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EU Commission Launches Far-Reaching Consultation on National Authorities' Antitrust Enforcement Powers

Jay Modrall (Norton Rose Fulbright, Belgium) · Friday, December 4th, 2015

On 4th November, the European Commission published a far-reaching consultation (the **Consultation**) on proposals to boost the enforcement powers of national competition authorities (**NCA**s) and to address differences between national competition enforcement systems in the European Union. The Consultation builds on the 2014 Communication on Ten Years of Regulation 1/2003 (the **Communication**) but also reflects investigations by DG Competition since the Communication was published. The changes discussed in the Communication relate to three main areas:

- safeguarding NCA's independence, while ensuring they have sufficient resources and staff;
- ensuring that all NCA's have a harmonised set of tools to detect and sanction violations of EU competition rules; and
- harmonising certain aspects of national leniency programs.

The consultation is open until 12th February, 2016. Although at this stage the Commission is only seeking views from stakeholders, the Consultation is a significant step in what will likely be the most significant reform of EU competition law enforcement since Regulation 1/2003 entered into force in 2004. According to the Commission's work programme, the Commission expects to propose legislation reflecting the results of its consultation in early 2017.

The topics on which the Commission is seeking input are broken down between a number of general questions and more specific questions for stakeholders active in competition matters. The Commission's questions are summarized below.

General Questions

At the most general level, the Commission seeks input on whether NCA's effectively enforce EU competition rules already and on measures that could be taken to help NCA's become more effective. Options include measures to ensure that NCA's have the necessary independence and resources and effective enforcement tools, including effective powers to impose fines and effective leniency programs.

Where additional measures are called for, the Commission asks whether these measures should be taken at the EU or national levels, and whether they should take the form of legislation, "soft law" such as best practices, or a combination.

More Specific Questions

The Commission's more specific questions fall into four areas: NCAs' resources and independence; NCAs' "enforcement toolbox"; NCAs' powers to impose fines; and leniency programs.

NCAs' independence and resources

In the Communication, the Commission found that further steps were needed to ensure that NCAs have the necessary independence and resources effectively to enforce EU competition law. The Consultation asks a variety of questions about the extent to which political influence and/or a lack of resources has interfered with the enforcement activities of particular NCAs and ways in which such problems should be remedied.

Enforcement toolbox

According to the Commission, the "vast majority of NCAs do not have a complete set of investigation and decision-making powers". For example, some lack the power to reject complaints based on their own enforcement priorities, while others lack powers to adopt commitment decisions or to inspect individuals' homes. Some NCAs do not have effective powers to collect digital evidence, some cannot impose remedies to restore competition, and some lack the power to impose significant fines for failures to comply with their investigations and decisions.

While attempts have been made to harmonise NCAs' enforcement toolbox through "soft convergence," for instance through recommendations by the European Competition Network (ECN), the Commission is seeking input on further steps to ensure that NCAs have the necessary tools, potentially including EU legislation to harmonize the enforcement tools available to NCAs.

Fining powers

The Commission believes that a number of differences in NCAs' fining powers could lead to differences in levels of enforcement of Articles 101 and 102 TFEU, including differences in the nature of the fines imposed (civil or criminal), who can be fined, and methods for determining fines, including maximum fines.

The Commission is seeking feedback on areas in which national rules on antitrust fines should be harmonized, potentially through EU legislation. Of particular interest are the Commission's questions on parental and successor liability, where the Commission seeks input on whether EU-law liability principles should be harmonised across the EU.

Leniency programmes

The Commission notes that all Member States except Malta operate leniency programmes to encourage the discovery of secret cartels, and the ECN introduced a model leniency programme (MLP) in 2006. The Commission notes, however, that differences between leniency programmes, for example as regards eligibility conditions, remain and that these can have spill-over effects in view of the parallel competences of the Commission and NCAs to investigate cartels under EU law.

To address this risk, the Commission is seeking input on a range of questions including the

operation of the MLP's summary leniency application in cases involving multiple leniency applications, the protection of incriminating materials in NCA files in the event of follow-on damages litigation, and the interplay between leniency programmes and sanctions on individuals.

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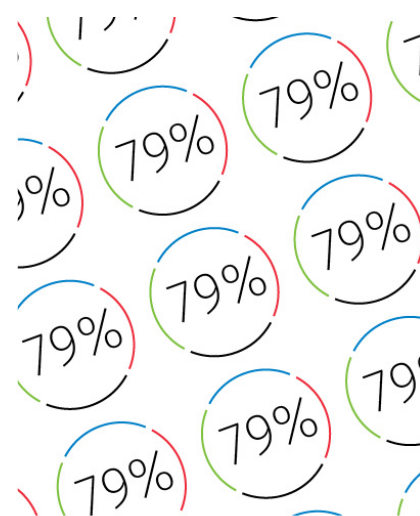
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