UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
EUROPEAN ASSOCIATION OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
UNIONE EUROPEA DELL' ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

UEAPME Position concerning the European Commission's white paper on damages actions for breach of the EC antitrust rules

Introduction

UEAPME welcomes the initiative of the Commission to publish a white paper on damages actions for breach of the EC antitrust rules.

UEAPME would like to underline that SMEs are sometimes in the position of victims of damages actions in their quality of subcontractors, distributors and retailers. In this respect, they are much in the same position of consumers in this case.

But also as actors, SMEs are damaged by the enterprises that breach the EC antitrust rules. Those enterprises, in fact, make consumers lose their confidence, which is very important for SMEs.

UEAPME agrees on the need to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. It is important that victims can have the full compensation in those cases.

On the other hand, the principle of subsidiarity should be taken into account and, in our opinion, the Commission should strongly limit its task to the definition of some general principles without interfering with national law and with the procedures in use in the Member States.

Therefore UEAPME agrees with the exclusion of the option 1 made in the impact assessment report.

1.2 Objectives, guiding principles and scope of the White Paper

UEAPME agrees on the fact that the costs of antitrust infringements should be borne by the infringers, and not by the victims and law-abiding businesses. In the majority of the legal systems is already like that: the losing party pays for the costs of the trial. What it should be added is the reimbursement of the lawyers' fees that the victims have to sustain when obliged to introduce a legal action.

2. THE PROPOSED MEASURES AND POLICY CHOICES

2.1. Standing: indirect purchasers and collective redress

UEAPME is participating to the discussions launched by DG SANCO on a collective redress system.

UEAPME is in principle strictly opposed to the introduction of collective redress mechanisms. Collective legal actions by or on behalf of a group of claimants, when not justified, could cause immense financial burdens to business and might bring about a loss of reputation.

The introduction of a collective redress mechanism would definitively result in the abuse of collective actions by consumers and in an increase in litigation. Class actions bear the danger of misuse as in the case of the "blackmail settlements". As a result, US-style class actions would prove to be very detrimental for European SMEs.

Nonetheless, UEAPME believes that such mechanisms – if introduced – should ensure both the protection of consumers and small businesses.

In its white paper the Commission foresees a collective redress system where only brought **by qualified entities**, and **opt-in collective actions**, in which victims **expressly decide** to combine their individual claims for harm they suffered into one single action. It is very important that the representativity of such entities is checked seriously. Therefore UEAPME welcomes the idea of the Commission that are either (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members. This is a guarantee that must be seriously implemented. The danger that entities are created to commercialise this system must be avoided.

Besides, cases where several different associations claim the same trust violator and/or where there is an overlapping between association and individual claims must be taken into account. The Commission should create a solution to those cases in order to avoid the possibility of double claims.

It is also important to foresee that there will ***not be punitive damages*** (damages which are designed to punish the defendant rather than compensate the claimant), that the compensation to the victim should be limited to the material damage suffered. (i.e. the professional would reimburse the consumer the amount unduly received) and that the claimants are ***individually identified***.

Moreover, a mechanism to avoid abusive use of collective redress and that the same harm is not compensated for more then once should also be found.

UEAPME would anyway like to point out that the creation of an alternative resolution system should be preferred.

2.2. Access to evidence: disclosure *inter partes*

Concerning the proposal of the Commission of giving to the courts, under specific conditions, the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence, the aim of the proposal is to find ways that prevent parties from keeping relevant evidence to themselves. However it also seems necessary to observe the interest of the companies concerned not to have to reveal company secrets as a result of the disclosure procedure, as it could severely harm them if competing companies would get hold of such information. The Commission has suggested that a disclosure procedure is to be decided by the national court in situations where certain criteria are met. Mechanisms as such are needed in order to find a well balanced and effective system and the analyses of the proposal should in this respect continue. Of course there is also a need to find disclosure solutions that do not work against the leniency programmes.

2.3. Binding effect of NCA decisions

UEAPME agrees on the Commission proposal that final infringement decisions of both the Commission and the National competition authorities should be considered sufficient proof of an infringement in subsequent actions for damages.

2.4. Fault requirement

In our opinion the principal of the requirement of **fault** to obtain damages is a basic principle of many national legal systems, and as such it cannot be skipped. Moreover, it is very difficult to give a uniform definition of excusable error as this is also different in each member state.

2.5. Damages

UEAPME does not agree on the intention of the commission of create a uniform system of calculation for the damages. This must be left to the national jurisdictions.

2.7. Limitation periods

Limitation periods should be suspended during the procedures.

2.8. Costs of damages actions

The Commission opens up for the possibility for the claimants, even if unsuccessful, not to have to bear all the costs incurred by the other party. This proposal is presented in order to reduce the uncertainty for the potential claimants about the costs for which they may be liable. Potentially, there seems to be both pros and cons for small businesses with this proposal. On one hand, the principle of "loser pays" is well established and a derogation might in specific cases lead to heavy economic burdens for small enterprises. On the other hand cost allocation rules that deter victims with meritorious claims from starting a procedure is not an optimal solution either.

UEAPME strongly support the Commission when it encourages Member States to design procedural rules fostering **settlements**, as a way to reduce costs.

Settlements will also reduce the problem of congestion of courts, a big issue in many member states, and the issue of the length of procedures.

Brussels August 2008

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