

## **UK implementation of the EU Damages Directive**

### **Department for Business, Energy & Industrial Strategy**

#### **RPC rating: fit for purpose**

The IA is now fit for purpose as a result of the department's response to the RPC's initial review notice. As first submitted, the IA was not fit for purpose.

#### **Description of proposal**

The Department proposes to make minor changes to the conditions under which a private action for damages can be brought under UK competition law, in order to ensure that these are consistent with EU competition law. These changes are expected to make bringing private actions for damages slightly easier. In particular:

- there will be a legal presumption of harm in cases where a cartel is formed;
- a passing-on defence will be introduced, under which a cartel member will have a defence against a claim for damages if they overcharge but their customer then passes on the whole of those charges to a third party;
- protections for whistle-blowers will be slightly improved; and
- the limitation period for bringing a case will start when the litigant knew, or could reasonably be supposed to have known, that damage had occurred – rather than starting when the damage occurred as at present.

#### **Impacts of proposal**

The Department's best estimate of the total net present value of the preferred option (Option 4) is £83.9 million, with an estimated equivalent annual net benefit to business of £1.3 million. The preferred option includes gold-plating as a result of the Department's decision to apply the same legal framework to cases within scope of EU law and cases within scope of UK law only. The Department estimates that the gold-plating will be beneficial to business as it will increase the level of redress available to businesses that have been affected by anti-competitive behaviour. It estimates that the net effect of this gold-plating will be to increase the net present value of the measure by £28 million and increase the equivalent annual net benefit to business by £0.4 million. The Department states that this option was supported at consultation.

The Department's estimate is based on:

- legal costs of £3.2 million incurred by firms in bringing unsuccessful actions – where successful actions are brought, the costs will be incurred by non-compliant firms and are not considered;
- damages received by firms and consumers bringing successful actions estimated at £1.5 million;
- reductions in deadweight loss as a result of increased deterrence of anticompetitive behaviour estimated at £11.5 million; and
- increased costs to the court system estimated at £26,000.

The EANDCB differs very significantly from the business NPV because the deterrence effects are correctly assessed as being indirect.

### **Quality of submission**

As first submitted, the RPC did not consider the impact assessment to be fit for purpose for two reasons:

- the Department had not clearly set out the effect of gold-plating relative to the minimum implementation option; and
- many of the assumptions underpinning the Department's calculations were highly uncertain and the Department did not set out how it had attempted to improve these estimates at consultation stage.

The Department has now set out the impact of the various options clearly, and the IA explains the effects of gold-plating.

It has also provided further information regarding the consultation, and the revised IA explains that the Department sought general feedback on the consultation IA but received none. Given this further information and the scale of the measure, the RPC confirms that the Department has made appropriate use of the evidence available to it. However, although no consultation responses challenged the assumptions, the Department should have taken the opportunity to use the consultation to ask more specific questions which might have helped it to improve its assumptions.

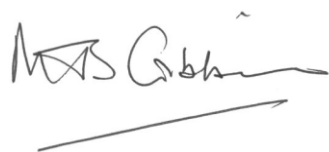
The RPC was also concerned that the drafting of the IA as originally submitted was unclear, especially as to which was the preferred option, and that the IA as originally submitted did not include the discussion of precautionary behaviour requested in our consultation stage opinion. The Department has now clarified the drafting and has added a short paragraph explaining why it believes that precautionary behaviour is unlikely in this case.

### Departmental assessment

Classification	Non-qualifying regulatory provision (EU) with qualifying beneficial gold-plating
Equivalent annual net direct cost to business (EANDCB)	-0.8 million NQRP (EU minimum implementation); -0.4M QRP (beneficial gold-plating)
Business net present value	£22.7 million
Societal net present value	£83.9 million

### RPC assessment

Classification	Non-qualifying regulatory provision (EU) with qualifying beneficial gold-plating
EANCB – RPC validated <sup>1</sup>	-£0.4 million
Business Impact Target (BIT) Score <sup>1</sup>	-£2.0 million
Small and micro business assessment	Not required



**Michael Gibbons CBE**, Chairman

<sup>1</sup> For reporting purposes, the RPC validates EANCB and BIT score figures to the nearest £100,000.