



ECN+

Empowering the national competition authorities to be more effective enforcers

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Structure

Background

The issues covered by ECN +

Result of the public consultation

Way-forward



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Background



NCAs key role as co-enforcers of EU antitrust rules

- Since 2004, national competition authorities (NCAs) empowered to also apply EU antitrust rules
- COM and NCAs cooperate closely within the European Competition Network
- Action by NCAs significantly boosted enforcement: over 1000 decisions (85% NCAs)
- Last decade shown not simply enough to give NCAs power to enforce - also need means and instruments

Stocktaking

- 2014 Communication on 10 years of Reg. 1/2003 identified areas for action to guarantee that all NCAs :
 - Have effective enforcement toolbox
 - Can impose effective fines
 - Have effective leniency programmes which encourage companies to come clean across EU
 - Have adequate resources and are sufficiently independent when enforcing EU antitrust rules
- Further intensive fact-finding with NCAs

Outcome of fact-finding

- NCAs not able to fulfil their potential because of gaps/limitations in their powers
- Soft action used extensively (ECN Recommendations on key enforcement powers, ECA principles of convergence-fines, ECN Model Leniency Programme, ECN Resolution on continued need for effective institutions)
- Mixed success - attempts to boost NCAs powers in European Semester/MoUs with "Programme Countries"



The issues covered by ECN+

Ensuring an effective toolbox

- Vast majority do not have a complete set of powers to effectively enforce
- Some do not have power to fully set priorities
- Most have basic set of powers but some lack important tools
- Scope of powers varies significantly which impacts on their effectiveness, e.g. some cannot effectively gather digital evidence
- Although many NCAs have powers on the statute books, may be deprived of force because not backed up by effective sanctions

Imposing effective fines

- Nature of fines
 - ✓ In systems where fines largely criminal–scope for more enforcement
- Who can be fined
 - ✓ Several NCAs cannot effectively fine undertakings (e.g. companies can restructure to escape) or associations
- Divergences in fining methodologies also mean that level of fines imposed by NCAs varies significantly (e.g. application of legal maximum and duration)

Effective leniency programmes

- Leniency programmes: key tool for detecting cartels
- Need to ensure companies have incentives to apply for leniency (cross-border legal certainty)
- Four issues:
 - Establishing core leniency features
 - Facilitating multiple leniency applications across the EU
 - Protecting leniency (and settlement) statements
 - Ensuring effective interplay between leniency programmes and sanctions on individuals



Sufficient independence and adequate resources

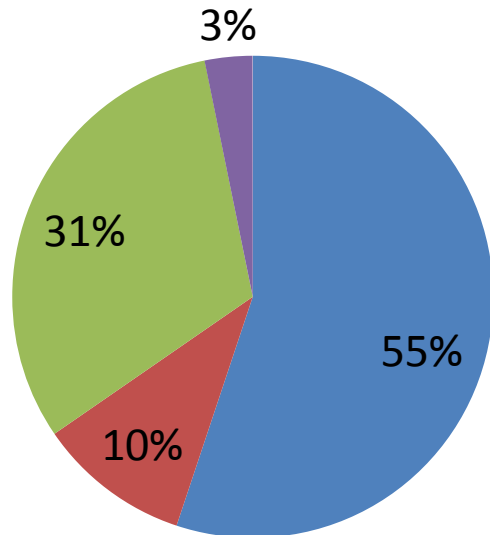
- Not all NCAs have safeguards in place to ensure functional independence
- Several NCAs do not have sufficient budget/staff to effectively enforce EU antitrust rules e.g. cannot carry out simultaneous inspections of alleged cartelists



Public consultation

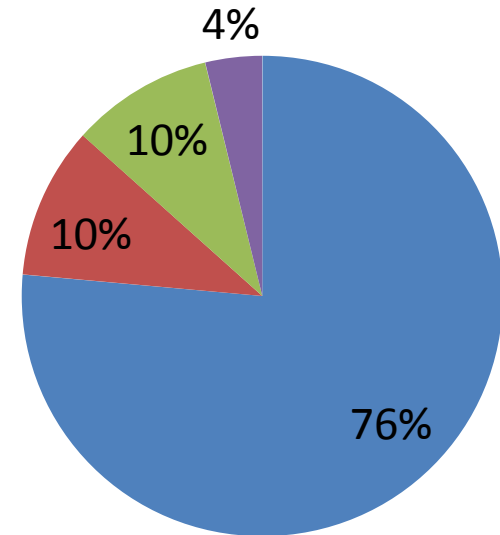
GENERAL QUESTIONS

Are EU competition rules effectively enforced by NCAs?



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

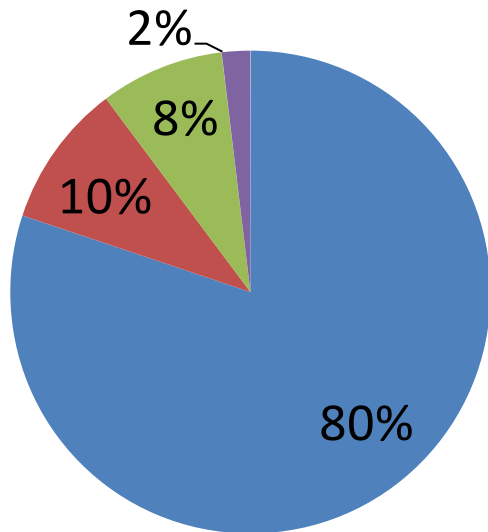
Could NCAs do more to enforce EU competition rules?



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

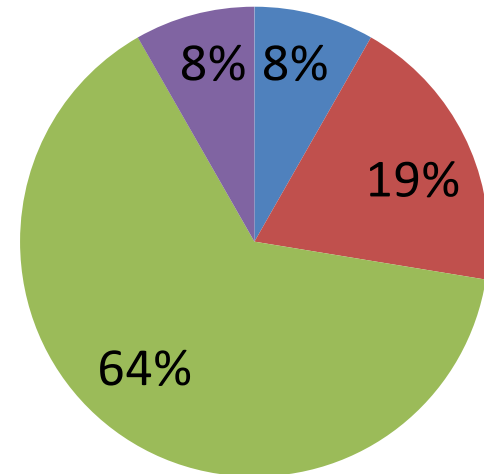
GENERAL QUESTIONS

Should action be taken?



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

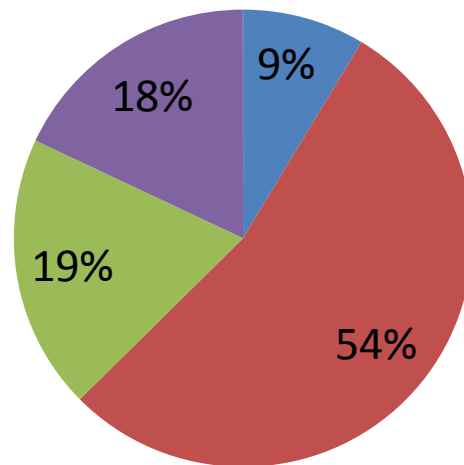
Who should take action?



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

GENERAL QUESTIONS

What type of EU action is most appropriate?



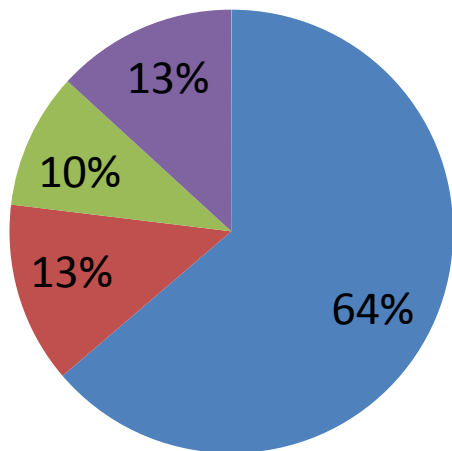
- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

DETAILED QUESTIONS: Enforcement toolbox of the NCAs

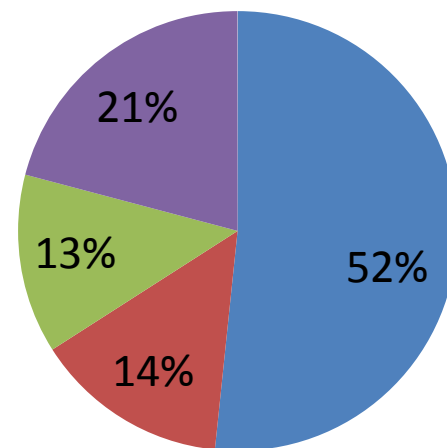
Is the lack of effective powers a problem for NCAs in terms of:

Effective enforcement (NCAs may refrain or take limited action)?

Cooperation within the ECN (e.g. NCAs may not have effective powers to carry out inspections on behalf of other NCAs)?



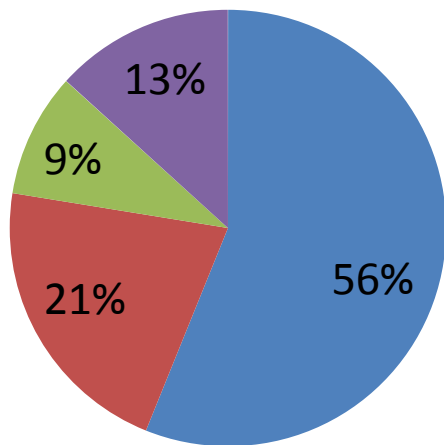
- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

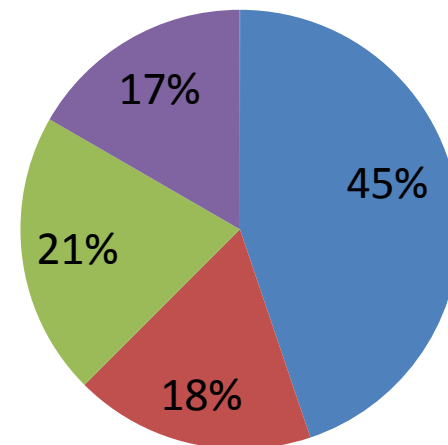
DETAILED QUESTIONS: Powers of NCAs to fine undertakings Nature of Fines

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



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

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



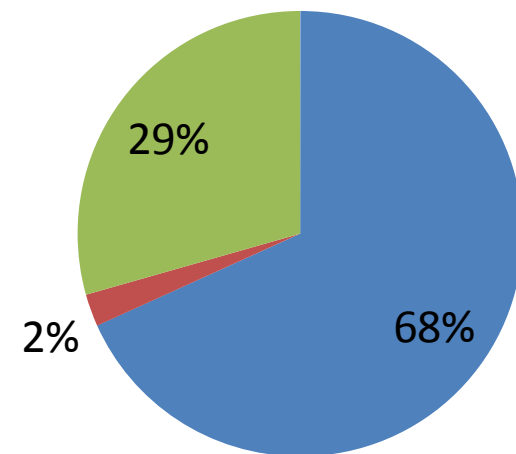
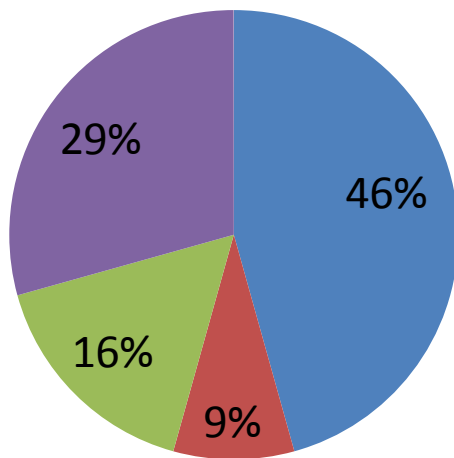
- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

DETAILED QUESTIONS: Powers of NCAs to fine undertakings

Who can be fined (concept of undertaking)

Is it a problem that some NCAs do not apply the concept of undertaking, parental liability and succession in line with the ECJ case law?

Which measures should be taken to address this issue?



■ (Strongly) Agree

■ Neutral

■ (Strongly) Disagree

■ Do not know/Not applicable

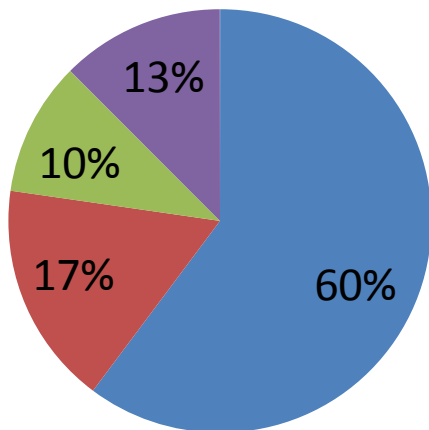
■ Ensure the EU-wide application of the concept of undertaking as established in EU law

■ Other

■ Do not know/Not applicable

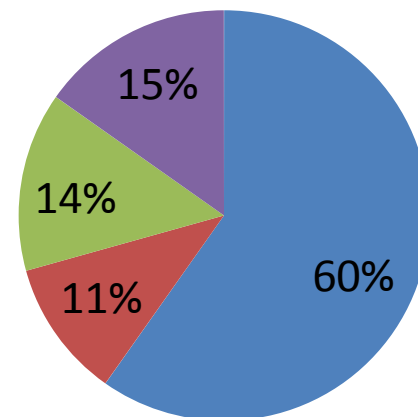
DETAILED QUESTIONS: Powers of NCAs to fine undertakings Legal Maximum & Differences in fines methodologies

Are differences in legal maximums of the fines a problem?



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

Are divergences in fines methodologies a problem?

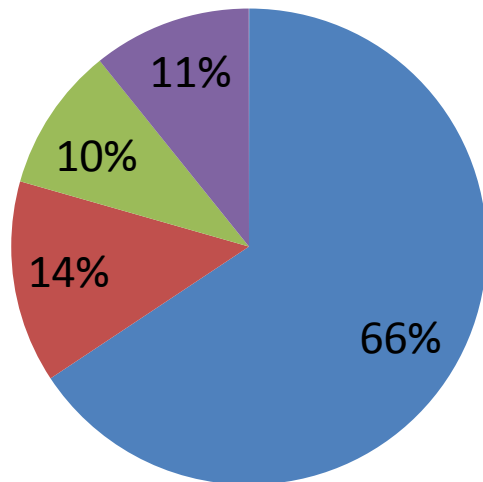


- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

DETAILED QUESTIONS: Leniency Programmes

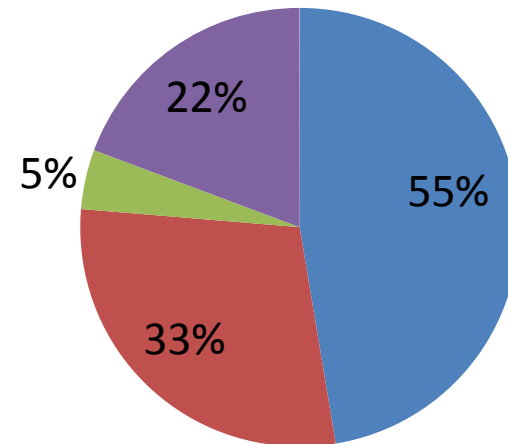
Lack of EU legal basis for national leniency programmes

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



- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable

Which measures do you think should be taken to address this issue?



- Introduction of an EU legal basis for national leniency programmes
- Introduction of core principles for leniency programmes
- Other
- Do not know/Not applicable

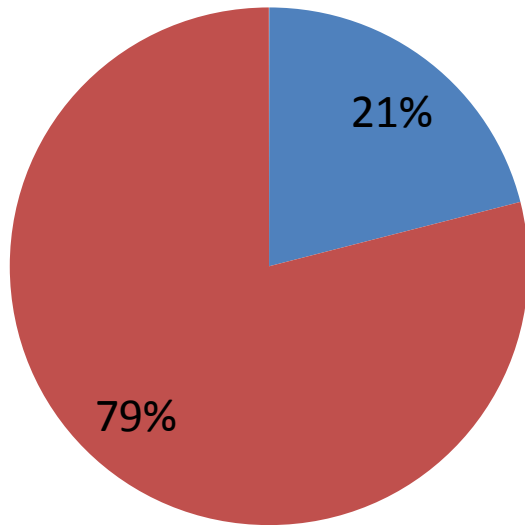


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DETAILED QUESTIONS: Leniency Programmes

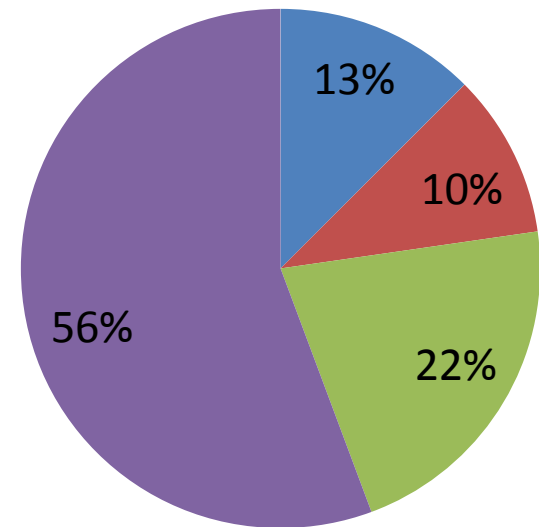
Multiple Applications

Experience or knowledge of the system of summary applications?



■ Yes ■ No/No Answer

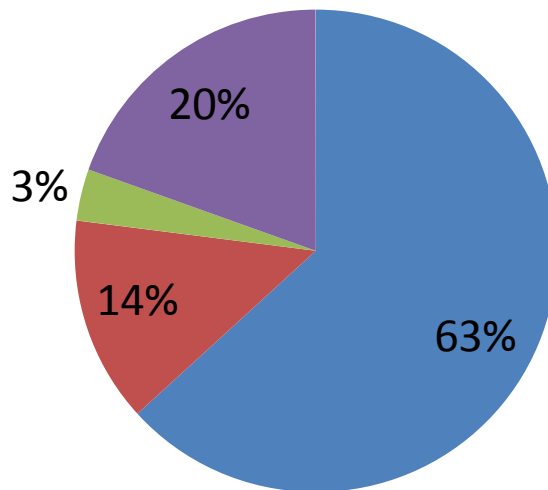
Experienced problems with summary applications?



■ (Strongly) Agree
■ Neutral
■ (Strongly) Disagree
■ Do not know/Not applicable

DETAILED QUESTIONS: Leniency Programmes Interplay of corporate leniency programmes with sanctions on individuals

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



■ (Strongly) Agree

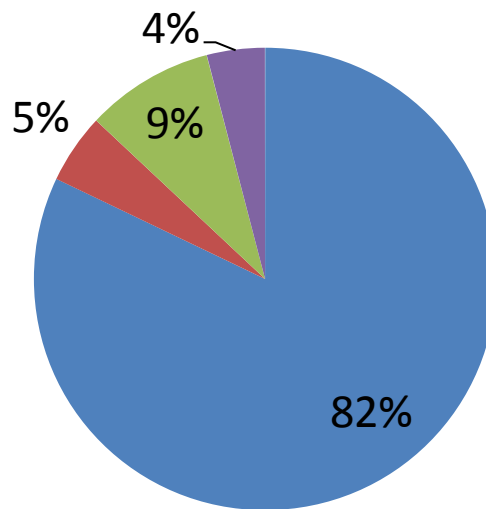
■ Neutral

■ (Strongly) Disagree

■ Do not know/Not applicable

DETAILED QUESTIONS: Resources and independence of the NCAs

Agree with the findings of the Communication that it is necessary to further guarantee the independence of NCAs and that they have sufficient resources when enforcing the EU competition rules?



■ (Strongly) Agree

■ Neutral

■ (Strongly) Disagree

■ Do not know/Not applicable

GENERAL QUESTIONS

Other issues raised by Stakeholders

Recurring issues:

- Call for greater coherency within the ECN in the application of the EU competition rules
- Recognition of Legal Professional Privilege (LPP) for in-house lawyers
- EU-wide recognition of compliance programmes as a mitigating factor for fines
- NCAs should be able to defend their cases in court
- More consistent application of the effect on trade criterion
- Abolition of the power of NCAs to apply stricter rules on unilateral conduct

New demand:

- Enhancement of NCAs' enforcement powers counter-balanced by increased procedural guarantees



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Way forward

Way-forward - options?

- No action
- Further soft action (either exclusively or as complement)
- EU legislative action to provide minimum guarantees that NCAs can effectively enforce
- EU legislative action to provide comprehensive guarantees that NCAs can effectively enforce



Way forward

- ECN + scheduled in Commission's work program 2017 for 2nd quarter
- Directive rather than regulation
- But still in impact assessment...



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THANK YOU!