

The Consumer Voice in Europe

## EMPOWERING THE NATIONAL COMPETITION AUTHORITIES TO BE MORE EFFECTIVE ENFORCERS

BEUC response



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## **A. ABOUT YOU**

BEUC – The European Consumer Organisation

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

### **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

Some of our members feel that the procedures followed by the national competition authorities (NCAs) are too slow and therefore not effective. In the meantime, until their decision is reached, competition is distorted and consumers are subject to detriment.

Moreover, the European Commission's own reports and studies show that the level of the effectiveness of the enforcement still differs across the EU in the area of competition law. This is the result of the flexibility given to the Member States to create their own procedural rules and institutional designs.

We agree with the Commission that certain aspects of the functioning of the NCAs are liable for creating divergences. Those differences could harm the efficient and consistent enforcement of the competition law in the EU.

### **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

It is advantageous for the NCAs to cooperate and exchange information not only among themselves but also with other authorities and organisations on the national level, most importantly with those protecting consumers. Often competition and consumer laws

overlap and reinforcing this cooperation would be, without a doubt, fruitful both for the authorities and consumers.

### **Co-operation with consumer authorities**

We consider it a good practice for the NCA to closely cooperate with the national consumer authorities in their respective countries. We would also encourage a closer cooperation between the ECN and CPC networks.

### **Co-operation with consumer organisations**

Better cooperation between the national authorities and consumer organisations would be beneficial for both sides, especially that national consumers' organisations are very well placed to inform the NCAs about suspected infringements. In fact, they can provide the authorities with valuable data coming from their own complaint handling. Consumer organisations are often the first to learn about a consumer problem through individual complaints or through their own research, tests, surveys, or media contacts. They often have information on whether it is a first time that the problem occurred, whether the problem has a cross-border dimension or how many consumers are affected (in what situations and under what conditions).

Unfortunately, due to the fact that their proper involvement in competition cases requires substantive funds, not all of them can engage in this field fully. In our opinion, this involvement should be in any case encouraged by the NCAs by having regular meetings with consumer organisations and exchanging relevant information.

In Italy for example, the cooperation between NCA and consumer's association is a very successful instrument in order to identify and inform the NCAs about suspected infringements.

Italian's NCA practice is based on regular annual meetings with consumer's associations in order to raise important questions, exchange relevant information and establish good relations to interact if needed. According to this positive experience, we suggest to repeat and foster other cooperation practices at European level, bearing in mind that sharing information on priority areas in advance could be very helpful.

Below we give a number of examples from the national level to demonstrate how such co-operation can improve results for consumers and the market:

Altroconsumo conducted an investigation on medical anti-cancer drugs underling a possible abusive conduct by a specific pharmaceutical company who threatened to withdraw its products from the Italian market, to obtain higher prices. After this report, the Italian Competition Authority opened an investigation for a possible abuse of a dominant position in the market for anti-cancer pharmaceuticals that are refunded by the National Health Service. The Italian Competition Authority has noticed that there was a significant price increase, resulting in major spending for the National Health Service and a lack of competitiveness in the national market<sup>1</sup>.

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<sup>1</sup> For more information see the following website: <http://www.altroconsumo.it/organizzazione/in-azione/azioni-in-corso/aspen-pharma-farmaci-carenti>

In another case, the NCA acted to punish a horizontal market-sharing agreement reached by pharmaceutical industry in order to sell the drugs with a higher price. The investigation was launched following complaints by an association of private hospitals and the Italian Ophthalmologic Association. Altroconsumo took part in this judicial procedure. This agreement clearly shows how the antitrust investigation has significant implications on consumer's health and protection<sup>2</sup>.

Another example of a good cooperation in Italy is well represented in the case of shipping companies. During summer 2010 and 2011 there was an increase in charges for ferries (operated, amongst others, by a public service operator in the maritime sector) to and from Sardinia. The price rose up to 66 % in average prices, with peaks of up to 131 %. The rise in transport costs affected the residents of Sardinia and their options to travel to and from the island. Given the significant increase in costs on the shipping routes operated by all shipping companies alike the existence of a price cartel was suspected; this has prompted the Italian Antitrust Authority (AGCM) to open a formal investigation on grounds of alleged violation of competition law. In this specific example the action of Altroconsumo was the first step to open a formal investigation from NCA.

Unfortunately, such good cooperation does not exist in all of the EU member states. In many countries, NCAs rarely consult our members.

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

- a: Strongly disagree
- b: Disagree
- c: Agree
- d: Strongly Agree
- e: Neutral
- f: Do not know/Not applicable

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 c)

Ensuring national competition authorities have sufficient resources to perform their tasks c)

Ensuring national competition authorities have effective enforcement tools, e.g. to detect and investigate competition law infringements d)

Ensuring national competition authorities have effective powers to fine companies for breach of competition law d)

<sup>2</sup> For more information see: <http://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2014/roche-e-novartis-multate-grazie-alla-denuncia-di-altroconsumo>

Ensuring national competition authorities have effective leniency programmes to encourage companies to come clean about competition law infringements d)

Other f)

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

Currently, no EU law provisions explicitly oblige Member States to ensure **independence** of the NCAs. Only general principles should be regulated on the EU level, in order not to disturb well-functioning national systems.

On the other hand, effective enforcement certainly cannot be achieved without an adequate and comprehensive set of **tools and powers** given to the NCAs. For consumers, it is also important that at least the basic set of tools is available in all of the EU countries. Otherwise, they risk to be less protected in certain countries where the NCA is less equipped.

In terms of **fine allocation**, it is also important that differences in the national procedural rules do not cause a situation where the amounts of fines accorded in different member states differ significantly. Those differences can lead to a failure in achieving a consistent result in the Single Market, which could distort competition and harm consumer protection.

On top of this, differences in defining an 'undertaking' or the lack of power of some NCAs to impose a fine on association of undertakings can result in weaker protection of consumers in countries where companies are not or less strictly held responsible for their anticompetitive practices.

On the other hand, it is possible that some NCAs might have the ability to impose a fine but due to lack of resources they have no power to carry out onsite inspections. Consumer organizations can play a role as watchdogs in this respect (see Apple case story mentioned further down).

Currently, there is no requirement at the EU level for a **leniency programme** in place. For consumers it would be however advantageous if all Member States would be in the possession of this tool that can efficiently straighten the enforcement, especially in most serious infringements like secret price-fixing and market-sharing cartels.

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.

Since under the current legal framework, Member States are flexible in designing their own procedural regimes for the application of the EU competition law, the influence of the adopted national legislation together with other national measures, on the efficiency of the enforcement of competition law, is significant.

Member States have an interest in creating good conditions for European companies to boost their productivity while at the same time helping to create a wider choice for consumers of better-quality products and services at more competitive prices, especially that this could help their economies to be more competitive and move towards sustainable growth. All this cannot be achieved without an efficient enforcement of competition laws and therefore how the NCAs are being designed or reformed is of a high importance.

Member States are also provided with different ECN recommendations, which allow them to seek a greater voluntary convergence and improve their national procedural systems taking into account solutions that worked well in other countries. In the case of the seven ECN Recommendations from 2013, many Member States used them to align their procedures to a greater extent. However, not all of the recommendations were followed at that time, which would suggest that this kind of measure may not be sufficient to reach a goal of an effective enforcement.

Finally, in our opinion Member States should also encourage better cooperation of the NCAs with other national authorities and organisations, most importantly those acting in the field of consumer protection. See also our response to question 2 where we raised this subject.

**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.

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, gave Member States a high degree of flexibility to design their own competition procedural regimes. However, divergences still exist across the EU even if many efforts have been taken since to reach a higher level of convergence.

Moreover, as it was often argued by the Commission in the past, voluntary convergence can be achieved only if there is a respective will on the side of the national authorities. The problem is often also that the voluntary convergence can quickly meet its limits due to potential conflicts with well rooted legal traditions of specific countries<sup>3</sup>.

Shaping the functioning of national enforcement authorities only by an obligation for them to comply with a general principle of effectiveness and equivalence, is not sufficient anymore. We see the adoption of certain minimal procedural standards as the best practical solution. Introducing a set of more precise minimal requirements for the NCAs and their procedures should allow for a more coherent enforcement of the competition law. Such minimal requirements should however only be based on the introduction of the more detailed general principles and not interfere with the national systems to any further extent.

Most importantly, we would support the creation of the list of basic investigative and decision making powers that should be at the disposal of the authorities for them to act efficiently (e.g. power to inspect private premises, power to set their enforcement priorities, power to impose structural remedies etc.).

On the other hand, from the experience gained in the field of the consumer protection, we can also confirm that different fines being accorded by different national authorities for the same kind of illicit behaviour, can create fragmentation and a sense of injustice for both companies and consumers.

A very clear example of this kind of differences and their negative effect on the equal protection of consumers across the EU was the Apple case, where consumer organisations of 11 Member States aimed to stop misleading practices of Apple. Apple had been found guilty to have breached consumer rights by the Italian competition authority by, first, not having correctly informed consumers about their statutory rights on legal guarantee and, second, by misleading consumers through 5 provisions of false and/or partial information in its advertising practices of Apple Care Protection Plan.

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<sup>3</sup> Those obstacles might include for example: institutional position of the NCAs and their relation to other national bodies, non-existence of the procedural code in some national legal systems, lack of experience of some countries with the power to investigate private premises etc.

However, even though all involved consumer organisations targeted the same misleading practice, the reactions of national enforcers were not consistent in different Member States. Amounts of fines differed significantly. Italian authorities imposed a fine of EUR 900.000 while the Spanish authorities imposed a fine of only EUR 47.000. At the same time, authorities in some other countries did not act at all<sup>4</sup>.

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

- a: very negative
- b: negative
- c: positive
- d: very positive
- e: neutral
- f: no opinion

The effective enforcement of the EU competition rules	c)
Legal certainty for businesses	d)
Costs for businesses (*)	c)
Cooperation within the European Competition Network	c)
Legitimacy of national competition authorities' decisions	c)
Investment climate/economic growth	c)

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

**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:**

**Allocation of fines**

As previously raised in our position paper from 2012<sup>5</sup>, we would also like to suggest that the Commission encourages Member States to redirect the fines that they collect in the framework of the competition law enforcement and allocate a part of them to consumer organisations or consumer-related projects. This would allow the consumers to be indirectly compensated for the anti-competitive behaviour of some companies and help defend their rights against them in the future.

This kind of mechanism already exists in several Member States and could be presented to other countries as examples of a good practice.

<sup>4</sup> BEUC response to the consultation on the review of Consumer Protection Cooperation (CPC) Regulation, 3 February 2014, ref. BEUC-X-2014-005.

<sup>5</sup> 'Re-directing Justice. Competition fines as a source of funding for consumer related projects and organisations', BEUC position paper from 17/09/2012, ref. X/2012/069.



In **Italy**, the law 388/2000 provides that administrative sanctions imposed on undertakings by the Competition and Market Authority can be allocated to initiatives for the benefit of consumers. The funds can be given to the regions (to promote consumer initiatives in collaboration with consumer organisations), chambers of commerce, consumer organisations or other bodies.

In **Greece**, in case of a successful collective court case brought up by an entity (usually a consumers organisation), the amount of pecuniary compensation granted by court for moral damage is directed 80% to the entity that has undertaken the collective action and 20% to the State for the purposes of education and protection of consumers.

In **Portugal**, in a case related to public service providers where the affected consumers could no longer be identified, a specific fund was established for the promotion of consumer rights. All NGOs can apply for money from this fund, provided the funding will be used for the promotion of consumer rights (including promotion of ADR, consumer education etc.).

In the **UK**, in a case related to the anti-competitive practices of a car manufacturer, who was preventing the car dealers from cutting the prices of their cars, in the absence of identifiable consumers that were affected, compensation was accorded to two consumer related projects instead.

In **Austria**, there is an ongoing discussion of providing a part of the cartel fines for consumer protection especially for the consumer organisation VKI. Although there is such a provision in the recent government program, there is still a risk that it will not be transposed into national law.

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

### **CONCLUSION AND SUBMISSION**

#### **1. What do you think about our questionnaire?**

We consider it to be a good idea to split the questionnaire into two separate parts: one with the general questions and one with the more detailed ones. This solution allows a bigger spectrum of stakeholders to participate in this consultation and collect the views from actors that are not necessary actively involved in competition matters.

As a consumer organisation, we also decided to use this opportunity and only responded to the part containing a list of general questions related to the competition law enforcement.

## **2. Were any important questions missing?**

This consultation would have been an ideal opportunity to evaluate and review the functioning of the European Competition Network (ECN), which plays a great role in ensuring the effective and consistent application of the EU competition law across different countries. We find that in the next years, with fast developments of the single market, its role and importance will certainly increase.

In the framework of the Digital Single Market, for example, certain practices are being evaluated very differently by NCAs, which can even result in contradictory decisions like in the case of the 'most favoured nation' (MFN) clauses. After cases were brought against Booking.com in different countries; Sweden, Italy and France agreed on the coordinated approach on this issue. As a result a 'narrowed MFN' clause was agreed on, which allows hotels to offer different prices to different Online Travel Operators (OTA) but not to offer a better price on their own website. At the same time NCA in Germany issued a straightforward ban of the MFN clause<sup>6</sup>. This means that after national investigations in different Member States, two diverging outcomes appeared what created uncertainty on the EU market.

As it can be seen on the basis of the example above, there is currently not enough coordination within the ECN, especially in certain areas. The transparency of ECN and its relations with the outside actors could also have been discussed in the framework of this questionnaire.

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

- Yes.

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<sup>6</sup> BKartA B9-121/13



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