

# Empowering the national competition authorities to be more effective enforcers

Fields marked with \* are mandatory.

## PRACTICAL GUIDE

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### Replying to the questions

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

### Saving your draft replies

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

### Submitting your final reply

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

## INTRODUCTION

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

### A. Purpose of the consultation

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

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

### B. Background

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

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

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

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

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

*(1) have an effective enforcement toolbox;*

*(2) can impose effective fines;*

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

*(4) have adequate resources and are sufficiently independent.*

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

### **C. General remarks regarding the consultation**

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

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

The questionnaire is divided into three parts:

- A. About you
- B. General questions
- C. Detailed questions for stakeholders active in competition matters

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

- C.1. Resources and independence of the national competition authorities
- C.2. Enforcement toolbox of the national competition authorities
- C.3. Powers of national competition authorities to fine undertakings
- C.4. Leniency programmes

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

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

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

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

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

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

## A. ABOUT YOU

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

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

**Please provide your contact details below:**

**\* Your full name**

Our responses do not necessarily reflect the opinion of all the members of the AEDC, although the document and our replies have been discussed within the Managing Board of the association. The working group in charge of preparing and drafting the replies to the questionnaire was composed by (in alphabetical order): Marcos Araujo, Oriol Armengol, Sergio Baches, Alejandro Camacho, Ramón García, Borja Martínez, Iliana Núñez, Irene Robledo, Lourdes Ruiz, and Patricia Vidal. The group has been coordinated by Marcos Araujo. Additional comments were submitted by Antonio Creus.

**\* Organisation represented**

Asociación Española para la Defensa de la Competencia (AEDC)

**\* Location (Country)**

Spain

**\* Email address**

secretaria@aedc.es

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

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

### 3. Where are you based?

Spain



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

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

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

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

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

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

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

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

**My/our contribution,**

**Can be directly published with my personal/organisation information (I consent to publication of all information in my contribution in whole or in part including my  name/the name of my organisation, and I declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication).**

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

**Cannot be directly published but may be included within statistical data (I understand that my contribution will not be directly published, but that my anonymised responses**

- may be included in published statistical data, for example, to show general trends in the response to this consultation) Note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001.

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

- Yes  No

## B. GENERAL QUESTIONS FOR ALL RESPONDENTS TO THE QUESTIONNAIRE

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

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

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

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

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

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

Spain

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

Not applicable.

**2. Do you think that the national competition**

**authorities could do more to enforce the EU competition rules?**

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

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

Spain

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

Not applicable.

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Ensuring national competition authorities have guarantees that they enforce the EU competition rules in the general interest of the EU and do not take instructions when doing so	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ensuring national competition authorities have sufficient resources to perform their tasks	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

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

A relevant issue connected with independence is the appointment procedure of the NCA's members. This is currently done behind closed doors. A transparent, merit-based appointment procedure would greatly improve the capacity and independence of the NCA.

Besides, an internal review mechanism of the NCAs decisions by an independent case handler would also enhance the NCA's independence by avoiding undue capture.

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

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

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

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

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

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

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

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

Courts have recently criticised non legislative measures in this context. Besides, non-legislative measures are ill-suited for institutional issues.

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

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

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

Effective enforcement of EU competition rules by NCAs requires ensuring its independence vis-à-vis their own Member States. EU rules are appropriate in that regard. Thus, these rules need to be legally binding. A reform of Regulation 1/2003 would be a good opportunity to set a harmonised legal framework.

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

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

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

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

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A harmonised playing field at EU level would contribute to a better business climate, with less interference of Member States into the private sector.

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

Competition law remains a legally difficult area in Spain. The large margin of discretion of the agencies contrasts with other enforcement areas. One practical effect is that a disproportionate number of decisions are successfully challenged in Courts. Another difficult area is the role of independent enforcement agencies, which face cultural challenges to stand up against large companies especially if supported by the State. Those two areas would improve with EU legislative rules – not merely guidelines, but hard law with binding legal effects.

Another area of concern consists in the tendency to apply national competition rules in cases which clearly affect trade between Member States and should also be examined under Articles 101 / 102 TFEU. In these cases the EU Commission is deprived from the possibility to express its views.

Some members of the AEDC also believe that the cooperation mechanism of Article 11 of Regulation 1/2003 should be revised in order to (i) increase its transparency; (ii) ensure that the opinion is issued earlier in the procedure so as to be taken into consideration in an appropriate manner; (iii) in cases where the NCA's procedure allows the parties to have a detailed knowledge of the file, parties should also have access to the documents that the NCA sends to the Commission on the basis of Article 11 of Regulation 1/2003.

## **C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS**

### **C.1. RESOURCES AND INDEPENDENCE OF THE NCAs**

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

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

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

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

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

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

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

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

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

Yes  No  Do not know/Not applicable

• If yes, in which countries?

Spain

2. In its Communication on Ten Years of Regulation 1/2003 of 9 July 2014, the Commission considers it "*necessary to further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources*" when enforcing the EU competition rules.

Do you agree with this finding with respect to the NCAs with which you have experience/knowledge?

Strongly disagree  
 Disagree  
 Agree  
 Strongly Agree  
 Neutral

Do not know/Not applicable

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

NCA's need statutory independence vis-à-vis national governments, as many of their responsibilities lead to clashes. Resource-gauging is an indirect means to influence the NCAs. European intervention can assist in reducing these risks. A stronger technical background of the NCAs' members would also facilitate independence.

Besides, there are issues concerning how directors and other leaders of the CNMC are appointed.

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Enforcement in individual cases	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Engaging in competition advocacy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation within the ECN for enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

- **Indicate which is the "Other" main task of the NCAs you are referring to:**

It is important to stress the importance of competition advocacy, both in respect of regulations and other administrative decisions and concerning public sector companies. NCAs should have the power to adopt reports and challenge anticompetitive regulations before the Courts. Additionally, the

level of transparency should be enhanced as concerns borderline cases, setting of priorities and the method for the calculation of fines.

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

In order to increase legal certainty for companies, NCAs may be granted the power to adopt decisions of inapplicability of Articles 101 and 102 TFEU, which would require the modification of Articles 5 and 10 of Regulation 1/2003. In addition, measures to increase the degree of coordination between NCAs in parallel proceedings regarding the application of Articles 101 and 102 TFEU will be welcome.

Transparency in the recommendations and exchange of correspondence between the NCAs and the Commission would also be important. It is not clear always whether the Commission receives the full picture of the case on time, which does not allow it to really assess whether the national authority is consistently applying 101/102 TFEU.

An improvement of Regulation 1/2003 would also be welcome to ensure that the Commission receives draft decisions with sufficient time. With the current system it is impossible for the Commission to identify on time a possible discrepancy in the application of Articles 101/102 and call for jurisdiction on the case to avoid inconsistent application of competition rules in different member states. Only when the parties take the initiative on time, the Commission may become aware of the situation (see for instance the luxury watches case affecting Spain). However, it is not for the parties to ensure the consistent application of EU law, but for the NCAs and the EU Commission.

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

- Yes    No    Do not know/Not applicable

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

Although the total number of CNMC's staff is high as compared to other Member States, according to the Global Competition Review, the proportion of

Competition Law enforcers within the CNMC is 32%, which results a relatively small number of enforcement officials.

Additionally, the low availability of IT devices seems to slow down the action of the authority in some cases (i.e. limited number of computers for a huge load of electronic documentation).

There are also rigidities concerning employing personnel with private sector experience because of posts reserved for public officials. In this regard, given the turnaround of officials, the competition background of some newer officials is relatively low. Similarly, the rotation system introduced by Law 3/2013 means that members of the Council often have little experience in competition matters.

The number of enforcement officials in the Competition Directorate of the CNMC has also proven to be essential taken into consideration that under Spanish Competition Law infringement proceedings decisions should be adopted within 18 months from the opening of proceedings. In case of complex cases where thousands of documents have to be reviewed, these time constraints may limit the capacity of the staff available to carry out a complete review of all the evidences and arguments submitted by the parties.

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

Yes  No  Do not know/Not applicable

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

While not aware of specific cases, this is perceived as a real risk given the size of the public sector and the reportedly close relationship between large corporations and government officials. There is an ongoing debate over revolving doors.

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

Yes  No  Do not know/Not applicable

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

At the time the CNMC was set up, all former CNC members were dismissed. It is unclear if that was a result of specific decisions they may have adopted but indeed calls into question the independence of the organ.

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

- Yes    No    Do not know/Not applicable

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

Press reports at the time the former President of the CNC left the institution voiced concerns at potential conflict issues. The press has also expressed concern in respect of professional advice given by a member of the CNMC to a regulated company before his appointment which may not have been duly reported. No official reaction from the agency has been issued on either case.

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

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

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

	1	2	3
Guarantees ensuring that NCAs are endowed with adequate and stable human and financial resources to perform their tasks	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Guarantees that NCA's top management/board or decision-making body are not subject to instructions from any government or other public or private body	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Guarantees ensuring that dismissals of members of the NCA's top management/board or decision-making body can only take place on objective grounds unrelated to its enforcement activities	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Rules on conflicts of interest for the NCA's top management/board or decision-making body	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Rules on accountability of the NCA (e.g. requiring that NCAs report annually on their activities)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

The appointment of the CNMC members should be a public procedure, open to all nationals of other EU Member States.

We are not aware of any non-Spaniard having any responsibility at any professional level at the CNMC.

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

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

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

Although the European Commission has a primary role in ensuring compliance with the TFEU, any structural modification introduced by EU laws must be implemented within a State structure. Therefore, coordination between both levels is essential. It is however also important to bear in mind the principle of subsidiarity.

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

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

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

National rules need to take the lead but are arguably insufficient. NCAs are subject to national legislation, and thus national laws should also be changed. In order to ensure NCA's independence, actions must be taken at both national and European levels.

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

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

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

Modifications that affect institutional issues would require legislative action. Legislative regulation ensures more legal certainty than soft-law or best practices, which do not appear to benefit from enough authority under Spanish law, as shown by the stance taken by the Supreme Court in relation to the former CNC's fining guidelines.

However, this legislative action can be complemented with soft-law mechanisms to explain and construe the law from a more flexible perspective.

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

:

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

- Legislative action
- Do not know/Not applicable

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

Any changes concerning institutional issues require legislative actions but this can be complemented with soft-law mechanisms to enhance flexibility.

**13. Please clarify why you consider your preferred type of EU action more appropriate than other types of action to ensure the independence of the NCAs in the exercise of their tasks and that they have sufficient resources when they enforce the EU competition rules?**

Independence must be mainly granted vis-à-vis the authorities of the country in question. Accordingly, it makes little sense to leave that solely to national legislation. The desired level of convergence and legal certainty can only be reached through EU legislation.

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

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

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

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

EU action would ensure a minimum degree of convergence.

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

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

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

## C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

### C.2. ENFORCEMENT TOOLBOX OF THE NCAs

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

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

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

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

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

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

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

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

The **ECN has developed a set of seven Recommendations** on key enforcement tools to foster soft convergence. **Attempts have also been made to improve the enforcement toolbox of NCAs** through the **Memoranda of Understanding** of Specific Economic Policy Conditionality with the **so-called "Programme Countries"** and through country specific recommendations in the framework of the **European Semester**.

### C.2.(a) Your experience/knowledge

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

Yes  No  Do not know/Not applicable

• If yes, in which countries:

Spain

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

Yes  No  Do not know/Not applicable

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion

The effective enforcement of the EU competition rules e.g. NCAs may refrain from taking action/carry out more limited action/take action which does not meet the desired objective?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Cooperation within the ECN e.g. NCAs may not have effective powers to carry out an inspection on behalf of another ECN member pursuant to Article 22?	<input type="radio"/>	<input checked="" type="radio"/>				

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

In the case of Spain there are regional competition agencies which do not have jurisdiction to apply EU rules. There is little consensus within the AEDC as to conclude whether these authorities should be granted increased powers to apply articles 101 and 102 TFEU.

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

- Yes  No  Do not know/Not applicable

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion

Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input checked="" type="radio"/>				
Uncertainty for businesses operating cross-border within the EU, e.g. differences in terms of which data may be gathered?	<input type="radio"/>	<input checked="" type="radio"/>				
Cooperation within the ECN e.g. differences in terms of which evidence can be gathered on behalf of another NCA?	<input type="radio"/>	<input checked="" type="radio"/>				

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

Divergences are costly but do not reach a level of a barrier -at least not insurmountable. These divergences may cause forum shopping distortions, favoring those Member States in which antitrust standards and competences are lower. However, there is no complete consensus within the AEDC in this regard.

Harmonization -not only of the toolbox but also of procedural guarantees- in competition cases in line with the qualification of antitrust fines as criminal within the meaning of Article 6 ECHR pursuant to ECtHR's judgment in Menarini would be welcome. In this regard, the effectiveness of Articles 101 and 102 TFEU would not be fully ensured if NCA's decisions are subject to annulment by courts on the grounds of violations of procedural rights under

the ECHR. Indeed, recognition at EU level of procedural rights applicable to competition proceedings in line with the rights recognized under the EU Charter of Fundamental Rights, including the requirement of an oral hearing, the inviolability of the home and the secret of correspondence (included electronic communications) in the absence of judicial warrant would avoid the annulment of NCA's decisions on the grounds of procedural infringements.

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

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

Yes  No  Do not know/Not applicable

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

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

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

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

The proposal of a single regulatory authority in Spain (CNMC) aimed to facilitate the liberalization of markets through a transition from ex ante regulation to a mere application of ex post competition law. However, it is imperative that the competition advocacy continues acting competition in sectors subject to regulation. From a European and national standpoint, an enhanced level of cooperation between regulatory and competition departments would therefore be essential. In this light, the new decisions of the European Commission in which it punishes as abuse of a dominant position behaviors previously approved by the regulator on issues such as Deutsche Telekom (Judgement of the TJUE 2010/10/10 Case C-280/08 P, Deutsche Telekom/Commission), demonstrates the active role that competition law should follow playing on factors under control.

It should be noted that the Supreme Court has questioned the legality of the creation in 2013 of the National Commission of Markets and Competition (CNMC) and super-regulator to replace the previous sectoral supervisors (and particularly the telecommunication sector) as it may affect the independence of these bodies from the Government against EU directives regulating this matter (ATS 5896/2015 of 07.03.2013, Appeal 506/2013).

Besides, it is worth noting that, under Spanish Competition law, compliance with earlier decisions of the CNMC are investigated by means of summary proceedings in which the rights of defense of the parties are limited.

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

Yes  No  Do not know/Not applicable

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of Articles 101 and 102 TFEU by NCAs, e.g. if NCAs' inspection and investigation powers are not backed up by any power to impose fines or the fines are set at a very low level companies may not be incentivised to comply?	<input type="radio"/>	<input checked="" type="radio"/>				
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	<input type="radio"/>	<input checked="" type="radio"/>				
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input checked="" type="radio"/>				

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

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

- Yes    No    Do not know/Not applicable

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

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

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

The power to determine enforcement priorities may be blurred because of the workload. Under Spanish law it is arguable that the NCA may decide not to pursue cases. This is however not perceived as a major drawback.

By contrast, other opinions within the AEDC suggest that the CNMC should not be able to reject cases and this would not affect the NCA's workload.

A future reform of Regulation 1/2003 would be a good opportunity to set out criteria for the NCAs to establish priorities and expressly confer on them the power to reject complaints on the grounds of those criteria (although it should be bound to state the reasons for the rejection).

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

- Yes    No    Do not know/Not applicable

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

These divergences exist but do not seem to cause significant problems having regard the possibility for NCAs to operate as a network under Regulation 1/2003.

Other opinions within the AEDC suggest that common rules on statute of limitation may damage the uniform application of competition rules or might influence the substance of the cases.

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

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

acquainted with different rules?						
Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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

The main problem is legal certainty. The statute of limitations applicable to a behavior should not depend on not-always clear criteria that cannot be ascertained from the beginning of an investigation (especially the effect on trade within the EU).

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

- Yes  No  Do not know/Not applicable

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

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

Uncertainty for businesses operating cross-border within the EU?	<input type="radio"/>	<input checked="" type="radio"/>				
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(\* Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

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

We understand that cooperation within the NCA should cover these issues, which look anecdotal.

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

- Yes  No  Do not know/Not applicable

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

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

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

- 9.1. Power to inspect business premises**

- Strongly disagree  Disagree  Agree  Strongly agree  Neutral  No opinion

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

NCAs should make use of all available tools to ensure swift, responsive, targeted, efficient and predictable solutions. In this regard, the power to access computer systems and to inspect business premises seems essential.

However, in order to ensure the respect of the rights of defense of the parties, this power should be subject to some limits, among others the requirement of a judicial authorization to enter into business premises so that a review of necessity of the inspection would be carried ex ante. Other practices, such as fishing expeditions or access to private emails should be avoided to the maximum extent as possible. In this regard, further harmonization at EU level in this regard would be welcome.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

This tool is indeed important and the CNMC has that power to inspect non-business premises subject to a prior judicial control.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

Again, the CNMC has this power which is important.

We may add that the power to issue RFIs should be subject to some limits. In particular, reasons for the request as well as the relationship between the information requested and the infringement that is being investigated should be stated in order to identify the limits of the RFI, particularly, in cases in which the reply would entail the creation of information not available to the Company or the requirement to provide it in a specific format. In addition, the legality of the RFI should be able to be challenged before Courts.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

This power is of outmost importance in order to ensure full effectiveness of competition rules. In any event, it would be in the interests of legal certainty that an express position on the seizure of digital evidence is taken at the level of EU legislation on the occasion of a Reform of Regulation 1/2003. This would include the measures to be taken in order to ensure the respect of the rights of defense, among others the prevention of fishing expeditions and the prohibition for NCAs to review the information seized without the presence of the legal representatives of the company.

Likewise, it would be positive to harmonize with legislative action the protection of legally privileged documents and the procedure to be used in cases the authorities seize legally privileged documents during an inspection. An independent third party reviewing the document (e.g. courts) and proper protection is required.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

These situations should be coordinated within the ECN and are largely anecdotal, as in truly cross border cases the EC is the best placed agency anyway.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

This power is also important and the CNMC regularly uses it. In any event, as in the aforementioned proposals, we consider that parties' rights of defense should be protected.

For instance, employees should be allowed to request legal advice and the presence of a lawyer during these interviews. In cases where sanctions may be imposed on employees or directors of a company under national law criminal or civil, they may not have any incentives to answer the NCA's questions. In those cases, a fine should not be imposed on the company, provided that it demonstrates that it has adopted proper measures to ensure compliance with NCA's requests.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

This power is explicitly listed in the Spanish Law and therefore the CNMC can use it.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

Again, this power is explicitly conferred to the CNMC by the Spanish law.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

So far, the CNMC does not have the power to adopt formal settlement decisions. Most members of the AEDC consider that such a power would be very useful for the effective enforcement of competition rules, but the criteria for adopting such a decision should certainly be clarified ex ante to eradicate risks of arbitrary discrimination. This system works reasonably well at EU level and should be imported to Member States.

Additionally, some members of the AEDC highlight that under Spanish law it is already possible to reach settlements with sanctions in administrative law as well as in criminal law and thus the power to adopt settlement decisions should be expanded to the CNMC. The clear advantages of using such an instrument should not be lost when applying EU competition law in Spain.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

The power to adopt commitment decisions is available for the CNMC and it is frequently used.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

Again, the power to issue interim orders is granted to the CNMC and it is frequently used. It is necessary to guarantee the full effectiveness of Articles 101 and 102 TFEU.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

The power to impose fines for obstructing and hampering inspections is essential. It is contemplated by Spanish law and used when necessary.

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

Strongly disagree     Disagree     Agree     Strongly agree     Neutral     No opinion

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

The power to compel compliance with investigative and decision-making powers is of utmost importance to guarantee the enforcement of NCAs decisions and it is available for the CNMC.

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

Strongly disagree     Disagree     Agree     Strongly agree     Neutral     No opinion

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

The CNMC's discretion to set enforcement priorities does not extend to rejecting complaints on priority grounds. While a limited discretion to shelve de minimis cases might be welcome, an unlimited discretion to select cases may deprive companies of their rights and should not be in our view granted.

It would be useful that a future reform of Regulation 1/2003 sets out criteria for establishing priorities and expressly confers on NCAs the power to reject complaints on the grounds of those criteria.

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

Strongly disagree     Disagree     Agree     Strongly agree     Neutral     No opinion

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

According to Spanish law, the CNMC is subject to a limited prescription period. In our view, this is important and necessary for an efficient enforcement of competition rules.

A firm faced with cumbersome and dragging competition law procedures may see itself beset by undue reputational, operational and financial damage. In connection with this, one cannot exclude that NCAs may be tempted to strategically keep “weak” cases – those which are unlikely to lead to a negative decision – dormant, to induce firms to come forward with settlement proposals, and close the proceedings. It is thus often considered “good practice” to establish deadlines for reaching a decision.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

These situations should be coordinated within the ECN and are largely anecdotal, as in truly cross border cases the EC is the best placed agency anyway.

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

Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

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

This is unlikely to be a frequent situation and raises complex issues of shared liability of legal persons within a group.

- **9.18. Other**

- Strongly disagree       Disagree       Agree       Strongly agree       Neutral       No opinion

Indicate what this "Other" power would be:

Some members of the AEDC consider that in some cases NCAs should have the power to make a provisional determination of the damages and identify the directors of the company which may be liable for the damage caused.

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

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

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

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

In the case of Spain, informal harmonization has been sufficient to align the toolbox. To the extent this is not so in other countries it would make sense to have consistent powers across the EU. Some members of the AEDC consider that EU harmonization in this field is essential.

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

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

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

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

:

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

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

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

Not applicable.

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

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

Cooperation within the ECN?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
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(\* Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

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

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

We do agree that a number of informal instruments used at the EU level such as best practice guidelines, manuals of procedures etc. should be considered by NCAs in national proceedings.

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

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

## C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

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

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

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

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

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

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

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

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

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

### **C.3.1. NATURE OF FINES**

#### **C.3.1.(a) Your experience/knowledge**

**1. For each system of competition enforcement[4], indicate the advantages and disadvantages for the enforcement of fines imposed on companies for breach of Articles 101 and 102 TFEU,**

**both in terms of their effectiveness and their efficiency (i.e. in terms of time, use of resources, administrative burden or any other aspect you consider as relevant).**

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

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

A competition enforcement based on an administrative system has a series of advantages.

From a procedural point of view, as a general rule, administrative procedures are more flexible than the judicial ones, and deadlines might be more lax. This system is more time-efficient which may imply lower costs for the parties.

From an organizational point of view, administrative bodies are usually more specialized than courts, and include a multidisciplinary team, composed of members with a different background which are specialized in competition law. Further, this specialization in the competition field allows the creation of sectorial expert teams.

The abovementioned specialization as well as the multidisciplinary background allows a deep scrutiny of the facts, i.e. an in-depth economic analysis, and their effects on competition, which is key when calculating the amount of the fine in order for it to be deterrent.

Besides, the existence of a dawn raid specialized team allows the authority to carry out inspections in the most efficient and least-cost way.

An administrative system is useful if the authority is entitled to impose high fines which may have a deterrent effect and if this authority also has the power to enforce the sanction.

Administrative sanctions are therefore in our opinion the most efficient and less time consuming put an end to anti-competitive conducts.

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

However, an administrative system has also a lot of disadvantages.

First, if the National Competition Authority does not have an independent statute, it is possible that its decisions whether to investigate or not / whether to impose the fine or not may be influenced by political decisions. This situation may also have consequences when balancing private concerns, i.e. damages and/or interim measures.

Second, from a procedural point of view, Administrative systems usually gather both the functions of investigation and decision under the same institution and this may raise criticisms in relation to a potential biased enforcement of competition law.

Third, in many occasions Administrative fines / sanctions are below the illicit profit made by companies carrying out anti-competitive conducts, which prevents fines to be deterrent enough to force stakeholders to stop these practices. In addition to this, it is possible that even if the administrative body may impose a fine, it will not have enough power to enforce such sanctions.

Fourth, although significant penalties, administrative proceedings in competition cases may not always ensure the protection of the rights of defense of the parties involved in line with the requirements set out under the ECHR and the EU Charter and that are applicable to criminal penalties.

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

A Civil court system may have some advantages as compared to a criminal and / or administrative system.

From a sociological point of view, court decisions are generally taken more seriously than administrative decisions. Therefore the possibility of being sanctioned by a court may have a more deterrent effect on companies than a system controlled by an administrative body.

Civil actions may also be more adjusted to the needs of the parties, and the damage recovery may be facilitated by the intervention of a judicial authority.

Finally, in some jurisdictions a Civil court system may be less time-consuming than administrative proceedings.

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

Civil court proceedings present a set of disadvantages that may hinder the effectiveness of the competition control system.

In many jurisdictions courts do not dispose of a team of court-officials devoted to evidence-gathering but they rely on police forces. Therefore, data collecting via dawn raids and/or processing software may pose a problem of efficiency.

Further, Court costs are normally higher than administrative costs as they may involve the payment of fees and legal professionals.

It will take longer in many jurisdictions for a court to investigate and issue a judgment than for an administrative body. This is because of two main reasons. On the one hand, civil judges are not completely devoted to competition law and they also have to deal with other matters. On the other hand, civil judges are normally not specialized in competition law nor are the officials supporting their work.

As a consequence the balance time-cost is more in favor of an administrative system than of a civil court system.

Besides, the lack of effective mechanisms for collective redress may be an obstacle.

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

The two main advantages of a Criminal court system are:

First, the deterrence effect that these courts have.

Second, from a company's point of view, the procedural guarantees and standards are normally higher in criminal proceedings than in other types of proceedings.

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

However, as a result of special procedural guarantees, deadlines are more tough and rules on evidence are stricter.

Criminal proceedings might also be considered disproportionate in some occasions where the anti-competitive conducts are minor and specially in those situations where the inquiry lead the judge to find that no anti-competitive

conduct took place.

Finally, criminal court proceedings are normally more time consuming than administrative proceedings. In addition to this, the lack of expertise of criminal judges in competition law, as well as the fact that they also deal with other cases, makes that criminal judges will take more time to issue a judgment on competition matters.

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

From a company's point of view, the procedural guarantees and standards are normally higher in criminal proceedings than in other types of proceedings.

Considering anti-competitive conducts crimes and applying competition law via criminal courts may have an important deterrence factor. It will also have a deterrence impact in the whole anti-trust system as company officials may fear to be charged with crimes.

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

However, as a result of special procedural guarantees, deadlines are tougher and rules on evidence are stricter.

Criminal proceedings might also be considered disproportionate in some occasions where the anti-competitive conducts are minor and especially in those situations where the inquiry leads the judge to find that no anti-competitive conduct took place.

Another difficulty is to distinguish and to determine the liability of the companies and their officials.

Finally, criminal court proceedings are normally more time consuming than administrative proceedings. In addition to this, the lack of expertise of criminal judges in competition law, as well as the fact that they also deal with other cases, makes that criminal judges will take more time to issue a judgment on competition matters.

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

- Yes  No  Do not know/Not applicable

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

We do not have experience of instances where Member States cannot impose administrative fines for infringements of Articles 101 and 102 in Spain, where competition fines are of an administrative nature. However, we consider that collaboration between NCAs might be hindered in case such administrative fines cannot be imposed.

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

- Strongly disagree     
  Disagree     
  Agree     
  Strongly agree     
  Neutral     
  No opinion

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

The members of the AEDC have differing opinions on this point.

Coexistence of criminal and administrative systems introduces an additional level of legal uncertainty for companies and employees.

Additionally, in some member States a conduct might be considered a crime whereas in another State it might simply be considered an administrative offence.

Besides, the existence of criminal sanctions may discourage leniency applications unless immunity is also granted criminal proceedings. Furthermore, the protection of rights of defense in criminal proceedings is higher than in administrative proceedings, even as regards competition cases.

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

- Strongly disagree     
  Disagree     
  Agree     
  Strongly agree     
  Neutral     
  No opinion

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

Again there is no consensus between AEDC members. The situation appears less difficult than with criminal procedures.

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

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

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

- **Should your suggested measure cover:**

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

- **If only some infringements, which ones?**

Civil and criminal enforcement and/or imposition of fines should be restricted to major offences such as cartels or bid rigging cases in which the anti-competitive practice is very likely to lead to damage and/or crimes such as alteration of prices in public tenders and auctions.

Administrative enforcement should remain the basic system for enforcing competition law especially when it comes to less damaging anti-competitive conducts

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

There are divergent opinions as to whether replacing civil / criminal fines by a system of administrative fines is necessary. Indeed, some opinions suggest that a harmonized system of administrative fines is not indispensable for an effective enforcement of articles 101 and 102 in Member States.

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

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

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

As a general rule, we consider that administrative and court actions should be coordinated in order to achieve a correct enforcement of competition law.

An administrative body with sufficient power and resources to carry out investigations, including dawn raids, is more time and cost-efficient than court action. Therefore, at least the inquiry part shall be a competence of an administrative body.

As regards the imposition of fines, we consider that for the less-damaging cases we see advantages in that the administrative body imposes the fine.

However, courts should also play a role in the application of competition law. Administrative courts shall be entitled to ensure that the decisions taken by the Administration are lawful.

Civil courts shall be able to use the investigation results of the competition authority to decide on damages without the need of conducting an ex profeso inquiry.

Finally, criminal courts shall ensure that in those jurisdictions where anti-competitive conducts are considered a crime and / or could lead to a crime (i.e. bribery, tax fraud), these sanctions are duly applied. It is for the criminal courts therefore to establish the link between the company, the company's representative and the crime.

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

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

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

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

:

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

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

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

The European Union shall establish a common standard of application to all NCAs. Member States should introduce a new legislation to adopt their NCAs to the common framework. A package of non-legislative action will develop the specificities of common activities carried out by NCAs.

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

--	--	--	--

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

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

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

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

### **C.3.2. WHO IS FINED**

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

##### **C.3.2.1.(a) Your experience/knowledge**

**1. Do you have experience/knowledge of instances where the EU concept of undertaking, and in particular the application of parental liability and legal and economic succession, was not**

## applied for establishing liability for infringements of Article 101 and 102 TFEU?[5]

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

Yes  No  Do not know/Not applicable

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

Despite there being a legal concept of undertaking in Spanish law, NCAs tend to maintain the legal person as centre of enforcement and the consequences are increasingly unclear. This should be clarified once and for all Member States.

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

Strongly disagree  Disagree  Agree  Strongly agree  Neutral  No opinion

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

While the Spanish NCA (and for that matter the EC) applies the concept of undertaking, parental liability and succession, the EU lacks a consistent approach on these three issues and specifically how these concepts translate to how fines are calculated.

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

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

**address this issue?**

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

- Indicate what these "Other" measures would be:

The issue is not resolved by applying existing criteria, as these are unclear. EU common definitions and rules are needed.

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

Not applicable.

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

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

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

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

:

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

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

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

The EU is the only instance able to impose minimum standards in all Member States. Moreover, EU action will ensure consistency on the application of the EU legislation as regards this issue in all Member States. Particularly, the EU legislature should clearly take a stance on parental liability.

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

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

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

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

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

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

#### C.3.2.2.(a) Your experience/knowledge

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

- Yes  No  Do not know/Not applicable

- Do you consider this to be a problem?

- Strongly disagree  Disagree  Agree  Strongly agree  Neutral  No opinion

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

Associations sometimes play a key role in coordinating anti-competitive practices. The possibility to impose fines on associations is of utmost importance for the effective enforcement of competition rules. However, the possibility to sanction associations and their members for the same infringement may entail a breach of the ne bis in idem principle since fines imposed on associations are usually paid by their members.

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

- Yes  No  Do not know/Not applicable

- Do you consider this to be a problem?

Strongly disagree     
  Disagree     
  Agree     
  Strongly agree     
  Neutral     
  No opinion

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

As of 2007, the CNMC may take into account the sales of members when imposing sanctions to associations. However, guidance is needed as to how to allocate turnover to associations and which entities would be obliged to pay the fine as there has been certain confusion in recent CNMC decisions. In addition, clear rules regarding the criteria for the attribution of liability between the association and its members would be welcome.

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

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

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

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

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

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

While agencies should have the power to take into account the turnover of the

members in order to calculate the fine, this inevitably requires rules on subsidiary claims against members which might be complicated at times and unfair in others. Rules on calculation such as the need to subtract turnover of non-infringing members might also be needed.

Problems of ne bis in idem may arise if the members of the association may also be individually sanctioned together with the association.

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

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

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

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

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

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

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

:

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

- Legislative action
- Do not know/Not applicable

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

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

Only the EU can impose common minimum standards in for all Member States. Moreover, both EU and national rules will be needed in this case.

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

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

States treating associations of undertakings differently)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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(\* Negative impact on costs means that costs increase. Positive impact on costs means that costs decrease.

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

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

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

#### **C.3.3.1. Legal maximum of fines**

##### **C.3.3.1.(a) Your experience/knowledge**

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

Yes  No  Do not know/Not applicable

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

Strongly disagree  Disagree  Agree  Strongly agree  Neutral  No opinion

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

The maximum level of fines is in practice less important than (i) how the base amount is calculated (consolidated turnover, sales in one country only,

parental liability) and (ii) how the fine is calculated (overall level). Significant divergences should be avoided but the maximum level of the fine is not the most relevant element.

Consequently, specific guidance at EU level, including the method of the fine setting by NCAs in cases of application of 101 and 102 TFEU, may ensure transparency and harmonization between Member States.

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

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

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

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

Although a maximum legal maximum for the level of fines imposed by NCAs across the EU seems the best way to address this issue, other measures aimed at the same purpose may include setting a legal methodology on how fines are imposed or narrowing the discretion of the authority to set the fine through a combination of a common legal maximum and common legal minimum for the level of fines across the EU.

In our view, it is important that these rules are clear and enforceable. The legal vehicle used at the EU level (a mere Communication) has been supported by ECJ, but raises problems at MS level, as their authorities and courts are not legally bound.

### **C.3.3.2. Fines methodologies**

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

#### **C.3.3.2.(a) Your experience/knowledge**

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

- Yes  No  Do not know/Not applicable

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

- Strongly disagree  Disagree  Agree  Strongly agree  Neutral  No opinion

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

Again, a maximum level of fines should be paired with measures that ensure that this maximum fine is homogeneously applied in all Member States. This is the only way to ensure that companies are able to predict the consequences of their acts. The lack of harmonization can jeopardise a consistent application of the provisions in the different countries. As an example, the Spanish Supreme Court annulled in January 2015 the guidelines used by the Spanish national competition authority to set antitrust fines and that were based on the Commission's own guidelines.

In this regard, the criteria for the determination of the fine and their respective weight must be established in a future reform of Regulation 1/2003.

As concerns Spain, it is worth noting that the rejection of the CNMC fining guidelines by the Supreme Court and the new case law on calculation of fines have created a situation of uncertainty that threatens the principle of legality. A possible solution to this could be to impose on Member States a duty to issue guidelines on fine calculation and require that parties can express their views on the level of the fine.

Some members of the AEDC believe that it should be specified that the fine should be calculated on the basis of the turnover generated within the relevant product and geographic market, and not to the undertaking's global turnover, in order to comply with the principle of proportionality.

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

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

- Establish a set of minimum core elements to be taken into account in fining methodologies of

all NCAs

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

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

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

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

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

Other elements to be included among the criteria to consider could be:

- a) A clear formula legally established
- b) Effects on the market
- c) Involvement of each company (i.e. the level of participation of each undertaking in the infringement: ring-leaders, mere participations in meetings, enforcement of retaliatory mechanism)

A straightforward scheme for fine calculation should be included in a future reform of Regulation 1/2003.

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

Another element to consider could be the size of group at the time the infringement was committed.

### **C.3.3.3. Aggravating and mitigating circumstances and other factors**

#### **C.3.3.3.(a) Your experience/knowledge**

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

- Yes    No    Do not know/Not applicable

- Do you consider this to be a problem?

- Strongly disagree    Disagree    Agree    Strongly agree    Neutral    No opinion

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

As aggravating and mitigating circumstances are part of the process to calculate the fine, they should be harmonised. Once again, the existence of different policies on this regard only creates legal uncertainty for companies.

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

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

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

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

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

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

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

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

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

Only EU action has enough force to obtain full harmonisation of fining policies.

- **8.2. Measure on fines methodologies**

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

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

Only EU action has enough force to obtain full harmonisation of fining policies.

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

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

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

Only EU action has enough force to obtain full harmonisation of fining policies.

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

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

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

National action would not avoid divergence, which is the problem to be tackled.

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

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

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

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

Besides clarity considerations and criticism of guidelines as a tool in this area by various Supreme Courts across the EU, competition law sanctions are considered criminal sanctions under the ECHR and require a solid legal framework.

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

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

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

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

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

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

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

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

Harmonisation of fining policies should come from EU level. Only EU action can ensure a binding effect in all 28 Member States and guarantee that the procedure is going to be applied similarly in all the EU, without taking into account the practice of the different NCAs or the local courts in the implementation.

Although legislative action seems the most effective tool to attain the intended goal and reach a uniform and consistent EU competition policy, non-legislative action could also play a role in helping in the implementation.

- **11.2. For fines methodologies:**

See comments to 11.1, above.

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

See comments to 11.1, above.

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

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

The consistent enforcement of the EU competition rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The effectiveness of fines (**)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for businesses (*)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation within the ECN (e.g. treatment of an infringement in several Member States in a coherent manner as regards these factors)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
NCA's flexibility to adapt to the specific circumstances of each case	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

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

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

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

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

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

## C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

### C.4. LENIENCY PROGRAMMES

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

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

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

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

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

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

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

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

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

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

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

##### **C.4.1.(a) Your experience/knowledge**

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

Yes  No

##### • **1.1. In which countries?**

Spain

##### • **1.2. In which capacity?**

- Leniency applicant  
 Representative of a leniency applicant  
 Other

##### • **Please specify in which "Other" capacity:**

Representatives of a leniency applicant and intervention in cases where leniency was sought.

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

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

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

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

Considering the potential implications, all leniency programs covering infringements of EU competition law should have the same legal basis. In this regard, an amendment should be introduced in order to establish a harmonised legal basis.

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

- Yes   
  No   
  Do not know/Not applicable

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

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

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

Legal certainty for business	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Costs for leniency applicants.

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

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

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

- Yes    No    Do not know/Not applicable

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

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

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

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

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

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

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

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

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

:

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

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

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

Only the EU can provide a common legal ground for infringements of EU antitrust law. EU legislative action also allows to regulate more issues than non-legislative action.

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

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

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

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

**C.4.2. DEALING WITH MULTIPLE LENIENCY APPLICATIONS**

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

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

**assessments** in cases covering a number of jurisdictions.

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

#### **C.4.2.(a) Your experience/knowledge**

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

Yes  No

###### **• 1.1. In which countries?**

Spain

###### **• 1.2. In which capacity?**

Leniency applicant  
 Representative of a leniency applicant  
 Other

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

Yes  No  Do not know/Not applicable

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

##### **3. Have you experienced any problems with summary applications?**

Strongly

Strongly

Do not know/Not

disagree     Disagree     Agree     Agree     Neutral     applicable

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

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

Yes     No     Do not know/Not applicable

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

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

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

Yes     No     Do not know/Not applicable

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

Yes     No     Do not know/Not applicable

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

	Very negative	Negative	Positive	Very positive	Neutral	No opinion
The effective enforcement of						

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

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

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

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

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

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

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

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

#### **C.4.3.(a) Your experience/knowledge**

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

Yes  No  Do not know/Not applicable

• **1.1. In which countries?**

Spain

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

Yes  No  Do not know/Not applicable

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

We would firstly note that there are not as such settlement procedures in Spain.

Concerning leniency statements, it is generally understood that the system is appropriate. However, the legislation is unclear concerning access at the appeal stage, where the file is sent to the administrative Court and arguably made available to all parties.

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

Yes  No  Do not know/Not applicable

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

There might be practical difficulties in affording protection to leniency statements in cases in which third parties may have had access to the file during administrative proceedings. The existing level of fines in cases of breach of secrecy may not be sufficient.

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

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

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

- **4.1. If you have chosen the option extending the protection put in place for leniency statements and settlement submissions to other situations, what these situations would be?**

- Civil proceedings other than damages actions covered by the Damages Directive (for example injunctive relief)
- Administrative proceedings (such as proceedings before tax authorities or regulators)
- Criminal proceedings
- Proceedings under the "transparency" rules/public access to documents
- Other (clarify in new box below)

- Indicate what this "other" would be:

Some members of the working group contend that protection should be extended to all the above situations, while others only to some of them.

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

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

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

- **5.1. If you have chosen the option extending the protection of documents to other situations, what these situations would be?**

- Civil proceedings other than damages actions covered by the Damages Directive (for example injunctive relief)
- Administrative proceedings (such as proceedings before tax authorities or regulators)
- Criminal proceedings
- Proceedings under the "transparency" rules/public access to documents
- Other

- Indicate what this "other" situation would be:

Make the system of the Damages Directive applicable in general to any administrative or legal procedure, not just to those seeking damages.

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

**6. Should the protection of leniency and settlements material, as well as of material specifically**

**prepared for the purpose of the investigation of a competition authority whilst that investigation is still ongoing, be addressed by the Member States and/or by EU action?**

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

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

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

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

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

The extension of the Damages Directive system should apply throughout the EU through binding legal measures

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

Any divergence in this field such as just one country granting access to leniency statements is as bad as divergence across the board. Either there is a common standard or leniency policies will be at risk.

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

	Very negative	Negative	Positive	Very positive	Neutral	No opinion

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

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

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

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

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

##### **C.4.4.(a) Your experience/knowledge**

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

- Yes    No    Do not know/Not applicable

- **1.1. In which countries?**

Spain

- **1.2. In which capacity?**

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

- If "Other", please specify:

Most of the members of the working group have experience in applying the leniency provisions of the Spanish Competition Act to individuals, either as leniency corporate leniency applicant or most frequently as legal representatives of a corporate leniency applicant. Some of them have also experience with or knowledge of arrangements in other Member States to protect employees of undertakings, which cooperate under a leniency programme of the NCA or the Commission, from individual sanctions.

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

- Yes    No    Do not know/Not applicable

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

See above.

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

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

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

The fact that such arrangements only exist in a few member states is seen as an imbalance between jurisdictions that hinders the coherent application of EU competition law throughout the Union and also it deters some potential leniency applicants from moving forward.

The working group considers that from a general interest standpoint and the effective application of competition law, whistleblowing in competition matters should be encouraged in all member states as well as the protection of whistleblowers.

As DG Comp is aware of, retaliation against whistleblowers, and not just in antitrust cartel matters, is currently a trendy topic in which the struggle of employees who allege wrongdoing has been highlighted as well as the different levels of protection against retaliation existing in different countries. Initiatives aimed at a consistent approach even outside the EU should be considered too.

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

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

- Establish safeguards to protect employees of companies which cooperate under corporate leniency programmes from the imposition of individual sanctions for the same cartel conduct
- Other
- Do not know/Not applicable

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

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

- employees of companies which cooperate under the **European Commission's leniency programme**

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

All the above situations should be at least seriously considered. Leniency applicants should be primarily protected from retaliatory measures by their employers, but other measures might also be necessary for them to speak up.

None of the members of the working group considered that individual leniency applicants should be rewarded through bounties for submitting leniency applications.

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

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

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

**4.2. If you consider that there is a case for EU action, what type of EU action do you consider most appropriate?**

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

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

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

Members of the working group favour legislative measures over soft law, the latter being a source of legal uncertainty. The group, however is split between those that think that actions should be left exclusive at the EU level and those who favour a more collaborative approach between the EU and member states and proposed harmonization at the EU level followed by implementation at the national level.

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

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

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

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

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

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

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

## CONCLUSION AND SUBMISSION

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1. What do you think about our questionnaire?

2. Were any important questions missing?

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

### Background Documents

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

Communication from the Commission - Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives (COM(2014) 453 final, 9.7.2014) ([/eusurvey/files/620d3975-1019-4169-afd1-c770167c4e6c](#))

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

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

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

## Contact

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