UEAPME's contribution to the Session "Enhancing SMEs' ability to contribute to growth in Retail" of the 3rd Workshop organised in the framework of an European Retail Action Plan

30th March 2012

Administrative burdens

UEAPME and its member organisations are fully supporting the European Commission's and Member States' efforts for better regulation and cutting red tape. Recently, also public authorities and especially the Commission are recognising that the **compliance cost of regulation is higher, the smaller an enterprise is**.[1] Small retailers are in addition more than big ones subject to local, regional and national legislation.

Simplification and better regulation is a complex issue that cannot be achieved through simplistic proposals. Simplification and better regulation needs in the first place a cultural shift, a change of mindset among civil servants, public authorities and the legislator in general.

It has never been the aim of the European founding fathers to create a two-level or two layers legal framework in Europe, meaning one, for the happy few, that are active in the entire internal market and one for the "lesser" subjects being only active at local level. The objectives are clear: **to create a Union which offers high standards of social, environmental and consumer protection**. So, if legislation is necessary in this field it should apply to everybody. Standards and regulations which are related to the quality aspects of enterprises, their products and their services must also be respected by smaller enterprises, if they want to be successful and **remain competitive on the market, even locally.**

However, the actual standards in the fields of environment, health and safety etc. create too often high administrative burdens and compliance costs. Such burdens and costs should not be reduced or abolished by exempting small enterprises from these rules and standards themselves, but by simplifying the procedures. **Therefore, UEAPME fully supports simplification as regards procedures of record keeping, documentation, publications, statistics and similar requirements for proving the compliance with these rules and standards adapted to the reality of smaller enterprises.**

As a consequence, the "**Think Small First"** approach should apply also here. Make legislation from the point of view of micro and small enterprises and make exemptions for the larger enterprises providing tailored regulatory schemes.

If regulations were created only if really necessary, with smaller entities in mind and through the application of the real "Think Small First" approach, exemptions would not be necessary for them.

From a better regulation and legislation point of view it may be clear that exemptions make the legislation more difficult and complex. Indeed, **exemptions have to be interpreted in a strict, limited way; consequently they have to be very precise.** For SMEs it is easier to know the general rule than to know all the exemptions.

[1] However, the Commission Recommendation of 22 April 1997 on improving and simplifying the business environment for business start-ups C (97) 1161 final, 22 April 1997, already mentioned that the average cost of administrative burdens is between 6 and 30 times higher for SMEs than for larger businesses.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

So, also here the **Think Small First** approach should apply. Make legislation from the point of view of SMEs and make exemptions for the larger enterprises.

Strengthening the application of the SME test, particularly for micro enterprises

The Commission's report on "Minimizing regulatory burden for SMEs" states that "*From January 2012 the Commission's preparation of **all** future legislative proposals will be based on the premise that in particular micro enterprises should be exempted...*" However, Commission officials have already publicly declared that the exemptions will not apply in case overall public policy objectives or the internal market are undermined, and **for example**, health and safety at the workplace, food safety or environmental protection.

The question is then in what kind of policies exemptions will be applied, as the mentioned examples cover in fact nearly the totality of the European policies towards enterprises. In addition, if it is only in an extremely limited number of (still undefined) files that the rule will apply, one can question if it is really necessary to announce this report as a fundamental change in the Commission's policy.

As 90% of all enterprises are micro enterprises, an exemption of this group would suggest that in practice that there is no need to legislate. Therefore UEAPME proposes the following alternative to the Commission's proposal:

"**If the proportionality of micro enterprises being covered cannot be demonstrated by the Commission services, then the proposal as such should not be tabled.**"

This proposal has the following advantages:

- it ensures that every future legislation will be proportional (for micros, small, medium and big enterprises);
- it really applies the think small first principle as the analysis and the proposal starts from the characteristics, needs, possibilities of the micro enterprises;
- it ensures that new legislation will only be introduced if it is really necessary.

In order to improve the Impact Assessments UEAPME proposes that stakeholders should be consulted on the first draft of the impact assessment, before the final study is used as a basis for consultation.

Micro enterprises are just as much part of the European economy as all other enterprises and must therefore remain covered by EU legislation - as already provided for under the "Think Small First" principle. Any general exemption of micro enterprises is to be rejected, not just from a legal and SME policy perspective but also and in particular for micro-economic reasons. Instead of across-the-board exemptions, the "Think Small First" principle needs to gain prominence as a legislative guideline, with future legislation ensuring effective regulations for SMEs entailing a minimum of red tape and based on high-quality and independent impact assessments. A focus must be put in all legislative initiatives of the European Commission on the consistent application of the "SME Test" included in the guidelines for impact assessments. The European Commission must not adopt a policy of sweeping the "problem" of micro enterprises under the carpet by generally exempting them from EU legislation. Instead, the existing provisions of the SME Test must be applied.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

Not all legislation is a burden or obstacle

A more important, preliminary question to answer is what kind of retail market do we want in the European Union? Little attention so far is paid by the European Commission to the specific situation of small independent retailers, and in addition they are sometimes presented in a quite negative way. What does a "more efficient" retail market means? Apart from the economy of scale factor, which is determining for the "efficiency" and "productivity", it may be clear that retail formulas which offer more service will not be the most productive ones.

UEAPME has been advocating since years for initiatives that improve the functioning of the internal market. UEAPME is also advocating in general for more harmonization, but harmonization does not mean no regulation at all. In our opinion, one cannot achieve free competition without ensuring that the free market is corrected and that there is a balance and the possibility for every market player, be it big or small, to have the same chances. And this is exactly what has happened in the last years and what some are still advocating for: to abolish national regulation that assured a level playing field for all players, big and small, in the retail sector. In UEAPME's opinion a real European internal market should guarantee a diverse retail market landscape, in which the consumer can choose freely between multinational chains, cheap discounts, but also local independent and service-oriented small shops.

This is for example the case with the **prohibition of sales below costs**. Allowing sales below costs is not only accepting the law of the jungle: the Court of Justice has repeatedly accepted the possibility to maintain this prohibition. So there is no need to evaluate and question this again. The possibility to maintain this prohibition is vital for SMEs, especially in the retail sector and there is no evidence at all that these legislations are not effective as the report states.

Another crucial issue is the **urban and local planning rules**. The proximity of shops offering essential goods and services are not only important for the elderly, the less mobile persons, but for the whole economic and social fabric of city centres and sparsely populated areas. Since the Services Directive, economic criteria cannot be used anymore for the establishment of enterprises or more specifically supermarkets. But it is clear that some reasons of general public interest, such as the environment, the urban environment, the viability of the city centres and villages, sustainable mobility and transport, good spatial planning can be used to impose some rules for the opening of such retailers and to guarantee a level playing field and to guarantee a diverse retail offer.

Nevertheless, UEAPME is of the opinion that the European policies have to respect the principles of subsidiarity and proportionality. One should not forget that the retail markets are merely local markets. According to UEAPME, the Commission is overestimating the importance of cross-border consumer spending, which is certainly not THE answer to guarantee a diverse retail market.

Due to the differences between the Member States and the fact that some problems need an approach that takes into account the specific situation in the Member State in question, a significant number of issues need to continue to be treated at Member State level. The advantage of this Member State specific approach is sometimes after all bigger than the possible advantage linked to abolishing the so-called "barriers" between national markets by solving these issues at the European level.
E.g. regulations concerning the opening hours of shops are issues that can better be dealt with at Member States level. When this should regulated at the European level, then there would be probably less "barriers" for cross border trade of some (a minority), but the advantage of this does not deny the advantage to adjust these measures to the local necessities in the Member State.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com

In order to remain competitive, also small retailers need to cooperate more. The franchise formula can offer many of advantages for the small retailer. However, there is a growing tendency amongst Franchise Companies to impose unacceptable provisions on the retailers which are unfortunately allowed by the competition rules applicable to vertical agreements.

In UEAPME opinion the block exemption on vertical agreements should be changed in the following way:

- A non-compete obligation should be limited to the contract period. The protection of know-how does not justify the exclusion of a buyer from the market. In addition, the supplier has been compensated for the transfers of know-how through the fees the buyer has paid during the contract. Moreover, the sector itself is more and more convinced that a balanced agreement should not contain a post term non-compete obligation. Finally, non-compete obligations are ineffective. Competition e.g. by a third party in the neighbourhood of the same selling point can never be avoided. So only the buyer is punished by such a clause while it has nearly no positive effect at all on the protection of the competitiveness of the supplier.
- It would be recommendable that the regulation contains a provision stating that the block exemption will not apply to vertical agreements containing a clause in which the valuation of the business is fixed at the moment of the signature of the agreement. Such clauses restrict the free market and deprive the buyer of the possibility to sell his/her business at the end of the agreement at a competitive price. UEAPME believes that pre-emptive rights are only acceptable if the free competitive market can continue to play. If a buyer wants to sell his/her business, in which he or she has invested him/herself and for which he/she has taken risks, then he/she should be allowed to do so. Predetermined prices, as they are mostly lower then the real value, should be considered as unwritten.
- The block exemption should also not apply if the agreement contains performance obligations which oblige the buyer to generate a certain turnover in a fixed period or to purchase an X number of goods. Moreover, any sales obligation should never be linked with a dissolution clause: clauses that contain the possibility to dissolve unilaterally and immediately the contract without taking into account external factors should be declared null and void. After all, good commercial co-operation agreements depend on the efforts of every party. Unilateral imposed performance obligations harm commercial co-operation.
- UEAPME would also like to stress that retailers and franchisees can suffer from competition from their providers and franchisers as for example through direct internet selling by these providers and franchisers. While the retailer and franchisee have to cooperate in the services of the franchiser, the franchiser is operating in the “exclusive” market of the franchisee. UEAPME regrets that this is not taken into account in this regulation.

MAISON DE L'ECONOMIE EUROPEENNE - RUE JACQUES DE LALAINGSTRAAT 4 - B-1040 BRUXELLES
TEL +32 (0)2 230 75 99 - FAX +32 (0)2 230 78 61 - E-MAIL info@ueapme.com