

THE SOCIAL ENTERPRISE ACT

WHITE PAPER

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MINISTRY FOR THE ECONOMY
INVESTMENT AND SMALL BUSINESS

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MINISTER'S MESSAGE



Hon. Christian Cardona
Minister for the Economy,
Investment and Small Business

Social enterprises are important contributors to the social and economic development of a country whose distinctiveness arises from the attention that these organisations pay to the social consequences of their activities and their participative governance structures.

For years, social entrepreneurs have helped us rethink the way we address the world's most entrenched social problems, such as poverty, the achievement gap, social exclusion and unemployment. However, while existing organisations already have the necessary characteristics that are typical of social enterprises there is no legal structure that allows them to identify themselves in a regulatory framework.

The European Commission has put social economy at the forefront of its 2020 Agenda, and a significant number of Member States have already enacted legislation to sustain and develop this sector.

The Government has embarked on this new initiative to introduce and develop the social enterprises sector, and give a boost and an opportunity to these emerging business models and most importantly to the social purpose and the disadvantaged persons they will serve and assist. By helping to create new legislation and regulatory schemes for social enterprises we also allow businesses to consider alternative ways of achieving corporate social responsibility and allow for disadvantaged persons to find opportunities where before there were only limitations and barriers. The scope of this new legislation is to allow social enterprises to ascertain their legal personality and ensure that they can operate in the market with the necessary capital.

It was for this reason that the Government has taken the initiative to create and develop this sector in consultation with all the stakeholders and the general public.

The main recommendation that this new legislation proposes is to allow businesses to structure themselves and acquire the status of social enterprises with the opportunity to benefit from such structure. The legislation clearly defines who is a 'disadvantaged person' and how social enterprises can be structured to recruit such persons or provide them with goods and services. The legislation also regulates and establishes the parameters within which social enterprises are to re-invest their profits back into their business to help them pursue their social goals. The legislation intends to establish operational benchmarks for management, human resources, services-derived income, liquidation, and reporting mechanisms in order that social enterprises can further achieve their social aims.

In addressing these key areas, and in developing and regulating this sector, Malta has the opportunity to develop its own model of social enterprises at par with those in the European Union while, at the same time, respect the unique, local characteristics of a small-

market economy and its long-standing tradition of being a nation that contributes to the social sector. With this necessary legislation in place, the business community has further opportunity to flourish whilst it provides core opportunities to those members of our society who most require the goods and services provided by social enterprises.

The ultimate objective of this process is to listen to all stakeholders and members of the public so that we can take an informed decision that reflects the wishes and interests of businesses and enterprises as well as those members of the general public and persons that fall under the remit of the proposed legislation.

1. INTRODUCTION

This White Paper is intended to provide background information on the social economy and on its potential to address some of our society's needs while contributing to the growth of the economy. It will also look at how the sector has developed in recent years and introduce proposals to build a framework to enable the creation and development of social enterprises in Malta. This Paper continues the process started some months ago when the public was asked to give its reactions to the findings of a study commissioned by the Government to look at the sector and its potential. In this context, a draft law is being proposed to provide the legal framework with the objective of enabling the development of sustainable Social Enterprise organisations.



2. THE SOCIAL ECONOMY

The terms “Social Economy” and “Social Entrepreneurship” have been given a broad range of definitions and there are a number of understandings of the nature of these two phenomena and the relationship between them. This situation is also found in relation to a variety of terms which combine the word ‘social’ with economic concepts such as social enterprise, social innovation, social business, etc. However one can safely say that in general these refer to new strategies, concepts, ideas and organizations that meet social needs of all kinds — from working conditions and education to community development and health — and that extend and strengthen civil society.

The Social Economy refers to the Third Sector of the economy that is made up of cooperatives, mutual organisations, voluntary organisations and social enterprises. It is an area that sustains thousands of jobs within the economy in the delivery of products and services and it is a sector where the profit-motive is not the main driver for the organization.

Social economy aims to find solutions to social needs that are not adequately addressed neither by market systems nor the welfare state. The main function of social enterprises is to contribute actively, at grass roots level, to the reallocation of resources and to a favourable transformation of the welfare system. In Europe, social economy established itself as a “pole of social utility” and fulfils an important role; bridging the gap between the diminishing welfare state offering and the needs of society.

Within this role, social enterprises can effectively help to combat social exclusion and can foster local development, as most often these are locally based organisations and are either linked with or recognised by local authorities. Moreover, the sector has proven to be a major provider of jobs in Europe, with a growth rate in the total paid employment in the sector of over 26% from 2002/2003 to 2009/2010, and currently offering more than 11 million paid jobs in over two million social economy enterprises. In this regard, social economy actively contributes in the labour market, facilitating economic growth through provision of services addressing new and emerging social needs, self management and an increased participatory role by all members in society. The ripple effect of social enterprises can be seen as the achievement of economic democracy.

The tendency is that players in the Social Economy depend to a certain degree on voluntary work and donations from the general public to sustain and fulfil their mission. With sustainability becoming a key issue and the need for good governance taking a centre stage, the players in this sector are required to become more professional in the way they operate in order to meet increasing expectations from their clients.

The European Commission believes that social enterprises have a key role to play in Europe’s economic recovery. In fact, the European Recovery Plan and Vision 2020, with the Special Investment Fund, are intended to provide tangible support for the development of the social economy.

3. MALTA'S SOCIAL ECONOMY

In Malta, the concept of social enterprises has been in existence for a long time, albeit under different forms. Addressing social needs was primarily the foundation for such initiatives. Presently, a number of co-operatives, foundations, associations, non-government organisations, church organisations/entities and voluntary organisations work within our society to address social problems.

Primary research has shown that Malta has a vibrant voluntary sector that today employs approximately 4,387 annual working units and provides services in a vast array of social areas. It has also been established that this sector is an active promoter of gender mainstreaming with significant involvement of women at all levels of the organizations. It also attracts a strong volunteer base of approximately 24,000 persons. The main issues that concern the sector are the protection of capital resources, economies of scale, bankability and the availability of specialist human resources, the latter due to competitive forces in the market.

The sector depends heavily on donations and is characterised by fragmentation which makes it very difficult to create economies of scale and recruit specialised human resources to sustain activities. These factors and, bar a few exceptions, the difficulty to develop the necessary commercial acumen, are significant factors that undermine the long term sustainability of these organisations. In this regard, it is very typical that these operators are not in control of significant areas of their value chain making it very difficult for them to achieve commercial growth and creating dependencies that stifle their existence.

4. SOCIAL ENTERPRISE ORGANISATIONS

Social Enterprise Organisations (or Social Purpose Organisations) are commercial entities operating as a 'going concern' where the main difference lies in the 'social objective' they aim to attain and the 'not-for-profit' context in which they operate. Their values-based management structures and commercial drive ensures that they are self-sustaining and do not require external resources to fulfil their mission. This makes them particularly suitable to form Public-Private Partnerships and to manage public funded initiatives or projects within the third sector.

Social enterprises trace their roots to the formation of popular associations, guilds and co-operative societies, based on a 'self-help' structure. These entities operate independent of the public sector, embrace democratic rights for members, operate within set rules of ownership and utilise surpluses to further develop their entity and their services for the benefit of its members and society at large. (Économie Sociale, 1981; Monzón, 1987). They undertake commercial activities in support of vulnerable populations and involving the same populations to generate wealth through employment and inclusion.

As defined by the European Parliament, A6-0015/2009, the social economy and ultimately social enterprises, operate under the following established criteria:

- Primacy of the individual and the social objectives over capital;
- Defence and implementation of the principles of solidarity and responsibility;
- Coincidence of the interests of used members and the general interest;
- Democratic control by members;
- Voluntary and open membership;
- Self-management and independence of public authorities;
- Mobilisation of the bulk of surpluses in pursuit of the aims of sustainable development, the interest of services to members and the general interest.

It is very rare to find a social enterprise organisation that operates and upholds all the criteria established by the European Parliament, however, even though organisations may not embrace all criteria, they must ensure that they are not operating against these philosophies.

Most EU countries have endorsed the concept of social enterprise in their legal and administrative framework. These countries all have different definitions for the term social enterprises and have differing policies in place. For example, in the UK, the official definition of social enterprises is the following:

'A social enterprise is a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners'.

In other countries such as in Belgium, the emphasis is mainly on the output of the service whereby focus is given to the goods and services delivered and target only a specific population of customers.

Finland defines social enterprises as enterprises that provide jobs to persons with disability and the unemployed in market oriented jobs.

5. WHY SOCIAL ENTERPRISE ORGANISATION?

The commercial nature of the social purpose organisations makes them different from any other legal form even though these may be able to undertake a commercial activity. Social enterprises are required to meet a series of prescribed standards in order to:

- a. Assure the continued commitment to the ‘not-for profit’ nature of the activity;
- b. Ensure that the social purpose for which the organisation has originally been established is attained and sustainable activity is created;
- c. Protect the organisation’s equity and ensure it operates within the principles of a going concern as established in company law through an ‘asset lock’ approach;
- d. Create structures for the organisation to be bankable;
- e. Protect the independence of the operation ensuring that no corporation can have a controlling interest in the management of the organisation;

Social Enterprise Organisations provide an effective instrument that assures that funds invested are dedicated to the objective for which they have been intended and that there is focus on the mission they were built to achieve from inception. Effectively, NGOs can use this legal form to create a separation between the voluntary organisation element of their operation whilst investing in shares of their commercial operation in the form of a Social Enterprise in order to hedge for the commercial risk, ensure continuity and build a distinct brand culture.

This philosophy has now also developed a new industry in the sector known as ‘Social Franchising’ whereby successful brands with their strategic implementation philosophy are sold (at times even at no cost) to other operators within and/or outside the country of origin. The approach assures transfer of knowledge, building of best practice systems and rapid implementation of concepts. Furthermore, successful owners of a social brand can commercialise their brand and extend their reach.

Within the Maltese scenario, the advent of a Social Enterprise legislative framework shall:

- a. Establish a new legal form within the social economy with a clear commercial orientation that promotes sustainability of operations;
- b. Ensure that these organisations in the social economy are properly capitalised and that the major part of the profits generated are re-invested within the organisation itself or in support of the declared social objective;
- c. Favour the growth of an equity/asset-base that will make these organisations within the social economy more bankable and enable them to procure finance from the market on their own merit;
- d. Develop different best practice models for social innovation using disciplined management methodologies to the benefit of the vulnerable within society; and
- e. Provide opportunities to start-up organisations and individuals with social entrepreneurial projects by providing clear direction to help develop their idea and implement it successfully with the community.

6. PROPOSED LEGISLATION

The Proposed Legislation is guided by the following main principles:

- a. Provision of a lean legislative framework that establishes the fundamental principles in social enterprise best practices as commonly found within the European Union;
- b. Utilisation of the ‘social enterprise label’ approach to avoid duplication and provide focus on the ‘not-for-profit’ and ‘social’ elements that are fundamental to the implementation of the concept;
- c. Provision of clear definitions on the key elements of the legislation;
- d. Provision of implementation mechanisms to ensure sustainability and commercial viability of organisations proposed; and
- e. Recognition of Malta’s particular circumstances in terms of economies of scale and market limitations.

6.1 Establishing the Legal Form

The Act establishes that the preferred form for social enterprise organisations is that of a limited liability company. In fact, it establishes that a “social enterprise company” means a limited liability company, which is registered in terms of this Act. This has been done because the company is seen as the most appropriate trading vehicle and to strengthen the ‘socio-commercial’ vocation of the social enterprise as well as to give clear guidance on the preferred legal form by the legislator

However Article 7(1) states that: ‘A legal organisation, of any form, other than a limited liability company may be registered as a social enterprise organisation if it files an application with the Regulator’. Art 7(5) states that “in such cases, the law applicable to the legal form of such organisation shall apply with such modifications as may be necessary due to the context”. This provision has been included in order to provide those existing social purpose organisations, which already operate under an established legal form, with the possibility to seek to qualify for the ‘social enterprise’ label, in order not to impose on such entities the need to change their legal form.

6.2 The Social Purpose

To give clear focus and direction, Article 2 defines that:

“social purpose” is a purpose which benefits the community and which includes:

- a. the advancement of education, including physical education and sports;
- b. the advancement of health;
- c. social and community advancement, including the integration of persons who are disadvantaged or disabled;
- d. the advancement of culture, arts and national heritage;
- e. the advancement of environmental protection and improvement, including the protection of animals;
- f. the promotion of human rights, conflict resolution, democracy and reconciliation;

- g. the relief of poverty, pain and suffering, and other humanitarian needs; or
- h. any other purpose as may be prescribed by the Minister by means of regulations made by virtue of this Act.

The Act specifies that a social purpose does not include a *political purpose* which is defined as the promotion of the interests of a political party or a political candidate, whether at local, national or international level, or to seek or oppose changes in the law or governmental policy or decisions except when such law or government policies or decisions directly concern the achievement of a social purpose.

6.3 Definition of a Social Enterprise Company.

Article 3 (1) defines the “Social Enterprise Company” as a limited liability company which is constituted after the coming into force of the Act, that is registered with the (Social Enterprise) Regulator, and which is established for:

- a. “the carrying out of any act of trade which is principally aimed towards the fulfilment of a social purpose for the benefit of the community from the activity itself; or
- b. the carrying out of any act of trade with the additional expressed social purpose of integrating into the labour market persons who are disadvantaged or disabled.”

The emphasis made on the words ‘act of trade’ is intended to highlight the commercial nature of the activity and its ‘social purpose’ relating to the definition outlined in 6.2 above, and, in the second option, the additional expressed social purpose of integrating the vulnerable members of society into the labour market through an act of trade.

In this context article 4(1) states that a social enterprise company shall be considered to be:

- carrying out any act of trade which is principally aimed towards the fulfilment of a social purpose when at least seventy per cent of its total income is acquired from such activity; or
- carrying out an act of trade while integrating into the labour market persons who are disadvantaged or disabled, when not less than thirty per cent of the total number of workers engaged or employed by it in any capacity are disadvantaged or disabled workers.

This ensures that the act of trade has a social purpose and that revenues are generated primarily from the act of trade and not through donations and further, that when the focus is on the integration of vulnerable persons, at least 30% of those employed are certified as such.

6.4 Definition of a “disadvantaged worker” and “disabled worker”.

The Act defines the terms “disadvantaged worker” and “disabled worker” in order to ensure clarity and focus, however it provides for the Minister to be able to institute provisions in further defining these terms if it is deemed necessary.

The term “disadvantaged worker” is defined as any person who belongs to a category which has difficulty entering the labour market without assistance, namely a person meeting at least one of the following criteria:

- i. any person who is under 25 or is within two years after completing full-time education and who has not previously obtained his or her first regular paid employment;
- ii. any migrant worker who moves or has moved within the European Community or becomes resident in the European Community to take up work;
- iii. any person who is a member of an ethnic minority and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment;

- iv. any person who wishes to enter or to re-enter working life and who has been absent both from work and from education for at least two years, and particularly any person who gave up work on account of the difficulty of reconciling his or her working life and family life;
- v. any person living as a single adult looking after a child or children;
- vi. any person who has not attained an upper secondary educational qualification or its equivalent, who does not have a job or who is losing his or her job;
- vii. any person older than 50, who does not have a job or who is losing his or her job;
- viii. any long-term unemployed person, i.e. any person who has been unemployed for 12 of the previous 16 months, or six of the previous eight months in the case of persons under 25;
- ix. any person recognised to be or to have been an addict in accordance with national law;
- x. any person who has not obtained his or her first regular paid employment since serving a period of imprisonment or other penal measure.

A “disabled worker” is defined as a person either:

- i. recognised as disabled under national law; or
- ii. having a recognised, serious, physical, mental or psychological impairment.

6.5 Exclusions

Article 3 (2) determines that Social Enterprise Companies are not to be controlled by the State, in line with the European Parliament definition and that voluntary organisations whether enrolled or not under the Voluntary Organisations Act and pious foundations and ecclesiastical entities do not qualify for registration. However, these exclusions do not hinder any organisation from being the holder of any of all the shares in a social enterprise company.

6.6 Management of Income and Equity.

Article 5 institutes a number of financial provisions that aim to ensure that:

- there is limited distribution of profits benchmarked at 10%;
- remaining profits are capitalised to strengthen the equity/asset-base of the company or used in any other manner as may be prescribed by the Minister in regulations or by the Regulator in guidelines;
- remuneration and expenses are maintained within acceptable levels;
- volunteer workers do not constitute more than fifty per cent of the total number of persons engaged by such company.

6.7 The Regulator

Part V of the legislation establishes the functions of the Regulator of Social Enterprises. Article 14 establishes a dual role that goes beyond regulatory responsibilities. In fact, it is envisaged that the Regulator also acts as a ‘champion’ for the promotion of Social Enterprise Companies thereby taking an active role to promote growth within the sector. In carrying out his functions, the Regulator is expected to:

- provide social enterprise companies with information about the benefits and responsibilities deriving from registration in terms of this Act;
- provide information and guidelines to persons involved in social enterprise companies, including those performing voluntary work, for the better performance of their role and for the better achievement of the objectives of the social enterprise companies in which they serve;
- make recommendations to the Minister on legislation and policies in support of the social enterprise sector;

- assist Government, government departments, public agencies and entities controlled by the State in preparing and reviewing policies in support of social enterprise companies and the social enterprise sector in general; and
- promote the social enterprise sector, developing co-operation between social enterprise companies and Government, and co-operation between social enterprise companies amongst themselves.

For this purpose, the Regulator is expected to run a lean structure with a clear demarcation between regulatory and promotional responsibilities. In order to nurture and encourage prospective social entrepreneurs to develop their ideas and build new enterprise, the Regulator would be pivotal to help bring together the necessary ingredients for the successful development of the sector. Some relevant initiatives would be to:

- Identify 'social purpose' projects that can attract funding and generate commercial sustainability;
- Support Human Resources Development structures to nurture social entrepreneurs with the right stamina to meet the prescribed goals and targets established for their venture;
- Promote the development of a suite of start-up finance schemes with public and private stakeholders;
- Help build an incentives package that shall sustain the development of the sector making the social enterprise model a creditable option for one to pursue;
- Promote the education of prospective social entrepreneurs in good governance and risk management techniques for the benefit of the development of their enterprise; and
- Promote Public-Private Partnerships with the participation social enterprises.

6.8 Other Provisions

Other provisions within the legislation determine:

- The contents of the Memorandum of Association over and above what is prescribed in Company Law;
- The Social Enterprise Register;
- Compliance and reporting

7. CONCLUSION

Legislation on its own cannot bring about the development of the social enterprise sector. This has to be supplemented by the right policies and policy actions to help achieve this objective.

These policies need to be developed in a cohesive manner, with the broad stakeholder participation, to devise actions that would identify educational, financial and legal tools to support the sector's development. The main key pillars that shall sustain such growth can be summarised under five key headings:

Pillar 1 - A Socially Responsible Country

Looking at options for supporting participatory models of analyzing social needs; supporting civic activity; increasing the participation of social enterprise companies in the services of general interest markets, activities strengthening sustainable development and solidarity of generations.

Pillar 2 - Regulatory Environment

Defining the legal environment of the social economy (partly through the proposed Act), and identifying options for possible changes to public procurement rules and for public aid in the sector.

Pillar 3 - Social Economy Support

Development of tools intended to enable access to forms of financing; developing the infrastructure of social enterprise support.

Pillar 4 - Mainstreaming Social Economy in Public Policy:

Identify ways to coordinate social economy public policies across all policy areas; supporting the self-organisation of the social economy sector; monitoring of social economy development.

Pillar 5 - Education

Developing educational schemes to strengthen the social economy by eliciting participation of schools, students and local communities and develop social entrepreneurs with the right focus to develop successful ventures.

The five Pillars also need to be assessed within the Social Business Initiative launched by the European Union that aims to develop transnational initiatives for the development of social enterprises and in view of actions arising from the new programming period 2014-2020 in this regard.

Within this context, interested parties are being invited to submit their ideas, suggestions and comments on the proposals in this document in order to ensure that a holistic programme can be established with the broadest consultation from stakeholders in the field. This participatory approach shall also ensure that this proposed legislation shall help provide the right impetus for the development of social innovation to the benefit of Maltese Society as recipient and enabler of the benefits of social enterprise for the proactive growth of the social economy.

ANNEX 1

Issues raised during the internal consultation process and which have been addressed, wherever possible, in the attached draft Bill.

There should be a clear distinction between a social company and a social cooperative. The white paper and accompanying Act should indicate why someone should opt for a social company rather than a social cooperative? The incentives to set up a social company are not listed in the white paper and therefore it is difficult to distinguish the difference the financial benefits for setting up a social company especially when considering the benefits for setting up a social cooperative.

As far as we are aware there are no specific requirements for a co-operative to operate as a social co-operative and therefore such a co-operative would operate along the same lines as a normal co-operative where members receive compensation on capital subscribed as a condition of membership, and allocate surpluses for any or all of the following purposes:

- *developing their co-operative, possibly setting up reserves, at least part of which would be indivisible;*
- *benefitting members in proportion to their transactions with the co-operative; and*
- *supporting other activities approved by members.*

In fact articles 92, 93 and 94 of Cap 442 establish the 'for-profit' nature of co-operatives. This is different from the 'not-for-profit' nature of a Social Enterprise Company where profit is not a motivating factor - thus the limitation on profit distribution (asset lock).

The draft law does not create any confusion between a 'Social Enterprise Company' and a social co-operative because both will be regulated under different laws. The draft Act identifies the Company legal form as the preferred form for Social Enterprises but also leaves the option for other legal forms (such as co-operatives) to be registered as 'Social Enterprises' if these comply with the established parameters by, for example, changing their statute to come in line with the requirements of the law. In such a scenario the co-operative would continue to be regulated by the laws relevant to its legal form (Cap 442 etc.) but would need to abide by the requirements of the Social Enterprise Act where these regulate its activities as a Social Enterprise.

The draft law, once enacted, would need to be supplemented by subsidiary legislation which would further develop any incentive framework that could be put in place to help Social Enterprise Companies particularly at start-up stage. The White Paper identifies this need under 7.0 Conclusion, Pillar 3. However, the intention of the draft Act is to put in place a legal framework for Social Enterprises that can operate along commercial lines and not depend on handouts for their existence. This is why these entities are expected to operate at a profit (as different from 'for-profit') so as to be sustainable and be able to continue pursuing their social purpose in the longer term.

Concern partially solved with subsidiary legislation; however efforts have to be made to explain the different types of incorporation for take-up of social enterprises for the success of the legislation itself.

* * * * *

Would it not be better to keep a clear distinction between the role of the regulator and that of the promoter?

It is not a new concept to combine the roles of regulator and promoter. This is done for example, in the Co-operative Societies Act (Cap 442) where the Co-operatives Board's functions are:

- a. *"to register, monitor and exercise supervision over cooperative societies and to ensure compliance with the provisions of this Act;*
- b. *to support and assist the establishment of co-operative societies in all sections of the economy and society;"*

It is also the case for the CIC Regulator in the UK.

It is not envisaged that there will be large numbers of Social Enterprises, particularly in the first months, since setting up such organisations depends on finding entrepreneurs who can develop innovative ways of meeting social needs and are willing to apply their business skills to reach these objectives.

Social enterprises can also be set up based on models of those already operating successfully in other countries using what is known as 'social franchising' thus making it simpler to start-up new social enterprises.

The resources required for the Regulator / Promoter function itself should be limited to start with while those required to carry out the actual promotional activities depend on the extent and nature of these activities and can be tailored accordingly. In the new Programming Period 2014 - 2020, Structural Funds will be available to support such activities.

* * * * *

The White paper does not include any information on the funding element. Social enterprise companies need start up incentives; tax incentives and possibly seed money. Is a plan already established? Will funding emanate from Government sources only? What kind of fees will be applied? Will MFSA fees for limited liability companies apply? Have other sources of funding been identified e.g. EU Funds?

Social Enterprises will be operating under the Companies act as 'normal' companies and should therefore qualify for any assistance available for such enterprises. The draft Act is intended to ensure the 'bankability' of such enterprises so as to facilitate their funding including start-up and moreover, their nature will make them attractive to investors who, while having the prospect of a return on their investment (the 10% profit), want to see their investment used to achieve social objectives. Other support depends on decisions which would need to be made by the administration but which should ideally develop along with the sector.

As a normal company, a Social Enterprise Company will need to comply with the Companies Act including any fees, etc.

Regarding EU funding, Annex I of the Commission Staff Working Document - Elements for a Common Strategic Framework 2014 to 2020, identifies the following actions in Thematic Objective 9 aimed at promoting the social economy and social enterprises;

under ESF:

- capacity-building and support structures for the promotion of social enterprises, in particular through social entrepreneurship education and training, networking, the development of national or regional strategies in partnership with key stakeholders, and the provision of business development services and easier access to finance;

- mobilisation of funds to support initiatives in the social economy and social entrepreneurship.

under ERDF:

support for the development of social enterprises through developing new business models and innovative solutions to address societal challenges;

Thematic Objective 3

"Actions under this thematic objective should be implemented taking into account that Europe has too few entrepreneurs and disproportionately even fewer women than men entrepreneurs.

Particular attention should be paid to tackling the factors discouraging women from becoming entrepreneurs. Actions under this thematic objective should be reinforced by actions financed by the ESF to boost the competitiveness of SMEs. These actions should focus on developing the capacity of SMEs to anticipate and manage change through identification of employment and skills trends, on providing support for the organisational development, information and counselling of SMEs, on introducing innovative forms of work organisation and/or flexible working time arrangements and on promoting enterprise investment in training. Actions under this thematic objective should also complement actions financed by the ESF to support entrepreneurship, self-employment and business creation (under the employment thematic objective) and actions supporting social enterprises which can be provided by the ESF and ERDF (under the social inclusion thematic objective)."

We are of the opinion that incorporation and maintenance fees should be kept to a minimum, ideally nil, considering that distributable profit is limited and the main scope is the social aspect. As regards assistance, these enterprises should benefit from incentives offered by business development agencies ideally with a monetary return as tax incentives may not be beneficial since emphasis is on the social aspect and not on the limited profit. The access for this assistance should not be complicated and time consuming.

* * * * *

The proposed Act indicates that only 10% of profits can be distributed amongst shareholders. Will there be an obligation to pool in a percentage of the profits to a common Government fund which would be used for and in the interest of social companies....e.g. training, aid to fill in application forms, writing a business plan etc...(which would eventually fall within the promoter's role).

As explained earlier the Social Enterprise Companies are meant to be not-for-profit but operate at a profit to ensure sustainability. The allowance for a 10% distribution of profits is meant to ensure a level of return is available to attract investment in such companies. Any residual profit is to be retained in the company (asset lock) and reinvested with the objective of achieving the Company's declared social purpose. In the event that the company ceases operations its assets are to be devolved to another registered Social Enterprise having a similar social purpose (more details in the draft Act).

No further comment.

* * * * *

Why does the Act limit the activity of a Social Enterprise Company to an "act of trade"?

We believe that "act of trade" as defined in the same Act ("acts of trade" shall be those identified in Article 5 of the Commercial Code;) is sufficient to include any activities that a Social enterprise Company would wish to undertake in furtherance of its 'social objective'.

The Act states that "the Minister may issue regulations from time to time to determine how specific articles of the Companies Act are to apply in the case of social enterprise companies". It is relevant to point out that EU Regulations will still apply, since a Social Enterprise Company is still a limited liability company)

Any legislation that applies to a normal Company will apply to a Social Enterprise Company.

* * * * *

The Bill should be welcome given that this has the aim of providing a legal framework that enables the development of sustainable Social Enterprise organisations in Malta. It should be noted that the promotion of Social Enterprise through social economy and social innovation initiatives is an EU objective and the European Commission on 25th October 2011 issued a Communication "*Social Business Initiative - Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation*". This Communication defines a social enterprise as "*an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by providing goods and services for the market in an entrepreneurial and innovative fashion*

and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involves employees, consumers and stakeholders affected by its commercial activities". The draft Bill builds on such a definition.

In this regard, mention should also be made of Regulation (EU) No 346/2013 of 17th April 2013 on European Social Entrepreneurship Funds which is part of the Social Business Initiative established by the Commission in its Communication of 25th October 2011. The purpose of this Regulation is to enhance the growth of social undertakings in the Union while also establishing uniform rules on the nature of qualifying social entrepreneurship funds, in particular on qualifying portfolio undertakings into which the qualifying social entrepreneurship funds are to be permitted to invest, and the investment instruments to be used.

It is felt that the concept of social enterprise should be extended to include those who offer social services, which may or may not be of a profitable nature, as long as it follows the rationale of effective management. In this regard, consideration may also be given to the issue of co-operatives given that in many countries, co-operatives are dealt with in the same legislation as that of social enterprise.

The Social Enterprise Act is not meant to be a complete solution to cater for all instances where services are offered to meet social needs. It is a specific vehicle to cater for those who can provide such services in "an entrepreneurial and innovative fashion", and aims to create a regulated environment which will assist them to do so in a sustainable manner. It will not interfere in any way in the operations of other organisations.

Regarding co-operatives and organisations of other legal forms, the Act provides for their acceptance as Social Enterprise Organisations provided the established parameters are met (Art 7).

On the White Paper, we acknowledge what is stated that "the tendency is that players in the Social Economy depend to a certain degree on voluntary work and donations from the general public to sustain and fulfil their mission". Indeed, the presence of the voluntary sector in our society is particularly strong and its contribution to people's wellbeing, especially those who are vulnerable or disadvantaged in life, is highly appreciated and widely supported across all levels in our country. Moreover, while recognising that sustainability and good governance are key issues, as yet, it needs to be seen how Malta's voluntary sector will be able to take advantage of such legislative developments given that the majority of the organisations that operate in this sector are micro ones with limited managerial capacity and human resources.

One of the objectives behind the draft legislation is to provide encouragement and the means for such organisations to overcome their limitations such as by (ideally) pooling their resources, or by adopting a different business model, and providing their services in a more sustainable manner.

Social Enterprise Organisations will still be able to benefit from voluntary work (Art 5(8)) and the Act includes provisions that are meant to promote voluntary work (Art 14(1)(h) and Art 34(1)(r)).

In advocating a more business-like mentality, one must also be careful in not undermining the "voluntary" aspect as this is after all the very essence of the existence and *raison d'être* of such organisations. It is thus heartening to read that the role of the Regulator will also be that of making recommendations to Government on legislation and policies in support

of the social enterprise sector as well as enhancing co-operation between those operating in this area.

We feel that the social enterprise set-up should be more open to people who are in transition in the labour market, including those who have been unemployed for less than a year.

The definition of “disadvantaged worker” in Art 2 of the draft Act, includes quite a wide understanding of persons who are unemployed and therefore these can be included in the social purpose of Social Enterprise Company particularly as defined in Art 3(1)(b).

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The regulations that support the social economy are necessary and overdue, making this white paper welcome by organisations that de facto are already working in this area as social enterprises and organisations, but perhaps not gaining from the status and protection we hope legislation will allow. There however needs to be greater clarity differentiating the plethora of ‘statuses’ that range from Co-operatives, Non- profits, Charities, Voluntary Organisations, Trusts and pure Commercial entities. These titles are readily interchanged in public opinion, which does not necessarily reflect the legal & fiscal frameworks in which they act.

Whilst the term Social Economy and Social Enterprise are welcomed, the organisations that would fit into this legal framework need to understand more clearly where they would benefit. The White Paper largely indicates obligations required from SEs that register, whilst benefits are perhaps still unclear. We would like to raise the following issues:

1. Social Enterprises should not be classified as ‘commercial’ entities but should be described in their own right as community interest companies, social enterprises and the like. The term ‘non-profit’ is also misleading as it implies a zero-tax rating and zero profit distribution.

This will be a new legal framework and we believe that few (if any) existing organisations would fit into the established parameters without any changes to their statutes and organisational structure. The Act is not meant to regulate the whole social economy but to provide a regulated legal form for those who want to achieve a social objective by operating in the commercial market. This type of activity is quite widespread in a number of countries and operates in different forms. Social Enterprise Companies set up under this legislation will be similar to the Community Interest Companies in the UK.

The Act does not use the term “non-profit” but Social Enterprise Companies are expected to be “not-for-profit” in the sense that making a profit will not be their raison d’être while they will be expected to make profit since this will ensure their sustainability.

2. By defining the value of 10 % of distribution of profits to shareholders implies the SE is not a ‘non-profit’ but potentially making a profit.

See comment above.

3. It is not clear what taxation system will be applied to any NET profits, or taxes on profits distributed to shareholders, or both.

A Social Enterprise Company or a Social Enterprise Organisation (for which the Act provides) will operate according to its legal form.

At this point the Act does not establish any form of exemptions that could be afforded to such enterprises since these will be developed and legislated at a later stage. Any such incentives would need to be within the relevant parameters to ensure fair competition and compliance with state-aid regulations.

4. It is not clear whether VAT is applied on all operations of the SE at regular rates and whether these are creditable on purchases like a Limited Liability Company, or excluded as a Voluntary Organisation, Educational Institution or Financial Institution. Inability to claim VAT on operations, or not charge VAT for services may impact sustainability and possibly lead to unfair competition in the market.

A Social Enterprise Company / Organisation will operate like a normal company (or other legal form, for example co-operative) but will accede to any benefits that will be established by virtue of its recognition (through registration with the Regulator) as a Social Enterprise.

5. What protection is available for unfair competition against limited liability companies that can benefit from VAT credit, and self-control on profit distribution, therefore?
6. Conversely, what unfair advantages could an SE gain by using its SE status against a limited liability company?

Any benefits or incentives made available to Social Enterprise Companies will need to comply with existing fair competition and state-aid regulations.

7. Whilst cooperatives in Malta require democratic control by its members, SEs may be purely entrepreneurial activities that drive social innovation, with no members but with shareholders and owners. How will these be looked at *vis a vis* classification as an SE?

The draft Act envisages two types of Social Enterprise Companies, those whose commercial activity is directly aimed at achieving a social objective, and those who achieve their social objective in the carrying out of a commercial activity (i.e. by employing disadvantaged or disabled persons).

The main vehicle provided by the draft act for this activity is the Social Enterprise Company, set up specifically according to the parameters of the Act. However, the legislator opted to allow for other existing organisations who wish to operate as a social enterprise the possibility to do so, while retaining their legal form, as long as these make the necessary changes to come in line with the requirements set out in the act.

- 8 Can a purely commercially driven entity that's whole ethos and operation 'fit' within the SE framework (such as a company that sells green products) fall under the SE umbrella to gain fiscal benefits?

It will be the Regulator's remit to establish whether an enterprise that wishes to be registered as a Social Enterprise fulfils the requirements laid out in the Act.

The "advancement of environmental protection and improvement" is listed as social purpose but it remains to be seen whether its achievement can be done simply by selling green products.

- 9 Will SEs be classified as commercial enterprises under the Malta Enterprise or ETC framework and therefore benefit from particular funding schemes, unlike VOs which are currently excluded?

The fact that Social Enterprise Companies will be operating as a normal commercial entity would entitle them to accede to any schemes available to other operators.

- 10 What incentives would a limited liability or purely commercial company gain from outsourcing/partnering to/with an SE? What (outside kindness of heart) would incentivise companies to drive business to SE's, versus their purely commercial counterparts who (one assumes) is not focused on social value-added?

A purely commercial company can opt to invest in a Social Enterprise Company as a way of meeting its corporate social obligation. This would also mean that it would still be getting some (limited) return for the capital invested whilst helping achieve improvements to the community.

The European Union has recently provided for the setting up of Investment Funds that would be able to channel their investments to social enterprise organisations.

With the appropriate platforms, Social Enterprise Companies will even be able to attract private investment from people who want to see their money being used to achieve social improvement.

One of the main objectives of the draft Act is to render these social organisations into bankable entities that will be able to raise the necessary funding to run and grow their operations