

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Enhancing competition in the EU for the benefit of businesses and consumers – Reinforcement of the application of EU competition law by national competition authorities		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	DG COMP/A4	DATE OF ROADMAP	11/2015
LIKELY TYPE OF INITIATIVE	Legislative		
INDICATIVE PLANNING	1 st Quarter 2017		
ADDITIONAL INFORMATION	http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html		
<p style="text-align: center;">This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.</p>			

A. Context, Subsidiarity Check and Objectives

Context

The internal market is recognised as Europe’s best asset in times of increasing globalisation. The Commission is determined to build on the strength of the single market in all its dimensions by **making it fairer and deeper**. The EU Treaty’s **competition rules are one of the defining features of the single market**: where **competition is distorted, the single market cannot deliver** on its full potential.

Effective enforcement of the EU competition rules is therefore indispensable for the Union to meet the challenges presented and seize the opportunities offered by globalisation.

The EU Member States are **essential partners for enforcing the EU competition rules**. Since 2004, the national competition authorities (NCAs) are empowered by Regulation 1/2003 to apply the EU antitrust rules alongside the Commission. This is done in close cooperation in **the European Competition Network (ECN)**. The **ECN is widely recognised as a successful model for European governance**.

Enforcement of the EU competition rules by both the Commission and the NCAs is **an essential building block to create an open, competitive and innovative single market** and is **crucial for creating jobs and growth in important sectors of the economy**, in particular, the energy, telecoms, digital and transport sectors. Competition enforcement is now taking place on a scale which the Commission could never have achieved on its own. Since 2004, NCAs have adopted 865 decisions compared to 128 decisions of the Commission during the same period. The NCAs thus **play a key role in making sure that the single market works well and fairly for the benefit of businesses and consumers**.

However, there is **potential for NCAs to do much more**. Regulation 1/2003 **focused on giving the NCAs the power to co-enforce the EU competition rules and did not address the means by which they apply these rules** (enforcement tools, fining powers, leniency programmes, guarantees of independence and resources).

Empowering the NCAs to be more effective enforcers would boost competition enforcement in Europe, make markets more competitive and give consumers a better choice of goods at lower prices.

Issue

Action by a multiplicity of authorities is much stronger, more effective and a better deterrent for companies that may be tempted to breach competition law.

Regulation 1/2003 therefore granted the NCAs the power to enforce the EU competition rules together with the Commission. However, it **did not regulate the means and instruments by which NCAs apply these rules**. Therefore, the investigation and sanctioning tools, resources and institutional structure of NCAs when enforcing the EU competition rules are not governed by EU law but are determined by national law.

In 2013/2014, the Commission conducted the assessment of the functioning of the **Council Regulation 1/2003**. As part of this work, the Commission examined a range of areas that: (1) were not addressed by Regulation 1/2003; (2) were addressed in a general way while a need for a detailed response has subsequently arisen in

practice or; (3) have emerged as new issues.

Based on the results of this analysis, the 2014 **Commission's Communication on Ten Years of Council Regulation 1/2003** (COM (2014) 453) identified **areas for action** to make the NCAs more effective enforcers, namely to guarantee that NCAs: (1) have an effective toolbox; (2) can impose effective fines; (3) have effective leniency programmes and (4) have adequate resources and are sufficiently independent.¹

The following issues have been identified:

1. The **vast majority of NCAs do not have all the tools they need** to effectively detect and tackle competition law infringements. Some NCAs do not have key investigative powers such as to gather evidence stored on mobile phones, laptops, tablets etc. - a key drawback in the digital age. Their investigative powers are often without force because they are not backed up by effective sanctions if companies do not comply with them.
2. **In some Member States, national law prevents NCAs imposing effective fines for breaches of EU competition law**, e.g. in some Member States companies can restructure to escape paying fines. **Differences in the core principles for imposing fines** may also result in **divergent outcomes in the level of fines** imposed for the same type of infringements of EU law, which undermines the level-playing field uniform competition rules are intended to create.
3. **Leniency programmes are a key tool for detecting cartels**. They encourage companies to provide valuable information about cartels in which they participated in exchange for full or partial immunity from fines. **Companies considering applying for leniency need a sufficient degree of legal certainty** to be incentivised to cooperate with authorities. That is particularly so when **companies** apply for leniency in different Member States because the cartel affects a number of jurisdictions. **However, currently cross-border legal certainty is limited in such cases, which makes applying for leniency in multiple jurisdictions risky for potential leniency applicants and thus undermines the attractiveness of leniency programmes** through-out the EU.
4. A number of authorities struggle with **insufficient human and financial resources**. This may have an **impact on their ability to** effectively enforce. For example, some NCAs are not able to carry out simultaneous inspections of all members of a suspected cartel. Others lack the appropriate forensic IT tools to find evidence of infringements.

When co-enforcing the EU competition rules together with the Commission, **NCAs should, like the Commission, act in the general interest of the EU**. However, **not all NCAs benefit from the corresponding guarantees**.

In conclusion, it is **not enough to simply give the NCAs the power to apply the Treaty rules: they need to be in a position to act effectively**. **Enforcement of the EU competition rules by NCAs would be improved** if it is ensured that they can act independently when applying such rules, have the resources they need to perform their tasks and have adequate tools to detect and sanction violations.

Moreover, although the Commission and the NCAs apply the same EU Treaty rules, the **outcome of competition proceedings can differ depending on which authority takes up the case**. This leads to **costs and uncertainty** for businesses operating cross-border. This has implications beyond the realm of competition policy, since effective competition law enforcement is an important ingredient for Member States' business environment and economic policy.

Soft action has been used extensively to promote NCAs having the ability to effectively enforce the EU competition rules, but **this route is largely exhausted** (see below under section B, "Alternative policy instruments", page 4).

Subsidiarity check

Regulation 1/2003, which enabled the NCAs to enforce the EU competition rules together with the Commission, is **already in place for more than 10 years**. During this timeframe, despite soft regulation at EU level (see below section B, "Alternative policy instruments"), **the necessary guarantees** to ensure that NCAs can act

¹ Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives COM(2014) 453 and the accompanying Staff Working Documents: Ten Years of Antitrust Enforcement under Regulation 1/2003 SWD(2014) 230 and Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues SWD(2014) 231, <http://ec.europa.eu/competition/antitrust/legislation/regulations.html> .

independently when enforcing the EU competition rules, have sufficient resources to perform their tasks and/or the adequate tools to detect and sanction infringements of these rules **have not been put in place for all NCAs**.

In some Member States, **national law prevents NCAs from imposing effective fines** on companies for infringements of the EU competition rules. Moreover, the differences between the NCAs in the core principles for imposing fines make that companies may face very different levels of fines depending on which authority acts. This may affect the predictability of fines for infringements of the EU competition rules. Only action at EU level can ensure that all NCAs can effectively fine companies and that there are common core principles for imposing fines, thus, providing a more level playing field for business.

This is also the case for leniency programmes where companies regularly file applications to a number of EU jurisdictions and need guarantees of cross-border legal certainty. Such cross-border legal certainty cannot be sufficiently achieved by Member States individually as they **cannot set up a leniency system that is available and applied in the same way in all Member States**.

Thus **only an initiative at the EU level can empower the NCAs to be more effective enforcers** by ensuring that they have more effective means and instruments to apply the EU competition rules.

Article 103 TFEU enables the EU to adopt legislation that gives effect to the EU competition rules. **Article 114 TFEU** allows for the adoption of legislation which supports the functioning of the internal market.

Main policy objectives

The initiative would boost competition enforcement and market functioning in the EU by empowering the **NCAs to be more effective enforcers of the EU competition rules** (general objective).

This requires the achievement of the following specific objectives:

1. Ensuring all NCAs have **effective investigation and decision-making tools**;
2. Ensuring that all NCAs are **able to impose effective fines**;
3. Guaranteeing that all NCAs have **a well-designed leniency programme in place which facilitates applying for leniency in multiple jurisdictions**; and
4. Ensuring that NCAs have **sufficient resources** and they can enforce the EU competition rules **independently in the EU interest**.

B. Option Mapping

For each of the objectives listed above, there are four options in terms of intensity of EU intervention:

- (1) **No action**.
- (2) **Further soft action**, either exclusive or as a complement to legislation.
- (3) **EU legislative action** to provide **minimum guarantees** that NCAs can effectively enforce the EU competition rules.
- (4) **EU legislative action** to provide **comprehensive guarantees** that NCAs can effectively enforce those rules.

Baseline scenario – no EU policy change

No EU policy change (option 1) would imply that all problems identified in section A will persist.

Some Member States may provide the NCA over time with additional powers or resources or remove the existing divergences in the national legal framework with regard to leniency or fines. However, most NCAs will continue to miss certain key tools to detect and sanction infringements or lack sufficient resources. Therefore, in the absence of further action at EU level, the existing national competition frameworks will not allow the NCAs to enforce the EU competition rules more effectively across the EU.

Moreover, the Commission can currently not enforce any EU requirements regarding the investigation and sanctioning tools, resources and institutional structure of NCAs when enforcing the EU competition rules since they do not exist.

Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

Existing legislation (Regulation 1/2003) **focused on giving the NCAs the power to co-enforce the EU competition rules and did not address the means by which they apply these rules** (enforcement tools,

fining powers, leniency programmes, guarantees of independence and resources).

Alternative policy approaches to the baseline scenario

Option 2: Further soft action as an exclusive tool.

Soft action would be most respectful of rules at national level. However, soft action has already been extensively used, meaning that the possibilities to prompt legislative change at national level by exclusively using this approach are very limited (see section below on "alternative policy instruments"). It is therefore unlikely that soft action alone would meet the objectives listed above (see section on subsidiarity). Soft action could also be taken to complement and reinforce legislative action.

Option 3: EU legislative action to provide minimum guarantees

Minimum guarantees, if calibrated correctly, would aim at allowing NCAs to effectively enforce the EU competition rules. This implies:

- Giving the NCAs the operational means that are necessary to enforce the EU competition rules: this would mean that they would all be empowered to detect and sanction infringements more effectively and would no longer be hampered by gaps or limitations in their powers.
- Putting in place guarantees that NCAs only act in the EU interest when they apply the EU competition rules: this would help to protect them from inappropriate influence.
- Ensuring that NCAs have sufficient resources in order to allow NCAs to be able to duly perform their tasks to enforce the EU competition rules.

This option, if calibrated correctly, would avoid undue interference in the Member States' legal systems. The option would not imply full harmonisation. For example, regarding the calculation of fines, the measures could be establishing a minimum set of aspects that should be taken into account when determining a fine, such as the duration and gravity of an infringement, leaving for the NCAs the more detailed methodology for their application.

Option 4: EU legislative action to provide detailed and uniform guarantees

This option would aim at a higher level of harmonisation in order to create the best possible level playing field for the effective enforcement of the EU competition rules by NCAs, thereby strengthening the single market. Following with the above example on fines, this could mean establishing a common methodology for setting fines to be applied by all NCAs.

Alternative policy instruments

Since NCAs were empowered to enforce the EU competition rules over a decade ago, **soft regulation has been extensively used to try to support NCAs being in a position to effectively act.** For example, the **ECN issued seven Recommendations on key enforcement powers** in 2012/2013. The European Competition Authorities endorsed key "principles of convergence" for the determination of fines in 2008. As regards leniency, the ECN has achieved some degree of convergence by developing a Model Leniency Programme in 2006, which was revised in 2012. The ECN adopted a Resolution on the continued need for effective institutions in 2010. Attempts have also been made in the context of the European Semester process since 2011 and the Memoranda of Understanding for programme countries since 2010 to enhance the NCAs' enforcement and fining powers and their independence and resources. Despite all these efforts, NCAs are still not sufficiently well equipped to effectively enforce the EU competition rules. It is therefore **unlikely that soft regulation alone would meet the objectives listed above.**

When taking EU legislative action, a choice has to be made between either a **regulation or a directive**. A regulation is directly applicable, and thus automatically deemed to be enshrined in Member State law, there is **no need for implementing legislation**. However, it leaves **Member States very limited or no scope to adapt to their national specificities**. A directive is only binding as to the result to be achieved, which **gives Member States a choice as to the form/method** to achieve this goal. Directives can **set minimum standards** which do **not prevent Member States from having in place provisions which go further**. The aim of this initiative is to enhance effectiveness, while not imposing one size fits all, thus a Regulation would not seem an appropriate instrument.

Alternative/differentiated scope

The initiative would benefit all consumers and companies, both large and small, by creating a more level playing field. There is therefore **no need for a differentiated scope**.

Options that take account of new technological developments
The initiative will allow the NCAs to effectively enforce the EU competition rules in the digital context , for example, by enabling them to effectively collect data stored digitally , such as on mobile devices, to prove infringements of these rules.
Preliminary proportionality check
Setting minimum standards to empower NCAs to effectively enforce the EU competition rules is necessary to ensure that they have the operational means to fully perform as co-enforcers. At the same time, it would allow Member States scope to set higher standards and adapt the rules to national specificities . The use of a directive would also allow for a proportionate solution to the identified objectives in section A.
C. Data Collection and Better Regulation Instruments
Data collection
On the basis of a decade of experience of the NCAs applying the EU competition rules, the 2014 Commission's Communication on Ten Years of Council Regulation 1/2003 identified areas for action to make the NCAs more effective enforcers. This Communication built on the Report on Five Years of Regulation 1//2003 of 2009 which found that empowering the NCAs to apply the EU competition rules has positively contributed to the stronger enforcement of the EU competition rules, but there was room for improvement, in particular, with respect to making NCAs' enforcement tools and fining powers more effective . By way of follow-up to the 2014 Communication, extensive fact-finding was carried out by DG Competition in cooperation with all NCAs on all the objectives listed above in order to have a detailed picture of the status quo. Further information, especially from the business and legal community, will be gathered through the public consultation .
Consultation approach
Any future policy in these four areas will directly affect NCAs and multi-national/national companies (including SMEs) and indirectly also consumers . In addition, Member States (national ministries responsible for competition policy) will have to implement any future legislative action. These stakeholders together with experts and the public at large will be consulted in the public consultation launched on 4 November 2015 . Public consultations in the area of competition are usually replied to by a stable group of expert stakeholders , including: (i) national competition authorities and national ministries responsible for competition, (ii) EU and national business organisations , Chambers of commerce and multi-national and national companies, (iii) European consumer organisations , (iv) competition lawyers associations and law firms specialised in competition law (both Brussels based and national), (v) think-tanks and economic and public affairs consultancy firms advising companies on competition issues, and (vi) academics with expertise in EU competition law. As the current initiative concerns NCAs which need to ensure that national markets work well and fairly for the benefit of consumers and businesses (including SMEs) often operating within national borders, the national perspective is particularly important for this initiative . Therefore, the involvement of SMEs and consumers needs to be ensured through targeted communication on the public consultation to SMEs and national trade and consumer associations . The Commission, in collaboration with the Commission Representations in the Member States and the NCAs, will promote the public consultation at national level, inter alia through targeted communication to SMEs. Moreover, to encourage input by SMEs and consumers the public consultation is split up in a part with general questions and specific sections with more detailed questions. Answers can be provided in all official EU languages. A press release will also be issued explaining the aim and background of the public consultation. The public consultation will be supplemented by a stakeholder conference towards the end of the open public consultation period. Furthermore, the initiative is developed in continuous cooperation and consultation with the NCAs . A meeting has already been held with relevant Ministries to get their preliminary feedback and this will be repeated at appropriate stages . The Commission will continue to engage in regular dialogue with other stakeholders , in particular, consumer organisations and the business (including SMEs) and legal community,

through conferences and meetings.
The launch of stakeholder consultations related to this initiative will be announced in the consultation planning that can be found at http://ec.europa.eu/yourvoice/consultations/docs/planned-consultations_en.pdf .
Will an Implementation plan be established?
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
D. Information on the Impact Assessment Process
An IA will be carried out on all four options defined in section B above (no action; further soft action; EU legislative action to provide minimum guarantees; EU legislative action to provide comprehensive guarantees that NCAs can effectively enforce competition rules) against the objectives defined in section A. Additional options brought forward during the consultation process may be assessed, too.
The IA Steering Group was set up in October 2015 and met before the public consultation (see below) and will meet at least twice thereafter. The following DGs and services were invited :
DG Internal Market, Industry, Entrepreneurship and SMEs (GROW), DG TRADE, DG Mobility and Transport (MOVE), DG Communications Networks, Content and Technology (CNECT), DG Budget (BUDG), DG Justice and Consumers (JUST), DG Financial Stability, Financial Services and Capital Markets Union (FISMA), DG Energy (ENER), DG Environment (ENV), DG Economic and Financial Affairs (ECFIN), Secretariat-General (SG), Legal Service (LS), European Anti-Fraud Office (OLAF), Health and Food safety (SANTE), Maritime affairs (MARE)
E. Preliminary Assessment of Expected Impacts
Likely economic impacts
Giving NCAs the operational means to be more effective would lead to increased enforcement of the EU competition rules and further spread the competition culture through-out Europe . This would result in more open competitive markets , where companies compete more fairly on their merits, and enabling them to generate wealth and create jobs . Greater competition boosts productivity - a key driver for economic growth . Competition enforcement helps to remove barriers to enter markets . The single market would be reinforced and be fairer for businesses and consumers . Greater competition enforcement also protects European consumers from business practices that keep the prices of goods and services artificially high and enhances their choice of innovative goods and services .
Likely social impacts
Greater competition stimulates economic growth , leading to greater economic prosperity for EU citizens, the creation of jobs and greater public confidence in the functioning of the national framework for ensuring compliance with the EU competition rules.
Likely environmental impacts
The objective of the legislative initiative would be to empower the NCAs to become more effective enforcers of the EU competition rules, which means that no significant environmental impact is expected .
Likely impacts on simplification and/or administrative burden
Common minimum standards regarding the investigation and sanctioning tools can reduce (option 3) or minimise (option 4) divergent outcomes for companies and make the application of the EU competition rules by NCAs more predictable . The competition authorities in the EU would be able to cooperate better with each other and the credibility of the ECN would be reinforced . Moreover, costs for businesses involved in cross-border activities to adapt to different legal frameworks would be reduced or even fall and legal certainty would increase as all NCAs would have the same guarantees in place. This will, for example, further ensure the attractiveness of leniency programmes and incentivise companies considering applying for leniency to cooperate with NCAs through-out the EU.
Likely impacts on SMEs
Creating a more level playing field in which a competition culture prevails enables all businesses to compete more fairly and grow throughout the single market, including SMEs .
Likely impacts on competitiveness and innovation
Empowering the NCAs to be more effective competition enforcers would boost competition enforcement ,

making **European markets more competitive and creating a more level playing field for businesses operating cross-border**. Businesses would compete more fairly on the merits, **incentivising them to innovate** and **offer a better range of higher quality products and services** that meet consumers' expectations.

Likely impacts on public administrations

A key benefit of the initiative is that it would empower the NCAs to be more effective enforcers, making them **better 'value for money'**.

The **burden** on public administrations would consist largely of the **implementation costs of the legislative initiative**. These costs would be variable depending on the extent to which guarantees that NCAs are empowered to be effective enforcers are in place. Both option 3 and 4 would entail **considerable costs linked to the legal adaptation to the new rules** but these adaptation costs would be lower under option 3 as it allows taking into account national specificities. Moreover, some Member States could consider the changes under option 4 to be a **far-reaching interference** in their legal systems and/or traditions compared to option 3.

Likely impacts on third countries, international trade or investment

Making Europe's markets more open and competitive would make them **more attractive to investors**. Greater competition **enhances the ability of businesses to compete, both on their home markets and internationally**.