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PART 2/2

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Annexes

Accompanying the document

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

List of Annexes

{COM(2017) 142 final}
{SWD(2017) 115 final}
{SWD(2017) 116 final}

List of Annexes

Annex I - Procedural information

1. Initiative key information

Leading DG: DG Competition

Agenda planning reference: 2017/COMP/001

Initiative title: Legislative proposal - Enhancing competition in the EU for the benefit of businesses and consumers – Reinforcement of the application of EU competition law by national competition authorities

Expected adoption of legislative proposal: 1st quarter 2017

2. Reports on the functioning of Council Regulation 1/2003

During 2013 and 2014 DG Competition conducted an assessment of the functioning of Council Regulation 1/2003.

As part of this new assessment, DG Competition examined a range of areas that either were not addressed by Regulation 1/2003, were addressed in a general way but a need for a detailed response has subsequently arisen in practice, or have emerged as new issues.

Based on the results of this assessment, the Commission adopted in July 2014 the "Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives"[1] ("the Communication"). The Communication concluded that the enforcement of the EU competition rules had considerably increased as a result of the achievements of the Commission, the ECN and the national competition authorities (NCAs). The guidance provided by the Commission to stakeholders, NCAs and national courts and the cooperation within the ECN had favoured the coherent application of the EU competition rules throughout the EU and boosted the enforcement of EU competition rules. However, the Communication also concluded that it was important to build on these achievements to create a truly common competition enforcement area in the EU, in particular by:

- further guaranteeing the independence of NCAs in the exercise of their tasks and that they have sufficient resources;

- ensuring that NCAs have a complete set of effective investigative and decision making powers at their disposal;

- ensuring that powers to impose effective and proportionate fines are in place in all Member States;

- ensuring that well-designed leniency programmes are in place in all Member States and consider measures to avoid disincentives for corporate leniency applicants.

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[1] http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf
http://ec.europa.eu/competition/antitrust/legislation/swd_2014_230_en.pdf
http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf.

This exercise built on the previous "*Report on the functioning of Regulation 1/2003*"[2] of 2009 which had found that the new competition enforcement system had positively contributed to a stronger enforcement of the EU competition rules, but that some aspects merited further evaluation, in particular, with respect to making NCAs' enforcement tools and fining powers more effective.

3. Evidence used to support the Impact Assessment

By way of follow-up to the Communication, extensive fact-finding has been carried out by DG Competition in cooperation with NCAs on all the objectives identified by the Communication in order to have a detailed picture of the status quo.

In addition to the Communication on ten years of Regulation 1/2003 and the Report on five years of Regulation 1/2003, noted above, the fact-finding built on the following Reports:

- Investigative Powers Report (31 October 2012), which provides an overview of investigative procedures within the ECN.[3]

- Decision-Making Powers Report (31 October 2012), which provides an overview of decision-making powers within the ECN.[4]

- Report on the Assessment of the State of Convergence with the ECN Model Leniency Programme (15 October 2009).[5]

- Several publications on the impact of competition, such as the OECD report "Fact-sheet on how competition policy affects macro-economic outcomes" (October 2014)

Fact-finding within the ECN

For the preparation of this Impact Assessment, DG Competition relied on fact-finding carried out by three ECN working groups: the Working Group on Cooperation Issues and Due Process, the Cartels Working Group and the ad-hoc Working Group on Fines and Related Issues. Detailed questionnaires have been sent on the different issues raised in the Communication.

Moreover, the fact-finding done at the level of the respective working groups was further discussed and reviewed at a higher level in the context of the ECN Plenary meetings, and finally at the highest level during the ECN Directors-General meetings, attended by the Heads of the NCAs and DG Competition.

On the basis of all the information gathered, the Commission has decided to carry out an Impact Assessment in order to define in more detail the scope of the identified problems and the objectives to be achieved and assess the different policy options to address them.

4. Organisation and timing

4.1. Inter-Service Steering Group

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2 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0206&from=EN and http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0574&from=EN.

3 http://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf.

4 http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf.

5 http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

An Inter-Service Steering Group (ISSG) was set up in October 2015. In total four meetings have been held on the following dates: 22 October 2015, 19 May 2016, 23 June 2016 and 14 July 2016.

The following Directorates-General and services participated: BUDG, CNECT, ECFIN, ENER, ENV, FISMA, GROW, JUST, MARE, MOVE, OLAF, TRADE, LS and SG.

The feedback received from these Directorates-General and services has been taken into account in the draft Impact Assessment Report.

The ISSG approved the Inception Impact Assessment that was published in November 2015 and the draft Impact Assessment Report.

The minutes of the meeting held on 14 July 2016 were submitted to the Regulatory Scrutiny Board.

4.2. Consultation of the Regulatory Scrutiny Board

This draft Impact Assessment Report was submitted to the Regulatory Scrutiny Board on 31 August 2016 and a meeting took place on 28 September 2016.

The table below provides an overview on, and, where necessary, brief explanations about, the changes introduced in the revised draft Impact Assessment Report after the meeting on 28 September 2016 and the main recommendations for improvements of the Regulatory Scrutiny Board.

Main Recommendations for improvements	**Overview of changes in the revised draft IA Report & explanations**
(1) **Demonstrate relevance of identified problems**. The report should go beyond the general statement that more competition enforcement is better and present further evidence to demonstrate the untapped potential of more effective NCA enforcement of competition rules. It could achieve this by adding anecdotal evidence (i.e. examples of cases that NCAs were not able to deal with), comparing Member States' performances, or using other relevant facts drawn from the 10 years of cooperation between the Commission and Member States on enforcement.	Section 2 of the revised draft Impact Assessment report includes all relevant facts and anecdotal evidence available at the time of drafting to illustrate the four problem drivers. The main difficulty in determining the untapped potential of more effective enforcement of the competition rules lies in estimating undetected anti-competitive practices which necessarily companies try to keep secret.
(2) **Clarify the policy options**. The report should explain in more detail the proposed provisions to ensure Member States have the right investigative tools, deterrent fines, better leniency programs, more resources, and strong independence. The choice of parameters should be based on more evidence. On this basis, the report should clarify the differences between the preferred option 3 and option 4. The report also	Sections 5.3 and 5.4 of the revised draft Impact Assessment report include more details on the envisaged options for each specific objective. Where available, references to evidence have been added or highlighted compared to the previous draft. Equally, the differences between option 3 and option 4 have been brought out and further explained in the revised draft. A

needs to reflect on a possible redistribution of work between the Commission and NCAs, or explain why this approach is discarded.	new section 5.5 explains why a possible redistribution of work between the Commission and the NCAs has been discarded.
(3) **Strengthen subsidiarity and proportionality aspects**. The report should strengthen the analysis of the options against the subsidiarity and proportionality principles. In doing so, the report should better explain to which degree EU law could and should restrict Member States' choices as to their administrative/civil/judicial procedures. In terms of proportionality, possibly a "lighter" option "2.5" with more limited regulatory changes could be included.	Section 7 of the revised Impact Assessment report clarifies the analysis of the options against the principles of subsidiarity and proportionality as well as the degree to which the envisaged options could and should restrict the procedural choices of Member States. Regarding the possibility of a "lighter" option "2.5" with more limited regulatory changes: as explained in the report, soft action is not considered effective because it has already been used extensively to address all four problem drivers, and, based on this experience, it is expected to lead only to at most very limited change without achieving the overall aim. The regulatory changes envisaged by the preferred option include only the minimum means and instruments necessary to ensure that NCAs are effective competition enforcers while carefully avoiding undue interference. Leaving out any of these means and instruments would risk failing to meet the overall aim of making NCAs more effective enforcers.
(4) **Estimate costs and impacts**. The report should give indications on the cost of implementing the new requirements for Member States. The impact analysis should more clearly establish how the additional instruments and resources would yield the expected benefits in individual Member States.	The new Annex XVI provides an analysis of the costs and benefits of the preferred option. The methodology, main arguments, and results presented in this Annex have been summarised in sections 6.3 and 6.4 of the revised draft Impact Assessment report.

The Regulatory Scrutiny Board issued a subsequent opinion on 9 December 2016, giving a positive opinion, with a recommendation to improve the following aspects:

Main Recommendations for improvements	**Overview of changes in the revised draft IA Report & explanations**
(1) **Provide more evidence to support the argument that some NCAs do not have**	Section 2.2.4 of the revised draft Impact Assessment report includes additional

enough resources.	explanations on the correlation between the level of resources and the level of enforcement of NCAs of comparable GDP.
(2) **Disaggregate stakeholder's views according to stakeholder categories.**	Annex II summarising the results of the public consultation now contains now a more detailed description of the stakeholder's views disaggregated according to stakeholder categories.
(3) **Elaborate on the limitations and uncertainties of the quantitative estimates.**	Sections 2.1 and 6.3 include additional explanations about the limitations and uncertainties of the quantitative estimates. Section 6.3 and Annex XVI also include additional explanations about how the competition policy indicators are built.

The Regulatory Scrutiny Board also recommended the addition of a glossary of acronyms, issues and expressions used. A glossary of terms has been added in Annex XVII.

Annex II - Stakeholder consultation

I. Report on the Contributions to the Public Consultation on Empowering the national competition authorities to be more effective enforcers of the EU competition rules

Introduction

A public consultation[1] on empowering the national competition authorities to be more effective enforcers of the EU competition rules was launched on 4 November 2015 and ran until 12 February 2016.

The public consultation follows up the Commission's Communication on Ten Years of Regulation 1/2003[2], which identified a number of areas of action to boost the powers of national competition authorities ("NCAs") to enforce the EU competition rules. The objective of the public consultation was to get feedback from a broad range of stakeholders on their experience/knowledge of issues that NCAs may face having an impact on their ability to effectively enforce the EU competition rules and what action, if any, should be taken in this regard.

The public consultation followed the Commission's minimum standards and has taken the form of an EU Survey which was split into two parts, a first one with general questions seeking input from non-specialised stakeholders, and a second one for stakeholders with a deeper knowledge/experience of competition matters. This second part addresses four key issues:

A. resources and independence of the national competition authorities;

B. enforcement toolbox of the national competition authorities;

C. powers of national competition authorities to fine undertakings; and

D. leniency programmes.

The public consultation page and the general questions were available in the following EU official languages: bg cs da de el en es et fi fr hr hu it lt lv mt nl pl pt ro sk sl sv to encourage input by consumers and SMEs and to allow the public at large to contribute. The detailed sections of the open public consultation questionnaire were only available in English but answers could be provided in all EU official languages.

Validity of the public consultation: assessment of its weaknesses and strengths

The main weakness of the questionnaire, which has been raised by some stakeholders, is that it is rather long. This, together with the inherent complexity of the issues it tackles, might have dissuaded some stakeholders from replying. To address this issue, the questionnaire contains a shorter section with general questions aimed at all (including non-specialised) stakeholders.

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1 http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html

2 COM(2014) 453 final, 9 July 2014.

Another weakness is that it was not possible to translate the entire questionnaire in all official languages. To encourage wide participation in the public consultation the introductory sections and the section with the general questions, which covered the essence of the main issues covered by the questionnaire, were translated into all official languages. Over 40 participants opted to exclusively use this option.

The public consultation had however several features that counterbalanced, at least partially, the weaknesses referred to above.

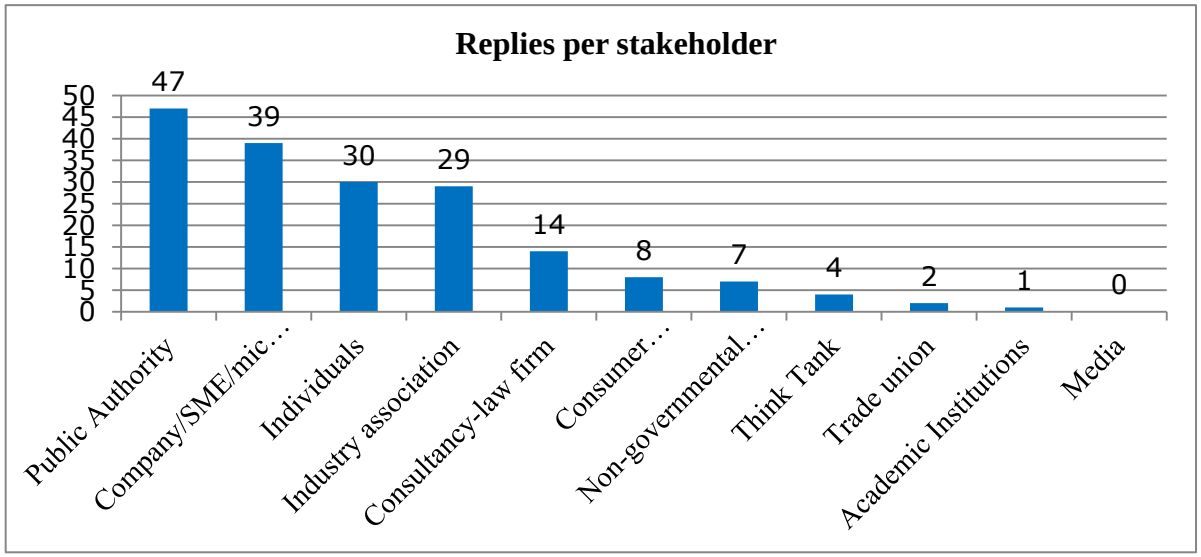
First, although the public consultation has been officially open for participation for about 12 weeks, in practice stakeholders could provide input for around 16 weeks. This has allowed stakeholders willing to participate ample time to do so.

Moreover, respondents had for almost every question the possibility to add additional comments clarifying or expanding their replies and to attach supporting documents. Replies in the form of a position paper as opposed to through the questionnaire were also accepted.

Finally, in order to promote participation as much as possible, we encouraged NCAs to bring the the public consultation to the attention of their respective national consumer and business associations. This was complemented by initiatives by the Commission to promote awareness of the public consultation by reaching out to organisations with a pan-European dimension such as the European consumer organisation BEUC and Business Europe, as well as through participating in conferences at national level.

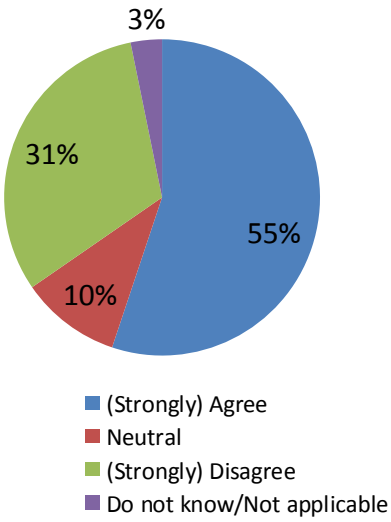
Summary of the general questions

There have been 181 replies from a wide variety of stakeholders, ranging from private individuals, law firms and consultancies, companies and industry associations, consumer organisations, academics, non-governmental organisations, think tanks and trade unions to public authorities, including a number of Ministries and NCAs, from within and outside the EU. This is a very good response rate for a public consultation in the competition field.



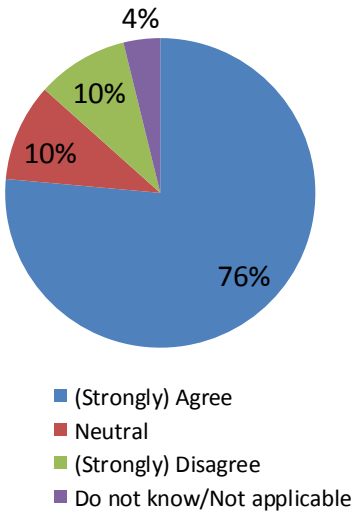
The results show that for the majority of respondents NCAs are effectively enforcing EU competition rules. There is however a 31% of respondents that considers that this is not the case.

Are EU competition rules effectively enforced by NCAs?



However, a wide majority of respondents consider that NCAs could do more to enforce EU competition rules than they currently do:

Could NCAs do more to enforce EU competition rules?



Respondents also consider that the following measures would help NCAs to be more effective:

Degree of support for measures to help NCAs to be more effective enforcers. Number of replies =165[3]

Having guarantees that they enforce the EU competition rules in the general interest of the EU and do not take instructions when doing so	Strongly Agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Consumer associations	29%	71%				
Non-governmental organisations	14%	29%	29%	14%		14%
Public Authority	70%	24%	6%			
Business	26%	50%	6%			18%
Industry Association	26%	53%		11%	5%	5%
Consultancy/Law firm	23%	46%	31%			
Other	33%	56%	11%			
Having sufficient resources to perform their tasks	Strongly Agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Consumer associations	43%	57%				
Non-governmental organisations	14%	57%		14%		14%
Public Authority	77%	17%	6%			
Business	44%	35%	6%	6%	3%	6%
Industry Association	37%	42%	5%	16%		
Consultancy/Law firm	77%	15%		8%		
Other	44%	56%				
Having effective enforcement tools to detect and investigate infringements	Strongly Agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Consumer associations	71%	29%				
Non-governmental organisations	14%	71%				14%
Public Authority	68%	32%				
Business	23%	51%	9%			17%
Industry Association	32%	37%	16%	11%	5%	
Consultancy/Law firm	31%	46%	15%	8%		
Other	33%	33%	33%			
Having effective powers to fine companies for breach of competition law	Strongly Agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Consumer associations	86%	14%				
Non-governmental organisations	14%	71%				14%
Public Authority	76%	24%				
Business	34%	43%	9%	6%	3%	6%
Industry Association	37%	37%	11%	11%	5%	
Consultancy/Law firm	31%	23%	38%	8%		
Other	33%	33%	22%	11%		

[3] Although the total number of replies was 181, only 165 replied to the online questionnaire, while the other 16 provided their replies in the form of a position paper. The percentages indicated in the table are based on the replies to the online questionnaire only.

Having effective leniency programmes to encourage companies to come clean about infringements	Strongly Agree	Agree	Neutral	Disagree	Strongly disagree	No opinion
Consumer associations	71%	29%				
Non-governmental organisations	14%	71%				14%
Public Authority	68%	32%				
Business	23%	51%	9%			17%
Industry Association	32%	37%	16%	11%	5%	
Consultancy/Law firm	31%	46%	15%	8%		
Other	44%	56%				

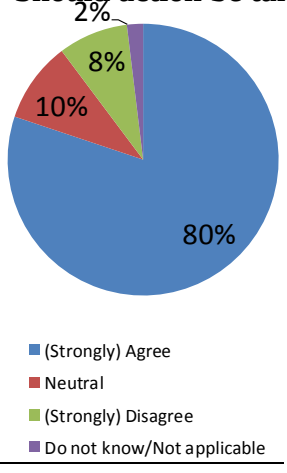
Other issues raised by stakeholders

A majority of stakeholders (59%) also consider that other actions should be taken to boost the effectiveness of the NCAs. There is in particular a consistent demand from lawyers, business and business organisations that any enhancement of NCAs' enforcement powers is counter-balanced by increased procedural guarantees, including ensuring that rights of defence can be effectively exercised by having greater transparency of investigations and effective judicial review (e.g. companies should receive a Statement of Objections and have effective rights of access to file).

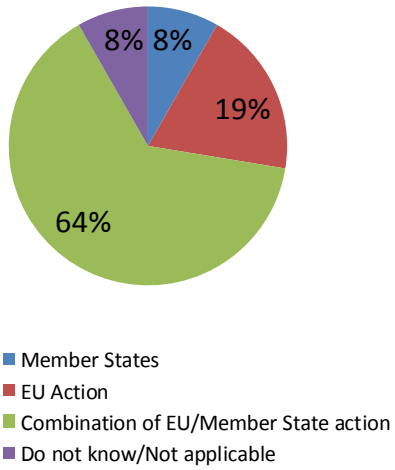
Other issues raised are the request of greater coherency within the ECN in the application of the EU competition rules, the recognition of Legal Professional Privilege (LPP) for in-house lawyers and of compliance programmes as a mitigating factor for fines, that NCAs should be able to defend their cases in court, a more consistent application of the effect on trade criterion or the abolition of the power of NCAs to apply stricter rules on unilateral conduct.

The questionnaire has also sought views from stakeholders on whether action to boost enforcement by NCAS should be taken and, if so, who should take action. The graphs below show the results which indicate that a wide majority of stakeholders supports that action should be taken and that such action should preferably be a combination of EU and Members States action.[4]

Should action be taken?



Who should take action?



[4] The figures used will not necessarily add up to 100% because some respondents may have answered "do not know" or "not applicable".

Per group of stakeholder, the replies are as follows:

Should action be taken?

	(Strongly) agree	Neutral	(Strongly) disagree	Do not know/not applicable
Academic institutions	100%	0%	0%	0%
Consumer organisations	100%	0%	0%	0%
Non-governmental organisation	86%	14%	0%	0%
NCA	100%	0%	0%	0%
Ministries	60%	40%	0%	0%
Company/SME/micro-enterprise/sole trader	77%	6%	11%	6%
Industry association	61%	11%	28%	0%
Think tanks	67%	33%	0%	0%
Consultancy/Law firm	84%	8%	8%	0%
Trade Unions	100%	0%	0%	0%

Who should take action?

	Member States	EU	EU & Member States	Do not know/not applicable
Academic institutions	0%	0%	100%	0%
Consumer organisations	0%	0%	100%	0%
Non-governmental organisation	29%	14%	43%	14%
NCA	0%	40%	60%	0%
Ministries	0%	25%	50%	25%
Company/SME/micro-enterprise/sole trader	9%	12%	66%	12%
Industry association	13%	27%	40%	20%
Think tanks	0%	0%	100%	0%
Consultancy/Law firm	8%	8%	84%	0%
Trade Unions	0%	0%	100%	0%

Respondents also consider that, if EU action were to be taken, it should preferably take the form of a mix of legislative and non-legislative action.

What type of EU action is most appropriate?

Per group of stakeholder, the replies are as follows:

What type of EU action is most appropriate?

	Non-legislative	Mix legislative & non-legislative	Legislative	Do not know/not applicable
Academic institutions	0%	0%	100%	0%
Consumer organisations	0%	100%	0%	0%
Non-governmental organisation	17%	50%	0%	33%
NCA	4%	40%	56%	0%
Ministries	0%	50%	25%	25%
Company/SME/micro-enterprise/sole trader	7%	50%	23%	20%
Industry association	25%	37%	12%	25%
Think tanks	0%	50%	50%	0%
Consultancy/Law firm	17%	75%	8%	0%
Trade Unions	0%	100%	0%	0%

Finally, the overall view of stakeholders is that taking action at EU level would have a (very) positive impact on various aspects, as shown in the table below:

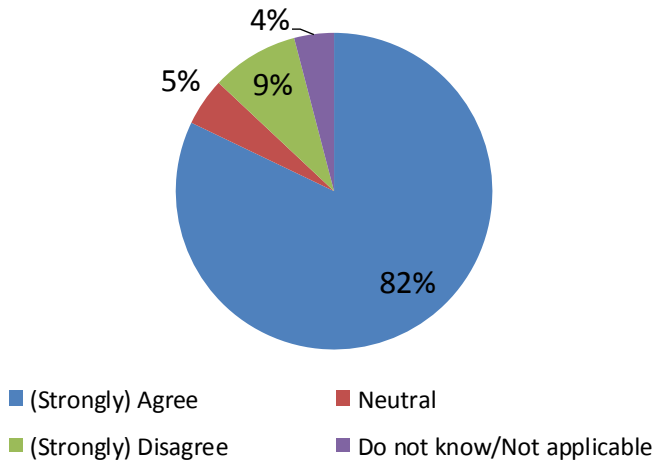
Impact of EU action

	(Very) Positive
Effective enforcement of the EU competition rules	92%
Legal certainty for businesses	85%
Cooperation within the European Competition Network	83%
Legitimacy of national competition authorities' decisions	83%
Investment climate/economic growth	79%
Costs for businesses	52%

Summary of results of the detailed questions

A. Resources and independence of the national competition authorities

A wide majority of stakeholders agree with the findings of the Commission's Communication on Ten Years of Regulation 1/2003 that it is necessary to further guarantee the independence of NCAs and that they have sufficient resources when enforcing the EU competition rules.



Per group of stakeholder, the replies are as follows:

Is it necessary to further guarantee the independence of NCAs and that they have sufficient resources when enforcing the EU competition rules?

	(Strongly) agree	Neutral	(Strongly) disagree	Do not know/not applicable
Academic institutions	100%	0%	0%	0%
Consumer organisations	100%	0%	0%	0%
Non-governmental organisation	86%	14%	0%	0%
NCA	100%	0%	0%	0%
Ministries	40%	20%	0%	20%
Company/SME/micro-enterprise/sole trader	71%	5%	10%	14%
Industry association	71%	12%	17%	0%
Think tanks	100%	0%	0%	0%
Consultancy/Law firm	100%	0%	0%	0%
Trade Unions	100%	0%	0%	0%

Many respondents consider that the following measures are needed to ensure NCAs' independence when they enforce the EU competition rules (stakeholders were asked to identify and rank the three measures they considered to be of most importance):

		Importance		
	Supported by: (# respondents)	1	2	3
Guarantees ensuring that NCAs are endowed with adequate and stable human and financial resources to perform their tasks	96	50%	28%	22%
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	97	45%	37%	18%
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	67	13%	31%	55%
Rules on conflicts of interest for the NCA's top management/board or decision-making body	46	20%	39%	41%
Rules on accountability of the NCA (e.g. requiring that NCAs report annually on their activities	37	19%	43%	38%
Other measures (*)	7	43%	0%	57%

(*)e.g. budgetary autonomy and transparent appointment procedures for NCAs' management

The majority of stakeholders prefer action to be taken at both EU and national level on resources (59%) and on independence (54%).

In terms of those who consider that EU action is appropriate, approximately 43% consider that a mixture of legislative and soft action is the best solution.

Per group of stakeholder, the replies are as follows:

Who should take action?

	Member States		EU		EU & Member States		Do not know/not applicable	
	Ind*.	Res.*	Ind.	Res.	Ind.	Res.	Ind.	Res.
Academic institutions	0%	0%	0%	0%	100%	100%	0%	0%
Consumer organisations	0%	0%	33%	0%	67%	100%	0%	0%
Non-governmental organisation	20%	33%	20%	17%	40%	50%	20%	0%
NCA	0%	0%	40%	36%	60%	64%	0%	0%
Ministries	20%	20%	20%	20%	60%	60%	0%	0%
Company/SME/micro-enterprise/sole trader	19%	10%	14%	5%	52%	70%	14%	15%
Industry association	25%	38%	19%	6%	50%	56%	6%	0%
Think tanks	50%	50%	0%	0%	50%	50%	0%	0%
Consultancy/Law firm	17%	25%	33%	25%	50%	50%	0%	0%
Trade Unions	0%	0%	100%	100%	0%	0%	0%	0%

Ind = Independence and **:Res = Resources

What type of EU action is most appropriate?

	Non-legislative	Mix legislative & non-legislative	Legislative	Do not know/not applicable
Academic institutions	0%	0%	100%	0%
Consumer organisations	0%	100%	0%	0%
Non-governmental organisation	17%	33%	17%	33%
NCA	4%	25%	70%	0%
Ministries	20%	0%	60%	20%
Company/SME/micro-enterprise/sole trader	15%	55%	15%	15%
Industry association	7%	27%	47%	20%
Think tanks	0%	0%	100%	0%
Consultancy/Law firm	9%	64%	18%	9%
Trade Unions	0%	0%	100%	0%

B. Enforcement toolbox of the national competition authorities

A lack of effective powers for NCAs is considered by stakeholders to be a problem, firstly, in terms of 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), and secondly, for cooperation within the ECN (e.g. it can impinge on the ability of NCAs to carry out inspections etc. on each other's behalf under Article 22 of Regulation 1/2003).

Divergences in NCAs' powers is seen as a problem in terms of legal certainty for business

(63%), costs for business (62%) and for cooperation in the ECN, e.g. different rules on what evidence can be gathered on behalf of another NCA (57%).

The table below shows the investigation and decision-making tools stakeholders think that NCAs need to have in order for them to be effective enforcers of the EU competition rules.

Tool	**% of support**
Power to inspect business premises	92
Power to inspect non-business premises	63
Power to issue requests for information	93
Power to effectively gather digital evidence	89
Power for the officials of one NCA (NCA A), which requests another NCA (NCA B) to carry out an inspection on its behalf, to assist in the inspection carried out by NCA B (e.g. to be present during the inspection, to have investigative powers)	80
Power to conduct interviews	90
Power to conduct sector inquiries	89
Power to adopt prohibition decisions	87
Power to adopt formal settlement decisions (formal decision and reduced fine)	86
Power to adopt commitment decisions	91
Power to issue interim measures	87
Power to impose dissuasive fines for non-compliance with investigative and decision-making powers	83
Power to compel compliance with investigative and decision-making powers, e.g., power to impose effective periodic penalty payments	76
Power to fully set enforcement priorities, including the power to reject complaints on priority grounds	75
Power for NCAs to act within a certain time period (limitation periods)	77
Power for one NCA (NCA A) to ask another NCA (NCA B) to notify acts (e.g. a Statement of Objections) on its 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/other legal representation there)	71
Power for one NCA (NCA A) to ask another NCA (NCA B) to enforce fining decisions on its 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/other legal representation there)	61

A majority of stakeholders consider that ensuring that the NCAs have an effective toolbox should be addressed by a combination of EU and national action.

Those who consider EU action appropriate prefer a mixture of legislative and non-legislative action (48%), with a smaller number opting for exclusive legislative action (41%).

Per group of stakeholder, the replies are as follows:

Who should take action?

	Member States	EU	EU & Member States	Do not know/not applicable
Academic institutions	0%	0%	100%	0%
Consumer organisations	0%	0%	100%	0%
Non-governmental organisation	33%	0%	67%	0%
NCA	0%	48%	52%	0%
Ministries	25%	25%	50%	0%
Company/SME/micro-enterprise/sole trader	6%	6%	76%	12%
Industry association	36%	36%	21%	7%
Think tanks	0%	0%	100%	0%
Consultancy/Law firm	0%	25%	75%	0%
Trade Unions	-	-	-	-

What type of EU action is most appropriate?

	Non-legislative	Mix legislative & non-legislative	Legislative	Do not know/not applicable
Academic institutions	0%		0%	100%
Consumer organisations	0%	100%	0%	0%
Non-governmental organisation	0%	75%	0%	25%
NCA	4%	20%	76%	0%
Ministries	0%	0%	100%	0%
Company/SME/micro-enterprise/sole trader	14%	43%	36%	7%
Industry association	14%	57%	29%	0%
Think tanks	0%	100%	0%	0%
Consultancy/Law firm	0%	73%	27%	0%
Trade Unions	-	-	-	-

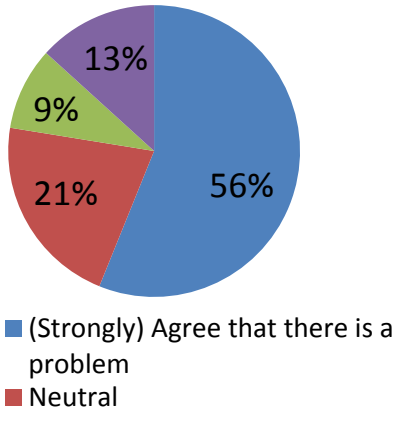
C. Powers of national competition authorities to fine undertakings

The public consultation has covered three main issues: the nature of the fines imposed by NCAs (criminal, civil or administrative); who can be fined (concept of undertaking, parental liability and succession); and fines methodologies/legal maximum of the fines.

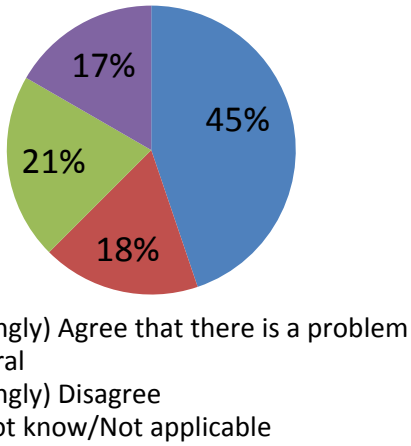
The graphs below show to what extent stakeholders considered that there are problems in the three areas identified:

Is it a problem that some NCAs impose only/primarily criminal / civil fines?

Criminal fines

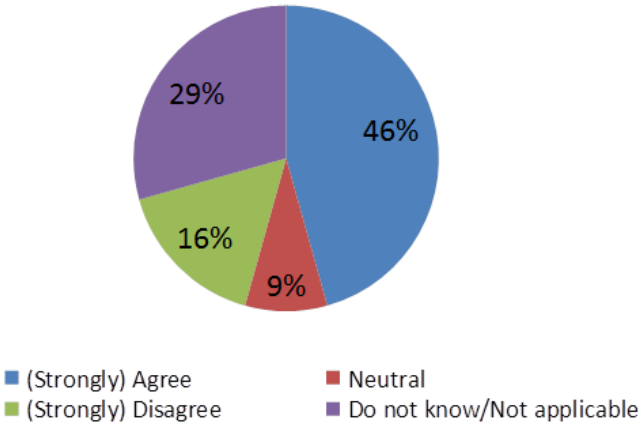


Civil fines



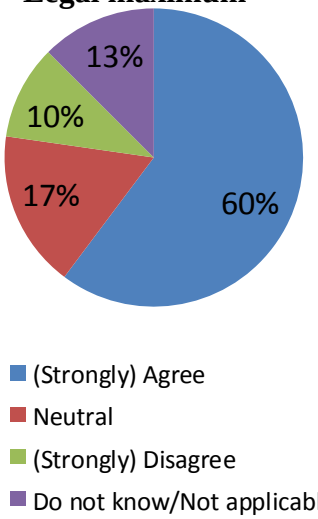
Regarding the measures which could be taken to address the issues identified in those Member States where no administrative fines are available, stakeholders' views are approximately evenly split between those proposing the introduction of a pure administrative system (27%), introducing administrative fines as a complement to the current criminal/civil systems (27%), or to take measures to make the current criminal/civil systems more effective (23%).

Who can be fined: is it a problem that some NCAs do not apply the concept of undertaking, parental liability and succession in line with the ECJ case law?

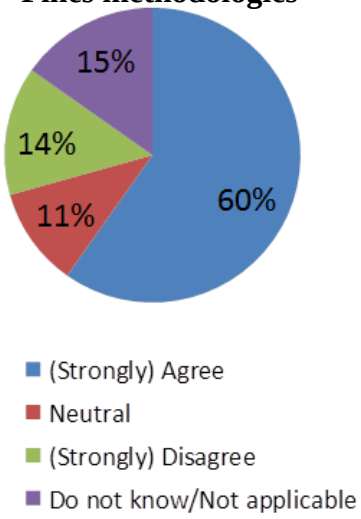


Are differences in legal maximum of the fines/fines methodologies a problem?

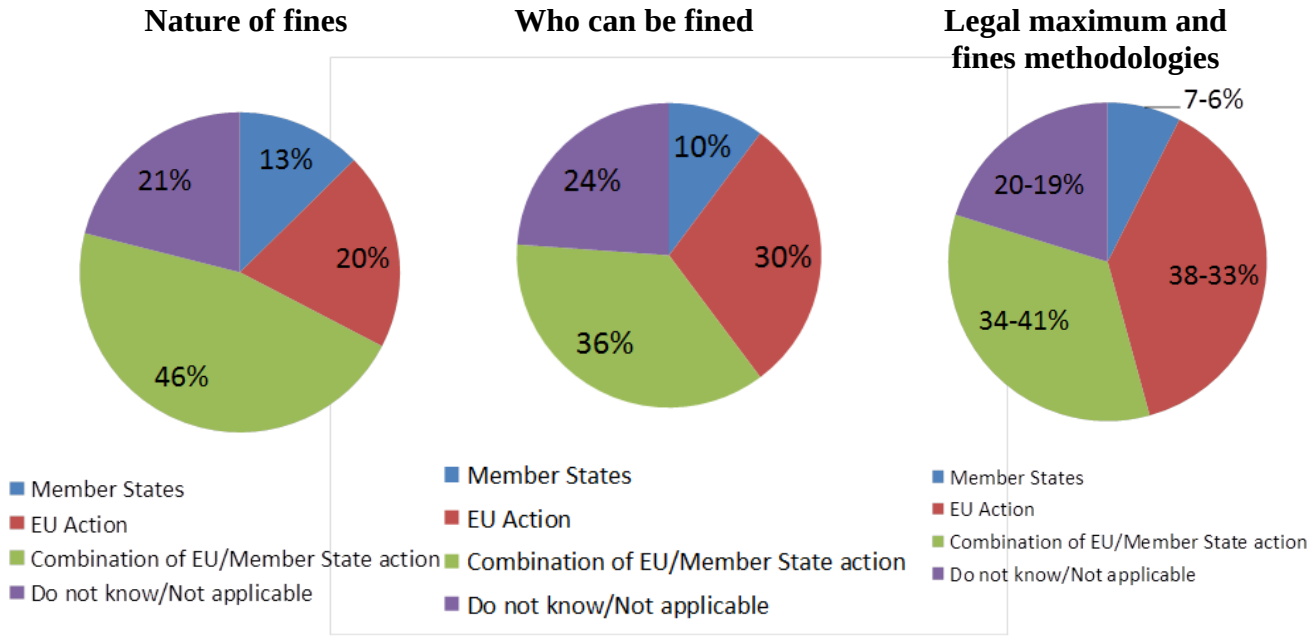
Legal maximum



Fines methodologies



With respect to who should take action on all of these three areas, stakeholders generally support either a combination of EU and Member States action or EU action alone.



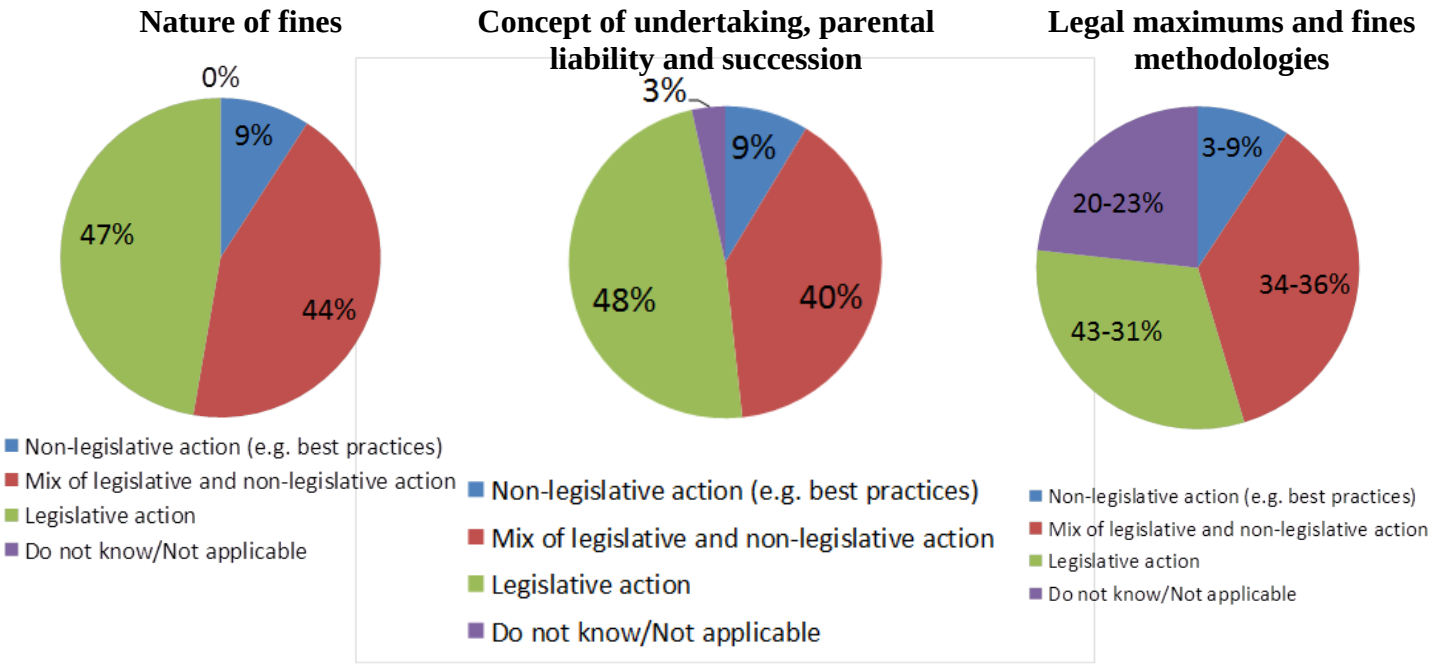
Per group of stakeholder, the replies are as follows:

Who should take action?(1: Member States; 2: EU; 3: EU & Member States; 4: Do not know/not applicable)

	Nature of fines				Who can be fined				Legal maximum			
	1	2	3	4	1	2	3	4	1	2	3	4
Academic institutions	0%	0%	100%	0%	0%	100%	0%	0%	0%	100%	0%	0%
Consumer organisations	0%	0%	100%	0%	0%	0%	100%	0%	0%	0%	100%	0%
Non-governmental organisation	33%	0%	67%	0%	60%	20%	0%	20%	0%	33%	33%	33%
NCA	5%	27%	36%	32%	0%	44%	44%	13%	0%	57%	35%	13%
Ministries	0%	0%	25%	75%	0%	25%	50%	25%	0%	25%	50%	25%
Company/SME/micro-enterprise/sole trader	14%	29%	43%	14%	14%	21%	43%	21%	7%	43%	29%	21%
Industry association	36%	14%	21%	29%	10%	30%	10%	50%	15%	31%	31%	23%
Think tanks	0%	0%	100%	0%	0%	0%	0%	100%	0%	50%	0%	50%
Consultancy/Law firm	0%	27%	45%	27%	11%	22%	33%	33%	30%	50%	10%	10%
Trade Unions	-	-	-	-	-	-	-	-	-	-	-	-

Finally, the majority of stakeholders considering that EU action should be taken have the view that such action should be either a mixture of legislative and non-legislative action or pure legislative action. In general, non-legislative action is supported by a minority of respondents.

What type of action is most appropriate?



Per group of stakeholder, the replies are as follows:

What type of EU action is most appropriate?

(1: Non-legislative; 2: Mix legislative & non-legislative; 3: Legislative; 4: Do not know/not applicable)

	Nature of fines				Who can be fined				Legal maximum			
	1	2	3	4	1	2	3	4	1	2	3	4
Academic institutions	0%	0%	100%	0%	0%	0%	100%	0%	0%	0%	100%	0%
Consumer organisations	0%	100 %	0%	0%	0%	100%	0%	0%	0%	100%	0%	0%
Non-governmental organisation	0%	100%	0%	0%	0%	0%	0%	100%	0%	60%	20%	20%
NCA	0%	21%	79%	0%	10%	25%	65%	0%	4%	25%	63%	8%
Ministries	100%	0%	0%	0%	33%	0%	67%	0%	25%	25%	25%	25%
Company/SME/micro-enterprise/sole trader	11%	44%	44%	0%	11%	44%	44%	0%	0%	29%	50%	21%
Industry association	25%	50%	25%	0%	0%	100%	0%	0%	0%	67%	11%	22%
Think tanks	0%	0%	100%	0%	-	-	-	-	0%	0%	50%	50%
Consultancy/Law firm	20%	40%	40%	0%	0%	60%	40%	0%	0%	20%	40%	40%
Trade Unions	-	-	-	-	-	-	-	-	-	-	-	-

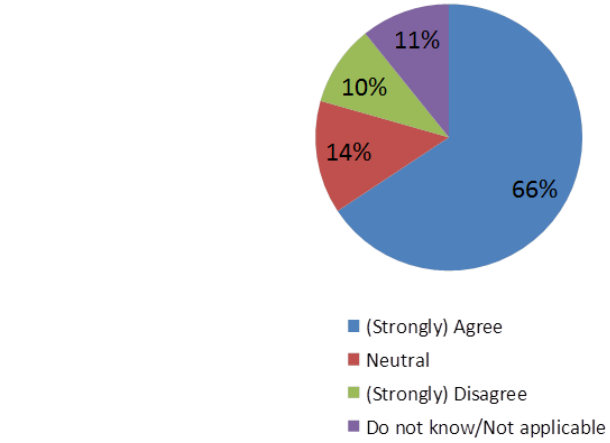
D. Leniency programmes

The public consultation has addressed four main topics: the need of a legal basis for leniency and divergences in leniency programmes; facilitating multiple applications for leniency; the protection of leniency and settlement material; and the interplay between leniency programmes and sanctions on individuals.

Legal basis for leniency and divergences in leniency programmes

The majority of respondents consider that the lack of a legal basis in EU law for leniency programmes is a problem:

Is the lack of EU legal basis for national leniency programmes a problem?

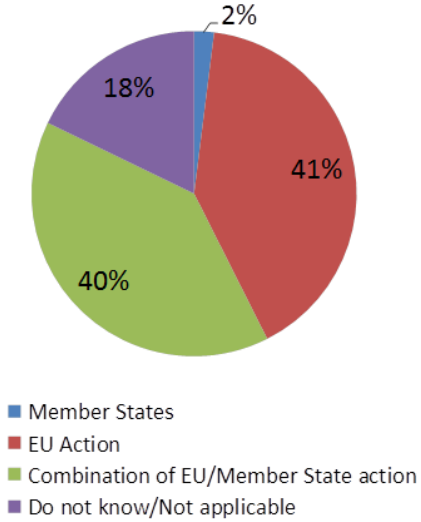


Moreover, 43% consider that the existence of divergences in the leniency programmes could have an impact on who can benefit from leniency and under which conditions (10% not sharing this view and 46% answering "do not know" or "not applicable"). This is considered to be a problem in terms of effective and consistent enforcement of EU competition law and legal certainty for business.

40% of respondents consider that the ECN Model Leniency Programme ensures a sufficient degree of alignment of Member States' leniency programmes. However 61% finds a lack of implementation of the ECN Model Leniency Programme by Member States, and 44% consider that additional rules are needed.

With respect to potential action, there is wide support for EU action either alone or combined with action by Member States. The type of EU action should be either a mix of legislative and non-legislative action or purely legislative.

Who should take action



What type of EU action is most appropriate?

Per group of stakeholder, the replies are as follows:

Who should take action?

	Member States	EU	EU & Member States	Do not know/not applicable
Academic institutions	0%	100%	0%	0%
Consumer organisations	0%	0%	100%	0%
Non-governmental organisation	0%	17%	67%	17%
NCA	0%	68%	27%	5%
Ministries	0%	25%	25%	50%
Company/SME/micro-enterprise/sole trader	0%	40%	40%	20%
Industry association	17%	17%	50%	17%
Think tanks	0%	100%	0%	0%
Consultancy/Law firm	0%	54%	23%	23%
Trade Unions	-	-	-	-

What type of EU action is most appropriate?

	Non-legislative	Mix legislative & non-legislative	Legislative	Do not know/not applicable
Academic institutions	0%	0%	100%	0%
Consumer organisations	0%	100%	0%	0%
Non-governmental organisation	0%	80%	20%	0%
NCA	5%	33%	62%	0%
Ministries	0%	50%	50%	0%
Company/SME/micro-enterprise/sole trader	8%	42%	50%	0%
Industry association	0%	100%	0%	0%
Think tanks	0%	50%	50%	0%
Consultancy/Law firm	0%	44%	56%	0%
Trade Unions	-	-	-	-

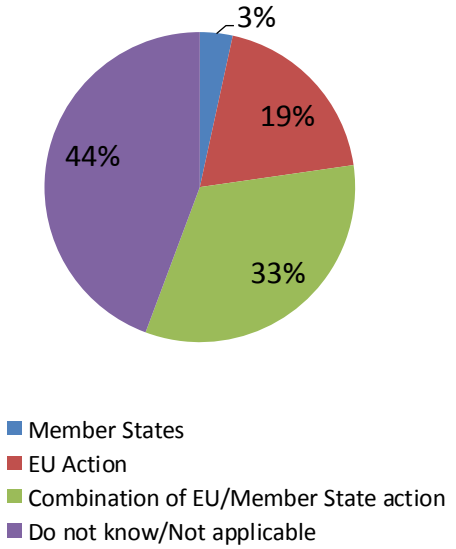
Multiple applications

Summary applications is a system set up by the ECN Model Leniency programme under which leniency applicants make a full application for leniency to the Commission and can make short form "summary applications" to NCAs on the basis of limited information, to protect their place in the leniency queue if the Commission decides not to take up, a part of, or the entire case. Only 19% of stakeholders consider they have experience or knowledge of the system of summary applications.

Divergences in the way summary applications are applied are considered to be a problem by nearly half of respondents in terms of the effective and consistent application of EU rules, legal certainty for business and incentives to apply for leniency.

With respect to taking action, the majority supports EU action either combined with action by Member States, or exclusively by the EU action. The type of EU action should mainly be either a mix of legislative and non-legislative action or purely legislative.

Who should take action?



What type of EU action is most appropriate?

Per group of stakeholder, the replies are as follows:

Who should take action?

	Member States	EU	EU & Member States	Do not know/not applicable
Academic institutions	0%	100%	0%	0%
Consumer organisations	0%	0%	50%	50%
Non-governmental organisation	0%	17%	50%	33%
NCA	10%	35%	25%	30%
Ministries	0%	0%	25%	75%
Company/SME/micro-enterprise/sole trader	0%	33%	25%	42%
Industry association	10%	0%	40%	50%
Think tanks	0%	50%	50%	0%
Consultancy/Law firm	0%	20%	30%	50%
Trade Unions	-	-	-	-

What type of EU action is most appropriate?

	Non-legislative	Mix legislative & non-legislative	Legislative	Do not know/not applicable
Academic institutions	0%	0%	0%	100%
Consumer organisations	0%	100%	0%	0%
Non-governmental organisation	0%	75%	25%	0%
NCA	8%	50%	42%	0%
Ministries	0%	100%	0%	0%
Company/SME/micro-enterprise/sole trader	14%	43%	43%	0%
Industry association	0%	75%	25%	0%
Think tanks	0%	50%	50%	0%
Consultancy/Law firm	0%	60%	40%	0%
Trade Unions	-	-	-	-

Protection of leniency and settlement material

About half of the respondents are in favour of extending the protection provided for by the Damages Directive (protection from use/disclosure in civil damages actions before EU courts) to other types of proceedings (another 48% replied that they "do not know"). A broad majority of these stakeholders support extending such protection to the following types of proceedings:

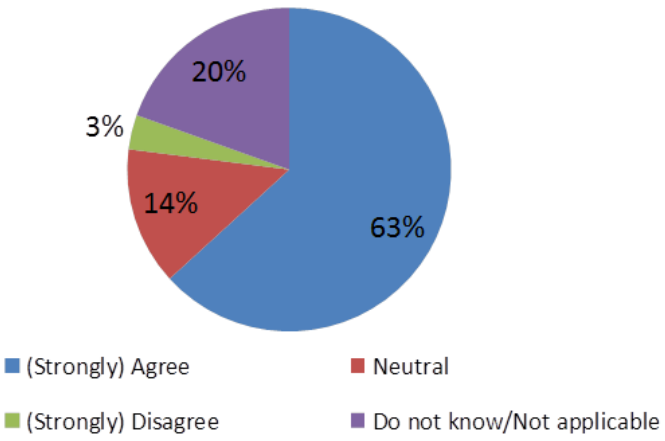
Civil proceedings other than damages actions (for example injunctive relief)	79%
Administrative proceedings (such as proceedings before tax authorities or regulators)	72%
Criminal proceedings	69%
Proceedings under the "transparency" rules/public access to documents	69%

They consider that measures to protect leniency and settlement materials should be addressed through a combination of EU and Member State action or through EU action alone. In terms of EU action, a majority is in favour of legislative action.

Interplay of corporate leniency programmes with sanctions on individuals

A majority of stakeholders considers it a problem that only a few Member States have arrangements to protect employees of companies cooperating under a leniency programme from individual sanctions.

Is it a problem that only a few MS protect employees of companies applying for leniency from individual sanctions?



Also a majority is in favour of establishing safeguards to protect such employees, mainly regarding the ones detailed in the table below:

Current employees	74%
Former employees	64%
Protection from administrative sanctions in all MS (director disqualification orders)	60%
Protection from criminal sanctions in all MS (imprisonment)	62%
Employees of companies which obtain immunity	72%
Employees of companies which benefit from a reduction in fines	60%
Employees of leniency applicants with any NCA	67%
Employees of leniency applicants with the Commission	64%

They consider that the interplay between corporate leniency programmes and sanctions on individuals should be addressed through a combination of EU and Member State action or through EU action alone. In terms of EU action, a majority favours a mix of legislative and soft action.

Per group of stakeholder, the replies are as follows:

Who should take action?

	Member States	EU	EU & Member States	Do not know/not applicable
Academic institutions	0%	100%	0%	0%
Consumer organisations	0%	0%	50%	50%
Non-governmental organisation	0%	20%	60%	20%
NCA	5%	33%	33%	29%
Ministries	25%	25%	25%	25%
Company/SME/micro-enterprise/sole trader	23%	15%	31%	31%
Industry association	10%	10%	50%	30%
Think tanks	0%	0%	100%	0%
Consultancy/Law firm	10%	10%	30%	50%
Trade Unions	-	-	-	-

What type of EU action is most appropriate?

	Non-legislative	Mix legislative & non-legislative	Legislative	Do not know/not applicable
Academic institutions	0%	0%	100%	0%
Consumer organisations	0%	100%	0%	0%
Non-governmental organisation	0%	100%	0%	0%
NCA	0%	14%	86%	0%
Ministries	0%	0%	100%	0%
Company/SME/micro-enterprise/sole trader	0%	67%	33%	0%
Industry association	0%	83%	17%	0%
Think tanks	0%	0%	100%	0%
Consultancy/Law firm	0%	50%	50%	0%
Trade Unions	-	-	-	-

II. Public Hearing co-organised by the ECON Committee of the European Parliament and the Commission

On 19 April 2016, the Committee on Economic and Monetary Affairs (ECON) of the European Parliament and DG Competition of the European Commission co-organised a Public Hearing. The purpose of the Public Hearing was to provide experts and stakeholders an additional opportunity to share their views on the Commission's public consultation on empowering national competition authorities to be more effective enforcers.

At the hearing, Commissioner Vestager presented the results of the Public Consultation.

It was followed by two panel discussions on the four topics covered by the Public Consultation. The two panels consisted of experts from different areas, including the business and legal community, consumer associations, academics and the judiciary. The first panel addressed the enforcement powers and independence of NCAs while the second panel discussed sanctions and leniency in the Member States.

The presentations by panellist were followed by an exchange of views with Members of the ECON Committee and a broad range of stakeholders (around 150 attended the public hearing including, academia, business (large and small), consultancy, industry associations, law firms, press, private individuals and public authorities).

The objectives of the initiative were widely agreed with and supported. Overall, it was considered that the goal is not just to strengthen the powers of individual NCAs, but to reinforce the EU enforcement system as a whole.

III. Further consultation of stakeholders

The initiative is developed in continuous cooperation and consultation with the NCAs and the relevant national Ministries.

Two meetings have already been held with relevant Ministries to get their preliminary feedback. On 12 June 2015, Ministries were informed about the main issues that had been identified by the Commission. A second meeting with the Ministries and NCAs was held on 14 April 2016 in which they were informed about the results of the Public Consultation.

The Commission has also engaged in regular dialogue with other stakeholders, in particular, consumer organisations (e.g. BEUC) and the business including SMEs (e.g. BusinessEurope) and legal communities (e.g. European Competition Lawyers Forum (ECLF)), through conferences and bi- or multilateral meetings and will continue to do so.

Annex III - Who is affected by the initiative and how

The following stakeholders would be affected by the initiative as set out in the preferred policy option 3:

National competition authorities

NCAs would be the first stakeholders affected by the initiative, and together with businesses, the most directly affected. NCAs play a key role in making sure that the single market works well and fairly to the benefit of both businesses and consumers throughout Europe. NCAs would be affected by the initiative as it aims precisely at removing the gaps and limitations which they currently face in their means and instruments to enforce the EU competition rules and that mark their ability to be more effective enforcers. However, not all NCAs would be affected in the same way, since the changes required would be dependent on the precise starting point of each national legal framework, most of them would need to undertake changes to address the problems as identified in section 2.2 of the Impact Assessment.

Once implemented, the initiative would provide all NCAs with the minimum means and instruments to find evidence of infringements, to fine companies which break the law, to act independently when enforcing the EU competition rules and to have the resources they need to perform their tasks, and to have at their disposal leniency programmes that are more effective. This will allow the NCAs to take effective enforcement action and enable them to cooperate better with other competition authorities in the EU leading to more competition on markets. More particularly, it will ensure that the system of cross-border information gathering and exchange put in place by Regulation 1/2003 works effectively. This might create some additional costs for some public authorities, if for example new tools need to be provided, but these costs are expected to be negligible.

Practically all NCAs have replied to the public consultation, showing their strong interest and confirming the impact that the initiative could have on them. The public consultation has also shown their support for the initiative: 100% think that action should be taken to empower NCAs to be more effective enforcers of EU competition rules, and that this action should be taken either by the EU alone (40%) or in combination with the Member States (60%). NCAs also consider that EU action should be either exclusively legislative (56%) or combined with soft action (40%).

Support for taking action not only comes from NCAs; 60% of ministries from Member States that have replied to the questionnaire consider that action should be taken to empower NCAs to be more effective enforcers (vs 40% with a neutral position. They consider, that action should be taken either by the EU alone (25%) or in combination with Member States (50%), and that in case of EU action, it should be exclusively legislative (25%) or combined with soft action (50%).

Business

Businesses would be, together with NCAs, the group of stakeholders mostly affected by the initiative.

Firstly, like consumers, businesses also suffer from the consequences of diminished competition enforcement, as they equally face the negative impact of higher prices from their suppliers and the lower levels of innovation and choice, as well as from attempts of competitors infringing competition rules to foreclose them from the market. The initiative

would boost competition enforcement by NCAs in Europe and create a more level playing field in which a competition culture prevails. This would be to the benefit of all companies, both large and small, as it would enable them to compete more fairly on their merits and grow throughout the single market. This would also incentivise them to innovate and offer a better range of higher quality products and services that meet consumers' expectations.

Secondly, the initiative would also benefit businesses subject to investigations for alleged infringements of EU competition rules in several respects. The introduction of common minimum means and instruments for NCAs would reduce divergent outcomes for companies, making the application of the EU competition rules more predictable and increasing legal certainty across the EU. Companies may also benefit from enhanced procedural rights particularly in those jurisdictions in which there is room for improvement, as well as more legal certainty when applying for leniency. Companies would face initial adaptation costs in terms of familiarisation with possibly new procedural rules. However, overall, the costs for businesses involved in cross-border activities in the single market to adapt to different legal frameworks would be reduced or even fall.

On the other hand, for those businesses infringing the law in some jurisdictions it would become more difficult to conceal evidence or to escape fines, or to benefit from low fines.

The public consultation has also shown the strong interest of this group of stakeholders (companies and industry associations, forming the second group with the highest number of replies after public authorities) in this initiative: more than 60% think that action should be taken to empower NCAs to be more effective enforcers of EU competition rules, and that this action should be taken either by the EU alone (12% for companies and 27% for industry associations) or in combination with the Member States (66% for companies and 40% for industry associations). They also consider that EU action should be either exclusively legislative (23%/12%) or combined with soft action (50%/37%).

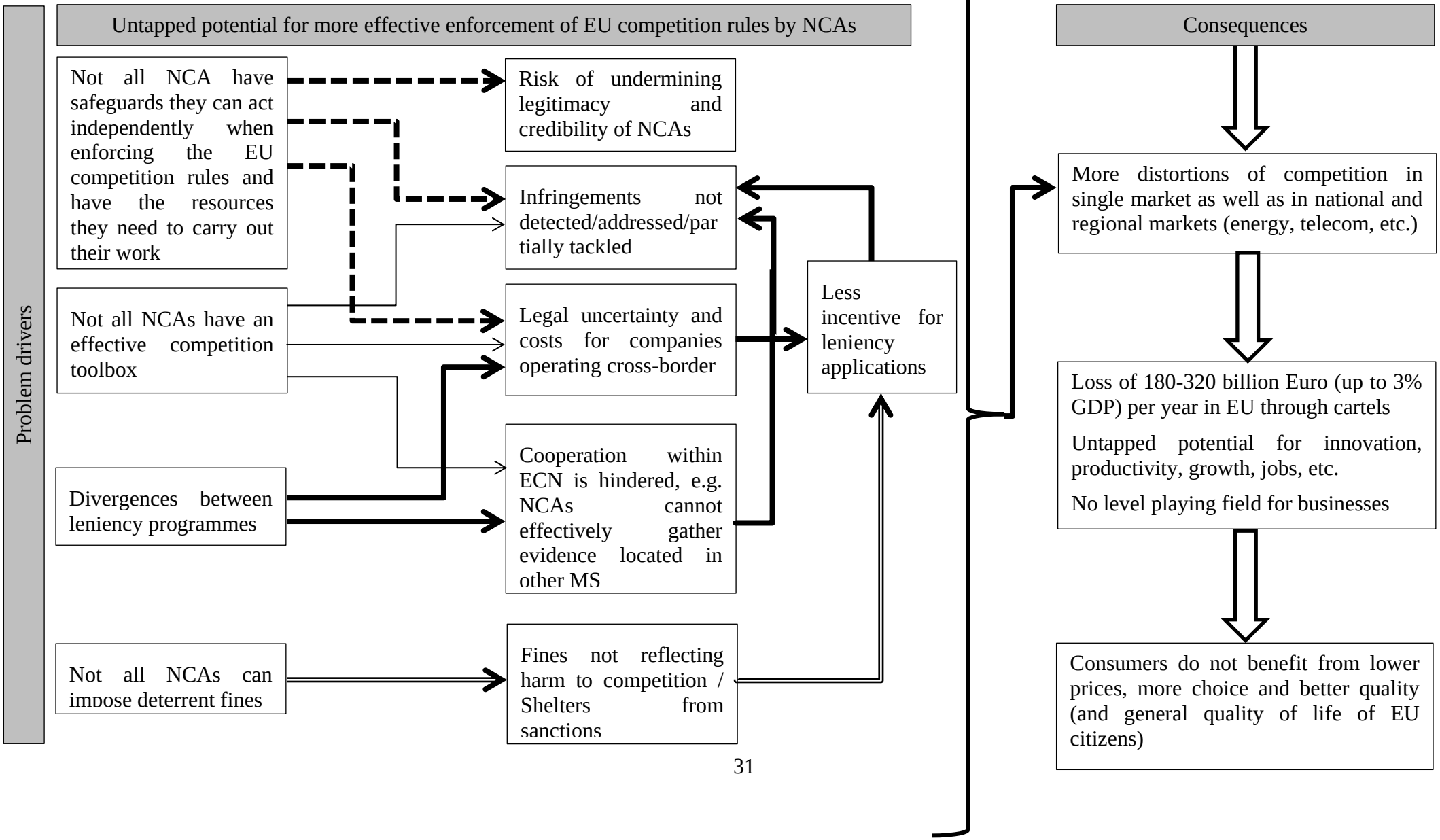
In addition, the initiative would not disproportionately impact SMEs compared to larger companies. While in principle all companies are subject to the EU competition rules provided there may be an effect on trade between Member States, many agreements/behavior of SMEs fall outside the scope of the EU competition rules as they not necessarily have such an effect on trade between Member States or appreciably restrict competition. SMEs are also unlikely to hold dominant positions, that is, substantial market power, the abuse of which would be caught by the EU competition rules.

Consumers

Although consumers would not be strictly speaking directly affected by the initiative, they would benefit directly from the benefits that stronger competition would bring to the market. EU competition policy aims at making markets work better to the benefit of consumers across the EU. It encourages companies to compete fairly by creating a wide choice of products for consumers at lower prices and with better quality. For consumers, the lack of means and instruments and capacity of national competition authorities (NCAs) to un-leash their full potential to enforce the EU competition rules means that they miss out on these benefits of competition enforcement. By making sure that NCAs have all the minimum means and instruments and adequate resources they need to be effective enforcers of the EU competition rules, consumers will get the same level of protection across Europe from business practices that keep the prices of goods and services artificially high and enhances their choice of innovative goods and services at affordable prices.

The importance of the initiative for consumers is reflected by the replies of eight consumer organisations to the public consultation. They consider that action should be taken to empower NCAs to be more effective enforcers of EU competition rules (100%), and that this action should be taken by the EU in combination with the Member States (100%). They also believe that EU action should therefore be a combination of EU action and soft action (100%).

Annex IV - Problem tree



Annex V - Replies of stakeholders on the tools NCAs need to effectively enforce

Tool	Percentage of stakeholders who agree/strongly agree
Power to inspect **business premises**	92
Power to inspect **non-business premises**	63
Power to issue **requests for information**	93
Power to effectively gather **digital evidence**	89
Power for the **officials of one NCA (NCA A),** which requests another NCA (NCA B) to carry out an inspection on its behalf, to **assist in the inspection carried out by NCA B** (e.g. to be present during the inspection, to have investigative powers)	80
Power to conduct **interviews**	90
Power to conduct **sector inquiries**	89
Power to adopt **prohibition decisions**	87
Power to adopt **formal settlement decisions** (formal decision and reduced fine)	86
Power to adopt **commitment decisions**	91
Power to issue **interim measures**	87
Power to impose dissuasive **fines for non-compliance** with investigative and decision-making powers	83
Power to **compel compliance** with investigative and decision-making powers, e.g., power to impose effective periodic penalty payments	76
Power to **fully set enforcement priorities**, including the power to reject complaints on priority grounds	75
Power for NCAs to act within a certain time period (**limitation periods**)	77
Power for **one NCA (NCA A) to ask another NCA (NCA B) to notify acts** (e.g. a Statement of Objection) on its 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)	71
Power for **one NCA (NCA A) to ask another NCA (NCA B)** to **enforce fining decisions** on its 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)	61

Annex VI - Issues related to legal maximum, fines calculations and who can be fined

Legal Maximum

The legal maximum is calculated as a percentage of a given turnover in most Member States. There are however significant differences between Member States in the way the legal maximum is calculated in terms of the percentages applied, and the turnover to which such percentages are applied.

- Percentages applied: While many NCAs apply a percentage of 10%, in other Member States the percentages applied are lower (up to 5%) for less serious infringements. Similarly, in one Member State, a cap of 5% is imposed on the turnover of the direct infringer only for vertical anti-competitive practices between companies operating at different levels of the supply chain i.e. agreements between a manufacturer and its distributor and abuses of dominant position contrary to Article 102. In another Member State, the cap is generally set at 10% for competition infringements, but for the specific case of cartels, the cap is 10% for each year of infringement up to a maximum of 4 years: this means that the maximum can reach 40% for cartels lasting 4 or more years. Moreover, these amounts can be doubled for cartels in cases of recidivism (that is, if a company has already been found to have breached competition law), with the result that the legal maximum could potentially reach 80% of worldwide turnover.
- Turnover to which percentages are applied: Most NCAs when calculating the legal maximum use the worldwide turnover of the corporate group that has been held liable for the infringement, but some base it solely on the national turnover or the turnover of the direct infringer. In at least one case there are also absolute maximum amounts. The entities for which the turnover is considered (the undertaking or the direct infringer) and whether the geographic scope of such turnover is worldwide or national make a big difference to the maximum level of the fine.

For example, in a Member State, only the direct turnover of the infringer is used and fines are limited to €16 million. For breaches of Article 102 TFEU, maximum fines of only €400 000 can be imposed. Such low legal maximums are highly unlikely to reflect the harm caused to competition and fines are likely to be under-deterrent, particularly for large multinational groups.

The table below gives an overview of how NCAs calculate the legal maximum of the fines.

Basis for calculation of legal maximum for fines

	Geographic scope of the turnover	
Entity's turnover:	Worldwide	National
Undertaking	11 NCAs	3 NCAs
Direct infringer	9 NCAs	4 NCAs

Fines calculation

Most Member States apply methodologies based on common parameters, such as the sales achieved by the infringer and the gravity and duration of the infringement. Some Member States however do not have clear rules on how fines are calculated. For those NCAs which do apply fining parameters, there are a number of issues:

- Fines risk being unrelated to the infringement: while many NCAs use sales related to the infringement/market affected, others use the total turnover of the undertaking which can include sales of other unrelated products.
- Fines risk being unrelated to the harm caused to competition: there is a wide range of percentages between NCAs for taking into account the gravity of the infringement[1] and in one NCA the fine is based on fixed amounts.
- The actual duration of the infringement is not always reflected in the fine and consequently does not reflect the harm to competition: many Member States base the fine on the sales over the entire infringement period – as a way to reflect as accurately as possible the harm caused to competition[2] – some Member States apply reduction factors so that each year of infringement counts less, and others apply still other methods based on single increases of the fine regardless of the exact number of years of infringement.[3]

These issues can have a significant impact on the level of fines. The amount of the fine may not reflect the harm caused to competition and be below the amount of gains improperly made as a result of the infringement. Very different fines may be imposed for the same infringement, meaning that the deterrent effect of fines differs widely across Europe.

Who can be held liable for paying the fine

Another aspect which may mean that fines do not reflect the harm to competition is limitations regarding who can be held liable for paying the fine. Not all NCAs can hold parent companies liable for infringements committed by subsidiaries under their control despite the long-established case law of the European Court of Justice according to which parent companies can be held responsible for infringements of their subsidiaries.[4] This sends a clear signal to the entire corporate group that the absence of good corporate governance and

---

1 Gravity is normally accounted for as a percentage of the sales that are used as the basis for the calculation of the fine. The Commission applies a percentage of up to 30%. Most Member States have the same range, but some have lower percentages. For Member States using the sales related to the infringement, four apply a percentage up to 10%, and another one up to 3% in the relevant market. For the Member States using the total turnover of the undertaking, two apply a percentage up to 7%/8% and another one up to 3%.

2 This is normally done by calculating the fine for the first year of infringement (starting amount) and multiplying it by number of years of duration of the infringement.

3 One NCA multiplies the starting amount of the fine by 1 for durations of 1 year or less, by 3 for durations of more than 10 years, and by a coefficient between 1 and 3 for intermediate durations. Another NCA increases the fine by 0.5% of total turnover for up to five years durations, and by between 0.5%-1% for longer durations. Another NCA, if the durations are longer than 1 year, increases the fine by 100% for abuses and by 200% for agreements.

4 Case C-97/08 P *AkzoNobel NV v Commission* [2009] ECR I-8237. It has to be shown that the parent company exercises decisive influence over the subsidiary that committed the infringement

compliance with competition law will not remain unpunished. It allows the legal maximum of the fine to be set on the basis of the overall economic strength of the corporate group, instead of only that of the subsidiary.

In addition, several NCAs cannot hold legal and economic successors of an infringer liable for fines or there is uncertainty about whether national courts would uphold the application of these principles, which means that companies can escape fines simply by merging with other companies or through corporate restructuring. The table below provides an overview of the application of parental liability and succession by NCAs:

Application of parental liability and succession by NCAs

	Can parent companies be held liable?	Can legal succession be applied?	Can economic succession be applied?
YES	17	21	14
YES (with certain restrictions)[5]	2	-	-
YES (limited practice)	2	5	6
NO	5	2	8

Moreover, there are NCAs that cannot effectively fine associations of undertakings, such as trade associations, either because national legislation prevents this possibility or because NCAs cannot impose fines that take into account the turnover of their members.[6] This is a problem as trade associations typically have very little turnover, compared to the turnover of their members. NCAs need to be able to also fine the members of the association benefitting from the infringement. The fines imposed by NCAs without this power are often symbolic and do not reflect the harm to competition.

[5] One NCA cannot apply the principle of "presumption" (meaning that in cases of 100% ownership it is presumed that the parent company has exercised decisive influence on the subsidiary and can be held liable), while two others can hold liable only one legal entity, either the direct infringer or its parent, but not both.

[6] In one Member State it is not possible to fine associations of undertakings, and in nine Member States the fine can only be based on the turnover of the association, and not on the turnover of its members.

Annex VII - Results of hypothetical cartel case for a duration of 3.75 years

To assess the impact of divergences in fining methodologies, the NCAs were asked to calculate the fine that they would impose in a hypothetical case.

The case was a simple cartel with several types of companies, ranging from companies with sales focussed at national level or worldwide sales, companies specialised in the manufacture of one product or multiproduct companies, and small single companies or large groups.

The two tables below show the different types of companies considered in the hypothetical in terms of geographic scope, product scope and corporate structure (first table), and the hypothetical sales attributed to each company/group (second table).

Companies involved in the infringement

Direct infringer	Geographic scope, product scope and corporate structure	Direct infringer	Geographic scope, product scope and corporate structure
A	National focus Production focussed on Product X Single company	F	Worldwide presence Producer of several products Single company
B	National focus Producer of several products Single company	G	Worldwide presence Production focussed on Product X Belongs to a group with parent G*
C	National focus Production focussed on Product X Belongs to a group with parent C*	H	Worldwide presence Producer of several products Belongs to a group with parent H*
D	National focus Producer of several products Belongs to a group with parent D*	I	Worldwide presence Producer of several products Belongs to a large group with parent I*
E	Worldwide presence Production focussed on Product X Single company	J	Worldwide presence Producer of several products Belongs to a very large group with parent J*

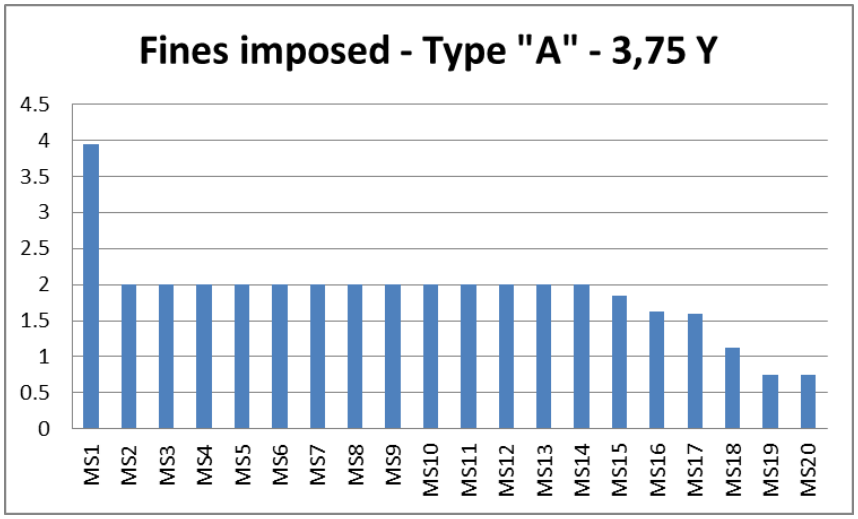
Sales affected by the infringement and turnovers (Million EURO)

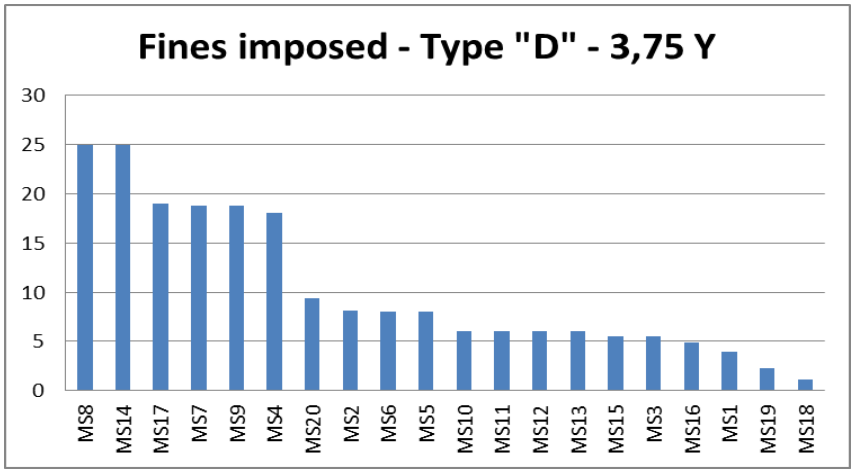
	Affected sales		Total turnover of the direct infringer		Total turnover of the Undertaking (EU meaning)	
Company	National	Worldwide	National	Worldwide	National	Worldwide
A	20	20	20	20	20	20
B	20	20	60	60	60	60
C	20	20	20	20	80	80
D	20	20	60	60	250	250
E	20	40	20	40	20	40
F	20	40	60	120	60	120
G	20	40	20	40	80	650
H	20	40	60	120	200	2000
I	20	40	60	120	750	7500
J	20	40	60	120	3250	32500

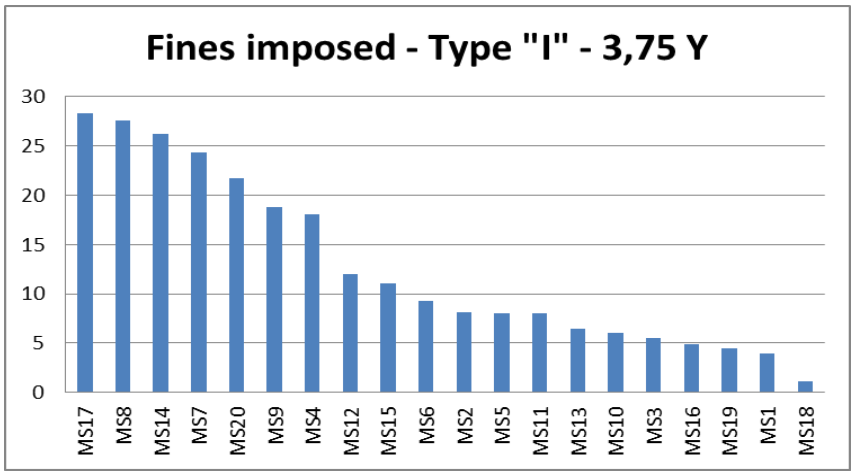
The hypothetical case also covered a range of different durations, from short durations of some months up to long durations of almost 9 years.

The results showed that the fines imposed by the different NCAs could range from small differences to significant variations depending on the specific scenario considered.

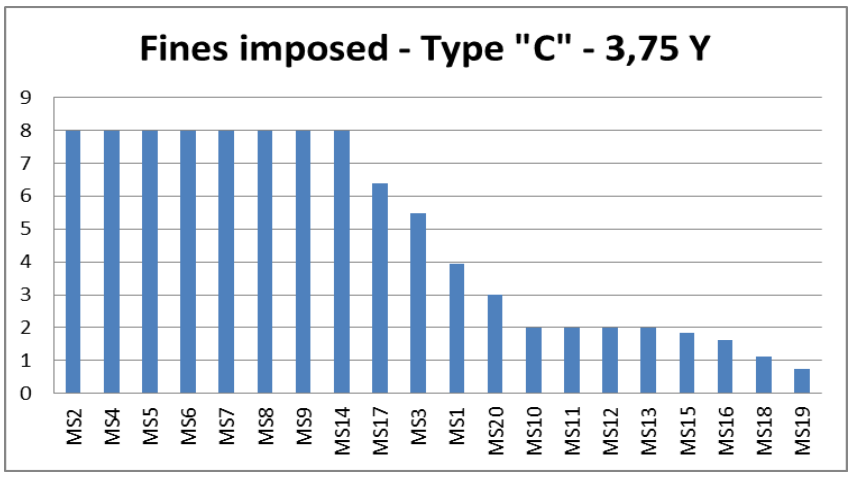
For example, while the differences in the fines are not very high in the case of a company with sales at national level only, producing one product and that does not belong to a wider corporate group (company type "A"), the differences between the fines increase with companies that, although also having a national focus, produce other products or belong to a corporate group (type "D"), and become significant with large multiproduct and multinational groups (type "I" in the example).







As shown in the example below, differences in the fines are also significant in the cases of smaller groups, such as type "C" companies.



Annex VIII - Article in German press

03.02.2015

Wirtschafts Woche

Drucken

Sünder schlägt Fahnder

Wurstkönig Tönnies trickst das Kartellamt aus

von Harald Schumacher und Mario Brück

Mit einem raffinierten Konzernumbau will sich Wurstkönig Clemens Tönnies einem Millionenbußgeld entziehen. Das kann zur Blaupause für andere Kartellsünder werden. Kartellamtschef Andreas Mundt fordert schärfere Gesetze.

Sünder ohne Buße: Unternehmer Clemens Tönnies findet ein Schlupfloch im Paragrafendickicht - und entgeht so möglicherweise einer hohen Kartellstrafe.

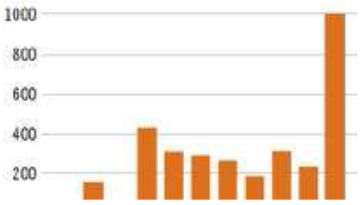
Bild: dpa/Montage

Wie stolz Bundeskartellamtspräsident Andreas Mundt auf seine Behörde und wie sicher er sich seiner Sache ist, offenbarte er kurz nach der Verhängung der drakonischen Bestrafung des Wurstkartells im Juli 2014: „Wir haben fünf Jahre ermittelt, sehr akribisch, nicht anders als eine Staatsanwaltschaft.
Es hat Durchsuchungen gegeben, Zeugen mit eindeutigen, belastbaren, detaillierten, glaubhaften Einlassungen. Es hat Notizen, E-Mails gegeben", referierte der Kartelljäger: „Elf Unternehmen haben mit uns kooperiert und letzten Endes die Tat eingeräumt. Das alles fügt sich ineinander und erzeugt für uns ein klares Bild."

Mundt auf der Höhe seiner Macht: Die Bußgeldsumme gegen 21 Wursthersteller sowie 33 Manager und Eigentümer der Unternehmen war mit 338 Millionen Euro fast so hoch wie die ebenfalls 2014 verkündete Strafe gegen das Bierkartell.

Desaster für das Kartellamt

Ein halbes Jahr später wird der Triumph zum Desaster. Der WirtschaftsWoche liegen Unterlagen vor, aus denen sich ergibt, dass Mundt vermutlich mehr als ein Drittel des Wurstbußgeldes in den Wind



Vom Bundeskartellamt verhängte Bußgelder (zum Vergrößern bitte anklicken)

schreiben muss. Schuld sind zwei kurze Briefe, die im Januar bei der Bonner Behörde eingingen und zwei der je 300 Seiten starken Bußgeldbescheide zu Makulatur machen.

Die Kartellanwälte der Wursthersteller Böklunder und Könecke teilen in wenigen Zeilen mit, dass die beiden Unternehmen nicht mehr existieren und im Handelsregister gelöscht wurden. Folge: Mundt kann rund 70 Millionen Euro bei Böklunder und rund 50 Millionen Euro bei Könecke nicht mehr eintreiben. Ob es Rechtsnachfolger gibt, die zahlen müssen, ist nach Aktenlage äußerst fraglich.

Die größten Kartelle

Alles anzeigen

▸ **Platz 10**

Branche: Kautschuk

Kartellmitglieder: ENI, Bayer, Shell, Dow, Unipetrol, Trade-Stromil

Verhängte Geldbuße: 519 Millionen €

Jahr: 2006

▸ **Platz 9**

Branche: Erdgas

Kartellmitglieder: E.On, GdF

Verhängte Geldbuße: 640 Millionen €

Jahr: 2009

▸ **Platz 8**

Branche: Gasisolierte Schaltanlagen

Kartellmitglieder: Siemens, ABB, Alstom, Areva, Fuji, Hitachi, Mitsubishi, Toshiba

Verhängte Geldbuße: 751 Millionen €

Jahr: 2007

▸ **Platz 7**

Branche: Vitamin

Kartellmitglieder: Hoffmann-La Roche, BASF, Aventis, Solvay, Merck, Daiichi, Eisai, Takeda

Verhängte Geldbuße: 791 Millionen €

Jahr: 2001

Platz 6

Branche: Luftfracht

Kartellmitglieder: Air France, British Airways

Verhängte Geldbuße: 799 Millionen €

Jahr: 2010

Platz 5

Branche: Kugellager

Kartellmitglieder: SKF, Schaeffler, JTEKT, NSK, NFC, NTN

Verhängte Geldbuße: 953 Millionen €

Jahr: 2014

Platz 4

Branche: Aufzüge und Rolltreppen

Kartellmitglieder: ThyssenKrupp, Otis, KONE, Schindler

Verhängte Geldbuße: 992 Millionen €

Jahr: 2007

Platz 3

Branche: Autoglas

Kartellmitglieder: Saint-Gobain, Asahi, Pilkington, Soliver

Verhängte Geldbuße: 1384 Millionen €

Jahr: 2008

▸ **Platz 2**

Branche: Fernsehröhren und Monitore

Kartellmitglieder: Philips, LG Electronics, Samsung, Panasonic, Toshiba, Technicolor Verhängte Geldbuße: 1471 Millionen €

Jahr: 2012

▸ **Platz 1**

Branche: Manipulation Derivate Euribor/ Libor/Yen

Kartellmitglieder: Deutsche Bank, Royal Bank of Scotland, Citigroup, Société Générale, JP Morgan, RP Martin

Verhängte Geldbuße: 1710 Millionen €

Jahr: 2013

Grund ist eine tief greifende Umstrukturierung beim größten deutschen Wurstkonzern Zur Mühlen, der dem Fleischtycoon und Schalke-04-Boss Clemens Tönnies privat gehört. Die soll vordergründig Synergieeffekte in der verschachtelten Unternehmensgruppe heben, zu der auch Böklunder und Könecke gehören. Alle Beteiligten machen jedoch keinen Hehl daraus, dass es nicht nur um die Schaffung eines schlagkräftigeren Konzerns geht.

„Aufgrund einer Umstrukturierung kann eine Kartellbuße entfallen beziehungsweise können die Verteidigungsmöglichkeiten von Unternehmen erweitert werden", sagt Matthias Blaum von der Düsseldorfer Kanzlei Hengeler Mueller, dessen Juristenteam die neue Struktur der Zur-Mühlen-Gruppe ersonnen hat.

Gelingt der Tönnies-Trick, wäre das für Mundt die größte Schlappe seiner siebenjährigen Amtszeit. Die Masche könnte zur Blaupause werden für andere Kartellsünder.

Zahmes Kätzchen statt wilder Tiger

Der Fall lässt die einflussreiche Behörde plötzlich als zahnlosen Tiger erscheinen. Das passt nicht zur öffentlichen Wahrnehmung der stetig wachsenden Macht der Wettbewerbshüter:

Seit die Kronzeugenregelung Bußgeldfreiheit verspricht, bringt sie immer mehr Kartellsünder dazu, sich selbst und die Mittäter zu verraten. Beim Wurstkartell etwa erleichterte Nölke aus dem westfälischen Versmold sein Gewissen gegenüber Mundts Ermittlern und geht straffrei aus.
Die Kartellwächter verhängen immer höhere Bußgelder. 2014 waren es erstmals mehr als eine Milliarde Euro.
Außerdem treiben die von den Kartellen geschädigten Unternehmen – ermuntert von den Ermittlungserfolgen und den Behörden – heute systematisch Schadensersatz ein. Dabei geht es oft um zwei- und dreistellige Millionenbeträge. Die Deutsche Bahn etwa verklagt aktuell die Lufthansa und weitere Airlines auf den Rekord-Schadensersatz von 1,76 Milliarden Euro wegen unerlaubter Preisabsprachen im Frachtgeschäft.
„Im Würgegriff" des Kartellamts sehen Kritiker wie der Wirtschaftsjurist und Buchautor Florian Josef Hoffmann die deutsche Wirtschaft. Gleichzeitig aber sind die Wettbewerbshüter so leicht verwundbar wie Siegfried in der Nibelungensage.

Schon seit Jahren hatte die gut 300-köpfige Mundt-Truppe Probleme, Bußgelder bei Unternehmen einzutreiben, die nach Übernahmen und Umstrukturierungen nicht mehr in der ursprünglichen Form existierten. Strittig war jeweils die Rechtsnachfolge. 2011 kam dann – aus Kartellamts-Sicht – der juristische GAU. Der Bundesgerichtshof (BGH) entschied, dass der Versicherungskonzern HDI Gerling ein Bußgeld von 19 Millionen Euro nicht zahlen muss. Die hatte das Kartellamt 2005 gegen den damals noch selbstständigen Gerling-Konzern verhängt. 2006 wurde Gerling vom Talanx-Konzern übernommen und mit dessen Tochter HDI fusioniert.

Kartellsünder werden unangreifbar

Dank BGH kam Gerling straffrei davon. „Die Ansprüche haben sich einfach in Luft aufgelöst", stellte Mundt konsterniert fest. Blamiert war er selber. Blamiert sind auch einsichtige Sünder wie der Allianz-Konzern, der 2007 brav seine 34 Millionen Euro Bußgeld wegen der Beteiligung am Industrieversichererkartell gezahlt hatte.

Übernahmen und das geschickte Hin- und Herverschieben von Unternehmensteilen erscheinen seit 2011 plötzlich als idealer Schleichweg, um einem schon verhängten Kartellbußgeld doch noch zu entkommen. Mundt: „Es reichen relativ simple Konstruktionen, damit Kartellsünder für uns nicht mehr greifbar sind. Das erschwert uns die Vollstreckung gewaltig."

Wie die Tönnies-Wurstfirma Böklunder ihre Kartellstrafe umgehen will (Klicken Sie für eine detaillierte Ansicht bitte auf die Grafik)

Bekannt ist etwa, dass die Mindener Melitta-Gruppe auf diesem Weg dem 2009 verhängten Bußgeld wegen Absprachen von Kaffeepreisen entgehen will. Das Oberlandesgericht Düsseldorf gab zwar 2014 dem Kartellamt recht. Aber die Melitta-Anwälte Holger Wissel und Olaf Kranz von der Düsseldorfer Kanzlei Taylor Wessing setzen darauf, dass der BGH seiner Rechtsauffassung von 2011 treu bleibt und Melitta am Ende von den geforderten 55 Millionen Euro Bußgeld keinen Cent zahlt.

Sünder sind für das Kartellamt nicht zu packen

Auch vier von neun Kosmetikherstellern schafften es, 2008 verhängten Strafen zu entkommen. Chanel, L'Oréal, YSL Beauté und Coty Prestige Lancaster „konnten sich durch konzerninterne Umstrukturierungen der Haftung entziehen", teilt das Bundeskartellamt dazu mit. Bei dreien geschah das durch Übernahmen. Eine übertrug ihr Vermögen im Wege eines sogenannten Asset Deals auf eine neue Gesellschaft.

So ähnlich hat es Tönnies nun bei Böklunder und Könecke machen lassen. Aber der Fall hat eine neue Dimension. Zum einen wegen der Höhe des Bußgeldes: Böklunder und Könecke sollen zwölf Mal so viel Strafe zahlen wie die 2008 verknackten Kosmetikkonzerne zusammen. Vor allem aber, weil der Gesetzgeber inzwischen versucht hatte, das Schlupfloch zu schließen. Offenbar vergebens – das könnte der Fall Tönnies nun zeigen.

Vehement hatte sich Mundt nach dem Gerling-Urteil für eine achte Novellierung des Gesetzes gegen Wettbewerbsbeschränkungen (GWB) und – damit zusammenhängend – des Ordnungswidrigkeiten-Gesetzes eingesetzt. Es wäre, so Mundt damals, „ein fatales wettbewerbspolitisches Signal, wenn die Täter nicht mehr zur Rechenschaft gezogen werden könnten". Am 30. Juni 2013 traten beide Änderungen in Kraft. Sie stellten klar, dass nach Firmen-Aufspaltungen und -Verschmelzungen die

Rechtsnachfolger zuvor verhängte Bußgelder zahlen müssen.

Aber damit, warnt Mundt, „hat die GWB-Novelle lediglich einen Teil der Fälle möglicher Umstrukturierungen erfasst, mit denen Bußgelder umgangen werden können“ – problematisch bleibe es etwa, wenn Gesamtbetriebe „ohne Übertragung der Gesellschaftshülle“ verschoben werden.

Dass Bußgeldflucht trotz GWB-Novelle möglich ist, dafür will Tönnies nun den Beweis antreten. Seine Zur-Mühlen-Gruppe war auf den wuchtigen Bußgeldbescheid Mitte Juli perfekt vorbereitet. Die werthaltigen Teile und die Produktion der Zur-Mühlen-Töchter Böklunder Plumrose und Könecke wurden wenige Wochen später abgespalten und in neue Gesellschaften verlagert. Von den alten Gesellschaften blieb kaum mehr als eine leere Hülle übrig. Selbst die ist inzwischen als Firma erloschen. Auch die neu entstandenen Böklunder- und Könecke-Unternehmen müssen nicht zahlen – wenn der Plan der Tönnies-Anwälte aufgeht.

So einfach soll es sein, das mächtige Bundeskartellamt aufs Kreuz zu legen?

Ja, meinen führende Kartell- und Gesellschaftsrechtler, denen die WirtschaftsWoche ihre exklusiv vorliegenden Dokumente präsentiert hat. Wissel und Kranz von Taylor Wessing, die unter anderem Melitta beraten, urteilen: „Die Abspaltungsmaßnahme im Fall Böklunder und Könecke führt nach den uns vorliegenden Informationen dazu, dass die neue Bußgeld-Nachfolgeregelung hier ins Leere läuft. Das Unternehmen, auf das das Betriebsvermögen abgespalten wurde, kann nicht bebußt werden.“

Spezialisten der Kanzlei Heisse Kursawe Eversheds in München, Oliver Maaß und Arndt Scheffler, bestätigen, dass die Bußgeldflucht funktioniert: „Das bebußte Unternehmen bleibt durch die Abspaltung zurück wie eine Bad Bank. Das Unternehmen mit dem werthaltigen Geschäft bekommt das Bundeskartellamt nicht zu packen.“ Auch eine Anfechtung der Umstrukturierung via Anfechtungsgesetz brächte dem Kartellamt nichts, sagen Experten: Der Vollstreckungszugriff auf die durch Abspaltung übertragenen Vermögensgegenstände sei nicht wieder herzustellen.

Das Kartellamt befürchtet Nachahmer

Kartellamtschef Mundt erklärt zur Causa Tönnies schmallippig: „Der Vorgang ist uns bekannt.“ Er werde „sehr sorgfältig prüfen, ob die Unternehmen tatsächlich auf diesem Wege ihre Zahlungspflicht umgehen können“. Offensichtlich habe der Gesetzgeber 2013 aber nur „einige Schlupflöcher zur Umgehung von Bußgeldern beseitigt“.

Der düpierte Wettbewerbshüter muss eine Lawine neuer Fälle fürchten. „Wenn das Vorgehen von Böklunder und Könecke erfolgreich ist, wird das in die Beratungspraxis einziehen“, sagt Taylor-Wessing-Jurist Wissel. Schon jetzt, so Maaß und Scheffler von Heisse Kursawe, „sind Anwälte im Interesse ihres Mandanten verpflichtet, ihm bei einem Kartellfall die Chancen einer Umstrukturierung aufzuzeigen“.

Mundt fordert bereits Unterstützung aus Berlin. Die Regelungslücken müssten „dringend geschlossen werden".

Abhilfe schaffen für die Zukunft würde eine Angleichung des deutschen ans europäische Kartellrecht. Denn für die EU-Kommission, die internationale Kartelle verfolgt, gilt der Grundsatz der wirtschaftlichen Einheit und der gesamtschuldnerischen Haftung im Konzern. Die Muttergesellschaft ist Maßstab für die Bemessung des Bußgeldes und haftet für die Zahlung.

Fall Tönnies wird zum Pyrrhus-Sieg

Der Bundesrat hatte das 2013 gefordert. Der Bundestag verwies das Kartellamt stattdessen aber auf die Möglichkeit, „Vermögensverschiebungen durch dinglichen Arrest" zu vermeiden. Das funktioniert allerdings nicht. Einen dafür notwendigen frühzeitigen Hinweis, dass eine Abspaltung geplant ist, wird Mundt niemand geben. Sobald aber die Abspaltung realisiert ist, ist es zu spät für die Sicherungsmaßnahme.

weitere Artikel

Bahn bekommt Unterstützung gegen Cargo-Kartell
Robert Bosch und Kühne + Nagel schließen sich Milliarden-Klage an

Sodastream
Kartellamt verhängt Bußgeld gegen Sprudelgerät-Hersteller

Herta, Meica, Rügenwalder
Wurstkartell muss Millionen-Bußgeld zahlen

Mundts Hoffnung: Ein Jahr nach dem Inkrafttreten der achten GWB-Novelle Mitte 2013 wollte der Bundestag deren Anwendung überprüfen und entscheiden, ob „gesetzlicher Nachbesserungsbedarf besteht". Das dürfte das Kartellamt nun mit halbjähriger Verspätung einfordern.

Möglich also, dass der Fall Tönnies zum Pyrrhus-Sieg für die deutsche Wirtschaft wird. Schwenkt Berlin wegen Mundts drohender Niederlage im Wurstkartell auf EU-Kartellrecht um, sinkt der Flucht-Spielraum für künftige Kartellanten auf null.

Tönnies selbst ist vermutlich fein raus. Allerdings kann er sich mit dem Firmen-Umbau nur Bußgeldern, nicht aber zivilrechtlichen Ansprüchen entziehen. Denn gegenüber den Gläubigern einer ab- oder aufgespaltenen Gesellschaft haften alle an dem Vorgang beteiligten Rechtsträger als Gesamtschuldner. Falls die Wurstkartellopfer – Aldi und Co. – also Schadensersatz fordern, müssen die neuen Böklunder- und Könecke-Gesellschaften, verhandeln. Und zahlen.

Annex IX - Imposition of sanctions in civil and criminal procedures

In the majority of Members States fines are administrative.

Civil fines are imposed in three Member States: Austria, Finland and Sweden.

Criminal or quasi-criminal fines are imposed in five Member States:

-Ireland

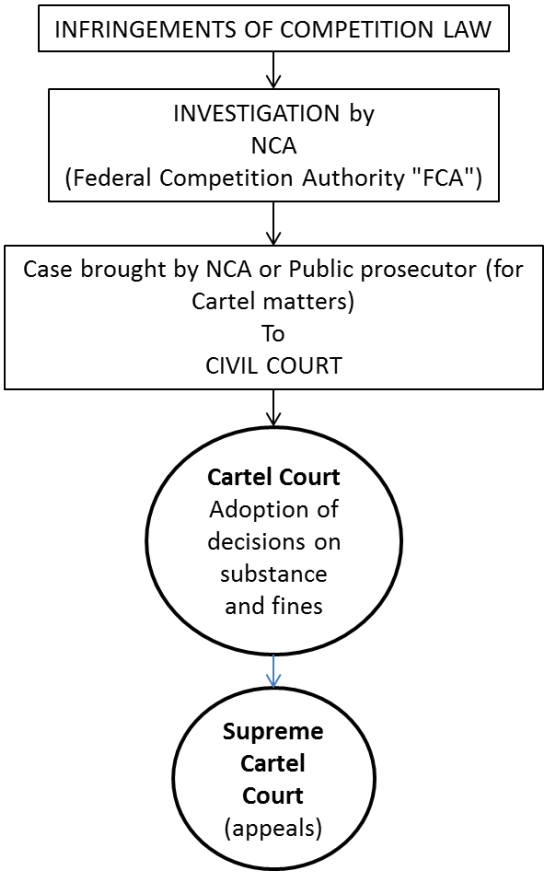
-Denmark,

-Estonia, where fines are imposed by criminal courts for infringements of Article 101 (and until 2014 also for Article 102). As from 1 January 2015 fines for infringements of Article 102 are imposed by the NCA instead of a criminal court but according to misdemeanour procedures (criminal offences of minor importance).

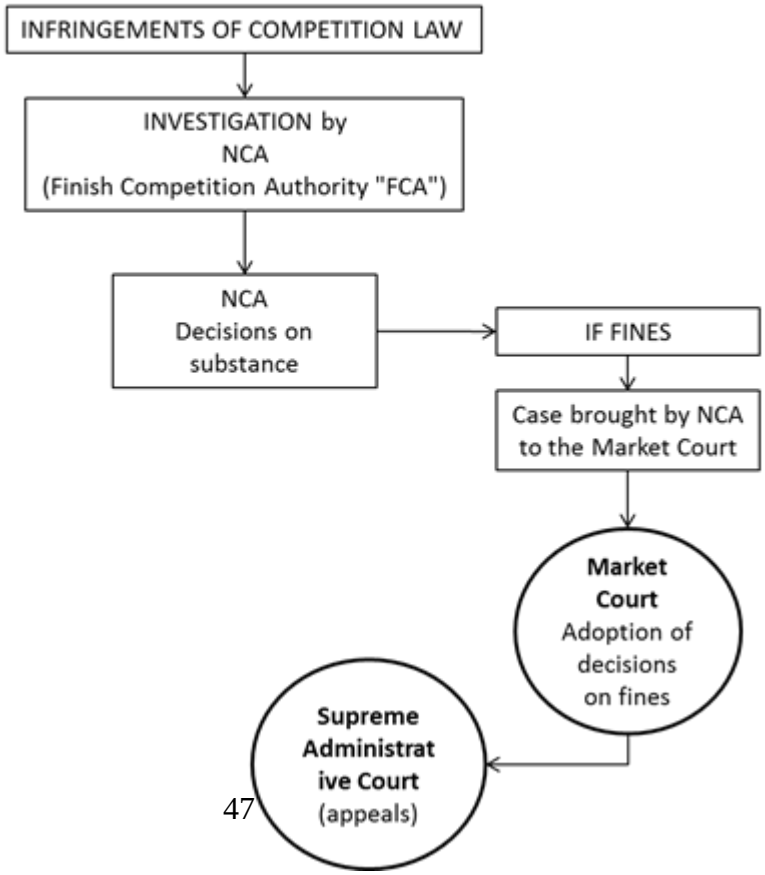
-Slovenia, where fines are imposed by the NCA instead of a court but according to misdemeanour (quasi-criminal) procedures.

-Germany, where fines are initially administrative, imposed by the NCA, but if they are appealed, the case is brought to court where it is reassessed according to criminal standards.

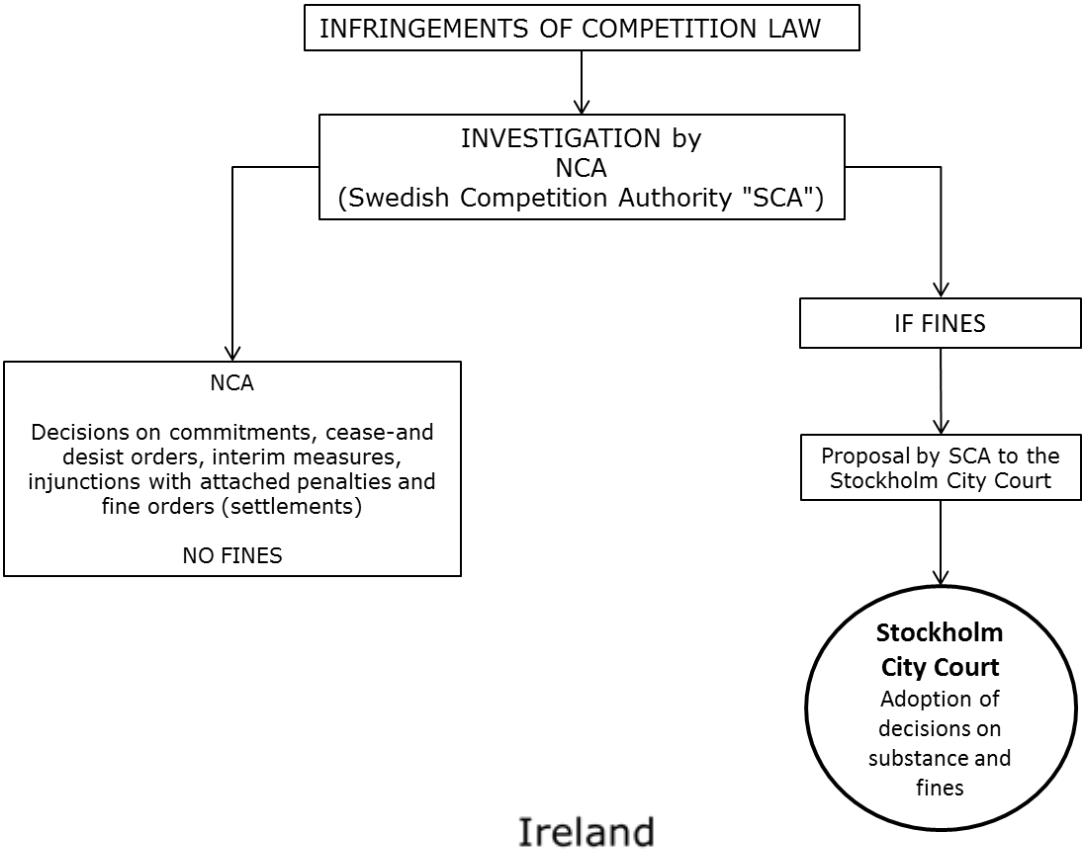
Austria
Fines imposed by civil courts



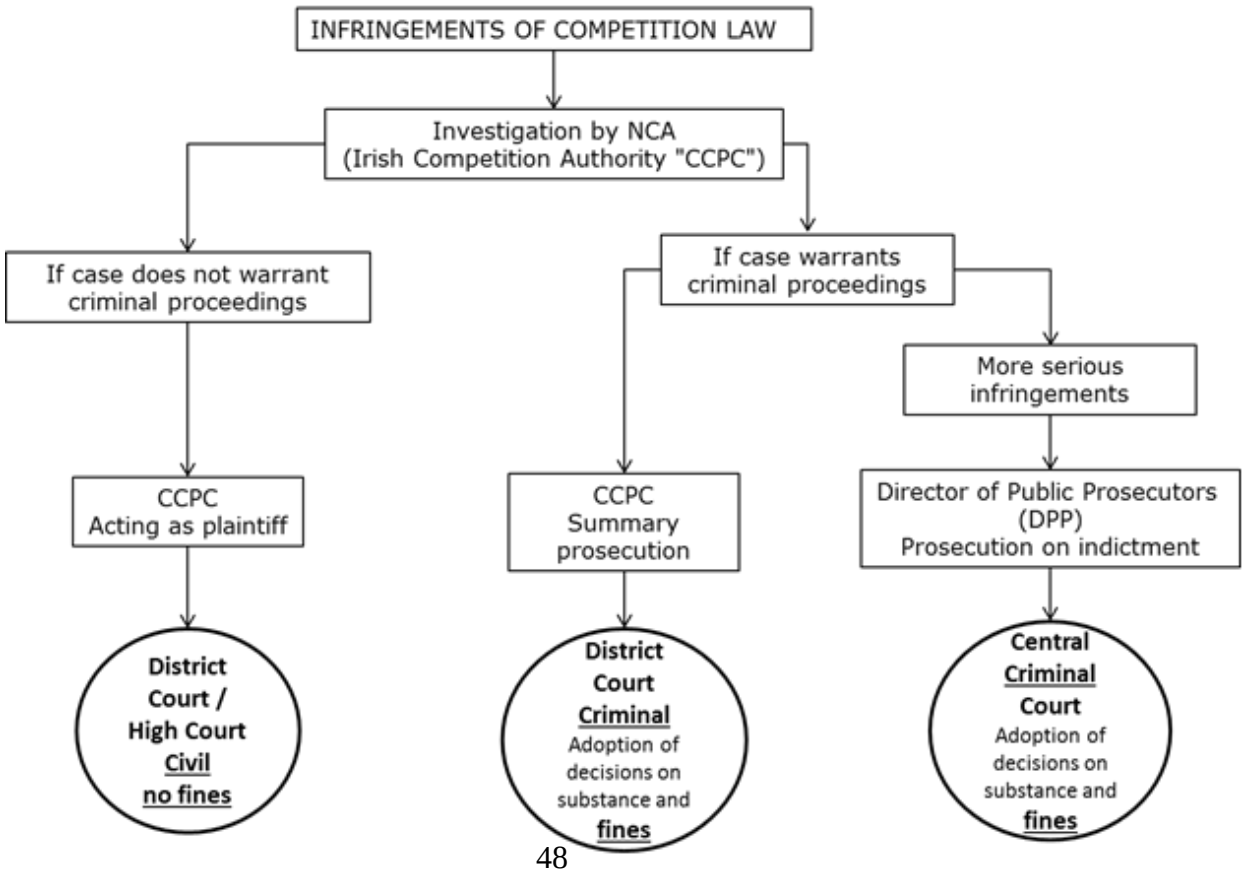
Finland
Fines imposed by civil courts



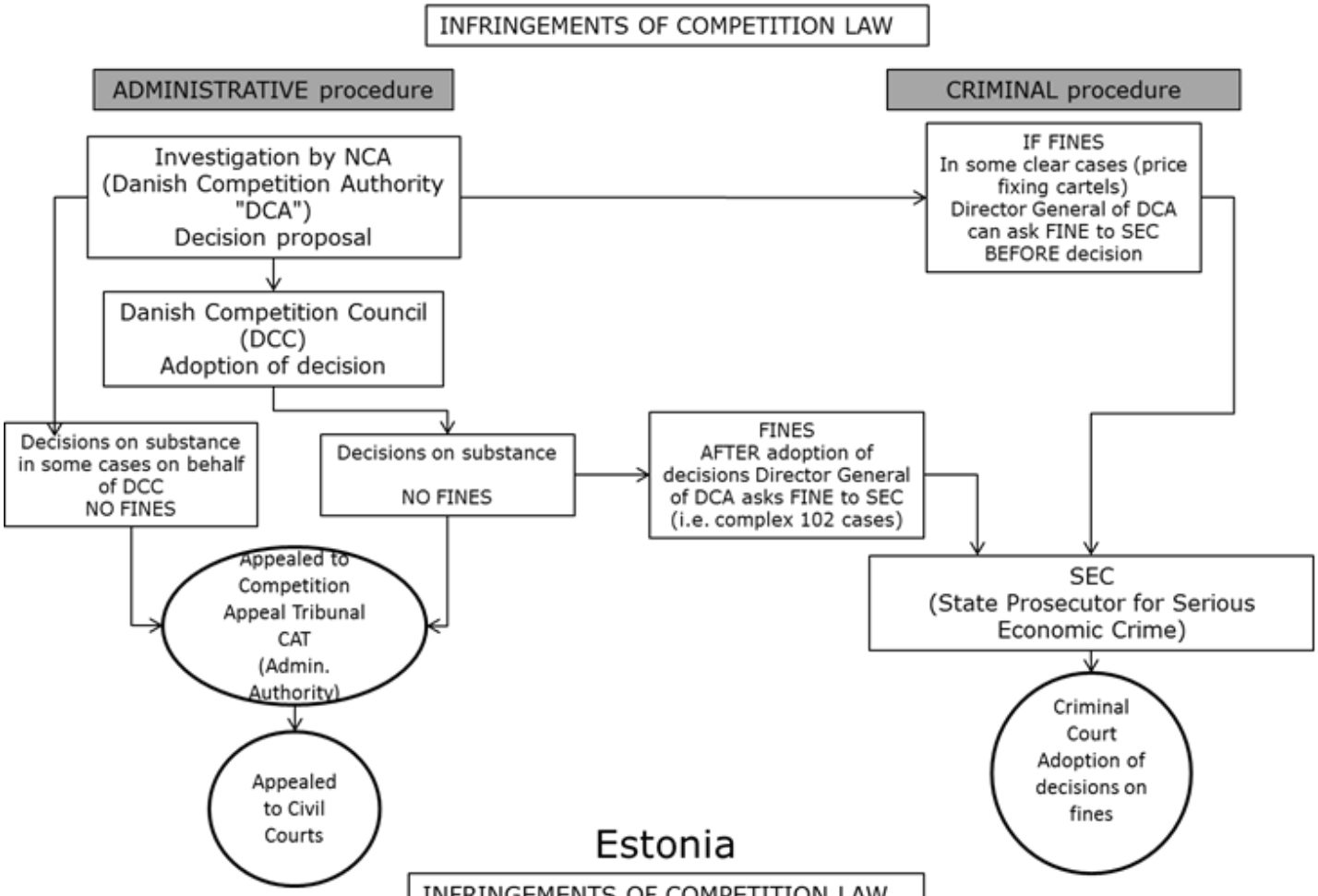
Sweden
Fines imposed by civil courts



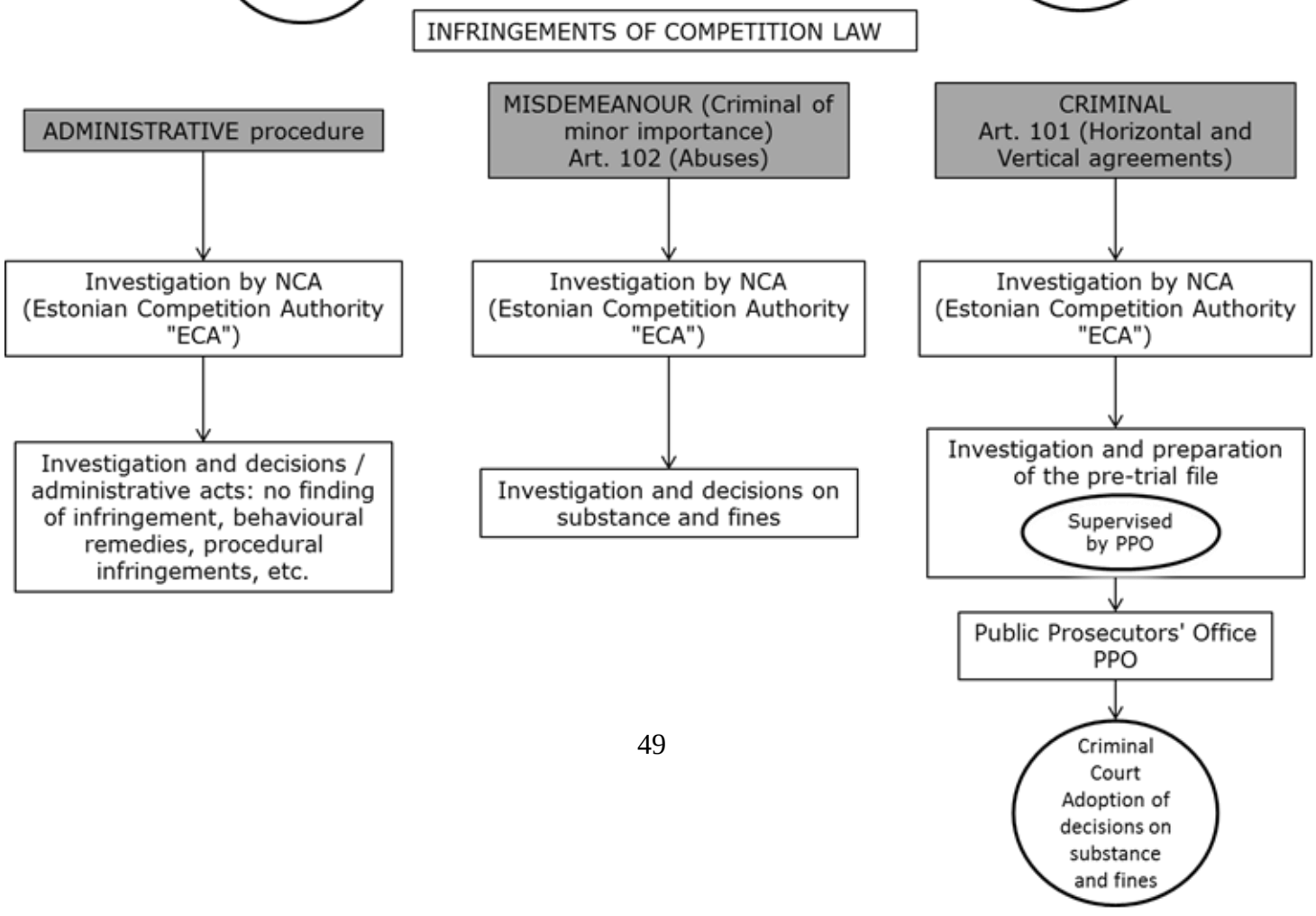
Ireland
Fines imposed by criminal courts

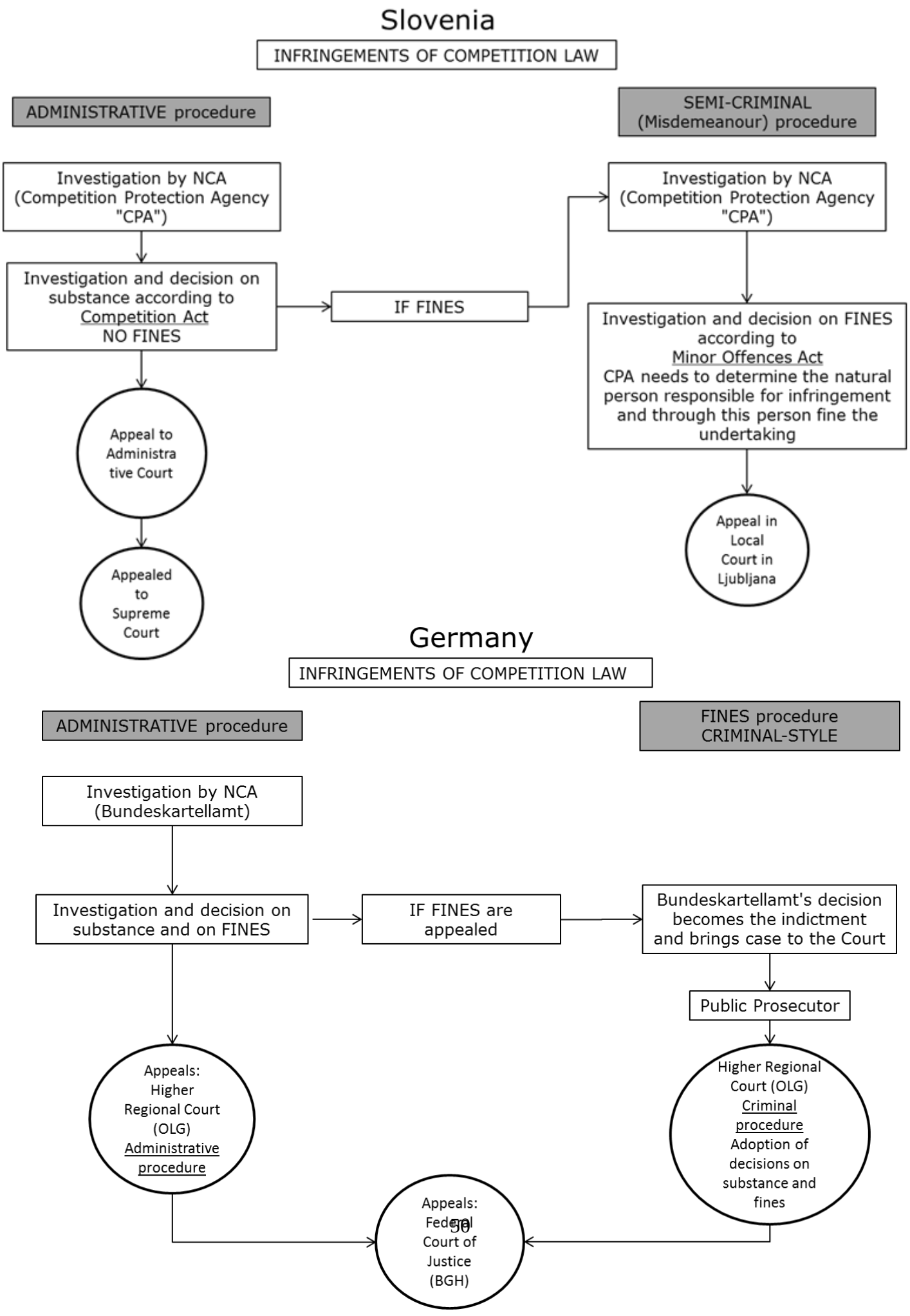


Denmark
Fines imposed by criminal courts



Estonia




Slovenia
INFRINGEMENTS OF COMPETITION LAW
ADMINISTRATIVE procedure
SEMI-CRIMINAL (Misdemeanour) procedure
Investigation by NCA (Competition Protection Agency "CPA")
Investigation and decision on substance according to Competition Act NO FINES
IF FINES
Investigation by NCA (Competition Protection Agency "CPA")
Investigation and decision on FINES according to Minor Offences Act CPA needs to determine the natural person responsible for infringement and through this person fine the undertaking
Appeal to Administrative Court
Appealed to Supreme Court
Appeal in Local Court in Ljubljana
Germany
INFRINGEMENTS OF COMPETITION LAW
ADMINISTRATIVE procedure
FINES procedure CRIMINAL-STYLE
Investigation by NCA (Bundeskartellamt)
Investigation and decision on substance and on FINES
IF FINES are appealed
Bundeskartellamt's decision becomes the indictment and brings case to the Court
Public Prosecutor
Appeals: Higher Regional Court (OLG) Administrative procedure
Higher Regional Court (OLG) Criminal procedure Adoption of decisions on substance and fines
Appeals: Federal Court of Justice (BGH)

Annex X - Policy options

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
Ensuring all NCAs have an **effective competition toolbox** to investigate and take decisions	No EU action	Further soft action on issues not covered by set of seven ECN Recommendations on key enforcement powers of 2012-2013, e.g. new ECN Recommendations on issues such as the use of behavioural remedies to ensure a return to competitive conditions on markets and formal settlement procedures.	Minimum rules to ensure that: (1) NCAs have a minimum core set of operational investigative tools (that is effective powers to inspect business and non-business premises, to issue requests for information and to gather digital evidence) and decision-making tools (the power to adopt prohibition decisions (including the power to impose structural and behavioural remedies), to issue interim measures and to adopt commitment decisions). These tools would be backed up by effective sanctions for non-compliance with them, e.g. the payment of a fine for failure to comply with an inspection and. the power of NCAs to set their	Build on option 3 to have uniform and detailed (as opposed to minimum) rules so that NCAs have identical investigation and decision-making powers backed up by uniform sanctions for non-compliance. This would mean, for example, having detailed rules such as on how NCAs consult market players about the appropriateness of proposed commitments. This option would also provide for a more complete competition toolbox, meaning that, for instance, the power to carry out sector inquires would also be included. It would

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
			priorities in full. Tools could also be put in place to address limitation periods and the inability of NCAs to enforce fining decisions cross-border. (2) the increase in the powers of the NCAs would be counter-balanced by ensuring that key procedural guarantees are in place in line with the EU Charter on Fundamental Rights, such as the obligation of NCAs to notify companies of the objections against them and by providing for effective judicial review of enforcement decisions.	also provide for detailed procedural guarantees, such as detailed and uniform rules on access to an authority's case file and rules on the ability of complainants and third parties to intervene in proceedings.
Ensuring that all NCAs can impose **deterrent fines** (a) Ensuring that fines reflect the harm caused to competition by addressing	No EU action	(a) ECN soft measures could be contemplated to convince Member States	(a) Minimum rules to ensure that: (1) The legal maximum of fines is set at a level which ensures	(a) A uniform fines methodology, setting out all the parameters that are to

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
differences in methodologies for calculating fines which lead to wide variations in fining levels; and limitations in who can be fined		of the need to apply the EU concepts of undertaking, parental liability and succession in line with the ECJ case law, to ensure that associations of undertakings can be effectively fined.	deterrence; and that fines take into account a minimum set of core parameters. To ensure that the fine is related to the infringement and to the harm caused to competition, it would be based on key elements widely recognised as essential for calculating a fine: the gravity and duration of the infringement, and the potential application of aggravating and mitigating circumstances. To ensure deterrence, the legal maximum of the fine would be set as a percentage of the total worldwide turnover of the undertaking. (2) When applying EU competition rules, the concept of undertaking, parental liability and succession are applied in line with ECJ case law, and that	be taken into account and prescribing how fines should be calculated and who can be fined.

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
			associations can be effectively sanctioned. (3) Soft action on non-core aspects such as aggravating/mitigating factors to be taken into account and how to assess the gravity of the infringement.	
(b) Tackling under-enforcement in primarily criminal systems		(b) ECN soft measures could be contemplated to convince Member States with primarily criminal enforcement systems of the need to allow the imposition of administrative fines or the imposition of fines by civil courts.	(b) There exists the possibility either to impose administrative fines or to apply to a civil court for the imposition of fines. This would mean that NCAs which currently operate within a primarily (quasi-) criminal system would be given the option of deciding depending on the facts and circumstances of the case, whether to follow an administrative track/seize a civil	(b) A uniform fining model so only administrative fines can be imposed.

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
			court or to follow the existing criminal route. It would also be ensured that all NCAs would have the power to defend their cases in court (most already can do so).	
Making leniency programmes and their interplay more attractive to encourage companies to cooperate with authorities in the fight against cartels (a) Reducing divergences on core principles of substance and procedure between national leniency programmes (for instance on the availability and treatment of summary applications)	No EU action	(a) The ECN MLP already provides for core principles of substance and procedure for efficient leniency programmes, for example a system of summary applications to facilitate multiple applications for leniency.	(a) Translate the core principles of the ECN MLP into law in light of experience with their application, thereby introducing binding minimum rules for leniency programmes. This would reduce the current divergences between national programmes and ensure, for example, that summary applications are available in all	(a) Maximum requirements beyond the ECN MLP to ensure, amongst others, a one-stop shop for leniency applicants (meaning they can file a single application with one authority that issues an immunity decision which is binding in all MS and before the

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
			Member States and are applied in the same way. In particular, NCAs would have in place leniency programmes that enable them to grant immunity from fines and reduction of fines to undertakings and companies would have to satisfy core common conditions in order to qualify for leniency. Further, it would be ensured that applicants that have applied for leniency to the European Commission can file summary applications in relation to the same cartel with the NCAs and that NCAs accept summary applications with the same scope as the leniency application filed with the Commission.	Commission) and fully harmonized leniency programmes.

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
(b) Ensuring protection of leniency and settlement materials beyond civil damages actions		(b) The ECN MLP already contains rules on the protection of leniency materials.	(b) Uniform binding rules to fully protect leniency and settlements materials against disclosure outside the context of civil damages actions (already being addressed by the Damages Directive). EU legislative action to this end would expand the protection granted by the Damages Directive to other procedures.	(b) Same as for option 3.
(c) Ensuring better interplay between corporate leniency programmes with sanctions on individuals		c) Encourage the introduction of arrangements to protect employees of companies which apply for leniency from individual sanctions at national level through an extension of the ECN MLP or a separate ECN Recommendation.	(c) Minimum rules to protect employees of leniency applicants to either the Commission or NCAs from sanctions at national level.	(c) Uniform and detailed rules to protect employees of leniency applicants to either the Commission or NCAs from sanctions at national level.

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
Ensuring that all NCAs have **safeguards they can act independently** when enforcing the EU competition rules and have the **resources** they need to perform their tasks	No EU action	The 2010 ECN Resolution on the continued need for effective institutions already calls for NCAs to be adequately equipped and to be able to act independently and impartially. Soft action could provide for more detailed provisions on the independence and resources of NCAs.	Minimum rules to ensure independence of NCAs when they enforce the EU competition rules, including for example the following requirements: (1) NCAs perform their tasks and exercise their powers independently and are not subject to any instructions from any other body when enforcing the EU competition rules. In particular, it would be ensured that NCAs can take decisions independently from any political and business influence and that the staff and the members of a NCA's decision making body refrain from actions and occupations that are incompatible with the performance of their duties during their term of office and for a reasonable period thereafter.	In addition to the minimum requirements foreseen under option 3, this option would foresee uniform and detailed rules to also ensure the institutional and financial autonomy of NCAs when they enforce the EU competition rules, including for example the following requirements: (1) NCAs should be legally distinct from any other public or private body (structural independence); (2) full authority over the recruitment and management of staff; (3) separate annual budget/full budgetary autonomy; (4) appointment of

Specific Objectives	Option 1: No EU action at all (baseline scenario)	Option 2: Further soft action	Option 3: EU legislative action to provide NCAs with minimum means and instruments, complemented by soft action where appropriate. For certain confined aspects detailed rules may be provided for where minimum rules would not suffice	Option 4 EU legislative action to provide NCAs with detailed and uniform means and instruments
			(2) NCAs' board/management cannot be dismissed for reasons related to the proper performance of their powers in the application of Articles 101 and 102 TFEU; (3) NCAs have adequate human and financial resources to perform their tasks. This would simply provide that NCAs should have sufficient financial, human and technical resources to perform their tasks and would include a list of these tasks (e.g. conducting investigations, taking decisions and cooperating with other authorities in the ECN).	board/management through a transparent procedure on the basis of merit.

Annex XI - Achievement of objectives

Objectives	Option 1: Baseline scenario – no EU action	Option 2: soft law measures	Option 3: EU legislative action to provide NCAs with minimum means and instruments	Option 4: EU legislative action to provide NCAs with detailed and uniform means and instruments
General objective: boost enforcement of the EU competition rules by the NCAs and the functioning of markets in Europe	0	0/+	+++	+++
Specific objective: Ensuring all NCAs have effective investigation and decision-making tools	0	0/+	+++	+++
Specific objective: Ensuring that all NCAs are able to impose effective fines	0	0	+++	+++
Specific objective: Making leniency programmes and their interplay more attractive to encourage companies to cooperate with the authorities in the fight against cartels across multiple jurisdictions	0	0	+++	+++
Specific objective: Ensuring that NCAs have sufficient resources and they can enforce the EU competition rules independently	0	0	+++	+++

Key: (-): option would have a detrimental effect

(0): option does not meet the objective

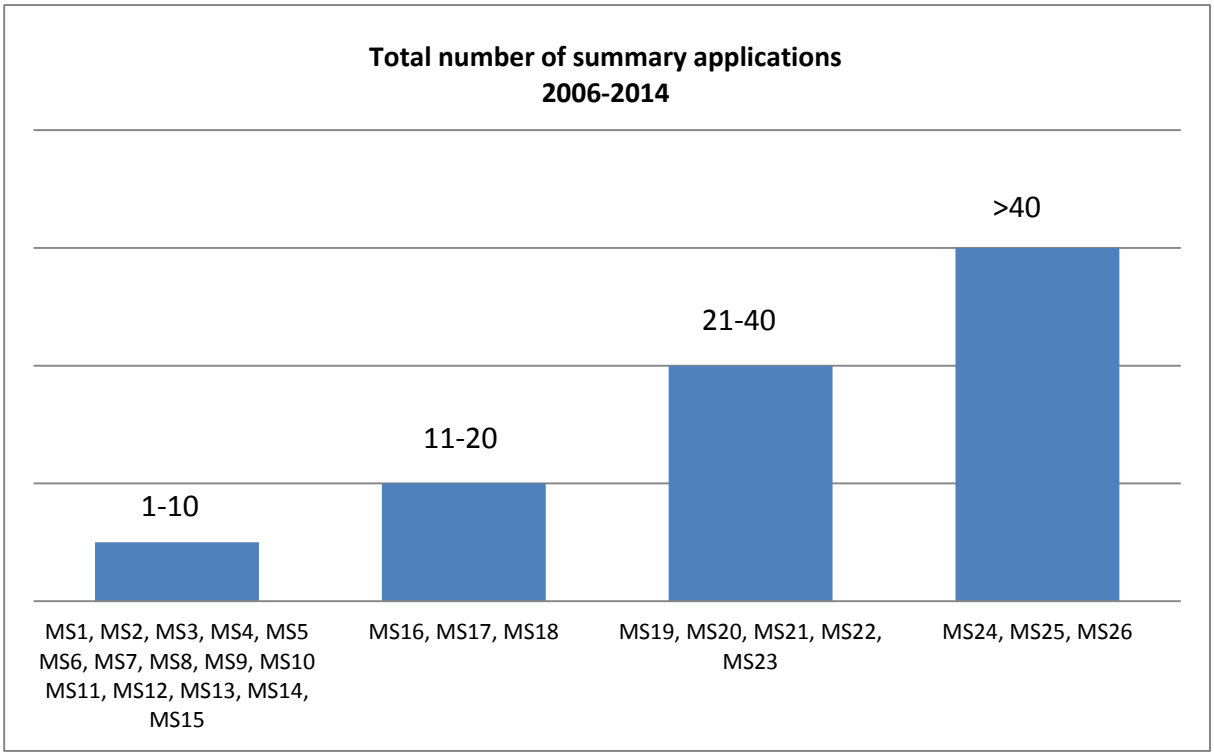
(+): partially meets the objective

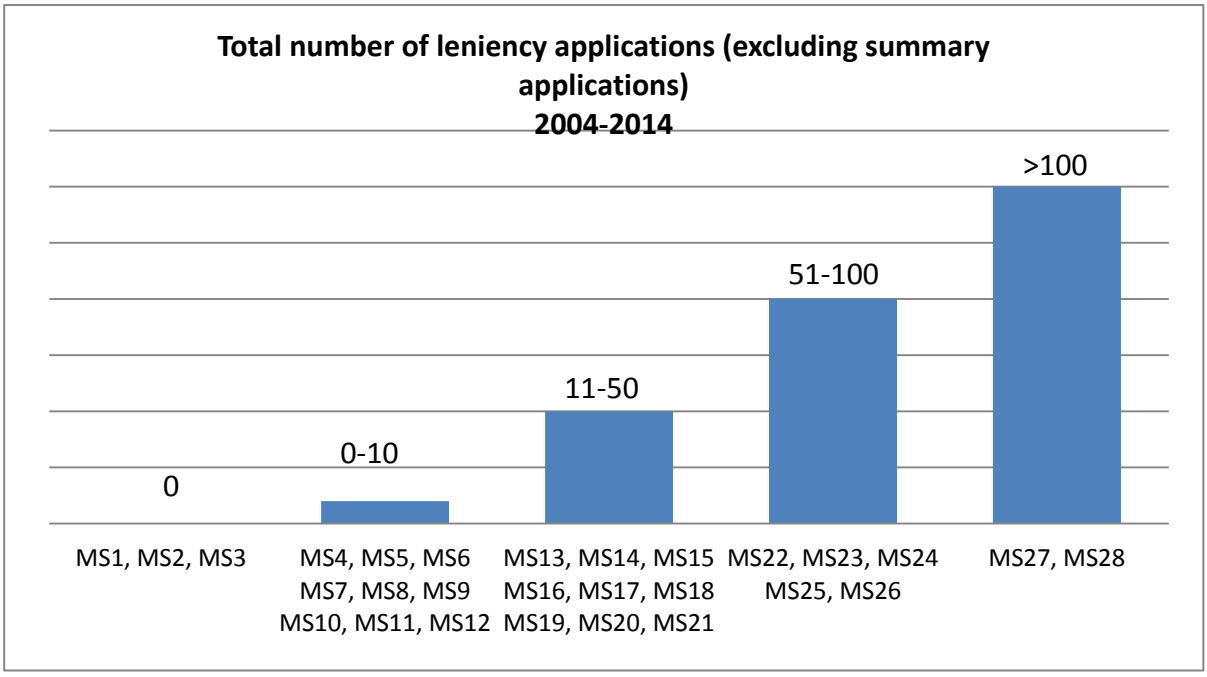
(++): option meets the objective to a reasonable extent

(+++): option meets the objective in full

Annex XII - Number of leniency and summary leniency applications submitted before NCAs

The figures below show the total number of leniency and summary leniency applications submitted before NCAs in the period 2004(2006)-2014. It is apparent from these figures that the number of (summary) leniency applications varies widely across NCAs and some NCAs are much more successful in attracting such applications. A number of authorities attracted none or only up to 10 applications during the 8-10 years of the survey:





It is interesting to compare the number of leniency application as stated above with the overall level of enforcement activity per NCA (for the period 2010-2015, as indicated by the number of competition cases, both under national law only and under national and EU law in parallel). Some NCAs can rely to a significant extent on leniency applications to feed their enforcement work stream whereas others generate none or much less of their overall enforcement activity with leniency applications. However, where both the number of leniency applications and the number of overall enforcement cases is comparatively high, the low share of leniency cases in the overall enforcement of a NCA might also be the result of special efforts deployed over the period to detect cartels and other infringements by other means.

Annex XIII – Divergences between leniency programmes

Divergences in the treatment of summary leniency applications and in core leniency features

In 2006 the ECN endorsed the ECN Model Leniency Programme (ECN MLP) that sets out the main features that an effective leniency programme should have. To facilitate making applications for leniency to multiple jurisdictions in cross-border cartel cases, the ECN MLP also provides for a system of summary applications. Under this system companies make a full application to the Commission, but can submit summary applications (which contain very limited information) to NCAs which may become active later if the Commission does not take up (a part of) the case. This is intended to protect companies' place in the leniency queue before these NCAs, so that they can still benefit from immunity or a reduction in fines if (parts of) the case would ultimately be pursued by the NCA(s).[1]

However, although the ECN has achieved a degree of convergence through the non-binding[2] ECN MLP, important divergences remain both in the treatment of summary applications and on core leniency features.

For example, summary applications are still not available before a number of NCAs. Even where the possibility to make summary applications exists, there are often restrictions, for instance, in some Member States, the protection provided by summary applications is only given to immunity applicants and not to companies who are eligible for a reduction of fines. Moreover, NCAs assess summary applications differently. For example, not all programmes clarify that when the summary application is perfected at the NCA's request, the NCA will consider that the information was submitted on the date when the summary application was submitted. Also on core leniency features, divergences continue to exist between NCAs regarding which companies can benefit from leniency and under which conditions. For example, NCAs apply different thresholds for granting leniency reductions and different rules for excluding certain cartel members from leniency altogether.

These divergences have two main consequences: (1) they hamper the **interplay between leniency programmes across the EU** because they lead to different outcomes for leniency beneficiaries; and (2) they may also undermine the effectiveness of **national leniency programmes** where such programmes contain diverging rules compared to other ECN members. This may reduce incentives for cartel members to cooperate with the NCAs concerned.

These issues are borne out by the majority of respondents to the public consultation: 66% of respondents consider that divergences in the features of Member States' leniency programmes are a problem in terms of legal certainty for business[3] and 61% believe that this hampers the

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1 It also ensures that companies and NCAs do not invest a disproportionate amount of resources in filing and checking parallel leniency applications for cases that are likely to be dealt with by the European Commission.

2 Judgement in *DHL Express (Italy) S.r.l. and Others v Autorità Garante della Concorrenza e del Mercato and Others*, C-428/14, EU:C:2016:27

3 Only 6% of respondents disagree with this proposition; 78% of the responding business organisations agree with it.

effective enforcement of the EU competition rules by the NCAs[4]. 59% of the respondents with sufficient knowledge about and experience with summary leniency applications find that the ECN Model Leniency Programme does not ensure a sufficient degree of alignment. 75% consider that this is a problem in terms of the effective enforcement of the EU competition rules and 77% believe that this impacts on incentives to apply for leniency.

Lack of protection of leniency and settlement material

Companies 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 settlements, parties to the investigation are required to acknowledge their participation in, and liability for, the infringement.[5] In this framework, companies provide NCAs with leniency statements and settlement submissions which, if disclosed and used outside the context of the investigation in which they have been provided, could seriously harm their commercial interests, by exposing them to liability to other proceedings being brought against them.

The Damages Directive[6] harmonises the protection of leniency statements and settlement submissions in the context of civil damages actions before national courts in the EU. However, this Directive does not address other scenarios, such as the use of such leniency statements or settlement submissions in other civil, administrative or criminal proceedings or in case of access by the public at large through "transparency" rules/public access to documents.

The level of protection granted for such material varies significantly between Member States:

	Level of protection of leniency statements	Level of protection of settlement submissions
Accessible to parties before NCA without limitation to their use	7 MS	6 MS
Accessible to civil courts in proceedings other than actions for damages	12 MS	13 MS
Accessible to public prosecutors and/or the police	20 MS	13 MS
Accessible through general transparency rules	5 MS	6 MS

Companies considering applying for leniency or contemplating settling a case may consider that there is not sufficient legal certainty about the protection of their commercial interests and decide not to cooperate with NCAs.[7] Indeed, the public consultation shows that only 33%

4 Only 7% of respondents disagree with this proposition; 74% of the responding NCAs agree with it.

5 A settlement is a simplified procedure which results in the faster handling of the case and in a reduction of the fines. In order to benefit from this procedure, the companies involved have to acknowledge their participation in the infringement.

6 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.

7 In order to ensure effective protection of leniency statements and settlement submissions in Commission investigations, the Commission adapted the provisions in Regulation 773/2004 and the four Notices

of respondents consider that leniency statements and settlement submissions are sufficiently protected from disclosure and use outside proceedings before NCAs. 49% of respondents are in favour of extending the protection foreseen by the Damages Directive to other types of proceedings including civil, administrative, criminal and transparency procedures.

This lack of protection can undermine cartel members' incentives to apply for leniency or to settle cases under the **national leniency programmes** concerned.

Lack of effective interplay between corporate leniency programmes with sanctions on individuals

Another challenge is the lack of arrangements in place to protect employees of companies which make leniency applications to NCAs and/or the Commission from individual sanctions. Individual sanctions are foreseen by many Members States for their involvement in certain types of anticompetitive behaviour.[8]

The mere threat of sanctions on individuals can have a stifling effect on the willingness of companies to report cartels to NCAs or the Commission. The legal risks for the individuals involved may discourage a company's management from deciding to apply for corporate leniency. Individuals who may be subject to criminal proceedings may be deterred from helping their employers to collect the evidence required for a successful corporate leniency application, unless they are protected from sanctions. This issue also has cross-jurisdictional implications: if a company considers applying for leniency in two Member States, but its employees could be exposed to criminal sanctions in one of these countries, this prospect may deter that company from applying from leniency at all. However, only two Member States[9] provide for arrangements to protect employees from individual sanctions if their company cooperates under the leniency programme of another NCA or the Commission.

This issue has been repeatedly signaled to the ECN by stakeholders as one of the main concerns which, if not resolved, would have a chilling effect on leniency applications. In the public consultation, 63% of respondents consider it a problem that only a few Member States have arrangements in place to protect employees from sanctions if the companies they work for cooperate under the leniency programmes of a NCA or the Commission. Most stakeholders (71%) are in favour of establishing safeguards to protect such employees.[10]

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concerning the disclosure and use of information in the Commission's investigative file (Access to the File, Leniency, Settlements, Cooperation with National Courts), to the rules of the Damages Directive 2014/104/EU on disclosure and use of information obtained from competition authorities in antitrust damages actions.

8 Only three Member States do not foresee any sanctions on individuals. 19 Member States foresee criminal sanctions on individuals for certain types of competition offences and 12 Member States have administrative or civil sanctions for individuals involved in certain antitrust infringements.

9 In Austria, the prosecution against individuals will be closed if their employers have filed for leniency in Austria, any EU Member State or with the Commission, subject to the individual's continuing cooperation. In the UK, criminal immunity is not only available for UK immunity recipients, but also for immunity recipients under the Commission's leniency notice.

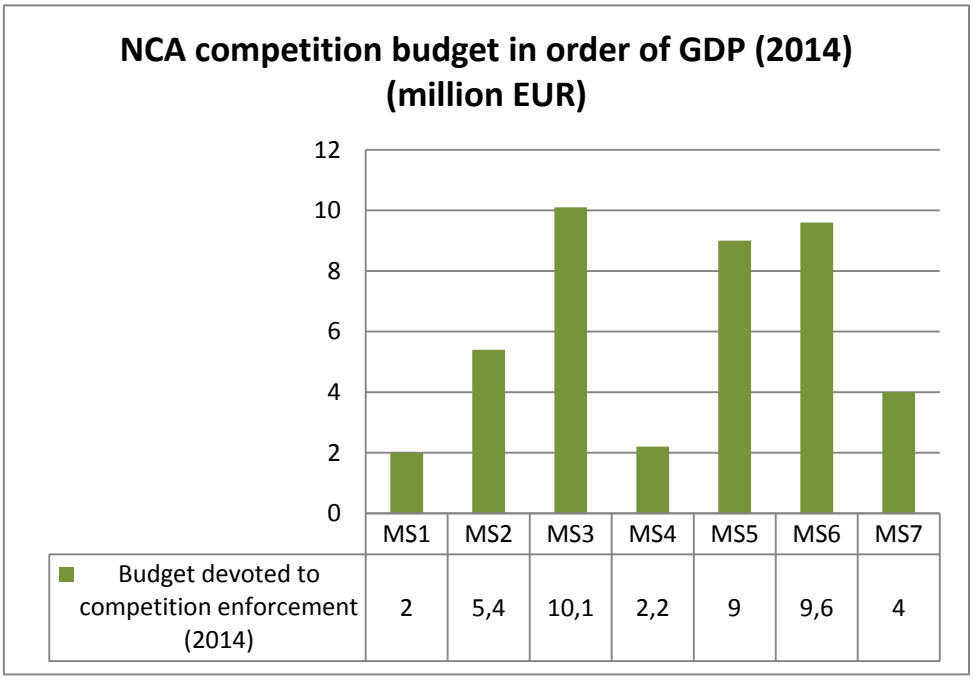
10 The remainder of the respondents replied do not know/not applicable, the latter probably because they have no experience with Member States where such arrangements already exist.

Annex XIV - Budget and staff of NCAs

Examples: Inadequate human and financial resources

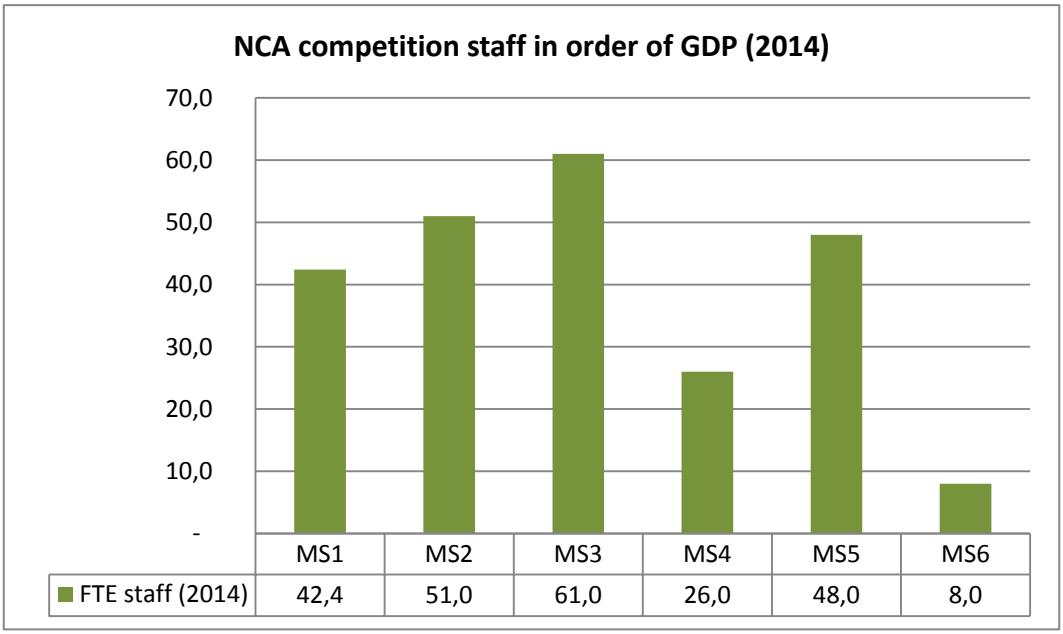
- Several NCAs had to stop or refrain from conducting certain investigations due to inadequate budget or limited staff.
- Certain NCAs cannot pursue several large cases at the same time or have to separate the proceedings against the undertakings in the same case.
- Some NCAs do not have sufficient staff to conduct simultaneous inspections of all members of a suspected cartel but have to limit the search for evidence of anticompetitive conduct to key targets in the investigation with the risk of missing out on key evidence.
- Many NCAs do not have the resources to invest in advocacy activities[1] and they face difficulties in cooperating closely in the context of the ECN.
- Others lack the appropriate forensic IT tools to find digital evidence of cartel infringements or cannot offer attractive salaries in order to attract or retain staff with experience in competition law.
- Some NCAs are less inclined to enforce abuses by companies in a dominant position given the lack of economic expertise to conduct the complex economic assessment required by the case law in Article 102 cases.

The two tables below show significant differences in budget and staff between NCAs in Member States with a similar GDP.



[1] Many respondents value competition advocacy as important as individual case enforcement.

Significant differences can also be observed regarding staffing levels. The below table shows that two NCAs have staff levels which are less than half those of other NCAs in Member States with a similar GDP.



Annex XV - Core indicators

(Key - Availability/Ability: NCAs have the power to do something - Application: NCAs in practice apply certain rules/power or they are put in place)

Objectives	Core indicators
Ensuring all NCAs have effective investigation and decision-making tools.	Legislative action 1. Availability of the core investigation and decision-making tools per NCA. 2. Availability of the key procedural guarantees per NCA. 3. Use of new investigation tools per NCA. 4. Number of enforcement decisions per type of decision (e.g. prohibitions, commitments, interim measures). Soft action: 1. Application by NCAs of recommended practices/guidance to be endorsed by the ECN (e.g. to reinforce basic procedural guarantees, such as on modalities for granting effective access to the NCAs case file).
Ensuring that all NCAs are able to impose effective fines.	Legislative action: 1. In MS currently imposing criminal fines: - Availability of administrative/civil fines. - Ability of NCAS to bring/defend cases before courts. - Number of fines vs. number of cases compared to previous period when primarily criminal fines were imposed. 2. Application of the prescribed legal maximum for the level of fines per NCA. 3. Changes in the level of fines compared to the situation prior to the entry into force of the Directive. 4. Total amount of fines imposed. 5. Application/non-application by national courts of the concept of undertaking, parental liability and succession.

	Soft action: 1. Application by NCAs of recommended practices/guidance to be endorsed by the ECN (e.g. on aggravating/mitigating circumstances, assessment of gravity, use of guidelines etc.).
Guaranteeing that all NCAs have a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions.	Legislative action: 1. Availability per NCA of effective guarantees that leniency applicants can safeguard their place in the leniency queue. 2. Availability per NCA of rules to protect employees of leniency applicants from sanctions. 3. Number of leniency applications per NCA. Soft action: 1. Application by NCAs of recommended practices/guidance to be endorsed by the ECN (e.g. on practical issues for dealing multiple leniency applications.
Ensuring that NCAs have sufficient resources and they can enforce the EU competition rules independently.	Legislative action: 1. Availability per NCA of rules ensuring that NCAs do not receive instructions from public or private bodies. 2. Survey of whether NCAs have been subject to attempts to undermine their independence. 3. Survey of whether NCAs have adequate human and financial resources to perform their tasks, including trend and comparison of levels of staff and budget.
Extra costs for NCAs	1. Additional costs incurred as a result from enhanced powers (training, etc.) 4. Cost of NCAs' antitrust enforcement activity (costs vs. amount of fines imposed)

Annex XVI – Costs/benefits analysis of the preferred option

A) COSTS ASSESSMENT

Total costs arising from the legislative initiative can be (1) Direct costs, (2) Enforcement Costs, or (3) Indirect costs. The three categories of costs are assessed in more detail below.

(1) Direct costs

Types of direct costs	Assessment	Quantification
Regulatory charges[27]	The initiative would not give rise to any additional regulatory charges on stakeholders.	0
Substantive compliance costs[28]	There could be adaptation costs for businesses in terms of familiarisation with the new rules, which would vary depending on which Member States they operate in. These costs would be in any case rather limited and more than off-set by the benefits of operating in a more level playing field with greater legal certainty. Apart from these potential costs, the initiative would not introduce additional obligations on businesses or citizens and therefore it would not be expected to give rise to any additional substantive compliance costs.	Low
Administrative burdens[29]	The initiative would not introduce information obligations and therefore it would not be expected to give rise to any additional administrative burdens.	0
Hassle costs[30]	The initiative would not be expected to give rise to any additional hassle costs.	0

[27] Fees, levies, taxes, etc.

[28] Investments and expenses that are faced by businesses and citizens in order to comply with substantive obligations or requirements contained in a legal rule.

[29] Costs borne by businesses, citizens, civil society organizations and public authorities as a result of administrative activities performed to comply with information obligations included in legal rules.

[30] Costs for businesses/consumers associated with waiting time and delays, redundant legal provisions, corruption etc.

(2) Enforcement Costs[31]

Types of enforcement costs	Assessment	Quantification
Implementation of the legislative initiative	This is expected to be the higher cost and is to be borne by the public administration. It would include: 1) adaptation of legal framework, which would include the costs of national civil servants and politicians involved in assessing the new requirements of the initiative, the changes needed to be done in their national legal frameworks and the drafting of the necessary changes; and 2) costs linked to the adoption of the legal changes by national parliaments. These costs are however not expected to be "additional costs" in general[32], since the costs of civil servants, politicians and of the normal functioning of national parliaments would be incurred anyway, regardless of the initiative. These costs are also difficult to quantify *ex-ante*, and could also vary significantly depending on the Member State: while for some Member States the changes would be minimal, for others more extensive legal changes could be required. In any event, even if not additional costs, these are public resources that, absent the initiative, could be devoted to other projects. We have therefore tried to at least estimate the order of magnitude of what these costs could represent. For the adaptation of the legal framework, the cost of the staff/politicians working in the	-Adaptation of the legal framework would involve at most: 2 FTE x 18 months per Member State

[31] These costs are associated with activities linked to the implementation by the Member States of new legal rules such as monitoring (compliance with the new rules), enforcement (cost of applying the new legal rules) and adjudication (using the legal system, or an alternative dispute resolution mechanism, to solve controversies generated by the new legal rules).

[32] Additional costs might arise for example in cases where external studies are commissioned for the assessment of certain aspects of the implementation. This is, however, not possible to foresee at this stage.

	assessment of the legal changes that are needed and drafting the proposals, taking as a basis experience in the implementation by Members States of the Damages Directive 2014/104/EU, a realistic estimate would be a maximum of 2 FTE for 18 months.	
Costs of actual enforcement of the initiative	Within the enforcement costs, for most of the measures it is not expected that they would in general entail *per se* additional costs for NCAs. All NCAs already have the basic framework in place for enforcing the EU competition rules. Moreover, filling in gaps in NCAs' means and instruments is primarily an implementation cost which is not borne by the NCAs directly (see above). NCAs would also need to get familiarised with the changes introduced by the initiative, and therefore training cost could be expected. These training costs would however be limited because they would partly be offset by the mechanisms of cooperation/training possibilities that are currently in place: through the ECN meetings NCAs' officials would be able to exchange experience and know-how about the application of the new measures; and NCAs' officials could also participate in the one month training programme organised annually by DG Competition. The cost of this training can be estimated to be about 5 training days, for 2 FTE per day The main cost for Member States would be related to the measures to ensure a sufficient level of financial and staff resources. The envisaged provision in this respect is however very basic and essentially it is aimed at preventing NCAs from being in a situation where they cannot effectively enforce the EU competition rules. This would mean that a limited number of Member States may need to increase their staff of their NCAs to ensure that they can effectively carry out simultaneous inspections of all/most members of a cartel. This cost is difficult to estimate accurately *ex-ante*, but in order to obtain an approximation of its order of magnitude, we have estimated these needs to range between 4 to 10 FTEs for 5 NCAs to allow them to conduct simultaneous inspections of all/most members of a cartel. Finally, the Commission is responsible for ensuring that appropriate IT platforms and tools are in place to ensure that authorities can cooperate effectively in the ECN. This is currently fit for purpose. These IT platforms and tools have to be updated continuously and any challenge resulting from the initiative would have to be integrated in this process. These costs are however	-Training 5 days x 2 FTE per Member State -Total increase of staff: ~ 35 FTE (4 to 10 FTEs for 5 NCAs)

	difficult to estimate *ex-ante* and in any case they would not be significant.	
Monitoring costs	The initiative is not expected to give rise to any additional monitoring costs on top of those each Member State may already incur to monitor the application of national competition rules.	
Adjudication costs	The initiative is not expected to give rise to any adjudication costs.	

(3) Indirect costs[33]

Types of indirect costs	Assessment	Quantification
Costs incurred in related markets or experienced by stakeholders not directly targeted by the initiative	The initiative is not expected to give rise to any indirect costs in related markets or for stakeholders not targeted by the initiative.	0
Indirect compliance costs	As a result of more effective enforcement, more companies could be subject to antitrust investigations, which could in turn lead to costs for these companies in terms of legal advice, administrative procedures with the NCA, and potential sanctions. These are however costs that are inherent to ensuring compliance with the law and would therefore not amount to additional costs.	0
Costs related to substitution	The initiative is not expected to give rise to any costs related to substitution.	0

[33] These costs are incurred in related markets or experienced by consumers, government agencies or other stakeholders that are not directly targeted by the initiative/regulation. These costs are usually transmitted through changes in the prices and/or availability and/or quality of the goods or services produced in the regulated sector. Changes in these prices then ripple through the rest of the economy changing prices in other sectors and ultimately affecting the welfare of consumers. The category also includes so-called "indirect compliance costs" (i.e. costs related to the fact that other stakeholders have to comply with legislation) and costs related to substitution (e.g. reliance on alternative sources of supply), transaction costs and negative impacts on market functioning such as reduced competition or market access, or reduced innovation or investment.

B) BENEFITS ASSESSMENT

Benefits arising from the legislative initiative could be (1) Direct regulatory benefits, (2) Indirect regulatory benefits, and (3) ultimate impacts of the initiative. The three categories of benefits are assessed in more detail below.

(1) Direct regulatory benefits

Types of direct regulatory benefits	Assessment	Quantification
Improvement of the well-being of individuals[34]	The initiative is not expected to give rise to any direct benefit in terms of health, environmental and safety improvements.	NA
Efficiency improvements[35]	The initiative is expected to give rise to significant benefits derived from more competitive markets in terms of lower prices and greater innovation, choice and quality of products and services. Although difficult to quantify at EU level, some Member States and the Commission have estimated the benefits for consumers derived from their respective enforcement actions as follows: Dutch NCA: €260 million (2014, and including merger control). UK NCA: £73 million (2015) (~ €100 million) Commission: €0.99-1.49 billion (2015, and only from cartel prohibition decisions) The cost of under-enforcement (uncovered cartels) has been estimated at around €181-320 billion.	Quantification not available

[34] Health, environmental and safety improvements.

[35] Notably, cost savings but also information availability and enhanced product and service variety and quality for end consumers.

(2) Indirect regulatory benefits

Types of indirect regulatory benefits	Assessment	Quantification
Indirect compliance benefits[36]	The initiative is not expected to give rise to any indirect compliance benefits, in addition to the wider effects for the economy assessed under ultimate impacts.	See "Economic goals" under "Ultimate impacts of the initiative"
Macroeconomic benefits[37]	Assessed under ultimate impacts.	See "Economic goals" under "Ultimate impacts of the initiative"
Other non-monetizable benefits[38]	The initiative is not expected to give rise to any other non-monetizable benefits.	NA

(3) Ultimate impacts of the initiative

Types of ultimate impacts	Assessment	Quantification
Well-being, happiness and life satisfaction	The initiative is expected to give rise to benefits derived from more competitive markets: lower prices and greater innovation, choice and quality of products and services. These features could have a positive impact on the level of satisfaction of citizens. It is however difficult to quantify these specific benefits.	Not quantified
Environmental quality	The initiative is not expected to give rise to any benefit in terms of environmental quality, beyond the fact that more competitive markets make a better use of the scarce resources available.	Not quantified
Economic goals (such as GDP growth and employment)	See section B.1	See section B.1

[36] Spill-over effects related to third-party compliance with legal rules.
[37] Including GDP improvements, productivity enhancements, greater employment rates, improved job quality etc.
[38] Protection of fundamental rights, social cohesion, reduced gender discrimination or international and national stability.

B.1) ECONOMIC GOALS (SUCH AS GDP GROWTH AND EMPLOYMENT)

Giving NCAs minimum means and instruments to address the problems identified would enable them to be more effective enforcers, boosting the application of the EU competition rules. According to a report from the OECD there is solid evidence from numerous empirical studies that enforcement of competition law leads to more competition on markets, which in turn results in higher productivity growth in affected industries, which translates into economic growth.[39] In a survey carried out by Ahn S. it was concluded that "*A large number of empirical studies confirm that the link between product market competition and productivity growth is positive and robust. […] Empirical findings from various kinds of policy changes […] also confirm that competition brings about productivity gains, consumers' welfare gains and long-run economic growth*".[40]

It is, however, difficult to give estimates of the expected benefits of the preferred option since the proposed changes are of a nature that is not easily quantifiable. This is because more effective competition enforcement is likely to give rise to general benefits to society and to the economy as a whole rather than to specific and quantifiable savings or benefits. In addition, economic literature trying to measure those benefits is scarce.

Despite these obstacles, in two articles published in the *Journal of Competition Law & Economics*[41] and *The Review of Economics and Statistics*[42] P. Buccirossi and co-authors developed a methodology to measure the impact that competition policy enforcement has on the economy. To our knowledge, this is the only available econometric approach trying to quantify the benefits of various detailed aspects of competition policy enforcement on the economy.

Using the articles of Buccirossi et al. we have tried to calculate (or at least give some orders of magnitude) the impact that the preferred option would have on the level of competition enforcement, and hence on growth in Total Factor Productivity ("TFP").

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39 See OECD, 2014, Fact-sheet on how competition policy affects macro-economic outcomes.

40 See Ahn, S. (2002). "Competition, Innovation and Productivity Growth: A Review of Theory and Evidence". OECD Economics Working Paper No. 317. A study carried out by Petit L., Kemp R. and van Sinderen J. (2015) "Cartels and productivity growth: an empirical investigation of the impact of cartels on productivity in the Netherlands", assessed the impact of cartels on total factor productivity (TFP). TFP is a measure of the output of a company, sector or total economy that cannot be explained by the amount of inputs used in production and whose level is determined by how efficiently and intensely the inputs are utilized and is an indicator of competitiveness. The results showed that the entry and presence of a cartel had a negative impact on TFP and it was estimated that cartels had a negative impact on TFP of between 2% to 3% during the period covered.

41 Bucirossi, P., Ciari, L., Duso, T., Spagnolo, G. & Vitale, C. (2011). "*Measuring the deterrence properties of competition policy: the competition policy indexes* ". Journal of Competition Law & Economics, 7(1), 165-204.

42 Buccirossi, P., Ciari, L., Duso, T., Spagnolo, G., & Vitale, C. (2013). Competition policy and productivity growth: an empirical assessment. Review of Economics and Statistics, 95(4), 1324-1336.

Quantification of the relationship between level of competition enforcement and TFP growth

Buccirossi et al. constructed so-called "Competition Policy Indicators" (CPIs) that are intended to measure the quality of competition policy enforcement in various countries. They then estimated the effect of competition policy enforcement on efficiency and productivity as measured by TFP.

TFP is a widely used measure of productivity in an economy. It basically describes how efficient the economy is in the use of all (hence "total") relevant inputs. To put it simply, if an economy is able to produce more with the same amount of inputs, its TFP increases.

To illustrate the importance of TFP, an annual growth of TFP of 1% would mean that an economy using the same amount of input resources would increase its production with around 10.5% over ten years. If the growth of TFP is only 0.5%, the increase in production would only be 5.1% higher.

The fact that TFP growth has slowed down in Europe has therefore raised concerns. For instance, the Commission devoted about half of its April 2016 Quarterly Report on The Euro Area to issues related to TFP growth.[43] The Report states that "*[i]n the current setting of low GDP growth, inflation and interest rates, all of which are legacies of the global financial crisis, a decline in productivity and a deterioration in demographic trends could weaken Europe's resilience in facing additional adverse shocks in the region*".[44]

Before moving on to our calculations, it may be useful to explain why we would expect a connection between competition policy and TFP growth. One part of the explanation is actually given in the Buccirossi articles mentioned above in a section focusing on the drivers of TFP growth in the EU. The section stresses the role of "business dynamics" by which it intends market entry and exit of firms. The section presents empirical analysis done by the Commission but first explains that *"[a]ccording to economic theory, there is a link between these firm dynamics and productivity developments. Various channels proposed in the literature may explain this link. These include Schumpeterian creative destruction (replacement of less efficient firms by more efficient ones through the process of innovation), the disciplining effect of market entry on existing firms, and reallocation of productive resources towards more efficient uses facilitated by the process of market entry and exit*."[45]

This quote explains well why we would expect effective competition policy enforcement to influence TFP growth. Effective competition policy enforcement helps keeping markets open, thereby ensuring that new innovative and more productive firms are not foreclosed from the market, at the same time putting pressure on incumbents to either improve or lose market

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43 http://ec.europa.eu/economy_finance/publications/eeip/pdf/ip024_en.pdf.
44 Quarterly Report on the Euro Area, April 2016, p. 19.
45 Quarterly Report on the Euro Area, April 2016, p. 25.

share. At the same time, effective competition policy ensures that prices for inputs in the productive process are not inflated by activities of cartels and anticompetitive mergers.

It would, of course, be interesting to know how large the contribution of competition policy actually is. This is the question that Buccirossi and his co-authors attempted to answer. To this end, the authors collected data on seven features of competition policy for 12 OECD countries for the period 1995-2005, 9 of which are EU Member States.[46].

Although not all these features are directly targeted by the current initiative (e.g. issues such as having effective merger control and private enforcement are already tackled by other EU legislative measures[47]), many of them match its specific objectives. Furthermore, the spirit of what Buccirossi et al. try to measure, the effectiveness of the enforcement of competition policy in improving efficiency and productivity, is obviously very close to what this initiative is trying to achieve. We therefore consider that we can use the effects estimated by Buccirossi et al. of competition policy on TFP to illustrate the magnitude of the effects that can be expected from our proposal.

For each of the 12 countries Bucirossi et al. constructed yearly indicators with values between 0 and 1 for each of the seven features of competition policy. They then used the seven indicators to calculate an aggregate CPI incorporating all the information on the competition policy regime in a jurisdiction. [48] [49]

The aggregate CPI, which also is between 0 and 1, has an average value (over the 12 countries and the 11 years) of 0.4976 with a standard deviation of 0.1019. The minimum value is 0.3167 and the maximum 0.7035. This means that improving the performance of a country with the lowest CPI value to the average would be an increase of the CPI of 57%. As we will see below, managing to cover just a part of that would have a significant impact on TFP growth.

In Bucirossi et al. the CPI, together with several other variables, is used to explain growth in TFP within an econometric framework. In the basic estimations (using basic OLS

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[46] Canada, the Czech Republic, France, Germany, Hungary, Italy, Japan, the Netherlands, Spain, Sweden, the United Kingdom and the United States.

[47] See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation) Official Journal L 24, 29.01.2004, p. 1-22, and Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 2014, L 349, p.1. .

[48] Details on these features, their components and the specific weights given to each of them used to calculate the aggregate final CPI can be found in Bucirossi, et al (2011). "*Measuring the deterrence properties of competition policy: the competition policy indexes*", Journal of Competition Law & Economics, 7(1), 165-204, tables 1, 2 and 3.

[49] To aggregate the seven components they experiment with different weighting choices and show that the results are robust with the chosen weights.

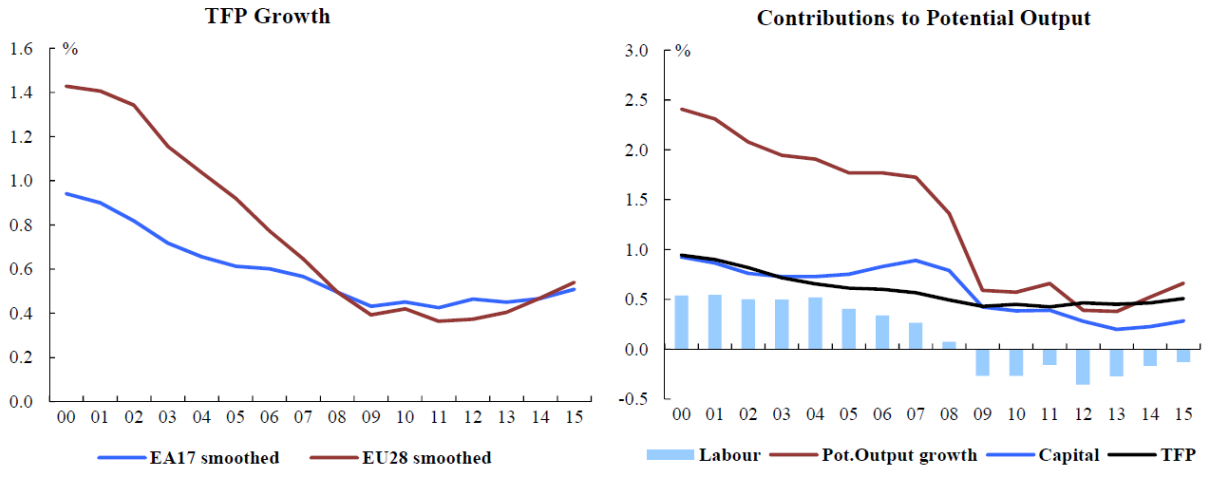
regressions), the estimated coefficient of the CPI index is around 0.09.[50] This means that an increase in the CPI index of 0.1 is estimated to lead to an increase in TFP growth of 0.009, that is, 0.9 percentage point.

One way to look at what this means is to consider the elasticity of TFP with respect to the CPI that emerges from the estimations. Using the estimated coefficient of 0.09 mentioned above, Buccirossi et al. calculate this elasticity to be 4.48 at the average values for TFP and CPI (over the 12 countries and 22 industries considered). This implies that a 1% increase in CPI leads to a 4.48% increase in the growth rate of TFP. A 10% increase in the CPI might therefore be associated with an increase in the growth rate of TFP of almost 50%. As the average TFP growth across the countries and industries considered by Buccirossi et al. was about 1% over the period 1995-2005, for the average country an increase in the CPI of 10% would have led to an average TFP growth of 1.5% (instead of 1%).

Another way to look at this is to concentrate on countries with low CPI indices, since it could be argued that it may be easier to raise the CPI from a low level, rather than increasing an already relatively high CPI. An increase of the smallest value of CPI in the data set from 0.3167 to 0.3484 (equivalent to a 10% increase) would result in an increase TFP growth of 0.29 percentage point (e.g. from 1% to 1.29%, using again a coefficient of 0.09).

Given that TFP growth in the EU as a whole has been below 1% for the last ten years (see Graph 1), the results of Buccirossi et al. indicate that even a relatively small increase in the effectiveness of competition policy enforcement would give a significant boost to productivity. In fact, as shown in Graph 1 below, over the last decade TFP growth has had an impact on total GDP as important as increases in labour and capital, and it has become the most important factor during the last five years.

Graph 1 - TFP and non-TFP contributions to EU Potential Growth: 2000-15[51]



[50] In the basic estimations, the authors use Ordinary Least Squares (OLS) regressions. In more sophisticated estimations using instrumental variables (IV) methods, the estimated coefficient of the CPI index is around 0.2. As the authors use the coefficient from the OLS regressions when explaining their results, we do the same in our calculations. Using the IV coefficient, the effects would be roughly twice as large.

[51] European Economic Forecast, Winter 2014, Box I.2. http://ec.europa.eu/economy_finance/publications/european_economy/2014/pdf/ee2_en.pdf.

It should be noted that for several countries in the data set the variation in the values of the CPIs over the period considered is more than 10%. In fact, the average CPI increases from around 0.45 to around 0.52 over the period, equivalent to an increase of more than 15%. Increases in the CPI of the magnitude we are discussing are therefore not unusual.

Taking into account that the EU28 GDP has been within the range 13 000 000 - 15 000 000 million euro during the past 5 years[52], very small changes in GDP have a huge impact in terms of absolute value. Even taking a very conservative approach and considering that the real impact would be a fraction of what would be expected, these results indicate that achieving even a relative small increase in the value of CPI would increase productivity growth in a manner that in all likelihood would dwarf the costs of implementing the proposals in the preferred option which, as explained in section A dealing with the cost assessment, are expected to be modest.

In the next section, an attempt will be made to relate the proposals in the preferred option 3 to the CPI, that is, to see what changes in the CPI these proposals can be expected to have. Following that, the corresponding increases in TFP growth will be calculated.

[52] http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tec00001&language=en.

Effect of the preferred option on competition enforcement and on TFP growth

Once the relationship between the level of competition enforcement - in terms of CPI - and TFP growth has been established and quantified, the next steps are to assess, first, whether the Member States have scope to improve their level of competition enforcement (i.e. the CPI) and, if so, assess the effect of the preferred option on such a level of enforcement (i.e. on the CPI).

Scope for the improvement of competition enforcement

One approach to estimate by how much competition enforcement could be improved in each Member State would be to estimate their respective CPIs. This would allow us to estimate the margin of improvement of such index (which can be between 0 and 1), and hence of TFP growth that could be achieved in each Member State as a result of changes in the CPI induced by option 3.

This exercise is, however, very difficult to carry out because the CPI estimates available in the study by Buccirossi et al. only relate to 9 Member States, and the study does not provide the information that would be needed to replicate the results for the remaining Member States or even to update the results for the 9 Member States for the period after 2005. Moreover, the results cannot be replicated either on the basis of the information that we have collected for the preparation of this Impact Assessment.[53]

Nevertheless, there is scope for improvement which can be inferred from the results of the Buccirossi study.

As mentioned above, the average CPI provided by the study is 0.4976 for the twelve countries considered, nine of which are EU Member States. The minimum value is 0.3167 and the maximum 0.7035. Taking into account that the CPI ranges between 0 and 1, these results show that, on average, there is a significant margin of improvement of the CPI for every country in the study.

A criticism of this approach could be that the CPI gives a value to some aspects of enforcement that are not pursued by the present initiative, so that in the Commission's view the optimum CPI level could probably be a CPI below 1. In any case, there is still significant scope for improvement (up to around 0.8217).[54]

Another potential criticism could be that the data in the Buccirossi study are for 2005, and that the enforcement level of the Member States could have improved in the meantime so that there is no longer scope for improvement. However, as explained in section 6.2. of the Impact Assessment, despite the significant efforts to address the gaps in the means and instruments of the NCAs that have been made since 2004 when Regulation 1/2003 entered into force, these problems still persist after more than ten years, and many jurisdictions still have a number of loopholes which leave room for significant improvements in the level of enforcement.

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[53] Although the information collected covers a wide range of topics, it does not cover certain aspects that are necessary to estimate some of the indicators (such as qualifications of staff or detailed information on sanctions to individuals).

[54] This value for the CPI is obtained by assuming that under the present initiative the scores of some low-level indicators would not reach 1 because not all aspects are addressed by the current initiative or are relevant. Re-calculating the CPI on the basis of the maximum values for the indicators addressed by the current initiative and the corresponding weights provided by the Buccirossi study, the maximum CPI would still be 0.8217, therefore still leaving significant scope for improvement.

Effect of the preferred option on competition enforcement

As indicated above, replicating the study of Buccirossi et al. and estimating the quantitative changes that all the measures proposed by option 3 would induce in the CPI, and hence in TFP growth, of each Member State, is not feasible.

It is, however, possible to carry out a qualitative assessment of the effects that option 3 would have on the CPI of the Member States by assessing how the proposed measures will affect each of the features that form the CPI. In addition, we have also tried to illustrate some quantitative estimates of the impact that some of the measures of option 3 would have on CPI and TFP growth for those Member States affected by that particular measure.

How CPI is constructed – weights of the different factors

In their study, Buccirossi et al explain the construction of the CPI. As indicated above, they used seven features to assess the competition policy of a given jurisdiction. These features included aspects such as independence, investigative powers, sanctions policy, the availability of private damages and resources. Five of the seven features are labelled "institutional", and other two are called "enforcement" features. These features are used to measure different aspects of competition enforcement regarding the four "limbs" of enforcement: abuses of dominant positons, hard-core cartels, other anticompetitive agreements, and mergers. Each feature is in turn formed by two or three "low-level indicators". See examples of these "low-level indicators" in Table 2 below.

The CPI is calculated by aggregating the values (between 0 and 1) assigned to each low-level indicator according to different weights given to each of the "low-level indicator", type of feature and "limb" of enforcement. Table 1 of Bucirossi's study [55] provides details on the weights given to each "low-level indicator". These weights are generally 1/6 for each of the "institutional" features, except in some cases in which it is 1/3, while for each of the "enforcement" features they can take the values 1/3, 2/3 or 1, depending on the case. The weights given to the groups of "institutional" and "enforcement" features as a whole, and to each of the "limbs" of competition are shown in Table 1 below:[56]

Table 1 – Weights

	Antitrust (3/4)			Mergers (1/4)
	Abuses (1/3)	Hard-core cartels (1/3)	Other agreements (1/3)	Mergers
Institutional features (2/3)	Institutional features	Institutional features	Institutional features	Institutional features
Enforcement features (1/3)	Enforcement features	Enforcement features	Enforcement features	Enforceme nt features

[55] Bucirossi, P., Ciari, L., Duso, T., Spagnolo, G. & Vitale, C. (2011). "*Measuring the deterrence properties of competition policy: the competition policy indexes*". Journal of Competition Law & Economics, 7(1), 165-204.

[56] Bucirossi, P., Ciari, L., Duso, T., Spagnolo, G. & Vitale, C. (2011). "*Measuring the deterrence properties of competition policy: the competition policy indexes*". Journal of Competition Law & Economics, 7(1), 165-204, Tables 2 and 3.

Qualitative assessment of the impact of option 3 on the CPI

First, it is necessary to identify the features and low-level indicators on which option 3 will have an impact. Option 3 would impact, depending on the antitrust enforcement "limb" considered (abuses of dominant positons, hard-core cartels and other anticompetitive agreements) between four and six features, and ten out of the seventeen low-level indicators. Table 2 shows the features and the low-level indicators (with their corresponding scores) that would be affected by option 3.

Table 2 - Low-level indicators forming the CPI affected by option 3

Impact on low-level indicators	Scores	Scope (*)	Affected by measures in Option 3			
			Effective competition toolbox	Fines	Independence and resources	Leniency programmes and interplay
Powers during the investigation						
-Ability to impose/request interim measures	-Yes: 1 -No:0	(a)(c)	X			
-Combination of powers: power to inspect business and/or non-business premises	-Two powers available: 1 -One power to inspect business premises available: 0.5 -None available: 0	(a)(b)(c)	X			
Sanction policy and damages						
-Sanctions to firms	(2/3) -If legal maximum of fine set as a percentage of turnover: 1 -If legal maximum of fine is left to discretion of adjudicator: 0.66 -If legal maximum fine set as an absolute value: 0.33 -If no fines envisaged: 0 (1/3) -Monetary sanctions + structural remedies: 1 -Only monetary sanctions: 0.75 -Neither: 0	(a)	X	X X		
	-If legal maximum of fine set as a percentage of turnover: 1 -If legal maximum of fine is left to discretion of adjudicator: 0.66 -If legal maximum fine set as an absolute value: 0.33	(b)(c)		X		

Impact on low-level indicators	Scores	Scope (*)	Affected by measures in Option 3			
			Effective competition toolbox	Fines	Independence and resources	Leniency programmes and interplay
	-If no fines envisaged: 0					
Independence						
- Body performing the investigation	-Total statutory independence (court or independent agency): 1 -Ministerial agency/department: 0 -If both can perform the investigation: intermediate value	(a)(b)(c)			X	
- Body making the decision and role of the government	-Total statutory independence and government cannot overrule the decision: 1 -Total statutory independence but government can overrule the decision: 0.5 -Ministerial agency/department: 0	(a)(b)(c)			X	
Resources						
-Budget	-Scores=[Budget/GDP country X]/[highest budget/GDP of sample]	(a)(b)(c)(d)			X	
-Staff	-Score=[Staff/GDP country X]/[highest staff/GDP of sample]	(a)(b)(c)(d)			X	
-Stall skills	-Score=[Number of economists with Ph.D and qualified lawyers /total staff country X]/[highest number of economists with Ph.D and qualified lawyers/total staff of sample]	(a)(b)(c)(d)			X	
Quality of the law						
-Leniency programme	-There is a leniency programme: 1 -There is no leniency programme: 0	(b)				X

			Affected by measures in Option 3			
Impact on low-level indicators	**Scores**	**Scope (*)**	**Effective competition toolbox**	**Fines**	**Independence and resources**	**Leniency programmes and interplay**
<u>Sanctions and cases</u> (Tries to measure the effectiveness of sanctions also on the basis of (i) the strictness of jail terms for employees and (ii) the credibility of CA by looking at their level of investigation activity)						
-Number of cases opened	-Score=[number cartel invest. initiated/GDP]/[highest number cartel invest. initiated/GDP]	(b)	X			X

(*) Scope: (a) dominant positons, (b) hard-core cartels, (c) other anticompetitive agreements, (d) mergers

It is important to underline that the impact of option 3 on the effective enforcement of competition rules by NCAs would be much wider than what it could be concluded from Table 2. This is because Table 2 only shows the impact of option 3 on the pre-selected indicators chosen by the authors of the study, which for practical reasons need to be limited to make the study manageable. However, there are many other aspects of competition enforcement which are as important as those shown in Table 2 and which would be also affected by option 3 as is illustrated below. For example, the pre-selected indicators do not cover the power to gather digital evidence, even though this is an indispensable tool to investigate infringements nowadays.

a) Effects of option 3 on the degree of "independence" and "resources"

The CPI attaches great relevance to the independence and the resources of CAs, which account respectively for about 15% and 28% of the overall index.

Option 3 will have a significant impact on several of the indicators considered in the CPI regarding both independence and resources:

-The measures to ensure that NCAs are not subject to any instructions from any other public or private body when enforcing the EU competition rules would ensure a protection of the independence of the bodies performing the investigations and making the decision equivalent to that of an independent agency, having, therefore, a positive impact on the two antitrust low-level indicators on independence. The additional measures to ensure that NCAs' board/management cannot be dismissed in relation to its decision-making would reinforce the level of independence.

- The measures to ensure that NCAs have adequate and stable human and financial resources to perform their tasks would also have a direct positive impact on the three antitrust low-level indicators on resources.

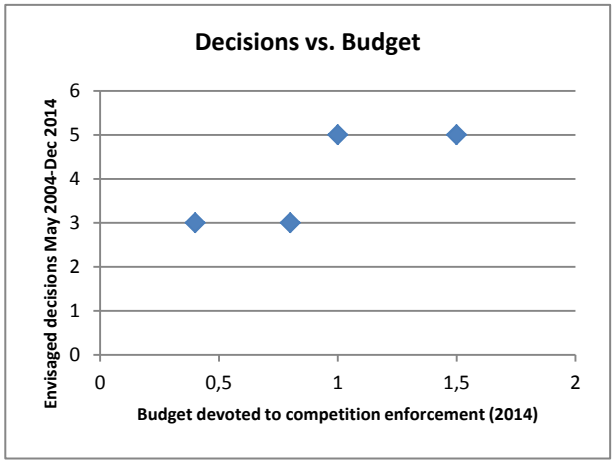
Table 3 shows that most Member states would be affected by the proposed measures on independence:

Table 3 – Provisions on independence in Member States

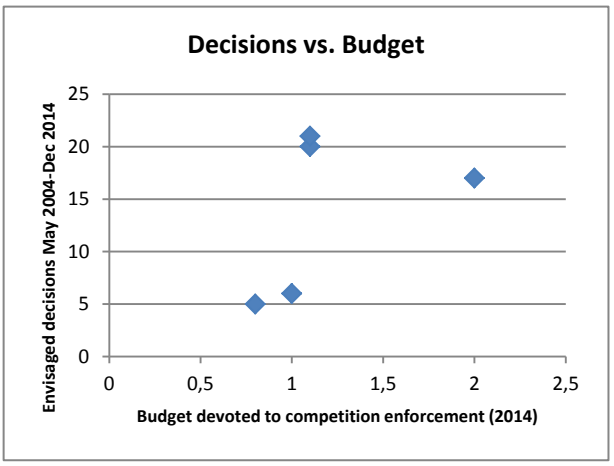
Qualitative Indicators ➔	Availability of explicit prohibition to seek or take instructions from government or other public or private bodies	Explicit requirement to act independently and impartially in the exercise of their duties
Member States lacking the provision	18	11

On resources, section 2.2.4 of the Impact Assessment contains a graph showing the relationship between decisions adopted by NCAs and budget for a single group of Member States with similar GDP. The strong link observed between the available budget and the level of enforcement is, however, not limited to this group of Member States, but an overall trend. This is shown in Graphs 2 to 6 below for all the groups of countries:

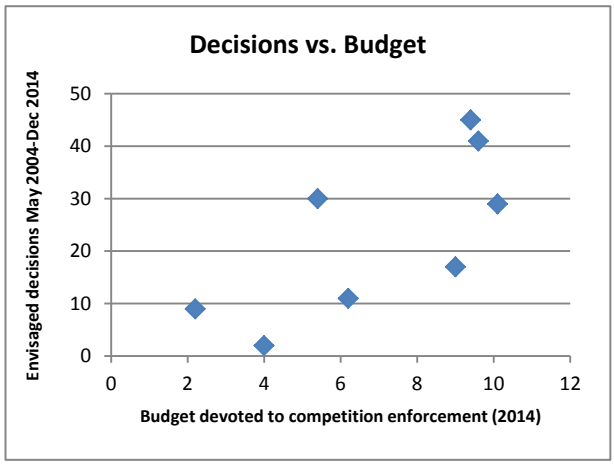
Graph 2 - Member States with GDP 7.9-24 Billion Euro



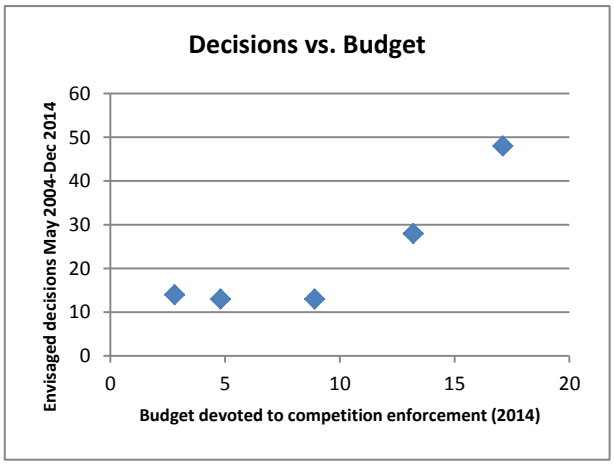
Graph 3 - Member States with GDP 36-75 Billion Euro



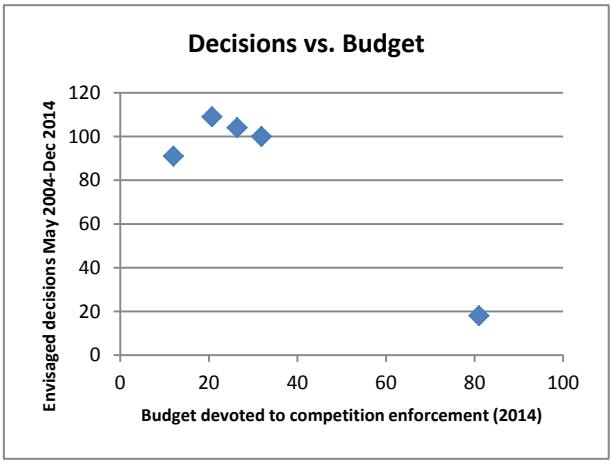
Graph 4 - Member States with GDP 102-256 Billion Euro



Graph 5 - Member States with GDP 329-650 Billion Euro

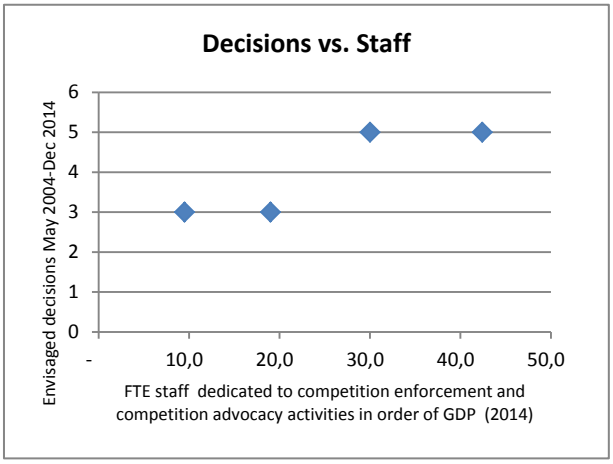


Graph 6 - Member States with GDP 1057-2903 Billion Euro

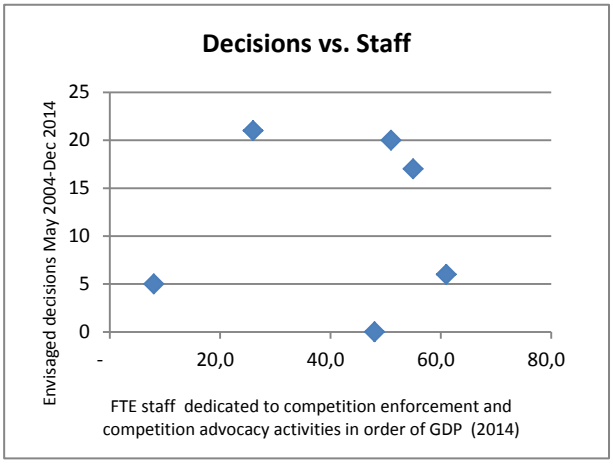


Regarding staff, Graphs 7 -11 below also tend to confirm the relationship between available staff and level of enforcement:

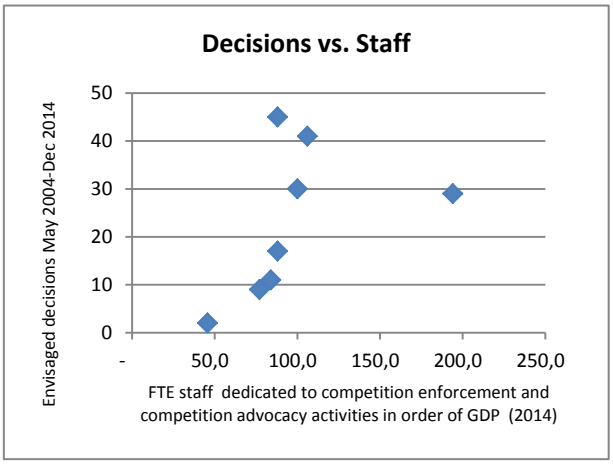
Graph 7 - Member States with GDP 7.9-24 Billion Euro



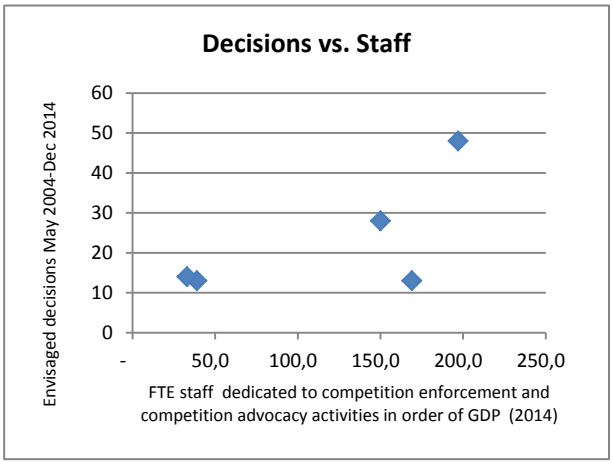
Graph 8 - Member States with GDP 36-75 Billion Euro



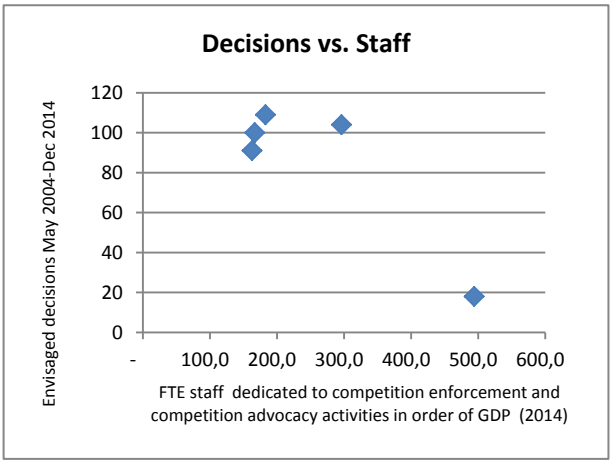
Graph 9 - Member States with GDP 102-256 Billion Euro



Graph 10 - Member States with GDP 329-650 Billion Euro



Graph 11 - Member States with GDP 1057-2903 Billion Euro



Moreover, the fact that the lack of sufficient resources has actually caused enforcement problems has been corroborated by many NCAs which have indicated that they have been forced to refrain or reduce their activities due to budgetary/staffing constraints:

Quantitative estimate

In an attempt to determine the impact of some of the proposed measures regarding powers on the CPI, we have estimated the change in the CPI attributing the following values to the budget low-level indicators:

a) Budget, Staff and Staff skills: an improvement in 10% in these indicators for a NCA with a value of 0.3[57] (therefore increasing from 0.3 to 0.33) would lead to an increase in the CPI of 0.0083, which in turn would translate into an increase of the TFP growth of 0.0083 x 0.09 = 0.000747 or ~0.075 percentage points (from 1%[58] to 1.075%).[59]

In order to illustrate the order of magnitude of the changes required, we can take a real example. According to the data on GDP and budget dedicated to competition enforcement of 2014, the normalised low-level indicators "budget/GDP" of all Member States would have an average value of around 0.3677. For a Member State with a real budget of 2 million Euro and a low-level indicator of 0.3064, an increase in 10% of this indicator would require a real budget increase of around € 200 000, which is a very low cost compared to the benefits brought in terms of TFP growth.

b) Effects of option 3 on the "powers during investigations"

The CPI also attaches great relevance to the powers of CAs (around 9% of the overall index) even if only a few of them, and with limited scope, are considered.

Option 3 will have a significant direct impact on the indicators considered in the CPI regarding powers during the investigation:

-The measures to ensure that NCAs can inspect business and non-business premises and to issue interim measures would have a positive impact on the two low-level indicators related to powers during the investigation.

-In addition, the power to impose structural remedies would have a positive impact on

[57] These indicators are "normalised", which means that the value assigned to each CA is the result of dividing its resources by the highest value of the sample.

[58] In this and the other examples, we use a value of the TFP growth of 1% for the base line scenario, which is the average value found by Buccirossi et al. for the period they studied. The current TFP growth is now lower, as shown in Graph 1, with an average of around 0.5-0.6% for the past 5 years and closer to 1% if the last 15 years are considered. The order of magnitude of the results would, however, not be substantially different.

[59] The calculation has been done as follows: on the basis of the weights given to each low-level indicator and the way they are aggregated to form the final CPI provided in the Buccirossi study, and assuming that a change in the resources of a NCA is evenly split amongst the four limbs of competition enforcement, it results that a change "X" in the "Resources" low-level indicator (comprising Budget, Staff and Staff skills) produces a change in the final CPI of $\frac{5}{18}$ * X. A change in the "Resources" low-level indicator from 0.3 to 0.33 (e.g. a 10% increase) results therefore in a change in the CPIs of $\frac{5}{18}$ * 0.03 = 0.00833.

another CPI indicator ("Sanctions to firms" under "Sanction policy and damages").

The real impact would, however, be much more significant in real terms, because option 3 would tackle a much larger number of powers and also their scope, making them decidedly effective. For example, relying solely on the power to inspect business premises, as the CPI does, is not enough. Since 2005 (year of the study), there has been an unprecedented development in communication and storage by digital means making the possibility of gathering digital evidence crucial (as explained in section 2.2.1 of the Impact Assessment). Likewise, the CPI relies very much on the power to impose interim measures, while the Commission's experience over the last years has shown that many other powers are equally or even more important. During the public consultation we assessed the relevance of 17 powers for the effective enforcement of EU competition. The results, shown in Annex V, demonstrate a broad consensus on the tools NCAs need to be effective enforcers.

Table 4 shows the availability in the NCAs of a sample of 5 of these 17 powers, which cover both investigative and decision making powers and include the ones that are considered as CPI indicators. Almost all NCAs (25) are lacking at least one of these 5 powers.

Table 4 – Availability of powers in NCAs

	Feature b): the scope of the investigative powers				
Qualitative Indicators	Full power to set their priorities and decide which cases to dedicate their (often scarce) resources	Fundamental power to inspect the homes of business people for evidence of infringements	Power to impose structural remedies to restore competition on markets	Effective power to gather digital evidence (following specific aspects only: access to data on clouds, servers located in third countries, ability to carry out continued inspection procedure, ability to access mobile phones used for cartels etc.)	Power to impose effective sanctions, pecuniary sanctions and periodic penalty payments in case of non-compliance with a commitment decision/compel compliance
# NCAs lacking the power	15	3	8	11	14

These results therefore show that the changes introduced by option 3 would have a significant impact in most, if not all, NCAs, as they ensure that all NCA have a minimum set of powers compared to the current situation in which practically all NCAs are lacking some or several of them.

Quantitative estimate

In an attempt to determine the impact of some of the proposed measures regarding powers on the CPI, we have estimated what would be the change in the CPI attributing the following values to the low-level indicators:

a) Combination of powers: change from 0.5 to 1. A NCA lacking one of the two

powers covered by this indicator would have as a result of option 3 an increase in the CPI of 0.0347, leading to an increase of the TFP growth of 0.0347 x 0.09 = 0.0031 or 0.31 percentage points (from 1% to 1.31%).[60]

b) Availability of interim measures: change from 0 to 1. A NCA lacking this power would have as a result of option 3 an increase in the CPI of 0.0139, leading to an increase of the TFP growth of 0.0139 x 0.09 = 0.001251 or 0.12 percentage points (from 1% to 1.12%).[61]

c) Effects of the measures of option 3 related to fines and leniency on the "sanctions policy and damages" and on "sanctions and cases"

The CPI attaches great relevance to the sanctions systems of competition authorities – such as the size of the sanction and the level of activity - and their level of activity, as shown by the features measuring the performance in these areas which account for around 22% of the overall CPI.

Sanctions

Regarding sanctions, Option 3 will have a significant direct impact on some of the areas that the indicators considered in the CPI try to capture, and in some cases they will directly impact the specific indicators:

-The measures to ensure that NCAs can impose deterrent fines (such as a legal maximum of fines set as a percentage of the total turnover) would have a positive impact on the level of sanctions and on the low-level indicators related to "sanctions to firms".

-In addition, the measures aimed at ensuring that NCAs would be able to impose fines through an administrative or civil route (without prejudice to their current criminal systems) would also have a positive impact on the indicator measuring the "number of cases opened".

The real impact would, however, be much more significant because the deterrent level of the fines would be reinforced by the additional measures to ensure the consistent application of the concept of "undertaking" so that parent and successor companies are fined (instead of escaping fines) and to establish a set of core fining parameters.

With respect to "sanctions to firms", the indicator used only takes into account if the legal maximum is based on a percentage of total turnover of the firm, if it is left to discretion of the adjudicator, if it is an absolute value, or if there are no fines. The indicator, however, does not

[60] Following the same methodology used for the example with the "Resources" low-level indicator, it results that a change "X" in the "Combination of powers" low-level indicator produces a change in the final CPI of 5/72* X. A change in the low-level indicator from 0.5 to 1 as a result of gaining the lacking power would therefore result in a change in the CPIs of $\frac{5}{72}$ * 0.5 = 0.0347.

[61] Following the same methodology used for the example with the "Resources" low-level indicator, it results that a change "X" in the "Availability of interim measures" low-level indicator produces a change in the final CPI of 1/72* X. A change in the low-level indicator from 0 to 1 as a result of gaining the lacking power would therefore result in a change in the CPIs of $\frac{1}{72}$ * 1 = 0.013888 ~ 0.0139.

enter into the details of how the legal maximum is calculated (e.g. what exact turnover is considered). This makes the assessment of how option 3 could impact this indicator very difficult to carry out. It is however clear that Option 3 would significantly affect the way NCAs calculate their respective fines legal maximums. Annex VII shows that there is an important scope for improvement in many Member States. Currently, many Member States calculate the legal maximum, not on the basis of the turnover of the group, but of the direct infringer, and/or not on the basis of the total worldwide turnover but of the national turnover. This is shown in Table 5 below.

Table 5 - Basis for calculation of legal maximum for fines

	Geographic scope of the turnover	
Entity's turnover:	Worldwide	National
Undertaking	11 NCAs	3 NCAs
Direct infringer	9 NCAs	4 NCAs

In addition, one NCA has also limits based on absolute values (€16 million for Art 101 infringements and €400 000 for Art. 102 infringements).

With respect to the level of activity ("number of cases opened"), option 3 would likewise have a positive impact on some NCAs which are currently facing some issues preventing them from achieving their full potential.

An assessment of the cases and the fines imposed per Member State shows that when fines are primarily criminal, the level of enforcement/sanctions is low. This is for example the case for Ireland, where there has been practically no enforcement of EU competition law (only one case) between 2004 and 2014. Similarly, in Denmark, only one fine was ever imposed for breach of the EU competition rules in the same period, despite a large number of cases (40) being undertaken by the NCA and several infringements being found. In Germany there have been no fines for infringements of Art. 102 despite having dealt with a large number of cases (for Art. 101 infringements the NCA has imposed 41 fines in 60 decisions, whereas for infringements of Art. 102 in has not imposed any fine despite having taken 24 decisions).[62]

Option 3 would allow NCAs to opt for a complementary administrative/civil route for imposing sanctions and would, therefore, significantly increase the number of both findings of infringements and sanctions in those Member States that are now facing this type of issues.

Leniency

With respect to leniency, the CPI only accounts for the fact of having or not having a leniency programme, which currently all Member States except one have in place. It does not capture, however, more detailed information which is very important to assess whether or not a leniency programme is really effective, or the inter-link between national leniency programmes at EU

[62] In the case of Germany, fines follow a quasi-criminal procedure only in case of the fine being appealed.

level. Although for these reasons it is very difficult to assess the direct effect that option 3 would have on the CPI, we consider that option 3 would have a clear positive and significant effect in the area of leniency programmes. Probably this effect would end up by also having a positive effect on TFP growth, even if not captured by a change in the CPI, as it would likely lead to more attractive leniency programmes, increasing the number of leniency applications and therefore of enforcement activity across the EU.

The positive impact on the level of activity of NCAs would however not be achieved only by these measures (sanctions and leniency). The level of activity would also be reinforced and therefore multiplicative effect of the other option 3 measures. The enhanced investigative and decision making powers and having adequate and stable financial and human resources would allow NCAs to engage in cases that are currently out of their reach.

Quantitative estimate

In an attempt to determine the impact of some of the proposed measures regarding sanctions on the CPI, we have estimated what would be the change in the CPI attributing the following values to the low-level indicators:

a) Sanctions to firms: a modest improvement in 10% in this indicator as a result of option 3 would mean that a NCA with an average value for these indicators of 0.75[63] would have an increase in the CPI of 0.00416, leading to an increase of the TFP growth of 0.00416 x 0.09 = 0.00037 or ~0.04 percentage points (from 1% to 1.04%). In the extreme case of a NCA which in practice does not impose sanctions, option 3 would lead to an increase in the CPI of 0.0555, and therefore an increase of the TFP growth of 0.0555 x 0.09 = 0.00499 or ~0.50 percentage points (from 1% to 1.50%).[64]

[63] As explained, the indicator used only takes into account if the legal maximum is based on the percentage of total turnover of the firm, if it is left to discretion of the adjudicator, if it is an absolute value, or if there are no fines. Since option 3 affects the legal maximum in the details of how it is calculated (e.g. what exact turnover is considered), the current indicator may not capture the real effect of option 3, making an assessment of option 3 difficult in this respect. We have, however, provided this indication to give an estimate of the order of magnitude of the effects that an improvement in the sanctioning systems could have on the TFP growth.

[64] Following the same methodology used for the example with the "Resources" low-level indicator, a change "X" in the "Sanctions to firms" low-level indicator produces a change in the final CPI of 1/18* X. A change of 10% in the low-level indicator from 0.75 to 0.825 as a result of option 3 would therefore result in a change in the CPIs of 1/18 * 0.075 = 0.00416. In the extreme case, a change from 0 to 1 would result in a change in the CPIs of 1/18 * 1 = 0.0555.

Annex XVII – Glossary of terms

Antitrust

Field of competition law and policy. In the EU context, 'antitrust' refers both to the rules prohibiting anti-competitive agreements and practices (such as cartels, other cooperation agreements, distribution agreements, etc.) based on Article 101 TFEU, and to the rules prohibiting abuses by dominant companies based on Article 102 TFEU.

Abuse of a dominant position

Anti-competitive business practices (including improper exploitation of customers or exclusion of competitors) which a dominant company may use in order to maintain or increase its position in the market. Competition law prohibits such behaviour, as it damages competition between firms, exploits consumers, and makes it unnecessary for the dominant company to compete with other companies on merit. Article 102 of the TFEU lists some examples of abuse, namely unfair pricing, restriction of production output and imposing discriminatory or unnecessary terms in dealings with trading partners.

Cartel

Agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition, through practices such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.

Commitment decision

When a competition authority pursues a competition law case, companies may offer commitments (for example, the removing of anticompetitive clauses in an agreement) that are intended to address the competition concerns identified by the competition authority. If the competition authority accepts these commitments, it adopts a commitment decision making them binding and enforceable on the parties, without taking position on whether an infringement has been committed.

Dominant position

A company is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer.. Article 102 TFEU prohibits firms that hold a dominant position on a given market from abusing that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

Effect on trade between Member States

Articles 101 and 102 TFEU are only applicable if there may be a direct or indirect, actual or potential influence on the flow or pattern of trade between at least two Member States of the EU. An effect on trade exists in particular where national markets are partitioned or the structure of

competition within the common market is affected. Anti-competitive agreements or conduct which have no effect on trade, therefore, fall outside the scope of EU competition rules and may only be dealt with by national legislation.

European Competition Network (ECN)

The network formed by the competition authorities of the Member States (NCAs) and the European Commission. This network is a forum for discussion and cooperation in the application and enforcement of EU competition policy. It provides a framework for European competition authorities to cooperate in cases where Articles 101 and 102 TFEU are applied, and for flexible allocation of cases between the authorities. The European Competition Network was created on the basis of Regulation No 1/2003.

ECN Model Leniency Programme

A document endorsed by the ECN members aligning the key elements of leniency policies within the ECN in order to increase the effectiveness of leniency programmes in the EU and simplify the burden for applicants and authorities in case of multiple filings. The Model Leniency Programme sets out the essential procedural and substantive elements that ECN members believe every leniency programme should contain. The ECN authorities made a commitment to use their best efforts to align their leniency programmes with the ECN Model Leniency Programme or to introduce aligned programmes. However, this document is not a legally binding programme.

Fine

A monetary penalty imposed by a competition authority on a company for a violation of the EU competition rules.

Hard-core infringement

Restrictions of competition by agreements or business practices, which are seen by most jurisdictions as being particularly harmful for competition and which normally do not produce any beneficial effects. They therefore almost always infringe competition law. Under EU law, the most prominent examples on the horizontal level include agreements between competitors that fix prices, allocate markets or restrict the quantities of goods or services to be produced, bought or supplied. Examples of hard-core restrictions in vertical relationships (i.e. between companies operating at different levels of the production or distribution chain) are resale price maintenance and certain territorial restrictions.

Interim measures

Conservatory measures imposed on companies by a competition authority in a competition case, to avoid damage to the marketplace.

Leniency statement

A voluntary presentation by, or on behalf of, a company to a competition authority, describing the company’s knowledge of a cartel and its role therein, which was drawn up specifically for submission to the authority with a view to obtaining immunity or a reduction of fines under a

leniency programme concerning the application of Article 101 of the Treaty or the corresponding provision under national law.

Leniency programme

A programme on the basis of which a participant in a cartel, independently of the other companies involved in the cartel, co-operates with the investigation of the competition authority by voluntarily providing presentations of its knowledge of the cartel and its role therein, in return for which such participant receives immunity from, or a reduction in, the fine for its involvement in the cartel.

National Competition Authority (NCA)

National competition authorities (NCAs) are the authorities designated by the Member States pursuant to Article 35 of Regulation 1/2003 as responsible for the application of Article 101 and 102 TFEU in their territories. EU law obliges Member States to ensure that NCAs are set up and equipped in such a way that the provisions of Regulation No 1/2003 are effectively complied with. Together with the Commission, the competition authorities from Member States form the European Competition Network (ECN).

Periodic penalty payment

A monetary penalty imposed by a competition authority on a company, in order to compel such company to comply with an earlier decision or order.

Statement of Objections

Form of communication addressed by a competition authority to a company which contains its preliminary concerns and conclusions with respect to such company's alleged anti-competitive behaviour on which the competition authority intends to rely upon in its final decision. This allows the addressee to make its point of view known on any objection in accordance with its rights of defence.

Summary application

A summary application system allows companies to file a leniency application to NCAs on the basis of more limited information where a full leniency application has been given to the Commission. This entails that they avoid having to file complete leniency applications with all NCAs with (potential) jurisdiction to take actions against the cartel.

Regulation No 1/2003

A Council Regulation setting out the main rules for the enforcement of EU antitrust rules (Articles 101 and 102 TFEU). This Regulation, which took effect on 1 May 2004 modernised the rules governing how EU antitrust rules are enforced. Regulation 1/2003 entrusts, in parallel with the Commission, competition authorities of the Member States (NCAs) and national courts with the role of applying Article 101 and 102 TFEU. Regulation 1/2003 also forms the basis for the European Competition Network (ECN) which provides a framework for the Commission and NCAs to cooperate.

Remedies

Measures adopted by a competition authority requiring behavioural or structural changes on the part of the company to whom the measures are directed.

Formal settlement procedure

A simplified procedure which results in the faster handling of the case and in a reduction of the fines. In order to benefit from this procedure, the companies involved have to acknowledge their participation in the infringement.