

ROADMAP	
TITLE OF THE INITIATIVE	Legislative proposal on antitrust damages actions
TYPE OF INITIATIVE	X CWP • Non-CWP • Implementing act/Delegated act
LEAD DG – RESPONSIBLE UNIT	COMP/A1
EXPECTED DATE OF ADOPTION	Month/Year: June 2012
VERSION OF ROADMAP	No: 1 Last modification: Month/Year: May 2011

This indicative roadmap is provided for information purposes only and is subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.

A. Context, problem definition
<p>(i) What is the political context of the initiative?</p> <p>(ii) How does it relate to past and possible future initiatives, and to other EU policies?</p> <p>(iii) What ex-post analysis of the existing policy has been carried out and what results are relevant for this initiative? n/a</p>
<p>(1) the political context</p> <p>According to the European Court of Justice, any citizen or business who suffers harm as a result of a breach of the EU antitrust rules (Articles 101 and 102 TFEU) must be able to obtain reparation from the party who caused the harm. As a result, and in the absence of an EU measure, Member States have to have an effective legal framework enabling victims to exercise their right to compensation. However, despite this requirement under European law, victims of EU antitrust infringements have to date only rarely obtained reparation for the harm suffered.</p> <p>The absence of an effective legal framework for antitrust damages actions also hampers the full enforcement of the antitrust rules and thus has a negative bearing on competition in an open internal market (see below for fuller explanation).</p>
<p>(2) The relation with possible future initiatives and with other EU policies</p> <p>The policy initiative will, in one of its elements, build on the Commission's ongoing work in the area of collective redress. Indeed, one of the reasons why victims of EU antitrust infringements are not obtaining full compensation of the harm suffered, is the lack of effective collective redress in the EU Member States. As that finding is not unique to competition law cases, the Commission has, as a first step, launched in 2011 a public consultation on a European approach to collective redress. On the basis of the results of this consultation, the Commission will by the end of 2011 adopt a horizontal European Framework for Collective Redress. Any provisions on collective redress in the legislative proposal on antitrust damages actions will be developed on the basis of this Framework.</p>
<p>What are the main problems which this initiative will address?</p>
<p>The legal framework for enforcing the EU right to compensation for antitrust infringements is currently, in the absence of European rules on the matter, determined by the national rules on civil liability and civil procedure. Under these very diverse national rules, citizens and businesses encounter strong difficulties in obtaining compensation for antitrust damages. Furthermore, the level of protection of the right to damages guaranteed by EU law depends on the Member State in which the victim of an infringement brings the action. During the public consultation on the 2008 Commission White Paper on Damages Actions for Breach of the EC antitrust rules, a wide number of stakeholders, even among those who expressed criticism on the concrete suggestions made, acknowledged this widespread lack of effective means for obtaining redress and the need to improve this situation either at the national or European level. As a consequence of the current situation, a large number of victims of infringements of EU antitrust law remain uncompensated for the harm suffered and see their right to damages under the Treaty frustrated. There is therefore an ineffective and unequal protection of the rights granted by EU law and ultimately a clear deficit in terms of corrective justice.</p> <p>Companies that infringe the EU antitrust rules usually gain an illegal advantage on the market at the expense of other players and, in particular, consumers and small and medium sized enterprises. The lack of an effective compensation mechanism means that the costs of antitrust infringements are currently borne by the victims and law-abiding businesses, rather than by the infringers. This situation is inimical to the functioning of the competition rules in general, since it affects their efficacy, and undermines general incentives to pro-competitive behaviour. Inefficient avenues of redress for injured parties lead to economic and welfare losses to society, a situation which is incompatible with the Europe 2020 objective of a competitive EU economy.</p>

Who will be affected by it?
Potentially all economic actors: consumers, small and medium sized enterprises and big companies.
(i) Is EU action justified on grounds of subsidiarity? (ii) Why can Member States not achieve the objectives of the proposed action sufficiently by themselves? (Necessity Test) (iii) Can the EU achieve the objectives better? (Test of EU Value Added)
EU action is justified for the following reasons : <ul style="list-style-type: none"> • Lack of European action would conflict with the requirements under European law to provide for an effective framework for compensation for victims of EU antitrust infringements. As there is no indication that a significant number of Member States are likely to introduce, in the foreseeable future, legislative changes that ensure a fully effective legal framework for damages actions by victims of antitrust infringements, only further incentives at European level can create a legal framework that adequately ensures effective redress. • There is currently marked inequality in the level of judicial protection of individual rights guaranteed by the Treaty in the Member States. The result is an evident disparity in the very content of the entitlement to damages guaranteed by European law. More specifically, a claim under the law of one Member State may lead to full recovery of the claimant's loss, while a claim for an identical infringement in another Member State may lead to a significantly lower award or even no award at all. • These sometimes large differences in the level of legal protection of the rights which victims derive from the EU antitrust rules also distort the competitive environment for businesses, as the likelihood and scope of claims for damages against undertakings directly affect their competitive position. Isolated initiatives by Member States are, by nature, not likely to produce a more level playing field for businesses and to reduce the uncertainty created by the currently big differences between the national legal systems. On the contrary, individual initiatives may even widen the gaps and increase the risk of negative impacts resulting from forum shopping. Consequently, only European action can correct the distortions of competition that currently exist due to the variations in the legal arrangements for antitrust damages in the Member States. • The interaction between the measures improving the conditions for antitrust damages actions and various aspects of public enforcement of competition rules needs to be addressed, for instance the operation and protection of the Commission's and Member States' leniency programmes. Individual action by Member States does not seem capable of achieving this in any consistent manner.

B. Objectives of the initiative
What are the main policy objectives?
The main objective of this policy initiative is to ensure that victims of infringements of EU antitrust law have in all Member States access to truly effective mechanisms for obtaining full compensation for the harm they suffered. Victims of infringements of EU antitrust law have a right to compensation conferred by the TFEU. However, to date the current legal framework in which actions for antitrust damages are brought makes it considerably difficult for victims to enforce their right. By pursuing this objective, the Commission wishes to guarantee, in every Member State, certain minimum standards allowing victims effectively to claim, and obtain, full compensation from the infringers of the EU antitrust rules. To this end, the initiative should include <i>inter alia</i> common rules as regards (i) access to evidence and protection of leniency programs in the context of antitrust damages actions brought to national courts, (ii) the binding effect of decisions of national competition authorities as proof for an antitrust infringement in civil proceedings, (iii) rules on whether or not a defendant can invoke that the claimant passed the damage on to his own customers (passing-on defence) and (iv) rules on standing, in particular as regards indirect purchasers and the potential aggregation of individual claims (collective redress).
Do the objectives imply developing EU policy in new areas?
No: private enforcement of the EU antitrust rules has been legally possible for decades. This policy initiatives aims at increasing the effectiveness of that possibility.

C. Options
(i) What are the policy options being considered? (ii) What legislative or 'soft law' instruments could be considered? (iii) How do the options respect the proportionality principle?
The policy options include: <ol style="list-style-type: none"> 1. Taking no further action; 2. Development of optional practical tools/best practices which would be recommended to the Member States;

3. Some approximation of national procedural rules via European legislation (directive);
4. Full harmonisation of national procedural rules via European legislation (directive or regulation).
In line with the proportionality principle, the Commission favours option 3 as it strikes a careful balance between effective protection of victims' rights to compensation, the legitimate interests of potential defendants and third parties and important interests of Member States . The preferred option is the minimum necessary to effectively achieve its objective, namely to guarantee that across the EU victims of infringements of EC competition law have access to a truly effective mechanism for obtaining full compensation for the harm they suffered.

D. Initial assessment of impacts
What are the benefits and costs of each of the policy options?
Please see the IA that has already been carried out (see the opinion of the Impact Assessment Board of 3 February 2009 and the accompanying documents)
Could any or all of the options have significant impacts on (i) simplification, (ii) administrative burden and (iii) on relations with other countries, (iv) implementation arrangements? And (v) could any be difficult to transpose for certain Member States?
Please see the IA that has already been carried out (see the opinion of the Impact Assessment Board of 3 February 2009 and the accompanying documents)
(i) Will an IA be carried out for this initiative and/or possible follow-up initiatives? (ii) When will the IA work start? (iii) When will you set up the IA Steering Group and how often will it meet? (iv) What DGs will be invited?
An IA has already been carried out. (see the opinion of the Impact Assessment Board of 3 February 2009 and the accompanying documents)
(i) Is any of options likely to have impacts on the EU budget above €5m? (ii) If so, will this IA serve also as an ex-ante evaluation, as required by the Financial regulation? If not, provide information about the timing of the ex-ante evaluation.
None of the options has an impact on the EU budget above €5m.

E. Evidence base, planning of further work and consultation
(i) What information and data are already available? Will existing impact assessment and evaluation work be used?
(ii) What further information needs to be gathered, how will this be done (<i>e.g. internally or by an external contractor</i>), and by when?
(iii) What is the timing for the procurement process & the contract for any external contracts that you are planning (<i>e.g. for analytical studies, information gathering, etc.</i>)?
(iv) Is any particular communication or information activity foreseen? If so, what, and by when?
n/a
Which stakeholders & experts have been or will be consulted, how, and at what stage?
The policy initiative is based on two expert studies (2004 and 2007) and two Commission policy documents (2005 Green Paper and 2008 White Paper), each of which were submitted for public consultation and were subject of own-initiative resolutions in the European Parliament and in the European Economic and Social Committee. Also the Commission staff working document "Towards a Coherent European Approach to Collective Redress" (February 2011) has been submitted for public consultation and was subject of a Hearing (April 2011). The European Parliament already announced its intention to produce an own-initiative resolution on the topic.