



## **ECN RECOMMENDATION ON THE POWER TO SET PRIORITIES**

By the present Recommendation the ECN Competition Authorities (the Authorities) express their common views on the power to set priorities. It contains general principles which the Authorities consider are relevant to ensure the effective enforcement of the EU competition rules within the ECN.

This document may serve as guidance to all those involved in shaping the legal framework for enforcement of Articles 101 and 102 TFEU to the extent possible in their respective jurisdictions. It is without prejudice to the legal frameworks of those ECN jurisdictions which already provide for these general principles or which go beyond the scope of the present Recommendation.

### **I. INTRODUCTION**

1. Competition law is applicable to all sectors of the economy. Investigations into suspected infringements of competition law may be extensive in scope and may involve complex analyses. By prioritising their enforcement actions, competition authorities are able to make more effective use of their limited resources, thus increasing efficiency in their functioning and operation, while focusing their efforts on deterring and influencing behaviour that poses the greatest threat to competition and consumers.
2. At a general level priority setting refers to the ability of the Authorities to prioritise and plan their work. This includes the definition of priorities from a policy perspective, in

other words, the formulation of long, medium or short-term strategic plans relating to the Authorities' overall portfolios and the allocation of resources across their areas of responsibility. However, priority setting also refers to the ability of the Authorities to apply different degrees of priority to individual cases in the exercise of their enforcement powers.

3. When defining their priorities, many Authorities operate on the basis of a set of prioritisation criteria to help them decide which cases merit being undertaken and which ones should not be pursued and/or should be discontinued. The criteria may be determined by law or jurisprudence or may be set by the Authority itself. Prioritisation criteria used by the Authorities may include, among others, public interest, consumer welfare, market efficiencies, or other substantive, institutional or procedural considerations. Currently there is a degree of divergence among Member States regarding the ability of the Authorities to set priorities in the exercise of their functions. Regulation (EC) 1/2003 leaves this issue to national procedural rules which may differ across the ECN. Although in different degrees, most Authorities already have the ability to set priorities in their enforcement activities, including the power to initiate new individual cases *ex officio*. Nevertheless, some Authorities are bound by the legality principle which entails a legal duty to consider all complaints formally filed.
4. Further convergence on the ability of the Authorities to set priorities would help enhance effectiveness and efficiency in the enforcement of competition rules by ECN members by allowing them to focus their action on the most serious infringements / sectors and areas most in need of their action, thereby increasing the impact of their action for the benefit of consumers. At the level of the ECN as a whole, it can contribute to the consistent application of these rules by enhancing the ability of the Authorities to pursue cases which are relevant at ECN level in a more coordinated way, for instance, further convergence may encourage the launching of joint enforcement initiatives on a multi-jurisdictional level.

5. The ability of the Authorities to set priorities in their enforcement actions is relevant for *ex officio* cases and in the context of complaints:

(i) The ability to take action *ex officio* with regard to cases identified as a priority is central to the remit of competition authorities as public enforcers and complementary to private actions before national courts. It enables competition authorities to take action independent of the flow and nature of complaints received.

(ii) The possibility to reject complaints in relation to cases which are not deemed a priority by the Authorities is another enforcement-specific tool which results from prioritisation. It is important that undertakings and citizens are able to alert the competition authorities of perceived anti-competitive conduct that may affect them. However complaints may cover a large range of possible allegations and may vary greatly in content and substantiation. Against this background, most authorities in the ECN are able to give differing degrees of priority to complaints before them and to close non-priority cases and reject non-priority complaints if they consider that these do not (or no longer) merit being followed up.

Prioritisation in the handling of complaints may be applied in different ways. In some jurisdictions complaints are treated as a source of information and an investigation is only opened on the basis of the initiative of the Authority. In other jurisdictions the Authorities have the possibility to decide not to conduct an in-depth investigation and/or not to open a formal investigation upon a complaint if the facts which have been brought to their attention do not fall within the Authority's priorities. In this context, numerous Authorities rely on a set of generally broad and/or non-exhaustive prioritisation criteria.

The methods of closing a case on priority grounds differ and range from informal means (simple closure, information to the complainant by letter) to formal decisions setting out the priority considerations for not pursuing the case. In addition, many jurisdictions leave it to the discretion of the Authority to adopt formal decisions that go further

depending on the circumstances of a case (no-grounds-for-action decisions, e.g. to illustrate the policy of the Authority in a given field). Simple closure provides for wide flexibility and allows an Authority to work more efficiently by focusing its resources where most needed.

In order to ensure efficiency in the enforcement of competition rules, it is therefore desirable that the Authorities may, to the greatest extent possible, close cases or reject complaints on priority grounds in a way that maximises administrative efficiency, without prejudging the ability of the Authorities to adopt formal decisions to close a case when considered necessary and/or appropriate.

6. There are also differences in the degree and intensity of judicial review which are related to the methods of priority setting used by the Authorities. Jurisdictions using informal means of closure / rejection mostly do not foresee a right of appeal for complainants. In this respect, they rely on the concept that the Authority acts predominantly in the public interest and that the legal framework generally provides sufficient means to complainants to seek recourse against infringers of antitrust law before national courts. Where complainants can appeal the fact of not initiating investigations or the rejection of non-priority complaints, judicial review may be limited to controlling the exercise of its discretion by the Authority. For example, it can consist in controlling that the Authority has provided sufficient reasoning to show that the case does not fall under its priorities. In order to preserve flexibility and efficiency in the handling of the casework of the Authorities, it is desirable that, where applicable, the framework of judicial review of decisions to reject non-priority complaints should, to the greatest extent possible, be designed in a way that preserves the ability of the Authority to set enforcement priorities.
7. The Authorities can give publicity to their priority setting in different ways. Some Authorities publish their overall policy or general strategic planning for the next year(s) in which they highlight the competition areas on which they intend to focus their activities in the near future. Authorities may also opt to give publicity to more targeted

priorities in order to give a signal to certain market actors and to induce compliance with competition rules. Publication may also be used as a public relations tool to raise awareness of an Authority's work in a particular sector. The interest of an Authority in giving such publicity must be balanced against certain risks and disadvantages. Firstly, publicity should not lead to undertakings being warned of impending enforcement action where that would put the success of investigations at risk. Moreover, published priorities should not be understood as conferring an individual right on parties to demand particular action from the Authorities, which must retain the flexibility to alter priorities where needed. In addition, centralised or systematic publication of priorities may be incommensurate with the internal (decentralised) structure of some Authorities. It is therefore important to ensure that Authorities have discretion to give publicity to their priorities with a view to maximise the efficiency of their action.

## **II. ECN RECOMMENDATION**

### **It is recommended that:**

1. The Authorities should have the ability to set priorities in the exercise of their tasks. To this end, the Authorities should be able to determine prioritisation criteria which support the definition of their priorities.
2. The Authorities should have the ability to open and close *ex officio* cases insofar as cases are deemed to be a priority by the Authority concerned. The Authorities should also, to the greatest extent possible, have the ability to decide not to initiate cases and reject complaints if they do not consider them to be a priority.
3. The ability to close or reject non-priority cases and complaints by the Authorities should be exercised in a way that maximises administrative efficiency, primarily by simple closure or other informal means. This possibility should not limit or prejudice the ability

of the Authorities to adopt formal decisions to close a case where considered necessary and/or appropriate by the Authority concerned.

4. Where applicable, the framework of judicial review of decisions by the Authorities to reject non-priority complaints should, to the greatest extent possible, be designed in a way that preserves the prerogative of the Authorities to set and pursue enforcement priorities.
5. The Authorities should have discretion as to whether or not they publish the priorities they have set, their prioritisation principles, as well as their decisions based on priority grounds, with a view to maximise the efficiency of their action.

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