EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
D(2013)

Opinion

Title **DG COMP - Impact Assessment for the legislative proposal on Antitrust Damages Actions**

(resubmitted draft version of 24 January 2013)*

(A) Context

Since 2001 the Court of Justice ("the Court") repeatedly stated that, as a matter of EU law, any individual must be able to claim compensation for the harm suffered as a result of an infringement of the EU competition rules. More than 10 years later, most victims of a competition law infringement are still not able to effectively exercise that EU right to compensation. This is largely due to a lack of appropriate national rules governing actions for damages. More recently, a new issue has arisen, showing that the EU right to compensation can sometimes be at odds with the effectiveness of public enforcement of the EU competition rules. To remedy these two gaps in the enforcement of the EU competition rules, the current Damages Actions Initiative therefore has two primary objectives: (i) to maintain effective public enforcement of the competition rules by regulating some key aspects of the interaction between on the one hand the public enforcement of competition law by the Commission and national competition authorities and on the other hand the private enforcement of competition law through actions for damages before national courts and (ii) to ensure an effective exercise of the EU right to compensation. This initiative should provide an effective system of public and private enforcement of competition law, fostering growth and innovation throughout the EU. On 2 February 2012 the European Parliament has adopted a Resolution calling on the Commission to deal with all horizontal collective redress issues in a separate initiative.

(B) Overall assessment: POSITIVE

The report has been improved along the lines of most of the recommendations issued by the Board in its first opinion. However, some aspects should still be strengthened. In the problem definition the report should clarify the differences in existing legal arrangements across Member States, and discuss the availability of alternatives, if any, to leniency programmes. The formulation of the specific objectives should be further improved, for example by explaining how the avoidance of overcompensation will be defined in practical terms, and the report should define operational objectives and associated indicators for future monitoring. The practical content and implementation arrangements should be more concretely presented for each of the proposed options. The assessment of costs and benefits of the options should be made more concrete by making better use of the available quantitative evidence, for example on foregone compensation and litigation costs. Finally, the report should better incorporate and address the critical

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted

opinions voiced by some stakeholders regarding the necessity and appropriateness of EU action, and present stakeholder views on the proposed options in a more transparent way.

(C) Main recommendations for improvements

(1) Further strengthen the problem definition. The report should still give a more detailed overview of differences between the existing regulatory arrangements for all Member States, for example as regards the required evidence to prove a case, the rules on passing-on defence, disclosure of evidence (Section 3.2), their effects on current compensation payments and on the effectiveness of competition in the internal market (Section 3.3), preferably in a summary table. It should provide further evidence to demonstrate the degree in which these regulatory differences currently distort competition in the internal market (see par. 49). The report should clarify whether possible alternatives to leniency programmes could be proposed. The discussion of collective redress in this section should be more concise and directly related to the initiative, especially since all horizontal collective redress issues will be dealt with separately. Therefore different collective redress mechanisms should probably not be part of any of the relevant objectives and options.

(2) Sharpen the formulation of the objectives. The report acknowledges the interdependence between the specific objectives 'access to justice' and 'full compensation', but it should explicitly address the possible trade-off between the two. Also, with respect to the specific objective 'protection of effective public enforcement', the possible trade-off between the limitation of disclosure of leniency documents and limitation of liability of the leniency applicants with respect to private damage actions should be better clarified and subsequently reflected in the content of the proposed measures. The objective to avoid overcompensation is now better identified as a problem flagged by business stakeholders (par. 48), but it is still unclear what should be achieved. The report needs to identify operational objectives expressed in concrete terms (timing, quantification), that should be linked to specific progress indicators under the proposed monitoring arrangements.

(3) Present and analyse the options independently. The report should structure its presentation and analysis of the options in such a way that each of them is separately defined and fully developed (e.g., Options 2 and 3 should be better distinguished). While the report shows that the current Option 2 may have clear benefits, it should still be reformulated (or discarded) as it still appears to include separate measures of collective redress (see par.85), which are supposed to be pursued through a separate horizontal instrument. This complicates the comparison with other options. More generally the options need to be clearer on practical implementation issues and the costs they may entail, such as requirements to adapt the legal frameworks in the Member States. The report should explain how this implementation will be monitored.

(4) Be more concrete about the costs and benefits of the options. The report should make a greater effort to give an indication of the magnitude of the likely costs and benefits of the options for the different parties involved. This assessment should be backed up with available evidence that can be found in existing comparative antitrust studies, for example the 2009 Quantification Study (par. 17) and the studies mentioned in par. 89. The report should for example make better use in the impact tables in Section 6 of the quantitative evidence on foregone compensation and litigation costs that is currently presented in Section 7, and present a more rigorous assessment of the risks of over-compensation. It should still provide a global indication of the variation in

implementation costs across Member States due to different degrees of inconsistency with their existing legal frameworks. The report should be clearer about some practical impacts of the proposed measures, e.g. to what extent the passing-on defence can negatively affect the length of procedures, which remains unaddressed among the costs of the different options, or how – in global quantitative terms to the extent possible - improved compliance by businesses with the EU competition rules will increase consumer welfare. For the comparison of impacts the scores in the simplified scoring model should be better explained on the basis of the available concrete evidence (such as the figures presented in par. 172 and 175).

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report

(D) Procedure and presentation

The report should better incorporate and address the critical opinions voiced by some Member States that have been reluctant to introduce the arrangements that were suggested in the White Paper and oppose the introduction of binding legislation. In addition it should discuss the contributions to the public consultations on the White Paper and on collective redress that considered EU action in this area inappropriate (par. 82). The report should also give a better overview of stakeholder positions on each of the proposed options. It should try to use plain language where possible.

(E) IAB scrutiny process	
Reference number	2008/COMP/023
External expertise used	No
Date of IAB meeting	Written procedure. This opinion concerns a resubmitted draft IA report. The first opinion was issued on 20 December 2012.