

Empowering the national competition authorities to be more effective enforcers

Fields marked with * are mandatory.

PRACTICAL GUIDE

Replying to the questions

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

Saving your draft replies

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

Submitting your final reply

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

INTRODUCTION

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

A. Purpose of the consultation

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

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

B. Background

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

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

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

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

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

(1) have an effective enforcement toolbox;

(2) can impose effective fines;

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

(4) have adequate resources and are sufficiently independent.

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

C. General remarks regarding the consultation

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

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

The questionnaire is divided into three parts:

A. About you

B. General questions

C. Detailed questions for stakeholders active in competition matters

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

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

C.2. Enforcement toolbox of the national competition authorities

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

C.4. Leniency programmes

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

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

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

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

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

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

A. ABOUT YOU

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

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

Please provide your contact details below:

*** Your full name**

Laura McGovern

*** Organisation represented**

The Competition and Consumer Protection Commission ("CCPC")

*** Location (Country)**

Ireland

*** Email address**

lauramcgovern@ccpc.ie

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

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

• 1.2. What type of Public Authority is it?

- ☒ EU national competition authority
- ☐ Government or Ministry

- ☐ International or European organisation
- ☐ Regulatory authority (other than a competition authority)
- ☐ Other public body

3. Where are you based?

Ireland
▼

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

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

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

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

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

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

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

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

My/our contribution,

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

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

Can be directly published provided that I/my organisation remain(s) anonymous (I consent to publication of any information in my contribution in whole or in part (which

- ☐ **may include quotes or opinions I express) provided that this is done anonymously. I**

declare that nothing within my response is unlawful or would infringe the rights of any third party in a manner that would prevent publication.

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

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

- ☒ Yes ☐ No

B. GENERAL QUESTIONS FOR ALL RESPONDENTS TO THE QUESTIONNAIRE

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

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

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

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

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

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

Ireland

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

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:**

Ireland

- **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	☐	☐	☐	☒	☐	☐
Ensuring national competition authorities have						

sufficient resources to perform their tasks	☐	☐	☐	☒	☐	☐
Ensuring national competition authorities have effective enforcement tools, e.g. to detect and investigate competition law infringements	☐	☐	☐	☒	☐	☐
Ensuring national competition authorities have effective powers to fine companies for breach of competition law	☐	☐	☐	☒	☐	☐
Ensuring national competition authorities have effective leniency programmes to encourage companies to come clean about competition law infringements	☐	☐	☐	☒	☐	☐
Other	☐	☐	☐	☐	☐	☐

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

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

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

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

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

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

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

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

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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.**

The CCPC considers that legislative action at EU level is necessary to empower NCAs to be more effective enforcers, as non-legislative soft law measures that have been implemented to date have not been effective in ensuring consistency of approach in relation to enforcement of competition law in Member States across the EU.
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8. How would your preferred option for EU action affect the following aspects:

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

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

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

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

As discussed in further detail in other sections of this response (please see, in particular, the response to section C.3.1), in Ireland, the CCPC does not have any power to adopt prohibition decisions or to make orders, grant remedies (procedural or structural) including interim relief, or impose penalties in respect of breaches of Irish and EU competition law. Instead, the Irish courts have sole competence to adopt prohibition decisions, make orders, grant remedies (procedural or structural) including interim relief and

impose penalties in respect of breaches of Irish and EU competition law.

It should also be noted that, in Ireland, breaches of competition law can be pursued either through civil or criminal proceedings in the Irish courts. The CCPC investigates breaches of competition law. At the conclusion of its investigation, the CCPC may opt to take either civil or criminal action against the undertaking concerned. Where the CCPC considers the matter to be civil in nature, it can initiate civil proceedings against the undertaking and/or individual concerned either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself take a summary prosecution in the District Court against the undertaking and/or individual concerned. In the case of more serious breaches of competition law, the CCPC sends a file to the Director of Public Prosecutions who will decide whether to bring a prosecution on indictment in the Central Criminal Court.

The CCPC takes the view that criminal sanctions are an appropriate and effective form of deterrence for hardcore cartel activity, such as price fixing, market sharing or bid-rigging. On conviction on indictment, the Irish courts may impose criminal fines on the undertaking concerned and criminal fines and/or a prison sentence on any individual involved.

However, the CCPC considers that criminal sanctions are neither appropriate nor practicable in relation to non-hardcore competition law infringements (e.g. infringements other than hardcore cartel activity) and the CCPC does not, in practice, pursue criminal prosecutions in such cases. Instead, the CCPC considers that civil procedures are more suitable for non-hardcore infringements of competition law. However, the only civil remedies available to the CCPC under current Irish legislation are to seek a declaration of illegality (i.e. a court ruling that a particular arrangement or behaviour is unlawful) and/or injunction (i.e. a court ruling requiring a particular arrangement or behaviour to be terminated) before the Irish courts. Irish law does not provide for the imposition of civil fines for competition law infringements. The CCPC takes the view that the absence of such sanctions is a serious deficiency in the Irish competition law enforcement toolbox. The CCPC considers, for the reasons set out later in this response, that civil fines should be one of the sanctions available to enforce competition law in Ireland and that legislative action is required at EU level to impose a clear obligation on Member States to introduce civil fines (or administrative fines) for infringements of EU competition law.

In summary, and more generally, the CCPC is strongly supportive of EU legislation to address areas, including in relation to matters other than those identified above, in which NCAs do not currently have the necessary means to enforce EU competition law effectively.

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.1. RESOURCES AND INDEPENDENCE OF THE NCAs

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

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

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

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

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

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

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

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

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

☒ Yes ☐ No ☐ Do not know/Not applicable

- If yes, in which countries?

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:**

The CCPC considers that it is of utmost importance that national competition authorities (“NCAs”) are independent and have sufficient financial and human resources to enable them to carry out their EU and national competition law enforcement functions in an effective and efficient manner. With regard to the CCPC’s experience in Ireland in relation to resourcing, please see our response to question C.1.a.4 below.

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	☐	☐	☐	☒	☐	☐
Engaging in competition advocacy	☐	☐	☐	☒	☐	☐
Cooperation within the ECN for enforcement of the EU competition rules	☐	☐	☐	☒	☐	☐
Other	☐	☐	☐	☐	☐	☐

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

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

- ☒ Yes ☐ No ☐ Do not know/Not applicable

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

Between 2009 and 2015, the CCPC (and its predecessor, the Competition Authority) has been working under an Employment Control Framework (ECF) and a moratorium on further recruitment, which led to depleted staff numbers within the CCPC.

However, following agreement of the 2010 Memorandum of Understanding as part of the EU-IMF economic adjustment programme, the Irish Government committed to a review of the adequacy of resources in the CCPC, which subsequently led to the sanctioning of an additional 10 posts for the CCPC's enforcement activities. These posts were filled, but the permitted salaries were at entry level and most of these staff later left to take up positions in other organisations (public and private) when the economy began to recover. As a result, only 2 of these 10 recruits remain on the CCPC's staff. Due to other staff departures and the continuing moratorium on recruitment, the CCPC's staff numbers fell some 25% below the permitted level in 2015, a shortage that created significant difficulties for the organisation in progressing its competition law enforcement agenda.

In late 2015, sanction was received to fill over 20 positions in the CCPC with a view to bringing its full staff complement to c.106. Recruitment for these posts began in late 2015 and will continue during 2016.

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.

In Ireland, the Competition Authority and the National Consumer Agency were amalgamated in 2014 to form the CCPC. The scenario outlined above has not occurred either during the existence of the former Competition Authority or since the creation of the CCPC. The CCPC is an independent statutory body established by the Competition and Consumer Protection Act 2014. While it operates under the auspices of a government ministry (i.e. the Department of Jobs, Enterprise and Innovation), the CCPC is wholly independent in the performance of its statutory functions.

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.

The scenario outlined above has not occurred either during the existence of the former Competition Authority or since the creation of the CCPC. The CCPC is wholly independent in the discharge of its statutory functions. However, it has certain reporting duties under the relevant national legislation and the chairperson of the CCPC can be called on to appear before a parliamentary committee on public accounts to examine the CCPC's financial accounts and the running of the office or any other parliamentary committee to discuss, subject to appropriate confidentiality constraints, the work of the CCPC and policy issues generally.

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.

The scenario outlined above has not occurred either during the existence of the former Competition Authority or since the creation of the CCPC. Please note that the Competition and Consumer Protection Act 2014 provides that where a member of the CCPC is personally interested in a particular matter with which the CCPC is dealing, he or she is obliged to inform the Minister for Jobs, Enterprise and Innovation accordingly and must not act as a member during the consideration of the matter.

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	☐	☐	☒
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	☐	☒	☐
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	☒	☐	☐
Rules on conflicts of interest for the NCA's top management/board or decision-making body	☐	☐	☐
Rules on accountability of the NCA (e.g. requiring that NCAs report annually on their activities)	☐	☐	☐
Other	☐	☐	☐

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

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

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

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

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

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

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

11. If you consider that there is a case for 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.**

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.**

We note that in the field of electronic communications regulation, Article 3 of the EU Framework Directive (Directive 2002/21/EC, as amended) contains general provisions designed to guarantee the independence of national regulatory authorities and to ensure that such authorities have adequate financial and human resources. The CCPC considers that it might be appropriate to introduce similar provisions in relation to national competition authorities.

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?

The CCPC considers that legislative action at EU level with respect to both independence and resourcing of NCAs is the most appropriate course of action because enacting legally binding obligations ensures consistency across the EU. This, in turn, would provide greater legal certainty for businesses.

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	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☒	☐	☐	☐

Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN	☐	☐	☒	☐	☐	☐
Legitimacy of NCA decisions	☐	☐	☐	☒	☐	☐
Investment climate/economic growth	☐	☐	☒	☐	☐	☐

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

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

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

As noted in our response to question C.1(b).12 above, in the field of electronic communications regulation, Article 3 of the EU Framework Directive (Directive 2002/21/EC, as amended) contains general provisions designed to guarantee the independence of national regulatory authorities and to ensure that such authorities have adequate financial and human resources. The CCPC considers that it might be appropriate to introduce similar provisions in relation to national competition authorities.

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

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

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.2. ENFORCEMENT TOOLBOX OF THE NCAs

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

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

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

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

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

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

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

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

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

C.2.(a) Your experience/knowledge

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

☒ Yes ☐ No ☐ Do not know/Not applicable

- If yes, in which countries:

Ireland

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

- ☒ Yes ☐ No ☐ Do not know/Not applicable

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of the EU competition rules e.g. NCAs may refrain from taking action/carry out more limited action/take action which does not meet the desired objective?	☐	☐	☐	☒	☐	☐
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?	☐	☐	☒	☐	☐	☐

- 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 CCPC does not have power to adopt prohibition decisions or to make orders, grant remedies (procedural or structural) including interim relief, or to impose penalties in respect of breaches of Irish and EU competition law. (The only area in which the CCPC has decision-making powers is under the merger review provisions of Irish competition legislation.) Instead, the Irish courts have sole competence to adopt prohibition decisions, make orders, grant remedies (procedural or structural) including interim relief, and impose penalties in respect of breaches of Irish and EU competition law.

It should also be noted that, in Ireland, breaches of competition law can be pursued either through criminal proceedings or civil proceedings in the Irish courts initiated by either the CCPC or aggrieved private parties. The CCPC investigates breaches of competition law. At the conclusion of its investigation, the CCPC may opt to take either civil or criminal action against the undertaking concerned. It should be noted that cartel activity is typically pursued through criminal proceedings, whereas non-hardcore breaches of competition law are typically pursued through civil actions. Where the CCPC considers the matter to be civil in nature, it can initiate civil proceedings against the undertaking and/or directors/managers involved either in the Circuit Court or in the High Court. Where the CCPC considers the matter to be criminal in nature, it may itself take a summary prosecution in the District Court against the undertaking and/or individual concerned. In the case of more serious breaches, the CCPC sends a file to the Director of Public Prosecutions who will decide whether to bring a prosecution on indictment in the Central Criminal Court. (In such cases, the penalties that can be imposed are much more onerous than those that the District Court can impose.)

The CCPC considers that the current regime in Ireland severely constrains its ability to effectively enforce competition law. In Ireland, the only financial penalty that can be imposed on an undertaking for breach of EU or Irish competition law is a fine following a criminal conviction in the Irish courts. In such cases, the accused is entitled to a full jury trial and the prosecution's case must be proved to the very high evidential standard of "beyond reasonable doubt". This means that such prosecutions will, in practice, only be initiated for the most egregious competition law infringements, typically hardcore cartels. The Director of Public Prosecutions ultimately decides whether or not to proceed with a prosecution on indictment and the Irish courts have sole competence to decide on the most appropriate remedy to be imposed on such an undertaking taking into account all the circumstances of the specific case.

The CCPC may bring civil proceedings before the Irish courts in respect of any breach of EU or Irish competition law. But no financial or other sanction can be imposed in such cases even where the court finds that an infringement has occurred. This is because neither the CCPC nor the courts have power to impose civil or administrative fines on an undertaking for a breach of EU or Irish competition law (please see further the response to Section C.3 below). Section 14B of the Competition Act 2002 as amended provides a mechanism whereby undertakings under investigation by the CCPC may avoid the institution of civil proceedings by entering into a voluntary agreement with the CCPC to provide commitments regarding their future behaviour. If the CCPC is willing

to enter into such an agreement, it will then apply to the High Court to have the agreement made an order of court. A breach of the agreement constitutes contempt of court. The CCPC may also accept contractual commitments without any involvement of the courts. However, the absence of financial penalties for a civil breach of Irish or EU competition law significantly reduces the incentives for undertakings to provide commitments to the CCPC in this way and therefore makes it difficult for the CCPC to operate this mechanism.

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?	☐	☐	☐	☒	☐	☐
Uncertainty for businesses operating cross-border within the EU, e.g. differences in terms of which data may be gathered?	☐	☐	☐	☒	☐	☐
Cooperation within the ECN e.g. differences in terms of which evidence can be gathered on behalf of another NCA?	☐	☐	☐	☒	☐	☐

- 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 CCPC believes that its investigative powers and its power to cooperate with other NCAs in gathering evidence are generally adequate. However, many of the anomalies between the Irish competition law regime and those of other EU Member States stem from the fact that the CCPC is not a decision-making body. Rather, it is an investigative body. Decisions on whether a breach of EU or Irish competition law has occurred are the preserve of the Irish courts. Decisions on what sanctions to apply, should the court find that a breach has occurred, are at the court's discretion. In contrast with NCAs in other EU Member States, the CCPC has no power to adopt prohibition decisions or to make orders, grant remedies or impose penalties in respect of breaches of EU or Irish competition law.

In addition, as explained in our response to question C.2.a.2 above, the fact that neither the CCPC nor the Irish courts have power to impose sanctions in civil cases – even following a finding of infringement – has a number of consequences, including the following. First, it makes it impossible for the CCPC to operate a leniency system such as exists in other Member States where the NCAs determine the level of sanctions to be imposed on infringing undertakings and the terms on which leniency may be available. This can create difficulties for undertakings that wish to negotiate EU-wide settlements. It also means that the CCPC cannot engage with other NCAs in relation to sanctions or leniency conditions. Second, it means that businesses which are the victims of anti-competitive conduct have difficulty in obtaining a fully effective remedy by filing a complaint with the CCPC and are faced, instead, with the often daunting alternative of initiating a private damages action in the Irish courts.

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?	☐	☐	☐	☒	☐	☐
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	☐	☐	☐	☒	☐	☐
Uncertainty for businesses operating cross-border within the EU?	☐	☐	☐	☒	☐	☐

- 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 Irish courts may impose sanctions on persons for obstruction of the CCPC's investigative powers. Individuals who interfere with an inspection being conducted by authorised officers of the CCPC (e.g. by impeding an authorised officer of the CCPC in the exercise of its powers, by failing to comply with a request or requirement of an authorised officer of the CCPC or by giving information to the CCPC which is false or misleading in a material respect) may be guilty of an offence under section 35(8) of the Competition and

Consumer Protection Act 2014 (the “2014 Act”), and may be liable, on summary conviction, to a fine not exceeding €5,000 and/or imprisonment for a term not exceeding 6 months, or on conviction on indictment, to a fine not exceeding €50,000 and/or imprisonment for a term not exceeding 3 years. In addition, individuals who hinder an investigation (e.g. by failing to attend as a witness on being duly summoned; by, in his/her capacity as a witness, refusing to take a legally required oath, to produce documentation legally required by the CCPC or to answer any question to which the CCPC may legally require an answer; by providing information which he/she knows or ought to know is false or misleading in a material respect; by failing to provide information pursuant to a notice issued by the CCPC) may be guilty of an offence under section 18(4) of the 2014 Act, and may be liable, on summary conviction, to a fine not exceeding €5,000 and/or imprisonment for a term not exceeding 6 months, or on conviction on indictment, to a fine not exceeding €250,000 and/or imprisonment for a term not exceeding 5 years.

As explained in our response to question C.2.a.2 above, the CCPC does not have any power to adopt prohibition decisions, make orders, grant remedies or impose penalties in respect of breaches of EU or Irish competition law. The Irish courts have sole competence to do so. In cases where the CCPC initiates court proceedings against an undertaking which result in the court imposing an order on the undertaking (e.g. to cease certain behaviour or to observe certain commitments), the CCPC typically engages in ongoing monitoring of the undertaking's compliance with that court order. If necessary, the CCPC can bring court action against the undertaking for contempt of court in cases where the undertaking has breached the relevant court order. In such cases, the court may impose fines or periodic penalty payments for non-compliance with a court order (which, under Irish law, is categorised as contempt of court).

- **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 TEFU by NCAs, e.g. if						

NCA's 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?						
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?						
Uncertainty for businesses operating cross-border within the EU?						

- 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.

As explained in our response to question C.2.a.4.1 above, in cases where the CCPC has brought court proceedings against an undertaking which resulted in the court imposing an order on the undertaking, in the event of that undertaking's subsequent non-compliance with the court order, the CCPC can bring court action to seek a decision that the undertaking's behaviour amounts to contempt of court.

In the event that an undertaking has entered an agreement with the CCPC pursuant to section 14B of the Competition Act 2002 in order to avoid the institution of civil proceedings (please see our response to question C.2.a.2 above) and the CCPC has applied to the High Court to have such agreement made an order of court, a subsequent breach of that agreement by the undertaking

would constitute contempt of court. In other words, the CCPC may apply to the High Court for an order finding the relevant undertaking to be in contempt of court.

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?	☐	☐	☐	☒	☐	☐
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	☐	☐	☐	☒	☐	☐
Uncertainty for businesses operating cross-border within the EU?	☐	☐	☐	☒	☐	☐

- **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.**

Pursuant to section 10 of the Competition and Consumer Protection Act 2014, the CCPC is empowered to set its own strategic objectives and to take all reasonable steps available to it to achieve those objectives. The CCPC prepares a strategy statement, which is revised every three years, which specifies the key objectives, outputs and related strategies, including use of

resources, of the CCPC and a review of the outcomes and effectiveness of the preceding strategy statement. The current strategy statement of the CCPC, which covers the period from 2015 to 2018, is available on the CCPC's public website (see: <http://www.ccpc.ie/about-us/strategy-statements>). The CCPC also prepares, on an annual basis, a work programme which includes the objectives of the CCPC for that year and its strategy for achieving those objectives, the priorities of the CCPC for that year, having regard to those objectives and its available resources, and any other relevant matters.

At an operational level, the CCPC has no obligation, either under statute or otherwise, to investigate every complaint which it receives. Given the CCPC's broad mandate and limited resources, it is not possible for the CCPC to investigate every complaint and the CCPC must prioritise its work in order to maximise the use of its resources for the benefit of consumers, businesses and the national economy. It does so on the basis of a set of prioritisation principles which are published on the CCPC's public website (see: <http://www.ccpc.ie/about/about/prioritisation-principles>).

The CCPC understands that some NCAs do not have the power to set their own priorities and to choose which cases to investigate and are, in effect, obliged to investigate every complaint they receive. The CCPC considers that it is of utmost importance that NCAs have the ability to select the cases they investigate on the grounds of clear and publicly available prioritisation criteria if they are to enforce compliance with EU and national competition law effectively and efficiently.

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

☐ Yes ☐ No ☒ Do not know/Not applicable

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

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
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The effective enforcement of Articles 101 and 102 TEFU by NCAs?	☐	☐	☐	☒	☐	☐
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules?	☐	☐	☐	☒	☐	☐
Uncertainty for businesses operating cross-border within the EU?	☐	☐	☐	☒	☐	☐

- 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 CCPC has not researched possible divergences between Member States in respect of limitation periods for initiating competition law proceedings. However, to the extent that there are significant divergences, the CCPC considers that this could give rise to difficulties with respect to the effective enforcement of competition law across 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?	☐	☐	☐	☒	☐	☐
Costs for businesses operating cross-border within the EU, e.g. costs of becoming acquainted with different rules? (*)	☐	☐	☐	☒	☐	☐
Uncertainty for businesses operating cross-border within the EU?	☐	☐	☐	☒	☐	☐

(*) 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.

The CCPC is not aware of any particular examples of instances where an NCA does not have the power to ask a second NCA to notify acts or to enforce decisions on its behalf in the territory of that second NCA. However, to the extent that any NCA does not have such powers, the CCPC considers that this could give rise to challenges with respect to the effective enforcement of competition law across the EU.

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.

As set out in greater detail elsewhere in this response, the inability of the Irish courts to impose civil fines for breaches of EU or Irish competition law is a major impediment to the creation of an effective competition enforcement regime in Ireland.

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?

The CCPC considers that it is of utmost importance that NCAs have the capacity to enter business premises without advance notice for the purpose of seizing evidence of a suspected infringement of competition law. Such evidence would otherwise be at risk of destruction or removal if advance warning were given that the NCA was seeking such evidence. The CCPC has adequate powers in this regard. However, to the extent that any NCA does not have such powers, the CCPC considers that this could give rise to challenges with respect to the effective enforcement of competition law across the EU.

• 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?

The CCPC considers that it is of utmost importance that NCAs have the capacity to enter non-business premises (including domestic residences or the vehicles) of directors, managers and other members of staff of the undertaking being inspected without advance notice for the purpose of seizing evidence of a suspected infringement of competition law. Such evidence would otherwise be at risk of destruction or removal if advance warning were given that the NCA was seeking such evidence. The CCPC has adequate powers in this regard. However, to the extent that any NCA does not have such powers, the CCPC considers that this could give rise to challenges with respect to the effective enforcement of competition law across the EU.

- **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?

In cases where there is a low risk that relevant evidence may be destroyed or concealed, the CCPC considers that the issuing of a mandatory request for information is a powerful tool for an NCA to gather evidence in respect of a suspected breach of competition law. It is also a useful tool for seeking the views of a relevant party where the interpretation of the relevant conduct is open to question or for seeking the views of any relevant third parties (such as competitors or customers of the undertaking(s) being investigated).

- **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?

Given the increasing move to the creation, transmission and retention of documents in digital format, the CCPC considers that it is increasingly important that NCAs are equipped with sufficient tools and expertise to search for and seize digital evidence. The rules surrounding seizure of such evidence should vindicate the rights of the undertaking(s) being searched, while not placing unnecessary burdens on NCAs in terms of, for instance, obligations to return hard drives within unreasonably short timeframes or attempts by the undertaking(s) in question to frustrate searches of digital evidence by, for example, making unsubstantiated claims of legal privilege or claims relating to the relevance of documents seized.

- **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?

The power of one NCA (NCA A) to ask a second NCA (NCA B) to carry out an inspection on their behalf in the territory of NCA B may be a vital mechanism for seizing evidence of anti-competitive conduct on the territory of A, where the undertaking under investigation may be a multi-national firm which stores its records in its home territory of B.

- **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?

In the course of an investigation, the CCPC may issue a witness summons to an individual who might have knowledge of the subject of the investigation. This obliges the witness to produce documents and answer questions put by the CCPC officials. (The legislation includes provisions which protect the rights of defence of the witness when he/she is a suspect in the investigation.) The CCPC considers that these powers are of great importance in understanding how a set of events unfolded, who participated in the events and their outcome. Such powers may be particularly important where documentary evidence is limited or inconclusive.

- **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?

The CCPC considers that sector enquiries are an important means of analysing market structures in a particular sector, and identifying market conditions that are conducive to anti-competitive conduct. Sector enquiries also permit a broader and fuller understanding of the dynamics of a particular market than in an investigation of a particular civil or criminal case.

- **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?

In Ireland, the Irish courts are designated as competition authorities for the purpose of Article 5 of Council Regulation 1/2003 of 16 December 2002 and have sole competence to adopt prohibition decisions, make orders, grant remedies and impose penalties in respect of breaches of Irish and EU competition law.

The CCPC considers that it is of utmost importance that NCAs (i.e. the Irish courts in Ireland) have the capacity to adopt prohibition decisions in order to bring competition law violations to an end and to provide legal certainty for businesses as to what conduct constitutes an infringement of competition 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?

Formal settlement decision powers such as those adopted by the European Commission's Directorate General for Competition (see Commission Notice 2008/C 167/01, OJ 2.7.2008) facilitate the settlement of cartel cases where the undertakings involved admit liability and are willing to accept the imposition of fines (with a 10% reduction to reward their willingness to agree settlement terms). This system has a number of advantages, including the freeing up of Commission resources to deal with other cases. In Member States where administrative/investigative NCAs take decisions and impose fines, similar settlement arrangements should have similar efficiency benefits for the NCAs concerned. However, in a court based system such as that in Ireland (where an investigative NCA conducts the investigation, but the court takes decisions and, in criminal cases, imposes penalties) the model adopted by the European Commission would not seem to be easily replicated. Having said that, where a prosecution is initiated in the Irish courts, it is always open to the accused party to plead guilty, a fact that is normally treated by the court as a mitigating factor when fixing the penalties to be imposed. In that respect, it could be said that the Irish system already provides for settlements that have all the essential features of the Commission's settlement procedure.

● **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?

Commitment decision powers enable an NCA to agree measures with an undertaking (or undertakings) which remedy suspected anti-competitive conduct without having to proceed to a formal prohibition decision (which, in Ireland's case, can only be taken by a court). This facilitates the elimination of anti-competitive conduct in appropriate cases and reduces the resource burden on the NCA, thereby releasing these resources to other work streams within the NCA. In a court based system, specific legislative provision should be made for settlements to be agreed by the investigating agency (and possibly also by the court). However, as already indicated in our response to question C.2.a.2 above, it is difficult for NCAs to obtain acceptable commitments unless the alternatives facing the undertakings concerned include an efficient decision-making regime with the risk of substantial fines and other remedies being imposed by the decision-maker.

● **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?

In Ireland, the Irish courts are designated as competition authorities for the purpose of Article 5 of Council Regulation 1/2003 of 16 December 2002 and have sole competence to adopt prohibition decisions, make orders, grant remedies (including interim relief) and impose penalties in respect of breaches of Irish and EU competition law.

The CCPC considers that it is of utmost importance that NCAs (i.e. the Irish courts in Ireland) have the capacity to adopt interim measures to bring to an end suspected anti-competitive conduct while an investigation or court proceedings are ongoing. Intervention in the form of permanent orders at the conclusion of an investigation/court proceedings may be too late to remedy widespread harm on a market.

● **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?

In Ireland, the Irish courts are designated as competition authorities for the purpose of Article 5 of Council Regulation 1/2003 of 16 December 2002 and have sole competence to adopt prohibition decisions, make orders, grant remedies (including interim relief) and impose penalties in respect of breaches of Irish and EU competition law.

The CCPC considers that it is of utmost importance that NCAs have the power to impose effective sanctions in the event of non-compliance with investigative and decision-making powers. Dissuasive fines in such cases may be one means of incentivising firms and individuals to cooperate with an NCA investigation, by levying immediate and certain punishment regardless of the outcome of the broader investigation. In the absence of effective sanctions of this kind, there are few incentives for undertakings under inspection to cooperate with the NCA or comply with its decisions.

- **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?

Please see our answer to question C.2(b).9.12 above.

- **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 CCPC considers that it is of utmost importance that NCAs have the power to set their own priorities and to choose which cases to investigate. In order to be effective, an NCA must be able to set its own enforcement priorities, which will allow it to assign its limited resources to those areas which are, in its own view, most likely to have the greatest impact for consumers and the wider economy. An NCA which, for instance, cannot reject complaints on priority grounds may find itself devoting resources to issues which give rise to little or no significant harm to competition, while being unable to proactively pursue markets or sectors which may not be functioning effectively for consumers. The CCPC (and its predecessor, the Competition Authority), where appropriate, applies prioritisation principles in selecting the cases

that warrant in-depth investigation. It has found these to be an excellent mechanism for identifying cases that fall within that category and for promoting efficiency and rigour in the processing of investigations.

- **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?

Prescription periods are a useful means of ensuring that investigation files are not left open by an NCA ad infinitum, and should therefore promote the effective and efficient disposition of files by NCAs.

- **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?

The power of one NCA (NCA A) to ask a second NCA (NCA B) to notify acts on their behalf in the territory of NCA B may be a vital mechanism for enforcing competition law in the case of multi-national firms which make sales into and engage in anti-competitive conduct on markets in the territory of NCA A without having a legal presence there. To the extent that any NCA does not have such power, the CCPC considers that this could give rise to challenges with respect to the effective enforcement of competition law across the EU.

- **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?

The power of one NCA (NCA A) to ask a second NCA (NCA B) to enforce fining decisions on their behalf in the territory of NCA B may be a vital mechanism for enforcing competition law in the case of multi-national firms which make sales into and engage in anti-competitive conduct on markets in the territory of NCA A without having a legal presence there. To the extent that any NCA does not have such power, the CCPC considers that this could give rise to challenges with respect to the effective enforcement of competition law across the EU.

- **9.18. Other**

☐ Strongly disagree ☐ Disagree ☐ Agree ☐ Strongly agree ☐ Neutral ☒ No opinion

Indicate what this "Other" power would be:

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

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

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

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

The CCPC considers that action at EU level is required to ensure consistency of approach across all EU Member States. Some Member States may have national or constitutional laws which do not permit the introduction of some of the powers referred to in question C.2(b).9 above. For example, in Ireland, a significant change to legislation would be required to permit the Irish courts to impose civil fines on undertakings for breaches of competition law. Under Irish law, it is possible that the introduction of such legislation would require amendment of the Irish Constitution (something that can only be done by plebiscite). However, if such a change were required by EU legislation, it could not be challenged under the Irish Constitution by virtue of Article

29.4.10 of the Irish Constitution (which protects from constitutional challenge any laws adopted by the State that are necessitated by the obligations of membership of the EU).

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.**

For the types of changes to its enforcement regime which the CCPC is seeking, it is unlikely that non-legislative measures would provide a sufficient legal grounding to implement such changes (for example, the implementation of civil fines).

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

The CCPC considers that legislative action at EU level is most appropriate to ensure that NCAs have an effective competition law enforcement toolbox. The CCPC considers that such action is necessary to empower NCAs to be more effective enforcers, as non-legislative soft law measures that have been implemented to date have not been effective in ensuring consistency of approach in relation to enforcement of competition law in Member States across the EU.

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?	☐	☐	☐	☒	☐	☐

Legal certainty for businesses?	☐	☐	☒	☐	☐	☐
Costs for businesses? (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN?	☐	☐	☐	☒	☐	☐

(*) *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.

We have already referred to the absence of civil fines in the Irish competition law enforcement toolbox and to the risk of constitutional challenge to purely Irish measures to provide for the imposition of such civil fines (whether imposed by the courts or by an integrated administrative/investigative/decision-making NCA). In the CCPC's view, this constitutional law risk would be eliminated if Ireland was obliged by EU legislation to provide for the imposition of civil fines on undertakings that are found to have infringed EU competition law.

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

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

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

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

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

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

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

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

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

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

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

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

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

C.3.1. NATURE OF FINES

C.3.1.(a) Your experience/knowledge

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

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

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

- The ability of an NCA to adopt a finding that an undertaking has infringed competition law and to impose administrative fines on such an undertaking has a number of advantages when compared with the alternative of separate bodies, one conducting the investigation with another making findings and, where appropriate, imposing sanctions and/or remedies. These advantages include the following: (i) it is an effective use of the NCA's expertise and resources to have one body in control of the process from start to finish; (ii) it is likely to result in consistent and predictable decisions as well as faster decision-making than the alternative models; (iii) it enables undertakings to engage with a single agency and facilitates communications with agency staff throughout the process; (iv) it avoids any incentive to game the system by playing one body off against another; (vi) it facilitates settlements and commitment agreements.

- The ability of an NCA to impose administrative fines at the closure of the NCA's investigation without having to initiate lengthy and costly court proceedings (which is the current process in Ireland, where only the courts may impose financial penalties and then only following a criminal conviction) may have a greater deterrent effect and, in turn, promote a better compliance culture at national level. This is particularly relevant for non-hardcore infringements of competition law which, in Ireland, are typically enforced via civil proceedings before the Irish courts and for which the only available (civil) sanctions are declaratory or injunctive relief (see further our response to questions C.3.1(a).2 and 3 below).

- Effective, dissuasive and proportionate administrative fines create incentives for undertakings to seek leniency under available leniency programmes and provide full cooperation with the NCA in its ongoing investigation of the alleged competition law infringements.

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

- Many lawyers and others have serious reservations about the desirability of a system that involves the same agency undertaking the investigation of an alleged infringement and making the decision as to whether there has been an infringement (and imposing the penalty where it decides that there has been an infringement). Such a system therefore creates at least a perception of “prosecutor bias” which can undermine respect for the system and its outcomes, as well as for the agency that administers it.
- Because of the issue referred to in the last bullet, appeals against the decisions of an administrative agency may be more frequent than would arise in a system involving a separate decision-making body (whether a separate administrative tribunal or a court). Such appeals can delay implementation of the decision and any remedy or fine imposed.
- Administrative fines may not be set at a level which is a sufficient deterrent in cases of hardcore infringements of competition law.
- A pure administrative model does not permit the imprisonment of individuals, a sanction that the CCPC believes should be available for hardcore cartel participants.

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

- For cases involving complex economic argument, civil procedures are more suitable than a criminal trial before a jury where evidentiary requirements, the standard of proof and the procedural rights of the defence are set at a very high standard. However, for civil proceedings to be an effective enforcement mechanism, it is essential that the legal system permits the imposition of effective sanctions, in particular, financial penalties of the kind that the European Commission can impose.
- As well as having a deterrent effect, the risk of civil penalties being imposed is likely to be an incentive for an undertaking suspected of infringing competition law to cooperate with the NCA, thereby facilitating faster resolution of investigations.
- The ability of a court to impose civil fines for infringements of competition law should promote a compliance culture at national level. This is particularly relevant for non-hardcore infringements of competition law which, in Ireland, are typically enforced via civil proceedings before the Irish courts but for which the only available (civil) sanctions are declaratory or injunctive relief (see further our response to questions C.3.1(a).2 and 3 below).
- Effective, dissuasive and proportionate civil fines create incentives for undertakings to seek leniency under available leniency programmes and provide full cooperation with the NCA in its ongoing investigation of the alleged competition law infringements.

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

- It is a more cumbersome system than the administrative model, since it requires the investigating agency to convince a court that an infringement has occurred instead of making the decision itself.
- Unless there are specialised courts for hearing competition law matters, the court may not have the same level of expertise as the NCA. This can result in poor quality and inconsistent judgments.
- In some jurisdictions, there may be no sentencing guidelines for competition matters. (This is the case in Ireland, where the courts do not operate formal sentencing guidelines.) In an administrative system, the agency will normally publish and follow such guidelines.

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

- The ability of an NCA to impose fines or to initiate proceedings before the courts for criminal misdemeanours (N.B. in Ireland, only the Director of Public Prosecutions may bring a prosecution on indictment) may act as an incentive for an undertaking suspected of infringing competition law to cooperate with the NCA which could, in turn, facilitate faster resolution of investigations.
- The ability of an NCA to impose fines for criminal misdemeanours without having to initiate lengthy and costly court proceedings may have a greater deterrent effect and, in turn, promote a compliance culture at national level.

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

- The NCA's findings would be appealable to a court or tribunal which could delay implementation of the decision and any remedy or fine imposed.
- Criminal fines for a "misdemeanour" may not be set at a level which has a sufficient deterrent effect.
- The courts that deal with criminal misdemeanours are unlikely to have the skills or the time to deal with anything other than the simplest cases involving competition law infringements.

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

- Hardcore cartels are the most serious form of competition law infringement, with all kinds of detrimental effects on the markets in which they operate as well as on the economy and society as a whole. In the CCPC's view, these effects justify the imposition of severe penalties, including large fines and the imprisonment of individuals responsible for the operation of the cartel. Criminal prosecution on indictment (i.e., involving the imposition of severe penalties following conviction) is the appropriate mechanism for imposing such penalties. It is widely recognised that such penalties, in particular, the imprisonment of the responsible individuals, have strong deterrent effects.
- Criminal convictions for breaches of competition law send a clear signal that infringements will be effectively punished and are appropriate for serious offences such as hardcore breaches of competition law.
- Criminal sanctions for individuals may include (as well as criminal fines) personal director disqualification and terms of imprisonment, both of which have strong deterrent effects.
- The possibility for an NCA to initiate/refer a case for criminal prosecution and of severe criminal penalties being imposed by a court is likely to act as a significant incentive for infringing undertakings to avail of immunity/leniency programmes and provide valuable evidence to NCAs.

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

- Criminal proceedings are generally not appropriate for cases involving complex economic argument, because they are difficult for juries to understand and are therefore unlikely to result in convictions, especially given the more demanding standard of proof (e.g. in Ireland, "beyond reasonable doubt") than that which applies in civil procedures.
- Criminal investigations typically involve more time and resources given the higher standard of proof than applies in civil procedures, as well as the more demanding evidentiary requirements and the procedural rights of the defence than that which apply in such cases.

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

☒ Yes ☐ No ☐ Do not know/Not applicable

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

In Ireland, the only financial penalty that can be imposed for breach of Irish or EU competition law is a fine following a criminal conviction. Neither the CCPC nor the Irish courts can impose administrative or civil fines for breaches of competition law.

The CCPC investigates breaches of competition law. At the conclusion of its investigation, the CCPC may opt to take either civil or criminal action against the undertaking concerned. Where the CCPC considers the matter to be criminal in nature, it may itself take a summary prosecution in the District Court against the undertaking and/or individual concerned. In the case of more serious breaches, the CCPC sends a file to the Director of Public Prosecutions who will decide whether to bring a prosecution on indictment in the Central Criminal Court. Where the CCPC considers the matter to be civil in nature, it can initiate civil proceedings against the undertaking and/or individual concerned either in the Circuit Court or in the High Court.

Please see further our response to question C.3.1(a).3 below.

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 CCPC takes the view that criminal sanctions are an appropriate and effective form of deterrence for hardcore cartel activity, such as price fixing, market sharing or bid-rigging. On conviction on indictment, the court may impose criminal fines and prison sentences as follows: (i) on an undertaking, fines of up to €5 million or 10% of its annual turnover in the financial year ending in the 12 months prior to the conviction, whichever is greater; and (ii) on an individual, fines of up to €5 million or 10% of his or her annual individual turnover in the financial year prior to the conviction, whichever is greater, and/or a term of imprisonment not exceeding 10 years.

However, the CCPC considers that criminal sanctions are neither appropriate nor practicable in relation to non-hardcore competition law infringements (e.g. cases involving an abuse of dominance). To date, neither the CCPC nor its predecessor, the Competition Authority has initiated summary criminal prosecutions in cases involving non-hardcore infringements of competition law, nor has it referred any such cases to the Director of Public Prosecutions for prosecution on indictment. The CCPC's view is that non-hardcore infringements are rarely susceptible to proof to the satisfaction of a jury in a criminal trial (i.e. beyond reasonable doubt) given the often complex economic and

legal arguments in such cases.

The CCPC considers that civil procedures are more suitable for non-hardcore infringements than a criminal trial before a jury due to the lower standard of proof (i.e. on the balance of probabilities or preponderance of evidence). Civil sanctions would also be more appropriate than those imposed in hardcore cartel cases since they do not involve a criminal conviction or the prospect of imprisonment for individuals.

However, the only civil remedies available to the CCPC under current legislation (section 14A of the Competition Act 2002) are to seek a declaration of illegality and/or an injunction before the Irish courts. As indicated above, Irish law does not provide for the imposition of civil fines for competition law infringements. (With regard to the available remedies, the only realistic remedy will often be a declaration, because the CCPC will have become aware of, or gathered sufficient evidence of, an infringement only after the event and the courts will normally refuse to grant an injunction where the anti-competitive behaviour has ended. Indeed, the courts may even refuse to issue a declaration in such cases where, because of the absence of civil fines, a declaration will have little, if any, practical effect.)

The result is that non-hardcore infringements, for example abuses of dominance, are, in practice, not subject to sanctions under Irish law. This is a serious deficiency in the Irish competition law enforcement toolbox, which makes it very difficult for the CCPC to effectively enforce EU and Irish competition law in respect of infringements other than hardcore cartels, with all the adverse consequences that that implies for the victims of such infringements and for competition in the affected markets.

The CCPC (and its predecessor, the Competition Authority) has instituted civil proceedings seeking declarations or injunctions in respect of non-hardcore infringements. In some cases, it has been successful in obtaining such remedies, while in other cases, the threat of such civil proceedings was sufficient to act as a deterrent to persuade the infringing parties to cease the infringing activities. However, the absence of a provision for civil fines in the legislation means that, in such cases, the courts were (and remain) unable to impose any sanction on the parties for their involvement in the illegal activity.

Civil penalties facilitate the settlement of cases on the basis of admissions or commitments in a way that is not possible in the context of a criminal prosecution. Settlement of such cases is often the most efficient and satisfactory mechanism for resolving the issues in question and the availability of civil sanctions can greatly assist a NCA in negotiating acceptable settlement terms. Equally, the absence of such sanctions diminishes an agency's ability to achieve such outcomes.

For the above reasons, the CCPC considers that civil fines should be one of the sanctions available to enforce competition law in Ireland. The CCPC

favours the introduction of civil fines that may be imposed on infringing undertakings by a court in civil enforcement proceedings brought by the CCPC as plaintiff.

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.

The CCPC has no experience of seeking civil fines for breaches of competition law before the Irish courts as the current legislative regime in Ireland does not provide for such sanctions. As stated above, the only financial penalty that can be imposed for a breach of competition law in Ireland is a fine following a criminal conviction.

The CCPC takes the view that criminal and civil sanctions are complementary and that the availability of both types of sanction, depending on the severity of the infringement (e.g. criminal for hardcore offences and civil for non-hardcore offences), would provide an effective deterrent against infringements of Irish or EU competition law.

The CCPC considers that criminal sanctions have a strong deterrent effect and, as such, are appropriate and effective sanctions for the enforcement of hardcore cartel activity. The possibility of being convicted of a criminal offence carries a significant reputational risk to both the undertaking and the individual. For the individual, it also carries a real risk to future prospects in terms of employment, for example. (However, for the reasons set out in our response to question C.1(a).3 above, the CCPC recognises that criminal sanctions are neither appropriate nor practicable in relation to non-hardcore competition law infringements.) Civil fines clearly do not have the same deterrent effect as criminal sanctions (in particular, the sanction of imprisonment of individuals) and a regime that provides only for civil fines is, in the CCPC's view, unlikely to be sufficient to deter hardcore cartel activity (which evidence has shown to be a repetitive feature of certain European industrial sectors).

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

- Indicate what these "Other" measures would be:

Please see our response in the comment box below.

- **Should your suggested measure cover:**

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

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

As stated above in our response to question C.1(a).3, the CCPC considers that civil fines should be one of the sanctions available to enforce competition law in Ireland in addition to already existing criminal fines and other civil measures (e.g. declaration of illegality and injunction). The CCPC favours the introduction of civil fines that may be imposed on infringing undertakings by a court in civil enforcement proceedings brought by the CCPC as plaintiff.

The CCPC considers that, in principle, civil fines should be available for all infringements of Irish and EU competition law. However, for the reasons given in our response to question C.1(a).3 above, the CCPC would, in practice, likely seek criminal sanctions for hardcore cartel activity (e.g. price fixing, bid rigging and market sharing) and civil sanctions for non-hardcore infringements of Irish and EU competition law.

With regard to measures that might be adopted to improve the efficiency and effectiveness of a civil fines system, the CCPC favours the allocation of competition law cases to specialist judges. It also takes the view that ongoing training in competition law for such judges is critically important in

order to ensure consistency in the application of EU competition law in all Member States. It also believes that it is important that prosecutors who initiate prosecutions for serious competition law infringements should have a good understanding of competition law and white-collar crime generally.

The CCPC recognises that a system of administrative fines has certain advantages (described at C.3.1(a)1 above) and is well established in many Member States. In Ireland, administrative fines are generally applicable only for relatively minor non-compliance with statutory obligations (e.g. under the Companies Act) or for more serious infringements of specific sectoral regulations. While the CCPC has sought legislation to enable the courts to impose civil fines for competition law infringements, it has not sought legislation giving it power to impose administrative fines itself. But it would have no objection to EU legislation requiring Member States to provide for either civil fines or administrative fines for competition law infringements.

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.**

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.**

As already explained, the CCPC considers that criminal sanctions are an appropriate and effective form of deterrence for hardcore cartel activity, but considers that they are neither appropriate nor practicable in relation to non-hardcore competition law enforcement. The addition of a civil fines mechanism (imposed by a civil court) would, together with the existing remedies available to the CCPC (e.g. declaratory or injunctive relief), act as a significant deterrent in respect of non-hardcore infringements of Irish and EU competition law.

With regard to civil fines, an argument can be made that the Irish courts, as a designated competition authority under Council Regulation (EC) 1/2003 of 16 December 2002, can already impose civil fines under Article 5 for infringements of Article 101 and 102 TFEU given that a Regulation is directly applicable by virtue of Article 288 TFEU. This issue has not been ruled upon by the courts and the interpretation of Article 5 in this context is therefore uncertain. This uncertainty is compounded by the fact that it has also been argued that Ireland is in compliance with its obligations under Article 5 of Regulation 1/2003 because, under the Competition Act 2002, all infringements of EU and Irish competition law are criminal offences punishable by the imposition of fines following the conviction of the accused in a criminal trial. The CCPC disagrees with this argument since, in practice, only hardcore competition law infringements will be the subject of criminal prosecution. All other infringements are therefore, in reality, sanction-free in Ireland. It is hard to see how this can constitute effective compliance with Ireland's obligations under Article 5. Nonetheless, this and other possible arguments create uncertainty regarding the interpretation of Article 5.

For this reason, the CCPC is strongly of the view that Regulation 1/2003 needs to be amended, or that other EU legislation needs to be adopted, to impose a clear obligation on Member States to introduce civil fines (or administrative fines) for infringements of EU competition law. While some argue that civil fines which involve the imposition of significant financial sanctions are tantamount to criminal penalties which, under the Irish Constitution, can only be imposed following a criminal trial, any such objection would be overcome, in the case of EU legislation, by the provisions of Article 29.4.10 of the Irish Constitution which provides that nothing in the Constitution invalidates acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union.

An amendment of Regulation 1/2003, or adoption of other EU legislation, in a way that made it clear that NCAs (whether agencies or courts) must be empowered to impose civil or administrative fines for infringements of EU competition law would not overcome any Irish constitutional law issues relating to the compatibility with the Irish Constitution of such fines when infringements of only Irish (as opposed to Irish and/or EU) competition law were involved. However, such an amendment would be likely to provide indirect support to the view that such sanctions are a necessary part of an effective competition enforcement regime. There are, in any event, good arguments under Irish law to support the view that properly structured and administered legislation providing for civil fines can be compatible with the Constitution.

(For a good summary of these arguments, see: “Issue 2: Civil Financial Sanctions” in the Irish Law Reform Commission’s Issues Paper on Regulatory Enforcement and Corporate Offences published in January 2016, which is available at the following link:
http://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Regulatory%20Enforcement%20and%20Corporate%20Offences%20final.pdf).

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

Apart from the reasons supporting legislative action outlined in the previous comment, which relate specifically to the Irish context, the CCPC considers that legislative action at EU level would be more appropriate in order to ensure consistency of approach across EU Member States. The CCPC considers that such action is necessary to empower NCAs to be more effective enforcers, as non-legislative soft law measures that have been implemented to date have not been effective in ensuring consistency of approach in relation to enforcement of competition law in Member States across the EU.

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	☐	☐	☐	☒	☐	☐
The consistent enforcement of the EU competition rules	☐	☐	☐	☒	☐	☐
Infringements being fined	☐	☐	☐	☒	☐	☐
The level of such fines (**)	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN	☐	☐	☐	☒	☐	☐

(*) 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.

For more information on the views set out above in relation to the introduction of civil fines in Ireland, please see the attached paper prepared by the CCPC's predecessor, i.e. the Competition Authority, entitled "Filling a gap in Irish competition law enforcement: the need for a civil fines sanction" dated 9 June 2011, which is also available at the following link:
http://www.ccpc.ie/sites/default/files/2011-06-09%20Filling%20a%20gap%20in%20Irish%20competition%20law%20enforcement%20-%20the%20need%20for%20a%20civil%20fines%20sanction_0.pdf.

C.3.2. WHO IS FINED

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

C.3.2.1.(a) Your experience/knowledge

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

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

☐ Yes ☐ No ☒ Do not know/Not applicable

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

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

- ☐ Strongly 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.

The CCPC has no direct knowledge or experience relevant to this question. However, the CCPC considers that to the extent that there is an inconsistent application between Member States of the concept of an 'undertaking', such that there is an inability to hold parent entities liable for infringements of their subsidiaries or in a merger situation the inability to hold an economic successor liable for infringements of its economic predecessor, this could give rise to challenges with respect to the effective enforcement of competition law across the EU.

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

- If you have chosen the option of "*Ensure the EU-wide application of the concept of undertaking as established in EU law*", do you think that this should include:

- the ability of NCAs to apply the EU law notion of parental liability (ability to fine entities directly involved in the infringement as well as parent companies that exercised a decisive influence over them)?
- ☒ the ability of NCAs to hold legal and economic successors of the infringing company liable in line with the case law of the European Court of Justice?

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

The CCPC considers that this is necessary to ensure the consistent application of competition law across the EU and prevent undertakings from adopting measures (such as restructuring or liquidation) to avoid sanctions for competition law infringements. This would also increase legal certainty for businesses operating in more than one Member State.

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 CCPC considers that it may be appropriate to enact legislation at EU level to ensure a consistent approach is taken to require the recognition of the EU concept of undertaking and the application of parental liability and legal economic succession. These may be concepts that are new to some jurisdictions and EU-level legislation may be required if domestic legislation or constitutional laws impose an obstacle for the recognition of these concepts in certain jurisdictions.

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	☐	☐	☐	☒	☐	☐
The consistent enforcement of the EU competition rules	☐	☐	☐	☒	☐	☐
Number of Infringements being fined	☐	☐	☐	☒	☐	☐
The level of such fines (**)	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐

(*) 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.**

The CCPC has no direct knowledge or experience relevant to this question. While the CCPC's predecessor, the Competition Authority, obtained court orders against associations of undertakings and obtained legally binding commitments from such associations, it did not seek to have fines imposed on the associations in question. The cases concerned were not appropriate for criminal prosecution and since civil fines do not exist under Irish competition law, there was no mechanism whereby the Competition Authority could have sought the imposition of civil fines.

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.**

The CCPC has no direct knowledge or experience relevant to this question. However, the CCPC considers that, to the extent that some Member States cannot take into account the sales of members of associations of undertakings in imposing of fines for anti-competitive conduct, this could impede the effective enforcement of competition law across the EU.

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.**

In relation to payment of part of the fine by members of the association, this should only apply to members who have been actively involved or have actively supported the infringing activity of 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.

The CCPC considers that action at EU level would be more appropriate in order to ensure consistency of approach across EU Member States.

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.

The CCPC considers that action at EU level would be more appropriate in order to ensure consistency of approach across EU Member States.

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

The CCPC considers that it would be appropriate to enact legislation at EU level to ensure that all NCAs have the power (a) to impose fines on associations of undertakings, and (b) to take into account: (i) the turnover of the members of an association of undertakings in order to calculate the fine and determine the legal maximum, when the infringement of the association relates to the activities of its members; and (ii) 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. This approach will ensure that a consistent approach and methodology is applied across Member States. In the absence of such legislation, it is likely that laws and practice will vary between Member States.

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						
The consistent enforcement of the EU competition rules						
Infringements being fined						
The level of such fines (**)						
Legal certainty for businesses						
Costs for businesses (*)						
Cooperation within the ECN (e.g. infringements in several Member States treating associations of undertakings differently)						

(*) 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.**

In Ireland, the only situation in which fines can be imposed for infringements of either EU or Irish competition law is where an accused person has been convicted following a criminal trial. In those circumstances, the trial judge will determine the appropriate level of the fine. In doing so, he will have regard to the maximum fine permitted under the relevant legislation (the Competition Act 2002) as well as other generally relevant factors such as the nature of the offence, including its duration, the role played by the undertaking or individual, whether others were involved in the commission of the offence, any mitigating circumstances, etc. There are no sentencing guidelines for use by Irish judges in such cases (or, indeed, in any criminal case) which means that the trial judge has a large degree of discretion in determining the level of fines to be imposed. However, in a judgment delivered on 23 March 2009 in DPP v Patrick Duffy & Duffy Motors (Newbridge) Limited, Mr Justice McKechnie in the Irish Central Criminal Court gave some general guidance on sentencing in cartel cases.

The fine is subject to appeal, either by the prosecution or the defence, and may be varied by the relevant appeal court. However, as Irish law stands, the Irish courts will not take account of the practice of the European Commission or other NCAs in the calculation of criminal fines in competition cases. Given that the sanctions imposed by the European Commission are administrative fines, the CCPC believes that if EU legislation were adopted with a view to achieving greater consistency in the calculation of fines imposed by NCAs for infringements of EU competition law, this would have to be confined to the calculation of administrative or civil fines and could not be extended to restrict the discretion of national courts when exercising their criminal fining jurisdiction.

Having explained the Irish context, the CCPC nonetheless believes that it is desirable, in the interests of legal certainty and effective deterrence that there should be a high level of consistency among NCAs in the calculation of the administrative or civil fines to be imposed for infringements of EU competition law.

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

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

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

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

C.3.3.2. Fines methodologies

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

C.3.3.2.(a) Your experience/knowledge

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

- ☐ Yes ☐ No ☒ Do not know/Not applicable

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

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

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

The CCPC has no direct knowledge or experience relevant to this question. However, the CCPC considers that where there is any significant divergence in the application and method of calculating fines, this gives rise to inconsistent enforcement outcomes and creates uncertainty for businesses operating in more than one Member State. It may also undermine the development of a compliance culture across the EU. As a general principle, the CCPC therefore favours a high degree of consistency in the calculation of fines by NCAs in different Member States.

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

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

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

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

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
Gravity of the infringement	☐	☐	☐	☒	☐	☐
Duration of the infringement	☐	☐	☐	☒	☐	☐

Value of sales linked to the infringement	☐	☐	☐	☒	☐	☐
Any other(s)	☐	☐	☐	☐	☐	☐

- 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.

While we have indicated in our response to question C.3.3.2(b).4 above that a more detailed common methodology should be established and taken into account in fining methodologies of all NCAs, to the extent that it is decided that it would be more appropriate to establish a set of minimum core elements to be taken into account in fining methodologies of all NCAs, the CCPC considers that such minimum core elements should include those elements indicated in the grid directly above.

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.

Please see our response to question C.3.3.2.(a) above.

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.**

- **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.

- **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.

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.

Not applicable.

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

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

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

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

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

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

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

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

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

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

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

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

The CCPC considers that legislative action at EU level would be more appropriate in order to ensure consistency of approach across EU Member States. The CCPC considers that such action is necessary to empower NCAs to be more effective enforcers, as non-legislative soft law measures that have been implemented to date have not been effective in ensuring consistency of approach in relation to enforcement of competition law in Member States across the EU.

- **11.2. For fines methodologies:**

Please see our response to question C.3.3.3.(b).11.1 above.

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

Please see our response to question C.3.3.3.(b).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	☐	☐	☐	☒	☐	☐
The consistent enforcement of the EU competition rules	☐	☐	☐	☒	☐	☐

The effectiveness of fines (**)	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN (e.g. treatment of an infringement in several Member States in a coherent manner as regards these factors)	☐	☐	☐	☒	☐	☐
NCAs' flexibility to adapt to the specific circumstances of each case	☐	☐	☐	☐	☒	☐

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

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

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

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

You may also provide additional information which may be relevant for this section (copies of any documents, reports, studies etc.). Please do it by uploading the relevant information in

documents with a maximum size of 1 MB each using the button below.

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

- [be30aa49-8519-4a11-8e04-daa34dec434e/2011-06-09 Filling a gap in Irish competition law enforcement - the need for a civil fines sanction_0.pdf](#)

C. DETAILED QUESTIONS FOR STAKEHOLDERS ACTIVE IN COMPETITION MATTERS

C.4. LENIENCY PROGRAMMES

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

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

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

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

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

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

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

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

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

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

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

C.4.1.(a) Your experience/knowledge

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

☒ Yes ☐ No

• 1.1. In which countries?

Ireland

• 1.2. In which capacity?

☐ Leniency applicant
☐ Representative of a leniency applicant
☒ Other

• Please specify in which "Other" capacity:

National Competition Authority

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, *Pfleiderer AG v Bundeskartellamt* and Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie*.

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

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

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

- ☒ Yes ☐ No ☐ Do not know/Not applicable

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

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of the EU competition rules by NCAs	☐	☐	☐	☒	☐	☐
The consistent enforcement of the EU competition rules by NCAs	☐	☐	☐	☒	☐	☐
Legal certainty for business	☐	☐	☐	☒	☐	☐
Other	☐	☐	☐	☐	☐	☐

- 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

- **5.1. If you have chosen the option of "*Introduction of core principles for leniency programmes in all Member States*", which core principles should be covered?**

- ☒ Establishing uniform leniency thresholds
- ☒ Ensuring that a leniency applicant has a duty to cooperate with the competition authorities to which it has applied for leniency
- ☒ Ensuring the availability of oral leniency statements in all EU Member States
- ☐ Other

- 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.

Given the absence of full convergence in Member States' legal regimes for cartel enforcement, we envisage the best solution being the adoption of an EU legislative measure to provide a legal basis for Member States' leniency programmes, together with related non-legislative action (e.g. ECN Model Leniency Programme).

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

The CCPC considers that legislative action at EU level is the most appropriate course of action in order to ensure better alignment and consistency of approach with respect to cartel enforcement throughout the EU which would, in turn, provide greater legal certainty for businesses operating in more than one Member State.

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	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN	☐	☐	☐	☒	☐	☐

(*) 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.**

As explained previously in this response, it is a criminal offence for both undertakings and individuals to participate in a cartel under Irish competition law (section 6 of the Competition Act 2002, as amended).

The Director of Public Prosecutions and the CCPC operate a cartel immunity programme ("CIP") that provides full immunity from criminal prosecution to the first applicant that successfully complies with the requirements of the CIP. The CIP provides a mechanism to help uncover cartels and provide witnesses for the criminal prosecution of other cartel participants. The CIP does not provide for leniency for other cartel participants. Applications for immunity under the CIP are made to the CCPC. The CCPC may recommend to the Director of

Public Prosecutions that an undertaking receives immunity, but only the Director of Public Prosecutions can grant immunity from prosecution.

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?

Ireland

• 1.2. In which capacity?

☐ Leniency applicant
☐ Representative of a leniency applicant
☒ Other

- Please specify in which "Other" capacity:

National Competition Authority

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.

Summary applications are not addressed in the cartel immunity programme operated by the Director of Public Prosecutions and the CCPC in Ireland. The CCPC, however, accepts summary applications which comply with the requirements set out in the ECN Model Leniency Programme on the basis of limited information submitted in writing or orally.

3. Have you experienced any problems with summary applications?

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

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

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

- ☐ Yes ☐ No ☒ Do not know/Not applicable

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

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

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

☐ Yes ☐ No ☒ Do not know/Not applicable

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

☐ Yes ☐ No ☒ Do not know/Not applicable

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

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

	Strongly disagree	Disagree	Agree	Strongly Agree	Neutral	No opinion
The effective enforcement of the EU competition rules by NCAs	☐	☐	☐	☐	☐	☒
The consistent enforcement of the EU competition rules by NCAs	☐	☐	☐	☐	☐	☒
Legal certainty for business	☐	☐	☐	☐	☐	☒
Incentives to apply for leniency	☐	☐	☐	☐	☐	☒
Other	☐	☐	☐	☐	☐	☐

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

Although the CCPC is not aware of any particular divergences between Member States in relation to summary applications, the CCPC considers that better alignment across Member States in terms of the availability and features of summary applications would improve consistency of enforcement outcomes. This would also improve legal certainty for immunity/leniency applicants across the EU.

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.**

Given the absence of full convergence in Member States' legal regimes for cartel enforcement, we envisage the best solution being the adoption of an EU legislative measure to provide a legal basis for summary applications in all Member States, together with related non-legislative action (e.g. ECN Model Leniency Programme).

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.

The CCPC considers that legislative action at EU level is the most appropriate course of action in order to ensure better alignment and consistency of approach with respect to cartel enforcement throughout the EU which would, in turn, provide greater legal certainty for businesses operating in more than one Member State.

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	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN	☐	☐	☐	☒	☐	☐

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

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

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

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

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

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

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

C.4.3.(a) Your experience/knowledge

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

☐ Yes ☒ No ☐ Do not know/Not applicable

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

☐ Yes ☐ No ☒ Do not know/Not applicable

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

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

☐ Yes ☐ No ☒ Do not know/Not applicable

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

There are various mechanisms under Irish law to exempt from disclosure material obtained during the course of an investigation (e.g. public interest privilege, exemptions under Freedom of Information Act 2014 if access to records could reasonably be expected to prejudice or impair the investigation of offences or the enforcement of any law). The Competition and Consumer Protection Act 2014 also prohibits members, staff and authorised officers of the CCPC from disclosing confidential information obtained during the performance of their duties. However, such mechanisms/provisions have not been tested before the Irish courts.

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)

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

Although the CCPC does not itself have any particular experience of attempts to obtain leniency/settlement material obtained during the course of a CCPC investigation, the CCPC considers that the abovementioned measures would provide additional protection for leniency/settlement material in Ireland.

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

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

Although, as stated above, there are already various provisions under Irish law to prevent the disclosure of material obtained during the course of an investigation, the CCPC considers that the abovementioned measures would support/strengthen existing provisions in this regard.

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.

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.

The CCPC considers that legislative action at EU level is the most appropriate course of action in order to ensure better alignment and consistency of approach with respect to cartel enforcement throughout the EU which would, in turn, provide greater legal certainty for businesses operating in more than one Member State.

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	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN	☐	☐	☐	☒	☐	☐

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

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

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

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

C.4.4.(a) Your experience/knowledge

1. Do you have experience with or knowledge of sanctions that can be

imposed on individuals for their participation in secret cartels?

- ☒ Yes ☐ No ☐ Do not know/Not applicable

• **1.1. In which countries?**

Ireland

• **1.2. In which capacity?**

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

• If "Other", please specify:

National Competition Authority

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.**

Under the Cartel Immunity Programme operated by the CCPC and the Director of Public Prosecutions, an undertaking may choose to seek immunity on behalf of its employees (present and past), including directors and officers. If an undertaking qualifies for immunity, all current and/or former directors, officers, partners and employees who admit their involvement in the anti-competitive activity and who comply with the conditions of the CIP will also qualify for immunity.

- **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.**

Although the CCPC is not aware of any particular divergences between Member States in this regard, the CCPC considers that better alignment across Member States with respect to sanctions and/or protection for employees of undertakings participating in cartels would improve consistency of enforcement outcomes. This would also improve legal certainty for immunity/leniency applicants across the EU.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The CCPC considers that legislative action at EU level is the most appropriate course of action in order to ensure better alignment and consistency of approach with respect to cartel enforcement throughout the EU which would, in turn, provide greater legal certainty for businesses operating in more than one Member State.

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	☐	☐	☐	☒	☐	☐
Legal certainty for businesses	☐	☐	☐	☒	☐	☐
Costs for businesses (*)	☐	☐	☒	☐	☐	☐
Cooperation within the ECN	☐	☐	☐	☒	☐	☐

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

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

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

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

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

CONCLUSION AND SUBMISSION

1. What do you think about our questionnaire?

The CCPC is strongly supportive of the European Commission's initiative to empower NCAs to be more effective enforcers of EU competition law and is very happy to respond to this comprehensive consultation document in this regard.

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?

The CCPC would be willing to participate in a short telephone interview to discuss our answers to this consultation if necessary.

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](#))

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