



**British Institute of
International and
Comparative Law**

COLLECTIVE REDRESS MALTA



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**British Institute of
International and
Comparative Law**

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I. General Collective Redress Mechanism

1. Scope/ Type

There are two types of collective action: (a) A rudimentary form where two or more plaintiffs bring one application, and (b) Collective Proceedings action

a. Collective Action

Maltese procedural law has at least since 1985 allowed a Collective Action. This is in terms of Article 161(3) of the Code of Organisation and Civil Procedure. In a Collective Action, two or more plaintiffs are allowed to bring their actions by means of one application (rather than separate), if:

- the actions are connected in respect of the subject matter thereof; or
- the decision of one of the actions might affect the decision of the other action or actions and the evidence in support of one action is, generally, the same to be produced in the other action or actions.

This applies for both injunctive and compensation relief and applies to any action which may be brought before the Maltese courts and tribunals.¹

It must be said that this provision of the law has not been interpreted restrictively by the Maltese courts² and the same courts have recognised its importance to reduce the amount of litigation and also to empower the plaintiffs by reducing costs and inconsistent judgments.³ There are a couple of significant cases which allowed more than 2 applicants to file their actions by way of one application:

- approximately 18,000 claimants were allowed to bring a case in 2009 against the Government of Malta for the refund of VAT paid on imported cars within the internal market (the “**VAT case**”). The campaign was promoted by the Malta Labour Party (who was at the time in opposition and since 2013 was elected to govern) through various newspapers, TV stations and social media pages. The case was eventually dropped after the Government of Malta launched a scheme to refund VAT paid;
- 25 claimants were allowed to bring a constitutional case in 2013 to challenge an alleged case of discrimination on the basis of nationality/residency by the national utility company (*Patricia Graham v Advocate General* Application No. 19/2013: judgment expected to be delivered on 27 June 2017) (the “**ARMS case**”). The case was strongly promoted on social media pages (specifically Facebook) and also on newspapers. Although 80 claimants initially showed interest, the amount of claimants dwindled to 25 when the lawsuit was actually filed. The case is still pending; and
- 138 claimants were being assisted by the Malta Consumer Rights Association and the University of Malta on the possibility to bring a lawsuit against a travel package provider which ran into bankruptcy (the “**Fantasy Tours case**”). The claimants filed an initial pre-litigation judicial letter in the Maltese courts with a view to file an application under the Act in case of non-payment. The claimants eventually never filed the application for collective proceedings after the Government of Malta launched a refund scheme.

There are other areas of the law where collective proceedings are encouraged and allowed, in particular, employment law related disputes, but again this is allowed under Article 161 of the Code of Organisation and Civil Procedure. Nevertheless, the legislator must have felt that a robust and structured legislative framework had to be introduced for collective proceedings.

¹ We are also assisting a Malta-based gaming company in connection with voluntary arbitration proceedings filed by their distributors in Malta by relying on this provision of the Code of Organisation and Civil Procedure.

² *Joseph Micallef et v Trusted Limited et*, First Hall Civil Court (20 June 2012); *Jonathan Ellul et v Jesmond Mercieca et*, First Hall Civil Court (14 April 2016); *C&M Contractors Ltd et v Attard Elasrag Co Limited*, First Hall Civil Court (5 October 2016). A notable exception where the test was applied, in our view, rigidly is *Robert Hughes et v Permanent Secretary, Ministry for Finance, Economy and Investment*, Administrative Review Tribunal (17 November 2014).

³ *Mary Vella et v Josephine Bugeja*, First Hall Civil Court (4 June 1991).

b. Collective Proceedings

In 2012, the Maltese Parliament passed the Collective Proceedings Act (Chapter 520 of the Laws of Malta) which provides for a collective redress mechanism. The Act is solely limited to actions asking for the cessation of an infringement, or the rectification of the consequences of an infringement and, or compensation for harm where:

- an infringement of the Consumer Affairs Act (Chapter 378 of the Laws of Malta), Product Safety Act (Chapter 427 of the Laws of Malta) and the Competition Act (Chapter 379 of the Laws of Malta);
- an investigation before a public authority or proceedings before a tribunal or similar body or court of civil jurisdiction concerning an infringement of the laws mentioned in the first sub-indent is or are still pending; or
- a decision or judgement establishing a breach of the said laws in relation to the same facts has become *res judicata*.

It must be said that the intention of the Minister responsible for pushing through the Act was clearly to extend the scope of the Act to other sectors and industries, however, this never materialised.⁴ It must also be said that the Act remains largely untested and the Maltese courts only dealt with a handful of applications filed under the Act.

The focus of the Malta report will be exclusively on the Act and it will not deal with the collective action allowed under Article 161(3) of the Code of Organisation and Civil Procedure.

2. Procedural Framework

a. Competent Court

Any collective proceedings must be filed before the First Hall Civil Court (Malta) or the Court of Magistrates (Gozo) Superior Jurisdiction depending on the domicile of the defendant irrespective of the amount claim (in the case of compensative relief). The application must be confirmed on oath by the class representative.

b. Standing

Collective proceedings may either be brought on behalf of a class of members by a registered consumer association/*ad-hoc* constituted body or by a class representative. The Act makes the distinction between a representative action (brought by a registered consumer association or an *ad-hoc* constituted body on behalf of class members) and a group action (brought by a class representative on behalf of class members). Public authorities are not empowered to bring representative actions.

The courts are required to “approve” of the class representative if the eligibility criteria in the Act are satisfied. A registered consumer association or an *ad-hoc* constituted body is expected to act fairly and adequately in the interests of the class members and that it does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members. Moreover, a registered consumer association can only bring a representative action on behalf of class members who satisfy the definition of “consumer” at law.

A class representative (not being a registered consumer association):

- must have also have a claim which falls within the proposed collective proceedings;
- is expected to act fairly and adequately act in the interests of the class members; and
- must not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of the class members.

The court hearing the collective proceedings may at any stage order the substitution of the class representative if the eligibility criteria indicated above are no longer satisfied by that person.

⁴ Juan Ameen, ‘Class action law for business will be given wider scope’ (Times of Malta, 29 September 2011) <http://www.timesofmalta.com/articles/view/20110929/local/Class-action-law-for-business-will-be-given-wider-scope.386865>.

c. Availability of Cross Border collective redress

Any collective proceedings which are filed in Malta must satisfy the jurisdictional tests provided for by law. If the defendant is domiciled in Malta or in an EU Member State, then the Brussels I bis Regulations will apply,⁵ while if the defendant is domiciled in a third country the Code of Organisation and Civil Procedure will apply.⁶ The Maltese courts are definitely seised with jurisdiction to hear collective proceedings brought against any legal or natural persons domiciled in Malta.⁷ It is also possible in certain cases for a class of consumers exclusively domiciled in Malta to bring collective proceedings in Malta against a defendant domiciled in another EU Member States.⁸

In the case of collective proceedings against a Maltese defendant, it is certainly possible for the class representative and for the class members to be foreign, and therefore, not domiciled or habitually resident in Malta. As far as we are aware, there are no national rules on admissibility or standing which would act as a barrier for such cases. As a matter of fact, the definition of a “registered consumer association” (which can act as a class representative) is wide enough to taken into account “any other consumer association that has been officially recognised in any other country”.

d. Opt In/ Opt Out

The Act adopts an opt-in system. Any member of the class needs to be part of a collective proceedings agreement, and therefore, each member must opt-in by express consent. The class representative must then provide the court with a collective proceedings agreement to which each class member should be a party.

After the application is filed by the class representative a pre-trial hearing will be scheduled by the court. In this pre-trial hearing the court has to decide whether it will decree the continuation of the collective proceedings if the requirements at law are satisfied. The court shall then order that such decree is to be published in the Government Gazette and in a local English and Maltese newspaper and in any other media with an invitation to any other third parties who wish to be class members must indicate their intention to do so within roughly 5 months from the date of the decree. This requires the third party to register his or her claim with the class representative and entering into a collective proceedings agreement.

If a potential class member does not opt-in by the time period laid down in this decree, he may only do so with special leave from the court in case only if the delay was not attributable to the applicant and the continuation of the proceedings would not suffer substantial prejudice if permission were granted.

The Act is silent on whether a class member can opt-out at any stage during the proceedings. We would take the view that any class member can opt-out if he or she is permitted to do so in terms of the collective proceedings agreement. The collective proceedings agreements we have seen (which were submitted in two cases brought under the Act) did not contain any terms on opt-out.

The class representative shall keep a register of all the class members (identity and claim) and is required to provide the defendant with a copy of such register to the defendant/s.

e. Main procedural rules

The procedure under the Act is structured in multi-stages which include a pre-trial hearing to determine whether proceedings can continue as collective proceedings, the possibility of having sub-classes of claims as well as the hearing of individual issues separately. We will explain in brief each stage.

Pre-Trial Hearing: Following the filing of the application for collective proceedings, the court will schedule a pre-trial hearing where it will either issue a decree ordering the continuation of the proceedings together or the stay of the proceedings if the parties agree, during the hearing, to attempt to compromise the lawsuit by alternative dispute resolution or other means.⁹

⁵ Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

⁶ Code of Organisation and Civil Procedure, Article 742

⁷ Regulation 1215/2012, Article 4.

⁸ *ibid.*, Article 17.

⁹ Act, Article 6.

The court must be satisfied that 3 requisites are present in order to decree the continuation of proceedings”¹⁰ Firstly, the collective proceedings must be appropriate. Secondly, the class representative is eligible to act as such (as explained in more detail above under b. Standing). Thirdly, the claims put forward in the application fall within the scope of the Act (as explained more detail above under 1. Scope). If any one of the 3 requisites are not present, the court must dismiss the act and order that the collective proceedings are discontinued. This assessment is required at law, and therefore, it is carried out on the court’s own motion. A right of appeal lies from this decision.

The collective proceedings are deemed appropriate where those proceedings:

- are brought on behalf of an identified class of two or more persons;
- raise common issues;¹¹ and
- are the most appropriate means for the fair and efficient resolution of the common issues, in particular, by taking into account the benefits of the proposed collective proceedings and the nature of the class.

Decree ordering Continuation of Proceedings: The decree issued by the court must include the following details:

- the name and address of the class representative;
- the name of the defendant;
- a description of the class;
- the common issues for the claims which the class representative has brought in the collective proceedings;
- the claims sought; and
- information on the legal effect of a judgment in the collective proceedings:

This decree will be published by way of a notice in the Government Gazette, in a local English and Maltese newspaper and also in any other media. This notice will also include an invitation for third parties to opt-in in the collective proceedings.

Stages of Collective Proceedings: In principle, common issues for a class and sub-class will be determined together, while individual issues will be determined in further and separate hearings. The applicable rules on the burden of proof depend on the claim brought by the class members, but in principle, it is for the claimant to make his or her case before the courts. Under Maltese law, there is no duty of disclosure of documents within a context of discovery phase, but in claims for damages for anti-competitive behavior there are wider remedies for the disclosure of documents.

Judgments and Decrees: The court has the discretion to deliver separate judgments in respect of class common issues, sub-class common issues and individual issues. The court may also, on the application either party or even a class member, issue decrees with respect to the conduct of collective proceedings to ensure its fair and expeditious determination.

Compromise/Settlements: A class representative may only reach a compromise with the defendant/s or discontinue all or part of a claim in collective proceedings with the permission of the court. The court will require the class representative to inform the court on how he intends to notify the class members and on the terms of the proposed compromise. In line with the opt-in principle, any class member may, with the permission of the court, be omitted from the compromise. A compromise approved by the court binds every class member, except those who have been omitted after applying to the court or notifying the class representative directly. If one or more of the class members are to be omitted from the compromise, the court shall give directions for the future conduct of the proceedings.

3. Available Remedies

The Act expressly provides that collective proceedings may be filed to seek the cessation of an infringement, the rectification of the consequences of an infringement and, or compensation for harm. The remedy emerges from

¹⁰ Act, Article 7.

¹¹ “Common issues” are defined as common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

the actual provisions of the Consumer Affairs Act, Competition Act and Product Safety Act. In principle, however, the following points apply across the board to all three:

Interim measures: Under Maltese civil procedural law it is possible to obtain pre-trial attachment. There are various types of warrants available, including:

- Warrant of description. Following an application for a warrant of description, a Maltese court may order a court official to draw up an inventory describing in detail the things forming the subject matter of the warrant (which must be movables and tangible in nature, and include bearer securities) by stating their quantity and quality. The Maltese Courts may also order that the things forming the subject matter of the warrant remain in the custody of the person in whose possession they are found;
- Warrant of seizure of movables. This warrant of seizure orders the removal of property of the debtor, which is subsequently seized under court authority with a view for it to be sold by means of a court approved public auction (i.e. after an executive title is obtained such as a judgment on the merits);
- Warrant of seizure of a commercial going concern. A warrant of seizure of a commercial going concern is issued to preserve the totality of the assets of the going concern by ordering that those assets are not sold in part or in whole and are to be concurrently kept in business;
- Garnishee order. A garnishee order would require that moneys or movable property held by third parties for a debtor are attached and deposited in court;
- Warrant of prohibitory injunction. An application for a warrant of prohibitory injunction must demand that a person is restrained from doing (both acts and omissions are included) anything which might be prejudicial to the person filing the application. Any such application is generally always provisionally upheld by the court once filed, but then within a short period of time a hearing is scheduled for both parties to exchange evidence and legal submissions on whether the application should be upheld on a permanent basis (which then requires the filing of a lawsuit within 20 days). The court is required at law to deliver the judgment on whether the warrant is to be upheld permanently within 1 month from the date the application was filed; and
- Warrant of arrest of sea vessels / aircraft. Such warrants order that the sea vessel or aircraft in question is seized and attached under the control and power of the Authority for Transport in Malta.

The precautionary warrants mentioned above may only be issued if the essential requisites particular to each warrant are satisfied and each warrant is subject to any procedural formalities or exceptions provided by law.

It is not clear whether a class representative is in a position to demand the issue of such precautionary warrants, but it is likely that the adverse parties affected by such warrants would attempt to challenge the issue of the warrant by attacking the appropriateness of the collective proceedings. There are a couple of cases where more than two parties collectively file for a warrant of prohibitory injunction (injunctive order). A good example would be *Simon Camilleri et v Mapfre Middlesea et* where over 90 tradesman demanded an injunctive order against 4 insurers based in Malta from applying a system of technical certification.¹² Although the demand was not upheld on the merits, neither the defendants nor the court raised the issue of whether 90 tradesmen could have filed for the injunctive order on the basis of lack of commonality. It is likely that the injunctive order was filed (as has happened in other cases) on the basis Article 161 (3) of the Code of Organisation and Civil Procedure.

Damages: Damages which may be awarded under Maltese law are restorative in nature intended at placing, to the extent possible, the injured party to situation which would have prevailed if the harm was not suffered. The so-called *status quo ante*. No punitive damages may be awarded and it is considered against Maltese public policy to do so. The damages which may be claimed are either patrimonial, which refer to losses suffered directly by the claimant's patrimony or estate, whether past, present or future, or non-patrimonial, which refer to moral anguish and pain and suffering.

Limitation periods: The applicable limitation period is that provided for the law applicable to the dispute. The Act does provide that the limitation period will be "interrupted" in favour of a class member on the commencement of the collective proceedings, but that interruption will not apply if the class member withdraws from the collective proceedings.¹³ It is not clear what the meaning of "interruption" is here. The Civil Code provides that an "interruption" of a limitation period means that it will start to run afresh, but usually the filing

¹² First Hall Civil Court (28 April 2017) [Ref: 430/2017/1].

¹³ Act, Article 22.

of a lawsuit will “suspend” a limitation period rather than “interrupt” meaning that it will stop running until a final and definitive judgment is delivered. It is likely that within the context the legislator wanted to attribute the meaning of “suspension” to “interruption” used in the drafting of this provision.

4. Costs

The Act embraces the loser pays principle as applied in Maltese civil procedural law. There are exceptions to this principle, in particular, registered consumer associations are exempted from the payment of the fees due to the court registry and the judicial costs may be shared amongst the parties to the lawsuit where a novel point of law was dealt with.

The judicial costs are composed of three different components:

- costs due to the court registry upon filing of an application and further judicial acts;
- fees due to the advocate; and
- fees due to the legal procurator.

All three components are calculated according to a tariff established by law which is proportionate with the estimated value of the dispute. In practice, the fees due to the advocate and to the legal procurator do not always cover the professional legal fees agreed between the advocate and the client. This is particularly so in the cases of disputes with a low estimated value or disputes which are for injunctive relief (rather than for compensation) since the tariff establishes an amount of fees which does not necessarily represent the work required by the advocate to represent his client.

The judicial costs will be awarded in favour or against the class or sub-class representative—the class members are not imputed any costs.

Interestingly, the Maltese courts may add up a “penalty” of €2,500 where it finds that the collective proceedings were frivolous or vexatious.

5. Lawyers’ Fees

Advocates admitted to the Maltese bar usually charge in line with a tariff established by law according to the value of the dispute or by way of hourly rates or fixed/capped fees as agreed with client. Champetry is not allowed under Maltese law—advocates are not allowed to agree to a stipulation *quotae litis* and such stipulations are deemed unenforceable.¹⁴

6. Funding

There are no provisions in the Act on third party litigation funding in the case of collective proceedings, but we are not aware of any national provisions which would prohibit it. Having said that, the Act provides no framework for the provision of funding and in that respect it falls short of the Recommendation, in particular points 14, 15, 16 and 32. Third party litigation funding is not customarily resorted to by Maltese litigants across all sectors and industries. We are aware that some third party litigation funding institutions are based in Malta, but they mostly operate overseas within the internal market.

7. Enforcement of collective actions/settlements

The enforcement of foreign collective actions/settlements in Malta is only possibly if in case of an EU/EEA decree/judgment it falls within the Brussels I bis Regulation and in the case of third countries only if it is a final and definitive judgment (not an order or decree).

8. Number and types of cases brought/pending

We are only aware of 1 pending case and 1 settled case filed under the Act.

¹⁴ Code of Organisation and Civil Procedure, Article 83; Civil Code, Article 986.

9. Impact of the Recommendation/Problems and Critiques

It does not appear that the Act has been used since its introduction other than 2 reported cases. It may well be that the reluctance to pursue class actions by stakeholders in Malta is attributable to cultural issues. It is our view, however, that the absence of proper education on the Act and the opportunities it presents is at root of this “reluctance”. As the VAT and Fantasy Tours cases have shown, the right education campaign can be crucial to gather sufficient interest to push ahead with collective proceedings.

It is a pity that the Act has not been properly tested so far, and therefore, it is difficult to assess what its weakness may be. Having said that, the Act, which was enacted in August 2012, may certainly be improved in certain respects. Firstly, its scope should be widened to cover other breaches of the law. Secondly, a number of the points put forward by the Recommendation can be endorsed. These are the following:

Standing: In the case of a representative action brought forward by a registered consumer association, there are no requirements as to its sufficient capacity (financial resources, human resources and legal expertise) to properly represent the class members in their best interests. Indeed, the Act does indicate that the court must see that the class representative will act in the class members’ best interests and must fairly and adequately represent them—but this might have been drafted too widely. Public authorities should also be empowered to bring representative actions, but certain public authorities who can also exercise executive powers against traders, in particular, the Malta Competition and Consumer Affairs Authority, should not, in our view, be empowered to do so as there might be conflict of interest issues.

Funding: As highlighted above, there is no framework regulating third party litigation funding of collective proceedings in the Act. Although it is not customary to resort to third party litigation funding in Malta, a light-touch framework should be in place to avoid abuse.

Opt-In: The right of a class member to opt-out at any stage during the collective proceedings should be introduced in the Act, naturally subject to certain conditions on sharing of costs and other pertinent issues. The Act should also establish a black-list of unfair terms which should not be included in the collective proceedings, in particular, those which may be too onerous for any class member wishing to opt-out.

Limitation Period: The legislator should clarify that the term “interrupted” is meant to mean “suspended” in line with point 27 of the Recommendation.

Registry of Collective Redress Actions / Information on Collective Redress Actions: A proper framework should be set up in connection with these points.

II. Sectoral Collective Redress Mechanism(s)

N/A

III. Information on Collective Redress

There is no comprehensive registry of collective redress actions in Malta. There are no clearly established channels for dissemination of information on collective claims. We observe that there is clearly a lack of education on the institute of collective proceedings introduced by the Act both in consumers and potential claimants, but more importantly in legal professionals who are meant to advise consumers and claimants.

In the past we have observed that social media pages (such as Facebook) and adverts on daily newspapers circulated in Malta were utilised to attract plaintiffs willing to join an action.

IV. Case summaries

<p>Case name: Malta Consumer Association noe v Global Capital Financial Management Limited</p> <p>Reference: 122/2012</p> <p>Subject area: consumer/financial services/investment services</p>	<p>Keywords</p> <p>competence / privilegium fori</p> <p>Summary of claims</p> <p>The claim was brought before the Court of Magistrates (Gozo) Superior Jurisdiction on behalf of 4 class members on the basis that the service provider committed unfair commercial practices under the Consumer Affairs Act in the provision of investment products. The court did not deal with the preliminary pleas raised by the service provider on the collective proceedings, but focused on the first preliminary plea that the application should have been filed in Malta not in Gozo. The court threw out this preliminary plea in a judgment which was then appealed. The parties then settled the case and the collective proceedings were dropped.</p> <p>Findings</p> <p>Nothing particularly relevant other than a preliminary judgment on whether the Gozo Courts were competent to hear the case</p> <p>Outcomes</p> <p>Settlement: Yes, but the settlement agreement was not submitted for the Court's approval</p> <p>Remedy: Damages</p> <p>Amount of damages awarded: N/A, but the amount demanded was roughly €40,000</p> <p>Distribution of damages: N/A</p>
<p>Dispute resolution method</p> <p>Representative action</p> <p>Court or tribunal: Court of Magistrates (Gozo) Superior Jurisdiction / Court of Appeal</p>	
<p>Cross-border character/ implications, if any: No</p>	
<p>Opt-in/out</p> <p>Opt-in</p>	
<p>Type of funding</p> <p>None were disclosed</p>	
<p>Costs</p> <p>Shared</p>	
<p>Abusive litigation</p> <p>No</p>	

<p>Case name: Malta Consumer Association noe v Global Capital Financial Management Limited</p> <p>Reference: 85/2015</p>	<p>Keywords</p> <p>Standing / Admissibility</p> <p>Summary of claims</p> <p>The claim was brought before the Court of Magistrates (Gozo) Superior Jurisdiction on behalf of 3 class members on the basis that the service</p>
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Subject area: consumer/financial services/investment services	provider committed unfair commercial practices under the Consumer Affairs Act in the provision of investment products. The court has not deal with the preliminary pleas raised by the service provider on the collective proceedings yet, but focused on the first preliminary plea that the application should have been filed in Malta not in Gozo. The court upheld this preliminary plea and the case has now been transferred to the courts in Malta. The case is still ongoing and now the court is hearing evidence on whether the requirements of the Act have been satisfied
Dispute resolution method Representative action Court or tribunal: Court of Magistrates (Gozo) Superior Jurisdiction / First Hall Civil Court	
Cross-border character/ implications, if any: No	Findings Nothing particularly relevant other than a preliminary judgment on whether the Gozo Courts were competent to hear the case
Opt-in/out Opt-in	Outcomes Settlement: N/A Remedy: Damages
Type of funding None were disclosed	Amount of damages awarded: N/A but the amount demanded is roughly €150,000 Distribution of damages: N/A
Costs N/A	
Abusive litigation No	

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