

**Replies to questions raised by participants during the Public Hearing on Future  
Single Market Policy on 29 November 2006<sup>1</sup>**

***We are an NGO working on alcohol and drugs. Our concerns are linked to the issue of the relationship between public health and the freedoms of the internal market. Non-communicable diseases cause 86% of deaths and 77% of ill-health in Europe. These are linked to lifestyle choices or consumption patterns and are highly preventable. There is good evidence of policies that are effective in reducing the consumption of harmful products, for example reducing the availability, accessibility and visibility of tobacco, alcohol or certain food items. The EU internal market must take as a basis a high level of human health protection but internal market rules have been used to undermine or dismantle national policies that place restrictions on products harmful to public health. This contradicts Article 95. Has DG Internal Market assessed public health impact of their policies? How does this Single Market Review address the fundamental contradiction between protecting public health and the liberalisation of the internal market?***

First of all, there have always been mutually reinforcing links between the Single Market policy on one hand, and public health policy on the other. The best example illustrating this is that to date all of the legislation regarding labelling, advertising or product regulation put forward by the European Community (EC) has been based on the EC's competence to regulate the Single Market, i.e. Article 95. Article 95 has enabled active legislative action to protect public health, which would not have been possible under the public health legal basis (Article 152). Although Article 152 obliges the Community to ensure a high level of health protection in its policies, it explicitly excludes the harmonisation of the laws and regulations of Member States. As a result of action under Article 95, for instance the Directives regarding tobacco use (Products Directive<sup>2</sup> and Advertising Directive<sup>3</sup>) have had a substantial impact on reducing smoking rates by introducing strict regulation across the EU on the sale, marketing and advertising of tobacco products – by calling for more transparent information and setting maximum tar or nicotine yields for cigarettes.

Of course, in proposing such legislation, a balance needs to be found between public health and Single Market objectives. On the one hand, the EC has an obligation in Article 95(3) to take into account a high level of health protection when legislating on the Single Market issues. At the same time, the proposed legislation needs to be proportionate and cannot become an obstacle to a good functioning of the Single Market. This is a reasonable balance allowing for a high level of public health protection across the whole of the EU.

Apart from legislative action, the Commission is also active in putting forward supporting measures to ensure high level of public health within the Single Market.

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<sup>1</sup> In order in which they were asked during the Hearing.

<sup>2</sup> Directive 2001/37/EC of the European Parliament and the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products

<sup>3</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products

One of the examples could be the anti-smoking campaign "HELP - For a life without Tobacco".

The Communication "A Single Market for the 21<sup>st</sup> century Europe"<sup>4</sup> (and its accompanying Staff Working Document "Instruments for a modernised Single Market policy"<sup>5</sup>) published in November 2007 underlined those mutually reinforcing links between the market opening and consumer (including public health), social, environmental and Single Market policies. It also called for ensuring closer synergies between them. A more evidence-based approach to Single Market policy will help in that context. It will be based on an economic analysis of how markets work and will take better account of the potential consumer, SMEs, social and environmental impacts of Single Market policies. A concrete step in this direction is the introduction of a Consumer Scoreboard which will monitor the markets from the consumers' perspective as of 2008.

Furthermore, the Communication specifically underlined that the Single Market has to maintain high standards, in particular in areas such as product and food safety and put forward concrete initiatives. For instance, efforts will be made to improve coordination between accreditation, certification and surveillance bodies, and the Commission will present an initiative on food and nutrition labelling as well as a review of the legislation on novel food.

***The participant focused in his question on CFR-net (network of stakeholder experts on the Common Frame of Reference in the area of European contract law) and stressed that there was a need for more transparency and coherence on the part of the Commission. The last event was in July 2006 and no further information was provided by the Commission. The participant asked when the Commission would make its decision on the CFR as practical input from policy-makers and practitioners was essential for academics working on the subject.***

The Commission informed the public and the other institutions on the development of the CFR project in its Second Progress Report of 25 July 2007<sup>6</sup>.

In 2007, DG Internal Market and Services held two more workshops on information requirements in financial services and on how national rules on unfair competition and commercial practices are accounted for in the European CFR rules and model clauses for business to business contracts given the need to ensure the smooth functioning of the Single Market for business to business services. DG Justice and Home and Affairs plans workshops for 2008 on grounds of invalidity, formation of the contract, remedies for non-performance and prescription.

By the end of 2007 the researchers delivered their draft academic CFR. The Commission is in the course of assessing this draft according to the original conception of the CFR as a "toolbox" or a handbook for the Commission and the EU

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<sup>4</sup> COM(2007) 724 final, Brussels, 20.11.2007,  
[http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007\\_0724en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0724en01.pdf)

<sup>5</sup> SEC(2007) 1518, Brussels, 20.11.2007,  
[http://ec.europa.eu/citizens\\_agenda/docs/sec\\_2007\\_1518\\_en.pdf](http://ec.europa.eu/citizens_agenda/docs/sec_2007_1518_en.pdf)

<sup>6</sup> COM (2007) 447

legislator to be used when revising existing and preparing new legislation in the area of contract law. The Commission will need to select very carefully the parts of this draft that correspond to the common legislative objectives. This selection process will need to be done in consultation with the other institutions and stakeholders. The Commission will ensure that the parts of the research draft selected for the CFR (and possibly modified) are coherent with each other and with the follow-up of the Green Paper on the Consumer Acquis Review<sup>7</sup>. After analysing the results of the consultation process, elaborating its draft CFR, and conducting an impact assessment, the Commission will consider whether to submit its approach in the form of a White Paper.

***The participant applauded the Commission for developing the trademark system and asked how the efforts at EU, national and international level could be best coordinated and how the industry could help. Trademark counterfeiting is a huge problem for the Single Market, not only for businesses but also for government, citizens and consumers. What is the Commission going to do to harmonize Member States anti-counterfeiting laws and practice? How can efforts at national, European and international, level among institutions be coordinated and how can industries contribute?***

In order to harmonise the Member States' legislative IP enforcement systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market, the Commission made a proposal for a Directive on the enforcement of intellectual property rights which was adopted by the European Parliament and the Council on 29 April 2004. The Commission is currently monitoring the process of implementation to ensure the correct transposition of the Directive into the national law of the Member States. The Directive seeks to create a level playing field for rights-holders to defend their rights in the face of an infringement of their intellectual property right by bringing national legislation on civil measures, procedures and remedies closer into line with 'best practice' - taking what was felt to be the most effective from Member States' current legislation. The wide set of rules covered by the Directive (on evidence and the preservation of evidence, injunctions, seizure, recall and destruction of goods, damages, blocking of bank accounts and seizing of assets, financial compensation, a presumption of ownership of related rights, the publication of judicial decisions, etc.) also includes the establishment of a general framework for the exchange of information between the responsible national authorities. As a complement to the Enforcement Directive 2004/48/EC, the Commission furthermore submitted on 26 April 2006 a proposal for a Directive on criminal sanctions aimed at ensuring the enforcement of IP rights. This proposal is currently under consideration in the Council after having been adopted by the European Parliament in first reading. The proposal seeks to harmonise the Member States' IP legislation in the field of criminal penalties.

The EU efforts aiming at improving and approximating the legislative IP enforcement systems beyond the EU borders are undertaken in the framework of international (in particular, WIPO IP Committees and WTO TRIPS Council) and bilateral regulatory co-operation ("dialogues"), Free Trade Agreements and transatlantic co-operation. The European Commission adopted a specific strategy for the enforcement of IP

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<sup>7</sup> COM (2006) 744, 8 February 2007

rights in third countries on 10 November 2004. The action plan focuses on vigorous and effective implementation and enforcement of existing IPR laws. It proposes to identify priority countries where enforcement actions should be concentrated. Stress is put on technical cooperation and assistance to help third countries fight counterfeiting. The fostering of awareness raising of users and consumers in third countries and the support of the creation of public-private partnerships for enforcement are further actions undertaken by the Commission on the basis of this specific action plan.

In the context of the above activities DG Internal Market and Services created a new Unit called "Enforcement of Industrial and Intellectual Property Rights" to reinforce the close co-operation with representatives of industry to identify problematic issues and to try to find a solution for them.

***NGOs hold big potential for the Single Market but their voice has not been so far taken into account. How will DG Internal Market ensure that those voices are taken into account?***

It came out clearly from the Commission consultation on future Single Market policy and the public hearing on the same subject in 2006 that some groups of EU stakeholders, such as consumers, NGOs, trade unions, small enterprises or local governments do not feel sufficiently involved in the EU decision-making on Single Market policy and would like to be more closely associated to it.

The Communication "A Single Market for the 21<sup>st</sup> century Europe", published in November 2007, aims to put the citizens at the heart of Single Market policy. This is to be done through the specific policies targeted at citizens but also through better consultation on Single Market policies of those groups of citizens who feel that their concerns have not been sufficiently taken into account.

The accompanying Commission Staff Working Document "Instruments for a modernised single market policy" sets out in more detail how to broaden the involvement in Single Market policy of those actors who are not represented by the large trade associations, including NGOs. For instance it considers to:

- organise a structured, on-going dialogue with 'non-business' stakeholders on Single Market issues, including NGOs as those tend to be engaged in specific policies of concern to them rather than in the Single Market policy as a whole;
- make consultations more accessible and user-friendly (a clear structure and format, non-technological introduction) and pay more attention to post-consultation feedback;
- undertake more regular consultation of the European Consumer Consultative Group (ECCG), which would assist the Commission in preparing initiatives for these sectors.

DG Internal Market and Services realises the importance of feedback from organisations such as NGOs and is working towards a more pro-active approach to involve interested stakeholders. For instance, a number of meetings have already taken place in 2007 between DG Internal Market and NGOs (the Civil Society Contact Group and others), consumers (the European Consumer Consultative Group) and trade unions (the European Trade Unions Confederation). On the basis

of those meetings, experiences of other DGs (such as DG Health and Consumer Protection's "Healthy Democracy Initiative") and the proposals contained in the Single Market Review documents, DG Internal Market and Services is now in the process of working out further steps.

***The Single Market should be of concern to all DGs. For the moment, each DG has its own way of consulting. Why an identical procedure is not applied regardless which DG launches a consultation?***

The Commission attaches great importance to inclusive policy-making and is aware of concerns expressed in that context by various interest groups during the recent consultations (e.g. 2006 consultation on future Single Market policy). The need to better involve stakeholders in Single Market policy-making was also strongly stressed in the Single Market Review package of November 2007 and in particular in the Staff Working Document on instruments (as explained in the answer to the preceding question).

The rules for the Commission consultation practice were set out in the 2002 Communication on general principles and minimum standards<sup>8</sup>. The aim of the minimum standards is to build a framework for consultation that is coherent, yet flexible enough to take account of the specific requirements of all the diverse interests, and of the need to design appropriate consultation strategies for each policy proposal. The method and extent of the consultation performed must always be proportionate to the impact of the proposal under consultation and take into account the specific constraints linked to it.

Since the introduction of the minimum standards, efforts have been made to unify the way consultations are carried out, for instance, by using a single website for consultations (Your Voice in Europe<sup>9</sup>), and introducing specific standardised consultation tools such as Interactive Policy Making (IPM) and European Business Test Panel (to consult enterprises). The Commission is currently following up the work done so far by preparing measures on how to reinforce the application of 2002 minimum consultation standards. These will focus on sharing information and good practices on stakeholder consultation between the Commission Directorates-Generals; reviewing the practical guidelines for stakeholder consultation; creating a new standard consultation template to improve the consistency of open public consultations; as well as on training and awareness-raising among the Commission staff<sup>10</sup>. The first outputs can be expected in the course of 2008 and should further improve and unify the consultation practice across the Commission. These will include a voluntary register of interest representatives with the function to alert stakeholders to new open consultations thus adding to the coherence of the consultations of the different Commission services.

The work on improving consultation is also ongoing in specific Directorates-General, as for instance, in case of the "Healthy Democracy" initiative of DG Health and

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<sup>8</sup> COM(2002) 704 final, 11.12.2002

<sup>9</sup> <http://ec.europa.eu/yourvoice/>

<sup>10</sup> Commission Communication " Follow-up to the Green Paper 'European Transparency Initiative', COM(2007) 127 final, 21.3.2007

Consumer Protection. DG Internal Market and Services is also currently reflecting on how to improve its consultation practices.

***Does the European Commission believe that price competition alone is sufficient or should rules apply in the same way to those offering their services?***

Fixed tariffs constitute an obstacle to the Single Market since they limit services providers in their possibilities to compete more on price or on quality, which is an essential tool of any economic activity and may render the establishment in a Member State less attractive. In recent case law concerning minimum tariffs for lawyers (C-94/04), the European Court of Justice (ECJ) pointed out that these tariffs are not necessary in a number of cases since rules relating to organisation, qualifications, professional ethics, supervision and liability may suffice in themselves to attain the objectives of the protection of consumers and the proper administration of Justice. Obligations to apply fixed minimum or maximum tariffs are subject to the mutual evaluation process foreseen in the Services Directive<sup>11</sup>. In this context, Member States have to assess, by the end of 2009, whether such obligations are non discriminatory, justified by an overriding reason of general interest and proportionate to that objective, taking into account the considerations made by the ECJ.

***A successful Single Market depends on consistent legislation and avoiding different implementation in different Member States. Are transposition workshops accessible to stakeholders? Would the Commission see the concept of a "lead supervisor" as a good solution?***

Transposition workshops are meetings organised by the Commission with representatives of the Member States to help them in the process of implementing directives. These meetings are not open to other stakeholders. However, DG Internal Market and Services has usually made the conclusions of these meetings available on its website. For example, a number of the questions and answers included in the 'Your questions on the Market in Financial Instruments Directive (MiFID)' web-page of the Commission represent the conclusions of transposition workshops. In banking, the Capital Requirements Directive Transposition Group conducts work using a website which enables all stakeholders to channel specific/technical questions regarding the transposition of the Directive and where agreed answers are then posted<sup>12</sup>.

The Commission believes that an enhanced role should be given to a lead supervisor in the supervision of cross-frontier insurance groups, and this is a feature of the Solvency II proposal which is currently under examination in the European Parliament and the Council. In general, the Level 3 committees in the insurance, banking and securities sectors are working on supervisory convergence and on co-ordinated application of the relevant directives. In the securities sphere, the emphasis is on practical arrangements for sharing supervision of investment firms which have branches in more than one Member State (see, for instance, Committee of European

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<sup>11</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Official Journal L 376, p. 36, 27.12.2006

<sup>12</sup> [http://ec.europa.eu/internal\\_market/bank/regcapital/transposition\\_en.htm](http://ec.europa.eu/internal_market/bank/regcapital/transposition_en.htm)

Securities Regulators' (CESR) Protocol for the Supervision of Branches under MiFID). In banking, the Commission is working on proposals to change the Capital Requirements Directive to clarify the role of the lead ('consolidating') supervisor, reinforce cooperation in crises, and introduce 'colleges' for all cross-border banking groups (limited to crisis functions). In the insurance field, the CEIOPS (Committee of European Insurance and Occupational Pensions Supervisors) has adopted a number of protocols setting out agreed arrangements for the application of various directives.

***What is the Commission's opinion on the 26th/28th insurance regime as a tool for harmonisation in the area of financial services?***

In its White Paper on Financial Services Policy 2005-2010<sup>13</sup>, the Commission noted that there was widespread scepticism about the feasibility and usefulness of optional instruments (such as the 26<sup>th</sup> regime) in the area of financial services. The Commission said that it remained open but felt that the promoters of the 26<sup>th</sup>/28<sup>th</sup> regime needed to explain their ideas and the legal and practical feasibility and advantages of such optional instruments in more detail. In its recent Staff Working Paper on initiatives in the area of retail financial services (part of the Single Market Review package), the Commission repeated that the practicability of the 28<sup>th</sup> regime concept should be assessed to see whether this approach could be successfully applied in some specific areas of retail financial services.

***The proposal for the Consumer Credit Directive is currently being discussed in the Council. The original text of the Directive has been completely amended and additionally, there was no impact assessment. To what extent can this new proposal for a Directive meet the objectives originally expected of this proposal by the Commission?***

The Consumer Credit Directive has been formally adopted on 7 April 2008. The new rules strike a balance between the proposal's two objectives: securing Single Market benefits whilst at the same time enhancing consumer confidence. The main effect will be more transparency in the market for consumers and business competitors. Under the new rules:

- consumers will be assured access to key facts and figures in advertisements,
- pre-contractual information must be set out in a comparable EU-wide European Credit Information Form to be used by all creditors,
- there will be a single EU-wide method for calculating the Annual Percentage Rate of Charge (APRC), and
- consumers will be able to withdraw from the credit without having to give any reason.

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<sup>13</sup> [http://ec.europa.eu/internal\\_market/finances/docs/white\\_paper/white\\_paper\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf)

***All citizens should benefit from the Single Market, however this is not necessary the case at the moment. What tools can be used to make all citizens benefit from Single Market policy? The pool of stakeholders is very diverse and in particular, as far as social services are concerned, Single Market rules are not adopted to specific requirements of various stakeholders.***

The Commission is aware that some doubt whether the Single Market has brought enough direct advantages to consumers and small businesses, as expressed in replies to the 2006 public consultation on future Single Market policy. That is why the Commission put a strong focus on consumers and enterprises in the Single Market Review (SMR) package of November 2007 in order to confirm that they are at the very heart of the Single Market. This was done by putting forward concrete initiatives which will bring direct benefits to citizens, such as in the area of retail financial services and regarding consumer rights and redress, but also by better taking into account the citizens' point of view in Single Market policy-making. For instance, a Consumer Scoreboard will be put in place in the course of 2008 in order to monitor the market performance from the perspective of the consumers and show which markets are failing in terms of economic or social outcomes.

In order to ensure that all EU citizens benefit from the Single Market, it is important that they are aware of their Single Market rights and know where to turn for redress if they cannot make use of those rights. The Commission project of linking the existing EU level information, assistance and problem-solving systems, such as SOLVIT, EURES or Your Europe, into a single gateway, which was announced in the SMR package, should lead to substantial improvements in that area.

As underlined in the 2007 Communication on services of general interest (part of the SMR package), the objectives of developing high-quality and affordable services of general interest (SGI), including social services, and of a competitive and open Single Market are compatible. However, uncertainty still prevails in some cases on how to apply Single Market rules in some SGI areas. In order to address those concerns, an interactive information service has been put in place (in January 2008) to handle questions on the application of Community law to services of general interest<sup>14</sup>.

***The regulation of tobacco products is a complex area. To date, all EC legislation has been based on the Internal Market legal base in the Treaty. This has led to several legal challenges. Given this, and the recommendation in the DG Consumer Protection funded ASPECT report that all nicotine and tobacco products should be regulated by one EU agency, what plans does the Commission have to implement this recommendation in furtherance of a harmonised Single Market in the sale of tobacco and nicotine products?***

The Tobacco Products Directive 2001/37/EC does not regulate how and by whom tobacco products ingredients shall be assessed. The Directive puts the main burden of the work on tobacco ingredients as well as on the yields on Member States and the Commission's role is largely left open. Until now, the Commission has interpreted its role narrowly. The reason for this is that information given by the

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<sup>14</sup> [http://ec.europa.eu/services\\_general\\_interest/index\\_en.htm](http://ec.europa.eu/services_general_interest/index_en.htm)

industry is not yet sufficient to evaluate ingredients; there are yet no commonly accepted and validated methodologies for evaluating toxicity and addictiveness.

In the statement on REACH of 18 December 2006, the Commission committed itself to put into practice several activities in this field, some of which are already ongoing<sup>15</sup>. In addition, several finished, ongoing and further actions are mentioned in the 2nd Report on the application of the Tobacco Products Directive<sup>16</sup>.

The burden of proof on the health effects of the contents and emissions of tobacco products should lie fully with the industry, which should be responsible for the financing of the development, validation and carrying-out of the appropriate toxicological and addictiveness tests.

- 1. Does the Commission agree that a strict compliance with harmonised definitions is the backbone of any directive and that MS should be prevented from adding any additional concepts which distort competition?**
- 2. Will the promised concordance tables finally help to achieve the abovementioned without the necessity of lengthy infringement procedures?**
- 3. Will access to infringement files for registered complainants, especially at the pre-litigate stage provide a genuine chance for early mutual acceptable settlement of disputes?**

1. Gold plating stifles the effort of better law making and conflicts with the objective of simplification and reduction of administrative costs. This position has been repeatedly and publicly expressed by Commissioner McCreevy.

Having said that, the Commission has no legal powers to prevent Member States from adopting additional measures. The Commission raises this issue as part of an on-going dialogue with Member States on better regulation.

From a more legal point of view, it must be recalled that the subsidiarity principle governs Community law making. Many pieces of legislation leave some aspects open. This is valid for both directives, and for regulations, which do not need transposition. Although gold plating is regrettable as it undermines competition, level playing fields and the delivery of benefits for final users the Commission cannot legally prevent Member States from gold plating areas or aspects which are not totally harmonised. Should the additional measures adopted in Member States pose a real problem for the market or market players, the Commission might come to the conclusion that Community legislation has to be amended to limit the room for manoeuvre. This is a case by case assessment.

2. Concordance tables do not have the objective of avoiding or limiting lengthy infringement procedures. Their purpose is to help the Commission to analyse the conformity of national legislation with Community legislation. Concordance tables

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<sup>15</sup> For instance, the Commission published on 31 May 2007 on DG Health and Consumer Protection's website a practical guide on tobacco ingredients reporting, which would facilitate the collection and analysis of the data submitted by industry:

[http://ec.europa.eu/health/ph\\_determinants/life\\_style/Tobacco/Documents/practical\\_guidance\\_en.pdf](http://ec.europa.eu/health/ph_determinants/life_style/Tobacco/Documents/practical_guidance_en.pdf)

<sup>16</sup> [http://ec.europa.eu/health/ph\\_determinants/life\\_style/Tobacco/Documents/tobacco\\_products\\_en.pdf](http://ec.europa.eu/health/ph_determinants/life_style/Tobacco/Documents/tobacco_products_en.pdf)

help to detect more quickly and more easily problems and to enhance transparency of transposition measures in each Member State.

3. The primary objective of an infringement procedure is certainly to remedy the problem detected. However, it is also of utmost importance to achieve long term results by correcting structural problems. In many cases the grievances formulated by the Commission go beyond the complaint. This requires that Member States repeal or largely amend the national legislation which is contrary to Community law. Quick solutions to problems also require a permanent and open dialogue with Member States during the infringement procedure. 90% of cases are solved in the pre-litigation phase, i.e. without going to the European Court of Justice. To find amicable solutions in infringement procedures the Commission and the Member States need to be able to communicate freely without running the risk that sensitive negotiations are going public. Access to the file for the complainant would not contribute to achieve the objectives of completing an infringement procedure in less time.

***With so many ways to achieve the Single Market, how can the Commission as a policy maker show to the citizens that there are actually several ways to choose the best approach towards the completion of the Single Market?***

One of the ways in which the Commission outlined to citizens the different ways of furthering the Single Market and asked for their views on those proposals was via a substantial consultation of all parties concerned by the Single Market which was undertaken throughout 2006. It consisted of a public consultation on future Single Market policy, a public hearing and Eurobarometer studies in which around 25000 citizens and 7500 company executives across the EU were asked about their opinions on the Single Market.

The Single Market Review package, published in November 2007, also put stress on the need for reflection and analysis on what is the best approach towards achieving the Single Market and set out several ways of doing that. These include, for instance, increased involvement of all concerned stakeholders into policy-making and more evidence-based policy-making. According to the latter approach, decisions about policy actions will be based to a larger extent on a thorough analysis of how markets work in practice and will take better account of the needs of consumers, SMEs and the global dimension, as well as social and environmental impacts.