A's offer. The law thus seeks to protect the subjective intention of both parties. An exception lies where A does not get to know of B's acceptance as a result of some fault or negligence on A's part. In such case, the so-called theory of reception applies, which provides that the contract is concluded when A receives B's acceptance, even if such receipt objectively takes place – i.e. if A has objectively received the message of acceptance.

The Commercial Code lays down the moment of conclusion of a contract to be when the acceptance "has ... become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally"²³ (emphasis added).

There must therefore not only be a co-existence of two wills but a mutual awareness of such co-existence. The offeror must not only have received the acceptance but must also be aware of the same. The above Section of the Code however limits its scope to contracts entered into by way of correspondence.

Article 10 of the E-Commerce Act in turn provides that, unless otherwise agreed by parties who are not consumers, where the addressee of an electronic communication is required to give his consent through technological means in accepting the originator's offer, an electronic contract is concluded "when the addressee has

²³ Section 110

received from the originator, electronically, an acknowledgement of receipt of the addressee's consent", provided that when the order is placed, the originator has to acknowledge the receipt of the addressee's order without undue delay and by electronic means. An acknowledgement of receipt is deemed to have been received when the addressee is able to access it. This rule however does not apply to contracts concluded exclusively by e-mail or by any other similar technological means.

The legal situation is however uncertain when seeking to apply the above rule of moment of conclusion of contracts to website contracts. It was argued above that a website would likely constitute an invitation to treat (not an offer). The following scenario could be envisaged. Online merchant A has a website and prospective purchaser B completes an online form. B is thereby deemed to have made an offer. A subsequently decides to accept this offer and sends his acceptance to B. In other words, the contract would be concluded when the person making the offer (purchaser B) receives an acknowledgment from the other party (online merchant A) that A has received B's offer and accepted it.

However the terminology in the E-Commerce Act would seem to imply otherwise. Article 10 of the said Act speaks of "accepting the originator's offer", implying that the offer is to emanate in all cases from the online merchant. This leads to confusion and may further result in undesirable consequences not envisaged or desired by the legislator.

For example, problems may arise where the goods being advertised by the online merchant are out of stock.

Moreover, the proviso speaks of the order being placed by the addressee. This implies that the addressee is the customer and hence presents a situation diametrically opposite to that portrayed in the previous paragraph.

This confusion has, to a certain degree, been mitigated by the fact that the same paragraph (1)(a) of Article 10 clearly defines the moment of conclusion of the contract as that in which the addressee of the communication is able to access an acknowledgment from the originator of the receipt of the addressee's consent.

It is understood that amendments to this article of the Act are currently being discussed with the intention of bringing about greater legal certainty and amending the inconsistencies of terminology where these exist. These amendments, as proposed, would clarify that the provider of the service is originally merely making an invitation to treat, whereas the recipient of the service (the customer), by means of his order, makes an offer. The acknowledgment of the order constitutes acceptance and defines the moment in which the contract is concluded.

Further problems arise from the terminology used by the current version of the E-Commerce Act, which, as noted above, is different to that used by Directive 2000/31/EC. As discussed, Article 10 of the E-Commerce Act is drafted in terms of "originator" and "addressee". The definition of an "addressee" provides that this is "a person who is intended by the originator to receive the electronic communication." Both the definitions of originator and addressee exclude persons acting as a service provider with respect to the processing, receiving or storing of, or providing other services with respect to the electronic communication sent or received, from the ambit of the definitions.

The White Paper containing the explanatory memorandum and draft bill that eventually became the E-Commerce Act clarified that in a sale over the Internet the addressee would be the customer. Conversely, therefore, the online merchant would be the originator. As noted earlier, the Act does not define "service provider".

A number of observations may be made. Article 11 of Directive 2000/31/EC merely imposes an obligation on the service provider to acknowledge receipt of the recipient's order. In no way is this requirement linked to the moment of conclusion of the online contract. Second, the imposition of such obligation makes it more likely, under the Directive, that it is the communication made by the customer with the trader that will most likely amount to the offer.

The wording of Article 11(1) of the Directive seems to assume that the website is not an offer but merely an invitation to treat. This is implied in the said Article which contemplates a situation where the recipient of the service "places his order" through technological means. This shows that the customer is deemed to place an order rather than accept the website's offer.

Moreover, the Directive is drafted in terms of "service providers" and "recipients of such service", in contrast with the E-Commerce Act, which uses the more restrictive terms of "originator" and "addressee", both of which specifically exclude from their scope service providers and virtually all services relating to them. The amendments to the E-Commerce Act being discussed at the time of this report tackle this inconsistency of terms between the said Act and the Directive, too, and propose to replace the term 'originator' with 'service provider' and 'addressee' with 'recipient of the service'. The term 'service provider' would moreover be defined in accordance with the definition found in the Directive.

3.1.4 Information obligations in relation to electronic contract conclusion

Article 10 of Directive 2000/31/EC requires Member States to ensure that their implementing national legislation lays down an obligation on service providers to "clearly, comprehensively and unambiguously and prior to the order being placed by the recipient of the service", provide information as to the manner of the formation of an electronic contract.

The Maltese E-Commerce Act has transposed the above Article 10 obligation with a difference. While the said Directive imposes the above obligation on "service providers", the E-Commerce Act speaks of "originators", who are defined as including any persons who send or generate an electronic communication, other than service providers. The term "service provider" is in turn not defined anywhere in the E-Commerce Act. As mentioned above, a remedy to this situation is being discussed at the time of writing of this report.

Article 11 of the E-Commerce Act further provides that addressees of electronic contracts must be provided with information relating to any terms and conditions applicable to the said contract. Such terms and conditions must be made available to the said addressee in a way that allows the latter to store and reproduce them.

Save for those circumstances in which the contracts in question are concluded exclusively by e-mail or by other similar technological means, the following information must further be provided in clear, comprehensive and unambiguous terms, prior to a customer placing an order:

- (a) the name and address where the originator is established;
- (b) the e-mail address where the originator can be directly contacted;
- (c) the registration number of the originator in any trade register or of any professional body, if applicable;
- (d) where the activity of the originator is subject to an authorisation, the activities covered by the authorisation granted to the originator and the particulars of the authority providing such authorisation;
- (e) the Value Added Tax (VAT) registration number of the originator where the originator undertakes an activity that is subject to VAT;
- (f) the different steps to follow to conclude the contract;
- (g) the technical means for identifying and correcting input errors prior to the placing of the order;
- (h) the language or languages in which the contract may be concluded;
- (i) a statement of whether the concluded contract will be filed by the originator and whether it will be accessible.

Exceptions to the provisions of this Article are only allowed in business-to-business commerce.

The issue of accessibility of the terms and conditions of online B2C contracts is of some concern. A clickable icon or hyperlink on the website usually serves the purpose of displaying such terms and conditions adequately to the consumer, but much depends on where such icon or link is placed. It must be placed in such a way as is visible and easily accessible to the consumer before the contract is formed. The most legally compliant solution would arguably be one where the consumer is made to scroll through the terms and

conditions before he clicks the "order" or "submit" button to submit his completed application form to apply for the service offered by the online merchant. The "order" or "submit" button would not be activated before the consumer scrolls through the terms and conditions in the dialog box that pops up onto the screen.

The above information obligations are supplemented, insofar as consumer contracts are concerned, with the provisions of the Distance Selling Regulations, which oblige a trader to provide "(i)n good time before the conclusion of any distance contract" and "in a clear and comprehensible manner appropriate to the means of distance communication used" the information listed in the said Regulations²⁴. The trader shall in any case always make clear the commercial purpose of the information given.

The Regulations define a "distance contract" as "any contract concerning goods or services concluded between a trader and a consumer under an organised distance sale or service provisions scheme, arrangement, undertaking or similar activity run or operated by the trader, who for the purpose of the contract, makes exclusive use of one or more means of distance communication up to, and including, the moment when the contract is concluded"²⁵. The term "means of distance communication" is defined as referring to "any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the purposes of the conclusion of a contract between those parties as contained in the First Schedule"²⁶.

The said First Schedule to the Regulations includes e-mail as a means of distance communication. Another such means is videotex (microcomputer and television screen) with keyboard or touch screen. Internet as such is not listed in the said Schedule and may arguably raise issues in regard to the applicability of the above to website contracts.

Regulation 5(1) of the Distance Selling Regulations further provides that in order for a distance contract to be enforceable against a consumer, the trader must have provided the said consumer with written confirmation or confirmation in another tangible medium available and accessible to the consumer of the information referred to under Regulation 4(1)(a) to (f)²⁷, either (a) prior to the

²⁴ Regulation 4, Distance Selling Regulations

²⁵ Regulation 2, Distance Selling Regulations

²⁶ Regulation 2, Distance Selling Regulations

²⁷ The information referred to in reg.4(1)(a) to (f) is as follows:

"(a) the full name and the permanent address of trade or business of the trader;

(b) a description of the main characteristics of the goods or services;

(c) the price of the goods or services including any taxes or any charges due;

(d) delivery costs, where appropriate;

(e) the arrangements for payment, delivery or performance;

(f) the existence of the right of cancellation by the consumer, except in the cases referred to in regulation

6(5);" The cases referred to in reg. 6(5) are those instances where the consumer may not exercise his right to cancel a contract in relation to which the regulations apply.

conclusion of the contract, or (b) in good time during the performance of the contract and at the latest at the time of delivery where goods not for delivery to third parties are concerned. This obligation does not apply to services performed by the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer shall in all cases be entitled to obtain the permanent address of the place of trade or business of the trader to whom he can address any complaints.

Regulation 5(2) of the said Regulations further provides that a distance contract to which such Regulations relate will only be enforceable against the consumer if the trader provides the consumer with (a) written information on the conditions and procedures for exercising the right of cancellation under these Regulations; (b) the full name and the permanent address of trade or business of the trader to which the consumer may address any complaints; (c) information on after-sales services and commercial guarantees which exist; and (d) the concluding date for cancelling the contract, where it is of an unspecified duration or of a duration exceeding one year.

In case of dispute, the onus is on the trader to prove that written confirmation of the information which he is required to provide under the said Regulation 5(1) and (2) has been provided to the consumer.

3.1.5 Standard terms and unfair clauses

The Consumer Affairs Act (Chapter 378, Laws of Malta) prohibits unfair practices²⁸. Articles 44-47 of this Act deal with the prohibition of unfair terms. More specifically article 44 prohibits the use of terms or combination of terms whose object or effect is that of:

- (a) 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;
- (b) establishing an unreasonably short period for notifying the trader of any defects;
- (c) excluding or limiting the legal rights of a consumer against the trader in the event of total or partial non-performance or inadequate performance by the trader of any of his contractual obligations;
- (d) prohibiting the consumer from offsetting a debt owed to the trader against a claim which the consumer may have against the same trader;

²⁸ Articles 44-55 of the Consumer Affairs Act

- (e) making an agreement binding on the consumer whereas the provision of services or goods by the trader is subject to a condition whose realisation depends solely on the will of the trader;
- (f) allowing the trader to retain sums paid by the consumer if the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract;
- (g) requiring a consumer who fails to fulfil his obligation, to pay to the trader as compensation a sum which is disproportionately high to the value of the goods or services purchased or hired;
- (h) determining the compensation payable by a consumer who fails to fulfil his obligations, without providing for compensation of the same magnitude by the trader who fails to fulfil his;
- (i) limiting the means of proof which the consumer can use;
- (j) causing the consumer to waive any ground of claim against the trader in the event of a dispute;
- (k) prohibiting the consumer from seeking the cancellation of the contract if the trader fails to fulfil his obligations;
- (l) restricting the right of the consumer to cancel the contract if the trader, in connection with any guarantee or warranty given, does not fulfil his obligation or fails to do so within a reasonable period;
- (m) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (n) enabling the trader to alter the terms of a contract unilaterally, without a valid reason which is specified in the contract;
- (o) enabling the trader to alter unilaterally, without a valid reason, any characteristics of the product or service to be provided;
- (p) providing for the price of goods to be determined at the time of delivery by the trader or allowing him to increase the price without in any case giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- (q) causing the price to vary by reference to factors depending only on the will of the trader;
- (r) giving the trader the right unilaterally to determine whether the goods or services supplied are in conformity with the contract;

- (s) giving the trader the exclusive right to interpret any term of the contract;
- (t) limiting or eliminating the obligation of the trader to respect commitments undertaken by his agents or employees;
- (u) obliging the consumer to fulfil his obligations where the trader does not perform his;
- (v) allowing the trader the possibility of transferring all his rights and obligations under the contract where this may serve to reduce the guarantees or warranties for the consumer, without the consent of the consumer;
- (w) providing for an immediate and final commitment by the consumer on signature of the contract, with the trader contracting subject to a condition the fulfilment of which depends only on the will of the trader; and
- (x) permitting the trader to establish or alter unilaterally the period for delivering goods or supplying a service.

Should any such prohibited term be inserted in any consumer contract, such term shall be deemed as though it was never so inserted.

The above list of unfair terms is not an exhaustive list. Rather, the Consumer Affairs Act expressly provides that an unfair term is to be interpreted as 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.

The Act is meant to protect “consumers” as defined in Section 2 of the Act²⁹. The definition excludes from the meaning of “consumer”

²⁹ “consumer” means -

- (i) any individual who in transactions and other matters covered by this Act or any regulations made thereunder, 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,

any individual who is acting for purposes relating to his trade, craft, business or profession. The remedies under the said Act therefore do not apply to B2B contracts but only to B2C contracts. The Consumer Affairs Act does not extend its protection to SMEs, notwithstanding the fact that they may be considered a "weaker party" when compared to larger business organisations.

One should note that although the principles set out in the Consumer Affairs Act may be applied to e-commerce transactions, the said Act was originally enacted with "traditional" business transactions in mind. In view of the increasing use of electronic commerce in Malta, however, the need is being felt to implement legislation which gives specific protection in the case of electronic transactions. The E-Commerce Act provided minimum safeguards to consumer rights in the online business. The proposed E-Commerce Regulations seek to address this need. Indeed, the Explanatory Memorandum published by the Ministry for Competitiveness and Communications in September 2005 in the context of a public consultation regarding E-commerce, makes reference to a number of issues which will eventually be addressed with the enactment of the proposed Regulations. Thus, the proposed Regulations will impose stricter requirements on the online trader to be transparent. The draft Regulation, for instance state that any communication from the trader shall be clearly identified as a commercial communication, and require that in the case of any promotional offer, all conditions should be presented "clearly and unambiguously".

Interestingly, the draft Regulations propose that the Malta Communications Authority will be competent to hear and determine disputes between an information society service provider and a consumer including a recipient of the service. It is not clear whether this would exclude the competence of the Consumer Claims Tribunal in e-commerce cases should the Regulations as proposed come into force.

The Regulations as proposed do not tackle the issue of the validity of standard terms on the website of a trader and whether these would bind an online consumer. The general principles of contract law could be applied by analogy in such cases. Thus, for instance, the requisite of the consent of both parties would mean that, if the consumer is not adequately informed of the applicable terms and conditions, there could be a lack of consent to be bound by the said terms. One should also keep in mind the safeguards established by the Consumer Affairs Act, particularly with reference to unfair or misleading terms. That said, there is an element of legal uncertainty with regard to the issue of standard terms in e-commerce transactions, especially in view of the fact that there are as yet no Court judgments which could guide the consumer or legal practitioner regarding this point.

be designated as "consumers" for all or for any of the purposes of this Act by regulations made by the Minister after consulting the Council;

3.1.6 *Choice of law and forum*

On 4 April 2006 Malta published the Rome Convention on Contractual Obligations (Ratification) Act³⁰ that authorises the Maltese Government to ratify the Accession Convention of the 14 April 2005 to the 1980 Rome Convention on the law applicable to contractual obligations and to the First and Second Protocols thereof³¹. The Minister should, by order in the Government Gazette, specify the date of the coming into force of the said Rome Convention as between Malta and the States specified in the said order. The Rome Convention will have the force of law in Malta as from such date as the Minister may so prescribe.

Council Regulation (EC) No 44/2001³² is applicable to Malta and regulates issues of jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

On 30 May 2006, a bill was presented in Parliament to authorize the Maltese Government to ratify the Convention on the Contract for the International Carriage of Goods by Road (CMR) signed in Geneva on the 19th May, 1956 as amended by the CMR Protocol of Geneva signed on the 5th July, 1978.

Choice-of-law/forum selection is not considered as being a specific barrier for e-business in B2B transactions in Malta. The challenge for e-business in this area is the same as for traditional business relations.

Directive 2000/31/EC on electronic commerce is based on a country of origin principle, which provides that information society services are only required to comply with the requirements of the Member State in which the service provider is located.

Regulations 3 and 4 of the proposed Regulations³³ transpose Article 3 of the E-Commerce Directive which applies the country of origin principle to the requirements falling within the coordinated field with respect to information society service providers as well as laying down the internal market provisions.

3.2 **Cross border regulatory issues**

During the research, no specific court rulings on the use of electronic contracts in cross-border trade between enterprises have been identified. However, it seems reasonable to assume that especially small and medium-sized enterprises are unaware of the specific legal status of electronic contracts agreed with trade partners from

³⁰ Chapter 482, Laws of Malta

³¹ 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

³² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³³ Refer to Footnote 2 above

another Member State. This could be an obstacle to cross-border use of electronic contracts.

4. Electronic invoicing, payment and other matters related to execution of electronic contracts

4.1 National legislation and administrative practices

The basic principles regarding the elements of contracts of sale, including payment, are common to both e-commerce (B2B and B2C) transactions and traditional off-line transactions. The matter is regulated primarily by the Civil Code (Chapter 16 of the Laws of Malta) under the Title of Sale (Book Second, Part II, Title VI, Sections 1346-1484).

The sale of goods is considered completed as soon as there is agreement regarding the thing and the price. Unless otherwise agreed, delivery should take place on conclusion of the contract of sale³⁴. In the case of e-commerce transactions this concurrent delivery is virtually impossible and one must therefore consider the provisions of the Distance Selling Regulations³⁵, discussed further below.

If the time and place for the payment of the price are not stated in the contract, the buyer must pay at the time and place of the delivery of the thing.³⁶ Unless otherwise agreed, failure to pay on delivery gives the right to the seller to rescind the sale³⁷ and also gives the right to the seller to take back the things sold if it is still in the actual possession of the buyer.³⁸ In the case of B2B transactions, the Commercial Code stipulates that interests on late payments may be charged at the rate of seven percentage points above the Central Bank base rate, which is considerably higher than the 8 per cent cap which is generally applicable in B2C transactions or in transactions between non-traders.

As discussed above, the non-exhaustive list of terms which may be regarded as unfair in the Annex to Directive 93/13/EC, has been incorporated into Maltese Law under the Consumer Affairs Act³⁹, though it has not been reproduced verbatim. Any term which may be considered to be "unfair" is deemed never to have been so inserted⁴⁰ and if the contract in question cannot subsist without that particular unfair clause, the consumer shall not be bound to honour the obligations under that contract.⁴¹ Some items in the list of unfair

³⁴ Section 1380.

³⁵ Legal Notice 186 of 2001, enacted under the Consumer Affairs Act.

³⁶ Section 1433.

³⁷ Section 1438.

³⁸ Section 1439.

³⁹ Chapter 378 of the Laws of Malta.

⁴⁰ Section 44(1) of the Consumer Affairs Act.

⁴¹ Section 46 of the Consumer Affairs Act.

terms refer specifically to payment of price: for instance there is a prohibition causing the price to vary by reference to factors depending only on the will of the trader

The Consumer Affairs Act makes it clear that the list of "unfair terms" is not exhaustive, and it establishes in general terms what makes a term "unfair", namely if it:

- (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.

As part of the e-Government initiative discussed earlier in this report, the Ministry for Investment, Industry and Information Technology set up an electronic payment gateway that enables Government to receive payments in a secure electronic form via the Internet. This gateway, which is a public private initiative⁴², enables the implementation of services requiring secure on-line payment to be made technologically possible. It allows for the payment of Government services on-line in a secure environment.

Means of payment and the obligation of the parties regarding the use of certain payment instruments

As noted above, the Distance Selling Regulations implement into Maltese Law Directive 1997/7/EC. These Regulations stipulate that the consumer shall be entitled to cancel a payment and also to be re-credited with all sums debited as a result of the fraudulent use of his credit card in connection with a distance contract.

The same principles as set out in Articles 7 and 8 of Directive 2002/65/EC are implemented by means of the Distance Selling (Financial Services) Regulations, 2005.⁴³

4.1.1 Electronic invoices

The Value Added Tax Act⁴⁴ has been amended in order to implement Directive 2001/115/EC on the conditions laid down for invoicing in respect of value added tax.

⁴² Government entered into an agreement in 2002 with a local Internet Service Provider for the provision of on-line payment services, with further close collaboration with one of the major local banks.

⁴³ Legal Notice 36 of 2005, Enacted under the Malta Financial Services Act, Chapter 330 of the Laws of Malta.

⁴⁴ Chapter 406 of the Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_12/chapt406.pdf

The Twelfth Schedule to the Act ⁴⁵ sets out the required form of tax invoice and lists the particulars which a tax invoice shall contain in accordance with the Act. In line with the Directive, the Schedule does not require a VAT invoice to be signed.

In paragraph 11 of the Schedule it is specifically stated that invoices containing the required details in terms of the Schedule may be sent by electronic means, subject to the acceptance by the consumer, provided that the authenticity of the origin and the integrity of the contents are guaranteed as may be provided for by national legislation with regard to the use of electronic signatures or as may be required and approved by the Commissioner of Value Added Tax.

This paragraph should therefore be read in the light of the sections of the E-Commerce Act regarding authenticity of origin of electronic signatures. In other words, the authenticity and integrity of the contents of the invoice should be guaranteed in the same manner as an electronic signature is guaranteed in terms of the E-Commerce Act. Hence, the reference to "electronic signatures" in the Twelfth Schedule of the Value Added Tax Act should not be interpreted to mean that an electronic VAT invoice has to be signed.

As yet, there are no Maltese Court judgments concerning the use of electronic invoices.

4.1.2 *Delivery of the good or provision of services ordered electronically and withdrawal period*

4.1.2.1 Non-performance of the obligation to deliver and late delivery

Under the general rules of sale contained in the Civil Code, delivery must take place on the conclusion of the contract of sale. In the case of e-commerce B2C transactions however, one should also consider the impact of the Distance Selling Regulations.

The Distance Selling Regulations reproduce Article 7 of Directive 1997/7/EC on distance contracts by stipulating that, unless the parties have otherwise agreed, the trader must execute any order within a maximum of thirty days from the day following that on which the consumer forwarded his order to the trader. They also follow the Directive by specifying that if the trader fails to deliver the goods or services ordered because they are unavailable, the consumer must be informed of the situation and the consumer would have the right to obtain from the trader a refund of any sums paid as soon as possible and in any case not later than thirty days.⁴⁶

The remedies available to buyers in the case of non-delivery are set out in the Civil Code. The Code stipulates that if the seller fails to make delivery at the time agreed upon, the buyer may elect either to demand the dissolution of the contract or to demand that he be placed in possession of the thing sold, provided the delay has been

⁴⁵ substituted in terms of Act X of 2003.

⁴⁶ Regulation 7 of the Distance Selling Regulations

caused solely by the seller⁴⁷. Besides, in all cases, the seller is liable for damages if the buyer has sustained any loss from the non-delivery of the thing at the time agreed upon.⁴⁸

There are situations where the seller is released from his obligation to deliver the thing. Thus, the seller is not bound to deliver the thing, if the buyer does not pay the price thereof, unless the seller has allowed the buyer time for payment.⁴⁹ Nor shall the seller be bound to make delivery of the thing, even though the sale is on credit, if, since the sale, the buyer has by his own act diminished the security which by the contract he had given to the seller⁵⁰ or if, since the sale, the buyer has become a bankrupt, or insolvent, or his condition has been so altered that the seller is in danger of losing the price.⁵¹

The Consumer Affairs Act has no provisions regarding the act of delivery as such. One may therefore say that in the case of B2C transactions, the same general rules should be held to apply as in B2B transactions, subject to the application of the provisions of the Distance Selling Regulations as explained above. It must be pointed out however that Part VIII of the Consumer Affairs Act establishes certain remedies⁵² for consumers in relation to goods which do not conform with the contract of sale, which remedies must be exercised within two years from the date of delivery of the good in questions. These rules, which will be discussed in more detail further on, are in addition to the rules under general civil law and apply to the extent that they do not detract from the rights that the consumer has under general civil law and under the Distance Selling Regulations.

4.1.2.2 Right of withdrawal from the contract in B2C transactions and return of the good

The right of withdrawal for contracts governed by Directive 97/7/EC on the protection of consumers in respect of distance contracts is 14 calendar days. The Distance Selling Regulations gives a right of cancellation "within fifteen days" from the date of delivery of goods or from the conclusion of the contract in the case of services.⁵³ The Distance Selling (Retail Financial Services) Regulations, 2005⁵⁴ on the other hand retain the reference to "fourteen calendar days".

4.1.2.3 Delivery of a good not in conformity with the contract

The seller has a general obligation to deliver goods which are in conformity with the contract of sale.

⁴⁷ Section 1385 of the Civil Code.

⁴⁸ Section 1386 of the Civil Code.

⁴⁹ Section 1391 of the Civil Code.

⁵⁰ Section 1392 of the Civil Code.

⁵¹ Section 1392(2) of the Civil Code.

⁵² See articles 73 et seq of the Consumer Affairs Act.

⁵³ Regulation 6 of the Distance Selling Regulations.

⁵⁴ Legal Notice 36 of 2005

In the case of B2C contracts, the consumer is given various remedies under the Consumer Affairs Act. Thus, the consumer may demand that the good in question be repaired free of charge or replaced unless this remedy is “disproportionate” considering the costs involved for the seller and the nature of the non-conformity.⁵⁵

If the remedy of repair or replacement cannot be obtained within a reasonable time, or it can be obtained only at significant inconvenience to the consumer, or it cannot be obtained at all, the consumer may opt either to have an appropriate reduction in the price or to have the contract rescinded.⁵⁶

The consumer’s rights as described above must be exercised within a 2-year period. However, this period of prescription is suspended for the duration of negotiations carried on between the trader and the consumer with a view to an amicable settlement.

The Consumer would have the choice to bring an action either before the Consumer Claims Tribunal (in claims of less than Lm1500) or the ordinary courts. Technically, the Small Claims Tribunal would also be competent to hear consumer claims of up to Lm1500 but it is more practical and cost-effective to refer such matters to the specialised Consumer Claims Tribunal, and in fact consumers generally opt for the latter forum.

In the case of B2B transactions, the remedies for delivery of goods not according to contract would be those existing under the Civil Code. Thus if the goods delivered are not of the quality promised, the buyer may elect either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon a valuation by experts.

Under the Civil Code, the seller also has an obligation to provide a warranty against “latent defects which render it unfit for the use for which it is intended, or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them.”⁵⁷ Again, in the case of latent defects the buyer may opt to rescind the sale (*actio redhibitoria*) or ask for a reduction of the price (*actio aestimatoria*). In the case of latent defects, the seller would only be liable for damages if he was aware of the defect at the time of sale. Both the *actio aestimatoria* and the *actio redhibitoria* have to be instituted within six months of delivery or from the date on which it was possible for the buyer to discover the latent defect.

⁵⁵ Section 75 of the Consumer Affairs Act

⁵⁶ Section 76 of the Consumer Affairs Act

⁵⁷ Section 1424 of the Civil Code.

4.2 Cross border regulatory issues

There are as yet no court rulings given by Maltese Courts on electronic invoicing or payment related to execution of cross-border electronic contracts.

5. General assessment of national legislation and administrative practices in the fields of e-signatures, e-contracts and e-invoicing

5.1 Main legal and administrative barriers to e-business

The following main legal and administrative barriers to e-business in Malta have been identified:

5.1.1 Legal uncertainty of the position of the contracting parties in electronic transactions, both with regard to national transactions and to cross-border transactions

The laws of Malta have been amended to cater for e-commerce transactions. This has ensured that, whilst traditional principles of contract law particularly in the contract of sale, are still applicable, they can also be “transposed” to cater for e-commerce situations.

This notwithstanding, as often happens with regard to new areas of the law, until the national Courts start to apply and interpret such legislation, there will be a feeling of uncertainty as to the how the law will be applied. There are as yet no higher Court decisions regarding e-signatures, e-contract conclusion or e-invoicing, though one should say that e-mails have now become an established and accepted form of evidence.

The same feeling of uncertainty can also be said to apply to cross-border transactions.

5.1.2 Reluctance to use e-payment methods

Though we are aware of no official scientific study regarding online payment by consumers, there seems to be a tendency for newcomers to e-commerce transactions to be wary of making online payments. This is however more of a psychological barrier since, as has already been explained, the law does protect consumers from fraudulent use of credit cards.

5.1.3 The legislation offers limited protection for smaller businesses in electronic commerce

Many of the new provisions of Maltese law regulating e-commerce and distance selling are meant to protect consumers and not traders which reflects the general position adopted by the European Union. Traders can still resort to the protection afforded under general principles of law, however there is a tendency to consider traders

involved in a transaction to be on equal footing. This point of view is not a new development – indeed, even in its earliest versions drafted in the 19th century, the Maltese Commercial Code has distinguished between “traders” and “non-traders” and generally held that “traders” do not need special protection.

This point of view is questionable in today’s business world where SMEs contend for a share of the market. Such enterprises may feel that they are not being given sufficient protection.

5.2 Awareness about national authorities in charge of solving legal problems in e-business

While the Malta Communications Authority⁵⁸ has been designated as the regulatory authority in the sector of e-commerce, the main authority in charge of solving legal problems in e-business where B2C contracts are concerned is the Director of Consumer Affairs⁵⁹.

The Consumer Affairs Council⁶⁰ is an autonomous entity set up under the Consumer Affairs Act which advises the Minister responsible for consumer affairs on consumer policy and strives to promote consumer interests, particularly through leaflets, seminars and publicity campaigns.

The Consumers Association is a voluntary association which represents the interests of consumers. It is officially recognised as a registered consumer association under the Consumer Affairs Act and as such enjoys certain statutory rights including notably the faculty of requesting the issue of compliance orders under the Consumer Affairs Act.⁶¹ It runs an informative website⁶².

We are aware of no particular study regarding public awareness about these national authorities and associations. However, it can be said that these entities do much to promote consumer affairs and to increase awareness about consumer rights. There also seems to be an increasing interest among consumers regarding their rights and the remedies afforded to them by the law, as evidenced by the various “consumer pages” in the leading national newspapers.

We understand that throughout 2006, the Ministry for Investment, Industry, and IT (MIIIT) shall be launching a number of information campaigns aimed at instilling confidence in online trade amongst both businesses and consumers. The said Ministry collaborates closely with the authorities and stakeholders involved in the sector.

⁵⁸ www.mca.org.mt

⁵⁹ http://www.mcmp.gov.mt/consumer_info.asp

⁶⁰ http://www.mcmp.gov.mt/consumer_affairs.asp

⁶¹ See Parts IV and IX of the Consumer Affairs Act.

⁶² www.camalta.org

ANNEX 1: Interviews performed

Interviews were performed with representatives from the Malta Communications Authority: www.mca.org.mt

ANNEX 2: E-business National Legislation

The regulatory framework for e-business in Malta is based on the Electronic Commerce Act⁶³, the Consumer Affairs Act⁶⁴, the Distance Selling Regulations⁶⁵, and the Distance Selling (Retail Financial Services) Regulations, 2005⁶⁶, Part VIII of the Consumer Affairs Act entitled "Sale of goods to consumers" and on the general contract law provisions contained in the Civil Code⁶⁷ and the Commercial Code⁶⁸. The Data Protection Act⁶⁹ also applies generally to e-business insofar as the processing of personal data is concerned. Electronic Commerce (General) Regulations, complementing the Electronic Commerce Act, are expected to come into force in the near future.

⁶³ Chapter 426, Laws of Malta

⁶⁴ Chapter 378, Laws of Malta

⁶⁵ Legal Notice 186 of 2001

⁶⁶ Legal Notice 36 of 2005

⁶⁷ Chapter 16, Laws of Malta

⁶⁸ Chapter 12, Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt12.pdf

⁶⁹ Chapter 440, Laws of Malta.

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt440.pdf