



Commission for
Communications Regulation

Information Notice

Response to DG Competition Consultation on Empowering National Competition Authorities to be more Effective

Information Notice

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1 Overview

- 1.1 The Commission for Communications Regulation (ComReg), through the exercise of its *ex ante* regulatory role, seeks to create the conditions necessary for competition to develop by establishing the framework under which service providers may enter and operate within electronic communications markets.
- 1.2 In parallel with this role and following legislative changes in 2007, ComReg also shares responsibility with the Competition and Consumer Protection Commission (CCPC) for investigating breaches of competition law in the electronic communications sector on an *ex post* basis. Further details in relation to ComReg's competition law role and functions are available in the published 2010 Information Notice¹.
- 1.3 The European Commission, through the Directorate General (DG) for Competition, recently consulted with stakeholders on how to empower national competition authorities (NCAs) to be more effective enforcers of competition law². In doing so, via a questionnaire DG Competition invited interested parties to share their experience and provide feedback on potential EU legislative actions to further strengthen the enforcement and sanctioning tools of NCAs.
- 1.4 A copy of ComReg's response is set out in Appendix A of this Information Notice.

¹ Guidance on the Submission of Competition Complaints relating to the Electronic Communications Sector, Information Notice, [ComReg Document 10/110](#), December 2010 (2010 Information Notice).

² See http://europa.eu/rapid/press-release_IP-15-5998_en.htm.

Appendix A ComReg Response to DG Competition Questionnaire

Empowering the national competition authorities to be more effective enforcers

Fields marked with * are mandatory.

PRACTICAL GUIDE

Replying to the questions

- Questions with a radio-button are "single choice": only one option can be chosen.
- Question with a check-box are "multiple choice": several answers can be chosen.
- Questions showing an empty box are free text questions.
- Depending on your answer to a given question, some additional questions may appear automatically asking you to provide further information. This, for example, is the case when the reply "Other" is chosen.
- Please use only the "Previous" and "Next" buttons to navigate through the questionnaire (do not use the backwards or forward button of the browser).

Saving your draft replies

- The questionnaire is split into several sections.
- At the end of each section you have the possibility to either continue replying to the remaining sections of the questionnaire (clicking on "Next") or saving the replies made so far as a draft (clicking on "Save as Draft") (*NOTE: the first two sections "Practical guide" and "Introduction" do not contain questions*).
- If you chose "Save as Draft", the system will:
 - show you a message indicating that your draft reply has been saved,
 - give you the link that you will have to use in order to continue replying at a later stage,
 - give you the possibility to send you the link by email (we encourage you to use this option).
- You can then close the application and continue replying to the questionnaire at a later stage by using the said link.

Submitting your final reply

- The submission of the final reply can only be done by clicking the "**Submit**" button that you will find in the last section "**Conclusion and Submission**".
- Once you submit your reply, the system will show you a message indicating the case identification number of your reply ("**Case Id**"). Please keep this Case Id. number as it could be necessary in order to identify your reply in case you want to modify it at a later stage.
- You will also be given the opportunity to either print or download your reply for your own records.

INTRODUCTION

Preliminary Remark: The following questionnaire has been drafted by the Services of the Directorate General for Competition in order to collect views on the enforcement of the EU competition rules by national competition authorities. The questionnaire does not reflect the views of the European Commission and will not prejudice its future decisions, if any, on further action on this issue.

A. Purpose of the consultation

The purpose of the present consultation is to gather information on how to better serve the citizens of the European Union through the Union's competition law framework. This consultation invites citizens and stakeholders to provide feedback on their experience/knowledge of issues that national competition authorities may face which impact on their ability to effectively enforce the EU competition rules and what action, if any, should be taken in this regard.

The Commission will carefully analyse the outcome of the consultation before deciding whether and to what extent it should take further action. Input from stakeholders may be used in an Impact Assessment to assess which measures should be taken, if any, to ensure national competition authorities are empowered to be effective enforcers.

B. Background

Competition policy in Europe is a vital part of the [internal market](#). The aim of the EU competition rules is to provide everyone in Europe with better quality and innovative goods and services at lower prices. Competition policy is about applying rules to make sure companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality. These are the reasons why competition authorities fight [anticompetitive behaviour](#).

The national competition authorities are essential partners for enforcing the EU competition rules alongside the European Commission. Since 2004, the national competition authorities have been empowered by Regulation 1/2003 to apply the EU competition rules. The national competition authorities and the European Commission closely cooperate with each other in the European Competition Network, to ensure the EU competition rules are applied in a consistent way.[1]

Enforcement of the EU competition rules by both the European Commission and the national competition authorities is an essential building block to create an open, competitive and innovative single market and is crucial for creating jobs and growth in all sectors of the economy. The national competition authorities thus play a key role in making sure that the single market works well and fairly for the benefit of business and consumers.

However there is potential for the national competition authorities to do much more. It is not enough to simply give the national competition authorities the powers to apply the EU antitrust rules: they need to have the means and instruments to act effectively.

On 9 July 2014, the Commission adopted a Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives[2] which identified areas for action to empower the national competition authorities to be more effective enforcers, *namely to guarantee that the national competition authorities:*

(1) have an effective enforcement toolbox;

(2) can impose effective fines;

(3) have effective leniency programmes to encourage companies to come clean about cartels and

(4) have adequate resources and are sufficiently independent.

By way of follow-up to the Communication, the Commission has engaged in detailed fact-finding with the national competition authorities. This public consultation aims to get the views of stakeholders, experts and the public at large.

C. General remarks regarding the consultation

Any citizen or interested stakeholder organisation is invited to participate in the consultation. In particular, stakeholders active in competition matters, including businesses, their legal and economic advisors, consumer and industry associations and members of the academic community, are invited to respond to the questionnaire. Replies can be submitted in all official languages.

Any other comments and information is welcome, in particular, other documents, reports, studies, etc. which may be relevant.

The questionnaire is divided into three parts:

A. About you

B. General questions

C. Detailed questions for stakeholders active in competition matters

The detailed questions are further sub-divided into four **optional** sections:

C.1. Resources and independence of the national competition authorities

C.2. Enforcement toolbox of the national competition authorities

C.3. Powers of national competition authorities to fine undertakings

C.4. Leniency programmes

We encourage *all respondents to the questionnaire to reply to the general questions.*

In addition, we encourage *stakeholders active in competition matters to also reply to the sections with the detailed questions (C.1 to C.4).* As these sections are optional, stakeholders may select those sections about which they have experience/knowledge.

Respondents only replying to the general questions are also invited to read the introductory parts of each of the sections C.1. to C.4 as they provide further background information on the scope of the questionnaire.

The deadline for replies is **12 February 2016.**

You can send to the mailbox **COMP-ECNPLUS@ec.europa.eu** any **additional question or information** that you consider relevant to empowering the national competition authorities to be more effective enforcers.

[1] *More information about the European Competition Network (ECN) can be found at:*
http://ec.europa.eu/competition/ecn/index_en.html

A. ABOUT YOU

*** 1. Are you replying as:**

- a private individual
- an organisation or a company
- a public authority or an international organisation

Please provide your contact details below:

*** Your full name**

Eric Tomkins

*** Organisation represented**

Commission for Communications Regulation (ComReg). ComReg is responsible for both ex-ante and ex-post regulation of the electronic communications sector (amongst other things). Both ComReg and a separate organisation, the Competition and Consumer Protection Commission (CCPC) are designated as national competition authorities (NCAs) with respect to the ex-post regulation of the electronic communications sector. However the CCPC's remit extends beyond the electronic communications sector.

*** Location (Country)**

Ireland

*** Email address**

eric.tomkins@comreg.ie

• 1.1. Please indicate which type of organisation or company it is:

- Academic institution
- Non-governmental organisation
- Company/SME/micro-enterprise/sole trader
- Think tank
- Media
- Consumer organisation
- Public Authority
- Industry association
- Consultancy/law firm
- Trade union

● **1.2. What type of Public Authority is it?**

- EU national competition authority
- Government or Ministry
- International or European organisation
- Regulatory authority (other than a competition authority)
- Other public body

3. Where are you based?

 

4. Do you represent interests or carry out activity at:

- National level (your country only)
- EU level
- International level
- Other

In the interests of transparency, the Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent by registering in the [Transparency Register](#) and subscribing to its [Code of Conduct](#). If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704; Better Regulation guidelines, see SWD(2015)111 final and Communication on ETI Follow-up, see COM (2007) 127).

If you are a registered organisation, please indicate below your Register ID number when replying to the online questionnaire. Your contribution will then be considered as representative of the views of your organisation.

If your organisation is not registered, you have the opportunity to [Register now](#). Then you can return to this page, continue replying the questionnaire and submit your contribution as a registered organisation.

It is important to read the specific privacy statement attached to the announcement of this public consultation for information on how your personal data and contribution will be used.

5. For registered organisations: indicate here your Register ID number

*** 6. Please choose from one of the following options on the use of your contribution:**

My/our contribution,

Can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my

- name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).

Can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which may include quotes or opinions I express) provided that this is done anonymously. I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication.

- Cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

7. Finally, if required, can the Commission services contact you for further details on the information you have submitted?

- Yes No

B. GENERAL QUESTIONS FOR ALL RESPONDENTS TO THE QUESTIONNAIRE

The aim of the EU competition rules is to provide everyone in Europe with better quality and innovative goods and services at lower prices.

The national competition authorities together with the Commission are responsible for applying the EU competition rules to fight anti-competitive behaviour and make sure companies compete fairly with each other.

This encourages enterprise, innovation and productivity, creates a wider choice for consumers and helps reduce prices and improve quality.

1. Do you think that the EU competition rules are effectively enforced by the national competition authorities ?

- Strongly disagree
- Disagree
- Agree
- Strongly Agree
- Neutral
- Do not know/Not applicable

- **Please indicate which Member State(s) your answer refers to:**

Ireland

- If you have different views for different countries, please clarify below your views for each country.

2. Do you think that the national competition authorities could do more to enforce the EU competition rules?

- Strongly disagree
- Disagree
- Agree
- Strongly Agree
- Neutral
- Do not know/Not applicable

- Please indicate which Member State(s) your answer refers to:

Ireland

- If you have different views for different countries, please clarify below your views for each country.

3. For the NCAs identified above, which measures do you think would help them to be more effective enforcers of EU competition rules?

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Ensuring national competition authorities have guarantees that they enforce the EU competition rules in the general interest of the EU and do not take	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

instructions when doing so						
Ensuring national competition authorities have sufficient resources to perform their tasks	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ensuring national competition authorities have effective enforcement tools, e.g. to detect and investigate competition law infringements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ensuring national competition authorities have effective powers to fine companies for breach of competition law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ensuring national competition authorities have effective leniency programmes to encourage companies to come clean about competition law infringements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

- **Indicate which is the "Other" aspect which in your view would need to be reinforced:**

- **You are welcome to add additional comments and/or explanations.**

4. Do you think action should be taken to empower national competition authorities to be more effective enforcers of the EU competition rules:

- Strongly disagree
- Disagree
- Agree
- Strongly Agree
- Neutral
- Do not know/Not applicable

5. If you think that action should be taken to empower the national competition authorities to be more effective enforcers of the EU competition rules, who do you think should take action?

- Member States
- EU Action
- Combination of EU/Member State action
- Do not know/Not applicable

6. If you consider that the Member States should take action to empower the national competition authorities to be more effective enforcers, what type of action is most appropriate?

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

To have immediate direct effect and to ensure that a desired approach is consistently applied throughout Member States legislative action is preferred. Legislation will bind a court and the NCA in Ireland whereas best practice or a recommendation will not be considered binding by a court (there is recent Irish case law in the ex ante regulatory context expressly stating the court is not bound to consider and is not bound by an EU recommendation) and will not bind the NCA leading to potential inconsistencies across Member States.

7. If you consider that action should be taken at EU level to empower the national competition authorities to be more effective enforcers, what type of EU action is most appropriate?

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action

- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

8. How would your preferred option for EU action affect the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the European Competition Network	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legitimacy of national competition authorities' decisions	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Investment climate/economic growth	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

() Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

- **You are welcome to add additional comments and/or explanations, in particular, if you consider that your preferred option would have any other impact, please provide details.**

9. You are welcome to add any additional comments/and or explanations concerning the enforcement of the EU competition rules by the national competition authorities:

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.1. RESOURCES AND INDEPENDENCE OF THE NCAs

The [Communication on Ten Years of Regulation 1/2003 of 9 July 2014](#) states that: "it is necessary to further guarantee the independence of national competition authorities ("**NCAs**") in the exercise of their tasks and that they have sufficient resources".

The NCAs directly enforce the EU Treaty provisions on competition, namely Articles [101](#) and [102](#) TFEU, alongside the Commission. EU law leaves Member States a large degree of flexibility for the design of the NCAs. The **level of resources** and **degree of independence of the NCAs are essentially determined by national law** subject to Article 35 of Regulation 1/2003, which requires Member States to designate NCA(s) in such a way that the provisions of the Regulation are effectively complied with, and that the EU law principles of effectiveness and equivalence are respected.

The Commission initial fact-finding in follow-up to the 2014 Communication shows that **significant differences exist among the NCAs in terms of human and financial resources in Member States of a similar size** in terms of GDP and that NCAs in small Member States often suffer from limited financial means or very low staff numbers. Moreover, as a result of budgetary and staffing constraints and cuts, **many NCAs have had to stop or refrain from conducting certain enforcement activities**.

Against the backdrop of cuts in the resources of several authorities, an **European Competition Network ("ECN") Resolution of Heads of Authorities was adopted on the continued need for effective institutions**.^[3] The Resolution underlined, inter alia, the need for appropriate infrastructure and expert resources for all NCAs.

With regard to the functioning of the NCAs, the Commission initial fact-finding shows that while they have generally developed in the direction of greater independence, the **applicable national rules do not always safeguard them against interference from public and private bodies when carrying out their task of enforcing EU competition law**.

The Commission has also **tried to address the level of resources** and **degree of independence** of some NCAs through the Economic Adjustment Programmes with so-called Programme Countries and the European Semester where possible, as well as through direct reactions to Member States on a bilateral basis.

[3] See the Internet (<http://ec.europa.eu/competition/ecn/ncas.pdf>).

C.1.(a) Your experience/knowledge of resources and independence of NCAs when enforcing EU competition law

1. Do you have experience/knowledge of the enforcement of the EU competition rules by the NCAs?

- Yes No Do not know/Not applicable

- **If yes, in which countries?**

Ireland

2. In its Communication on Ten Years of Regulation 1/2003 of 9 July 2014, the Commission considers it “*necessary to further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources*” when enforcing the EU competition rules. Do you agree with this finding with respect to the NCAs with which you have experience/knowledge?

- Strongly disagree
 Disagree
 Agree
 Strongly Agree
 Neutral
 Do not know/Not applicable

- **You are welcome to add additional comments/and or explanations:**

3. In your view, which are the main tasks NCAs should perform concerning the enforcement of the EU competition rules?

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Enforcement in individual cases	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Engaging in competition advocacy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation within the ECN for enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- You are welcome to add **additional comments/and or explanations:**

4. Do you have experience/knowledge of instances where a NCA does not have sufficient human or financial resources to carry out its main tasks concerning the enforcement of the EU competition rules (e.g. conduct simultaneous inspections at different locations)?

- Yes No Do not know/Not applicable

- You are welcome to add **additional comments and/or explanations**, in particular, explaining which NCA(s) you refer to, and if and why you consider this to be a problem.

ComReg is aware that the CCPC has, in recent years, been significantly resource constrained. ComReg faces similar constraints which impacts on its prioritisation of work streams generally, including competition law enforcement.

5. Do you have experience/knowledge of instances where a NCA has been influenced by other bodies (e.g. government, other national public bodies, or private entities apart from the parties involved in the case) or subject to instructions from outside the authority when enforcing the EU competition rules in individual cases?

- Yes No Do not know/Not applicable

- You are welcome to add **additional comments and/or explanations**, in particular, explaining if and why you consider this to be a problem.

6. Do you have experience/knowledge of instances where members of the NCA's top management/board or decision-making body have been dismissed due to their enforcement activities (including for example the position they took during a collegiate decision making process) in individual cases?

- Yes No Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, in particular, explaining if and why you consider this to be a problem.

7. Do you have experience/knowledge of instances where members of the NCA's top management/board or decision-making body had a conflict of interest or immediately after the end of their contract/mandate with the NCA, have taken up a professional position/responsibility with an undertaking which had been subject to an investigation or decision during their employment with the NCA?

- Yes No Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, in particular, explaining which NCA(s), which activity and if and why you consider this to be a problem.

While ComReg has no experience of NCAs' independence being compromised, we set out views below on the measures which are generally necessary to ensure that NCAs are functionally independent when enforcing the EU competition rules.

C.1.(b) Your views on potential action

8. Which measures are necessary to ensure that NCAs are functionally independent when enforcing the EU competition rules, i.e. they act in the general interest of the EU and do not take instructions when carrying out this task?

Please list the 3 most important measures in order of importance (starting with "1" for the most important).

	1	2	3

Guarantees ensuring that NCAs are endowed with adequate and stable human and financial resources to perform their tasks	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Guarantees that NCA's top management/board or decision-making body are not subject to instructions from any government or other public or private body	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Guarantees ensuring that dismissals of members of the NCA's top management/board or decision-making body can only take place on objective grounds unrelated to its enforcement activities	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Rules on conflicts of interest for the NCA's top management/board or decision-making body	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Rules on accountability of the NCA (e.g. requiring that NCAs report annually on their activities)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- **You are welcome to add additional comments and/or explanations.**

9. Should ensuring that NCAs have sufficient resources when they enforce the EU competition rules be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

10. Should guarantees regarding the independence of the NCAs when enforcing the EU competition rules be addressed at Member States and/or EU level?

- Member States
- EU action
- Combination of EU/Member State action

Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

11. If you consider that there is a case for act ion by the Member States, please specify what type of action you consider most appropriate:

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations. If your reply is different for resources and for independence, please clarify it here.

12. If you consider that there is a case for EU action, what type of EU action you consider most appropriate

:

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations. If your reply is different for resources and for independence, please clarify it here.

13. Please clarify why you consider your preferred type of EU action more appropriate than other types of action to ensure the independence of the NCAs in the exercise of their tasks and

that they have sufficient resources when they enforce the EU competition rules?

EU legislative action would have direct effect, ensure consistency of approach across all Member States and provide increased certainty to market participants.

14. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legitimacy of NCA decisions	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Investment climate/economic growth	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

() Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

- You are welcome to add additional comments and/or explanations, in particular, if you consider that your preferred option would have any other impact.

15. Please indicate whether you have any other comment or suggestions, such as examples of good practice etc.

You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please do it by uploading the relevant information in documents with a maximum size of 1 MB each using the button below.

Should you prefer to provide documents of more than 1 MB, please send them to the functional mailbox COMP-ECNPLUS@ec.europa.eu after having submitted your reply to the questionnaire indicating your Case-Id, email and contact details.

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.2. ENFORCEMENT TOOLBOX OF THE NCAs

The [Communication on Ten Years of Regulation 1/2003 of 9 July 2014](#) provides: “it is necessary ... to ensure that NCAs have a complete set of effective investigative and decision-making powers at their disposal”.

The **tools NCAs use to apply the EU competition rules** are **essentially governed by national law**, subject only to EU general law principles of effectiveness and equivalence.

By way of follow-up to the Communication, the Commission has carried out initial fact-finding which indicates that the **vast majority of NCAs do not have a complete set of investigation and decision-making powers** which are **comprehensive in scope** and are **effective**.

Several NCAs **do not have the power to fully set their enforcement priorities, e.g. they cannot reject complaints on priority grounds**, and choose which cases to dedicate their scarce resources.

While most NCAs broadly have the same basic enforcement tools, **some lack fundamental powers** such as to adopt commitment decisions or to inspect non-business premises.

There are **significant differences in the scope of NCAs' powers**, e.g. while most NCAs have the power to inspect, some cannot effectively gather digital evidence. Similarly, while all NCAs have the power to adopt prohibition decisions, some cannot adopt behavioural or structural remedies to restore competition on the market.

Some NCAs cannot effectively fine non-compliance with their **investigative and decision-making powers**, as either their powers are not backed up by fines, fines are set at a very low level or there are no means to compel compliance e.g. through periodic penalty payments.

If NCAs do not have effective tools, their **ability to detect and find infringements suffers**. It also **impacts on cooperation within the ECN**: NCAs often ask other NCAs to carry out inspections on their behalf. However, the utility of this tool is diminished if NCAs do not have effective inspection powers. **Divergences in procedures result in legal costs and uncertainty** for companies operating cross-border, which need to acquaint themselves with different rules.

The **ECN has developed a set of [seven Recommendations](#)** on key enforcement tools to foster soft convergence. **Attempts have also been made to improve the enforcement toolbox of NCAs**

through the **Memoranda of Understanding** of Specific Economic Policy Conditionality with the **so-called "Programme Countries"** and through country specific recommendations in the framework of the **European Semester**.

C.2.(a) Your experience/knowledge

1. Do you have experience/knowledge of the tools NCAs use to enforce Articles 101 and 102 TFEU, e.g. to carry out inspections, to issue requests for information, to collect digital evidence and to impose structural or behavioural remedies?

Yes No Do not know/Not applicable

• **If yes, in which countries:**

Ireland

2. Do you have experience/ knowledge of instances where NCAs do not have effective investigation and decision-making tools to enforce Articles 101 and 102 TFEU, e.g. to effectively carry out inspections, issue requests for information, adopt commitment decisions, issue interim orders?

Yes No Do not know/Not applicable

• **Do you consider this to be a problem in terms of:**

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of the EU competition rules e.g. NCAs may refrain from taking action/carry out more limited action/take action which does not meet the desired objective?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation within the ECN e.g. NCAs may not have effective powers to carry out an inspection on behalf of	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

another ECN member pursuant to Article 22?						
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- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and if you consider that this gives rise to other problems.

3. Do you have experience/ knowledge of instances where NCAs have divergent investigation and decision-making tools to enforce Articles 101 and 102 TFEU, e.g. to gather digital evidence, to impose structural or behavioural remedies?

- Yes No Do not know/Not applicable

- Do you consider this to be a problem in terms of:

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Uncertainty for businesses operating cross-border within the EU, e.g. differences in terms of which data may be gathered?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation within the ECN e.g. differences in terms of which evidence can be	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

gathered on behalf of another NCA?						
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- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and if you consider that this gives rise to other problems.

4. Do you have experience/ knowledge of instances where NCAs do not have effective powers to:

- 4.1. fine non-compliance with their investigative and decision-making powers, e.g. to impose fines for non-compliance with inspection powers such as breaching seals or failure to comply with a commitment decision?**

Yes No Do not know/Not applicable

- Do you consider this to be a problem in terms of:**

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of Articles 101 and 102 TEFU by NCAs, e.g. if NCAs' inspection and investigation powers are not backed up by any power to impose fines or the fines are set at a very low level companies may not be incentivised to comply?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- You are welcome to add additional comments and/or explanations, e.g. which **Member State(s)** you refer to and if you consider that this gives rise to other problems.

- 4.2. compel compliance with their investigation and decision-making powers**, g. to impose periodic penalty payments to ensure that an undertaking complies with a prohibition decision?

Yes No Do not know/Not applicable

- Do you consider this to be a problem in terms of:**

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of Articles 101 and 102 TFEU by NCAs, e.g. if NCAs' inspection and investigation powers are not						

backed up by any power to impose fines or the fines are set at a very low level companies may not be incentivised to comply?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- You are welcome to add **additional comments and/or explanations**, e.g. which Member State(s) you refer to and if you consider that this gives rise to **other problems**.

5. Do you have experience/ knowledge of instances where NCAs do not have the power to set their priorities and to choose which cases to investigate, including the power to reject formal complaints on priority grounds?

- Yes No Do not know/Not applicable

- Do you consider this to be a problem in terms of:

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of						

Articles 101 and 102 TEFU by NCAs?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and if you consider that this gives rise to other problems.

6. Do you have experience/ knowledge of divergent rules on prescription (limitation) periods, e.g. if the possibility for one NCA to take an enforcement decision becomes time barred but another NCA may still act?

- Yes No Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and if you consider that this gives rise to other problems.

- Do you consider this to be a problem in terms of:

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of Articles 101 and 102 TFEU by NCAs?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

- You are welcome to add additional comments and/or explanations, e.g. which **Member State(s)** you refer to and if you consider that this gives rise to other problems.

7. Do you have experience/ knowledge of instances where one **NCA (NCA A)** does not have the power to ask another NCA (NCA B) to notify acts (e.g. Statements of Objection) or to enforce fining decisions on its behalf in the territory of NCA B, where it is not possible for NCA A to do so in its own jurisdiction, e.g. the company concerned has no legal presence there?

- Yes No Do not know/Not applicable

- Do you consider this to be a problem in terms of:

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of						

Articles 101 and 102 TEFU by NCAs?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules? (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

(*) Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and if you consider that this gives rise to other problems.

8. Please specify whether you have encountered any other problem in terms of NCAs not having sufficient tools to enforce Articles 101 and 102 TFEU?

- Yes No Do not know/Not applicable

- Please explain your answer and in particular which Member State(s) you refer to.

To the extent that any problems exist, ComReg sets out below its views on the necessary tools for an NCA to be effective in enforcing competition law.

C.2.(b) Your views on potential action

9. Which powers do you think NCAs need in order to have an effective toolbox to enforce Articles 101 and 102 TFEU?

- **9.1. Power to inspect business premises**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.2. Power to inspect non-business premises, e.g. homes and means of transport of directors, managers and other members of staff of the company being inspected**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.3. Power to issue requests for information**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

ComReg notes that written requests for information need to be backed by appropriate sanctions for failure to respond or to provide misleading or incorrect responses. Additionally, it would be beneficial if a regime was specified regarding the treatment of any information that may be governed by legal/professional privilege.

- **9.4. Power to effectively gather digital evidence**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.5. Power for the officials of one NCA (NCA A), which request another NCA (NCA B) to carry out an inspection on their behalf or to assist in the inspection carried out by NCA B (e.g. to be present during the inspection, to have investigative powers)**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.6. Power to conduct interviews with persons who might have knowledge of the subject under investigation**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.7. Power to conduct sector inquiries**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.8. Power to adopt prohibition decisions**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.9. Power to adopt formal settlement decisions (formal decision and reduced fine)**

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.10. Power to adopt commitment decisions**

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.11. Power to issue interim orders**

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.12. Power to impose dissuasive fines for non-compliance with investigative and decision-making powers**

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.13. Power to compel compliance with investigative and decision-making powers, e.g., power to impose effective periodic penalty payments?**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.14. Power to fully set enforcement priorities, including the power to reject complaints on priority grounds?**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.15. Power for NCAs to act within a certain time period (prescription periods)**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.16. Power for one NCA (NCA A) to ask another NCA (NCA B) to notify acts (e.g. a Statements of Objection) on their behalf in the territory of NCA B (e.g. if NCA A cannot notify acts to a company in its own territory because it does not have a subsidiary or other legal representation there)**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.17. Power for one NCA (NCA A) to ask another NCA (NCA B) to enforce fining decisions on their behalf in the territory of NCA B (e.g. if NCA A cannot fine a company in its own territory because it does not have a subsidiary or other legal representation there).**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Which aspects of this tool do you consider to be of importance?

- **9.18. Other**

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

Indicate what this "Other" power would be:

Which aspects of this tool do you consider to be of importance?

10. Should ensuring that NCAs have an effective competition toolbox be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

10.2. If you consider that there is a case for EU action, what type of EU action you consider most appropriate

:

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

11. Please clarify why you consider your preferred type of EU action more appropriate than other types of action to ensure that NCAs have an effective enforcement toolbox

To have immediate direct effect and to ensure that a desired approach is consistently applied throughout Member States legislative action is preferred.

12. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses? (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

() Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

- You are welcome to add additional comments and/or explanations, in particular if you consider that your preferred option would have any other impact.

13. Please indicate whether you have any other comment or suggestions, such as examples of good practice etc.

You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please do it by uploading the relevant information in documents with a maximum size of 1 MB each using the button below.

Should you prefer to provide documents of more than 1 MB, please send them to the functional mailbox COMP-ECNPLUS@ec.europa.eu after having submitted your reply to the questionnaire indicating your Case-Id, email and contact details.

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.3. POWER OF THE NCAS TO IMPOSE FINES ON UNDERTAKINGS

The [Communication on Ten Years of Regulation 1/2003 of 9 July 2014](#) provides: "... it is necessary to ensure that all NCAs have effective powers to impose deterrent fines on undertakings and on associations of undertakings"

Fines imposed on undertakings and associations of undertakings at national level for breaches of Articles 101 and 102 TFEU are **not regulated by EU law**, and each Member State has its own legal framework and methodology for imposing fines. **Members States must ensure that the fines applied are effective, proportionate and dissuasive.**

However, the fact-finding carried out by the Commission since the adoption of the Communication has **confirmed the existence of several issues which may lead to differences in the level of enforcement of Articles 101 and 102 TFEU**. These issues relate mainly to: (1) the nature of the fines imposed (administrative, civil or criminal), (2) who can be fined, and (3) certain aspects of the methodologies to determine the fines.

Regarding **the nature of the fines imposed on undertakings**, generally Member States enforce Articles 101 and 102 TFEU according to either: (i) administrative (non-criminal) systems, in which the

findings of infringements and the fines imposed are decided by the NCA, (ii) civil systems, in which the finding of an infringement can be done either by the NCA or by a civil court, but the fines are imposed by civil courts only, or (iii) criminal systems, in which fines are imposed pursuant to criminal procedures, normally by criminal courts or in some cases by the NCA but according to quasi-criminal (misdemeanour) procedures.

Regarding **who can be fined**, **some competition authorities do not apply the concept of "undertaking" as established in EU law** and cannot hold the parent companies liable for infringements of their subsidiaries. Others **cannot hold liable the legal successor of an infringer** (for example after a merger into another company) or its **economic successor**. In other cases, the finding of the infringement is subject to finding liability of natural persons in the first place. In addition, **some competition authorities cannot fine associations of undertakings**, while others that can do it are prevented from imposing dissuasive fines when the infringement relates to the activities of its members because the fine cannot take account of the sales of such members.

Finally, with respect to **the methodologies to determine the fines** the differences relate mainly to the following aspects: (i) the **legal maximum** of the fines, (ii) the **type of methodology** used, which can be based on an "overall assessment", on a "basic amount", or set at a given level in a range between a minimum and a maximum amount, including aspects such as the gravity and duration of the infringement, and (iii) the **aggravating and mitigating circumstances** considered and other factors applied to achieve appropriate levels of deterrence.

For example, **the legal maximum of the fines is not consistent across the EU**. The **methodologies for the determination of the fines also differ** amongst Member States. Some are rather systematic and are explained in more or less detail in national guidelines, while others are based on a less systematic assessment of the facts of the case. Generally, fines are based on essential aspects such as the gravity of the infringement, its duration and some type of sales linked to the infringement or to the undertakings involved in it. These aspects are however not always applied or done in different ways. Also the **aggravating and mitigating circumstances and other factors are not always the same in all jurisdictions**.

The questions below **exclusively concern the imposition of fines on undertakings for breaches of the EU competition rules** and **do not relate** to the imposition of fines on **natural persons**.

C.3.1. NATURE OF FINES

C.3.1.(a) Your experience/knowledge

1. For each system of competition enforcement^[4], indicate the advantages and disadvantages for the enforcement of fines imposed on companies for breach of Articles 101 and 102 TFEU, both in terms of their effectiveness and their efficiency (i.e. in terms of time, use of resources, administrative burden or any other aspect you consider as relevant).

[4] Generally Member States enforce Articles 101 and 102 TFEU according to either: (i) administrative (non-criminal) systems, in which the findings of infringements and the fines imposed are decided by the NCA, (ii) civil systems, in which the finding of an infringement can be done either by the NCA or by a civil court, but the fines are imposed by civil courts only, or (iii) criminal systems, in which fines are imposed pursuant to criminal procedures, normally by criminal courts or in some cases by the NCA but according to quasi-criminal (misdemeanour) procedures.

- **Administrative (NCA): Advantages of the system**

The penalties can be applied immediately and thus have greater effect and act as a greater deterrent. The NCA's expertise, including knowledge of the facts and national markets, is fully utilised thereby avoiding the scope for potential misunderstanding when transferring a case for prosecution to another entity. Traditional criminal offences are not the most effective or efficient approach to ensuring compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. With the exception of the simplest of hard core cartel offences (which may be more readily understood by a jury) NCAs will not be likely to adopt this approach and most undertakings will not treat these offences as a realistic deterrent. If there is the ability for the NCA to impose penalties, a more effective deterrence for these lesser infringements is created.

- **Administrative (NCA): Disadvantages of the system**

Implementation of the fine/measure could be delayed as the administrative fine would likely be appealable to a court. If there is a failure to pay the administrative fine, recourse to the courts would be required to enforce the fine. Hard core offences arguably need to be addressed by criminal sanctions and administrative penalties may not be sufficient or proportionate to the infringements in those circumstances to be a sufficient deterrent.

- **Civil (Civil court): Advantages of the system**

There is potentially more effective and efficient implementation of the penalty as the Court has jurisdiction to enforce any non-compliance, with any failure to comply with the Court order being contempt of court, with the Court having immediate jurisdiction to enforce this. The Court forum satisfies the right to a hearing by an entity separate from the entity that carried out the investigation, which satisfies the principle of *nemo iudex in causa sua*. The court's decision is appealable satisfying the right to challenge the decision.

Civil Courts, with a lower standard of proof and an ability to ensure the penalty is proportionate to the infringement, allow for non-hard core cartel offences to be effectively and efficiently addressed. Traditional criminal offences are not the most effective or efficient approach to ensuring compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. With the exception of the simplest of hard core cartel offences (which may be more

readily understood by a jury) NCAs will not be likely to adopt this approach and most undertakings will not treat these offences as a realistic deterrent. If there is jurisdiction in the civil courts a more effective deterrence is created.

- **Civil (Civil court): Disadvantages of the system**

The Court does not necessarily have the expertise to decide the matter compared to that of the NCA. Unless the Court has specialised courts for hearing such matters or expedited processes for managing such cases it may be less effective or efficient in imposing a penalty as compared to an NCA imposing administrative fines where the penalties can be applied immediately and thus have greater effect and act as a greater deterrent.

- **Criminal/Misdemeanour (NCA): Advantages of the system**

- **Criminal/Misdemeanour (NCA): Disadvantages of the system**

- **Criminal (Criminal court): Advantages of the system**

There are some instances where it is appropriate to seek criminal convictions and personal liability where civil penalties are not sufficient given the seriousness of the offence.

Potentially higher fines can be imposed in Ireland in the criminal Courts avoiding any potential constitutional issues regarding the level of the fine being outside the jurisdiction of the NCA or a civil court because it is punitive and can only be imposed by a judge in a criminal court (to avoid offending the principle of *nemo iudex in causa sua*) where the higher criminal standard of proof is met.

In a criminal prosecution, in addition to fines other criminal penalties may be applied such as personal director liability and terms of imprisonment thereby adding greater impact in proportion to the offence committed (and arguably becoming a greater deterrent because of the risk of personal

liability). Criminal convictions generally have a greater impact for companies and individuals who are liable because of the requirement to report same in accounts etc and the impact same might have on individual corporate office holder's ability to hold corporate and other positions if they have a past conviction.

- **Criminal (Criminal court): Disadvantages of the system**

Traditional criminal offences are not the most effective or efficient approach to ensuring compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. With the exception of the simplest of hard core cartel offences (which may be more readily understood by a jury) NCAs will not be likely to adopt this approach and most undertakings will not treat these offences as a realistic deterrent.

The higher standard of proof impacts the extent of the investigation to gather sufficient evidence, thereby impacting the time and resources required to present a case for prosecution. Given the competing cases, pending hearing the relevant prosecuting authority (if not the NCA) may prioritise enforcement against other more traditional (non-white collar crime) serious crimes.

2. Do you have experience/knowledge of instances where Member States cannot impose administrative fines for infringements of Articles 101 and 102 TFEU?

Yes No Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples of cases supporting your arguments.**

In Ireland all competition law infringements are criminal offences and the civil courts only have jurisdiction to issue declarations or injunctions and not civil fines. In circumstances where civil penalties were to be available, there are some instances where it is appropriate to seek criminal convictions and personal liability given the seriousness of the offence. A range of enforcement tools including civil, criminal and administrative fines would allow the NCA to choose the most effective and efficient approach depending on the facts of the case, so that the penalties are proportionate to the infringement and act as a credible deterrent.

Traditional criminal offences are not the most effective or efficient approach

to ensuring compliance. The evidential requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. With the exception of the simplest of hard core cartel offences (which may be more readily understood by a jury) NCAs will not be likely to adopt this approach and most undertakings will not treat these offences as a realistic deterrent.

The higher standard of proof impacts the extent of the investigation to gather sufficient evidence thereby impacting the time and resources required to present a case for prosecution. Given the competing cases, the relevant prosecuting authority (not the NCA) is likely to prioritise other more traditional (non-white collar crime) serious crimes. As a result the NCA focuses on pursuing cartel cases in the criminal courts.

3. Do you consider it to be a problem that in some Member States only/primarily criminal fines can be imposed for infringements of Articles 101 and 102 TFEU (e.g. for the consistent and effective enforcement of these Articles)?

Strongly disagree Disagree Agree Strongly agree Neutral No opinion

- **You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples of cases supporting your arguments.**

The resulting inconsistency in available approaches across Member States means that undertakings take a calculated risk in deciding whether to comply. Where abuse is unlikely to be enforced because only the option of pursuing a criminal offence (and the high evidentiary burden) is available, there is more likely to be non-compliance. For multinational companies there may be incentives not to comply in those jurisdictions where enforcement is limited to the detriment of the single market.

Traditional criminal offences are not the most effective or efficient approach to ensuring compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. With the exception of the simplest of hard core cartel offences (which may be more readily understood by a jury) NCAs will not be likely to adopt this approach and most undertakings will not treat these offences as a realistic deterrent. Nevertheless, at present, all competition infringements are criminal offences in Ireland and the civil courts only have jurisdiction to issue declarations or injunctions and not civil fines.

Penalties need to be a meaningful deterrent. For the penalties to be a

realistic deterrent to the potential gains from non-compliance they need to be proportionate to the harm incurred to the market. Fines should also be proportionate to the turnover of the infringing entity.

4. Do you consider it to be a problem that in some Member States only/primarily civil fines can be imposed for infringements of Articles 101 and 102 TFEU (e.g. for the consistent and effective enforcement of these Articles)?

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples of cases supporting your arguments.

There are some instances where it is appropriate to seek criminal convictions and personal liability where civil penalties are not sufficient given the seriousness of the offence. A range of enforcement tools including civil, criminal and administrative fines allows the NCA to choose the most effective and efficient approach depending on the facts of the case so that the penalties are proportionate to the infringement and act as a credible deterrent. However to ensure a consistent approach to similar cases prescribed approaches in EU legislation might ensure consistency across Member States when enforcing noncompliance.

C.3.1.(b) Your views on potential action

5. To the extent that you consider it to be a problem that in some Member States it is not possible to impose administrative fines on companies for infringements of Articles 101 and 102 TFEU, which measures do you think should be taken to address this issue?

- Replacing civil/criminal fines by a system of administrative fines
- Introducing administrative fines for NCAs which do not have this possibility in addition to their already existing civil/criminal fines
- Take measures to make civil/criminal enforcement/imposition of fines more effective, e.g. giving
- NCAs the power to initiate proceedings before civil/criminal courts instead of the public prosecutor having (sole) competence to initiate proceedings
- Other
- Do not know/Not applicable

- **Should your suggested measure cover:**

- All infringements of Articles 101 and 102 TFEU?
- Only some infringements of Articles 101 and 102 TFEU?
- All types of proceedings (such as normal proceedings, formal settlements, etc)

Only some types of proceedings

- **You are welcome to add additional comments and/or explanations.**

See above comments. At present only criminal sanctions are available. Opening the range of enforcement options that are mutually exclusive allows the NCA to tailor the enforcement to the facts of the case so that the penalties are proportionate to the infringement and act as a credible deterrent.

6. Should your preferred measure be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

In Ireland, transposition by the Member State has to date resulted in limited enforcement options (i.e. no administrative or civil penalties only criminal offences). If there was EU legislation with direct effect this would ensure consistency across Member States and provide greater certainty to market participants.

6.2. If you consider that there is a case for EU action, what type of EU action you consider most appropriate

:

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

Legislation will bind a court and the NCA in Ireland whereas best practice or a recommendation will not be considered by a court (there is recent Irish case law in the regulatory context expressly stating the court is not bound to consider and is not bound by an EU recommendation) and will not bind the NCA leading to potential inconsistency with other Member States

7. Please clarify why you consider your preferred type of EU action more appropriate than other types of action.

To have immediate direct effect so as to ensure that a desired approach is consistently applied throughout Member States, legislative action is preferred. Legislation will bind a court and the NCA in Ireland whereas best practice or a recommendation will not be considered by a court (there is recent Irish case law in the regulatory context expressly stating the court is not bound to consider and is not bound by an EU recommendation) and will not bind the NCA leading to potential inconsistencies across Member States.

8. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The consistent enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Infringements being fined	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The level of such fines (**)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

(*) Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

(**) *Negative impact on level of fines means that fines are less deterrent. Positive impact on level of fines means that fines are more deterrent.*

- You are welcome to add **additional comments and/or explanations, in particular if you consider that your preferred option would have any other impact.**

See attached response (space limitations do not allow inputting of response here)

C.3.2. WHO IS FINED

C.3.2.1. Concept of undertaking and the application of parent liability and succession in line with EU law

C.3.2.1.(a) Your experience/knowledge

1. Do you have experience/knowledge of instances where the EU concept of undertaking, and in particular the application of parental liability and legal and economic succession, was not applied for establishing liability for infringements of Article 101 and 102 TFEU?[5]

[5] *Some competition authorities do not apply the concept of "undertaking" as established in EU law and cannot hold the parents liable for infringements of their subsidiaries. Others cannot hold liable the legal successor of an infringer (for example after a merger into another company) or its economic successor. In other cases, the finding of the infringement is subject to finding liability of natural persons in the first place. In addition, some competition authorities cannot fine associations of undertakings, while others that can do it are prevented from imposing dissuasive fines when the infringement relates to the activities of its members because the fine cannot take account of the sales of such members.*

Yes No Do not know/Not applicable

- You are welcome to add **additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples where possible.**

2. Do you consider that the non-application of the concept of undertaking, parental liability and succession in line with EU law has had concrete negative effects on the consistent and effective enforcement of Articles 101 and 102 TFEU in your Member State/Member States with which you have contact?

Strongly

Strongly

No

disagree

Disagree

Agree

agree

Neutral

opinion

- You are welcome to add additional comments and/or explanations, in particular if you consider that this can give rise to other problems, and indicating which Member State(s) you refer to.

C.3.2.1.(b) Your views on potential action

3. To the extent that you consider this to be a problem for the consistent and effective enforcement of Articles 101 and 102 TFEU, which measures do you think should be taken to address this issue?

- Ensure the EU-wide application of the concept of undertaking as established in EU law
- Other
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

4. Should your preferred measure be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

5. Please clarify why you consider your preferred type of EU action more appropriate than other types of action.

6. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The consistent enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Number of Infringements being fined	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The level of such fines (**)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

() Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

*(**) Negative impact on level of fines means that fines are less deterrent. Positive impact on level of fines means that fines are more deterrent.*

- **You are welcome to add additional comments and/or explanations, in particular if you consider that your preferred option would have any other impact.**

C.3.2.2. Power to impose effective fines on association of undertakings

C.3.2.2.(a) Your experience/knowledge

7. Do you have experience/knowledge of instances where NCAs cannot impose fines on associations of undertakings or infringements of the EU competition rules?

- Yes No Do not know/Not applicable

• **Do you consider this to be a problem?**

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

• **You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples where possible.**

8. Do you have experience/knowledge of instances where the sales of the members of the associations of undertakings cannot be taken into account for imposing a fine on the association?

- Yes No Do not know/Not applicable

• **Do you consider this to be a problem?**

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

• **You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples where possible.**

C.3.2.2.(b) Your views on potential action

9. To the extent that you consider it to be a problem that NCAs cannot effectively fine associations of undertakings which measures should be taken to address this issue?

- All NCAs should have the power to find infringements committed by associations of undertakings and impose fines.
- Other
- Do not know/Not applicable

- If you have chosen the option of "*All NCAs should have the power to find infringements committed by associations of undertakings and impose fines*", do you think that this should also include:

- the power to take into account the turnover of the members in order to calculate the fine and
- determine the legal maximum, when the infringement of the association relates to the activities of its members?
- the means to require the payment of part of the fine from the members of the association if this is necessary to ensure the full payment of the fine?

- You are welcome to add additional comments and/or explanations.

10. Should your preferred measure be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

10.2. If you consider that there is a case for EU action, what type of EU action you consider most appropriate

:

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action

- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

11. Please clarify why you consider your preferred type of EU action more appropriate than other types of action.

12. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The consistent enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Infringements being fined	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The level of such fines (**)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN (e.g. infringements in several Member States treating associations of	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

undertakings differently)						
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(*) *Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*
(**) *Negative impact on level of fines means that fines are less deterrent. Positive impact on level of fines means that fines are more deterrent.*

- You are welcome to add **additional comments and/or explanations**, in particular if you consider that your preferred option would have **any other impact**.

C.3.3. AMOUNT OF FINES: LEGAL MAXIMUM, FINES METHODOLOGIES AND OTHER FACTORS

C.3.3.1. Legal maximum of fines

C.3.3.1.(a) Your experience/knowledge

1. Do you have experience/knowledge of the existence of divergences in the legal maximum of the level of fines imposed by NCAs for infringements of Articles 101 and 102 TFEU?

- Yes No Do not know/Not applicable

- Do you consider this to be a problem?

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

- You are welcome to add **additional comments and/or explanations**, e.g. which Member State(s) you refer to and concrete examples where possible.

If and to the extent that any divergences exist ComReg considers that this is an issues that should be addressed in order to ensure better and consistent enforcement across Member States.

C.3.3.1.(b) Your views on potential action

2. To the extent that you consider this to be a problem, which measures do you think should be taken to address this issue?

- Establishing a common legal maximum for the level of fines imposed by NCAs across the EU
- Establishing a minimum legal maximum for the level of fines imposed by NCAs across the EU
- Other
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

C.3.3.2. Fines methodologies

In the questions below "methodologies" are understood as the methods by which NCAs or national courts determine the initial value of the fine prior to considering other factors that can aggravate or mitigate the fines or increase it to achieve an appropriate level of deterrence (these factors are dealt with in the next section). It does not take into account either the way in which the legal maximum of the fine is set (already assessed in the previous section) or reductions in the fines as a result of leniency programmes.

C.3.3.2.(a) Your experience/knowledge

3. Do you have experience/knowledge of the existence of divergences in the fines methodologies applied by NCAs?

- Yes
- No
- Do not know/Not applicable

- **Do you consider this to be a problem?**

- Strongly disagree
- Disagree
- Agree
- Strongly agree
- Neutral
- No opinion

- **Please explain in more detail your reply, adding additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples where possible.**

If and to the extent that any divergences exist ComReg considers that this is an issue that should be addressed at an EU level in order to ensure better and consistent enforcement across Member States.

C.3.3.2.(b) Your views on potential action

4. To the extent that you consider this situation to be a problem, which measures do you think should be taken to address this issue?

- Establish a set of minimum core elements to be taken into account in fining methodologies of all NCAs
- Establish a more detailed common methodology to be taken into account in fining methodologies of all NCAs
- Other
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

5. If you were to consider that there should be a set of minimum core elements to be taken into account by all methodologies, what these elements should be?

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Gravity of the infringement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Duration of the infringement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Value of sales linked to the infringement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Any other(s)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

- **Indicate what these "other" minimum core elements would be:**

Recidivism

- You are welcome to add additional comments and/or explanations, in particular if you consider that there are other elements that can be included in the set of minimum core elements.

C.3.3.3. Aggravating and mitigating circumstances and other factors

C.3.3.3.(a) Your experience/knowledge

6. Do you have experience/knowledge of the existence of divergences in the sets of aggravating and mitigating circumstances and other factors applied by NCAs to calculate fines?

- Yes No Do not know/Not applicable

- Do you consider this to be a problem?

- Strongly disagree Disagree Agree Strongly agree Neutral No opinion

- You are welcome to add additional comments and/or explanations, e.g. which Member State(s) you refer to and concrete examples where possible.

If and to the extent that any divergences exist ComReg considers that this is an issue that should be addressed in order to ensure better and consistent enforcement across Member States.

C.3.3.3.(b) Your views on potential action

7. To the extent that you consider this to be a problem, which measures do you think should be taken to address this issue?

- Establish a common set of minimum aggravating and mitigating elements to be taken into account in fining methodologies of all NCAs
- Establish a more detailed common set of aggravating and mitigating elements to be taken into account by in fining methodologies of all NCAs
- Other
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

Please reply to the questions below with respect to each of the three issues addressed above.

8. Should your preferred measures be addressed by the Member States and/or by EU action?

- **8.1. Measure on legal maximum of fines**

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

A legislative measure providing a maximum level of fines would arguably not allow for proportionality of the fine to the infringement to be fully considered if the maximum is too low. However to enhance competition in open markets, legislation to empower judges to impose substantive fines in competition cases would generate more credible deterrence.

It should be noted that civil fines are not intended to replace criminal enforcement of the law, but to complement it. It should also be noted that it can be argued that they may involve a lenient alternative to criminal punishments that allow corporate bodies to treat the cost of financial sanctions simply as part of the price of doing business [1]. Therefore, to be effective, their maximum statutory levels need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance [2]. They must also be proportionate to the non-compliance to which they are applied. In cases where the maximum civil financial sanction is not high enough to reflect a suitable sanction for non-compliance, the most appropriate enforcement action will be criminal prosecution [3].

[1]Coglianese and Ors, "The Role of Government in Corporate Governance" (2004) Regulatory Policy Program, Center for Business and Government, John F. Kennedy School of Government, Harvard University.

[2] Elderfield, “Opening Remarks by Deputy Governor (Financial Regulation) Matthew Elderfield to Central Bank Enforcement Conference” (Central Bank Enforcement Conference, Dublin, 11 December 2012).

[3] de Moor-van Vugt, “Administrative Sanctions in EU Law” (2012) 5 Review of European Administrative Law 5, 37.

- **8.2. Measure on fines methodologies**

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

See above.

- **8.3. Measure on aggravating and mitigating circumstances and other factors**

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

See above.

9. If you consider that there is a case for action by the Member States, please specify what type of action you consider most appropriate:

- Non-legislative action (e.g. best practices)

- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations. If your reply is different for the measures on legal maximum, fines methodologies and aggravating/mitigating circumstances, please clarify it here.**

10. If you consider that there is a case for EU action, what type of EU action you consider most appropriate:

- **10.1. For the measure on legal maximum of fines:**

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

- **10.2. For the measure on fines methodologies:**

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

- **10.3. For the measure on aggravating and mitigating circumstances and other factors:**

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

11. Please clarify why you consider your preferred type of EU action more appropriate than other types of action:

- **11.1. For legal maximum of fines:**

To have immediate direct effect so as to ensure that a desired approach is consistently applied throughout Member States, legislative action is preferred. Legislation will bind a court and the NCA in Ireland whereas best practice or a recommendation will not be considered by a court (there is recent Irish case law in the regulatory context expressly stating the court is not bound to consider and is not bound by an EU recommendation) and will not bind the NCA leading to potential inconsistencies across Member States.

- **11.2. For fines methodologies:**

See above

- **11.3. For aggravating and mitigating circumstances and other factors:**

12. What would be the impact of your preferred option for EU action on the following aspects?

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The consistent enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The effectiveness of fines (**)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN (e.g. treatment of an infringement in several Member States in a coherent manner as regards these factors)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
NCA's flexibility to adapt to the specific circumstances of each case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

(*) Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

(**) Negative impact on effectiveness of fines means that fines are less deterrent. Positive impact on effectiveness of fines means that fines are more deterrent.

- You are welcome to add additional comments and/or explanations, in particular if you consider that your preferred option would have any other impact.

13. Please indicate whether you have any other comment or suggestions, such as examples of good practice etc.

You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please do it by uploading the relevant information in documents with a maximum size of 1 MB each using the button below.

Should you prefer to provide documents of more than 1 MB, please send them to the functional mailbox COMP-ECNPLUS@ec.europa.eu after having submitted your reply to the questionnaire indicating your Case-Id, email and contact details.

- eb7bbcec-3ee2-4ca0-8905-7187020eb59e/ComReg Response to Section C.3.1(a), Question 8.docx

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.4. LENIENCY PROGRAMMES

The [Communication on Ten Years of Regulation 1/2003 of July 2014](#) identifies the following **areas for action** "*[to] ensure that [...] well designed leniency programmes are in place in all Member States and consider measures to avoid disincentives for corporate leniency applicants.*" To this end, the Communication provides: "*It is necessary to ensure that the achievements made in leniency programmes are secured.*" [...] "*It is appropriate to consider possibilities to address the issue of interplay between corporate leniency programmes and sanctions on individuals that exist at Member State level.*"

Secret cartels are difficult to detect and investigate. Cooperation by parties is often crucial to uncover and punish these highly detrimental illegal practices. Therefore, **leniency programmes are among the most effective tools for the detection, investigation and punishment of secret cartels** as well as for providing effective deterrence against cartelisation.

Leniency programmes operate in all Member States except Malta. A common denominator in the European Union is that all leniency programmes cover secret cartels. This questionnaire thus addresses leniency programmes insofar as secret cartels are concerned.

As the **Commission and the NCAs have parallel competences to apply the EU competition rules**, their **leniency programmes are interlinked**. Therefore, **limitations in one jurisdiction** (such as who can benefit from the leniency programme and under which conditions) may have a **spill-over effect for other EU jurisdictions**.

The ECN Model Leniency Programme (MLP) was endorsed by the ECN in 2006, and sets out the principal elements which the ECN members believe should be common in all programmes.[6] In addition to the introduction of a uniform summary application system (see below), its aim is to provide a greater degree of predictability for potential leniency applicants and to avoid applicants being faced with uncertainty and contradictory demands when more than one leniency programme is applicable.

In the questions below, and unless otherwise specified, leniency includes both immunity from fines and reduction of fines.

[6] See further <http://ec.europa.eu/competition/ecn/documents.html>

C.4.1. LEGAL BASIS FOR LENIENCY AND DIVERGENCES IN LENIENCY PROGRAMMES

The ECN **Model Leniency Programme (MLP)**[7] **does not bind national courts**[8]. While the MLP stimulated voluntary convergence among leniency programmes of Member States, the initial fact finding shows that a **number of divergences remain**, including for features which impact on **who can benefit from leniency and under which conditions**. Divergence in such leniency features **may lead to different outcomes** such as when it comes to deciding **which applicants benefit from leniency**.

[7] See further the introduction to section C.4 above

[8] See the judgments in Case C-360/09, *Pfleiderer AG v Bundeskartellamt* and Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie*.

C.4.1.(a) Your experience/knowledge

1. Do you have experience/knowledge about the functioning of Member States' leniency programmes covering secret cartels?

Yes No

● **1.1. In which countries?**

Ireland

● **1.2. In which capacity?**

- Leniency applicant
- Representative of a leniency applicant
- Other

- **Please specify in which "Other" capacity:**

ComReg is an NCA with concurrent competition powers with the Irish Competition and Consumer Protection Commission (CCPC). ComReg does not have a Leniency regime in place but his aware, in general, of the CCPC's leniency regime.

2. Do you consider it to be a problem that there is no legal basis in EU law[9] for Member States' leniency programmes covering secret cartels which infringe EU competition law?

[9] *The European Court of Justice has held that the ECN Model Leniency Programme is not legally binding: Case C-360/09, Pfeiderer AG v Bundeskartellamt and Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie.*

- Strongly disagree
 Disagree
 Agree
 Strongly Agree
 Neutral
 Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.**

3. In your view, are there divergences in the features of Member States' leniency programmes which could have an impact on who can benefit from leniency and under which conditions?

- Yes
 No
 Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.**

- Do you consider this to be a problem in terms of:

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of the EU competition rules by NCAs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The consistent enforcement of the EU competition rules by NCAs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

- You are welcome to add additional comments and/or explanations, indicating which **Member States** you refer to.

4. Does the ECN Model Leniency Programme^[10] ensure a sufficient degree of alignment of the leniency programmes of Member States?

[10] See further <http://ec.europa.eu/competition/ecn/documents.html>

- Yes No Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which **Member State(s)** you refer to.

C.4.1.(b) Your views on potential action

5. To the extent that you consider the lack of an EU legal basis for leniency programmes and/or divergences between national leniency programmes to be a problem, which measures do you think should be taken to address this issue?

- Introduction of an EU legal basis for leniency programmes for secret cartels in all Member States
- Introduction of core principles for leniency programmes in all Member States
- Other
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

6. Should the lack of an EU legal basis for national leniency programmes and divergences between such programmes be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

6.2. If you consider that there is a case for EU action, what type of EU action you consider most appropriate

:

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

7. Please clarify why you consider your preferred type of EU action more appropriate than other types of action.

8. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation within the ECN	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

() Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

- You are welcome to add additional comments and/or explanations, in particular, if you consider that your preferred option would have any other impact.

C.4.2. DEALING WITH MULTIPLE LENIENCY APPLICATIONS

The ECN Model Leniency Programme (MLP) created a **system of summary applications**, which is aimed **at facilitating multiple leniency filings** in cases where a secret cartel has effects on competition in more than three Member States.[11]

However, according to the initial fact finding **summary applications are not available in all Member States. A few Member States**, which accept summary applications in practice, **do not have rules on this in their leniency programmes**. Also, in certain jurisdictions summary applications are available for immunity applicants **but not for subsequent leniency applicants**. The initial fact finding shows that the **criteria for the assessment of summary applications are not aligned across the EU**, which may **impact on the availability of leniency and lead to divergent assessments** in cases covering a number of jurisdictions.

[11] *The system is intended to work as follows: if a full application for leniency has been made to the Commission concerning a case for which the Commission is particularly well placed to act, NCAs can accept temporarily to protect the applicant's position in the leniency queue on the basis of very limited information (the so-called summary application) that they can give orally. This protects leniency applicants from losing their leniency protection because of re-allocation of cases from the Commission to NCAs, because, for example, the Commission does not take up a part or the entire case. It also allows leniency applicants to focus their cooperation efforts on the Commission without having to provide detailed information to several NCAs. Should any of the NCAs become active, it will grant the leniency applicant additional time to complete its application.*

C.4.2.(a) Your experience/knowledge

1. Do you have experience/knowledge about multiple leniency filings in the EU concerning secret cartels?

Yes No

2. Do you have experience/knowledge of summary applications?

Yes No Do not know/Not applicable

- **Please describe your experience and the reasons for your choice whether to use (or not) summary applications, indicating which Member State(s) you refer to.**

3. Have you experienced any problems with summary applications?

Strongly disagree Disagree Agree Strongly Agree Neutral Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

4. Does the ECN Model Leniency Programme ensure a sufficient degree of alignment of summary applications in the Member States?

- Yes
 No
 Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

5. Are you aware of any divergences in Member States:

- **5.1. In national rules on summary applications?**

- Yes
 No
 Do not know/Not applicable

- **5.2. In their application in practice?**

- Yes
 No
 Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

- **5.3. Do you consider this to be a problem in terms of:**

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	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of the EU competition rules by NCAs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
The consistent enforcement of the EU competition rules by NCAs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Legal certainty for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Incentives to apply for leniency	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

- Please specify what the "Other" problem would be:

- You are welcome to add additional comments and/or explanations, in particular, if you consider it could give rise to other problems.

C.4.2.(b) Your views on potential action

6. To the extent that you consider any divergences in national rules on summary applications or their application in practice in Member States to be a problem, which measures do you think should be taken to address this issue?

- Ensuring the availability of summary applications in all Member States
- Aligning the features of summary applications in all Member States on the basis of the ECN Model Leniency Programme
- Other
- Do not know/not applicable

- You are welcome to add additional comments and/or explanations.

7. Should this problem be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations.

8. Please clarify why you consider your preferred type of EU action for an effective and coherent leniency system in the EU more appropriate than other types of action.

9. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Cooperation within the ECN	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

(*) *Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

- You are welcome to add additional comments and/or explanations, in particular, if you think that your preferred option would have any other impact.

C.4.3. PROTECTION OF LENIENCY, SETTLEMENT AND OTHER MATERIAL IN THE FILE OF THE COMPETITION AUTHORITY

Parties that choose to cooperate **under leniency programmes** are required to **disclose their participation in a secret cartel** and **provide self-incriminating** leniency material. In case of formal **settlement procedures**, the parties are required to **acknowledge their participation in and liability for the infringement**. In this framework, **the parties provide the NCAs with material which, if disclosed** and used outside the context of the investigation in which it has been provided, could seriously **harm their commercial interests**. Furthermore, ongoing investigations of competition authorities could be seriously harmed if **materials specifically prepared** for the purpose of such investigations, either by the parties or by the competition authority, **are disclosed when the competition authority has not yet closed its investigation**.

The initial fact finding shows that the level of protection granted for such material varies between Member States. The **Damages Directive[12]** **harmonises protection of leniency and settlement material**, as well as of **disclosure** of documents during ongoing investigations, in the context of civil damages actions before EU national courts. However, this **Directive does not explicitly address other scenarios**, such as the **use of material in other civil matters** or in **third jurisdictions** or **access by the public at large** through "transparency" rules/public access to documents.

Under the **Directive**, **national courts are not allowed to order the disclosure of leniency statements and settlement submissions**. Furthermore, national courts cannot order the disclosure of documents that are **specifically prepared for the proceedings of a competition authority as long as those proceedings are ongoing**. If someone obtains any of these documents through access to the file, (s)he can (temporarily) not use them before a national court.

[12] *Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1 of 5.12.2014.*

C.4.3.(a) Your experience/knowledge

1. Do you have experience/knowledge about the protection of leniency and settlement material and about the protection of documents from disclosure during ongoing investigations?

- Yes No Do not know/Not applicable

2. In your view, is there a sufficient level of protection of leniency and settlement material in the Member States for which you have experience/knowledge?

Yes No Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

3. In your view, is there a sufficient level of protection of materials specifically prepared for the purpose of the investigation of a competition authority (either by the parties or by the competition authority) whilst that investigation is still ongoing in the Member States for which you have experience/knowledge?

Yes No Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

C.4.3.(b) Your views on potential action

4. To the extent that you consider that in the Member States for which you have experience/knowledge the level of protection of leniency and settlement material is insufficient, which measures do you think should be taken to address this issue?

- Extend the same protection put in place for leniency statements and settlement submissions by the Damages Directive to other situations
- Other
- Do not know/not applicable

- You are welcome to add additional comments and/or explanations.

5. To the extent that you consider that in the Member States for which you have experience/knowledge the level of protection for documents prepared for the investigation of a competition authority whilst that investigation is still ongoing is insufficient, which measures do you think should be taken to address this issue?

- Extend the same protection put in place for documents specifically prepared for the purpose of
- an investigation of a competition authority whilst that investigation is still ongoing by the Damages Directive to other situations
 - Other
 - Do not know/not applicable

- **You are welcome to add additional comments and/or explanations.**

6. Should the protection of leniency and settlements material, as well as of material specifically prepared for the purpose of the investigation of a competition authority whilst that investigation is still ongoing, be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

7. Please clarify why you consider your preferred type of EU action for an effective and coherent leniency system in the EU more appropriate than other types of action.

8. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion

The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Cooperation within the ECN	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

(*) Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

- You are welcome to add **additional comments and/or explanations**, in particular, if you think that your preferred option would have any other impact.

C.4.4. INTERPLAY BETWEEN LENIENCY PROGRAMMES AND SANCTIONS ON INDIVIDUALS

Most Member States provide for various sanctions on individuals for competition law infringements, in addition to fines on undertakings. However, the initial fact finding shows that **arrangements to protect employees of undertakings from such sanctions**, if the **companies cooperate under the corporate leniency programme of a NCA or the Commission**, exist only in **a few Member States** (referred to as “interplay”).

C.4.4.(a) Your experience/knowledge

1. Do you have experience with or knowledge of sanctions that can be imposed on individuals for their participation in secret cartels?

- Yes No Do not know/Not applicable

- **1.1. In which countries?**

Ireland

- **1.2. In which capacity?**

- Corporate leniency applicant
- Representative of a corporate leniency applicant
- Individual subject to investigation
- Representative of an individual subject to investigation
- Other

2. Do you have experience with or knowledge of arrangements in Member States to protect employees of undertakings, which cooperate under the corporate leniency programmes of NCAs or the Commission, from individual sanctions?

- Yes
- No
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

- **2.1. Do you consider it to be a problem that such arrangements only exist in a few Member States**

- Strongly disagree
- Disagree
- Agree
- Strongly Agree
- Neutral
- Do not know/Not applicable

- You are welcome to add additional comments and/or explanations, indicating which Member State(s) you refer to.

C.4.4.(b) Your views on potential action

3. To the extent that you consider the lack of national arrangements to protect employees of undertakings, which cooperate under the corporate leniency programmes of NCAs or the Commission, to be a problem, which measures do you think should be taken to address this issue?

- Establish safeguards to protect employees of companies which cooperate under corporate leniency programmes from the imposition of individual sanctions for the same cartel conduct

- Other
- Do not know/Not applicable

- **3.1. If you have chosen the option establishing safeguards to protect employees of companies which cooperate under corporate leniency programmes, what should this cover?**

- current employees
- former employees
- protection from administrative sanctions in all Member States, e.g. director disqualification orders
- protection from criminal sanctions in all Member States, e.g. imprisonment
- employees of companies which obtain **immunity** under corporate leniency programmes
- employees of companies which benefit from a **reduction in fines** under corporate leniency programmes
- employees of companies which cooperate under the corporate leniency programmes of **any** NCA
- employees of companies which cooperate under the **European Commission's leniency programme**

- **You are welcome to add additional comments and/or explanations.**

4. Should the interplay between corporate leniency programmes and sanctions on individuals be addressed by the Member States and/or by EU action?

- Member States
- EU action
- Combination of EU/Member State action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

4.2. If you consider that there is a case for EU action, w

What type of EU action you consider most appropriate?

- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

- **You are welcome to add additional comments and/or explanations.**

5. Please clarify why you consider your preferred type of EU action for an effective and coherent leniency system for the enforcement of the EU competition rules across the EU more appropriate than other types of action.

6. What would be the impact of your preferred option for EU action on the following aspects:

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

() Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.*

- **You are welcome to add additional comments and/or explanations, in particular, if you think that your preferred option would have any other impact.**

7. Please indicate whether you have any other comment or suggestions, such as examples of good practice etc.

You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please do it by uploading the relevant information in documents with a maximum size of 1 MB each using the button below.

Should you prefer to provide documents of more than 1 MB, please send them to the functional mailbox COMP-ECNPLUS@ec.europa.eu after having submitted your reply to the questionnaire indicating your Case-Id, email and contact details.

CONCLUSION AND SUBMISSION

1. What do you think about our questionnaire?

2. Were any important questions missing?

3. Would you be willing to participate in a short telephone interview to deepen our understanding of your answers?

Yes

Background Documents

Commission SWD "Enhancing competition enforcement by the Member States' competition authorities: institution and procedural issues" accompanying the Communication from the Commission (SWD(2014) 231 final, 9.7.2014 (/eusurvey/files/0a8fee8d-cd1f-426f-8b96-200cb6f0a5b5)

Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM(2014) 453 final, 9.7.2014)

(/eusurvey/files/620d3975-1019-4169-afd1-c770167c4e6c)

Communication from the Commission to the European Parliament and the Council, Report on the functioning of Regulation 1/2003 (COM(2009) 206 final, 29.4.2009) (/eusurvey/files/2cff6b19-1690-49d3-a9ed-70b8e12bc51e)

ECN Model Leniency Programme (/eusurvey/files/d9fc6fa7-39fc-4eb1-b4d2-1207ec672d81)

Regulation 1/2003 (/eusurvey/files/58236441-8770-4dfd-92d3-3342d872ecbb)

Contact

✉ COMP-ECNPLUS@ec.europa.eu

ComReg Response to Section C.3.1(a), Question 8

Q.8 What would be the impact of your preferred option for EU action on the following aspects?

- You are welcome to add additional comments and/or explanations, in particular if you consider that your preferred option would have any other impact.

In relation to administrative fines: "The European Commission noted in its 7th and 9th implementation reports [1] regarding electronic communications that there was an enforcement weakness in Ireland due to constitutional issues over the inability of a National Regulatory Authority to impose fines, noting that this causes serious problems with the functioning of the single market as a whole."

In the Memorandum of Understanding between Ireland, the EU Authorities and the International Monetary Fund of December 2010, the following recommendation was made: "To enhance competition in open markets, Government should introduce legislation to empower judges to impose fines and other sanctions in competition cases in order to generate more credible deterrence"

Traditional criminal offences are not the most effective or efficient approach to ensuring regulatory compliance. The evidentiary requirements, the complex economic analysis involved in many cases and the criminal standard of proof are such that criminal prosecution is neither practical nor appropriate in most cases. Most regulators will not adopt this approach and most regulated entities will not treat these offences as a realistic deterrent. Even in the realm of competition law, criminal offences are appropriate only for what are known as "hard-core" cartel offences, which are readily understood by a jury. Nevertheless, at present, all competition infringements are criminal offences in Ireland and the civil courts only have jurisdiction to issue declarations or injunctions and not civil fines.

Penalties need to act as a meaningful deterrent. For the penalties to be a realistic deterrent to the potential gains from non-compliance they need to be proportionate to the harm incurred to the market. Fines should also be proportionate to the turnover of the infringing entity.

Fines imposed directly by the courts in civil cases would be a very effective method of deterrence, if such fines are proportionate to the infringement in question.

Civil financial sanctions can be an effective means of responding to conduct that involves a breach of legislation but for which criminal prosecution would be too harsh a response. They are not intended to replace criminal enforcement of the law, but to complement it. However, it has been argued that civil enforcement may be a lenient alternative to criminal punishments that allows corporate bodies to treat the cost of financial sanctions simply as part of the price of doing business [2]. Therefore, to be effective, their maximum statutory levels need to be sufficiently high to deter non-compliance by signalling that the costs of infringement exceed those of compliance

[3]. They must also be proportionate to the non-compliance to which they are applied. In cases where the maximum civil financial sanction is not high enough to reflect a suitable sanction for non-compliance, the most appropriate enforcement action will be criminal prosecution [4].

Article 6 of the European Convention on Human Rights guarantees persons of the right to a fair trial in the determination of their civil rights and obligations or of any criminal charge against them. This may give rise to a concern where measures such as civil financial sanctions are imposed by regulatory bodies rather than courts. In interpreting Article 6, however, the European Court of Human Rights has tended to the view that it is for each State to determine whether proceedings should be classified as criminal or otherwise. The central issue is whether the procedural and substantive protections assured by Article 6 are provided by the court or tribunal [5]. A body such as an NCA that imposes civil financial sanctions is unlikely to breach Article 6 provided it can assure the required fairness and procedural safeguards [6].

EU case law on the proportionality of civil financial sanctions in competition law is well developed. These precedents provide useful benchmarks for any civil financial sanctions regime in Ireland [7]. Proportionality requires that the maximum statutory amount of any civil financial sanction should be imposed only in the most grave of circumstances.

Notes:

[1] 7th Report: Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Seventh Report on the Implementation of the Telecommunications Regulatory Package (Brussels, 2001); 9th Report: Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.

[2] Coglianese and Ors, "The Role of Government in Corporate Governance" (2004) Regulatory Policy Program, Center for Business and Government, John F. Kennedy School of Government, Harvard University.

[3] Elderfield, "Opening Remarks by Deputy Governor (Financial Regulation) Matthew Elderfield to Central Bank Enforcement Conference" (Central Bank Enforcement Conference, Dublin, 11 December 2012).

[4] de Moor-van Vugt, "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 5, 37.

[5] See Engel v The Netherlands (1976) 1 EHRR 647.

[6] See Woods and Macrory "Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach", Centre for Law and the Environment, University College London (2003) 34 at [6.18]. See also Rozakis, 'The Right to a Fair Trial in Civil Cases' (2004) 4 Judicial Studies Institute Journal 96.

[7] de Moor-van Vugt "Administrative Sanctions in EU Law" (2012) 5 Review of European Administrative Law 37.