

# MBB Position on a priority shortlist of draft SMA proposals pertinent to Maltese business

**“Towards a Single Market Act for Europe”**



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Malta Business Bureau

<b>Contents:</b>	<b>2</b>
<b>Background and General Reaction</b>	<b>3</b>
<b>Policy Annex –</b>	
- <b>European Market Surveillance</b>	<b>6</b>
- <b>The EU Patent</b>	<b>7</b>
- <b>Framework Directive on the Management of Copyrights</b>	<b>8</b>
- <b>SMEs access to finance/Private investment and venture capital</b>	<b>9</b>
- <b>The creation of an EU internal market for business services</b>	<b>11</b>
- <b>Electronic Commerce and e-procurement</b>	<b>12</b>
- <b>Reform of the standardization framework in 2011</b>	<b>14</b>
- <b>Launch of an Energy Efficiency Action Plan</b>	<b>15</b>
- <b>Assessing the Small Business Act</b>	<b>16</b>
- <b>Adopting legislation aimed at improving the Posting of Workers Directive / Re-examine the Directive on pension funds</b>	<b>17</b>
- <b>Initiative to reform the system for the proper recognition of professional qualifications / The introduction and adoption of a ‘European Skills Passport’</b>	<b>17</b>
- <b>Social Market Economy</b>	<b>19</b>
- <b>A Common Consolidated Corporate Tax Base (CCCTB)</b>	<b>20</b>
- <b>The revision of the Energy Tax Directive</b>	<b>22</b>
- <b>Legislative Impact Assessments</b>	<b>23</b>
- <b>Development of Alternative Dispute Resolution (ADR) Mechanisms</b>	<b>25</b>
- <b>Amending the directive on air passengers’ rights</b>	<b>27</b>
<b>Concluding Remarks</b>	<b>29</b>

## Background and General Reaction

The Malta Business Bureau has undertaken a broad analysis of the proposed contents of an eventual 'Single Market Act' on the basis of the Commission's 50 proposals. In this paper, the MBB conveys, the Maltese business perspective on the scope of the Act's proposals as well as a critical insight into the legislative and policy proposals that local enterprises would welcome, partially or completely oppose.

The Malta Business Bureau welcomes the publication of the Communication on a Single Market Act (SMA). This is a much-needed development and indeed a timely initiative to reinvigorate cross-border business activity across the EU-27 member-states. This is key for a quick and effective recovery from the international economic crisis that has hit several sectors hard. The Single Market Act should constitute the market regulatory response to the negative social spill-over effects of the crisis. Spiraling and prolonged unemployment is undoubtedly the most visible and tangible of these detrimental social consequences of the financial and economic crisis.

The Maltese economy has withstood the major impact of the international storm however any realistic assessment has to take into account the international economic context within which local business has to contend in its everyday operational endeavors. Our economic success depends to a large extent on the state of affairs on the European continental economy. Despite the well-established welfare policies of member-states' governments, the social ramifications of the crisis have exacerbated the perception that economic recovery will entail further hardships. Against this backdrop, several leading institutional voices have even misleadingly swayed European public opinion to question the added value of the European single market as a tool to foster growth and employment in the EU-27 member-states.

Certainly, Maltese business strongly counters this stance. Maltese entrepreneurs, business managers and investors alike, all believe in the critical instrumental importance that a dynamic EU internal market can bring in generating new employment opportunities via productive economic activity. New openings for economic activity require business to be in a position that takes advantage of the economies of scale afforded by an immeasurably larger market of 500 million consumers instead of a fragmental jigsaw of several smaller markets, each of which is constrained by its national peculiar set of regulatory restrictions and varying legislative precincts.

The self-evident benefits of the European single market are nowhere more pronounced and put in deep relief than in the case of a peripheral, insular economy such as the Maltese one. For this reason, Maltese business has backed Malta's accession to the EU. The reasoning was that access to the EU's internal market would be critical for sustaining Malta's long-term economic development. That reasoning is still valid today. The Single Market Act encapsulates the spirit and letter of this reckoning with economic reality.

More than at any other junctions in time, it is during periods of economic crisis, that the role of the private sector comes into questioning. In recent months we have witnessed a surge in binding regulation of economic activity particularly in the financial services sector, which has been singled-out – some say, rightly so - as the main culprit for the current economic predicament. The EU regulatory response to the economic crisis has been partially tainted by the inherent inability to focus on the very underpinning strength of the European integration process – the internal market and its considerable potential for countering economic slowdown in Europe. In this respect, the publication of the Single Market Act is a most welcome break from what was rapidly becoming the established thinking on macroeconomic market policy amongst both EU policymakers and national legislators.

The EU internal market should not be questioned, not because it is immune to criticism but precisely because it has been the engine spurring growth for the past decades that EU public policy should re-visit the political framework sustaining the single market policies in an attempt to capitalize on its strengths and not over blow its weaknesses. Structural inefficiencies remain, some of which are ingrained challenges that go hand in hand with the broadening and deepening of economic integration. Certainly, Maltese business does not believe that legislation is the perfect antidote reversing all kinds of economic ills and shortfalls of the internal market. Legislation can be part of the solution as long as it is proportionate and commensurate to a specific and clearly-identified market failure. The policy response must be construed on an evidence-based approach and not conjured within a contextual vacuum de-linked from the prevailing economic realities.

It is with this thinking in mind that Maltese business believes it is conveying a balanced assessment of the draft Single Market Act, discerning both the proposals it duly supports in an unqualified manner as well as those pertinent issues arising from proposals that might not necessarily yield the desired positive results, that they were conceived to obtain at this early-planning stage by EU decision-makers, in their laudable attempt to revitalize the internal market.

## Policy Annex: An Assessment of a selection of draft SMA proposals relevant to Maltese Business

### The Call for Action: the priority initiatives for Maltese business

#### **European Market Surveillance**

The Commission is pledging the drawing up of a multiannual action plan for the development of European market surveillance, with emphasis on guidelines for customs controls in the area of product safety in 2011. A revision of the General Product Safety Directive is meant to tighten up the level of consumer goods safety in the EU.

**Maltese Business Perspective** – Market surveillance in Malta (and not only) remains relatively weak and inter-departmental coordination on enforcement of VAT, eco-tax and food safety legislation is conspicuously missing at point of entry of goods shipped from Sicily. The fact that there is a single market doesn't mean that it's free for all. In the case of Malta, whereby importation is mostly carried out by maritime transport, there needs to be stricter control on import activities but also on service providers too. Only in this way is business sustainability as well as consumer safety aptly protected. Furthermore, lack of surveillance is resulting in Government coffers losing out on significant amounts of foregone tax revenue in VAT, excise duties and eco-tax receipts.

The enactment of new guidelines is a commendable initiative at EU-level however market surveillance policies need to be backed by concrete action at an operational level. Maltese business urges the European Commission to take the necessary steps to ensure member-states' administrations can effectively coordinate market surveillance at the border. It is recommended that an EU-wide monitoring system reporting on the action taken by the different member-states' administrations in addressing gaps in market surveillance and

overseeing the necessary enforcement should be undertaken in earnest by the European Commission.

### **The EU Patent**

In the absence of an efficient patent system, the EU-27 member-states are losing out on innovation for the reason that European enterprises, in particular SMEs' research and innovation investments are not duly protected. To date, Europe is lagging behind the US and Japan not only in innovation, but also in the costs involved for patent protection. Businesses in Europe have to face legal uncertainties due to divergent rulings in different member states.

The Commission envisages that the EP and Council should adopt proposals for a unified EU patent litigation system by 2014 in order to stimulate competitiveness and boost R&D with reduced costs and less cross-border administrative burdens. Following the disagreement on the Belgian Presidency's compromise proposal, it has been agreed that an enhanced cooperation procedure be launched that should permit the creation of a single EU patent system to be utilized by the participating countries in this procedure.

**Maltese Business Perspective** – There needs to be in place stronger political consensus amongst EU policy-makers in particular at the Council of Ministers in order to take firm and rapid political action to deliver on the long-awaited EU patent. Timeframes are crucial and indeed Maltese business feels that the projected date for 2014 is too distant a time-horizon to really prompt an improvement in the commercial patent environment particularly in the context of the rapid strides forward that emerging economies are attaining on the innovation scale.

During negotiations on an EU patent, most disagreements have derived from linguistic translation issues. For this reason, the initiative has been constantly shelved over the past decades. This is a contradiction in itself, at a time when the EU is proposing innovation-flagship initiatives earmarked to instill improvements in the macroeconomic environment

for innovation-based economic endeavours sustained by enhanced R&D intensive investments by the private sector. Maltese business welcomes the recent Council of Minister's decision to move forward on the creation of a common EU patent through the enhanced cooperation procedure and in this context welcomes the recent adoption of the Lehne Report initially by the IMCO Committee and subsequently by the European Parliament's plenary authorizing the last-measure resort to the enhanced cooperation procedure involving twenty-four member-states.

### **Framework Directive on the Management of Copyrights**

Counterfeiting and piracy are costing the European economy billions of Euros every year and furthermore they are hindering the process of innovation, which thus, undermines competitiveness. First and foremost, in order to get to a digital market, creative content must be available online, while owners must be assured of adequate remuneration and protection. Thus, the Commission is aiming for a framework directive on the management of copyrights to open up access to online content by 2011. This will have to find a balance reflecting the various and often disparate differences prevailing across the EU-27 national systems.

From another perspective, having a well-managed copyright framework is of utmost importance to the eventual success of the single market, being that present and future generations do not exclusively trade or consume physical goods. For this reason it must be ensured that the freedoms of the single market are extended to online business services whether tendered directly to end consumers or else to businesses increasingly purchasing and securing their supplies/product offers online.

**Maltese Business Perspective** – On the negative side, the local tourism industry has registered several instances of requests lodged by collecting societies established in other EU member-states to levy revenues for audiovisual and sound broadcasts conveyed within



hospitality properties whether in common areas (such as the front desk/lobby area) or within the private chambers for guests. The licensing system for collecting societies needs to be thoroughly revisited by the EU legislators in order to establish a fair level-playing field amongst the collecting societies themselves in order to avoid the unfortunate creation and maintenance of monopolistic practices in this sensitive field and more importantly, to avoid any unnecessary collection of fees unjustifiably claimed at the expense of end-users whether commercial entities (such as hotels) or private citizens as individual consumers of copyrighted material.

Maltese business requests transparency and accountability from the increasing number of collecting societies laying claim to cross-border copyright management fees. It is paramount that any EU initiatives on copyright management set clear-cut guidelines obliging collecting societies to disclose the end-use of collected revenue streams, the names of organizations benefitting from this income and the beneficial spread or otherwise of collected fees for the betterment of artistic production across the EU-27 member-states. Furthermore Maltese business is concerned about the duplication and the spiraling increases in the fees levied by collecting societies and the lack of regulatory oversight of such bodies. In this regard, it is advisable that the EU institutions incept and maintain a regular monitoring and reporting system guaranteeing as much as possible a reasonable-level of public accountability and transparency on the part of collecting societies.

### **SMEs access to finance/Private investment and venture capital**

The proposed adoption of an action plan for improving SME access to capital markets in 2011 is a welcome initiative as it addresses a long-standing hindrance afflicting small business' capacity to raise finance and tap credit lines for expansion purposes. This problem has been accentuated by the current international financial and economic crisis.

**Maltese Business Perspective** – The Maltese business community adopts a traditional approach for servicing its financing requirements, relying almost exclusively on conventional credit and loan-support packages offered by banks. The shift from this excessive reliance on traditional bank lending to more innovative sources of finance such as equity capital markets is a commendable path that should be actively pursued notably by easing the conditions for first-time entry onto the equity markets.

The proposal to create an EU-wide market for venture capital funds circumventing the current impossibility for a venture capital fund set up in any member-state to operate and invest freely across the internal market should take into account the onerous commitments for the smaller categories of business operators in overcoming the inherently-high risk-threshold associated with accessing such funds.

Access to venture capital funding is intrinsically related to the issue of scale, in particular the average entry-threshold levels of private equity investments which very often do not tally with the capital-leverage capacity of Maltese business. From local experience, it is apparent that venture capital schemes are not viable if the amount of investment is less than \$50m. This is due to the high risk involved with venture capital projects which needs to be sustained by capital investments large enough to permit adequate spread and eventually a reasonable return on investment.

A venture capital holding fund was established in recent years in Malta. Through Malta Enterprise, subsidiary legislation was enacted so that venture-capital funds could benefit from a safety net whereby, for instance, no capital gains tax was levied. The Government should pursue such innovative solutions for sustaining the veritable business-culture shift towards equity-based financing for long-term business growth projects. Therefore, not only there is a need for proper guidelines on a European level, but also for a bolstered local infrastructure for SMEs.

Nonetheless, there are other past initiatives in the field of finance-leverage for business worth re-visiting in order to facilitate access to finance by Maltese business operators. A case in point is the 'Royalty Agreement Scheme' managed in recent past years by Malta Enterprise. This scheme provided financial assistance, for instance to IT companies, which though not necessitating large capital investments would still require operational budgetary assistance for further business development. The 'Royalty Agreement Instrument scheme' allowed its beneficiaries to pay back from increased turnovers obtained over a spread of a few years.

### **The creation of an EU internal market for business services**

The SMA denotes that the creation of a single market for business services is still a challenge (proposal 9) whilst earlier on in the Communication text (within proposal 4) it is announced that the Commission is to continue developing the internal market for services on the basis of the 'mutual evaluation' process. This is the process used within the framework of the implementation of the Services Directive at member-state level.

The regulatory framework put in place by the correct transposition of the Services Directive is crucial for the future development of the business services industries in the EU. It is a recognised fact by all institutional and business stakeholders alike that the growth potential in the services sector is huge. As recognised within the Communication on the Single Market Act, the potential gains from high-quality implementation of the Services Directive ranges between Eur60 billion to Eur140 billion worth of cross-border commercial activity. This represents an increase between 0.6% and 1.5% of EU GDP.

**Maltese Business Perspective** – Local business backs the Commission's intention to create a performance test that would be utilized for assessing whether the business services sector is "delivering all that it should in terms of growth, jobs and innovation." The Commission's proposed initiative on the establishment of a High-level Group on services-

to-businesses tasked to study market deficiencies in economic sectors such as logistics, installations management, marketing and advertising is a recommendable initiative. However its scope must transcend the proposed unambitious remit of yet another study group mandated to carry out a report. The creation of a single market for the services-to-business sector requires an in-depth assessment of the operational feasibility of such sectors to conduct business on a cross-border basis.

In this context, Maltese business recommends that Government should undertake an assessment of the size, composition and contribution to GDP of the local logistics, installations/events management, marketing and advertising sectors. These sectors are intrinsically connected to the creative industries often utilizing the same skills-profile and constituting a critical link within the supply chain sustaining these industries.

### **Electronic Commerce and e-procurement**

By the end of 2011, the Commission will look into the market issues related to the basic delivery of services guaranteeing the free movement of information and networking, with a legal framework covering the internet and electronic commerce. This is required in order to address the digital economy. A functional framework regulating electronic commerce will help the EU to exploit its full potential for growth as well as to meet citizens' expectations with regard to the fast-expanding online retail market in particular.

At present, electronic commerce only accounts from 2% to 4% of all cross-border trading within the internal market. For instance measures to boost e-commerce activity should aim to ease on the one hand the contractual restrictions in cross-border online sales transactions whilst on the other hand provide cost-effective remedial solutions for disaffected customers in including in business-to-business transactions. The European Commission should explore novel legal frameworks targeting the resolution of online commercial disputes.

A related issue from a business viewpoint is electronic procurement which is briefly mentioned in proposal 22. Measures to enhance the uptake of e-procurement practices are not brought forward in the draft Single Market Act despite the known fact that cross-border e-procurement, and indeed cross-border procurement overall, remains at a low level in most, though not all, EU member-states.

**Maltese Business Perspective** – In e-commerce there is the need for competitive prices but unfortunately the prevailing market situation in Malta poses significant disadvantages to local operators due to a multiplicity of reasons. In the first instance, foreign enterprises benefit from better purchasing power levels, an endowment created by access to a larger capital base and economies of scale. Maltese imported-volumes are minimum in comparative scale and consequently, local businesses do not manage to obtain the same going rates that other operators manage to attain. Another issue is derived from Malta's insularity for being an island-state – a permanent quandary resulting into higher cost additions in supplementary transport costs.

It is Maltese business conviction that there are a number of potential ways to ease this predicament. Increasing the surveillance of sales-movements in order to clamp down on unfair competition would result into a fairer market place for e-based trade in goods and services.

On a related note but addressed to national authorities, it is recommended that Government develops warehousing space and logistic/distribution centres to consolidate business activity generated in Malta but earmarked mainly for re-distribution like onward freight-forwarding onto the EU internal market. This would help reduce the inherent market-scale disadvantages. Market-surveillance authorities, particularly the Customs Department should ensure at all times that goods intended for “re-export”/transit on the European Single Market remain tax-free. Furthermore, Malta Enterprise needs to assist in the setting up of such logistic centres even within the Freeport to ensure that Malta is a viable centre for the transit of goods and services procured through electronic commerce.

In addition, the Government also needs to help local companies that operate stores and franchises elsewhere on third-country markets to be able to import in greater volumes thus reducing costs whilst facilitating further-processing activities leading to re-export of services and goods.

### **Reform of the standardization framework in 2011**

This reform looks to raise the level of standards for European goods and services to offer high-quality / healthy / non-harmful products to citizens. Also, this will facilitate the guidelines for businesses to use innovative and internationally-recognized standards.

**Maltese Business Perspective** – The harmonization of standards very often leads to protracted discussions that do not necessarily yield the desired and expected benefits for business. Examples of such instances are profuse with remarkable difficulties being encountered in CEN debates on several health and safety standards as well on basic definitions on key concepts for developing the mandated standard. These instances of inadequate redress towards obtaining a minimum level of harmonization on basic definitions are particularly acute in relation to standardization-initiatives affecting the hospitality industry with the ensuing result that such processes often end in counterproductive outcomes.

Maltese business reiterates its long-standing position on EU-mandated standardization processes. New mandates for standardization should only be approved on the basis of well-grounded market-led demand for such initiatives. Flexibility should remain at the core of the EU approach towards standardization in order to accommodate the inevitable structural and cultural differences that underpin the distinctiveness of specific economic sectors and in the case of the hospitality industry, the peculiar attractiveness of a destination. An identical standardization approach cannot be realistically implemented for instance in relation to a hotel operation located in a mountain resort and hospitality facilities based on the Mediterranean-model of the ‘sun, sand and sea’ holiday destination.

In short, standards have to be tailor-made and flexible to the minimum level possible to accommodate location-specific structural characteristics. In the case of the hospitality industry, it is equally important to keep in mind that very often the specific cultural and geographical features of a destination constitute its very competitive advantages vis-à-vis other tourist resorts.

Maltese business recommends that the proposed reforms of the EU standardization framework based on an enhanced level of standards should strike a balance between the programming ambitions of the European standardization bodies and the ensuing implementation costs for business, especially for the smaller business categories. New mandatory standards should also be implemented over staggered and sensible timeframes in order to allow economic operators to have the necessary advance budgetary planning needed to implement the infrastructural and service-related upgrades. The operational context of business in these special circumstances of post-crisis economic recovery should be the main criteria according to which the timeframes guiding the launch of new European standardization initiatives. The hospitality sector is amongst the least well-positioned economic sectors able to sustain the accrual of new financial burdens given the prevailing trends towards lower and tighter profit margins and average occupancy levels hovering around the pre-crisis levels which were already quite some distance from the optimum desired levels.

### **Launch of an Energy Efficiency Action Plan**

The plan to launch an Energy Efficiency Action Plan (among other measures) in early 2011 will see the Commission providing tentative long-term solutions and supportive actions for energy suppliers to launch better and more extensive measures aimed to deliver energy savings for private, public and private customers alike. Other measures will see the development of European markets in energy services and the strengthening of policies in support of sustainable energy-supply solutions. A strong emphasis will be set on new

standards governing procurement rules for the public sector when issuing tenders for renovating, extending or building new office facilities.

**Maltese Business Perspective** – Any measure promoting efficiency and conservation of energy should be supported and encouraged by the local industry as it will ease the pressure on current excessive energy price-levels. The diffusion of energy-efficiency building practices within the construction industry posits the greatest challenge of all. The opportunities emanating from public procurement have to be properly marshaled to induce a veritable demand-shift in the construction market for energy-efficient buildings, carbon-neutral materials and improved construction techniques guaranteeing better insulation and therefore energy savings on the utility bills charged on industry.

### **Assessing the Small Business Act**

The Small Business Act includes important principles: in particular the ‘Think Small First’ that should underpin evaluation of SME-related initiatives on the basis of competitiveness and entrepreneurship considerations. Also, the SBA complements the Europe 2020 Strategy in so far that it enshrines new measures encouraging the internationalization of SMEs.

**Maltese Business Perspective** – Progress has been attained in Malta with the publication for consultation of a draft ‘Small Business Act for Malta’ in late 2010. However, the added-value of EU initiatives abetting the overall regulatory environment for business depends extensively on the delivery of the principles and objectives as incorporated in the Small Business Act across all the EU-27 member-states. The delivery of the SBA and the ensuing compliance with its overriding ‘Think Small First’ principle must be perceptible across the entire European single market.



Furthermore, in this regard, what is required by the Commission is to look into means and ways to facilitate SMEs' participation in cross-border public procurement, making public administrations more responsive to SMEs needs, thereby facilitating considerably SMEs' access to finance via the availability and tapping of public tendering opportunities.

**Adopting legislation aimed at improving the Posting of Workers Directive / Re-examine the Directive on pension funds.**

The Commission aims to facilitate the movement of workers from one member state to the other. This primarily addresses the internal market for services. An improved Posting of Workers Directive will propose concrete measures to clarify complex national administrative procedures as well as double-taxation issues that currently complicate the cross-border movement of workers.

**Maltese Business Perspective** – Maltese business does not hold any objections in this regard as long as the revision of the directive's text will allow the necessary flexibilities for business. The Directive will be useful to businesses with operations abroad as it will facilitate the mobility of staff and provides protection to workers in terms of taxation and pension schemes.

**Initiative to reform the system for the proper recognition of professional qualifications / The introduction and adoption of a 'European Skills Passport'**

This is another measure that directly affects the mobility of workers, in which the Commission is determined to improve in the coming years. By 2012, it intends to propose legislations to reform the system of recognition of professional qualifications. Now this will impact on professionals in general being that there are some 4,600 regulated professions in the EU. But this will be essential should it also cover the hospitality industry, especially with the proposals of a 'European Skills Passport' that will enable individuals to record the knowledge and skills acquired throughout their lives.

**Maltese Business Perspective** – It is believed that business will benefit from worker mobility across the EU especially in times of labour shortage in the future with the prospects of a declining active population. A European Qualifications Framework and a European Skills Passport may well facilitate the assessment of individuals willing to work in those industries that are constantly obliged to retain high standards without failure.

**The Call for Caution: the SMA proposals, the European Commission should desist from pursuing.**

**Social Market Economy**

The SMA proposes three new initiatives for a single market based on a ‘highly competitive social market economy’, the legal basis extrapolated from the recently-enacted Lisbon Treaty to develop further the social dimension of EU single market policies. The proposed initiatives are the following:

- 1) ‘Social Business Initiative’
- 2) A Regulation on a ‘European Foundation Statute’
- 3) Corporate Governance and Corporate Social Responsibility

**Maltese Business Perspective** – CSR-initiatives for business should be encouraged however they should not be streamlined into mandatory obligations for enterprises and preferential treatment particularly in public procurement procedures should be avoided. CSR policies come at a cost, often from internal revenue reserves of companies - a cash-flow which inevitably small businesses find hard to harness. Maltese companies are themselves becoming increasingly conscious of the benefits to be derived from CSR activities. In this regard, EU regulation is not the best instrument for incentivising the further uptake of CSR practices within the private sector.

From a local perspective Maltese business calls on Government not to accept these pan-European benchmarks unless there is the capacity in Malta to implement and enforce them fairly and uniformly. It must provide adequate and demonstrable assurances to businesses that regulations will provide an equal, level-playing field.

More specifically, Maltese business calls for clarifications on the Commission’s proposal on disclosure of non-financial information by business. The company disclosure of both financial and non-financial information is already regulated by the Accounting Directives,

where a general reference is made to the need to report on non-financial elements, wherever necessary and appropriate. Therefore the need for strengthening reporting requirements is rather questionable. Maltese business is of the view that flexibility for companies should be nurtured and supported so that companies can better communicate in a transparent manner on their CSR policies as a means of responsible business conduct. Certainly a one-size fits all approach via a mandatory 'integrated reporting' method on CSR policies (or the lack of them) will not be conducive to the promotion of CSR practices. Moreover, it is an inappropriate approach, in so far that it would meet with self-defeat given the heterogeneous nature of the European business environment, the sheer diversity of companies, sectors and markets in which they operate.

### **A Common Consolidated Corporate Tax Base (CCCTB)**

The Commission argues that varying tax bases for the computation of cross-border corporate tax is a hindrance for businesses already operating cross-border or planning to expand beyond their country of original establishment. It plans to publish a draft directive aiming to ease the above concern along with the issue of foregone tax income is on the Commission's work programme for 2011.

**Maltese Business Perspective** – it is the Maltese business viewpoint that tampering with taxation policy is detrimental to Malta's attractiveness as a business destination. The IMF annual report on Malta itself showed that the country's competitiveness could suffer and some of the new high-growth business activities such as financial services and pharmaceuticals would be adversely affected should EU or member-state regulation or taxation change. The Malta Business Bureau is committed to carry out a thorough and rigorous impact assessment of the Commission's draft CCCTB directive once the text is adopted by the College of Commissioners, as expected at some point during the first half of 2011. At this stage it is difficult to anticipate the eventual contents of the Commission's draft proposal. Inevitably, it is therefore premature to dismiss all-together the further exploration of a CCCTB as long as the finalized model allows for the maintenance of

competitive corporate tax rates by the respective tax authorities of the EU-27 member-states.

On this front, certainly for Maltese business there are a number of easily-foreseeable red lines: it is paramount that the CCCTB proposal would only be an optional instrument (therefore not replacing the national corporate tax systems), whilst allowing for the cross-border consolidation of profits and losses from the start and above all, it should not in any way involve decisions on tax rates. The subsidiarity principle with regard to the discretion of national member-states' governments in deciding their corporate taxation rates should not be tampered with as it constitutes a core instrument for promoting a healthy competitive fiscal environment for attracting foreign direct investment, ultimately benefitting the entire European single market irrespective of the operational location of the non-EU originating business investment.

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**The Call for Analysis: the SMA initiatives requiring re-thinking.**

**The revision of the Energy Tax Directive**

The Commission intends to publish a revision of the Energy Tax Directive by 2011. Originally, in 2003, this directive was intended to facilitate the functioning of the single market, however in light of the latest EU environmental goals to fight against climate change and greater uptake of energy efficiency, a revision of the said directive's rules to better reflect today's energy and utilities reality. For instance, the Commission aims to reduce energy consumption by 20% by 2020 to reduce dependence on non-renewable energy, and to reduce CO<sub>2</sub> emissions while increasing energy savings. In this respect, the Commission looks to restructure the current fiscal and excise duties regimes on energy consumed by those industrial sectors not covered by an 'emissions trading regime'.

**Maltese Business Perspective** - In this respect, it is questionable whether it is economically-feasible to extend energy taxation to cover all industrial sectors that are not already covered via fiscal measures managed within an 'Emissions Trading Scheme' (ETS). Any increase in energy-related taxation and the muted possibility of an introduction of an EU-wide carbon tax has to be offset with the reduction of other taxes levied on business, notably taxation on labour.

The whole idea of energy taxation is in principle conceived for environmental objectives within the context of the fight against climate change. Therefore, Maltese business contends that energy-related taxation whether directly on utilities or indirectly on transport fuels, should not be utilized or construed in a distorted manner so as to produce higher public revenue streams at a time of beleaguered public budgets in several EU member-states. The principle reported in the Commission Communication '*Towards a Single Market Act*', that Council Directive 2003/96/EC, "is intended mainly to ensure the proper functioning of the

single market and thereby avoid distortion of competition between energy consumers”<sup>1</sup> should be strictly and consistently adhered to without any exception once the revised Energy Tax Directive starts being rolled-out into member-states’ statute books. It is important for Maltese business that this proviso is retained in the final agreed text of the eventual ‘Single Market Act for Europe’.

### **Legislative Impact Assessments**

This proposal reiterates that the “Commission will first of all conduct an in-depth analysis of the **social impact** of all proposed legislation concerning the single market”. Impact assessments should essentially deal about the cost-implications of pipeline legislation both at community-level as well as with the specific implementation costs at national level. Furthermore, Impact assessments should become mandatory on all EP Reports introducing substantive changes to Commission legislative proposals steered through the ordinary legislative procedures (co-decision involving the European Parliament).

**Maltese Business Perspective** – Rather than considering the inclusion of the evaluation of prospective social impacts, first and foremost there is clearly the need to address the entire EU approach to legislative impact assessment through a fundamental re-thinking of the current process, which is not yielding the desired results. In this regard, Maltese business augurs that a common inter-institutional approach and methodology underpinning the conduct of impact assessments is rapidly adopted by the concerned EU institutions. The recently-published European Court of Auditors’ report on EU impact assessment policies clearly pointed out that one of the main weaknesses in the EU impact assessment system is that both the European Parliament and the Council do not systematically analyse the impact of their own amendments. In fact, according to the Court of Auditors’ report, the European Parliament and the Council of Ministers had carried out impact assessments on only seven and one legislative proposals respectively, between 2005 and 2008.

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<sup>1</sup> Commission Communication COM(2010) 608 final: “Towards a Single Market Act” – pg 11

The Malta Business Bureau calls on the European Commission to invite the Council and the European Parliament to produce and publish reader-friendly summaries of their own impact assessments. This should be done in the spirit of the Competitiveness Council Conclusions of the Council meeting held on Friday, 10<sup>th</sup> December, when the EU-27 Ministers underlined that regulatory quality is the responsibility of all the three institutions involved in the EU legislative process.<sup>2</sup> The Commission should not only decide which impact assessments to undertake but it should also support the other EU institutions in producing summaries of findings to better inform the decision-making process.

On the working methodology underpinning EU impact assessments, Maltese business retains the current system guiding the execution of impact assessments is flawed. The recent report carried out by the European Court of Auditors<sup>3</sup> concludes that the European Commission does not consider it necessary to consult on draft impact assessments despite the oft-repeated requests by stakeholders. Moreover, it is regrettable that there is no publication of the draft impact assessments and their terms of reference. This was the case for instance with the impact assessment report contracted by the European Parliament's secretariat on the impact of the Estrela Recommendations in the context of the revision of the pregnant workers directive during the acrimonious discussions at the FEMM committee.

It is advisable according to the local business viewpoint that consultations on the draft impact assessments reports would help better factor in the perspectives of stakeholders thus ensuring that the 'best product' would then feed into the co-legislative process involving the Council of Ministers and the European Parliament.

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<sup>2</sup> Press Release 17668/10: 3057<sup>th</sup> Council Meeting Competitiveness - Brussels 10<sup>th</sup> December 2010

<sup>3</sup> European Court of Auditors, Special Report 3/2010: "Impact Assessments in the EU Institutions: Do they support decision-making?"



In practical terms this could help reduce the number of amendments tabled by MEPs. A disproportionate number of amendments render draft EU legislation confusing and difficult to interpret with the legislative process made subject to the criticism that it lacks transparency.

Finally, the structural set-up framing the EU impact assessment policy needs to be improved and effectively strengthened. In particular, the role and functions of the Impact Assessment need to be reinforced. Currently, the Impact Assessment Board carries out an exclusively advisory role whereby it solely *advises* the Commission's Secretariat General and the respective Directorates-General in selecting legislative initiatives to undergo an impact assessment.

The Impact Assessment Board's mandate needs to be strengthened through a mandatory function to *require* that impact assessments are carried out. Also, the Impact Assessment Board, does not have the power to put the impact assessment report and de facto the related legislative proposal on hold should its analysis disclose major shortcomings in the research work carried out.

### **The development of Alternative Dispute Resolution (ADR) mechanisms**

The Commission aims to propose an initiative on the use of Alternative Dispute Resolution mechanisms in the EU sometime in 2011. ADR-practices involve the resort to a third party, usually an arbitrator or moderator to reach an 'out-of-court' settlement. The SMA intends to extend the scope of ADR to cross-border disputes.

The SMA Communication also recommends the creation of a separate ADR mechanism for the financial services industry so that by 2012, it could be extended to cover online disputes in relation to digital transactions.

**Maltese Business Perspective** – There is undoubtedly no questioning of the guiding principle that both citizens and companies should have easy, cost-effective and rapid access to independent institutions endowed with judicial competences to solve disputes in a cost-efficient manner for both the plaintiff and the defending party. Business organisations in other EU member-states report that the use of alternative dispute resolution (ADRs) systems can indeed provide quick, effective and affordable redress whilst avoiding the often-excessive costs associated with court litigation.

The Commission Communication leaves an open-ended question with regard as to whether the ADR proposal will be covering both business-to-business as well as business-to-consumer transactions. It seems from the choice of the Commission's text that the policy inclination is at least to incept new cross-border business-to-consumer dispute resolution bodies without an effective pronouncement as to whether the scope of such structures would preclude all-together the coverage of business-to-business transactions. Clarity needs also to be shed on whether the ADR frameworks intended to address cross-border business-to-consumer disputes be either exclusively public or else exclusively private bodies. Whatever the final outcome of the official proposal it is important that cross-border ADR litigation offers an expeditious and cost-effective solution, particularly for small businesses.

It is against the above-mentioned considerations that Maltese business considers ADR-modeled solutions for cross-border consumer dispute a more reasonable and effective instrument than collective redress. On an intrinsically-related note, Maltese business is concerned about the rapid pace of development of the discussions on the separate but related EU legislative proposals concerning the Consumer Rights directive and the optional European Contract Law besides the prospective launch of a public consultation on collective redress.

At the time of writing these submissions, the debate on the draft directive on Consumer Rights, which is closely linked to the European Contract Law initiative, is at a crucial stage

with the discussions gathering significant momentum at the IMCO Committee at the European Parliament. In our understanding, both initiatives seek to address legal fragmentation in business-to-consumer transactions in the European single market. It is Maltese business conviction, an opinion shared by counterpart business organizations across the EU that these two initiatives should progress in tandem rather than in parallel yet separate track, whilst also taking into account the delay in reaching an agreement on the directive on Consumer Rights.

Maltese business therefore urges the Commission services to await the final outcome of the pending consultation on European Contract Law and for the finalization of the first reading of the Consumer Rights Directive before progressing further with the drafting and eventual publication of an official text on an optional European Contract Law (acting as the EU's 28<sup>th</sup> legal regime).

### **Amending the directive on air passengers' rights**

The past year's chaos created by the volcanic eruption in Iceland prompted the Commission to issue a legislative proposal on the rights of passengers using all means of transport. So far, passengers' rights vary depending on the means of transport chosen, and the Commission is concerned that they are not always respected by operators. This may distort competition in the internal market and undermines the objective of ensuring a suitably uniform level of quality of services.

**Maltese Business Perspective** – Local business questions the Commission's intentions in relation to this specific proposal. Although the rights of air passengers should be respected at all times, the Commission has to avoid creating a regulatory system whereby customers are alleviated whilst operators held responsible and obliged to carry all the ensuing financial burdens. This is important especially in relation to the cases of natural disasters such as the volcanic eruption in Iceland which created significant premiums on insurance coverage.

A balance needs to be struck between consumer protection and the delicate state of expenses covered by service providers. Maltese business' outlook on the prospective revision of the air-passenger rights is based on a cautious assessment of the prevailing market practices in instances of natural disasters leading to lost or diverted demand for business services particularly in the hospitality industry. It is important to note that hotels' lost revenue can never be reclaimed, as it is impossible to regain the lost lead-time in advance. It is therefore suggested that in cases whereby insurance companies ask for a premium fee to cover against natural disasters, the Commission and member-state governments should study the possibility of introducing community/national funds that would partly offset the costs incurred by both airline operators and consumers who wish to opt for this type of insurance cover. This way, both the service providers as well as the consumers are protected in an equitable manner without infusing additional costs at a sensitive juncture for the travel industry when supplementary costs can at best be ill-afforded.

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## Concluding Remarks

The Malta Business Bureau is committed to oversee a regular monitoring of the implementation of the eventual set of policy and legislative measures that will make it into the final and definitive action plan for revitalizing the EU's internal market over 2011-2012. To this end, a follow-up assessment on these submissions will be carried out by the Malta Business Bureau on behalf of the Maltese private sector – an exercise meant to coincide with the 20<sup>th</sup> anniversary of the setting up of the European Single Market back on 1<sup>st</sup> January 1993.

In the meantime, Maltese business augurs that the enactment of the Single Market Act for Europe will truly serve as a timely catalyst for broadening and deepening the economic integration in full respect of the subsidiarity and proportionality principles in relation to the necessary legislative initiatives that will be adopted to attain the relaunch of the EU's internal market. Undoubtedly, a strong element of political ownership of the process will be required at both community-level and at the national member-state level. In this regard, Maltese business calls on the Maltese Government to ensure that EU measures enacted to improve the operation of the internal market are promptly and correctly transposed into the local statute book to ensure a fair and level playing field for Maltese business, thus safeguarding its daily operations on the European Single Market and improving the prospects for the generation of wealth and new employment opportunities.

Finally, Maltese business stresses the need for the strict adherence to proper, in-depth consultation concerning draft texts of any SMA-related initiative, therefore allowing the necessary stakeholder involvement and two-way dialogue on the final policy directions discerned by the European Institutions to be then implemented by the national public administration.