EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
D(2012)

Opinion

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

(draft version of 20 November 2012)*

(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.

(B) Overall assessment

The report should be significantly improved on a number of important points. First, it should strengthen the problem definition by basing it on more concrete evidence and references to case studies and stakeholder opinions. Second, it should clarify the general objectives and should demonstrate how each of the specific objectives is linked to the problems defined. Third, the report should better define the options by providing greater clarity on their content. Fourth, it should provide more quantitative information to support the analysis of the expected impacts of the various options, differentiated by affected business and authorities/judicial systems in the Member States. It should improve the comparison of the options against the baseline, using a more rigorous and simplified scoring model. Finally, the report should strengthen the references to the views of different stakeholder groups throughout the report, particularly on the need to harmonise certain national rules.

Given the nature of these concerns, the IAB requests DG COMP to submit a revised version of the IA report on which it will issue a new opinion.

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

(C) Main recommendations for improvements

(1) Better substantiate the problem definition. The report should strengthen the problem definition and the presentation of problem drivers and consequences, by providing more concrete evidence and making more references to relevant case studies and stakeholder opinions. It should give a more detailed description of the different legal regimes across Member States, and explain why current regimes are failing to award adequate compensation. The report should better explain how leniency programmes work, why they are so important and whether there are any comparable alternatives. It should also present more clearly the risk that the disclosure of evidence will affect the incentives of, and participation in, leniency arrangements. It should explain why these effects could only be indirectly assessed. The report should also present in more concrete detail how this initiative is linked with the broader policy on collective redress. In this context it should also explain that this initiative was delayed to propose a cross-cutting horizontal redress initiative. The report should better develop the baseline scenario as part of the problem section, making reference to the existing legislation on antitrust damages, and explaining how it expects the problem to develop if no action is taken.

(2) Clarify the objectives of the initiative. The report should clarify the objectives and sub-objectives. The formulation of the objectives should state more concretely what the initiative is trying to achieve. All objectives should be consistently linked to elements in the problem definition and where possible to the supporting evidence (e.g. "avoiding overcompensation" is mentioned throughout the text without supporting evidence that this is really a problem. On the other hand the report should state explicitly to what extent the initiative addresses the problem of "under-compensation", for which the report provides ample evidence. If in some cases only stakeholder views are available to support statements on possible effects, these should be referred to in the text.

(3) Improve the presentation of the options. The report should improve the construction of the presented options, as currently only Option 2 appears to be a viable option. Options 3 and 4 both seem to be practically identical with the status quo, and Option 1 is outdated as it includes particular measures for collective redress. As the introduction of new legislation does not necessarily lead to better implementation, the options should explore more explicitly how to ensure effective implementation, in the Member States. This should also include considerations on the way in which this implementation should be monitored.

(4) Better present the analysis of impacts and the comparison of options. The available evidence from the case studies and stakeholder opinions should be more explicitly used to give an indication of the significance of the likely costs and benefits of the different options for the different parties involved. As it is likely that costs and benefits for victims may differ across Member States depending on the regime that the Member State already has in place, the report needs to explain this and factor it in in the assessment of impacts. The presentation of the risks associated with each of the options should also be more explicit. The report should also discuss the experiences with the US system of antitrust damages in more detail and use it as a point of comparison to support the arguments throughout the text, where appropriate. It should compare all options independently against the baseline scenario, and it should clearly define the assessment criteria. The qualitative assessments should be linked in a more transparent way to the assessment of costs and benefits of the various options, and a more rigorous and simplified scoring model should be used.

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 clearly explain in separate sections the relevant details of the previous impact assessment for the White Paper, the Commission's leniency programme and the 2011 *Pfleiderer* Court ruling. The views of different stakeholder groups and national competition authorities should be more consistently presented throughout the report, including the opinions of stakeholders not in favour of legislation. The report should be made more accessible to non-specialist readers and include a glossary of technical terms used in the text.

(E) IAB scrutiny process	
Reference number	2008/COMP/023
External expertise used	No
Date of IAB meeting	18 December 2012