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LIGUE INTERNATIONALE
DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

International Report Question A: SMEs and competition rules

Should small and medium-sized enterprises ("SMEs") be subject to other or specific competition rules?

Michele Carpagnano[1]

with the contribution of Julia Suderow

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[1] University, of Trento. Italy, Attorney, Rome and Madrid. The Author is very grateful to Julia Suderow, Rechtsanwältin and Abogada and Antitrust Observatory, Trento) for her valuable research and academic assistance.

A. INTRODUCTION: THE SCOPE OF THE INTERNATIONAL REPORT

The scope of this International Report[2] is to foster the debate on the issue whether or not the Small and Medium-sized Enterprises ("SMEs") should be treated differently from other legal entities (and in particular big enterprises) under competition law provisions.

In order to contribute to the above mentioned debate, the International Report examines (in a comparative way) relevant legislative provisions, case-law as well as policy options and practices in thirteen national legal systems[3]. In the following pages we tried to report the most interesting policy trends, legislative developments and practices related to SMEs under competition laws.

The national legal systems analysed, belong to very different legal cultures and traditions including Civil Law System, Common Law System as well as Eastern Europe Legal traditions. It is also important to bear in mind that ten of the twelve legal systems analysed

[2] The International Reporter whish to thank Pierre Kobel, Muriel Chagny and the members of the Scientific Committee of the LIDC for their useful insights and feedbacks on this report and preliminary researches. A warm thank you to all national reporters for their excellent contributions and valuable insights on national legal systems. The list of National Reporters in here attached in Annex 1.

[3] Austria, Belgium, Croatia, Czech Republic, France, Germany, Hungary, Italy, Luxembourg, Sweden, Switzerland, United-Kingdom and United-States of America.

belong to the European Union thus having in common (at least since 1996) a relevant set of rules, case-law, policy options etc.

Notwithstanding those cultural and "structural" differences, the International Report shows a surprisingly high degree of common features in the treatment of SMEs in the field of competition law. Such common features as well as differences are described in detail in the following chapters.

The International Report is made up by four chapters and has been structured in order to take into full account the role of SMEs under competition law. Both the role of infringer and victim of competition rules infringement have been taken into account as well as the different levels of competition law enforcement (public and private). The International Report is structured as follows:

The **first chapter** describes the SMEs in the economic and legal context. The chapter describes the nature and the role of SMEs in the economy, their legal definitions (where existing) and their treatment under competition law.

The **second chapter** is focused on the position of SMEs in the context of the public enforcement of competition law and analyses the SMEs from two different perspectives: SMEs as infringers and SMEs as victims. Public enforcement of competition law is intended as the enforcement of competition law provisions by a public body (most often an Agency) capable of detecting infringements / putting an end to illegal practices, and of ensuring deterrence through appropriate fines and other remedies. Advocacy is also included (for the purpose of this International report) in such definition.

The **third chapter** analyses the role of SMEs in the context of private enforcement of competition law (i.e. the enforcement of competition rules by civil/commercial Courts within a private judicial litigation). Specific attention is paid here to burdens and limits that may eventually jeopardize the full effective exercise of SMEs rights in Courts.

The **fourth chapter** illustrates the policy recommendations submitted for discussion in the LIDC Congress 2012.

The International Report is based on data and information contained in twelve national reports, data that have been collected through an ad hoc questionnaire (see Annex n. 2).

1. SMEs IN CONTEXT

In the vast majority of the countries analysed, SMEs play a pivotal role in the national economies and represent the most common form of economic entity active in their

economies.[4] Taking this into account, several countries have already adopted specific legislative measures and policy programmes to support the establishment, the growth and the financing of SMEs.[5]

The Organisation for Economic Co-operation and Development ("OECD") is also fostering the adoption of ad hoc policy programmes being conscious about the relevance of SMEs in a globalized context[6].Within the European Union, the European Commission is leading a SMEs friendly policy under the motto: "*Think small first*". The "Small Business Act" enacted in 2008 can be considered as a milestone for Europe and for companies with less than 250 employees, being the definition of a SME.[7] The United States of America ("USA") and Japan also share this SMEs friendly approach since the relevance of SMEs is also crucial in their respective economies.[8].

2 THE ECONOMIC PERSPECTIVE

All national reports confirm that SMEs play a key role in national economies. In Europe, SMEs account for 99% of enterprises whereas 92% are considered as micro enterprises.[9] They play also a main role in the growth of the economy in particular in crisis periods. According to public data available, SMEs generate two thirds of employment and they are the main source of new jobs.[10] In the US SMEs represent nearly 99% of all employer firms[11].

These data show the outstanding importance of SMEs in the world economy.[12] Their business may typically have a local and/or regional scope, especially for micro enterprises, but it is worth mentioning that SMEs are also active across their national borders.[13]This means, from a legal point of view, that SMEs business it is potentially relevant not only under competition law but also under International Private Law provisions.

[4] See for more information about the role of SMEs : OECD : SME and Entrepreneurship Outlook, 2005, p. 17.
[5] See UK (National Report UK, p. 1); Italy (National Report p. 3).
[6] See for more information about the role of SMEs : OECD : SME and Entrepreneurship Outlook, 2005, p. 17.
[7] Small Business Act, COM (2008) 394, final 25 June 2008.
[8] See for more information about the role of SMEs : OECD : SME and Entrepreneurship Outlook, 2005, p. 17.
[9] See: Report from the Commission to the Council and the European Parliament: Minimizing regulatory burden for SMEs. Adapting EU Regulation to the needs of micro-enterprises. Brussels, 23.11.2011, COM (2011) 803 final: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0803:FIN:EN:PDF
[10] OECD, 2005 SME and Entrepreneurship outlook 2005, OECD 2005, p. 15.
[11] OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005, p.362.
[12] See hereto : OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005.
[13] OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005

3 LEGAL DEFINITIONS

3.1 Legal definitions of SMEs

What SMEs are from a legal perspective? And how they are defined by national laws?

It is not always easy to answer to this question despite of the fact that several jurisdictions have legal definitions of SMEs, since legislators have been introducing these definitions in different legal bodies (i.e. tax, commercial laws, labour laws, etc.) but not in one single law.[14]

National Constitutions do not usually set the legal definition of SMEs and some Civil / Commercial Codes only refer to the "entrepreneur" or the "trader" but do not contain any reference to SMEs.[15]

Nonetheless, in Europe (more precisely within the EU) a certain degree of harmonization in the legal definition of SMEs has been reached through the European Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/3617EC). According to such Recommendation are SMEs all enterprises with less than 250 employees and having a maximum € 50 million turnover or € 43 million balance sheet total (equivalent to US $ 65 million and $ 56 million). Micro-enterprises are the smallest category of SMEs, with less than ten employees and a turnover or balance sheet equal to or less than € 2 million (equivalent to US $ 2.6 million). [16]This definition, mandatory within the EU since 2005, has been adopted in all EU Member national legislations. In countries that do not belong to the EU, the definitions of SMEs are also often based on the number of employees and other factors as turnover.[17]

In general the OECD countries apply a variety of definitions whereas the employees number is not the sole defining criterion since financial assets also play a key role to define SMEs. The most frequent upper limit is 250 employees but some countries have set the limit to 200 employees or as the US to 500.[18] Small firms have usually less than 50 employees while the limits for micro enterprises vary from 5 to 10 employees.[19] In Japan the definition of a SME also depends on the market or sector where the company has its activities. In the

[14] OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005, p. 7.
[15] See for instance : Italian Report p. 4.
[16] See: Report from the Commission to the Council and the European Parliament: Minimizing regulatory burden for SMEs. Adapting EU Regulation to the needs of micro-enterprises. Brussels, 23.11.2011, COM (2011) 803 final: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0803:FIN:EN:PDF
[17] See hereto : OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005.
[18] OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005. p.17.
[19] OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005. p.17.

manufacturing or construction sectors companies with fewer than 300 employees or less than 300 Million Yen (equivalent to € 2,9 million or US $ 3,8 million) turnover are considered SMEs whereas in the service sector the thresholds are stricter, the capital has to be less than 500 Million Yen (equivalent to € 4,8 million or US $ 6,35 million) or the number of employees below 100.[20]

The figure below summarizes the different criteria followed in legal systems analysed to define SMEs. It is interesting to underline that what is an SMEs in a country may not be in another.

Country	**Company category**	**Employees**	**Turnover**	Or	**Balance sheet total**	**Market Share**
EU	Medium-sized	< 250	≤ € 50 m		≤ € 43 m	Not relevant
	Small	< 50	≤ € 10 m		≤ € 10 m	
	Micro	< 10	≤ € 2 m		≤ € 2 m	
USA	SME	< 500	Not relevant		Not relevant	Relevant
JAPAN	SME	<300	< 300 m-500 m Yen		< 300 m-500 m Yen	

Source: LIDC national reports and OECD

3.2 Legal definitions of SMEs in the field of Competition Law

Even in those countries where SMEs are properly defined by the legislation, specific definitions of SMEs are rare in the field of competition law. Nor the definition of SMEs based on annual turnover and/or number of employees thresholds may be taken as reliable indicator of market power scrutiny under competition law.

Indeed, if under some circumstances the annual turnover of an enterprise may roughly constitute a proxy of the market power of such company, the number of employees does mean nothing under competition law tests.

Germany constitutes one of the few exceptions to the absence of specific definition of SMEs under Competition Law. Indeed, the German Act on restraints of competition in the market contains a rule that refers explicitly to cartels realized by SMEs and to larger companies

[20] OECD , 2005 SME and Entrepreneurship outlook 2005, OECD 2005, Country report Japan.

dealing with SMEs.[21] In the German Competition law and its specific rule to protect dependent SMEs from bigger companies the size is defined by comparing it with other companies in the market.[22] If the company is relatively small compared to the other market participants then the specific protection rules apply. According to this protection rule, dominant undertakings can not abuse of their position with respect to dependent SMEs. Taking into account that in practice this could be a very difficult excercize, so far, as referred by the German National Reporter, German practitioners may use the thresholds for merger controls as an indication.[23] In **France** also exist special provisions for SMEs distinguishing the size of the company making an exemption for *certain agreements, in particular when their purpose is to improve the management of small or medium-sized enterprises*. Notwithstanding this, in practice, the agreements in place regarding this text are extremely limited[24]. In **Belgium, the competition law system** contains references but not a clear definition for SMEs in competition law altohugh there were some legislatory attemtps to regulate a clear definition in the belgian laws.[25] Outside the EU, the **US** Laws define SMEs with respect to their market share, excluding them from liability in case of unilateral conducts, and when they do not have market power and there is no negative effect in the market.[26]Of

[21] German Report, p.1.
[22] German Report, p. 2.
[23] German Report p. 3. ***§ 35 Scope of Application of the Control of Concentrations ARC:***

> *(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration:*
> *1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and*
> *2. the domestic turnover of at least one undertaking concerned was more than EUR 25 million and that of another undertaking concerned was more than EUR 5 million.*
> *(2) Paragraph 1 shall not apply:*
> *1. where an undertaking which is not dependent within the meaning of*
> *§ 36(2) and had a worldwide turnover of less than EUR 10 million in the last business year, merges with another undertaking, or*
> *2. as far as a market is concerned on which goods or commercial services have been offered for at least five years and which had a sales volume of less than EUR 15 million in the last calendar year. Where the concentration restricts the competition in the field of publishing, producing or distributing newspapers or magazines or parts thereof, only sentence 1 no. 2 shall be applied.*
> *...*

[24] There is also a specific jurisdiction rule about local anticompetitive practices that indirectly refers to SMEs: See French Report, p. 8 and 9.
[25] Belgian Report p. 3 and. 4.
[26] US Report, p. 5 and 6.

course, this liability limitation does not apply to hard core infringements, to restraints with negative effects and if the restraint is market-wide.[27]

3.2. Definition of Competition Law

The International Report refers to "Competition Law" in a narrow (and selective) meaning: as a set of laws that prevents and sanctions i) "agreements" between economic entities with the aim / effect to distort the competition in the market and ii) unilateral practices by operators with substantial market power with the aim / effect to monopolize the market (i.e. "abuse of dominance", monopolization). State Aid rules as well as Merger control rules fall outside of the scope of this report. In all legal systems analysed, Competition Law, as above defined, applies to all economic entities that are active in a market. Thus, as general rule, Competition Law does apply to SMEs as far as their conducts harm (even potentially) fair competition in the market.[28]

The Court of Justice of the European Union ("ECJ") established that *"the concept of an undertaking encompasses every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed"*.[29] The main point is therefore to identify if the entity is engaged in an economic activity. The legal status is not relevant to determine if an entity is subject to Competition Law or not.[30] Therefore even individuals or one person SMEs are subject to competition rules within the European Union. This does not, obviously, mean that conducts of economic entities that have very small or insignificant market power fall within the antitrust scrutiny.

On definition of SMEs, the approach followed by the United States of America appears more coherent with competition law rationale since, SMEs are there defined in relation to the market share of the economic enterprise in the relevant market (independently from the asset size and/or number of employees)[31].

[27] US Report, p. 3.
[28] ECJ Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten, C-309/99, 2002, ECR I-1577, (para. 57). Wish, Bailey, Competition Law 2011, p. 84 ; A. Calvo Caravaca, 2010 Derecho Antitrust Europeo, Vol. I, p. 179,.
[29] Van Bael & Bellis, Competition Law of the European Community , 2010, p. 17 ; ECJ Höfner and Elser v. Macrotron, 1991, ECR I-1979 (para. 21).
[30] Van Bael & Bellis, Competition Law of the European Community, 2010, p. 18-19.
[31] US Report, p. 1.

As it is discussed later in the Report, both the EU and US definitions of SMEs (even if based on conceptually different approaches) have, at least in the field of Competition Law, a very similar scope.

B. Special treatment of SMEs under Competition Law

1. The nature and scope of special treatment for SMEs in Competition Law

As said, even if SMEs are legally defined in most of the legal systems analysed, competition law systems do not make differences between undertakings because of their size, either as competitors or as trading partners.[32] As mentioned there is a minor exception to this general approach in Germany, where national competition law foresees an additional rule for SMEs for the abuse of the bargaining position of bigger companies against dependent SMEs.[33]

It shall also be noted that when certain sectors are (partially) excluded from competition rules, such as, for instance agriculture in the EU.[34] the more favourable treatment it is recognized to the economic entity independently from the quality of SME. Thus even big enterprises may apply for the favourable treatment under special regulation.

The red line for the economic operator to between eligibility or not to special programmes is, again as in the USA, the market share in the relevant market[35].

2. Specific programmes addressed to SMEs

A recent study published by the OECD shows that the lack of awareness of competition rules and enforcement practice is one of the prominent reasons leading to competition law infringements by SMEs in several jurisdictions across the globe.[36]

The majority of National Reports seems to confirm this statement.

It must be noted however that according to National Reports some countries (UK and Germany) have adopted policies and programmes on compliance and enhancement of

[32] Croatian Report, p. 5.; UK Report: p.2; German Report, p. 9. Italian Report, p. 12, Hungary, p.2
[33] German Report, p. 2.
[34] About European Block Exemptions see for instance, R. Whish & D.Bailey, Competition Law 2011, p. 168.
[35] See Art. 125 *quater*, Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products, According to which "*an organization of producers shall not be recognized when it holds a dominant position in a market*".
[36] OECD: Promoting Compliance with competition law, 30. August 2012, p. 211. Available here: http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2011)20&docLanguage=En,

competition enforcement specifically addressed to SMEs. Notwithstanding this, in general those programmes are addressed to all market players.

In the **UK**, the Office of Fair Trade (OFT) launched in 2005 a campaign ("*Championing Competition"*) addressed to SMEs to inform and highlight positive aspects of competition rules.[37] This campaign was based on a research commissioned by the same OFT that showed that only 49% of the employees of small companies with between 10 and 19 employees were aware of the Competition Act whereas 80% of the employees of corporations with more than 200 employees had knowledge of competition law.[38] This campaign was followed by a campaign against cartels. Six years later, the OFT carried out a similar study categorising the companies according to their number of employees with following interesting results: the knowledge of competition law increased with the number of employees, whereas Micro-enterprises had in general no knowledge of competition law.[39] Furthermore in **Germany**, the Competition Authority (*Bundeskartellamt*) issued an informative brochure about cooperation between SMEs that explained the German *de minimis rules* and the type of cooperation allowed and forbidden by the law.[40]Other jurisdictions (such as USA, Italy, Belgium, Switzerland, Croatia) have also programmes regarding compliance and programmes about SMEs but no specific policies that seek the improvement of competition law awareness for SMEs.[41]

To reach SMEs and awake their interest in competition law can be quite difficult since, as described in the above mentioned OECD Study, managers of SMEs usually have other priorities than competition law compliance.[42] A manager of a SME is much more involved in the day to day business and problems, he is probably in direct contact with clients, providers and employees, and worrying about each invoice more than about the last developments in compliance policies.[43]

Therefore, as stated by the same OECD, in order to enhance the compliance level for SMEs it seems necessary to design programmes and tools tailor made for them that can really reach, educate and "convince" small economic operators showing the advantages of competition law

[37] See hereto: http://www.oft.gov.uk/news-and-updates/press/2005/92-05.
[38] UK Report, p.5.
[39] UK Report p.6-7.
[40] German Report. p. 7. See Bundeskartellamt notice : Merkblatt des Bundeskartellamtes über Kooperationsmöglichkeiten für kleinere und mittlere Unternehmen, March 2007, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/07KMU-Merkblatt.pdf.
[41] See Italian Report, Belgian Report, Switzerland, Croatia, Bulgaria, Sweden, Denmark, USA.
[42] OECD : Promoting Compliance with competition law, cited, p. 264.
[43] OECD : Promoting Compliance with competition law, cited, p. 264.

compliance rather than promoting high fines once infringements have been realized. Those compliance tools should be spread across not only through National Competition Authorities (NCAs) but also through local authorities (at regional and local levels) which have more direct contact to SMEs and through trade and business associations.

Last but not least, the complexity in Competition Law can also become a big hurdle for an SME[44]. Predictability and legal certainty are crucial aspects in the decision making process of businesses. While a legal evaluation error can cause harm in a big company, the same error can have fatal consequences for an SME.

3. The role of trade and business associations

Trade and business associations have a crucial role in most all countries analysed.[45] Those associations embrace SMEs (as well as big enterprises and other type of companies, such as cooperatives, single professionals) normally for a specific sector or market segment and usually represent companies before the authorities and defend their interests.[46]

On the one side, trade associations provide expertise to their members and have a number of important functions which benefit the market. They can support the SMEs, help to educate and update businesses on applicable rules and regulations, or enhance consumer protection by developing standard terms and conditions, product safety standards or technical norms, etc.[47] In the **UK** Report, it is specified that the OFT has expressly recognised trade and business associations as potential effective partners to enhance compliance using them to disseminate their guides.[48]

On the other, it must be recalled that those associations are also a common vehicle to carry out anticompetitive conducts and especially by small and medium enterprises.[49] By their nature, they often bring together a number of – in some cases even all – competitors in a particular sector.[50]

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[44] B. Lasserre: Market Definition : a resilient feature of competition enforcement ?, Contribution to the 39th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute , September 2012, available at : http://www.autoritedelaconcurrence.fr/doc/article_fordham_sept12.pdf.
[45] Leibowitz , 30 March 2005, The Good, the bad and the Ugly, http://www.ftc.gov/speeches/leibowitz/050510goodbadugly.pdf, accessed 06.09.2012.
[46] OECD: Promoting Compliance with competition law, , cited, p. 209
[47] OECD: Promoting Compliance with competition law, cited, p. 209.
[48] UK Report p.7.
[49] OECD: Promoting Compliance with competition law, cited, p. 209.
[50] OECD: Promoting Compliance with competition law, cited, p. 209.

It is thus commonly believed that specific *caveat* must be adopted in order to avoid that business and trade associations may result in a *forum* for horizontal coordination which may, under certain circumstances, result in possible infringements of competition law provisions (i.e. anti-competitive agreements) with possible detrimental effects to market dynamics and to consumers. [51]

In order to increase the awareness of SMEs on more complex competition law issues (and prevent the opening of administrative proceedings against them) NCAs (*ex oficio* or after receiving a complaint) could be empowered to send an official warning to SMEs and or their associations. The warning, similar to those warnings addressed to bigger players in case of abuse of dominance cases[52], may alert SMEs on possible contrariety of their conducts in a specific market and may force them to a voluntary compliance. In case of non compliance NCAs must open a formal proceedings. Such moral persuasion activity aimed to obtain voluntary compliance by market operators is successful carried out in Italy by the National Competition Authority in consumer protection law cases.

4. Policy recommendations

- **Legal definition:** there is no need to set a specific legal definition for SMEs in the field of competition law. Soft law tools, such as guidelines, may suffice in order to provide a common definition of SMEs based on market share and power;

- **Information activities specifically addressed to SMEs (who):** NCAs (and the European Commission at EU level) should design and implement specific information/compliance actions/programmes to improve the knowledge of competition law within smaller businesses. Those programmes may be conducted with the strategic partnership of trade and business associations and other public authorities both at national and local level;

- **Information activities specifically addressed to SMEs (how 1):** *ad hoc* compliance guides/models based on common standards approved by NCAs could be used by SMEs in order to avoid expensive individual legal assessment/ competition law compliance. These models should be promoted by the NCAs and their networks and

[51] Leibowitz , 30 March 2005, The Good, the bad and the Ugly, http://www.ftc.gov/speeches/leibowitz/050510goodbadugly.pdf, accessed 06.09.2012.
[52] B. Lasserre : Market Definition : a resilient feature of competition enforcement ?, Contribution to the 39th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute , September 2012, available at : http://www.autoritedelaconcurrence.fr/doc/article_fordham_sept12.pdf., p. 12. and ECJ :NV Nederlandsche Banden Industrie Michelin v. European Commission, C-322/81, 1983 ECR 3461

disseminated by trade associations and local authorities. SMEs that adhere to such programmes may indicate it to clients;

- **Information activities specifically addressed to SMEs (how 2):** it could be certainly useful to establish "information point" or tool kits, even virtually in their web page, specifically addressed to SMEs by NCAs;

- **Information activities specifically addressed to SMEs (how 3):** business and trade associations should assist SMEs in Competition Law compliance programmes and audit. They could for instance: disseminate information on issues related to cartels and collusive conducts, including regarding relevant developments in international and regional forums; provide training, prevention, due diligence, and, general advice on diligence in carrying out compliance programmes; and advise on how to resist opportunities for collusive conduct;[53]

- **Specific Recommendations or warnings for risk groups:** NCA could address specific warnings to associations or other risk groups that could be suspected of being a vehicle for anticompetitive conducts.

C. PUBLIC COMPETITION LAW ENFORCEMENT AND SMES

1. Substantive and procedural rules applicable to SMEs

1.1. Introduction

The majority of the legal systems analysed in this International Report do not distinguish between SMEs and other undertakings when apply competition rules. As an example, it is worth to mention that in the UK competition rules are applied without "uncritical sentimentality" to SMEs.[54] This mirrors the European approach to competition rules that, as known, are applicable to all persons and undertakings irrespective of their legal nature and size[55].Notwithstanding, in at least two of the jurisdictions examined there are specific

[53] See on this point OECD : Promoting Compliance with competition law, 30. August 2012, cited, p. 283.
[54] UK Report, p. 6.
[55] See above, p. 3.

substantive rules applicable to certain competition law infringements (i.e. in the field of abuse of dominance position) that protect SMEs in relation to larger companies.

It is the case of **Germany** where specific rules applicable to SMEs define how larger companies with significant market power have to deal with smaller undertakings, prohibiting impediment and discrimination in vertical and horizontal relationships.[56] This rule pretends to protect retailers from anticompetitive practices such as low price strategies imposed by bigger companies.[57]

Austria also has similar rules for dominant companies and a specific rule to protect local suppliers.[58]

No distinction of treatment seems to be made from a procedural point of view, since, in principle, the same rules seem to be applied to all economic entities in the vast majority of jurisdictions examined. It seems possible, however, to detect some distinctions in the practice and enforcement through the NCAs and Courts when they assess a potential involvement of SMEs.

The size of the undertaking, for instance, is a factor that in **Hungary** is taken into account when the Competition Authority establishes the amount of a fine in sanctioning proceedings for horizontal conducts[59]. Public interest rules may also play a significant role since in the same Country the competition authorities "may" start investigations and proceedings if there is a potential harm of the public interest.[60]

In many jurisdictions the national authorities could consider that small markets or regional markets (where SMEs act) are not as interesting or important as the bigger trans-regional markets (where bigger companies play an important role). Therefore the national competition authorities tend to concentrate their efforts in "bigger" issues ignoring the situations where SMEs act regularly.

1.2. Safe harbours for SMEs

Taking into account that self assessment is becoming more relevant in competition law systems across the globe and in order to maintain predictability, safe harbours have been

[56] See Section 20 of the Act against Restrictions of Competition ("ARC").
[57] German Report, p.9.
[58] Austrian Report p. 3.
[59] See for instance, Hungarian Report , p. 4.
[60] See for instance Hungarian Report p. 6.

created such as Block Exemption Regulations, R& D agreements, specialization agreements or technology licensing agreements.

All these instruments are based on market shares thresholds. The object of these tools is to *enable firms, especially SME, which will be in most cases indisputably under the relevant thresholds, to proceed safely with their business activity, while only bearing in mind the clear red lines in the said Regulations, i.e. the so-called "hard-core" restrictions.*[61] Notwithstanding the above, we shall proof if these tools are really helpful for SMEs or if they can easily detect the "clear red lines". Several guidelines and regulations are based on market assessment and on the market definition. To define a relevant market can be a very complex task that needs expertise and specialised knowledge that could not be affordable for a micro enterprise. However, the national reporters coincide that there are no specific safe harbour rules for SMEs. Notwithstanding each of the jurisdictions analysed have *de minimis rules*, block exemptions and sector specific rules that indirectly consider the size of the companies, usually due to their turnover.[62]For instance, competition rules in the **UK** foresee certain immunity rules for parties to a "small agreement" whereas small agreements are those between undertakings whose combined turnover in the business year preceding to the agreement does not exceed £20 million (equivalent to € 25, 2 million and $ 31, 8 million).[63]

The **USA** enforcers also use market screens to protect SMEs if they consider the conduct pro-competitive.[64] Notwithstanding this, SMEs in the US, as in other jurisdictions, are also liable for direct anti-competitive effects, joint hard core conducts, market wide restraints as in other jurisdictions.[65]

It is important to remember the key facts of the European *de minimis rules* since it is logic that SMEs fall easily under these rules based on the turnover thresholds having usually smaller turnovers than the bigger companies. They also act locally or at most regional as stated by the European Commission in its *De Minimis Notice*.[66] Furthermore there is a safe harbour for SMEs if there is "no appreciable affectation of trade".[67]According to the Notice of

[61] [61] B. Lasserre : Market Definition : a resilient feature of competition enforcement ?, Contribution to the 39th Annual Conference on International Antitrust Law and Policy, Fordham Competition Law Institute , September 2012, available at : http://www.autoritedelaconcurrence.fr/doc/article_fordham_sept12.pdf., p. 15.
[62] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) TFEU : OJ : 2001 C368/13, para 3. See about the De minimis doctrine : R. Whish & D. Bailey, Competition Law, 2011, p. 140
[63] UK Report, p. 3. Official Exchange rate on September , 5th 2012.
[64] US Report, p. 7.
[65] US Report, p. 8.
[66] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) TFEU : OJ : 2001 C368/13, para 3.
[67] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) TFEU : OJ : 2001 C368/13, para 50.

the European Commission regarding the effect on trade, agreements will not appreciably affect the trade between Member States if the aggregate market share of the parties on the relevant markets within the European Community does not exceed 5% and in case of horizontal agreements the turnover of the involved undertakings does not exceed € 40 million (£ 31,6 million, $ 50,3 million[68]) or in case of vertical agreements the aggregate annual Community turnover of the supplier in the affected products does not exceed €40 million.[69] This definition establishes that the individual market share of each party to the agreement at stake should not exceed 15% in case of non competitors and 10% in case of competitors.[70]

However, SMEs have to assess themselves if they fall under a *De Minimis Rule*. Again, this issue could result more difficult for a micro enterprise or SME in comparison to a big corporation with experience, skills and resources in competition law.

1.3 Access to justice

SMEs enjoy in principle the same procedural rights as other companies or individuals in all jurisdictions. There may be some specific differences between legal persons and persons rather than a size based differentiation. There is also significant case law showing that SMEs have access to justice if bigger corporations abuse of their dominant position.[71]

There is consensus between the national reporters that no difference should be made between SMEs and larger firms from the procedural perspective apart from the differences that will be analysed in the following points.

2. Fundamental rights of SMEs (as infringers and victims)

The national reporters agree that fundamental rights should be equally applied to all undertakings. The current legal systems only treat differently legal entities and individuals, being this relevant for micro enterprises or one person entities, broader differences could be considered discriminatory.

[68] Official Exchange rate on September , 5th 2012.
[69] Notice of the Commission: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), (para 52).
[70] Italian Report, p. 18. Notice of the Commission: Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), (para 52).
[71] See for instance the German Experience, German Report, p. 12-13.

2.1 Complaints

Complaints are a useful tool for the enforcement of competition law provisions. Any person that has knowledge of an anticompetitive conduct may contact (in some countries anonymously) the Competition Authorities, which (at their discretion), may start an investigation about the informed conduct.[72] This means that the Competition Authorities in their duty-bound discretion have no obligation to open proceedings.[73]Practice has shown that SMEs can be reluctant to directly complain since they fear to lose business or clients if they report about partners, clients or providers.[74]In any case, sensitive information, such as business secrets, is usually handled confidentially by NCAs so that SMEs can easily communicate with the authorities. Nevertheless, this confidentiality has to be balanced with the right of access to the administrative files of third parties.[75]

Some of the national jurisdictions examined do protect complainants preserving their anonymity during the proceedings. In other jurisdictions the NCAs interpreted the confidentiality rules widely in order to protect complainants from other undertakings.[76] The German system contains an interesting anonymous tip-offs mechanism that could be an option to follow. The system has two main advantages: i) the competition authority can initiate the proceedings without indicating the name of the complainant in the files in order to help companies that do not want to take the risk of losing their business partner by reporting the conduct[77]; ii) the system allows to file complaints on unlawful conducts anonymously. This complaint mechanism is included in the website of the *Bundeskartellamt* and guarantees full anonymity during the entire complaint process.[78] According to the *Bundeskartellamt*, the guarantee of the anonymity by the tip-off system has been certified by a publicly appointed expert. The information provided cannot be traced back to the informant, as long as he does not enter any data that allow for inferences about his identity. [79] Evenmore, the German Authority also accepts tip offs filed through traditional channels such as post and telephone. The established system also permits to keep the communication with the Bundeskartellamt if necessary and allows the complainant to cooperate without revealing its identity.

[72] See about the complaints system before the European Commission : Van Bael & Bellis, 2010, p. 986.
[73] See ex multis Swiss Report, p. 15.
[74] German Report p. 7. Bundeskartellamt: https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=2bkarta151
[75] See Italian Report., p. 20.
[76] See Italian Report, p. 20.
[77] German Report, p. 9.
[78] https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=2bkarta151
[79] http://www.bundeskartellamt.de/wEnglisch/FurtherInfo/whistleblowing_infoW3DnavidW2631.php

However, there are also jurisdictions where the protection of complainants is not yet considered a relevant issue, probably due to their short experience with competition law rules.[80]

2.2 Access to the file as a complainant or third party

In public enforcement, the access to the file in competition law proceedings is possible for parties under investigation in order to comply with the constitutional principles of defence and of equality of arms between parties.[81] In some legal systems, under specific circumstances, access to file (at least to non confidential version) it is allowed to third parties that are able to demonstrate a concrete and legitimate interest to access to such information.

In private enforcement the access to the file as a complainant or in order to obtain information and evidences for potential claims is a crucial point it is necessary for potential claimants since they carry the burden of proof.[82]In principle the initial position is the same for all type of undertakings.[83]

SMEs may face more difficulties as other corporations if they are not well assessed and informed or if they are not party to the administrative proceeding. Complainants are considered as third parties without or with limited access to the file in some jurisdictions.[84] In the US, SMEs also have the same rights of access to evidence against them as individuals, they receive enhanced due process rights if the SME is ran by individuals and have a sole owner. This distinction is based on the corporate form rather than the size.[85]After receiving a complaint and if the NCA decide to start a proceeding it may interesting to inform specifically about the next steps of the proceedings and the rights of the complainant.

3. Leniency, settlements and commitment decisions for SMEs

Leniency programmes are used by undertakings to confess to the NCAs their participation to secret cartels. If the cooperation is successful the authority in most jurisdictions that have

[80] See Hungary, Croatia, Denmark.
[81] See about the access to the file before the European Commission : Van Bael & Bellis, 2010, p. 1042
[82] L. Idot, in Basedow: International Private Antitrust Litigation, 2011, p. 20. See also: J. Suderow: El acceso a las pruebas en expedientes de la Comisión Europea y los límites establecidos por su programa de Clemencia, in L. Velasco a. others: La aplicación privada del Derecho de la Competencia, 2011, p. 535.
[83] Swiss Report, p. 17
[84] See for instance : Croatian Report, p.7, UK : p. 15. OFT : Involving third parties in Competition Act investigations, OFT 451, April 2006, para. 3.22
[85] US Report, p. 3.

taken part in this study will grant immunity for the administrative fine.[86] Usually there two types of immunity from fines in favour of a company disclosing its participation in a cartel. The first undertaking in submitting information and evidences that enables the authorities to carry an inspection in connection with the alleged cartel will benefit from complete reduction of the fine. The other undertakings that submit information and evidences can only obtain a partial reduction of the fine.[87]It is important to highlight that a company will have to file as much evidences as possible and will have to cooperate during a long investigation proceeding. Therefore companies that want to benefit from leniency programmes will need resources, time and specialised advise yet SMEs can often not afford this. SMEs might because of these circumstances refuse to apply for leniency so that they would be disadvantaged in relation to more powerful undertakings.[88]In the jurisdictions examined leniency programmes do not contain specific procedures for SMEs. Nevertheless, some of the jurisdictions taking part in this study do not have any experience with leniency since their leniency programmes have only been recently introduced.[89]

It has been stated that SMEs could be disadvantaged in the leniency race since their resources are limited.[90] Furthermore a leniency application filed by the market leader or a subsidiary of a worldwide operator can lead to the disappearance from the market of SMEs.[91]In addition, leniency applicants are better positioned in case of damage claims since the authorities will protect them more than other undertakings that did not cooperate or their attempts arrived too late.[92]On the other side it shall also be highlighted that SMEs have a more direct access to the competition authorities since they do not have the bureaucratic and hierarchic structures of bigger undertakings.[93] With this respect it could be helpful to point out the obligations such as (cooperation duties) and rights (such as right to not self incriminate) of an SME during the leniency and sanctioning proceeding.

4. Sanctions: different penalties for different size?

[86] See about the leniency process before the European Commission : Van Bael & Bellis, 2010, p. 1125. A. Calvo Caravaca, 2010 Derecho Antitrust Europeo, Vol . I p. ;
[87] Van Bael & Bellis, 2010, p. 1127.
[88] Swiss Report, p. 21.
[89] See for instance Croatian Report p.7 and 8,
[90] UK Report, p. 15, Swiss Report, p. 21
[91] French Report, p. 27.
[92] French Report, p. 27. Van Bael & Bellis, 2010, p. 1125. A. Calvo Caravaca, 2010 Derecho Antitrust Europeo, Vol . I p.
[93] UK Report p. 15.

Sanctions for competition law infringements can be very high and even affect the economic balance of big and small companies. In most of the jurisdictions examined the amount of the fine is calculated on basis of the turnover of the sanctioned company.[94] In the European systems sanctions are capped to a maximum amount of 10% of the turnover of the company.[95] On the other side of the Atlantic, Courts can take into account the special status of SMEs but they are still jointly and severally liable for all damages caused by their illicit conduct.[96]

Therefore and despite of the mentioned cap, sanctions can be very harmful for undertakings. Nevertheless, a strict sanctioning policy guarantees also the effectiveness of the system and promotes more competition.[97] For this reason sanctions should be in principle equally applied on each company.

The **French** report contains an interesting analysis of the differences in sanctions against major companies and SMEs. According to the conclusions of the French Reporters, SMEs in France are more often involved in cartel cases than in other type of competition law violations: "*in relative terms, SMEs that originate practices are thus more often found guilty than major companies, with equivalent types of practices*". This asymmetry can be caused by the lack of knowledge or resources. Major companies could have the necessary funds for an effective defence. Finally, SMEs do not appeal as often as major companies: Only 20% of French SMEs appeal against a decision of the competition authorities whereas 63% of major companies do appeal.[98]

It is worth noting that bigger companies are not fined so often as SMEs but the sanctions imposed to big corporations are usually higher than the fine level imposed to SMEs.[99]We cannot ignore that being a SME reduces the appeal probabilities due to the smaller resources.[100] Therefore, the risk of paying the wrong fine is higher for SMEs than for bigger corporations that can invest more time, human and legal resources in costly appeal proceedings through different instances.[101] Nevertheless, in the **UK** the CAT considers that it would be "*inappropriate for the OFT to hold directors of smaller companies to a lower standard of compliance*".[102]

[94] A. Calvo Caravaca, 2010 Derecho Antitrust Europeo, Vol . I. p 571.
[95] A. Calvo Caravaca, 2010 Derecho Antitrust Europeo, Vol . I., p. 572. .
[96] US Report, p. 4.
[97] See hereto : Van Bael & Bellis, European Competition Law, 2010, p. 1125.
[98] French Report, p. 12,13, and 14
[99] French Report, p. 12,13, and 14.
[100] French Report, p. 26, old version.
[101] French Report, p. 26, old version.
[102] CAT Case Nos, etc, 1125/1/1/09 Barret Estate Services, Ltd & Ors v OFT (2011), CAT 8, Uk Report p. 15.

Notwithstanding the above, the competition authorities should somehow establish the necessary balance in their sanctioning policy as proposed below. Negligence can be considered in some cases as a mitigating circumstance. In practice this mitigating circumstance is not applied very often. In order to infringe the European prohibitions it is sufficient that the undertaking could not have ignored that the conduct had the object to restrict competition.[103] Notwithstanding this, there is no clear red line for business people with limited time and access to competition law. The exchange of information within a trade association is a clear example. Even companies with compliance programmes do not really know when the exchange of information is anticompetitive or not. The manager of an SME that takes part in regular association meetings where the participants discuss about the market conditions and developments even assisted by the legal advisors of the association are not always aware of the limits between infringements and authorised exchange of information. [104] Limited involvement is also considered a mitigating circumstance in some jurisdictions[105] that could be used to rebalance sanctions against SMEs if the effect of their conduct was limited or insignificant in comparison to the conduct carried out by other undertakings.

5. Policy recommendations

SMEs typically face more obstacles than big companies in dealing with competition law proceedings due to lack of human and financial resources.

In order to redress this asymmetry the following policy recommendations could be taken into account:

- **Anonymity for SMEs** that help to uncover a competition law infringement: NCAs should guarantee the anonymity of complainants during the proceedings if SMEs ask for this special protection. More incentive to SMEs to access to leniency programmes: preventing cartel leaders to benefit of any type or immunity within the leniency programmes. Cartels involving big and small companies are usually initiated by the bigger company that assume the leading role in the cartel. This measure would indirectly help SMEs in the race to blow the whistle.

[103] A. Calvo Caravaca : Derecho Antitrust Europeo, Vol. I, 2010, p. 573.
[104] See recent developments of the Jurisprudence regarding punctual exchange of information.
[105] See International Report prepared for the LIDC Congress in Oxford in September 2011 Question A: Fines in Antitrust, p. 26, and A. Calvo Caravaca : Derecho Antitrust Europeo,Vol. I , 2010 p, 574.

- The **US failing company doctrine** could help to hinder the removal of SMEs of the market. Essentially, the doctrine allows a company, under serious probability of business failure, to complete an otherwise illegal merger, provided no alternate good faith purchaser exists.[106]In Europe, according to the Commission notice about fines, in exceptional circumstances, the European Commission can reduce the fine if the company provides sufficiently clear and objective evidence that the fine is likely to affect seriously the economic viability of the undertaking.[107] The analysis looks in detail at various company-specific factors, and aims to be as objective and quantifiable as possible to ensure equal treatment and maintain deterrence.[108] This rule is applicable to all kind of companies and some national jurisdictions have similar rules. Notwithstanding this, it is easier that a SME suffers more the consequences of the fine than a big corporation. Therefore it could be interesting to include size and market position as factors to be taken into account when setting the fines. Other mitigating circumstances such as negligence or limited involvement could also be applied to SMEs on a case to case analysis.

D. PRIVATE COMPETITION LAW ENFORCEMENT AND SMES

It is a common belief that victims of anticompetitive behaviour may face harsh difficulties in obtaining effective compensation for the damages suffered.[109] This is particularly true in the European legal system where a legislative intervention aimed to foster litigation in competition law issue it is expected in the next future. The reform it is aimed to remove some substantial and procedural obstacles (*in primis* rules on access to evidence) that still impede

[106]M. P. Blum : The failing company doctrine, 1974, p. 1. In Boston College Law review, available in http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1461&context=bclr&sei-redir=1&referer=http%3A%2F%2Fwww.google.es%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dfailing%2520firm%2520antitrust%2520sanction%26source%3Dweb%26cd%3D2%26ved%3D0CDMQFjAB%26url%3Dhttp%253A%252F%252Flawdigitalcommons.bc.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1461%2526context%253Dbclr%26ei%3D-4dEUNiQCsGohAfN34GYDg%26usg%3DAFQjCNEtKqfkJNYb9vU3Gv88rybgld95Lg#search=%22failing%20firm%20antitrust%20sanction%22

[107] V. Bael & Bellis, European Competition Law, 2010, p. 1113.

[108] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT

[109] See on the international perspective of private Enforcement : J. Basedow : International Antitrust Litigation, 2011.

the full effectiveness of right of compensation by victims of anticompetitive conducts within the EU.

Irrespective of the specificities of the legal system where they are brought, actions for damages based on competition law violations are inherently difficult and expensive to pursue in Courts. This is due to the difficulties to demonstrate the existence of an antitrust infringement (especially in stand alone actions), the causal link between the misconduct and the damage, and, to quantify the damages suffered (where complex economic analysis are often required). As other element of complexity one may consider, according to the specificity of the case, that his kind of claims may involve several parties in multiple jurisdictions (this means that problems of joint liability, jurisdictions, conflict of laws applicable may also arise).[110] SMEs (as well as consumers), especially when the economic harm they suffered it is not relevant, are particularly disadvantaged in this kind of litigation. Limited resources can oblige SMEs to renounce to their compensation rights even if they learn about the anticompetitive practice on time.

1. Substantive rules, procedural aspects for SMEs in civil suits

1.1.Obstacles

In all the legal systems analysed, in a judicial proceedings it is the claimants who have to prove the facts necessary to substantiate claims. [111] This can be particularly expensive and time consuming in comparison to the success rates. Risks, such as the payment of the defendant's costs, the fear of losing a good business partner or passing on defence may reduce the claiming intention.[112]

Obstacles can be of two different categories depending on the anticompetitive conduct. In the first case – exclusionary practices – SMEs may be interested in claiming but if the practice is

[110] J. Basedow: International Antitrust Litigation, 2011, p. 3. E. Castellanos, Competencia Judicial internacional en las acciones de reparación de daños y perjuicios por infracción del Derecho Antitrust in L. Velasco a. others: La aplicación privada del Derecho de la Competencia, 2010., p. 619. ASHTON, D. Vollrath, D.: Choice of court and applicable law in tortious actions for breach of Community competition law, in ZweR 2006, pp. 1-26..

[111] L. Idot, in Basedow: International Private Antitrust Litigation, 2011, p. 20. See also: J. Suderow: El acceso a las pruebas en expedientes de la Comisión Europea y los límites establecidos por su programa de Clemencia, in L. Velasco a. others: La aplicación privada del Derecho de la Competencia, 2011, p. 535.

[112] Uk Report, p. 16 and 17.

irreversible they could just "leave the market" in order to avoid further costs and losses.[113] On the other hand, in vertical restraints the claiming tendency may be lower since SMEs fear exclusion or further discrimination by the stronger undertakings that is infringing the law.[114]

Furthermore, SMEs may ignore the existence of the cartel itself or even the sanctioning decision of the competent authorities. SMEs do not always have easy access to the information of in the hands of competition authorities.[115] Although the manager of an SME may be informed about a cartel that affected his business, he may not even know how and where to start in order to check if the firm suffered any damage at all.

Quantification of damages is also a very complex matter that affects all parties involved. Again, the limited human and financial resources can weaken the litigation possibilities of SMEs against larger companies, since quantification often requires expertise and complex price and costs analysis and market definition.[116]Access to the competition authority's file can be quite difficult, particularly if the defendant filed for leniency.[117]Last but not least, complex claims such as competition law claims are very costly, therefore the funding of the litigation can also represent a harsh burden on SMEs.

1.2 Best practices

National reporters all point out that there does not seem to exist any "best practice" in private litigation in the civil courts of the different jurisdictions. Furthermore, there are no concrete protection mechanisms for SMEs in civil proceedings.

In the **US**, SMEs are jointly and severally liable for all damages caused by the cartel.

On this respect it is important to highlight that US law, like other jurisdictions, does not allow SMEs to argue that other cartel members should pay more because of their leading role or market share.[118] Moreover, treble damages also apply to SMEs. This circumstance coupled with the joint and several liability as well as with the absence of a right to contribution could, in the worst scenario, eliminate SMEs from the market. On this respect, in the US report it has been proposed to accept the failing firm defence for trebled damages if the damages drive

[113] French Report p. 28.
[114] French Report , p. 29
[115] Belgian Report, p. 18.
[116] Belgian Report, p. 18.
[117] See recent developments in Germany and ECJ, C 360/09, 14.6.2011, Pfleiderer AG against Bundeskartellamt. German Report, p. 14.
[118] US Report, p. 4.

SMEs to bankruptcy.[119] This proposal should indeed not only be discussed for treble damages but also for public sanctions in European jurisdictions. The bankruptcy of any market player, particularly SMEs, provoked by competition law penalties would have negative effects on competition.[120]

2. Collective redress

The International Report follows the definition of the European Commission for "Collective Redress". Under this definition collective redress is any mechanism that *"may accomplish the termination or prevention of unlawful business practices which affect a multitude of claimants (consumers and/or SMEs) or the compensation for the harm caused by such illegal practices"*.[121]

As already mentioned, it is a matter of fact that SMEs are reluctant (especially in the EU) to bring forward an action for damages if such damages are small in comparison to the costs of litigation.[122] The current European systems are not effective in promoting access of SMEs' to collective redress instruments.[123]

The asymmetry *vis-à-vis* the infringers of SMEs is similar to that of consumers.[124] The debate around SMEs and collective redress starts with the discussion if SMEs should have access to the same mechanisms as consumers. Some voices consider that collective redress mechanisms have to protect consumers' interests and not other interests but on the other hand, the asymmetry is similar to consumers, particularly in micro businesses against big companies.[125] Nevertheless, the European definition of SMEs may be too broad since it embraces companies with an annual turnover up to € 50 million (equivalent to US $...). The asymmetry in this kind of companies is probably not as obvious as in micro enterprises.[126]

Furthermore, collective redress mechanisms only work if the claims have common elements. Although SMEs may also be subject to standard contracts, their contractual conditions may be

[119] US Report, p. 4.
[120] US Report, p. 19-20.
[121] See: P. Buccirossi; M. Carpagnano, L. Ciari,; M. Tognoni, C. Vitale: Collective Redress in Antitrust, Study requested by the European Parliament's Committee on Economic and Monetary Affairs, p. 15. Available on http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=74351.
[122] European Parliament Study on Collective Redress in Antitrust, cit., p. 15.
[123] European Parliament Study on Collective Redress in Antitrust, cit., p. 38.
[124] European Parliament Study on Collective Redress in Antitrust, cit., p. 64.
[125] European Parliament Study on Collective Redress in Antitrust, cit., p. 69.
[126] European Parliament Study on Collective Redress in Antitrust, cit. p. 69.

different across various countries. This could hinder the courts in determining the common ground for the action.[127]

With respect to Europe, some of the national reports describe the existing collective redress mechanisms, such as representative actions or group litigation orders but practical experience and case law with SMEs seems to be limited.[128]

In the US the situation is completely different. US class actions are open for SMEs and other types of companies, whereas large corporation usually file their own individual claims.[129]As stated by the US report, class action is a useful tool both for defendant and for the victims, that are SMEs and consumers. Indeed, the first can obtain a global release of claims, while the latter can obtain compensation for the damages suffered. However, even in the US the experience is limited with respect to SMEs and class actions for competition law infringements.[130]

3. Should trade associations have standing in collective redress claims?

As of today, trade associations cannot bring claims on behalf of their members in most of the jurisdictions with exception of German and Italian associations.[131] Also in this case, in the United States SMEs can file class actions trough associations as long as one member of the association can show that it suffered an economic injury causally connected to the illegal conduct of the defendant.[132]

In Europe, specific consumer bodies are authorised to bring forward claims on behalf of their members.[133] Furthermore, according to several civil procedural rules claimants need to have a personal, direct and immediate interest in the claim, whereas association would in principle not need to fulfil these requirements.[134]

[127] European Parliament Study on Collective Redress in Antitrust, cit.. 69.
[128] See UK Report, p. 17-18.
[129] US Report, p. 15.
[130] US Report p. 15.
[131] See German Report, p. 18. And Italian Report, p. 25.
[132] US Report, p. 14.
[133] See UK Report, p. 18,
[134] See for instance Belgian Report, p. 20.

4. Policy Recommendations

- As mentioned above, the British government has recently launched a public consultation about private actions in competition law.[135] One of the main targets is "*to make it easier for businesses, especially SMEs, to challenge anticompetitive behaviour that is harming them"*. It shall be highlighted that the British government is even considering creating a "fast track" procedure for SMEs before the CAT, which should be cheap, quicker and simpler[136]. This fast track seems to be an interesting option for the parties involved, reducing costs and asymmetric situations for SMEs as well as for defendants, because it would enable the courts to deliver fast decisions, reducing their own costs.

- Secondly, the Hungarian presumption could also be a potential solution. According to this, unless otherwise proved, horizontal price fixing and/or market sharing arrangements are assumed to determine an increase equivalent to 10% of the contractual prices. This option has certainly some disadvantages, since the price increase could easily be over the 10% threshold for long duration cartels or below, in the case of short living cartels. Nonetheless, both parties would save litigation costs and the courts would be able in place to take fast decisions.

- Legal aid tools cutting litigation costs made available to SMEs by the government or by bar associations, would be an easy option that reduces the unbalanced situation in proceedings between SMEs and big companies.

- Arbitration proceedings should also be promoted. Bar associations and Arbitration courts could create specialised panels for competition law litigations. This way, the parties involved would know where and how to claim. Also the defendants would probably prefer the arbitration approach due to the substantial time reduction of the proceedings.

[135] See UK Report, p. 19 and Private actions in Competition Law : a consultation on options to reform, April 2012.
[136] See UK Report, p. 19 and Private actions in Competition Law : a consultation on options to reform, April 2012.

- As stated by certain national reporters, allowing standing for trade associations is also another positive approach that could help re-establish the balance between the involved parties.[137]

E. CONCLUSIONS AND POLICY RECOMMENDATIONS

Below are detailed, with the aim to foster the debate, possible measures to take in order to improve the SMEs-Competition Law relationship in the main fields analysed in the Report: i) legal system and public policy; ii) public enforcement; iii) private enforcement.

In particular:

1. General issues:

- **No need for a sector specific legal definition of SMEs in the field of competition law**. Soft law tools, such as guidelines, may suffice in order to provide a common definition of SMEs based on market share and power. Certainly SMEs should in principle be defined in relation to their market relevance in the context of competition law. The International Report proposes to discuss if it is convenient to follow the German example including specific definitions but only in guidelines of the European Commission or of the national Authorities.
- **More competition law culture and compliance programs specifically addressed to SMEs**: NCAs should pay particular attention to the **awareness** and **knowledge** of competition law by SMEs. In order to to this they may develop specific programmes and mechanisms to inform SMEs about compliance and their particular rights. These programmes and tools should be spread by authorities and entities that are next to SMEs such as trade associations and local authorities. Compliance handbooks, models and websites should be drafted for SMEs in order to reduce their legal assessment costs**.**

[137] Hungarian Report, p. 13

2. Public Enforcement:

- **Anonymity guarantee for SMEs that denounce competition law infringements**: NCAs should guarantee the anonymity of complainants during the proceedings if SMEs ask for this special protection.

- **Voluntary adoption** (and effective implementation) by SMEs of standard compliance programme may give them favourable treatment in case of antitrust violations.

- **More incentive** to SMEs to access to **leniency programmes**: preventing cartel leaders to benefit of any type or immunity within the leniency programmes. Cartels involving big and small companies are usually initiated by the bigger company that assume the leading role in the cartel. This measure would indirectly help SMEs in the race to blow the whistle. Furthermore, a fast track leniency proceeding for SME could also help reducing their legal costs.

- **Mitigating circumstances in fine setting:** the **US failing company doctrine** could help to hinder the removal of SMEs of the market. This rule is applicable to all kind of companies and some national jurisdictions have similar rules. It could be interesting to include, as general assessment criteria, size and market position as factors to be taken into account when setting the fines. Furthermore, negligence or the limited involvement as mitigating circumstances could also be applied to SMEs since their knowledge about complex competition law developments can be very limited and since their involvement in the conduct and specially the effects of their participation in the illegal agreement could be insignificant due to their size and market power.

3. Private enforcement:

- **Collective redress** mechanisms should lower financial and organisational hurdles faced by SMEs in bringing a damage action. The mechanism should favour out-of-court settlements since they are in the interest of all parties.

- A "**fast track" procedure** for SMEs before the National Courts or arbitration chambers, which should be cheap, quicker and simpler could help to booster enforcement by SMEs.

- A **presumption about the suffered damages** fixed in a certain increase of the contractual prices is an option that reduces costs and proceeding time.

- **Legal aid tools** cutting litigation costs made available to SMEs by the government or by bar associations, would be an easy option that reduces the unbalanced situation in proceedings between SMEs and big companies. Arbitration proceedings should also be promoted. Bar associations and Arbitration courts could create specialised panels for competition law litigations.

- **Standing:** allowing standing for trade associations is also another positive approach that could help re-establish the balance between the involved parties.

***

Annex 1

LIST OF NATIONAL REPORTERS

Austria	Gerhard Fussenegger
Belgium	Norman Neyrinck
Croatia	Boris Babic
Czech Republic	Lenka Cizkova
France	Mathilde Baudou
France	Laurence Charvoz
France	Jean-Patrice de La Laurencie
France	Olivier Sautel
France	Véronique Selinsky
Germany	Meinrad Dreher
Hungary	Almos Papp
Italy	Clara Zammit
Luxembourg	Gabriel Bleser
Sweden	Robert Molden
Switzerland	Nicolas Birkhäuser
United-Kingdom	David Bailey
United-States	Emilio Varanini

Annex 2
QUESTIONNAIRE SUBMITTED TO NATITIONAL REPORTERS

Question A: SMEs and competition rules

Should small and medium enterprises ("SMEs") be subject to other or specific competition rules?

1. General Background

Several aspects could be taken into consideration in relation to address the subject matter of this International Report:

- the possibly lesser anticompetitive impact of competition law infringements by SMEs' (probably taken into consideration by *de minimis* rules), unless the SME is active on a very specific market (for instance technology markets);

- the hurdles faced by SMEs to self-assess contemplated conduct against the competition rules, in particular in relation to complex economic assessments (e.g. market definition, market share calculations, efficiency defences, etc.) (Should a more legalistic approach, with per se rules, safe harbours, etc. be promoted?

- the importance of SMEs for most economies of the world (SMEs constitute the ground force of our economies) and therefore the importance of economic competition at SME level;

- Competition Law sanctions for infringing SMEs (including payment rules for SMEs, etc.)

- Interim relief and access to compensation for SMEs.

The purpose of the International Report is to determine whether distinct Competition Law approaches, principles and exceptions apply to SMEs across the world.

- As infringers :

In practice, SMEs may be subject to different rules from those applicable to other economic operators.

A key aspect of the report should thus be toexplore whether such differences exist, and on which grounds they are, or not justified.

There are three main areas of focus in relation to Question A.

One pertains to the substantive rules, the second to the procedural rights (fundamental rights) and the third to the proceedings and sanctions.

- As victims :

  When SMEs are victims, the main issue is the access to justice. Should specific rules be introduced to facilitate access to private claims for SMEs.
  But one may wonder also whether substantive specific rules are necessary to protect SMEs against their partners or competitors.

  A related aim of the Report should finally be to gather information about the current application of Competition Law to SMEs in civil proceedings.

Most of these questions pertain to size, i.e. small versus big.

The small ones have lesser means than big ones to understand the markets, their practices and their impact, to defend themselves, etc. However, the term « undertakings » covers both legal entities and individuals. Large undertakings are quite always legal entities, whilst SMEs and in particular micro-entreprises are often in the hands of individuals. Not only the size may be different, but the legal reality as well. That could be a criterion for creating distinctions or at least calling for a re-examination of the way authorities currently operate or should operate.

2. Legal definitions:

Does your domestic competition legislation provide a legal definition of SME?

If the answer to the previous question is positive, please specify the nature of the rule (binding / non – binding, case-law) and indicate the reference.

Does the legal definition cover individual business?

Are there other specific national rules to be considered in the definition of SMEs (e.g. related to other economic sectors different form Competition law)?

Are there any specific programmes or National Competition Authority policies addressed to SMEs?

Do you think that National Competition Authorities should establish specific programmes addressed to SMEs?

A – SMEs as infringers

3. **Statistics:**

a) please list relevant Case-Law (both before the NCA and the Court) related to SMEs anticompetitive conducts in your country in the last 5 years;

b) please report it by the type of conduct;

c) please specify if the NCA's / Court Competition Law legal assessment has been, in your opinion, influenced by the economic dimension of the SME.

4. **Substantive rules:**

Are administrative substantive rules different or are the rules applied differently in relation to SMEs ? Please specify.

Are judicial substantive rules different or are the rules applied differently in relation to SMEs ? Please specify.

Are differences between SMEs and larger undertaking dealt with by different substantive rules or by means of a differentiated application depending on the size of the undertaking ?

Are there specific safe harbours in relation to SMEs ?

Taking into account the role of the SMEs in policing the markets, do or should SMEs benefit from a facilitated access to justice, remedies ?

5. **Procedural aspects:**

Are there situations where the procedural rights are different between SMEs and larger undertakings ? List all of them and specify if they are related to administrative / judicial or both Competition Law enforcement.

What is the justification for such differences?

Is it legal nature or size?

Should differences be made and which ones, for which reasons ?

In relation to a number of fundamental rights, it appears that legal entities are treated differently from individuals. This is true for instance in relation to the principle of legality (the requirement that the offense be sufficiently precisely defined) and art. 6 CEDH in general (no right to privacy for legal entities and search warrants subject to different conditions). There might be other aspects. Should these differences be maintained as a result of the difference in legal nature or should the (administrative law) concept of undertaking require that a difference be made in relation to the size only? In that case, should that difference in treatment benefit all SMEs ?

Examples :

- In relation to individuals, the principe « nemo tenetur se ipsum accusare » is applied more strictly. As a consequence, individuals have a stricter right to remain silent as opposed to undertakings, which usually face a duty to provide information.

- In relation to more procedural issues, it may be that the authorities apply different standards or have different practices (for instance in sending repeated reminders in relation to a questionnaire before sanctioning an SME).

- How are the rules regarding the access to the file in your country?

- Do you think that it is necessary to facilitate or accelerate the access to SMEs if they prove to have an objective interest?

5.1 Sanctions / Leniency programme:

Are different sanctions or levels of severity applied in relation to SMEs ? If the answer to the question is YES, please specify in what sanctions, SMEs differ from other economic operatorsCould you report national cases (if any) where larger companies, which, having stronger resources, were the first to "win the race" to file a leniency application, whereas small-medium sized undertakings, lacking sufficient resources, ended up having to pay hefty fines for participation in the cartel, possibly because they could not file a leniency application before the "larger" members of the cartel.

Do you think that the leniency and agreement systems should include specific rules for SMEs in order to facilitate their participation during a sanctioning proceeding?

Before and after a denunciation : Many companies refuse to take legal steps against unfair practices imposed by bigger companies in order to avoid further problems or to harm their own business or existence.

Does your national legislation contain any specific rules to protect SMEs before big undertakings after a complaint before the NCA?

Do you think it is necessary to establish protection mecanisms in order to enhance SMEs to inform about anticompetitive practices?

B- SMEs as victims

6. Private Competition Law Enfoncement:

Does your national legislation contain specific rules to protect SMEs confronted to large undertakings in civil suits for anticompetitive conducts?

Are there any known procedural difficulties for victims of cartel damages?

Do you think it is necessary to establish protection mechanisms in order to enhance SMEs' ability to take legal action against anticompetitive practices?

Does your national legislation allow a third party to bring an action before civil courts if some SMEs do not take action ?

6.1 Collective Redress:

Have SMEs legal standing to bring collective legal actions based on anticompetitive conducts?

Do you think that collective redress could help to improve the rights of SMEs?

Many collective redress mechanisms are only open to consumer associations.

Do you think that industrial associations of SMEs should have the same rights?

7. Substantive Rules

Are there some specific rules which aim at protecting SMEs as competitors or as partners by trying to prevent business to operate or larger undertaking to act in a way that is harmful to them ?
If not, do you think this kind of rules should be introduced in your legislation and why ?

Do these rules apply only to particular sectors or widely to any sector of the industry ? Do they protect rather retailers or suppliers, competitors or partners ?

Do you think specific rules are efficient if your legislation include some and, if not, how could they be improved ?

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