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Our reference
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Consultation on the Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules

The Federation of Private Enterprises (Företagarna) is the largest organization for business owners in Sweden. We represent some 55,000 directly affiliated entrepreneurs and 15 industry associations. Our members are entrepreneurs who own their own businesses or who support our work. Our mission is to promote entrepreneurship, safeguard the rights of business owners, and contribute to a climate in which running a business is easy and appealing.

The Federation of Private Enterprises would like to make the following comments on the White Paper presented by the European Commission on damages actions for breach of the EC antitrust rules.

Competition is an essential pre-condition for establishment of new enterprises, diversity and growth. For small enterprises the existence of open markets and fair competition is of vital importance. It is therefore very important to safeguard that the competition rules are not set aside. This is supervised by the competition authorities on both EU and national level. This supervision is of fundamental importance for the antitrust system within EU and we support initiatives to preserve strong public enforcement of the competition rules.

Breaches of the competition rules put the market mechanisms out of order and lead to undesired effects, like higher price levels. It is a justified interest of the victims of such breaches to be reasonably compensated. Such a right follows from EU-law - and also on national level from the Swedish competition law. It seems reasonable to strive to find mechanisms that make such compensation possible also in practice. In this work the interaction between EU legislation and national legislation is of course of vital importance to analyse.

On a broad scale small firms can be both victims of and participators in cartels and other unlawful behaviour. The vast majority of the small firms are, however, likely to be characterized as victims – and are in that sense in need of a fair chance to be economically compensated for the harm they have suffered. In that sense they are much in the same position as consumers.

On basis of the above mentioned aspects, the Federation of Private Enterprises is positive to the Commissions intentions with the White Paper.

Some brief comments on some aspects of the proposal:

The Commission proposes a model based on a principle of single compensation. This seems to be a model that gives possibilities for a balanced solution that fulfils the need for victims to get fair compensation.

The Commission finds that in particular consumers and SMEs with small value claims need better access to justice and should have the possibility to regroup their claims and bring actions via suitable representatives. The proposal foresees the possibility for both consumers and small enterprises to take such actions for collective redress. The Commission proposes two complementary mechanisms ("representative actions" and "opt-in collective actions") for such joint claims. The Federation of Private Enterprises believes that small firms may need to be able to carry through such collective claims through both these mechanisms. Concerning the option of opt-in collective solutions, The Federation of private Enterprises finds this to be an interesting model for small companies with minor claims. In respect of the model with representative actions, we note that the Commission foresees the possibility for, amongst others, trade associations to bring such claims. This would be of importance since this would make it possible for small firms with small claims to act collectively through trade associations.

The Federation of private Enterprises is thus open for a system with collective redress that makes it possible for small companies to get proper damages for the harm they have been caused by breaches against the EU antitrust rules. We however also see a relevant need for finding mechanisms that will avoid abusive use of collective redress. It is also important to find mechanisms that guarantee that the same harm is not compensated for more than once. We note that these aspects are observed by the Commission in the White Paper. This is good, since these aspects seem to be of great importance for the functionality of a future system.

Furthermore it should be noted that there is an ongoing work within the Commission on collective redress in consumer law. The reform work in these two areas must be coordinated in order not to overlap and in order to avoid the creation of procedures that may cause unnecessary burdens for enterprises.

The situation with small firms participating in anticompetitive behaviour must also be observed. It is important to make sure that the proposal is "balanced" and thus does not lead to not motivated administrative burdens or lack of legal security for such enterprises.

In this respect the proposal on disclosure is relevant to observe. The Commission proposes that national courts should, under specific conditions, have 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. The Federation of Private Enterprises finds that this is a justified interest in order to create an efficient system for damages actions for breaches of the antitrust rules. 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.

The proposal 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. A more definite standpoint from us is however not possible at this stage.

The Commission recommends in its White Paper that final infringement decisions of Member States' competition authorities should be considered sufficient proof of an infringement in subsequent actions for damages. The Federation of Private Enterprises considers this to be an interesting proposal, since it could lead to less costly and time consuming processes. However the national legal systems for damages actions must of course be observed and taken into account.

These are our overall comments on the White Paper, without the possibility to in detail analyse the proposal and its potential effects at this point. We foresee that the Commission will make a thorough analysis if proceeding with the proposal in order to create a functional and well balanced system for damages actions.

The Federation of Private Enterprises

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