

**Summary report of the replies to the Commission's
Public Consultation on
Empowering the national competition authorities to
be more effective enforcers**

I. INTRODUCTION

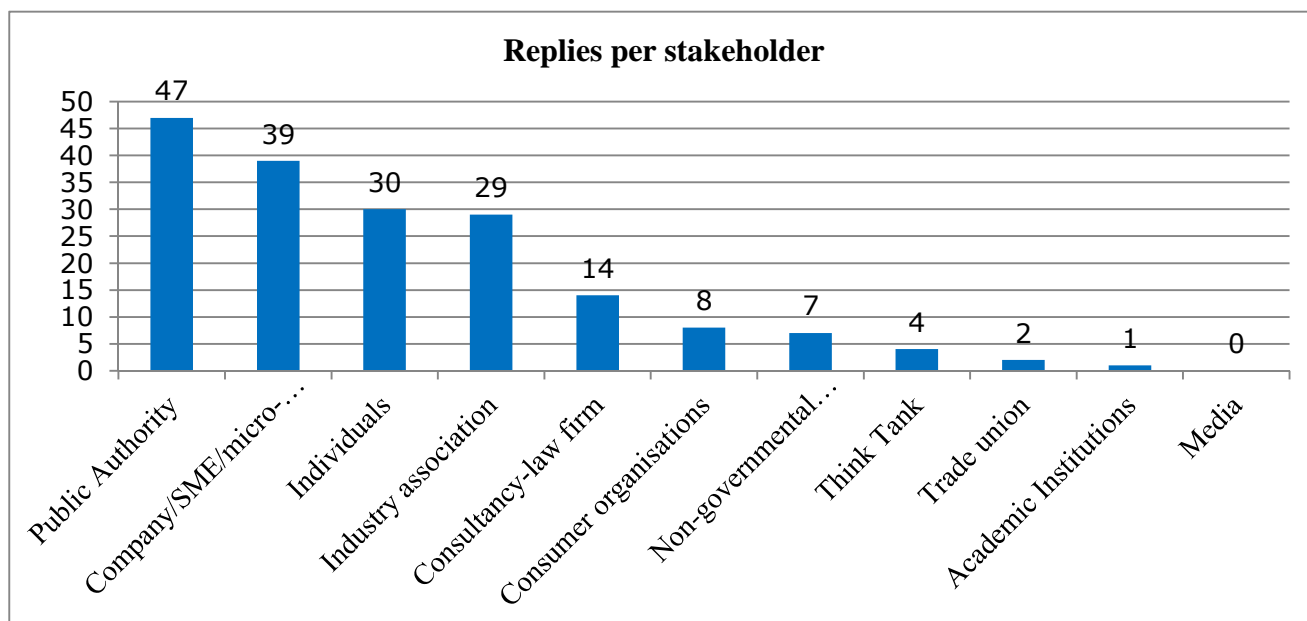
The Commission has launched between 4 November 2015 and 12 February 2016 a public consultation on empowering national competition authorities to be more effective enforcers. This consultation follows up the Commission's Communication on Ten Years of Regulation 1/2003 of 9 July 2014 [COM(2014) 453], which identified a number of areas of action to boost the powers of national competition authorities ("NCAs") to enforce the EU competition rules. The objective of the public consultation was to get feedback from a broad range of stakeholders on their experience/knowledge of issues that NCAs may face having an impact on their ability to effectively enforce the EU competition rules and what action, if any, should be taken in this regard.

The public consultation has taken the form of a questionnaire which was split into two parts, a first one with general questions seeking input from non-specialised stakeholders, and a second one for stakeholders with a deeper knowledge/experience of competition matters. This second part addresses four key issues:

- Resources and independence of the national competition authorities
- Enforcement toolbox of the national competition authorities
- Powers of national competition authorities to fine undertakings
- Leniency programmes

There have been 181 replies from a wide variety of stakeholders, ranging from private individuals, law firms and consultancies, companies and industry associations, consumer organisations, academics, non-governmental organisations, think tanks and trade unions to public authorities, including a number of Ministries and NCAs from within and outside the EU.

The majority of the respondents have replied to the questionnaire, but some stakeholders have opted



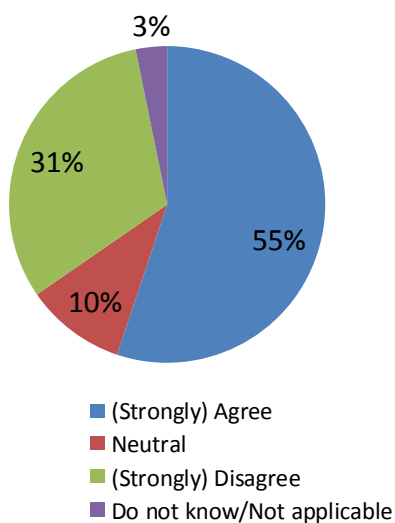
to reply with a position paper.

This report outlines the main results of the consultation regarding both the replies to the general questions and to the specific questions.

II. SUMMARY OF RESULTS OF THE GENERAL QUESTIONS

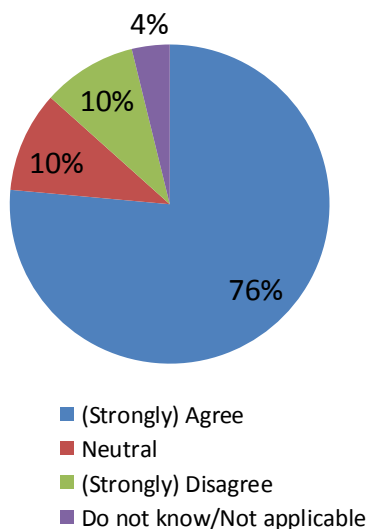
The results show that for the majority of respondents NCAs are effectively enforcing EU competition rules. There is however a 31% of respondents that considers that this is not the case.

Are EU competition rules effectively enforced by NCAs?



However, a wide majority of respondents consider that NCAs could do more to enforce EU competition rules than what they currently do:

Could NCAs do more to enforce EU competition rules?



Respondents consider also that the following measures would help NCAs to be more effective:

	(Strongly) Agree
Having effective enforcement tools to detect and investigate infringements	87%
Having sufficient resources to perform their tasks	85%
Having effective leniency programmes to encourage companies to come clean about competition law infringements	82%
Having effective powers to fine companies for breach of competition law	80%
Having guarantees that they enforce the EU competition rules in the general interest of the EU and do not take instructions when doing so	76%
Other	59%

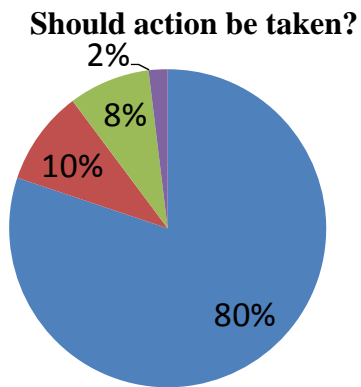
Other issues raised by stakeholders

A majority of stakeholders (59%) also consider that other actions should be taken to boost the effectiveness of the NCAs. There is in particular a consistent demand from lawyers, business and business organisations that any enhancement of NCAs' enforcement powers is counter-balanced by increased procedural guarantees, including ensuring that rights of defence can be effectively exercised by having greater transparency of investigations and effective judicial review (e.g. companies should receive a Statement of Objections and have effective rights of access to file).

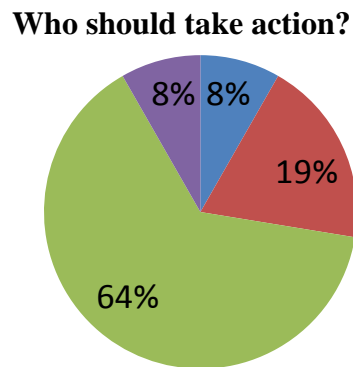
Other issues raised are the request of greater coherency within the ECN in the application of the EU competition rules, the recognition of Legal Professional Privilege (LPP) for in-house lawyers and of compliance programmes as a mitigating factor for fines, that NCAs should be able to defend their cases in court, a more consistent application of the effect on trade criterion or the abolition of the power of NCAs to apply stricter rules on unilateral conduct.

The questionnaire has also sought views from stakeholders on whether action to boost enforcement by NCAs should be taken and, if so, who should take action. The graphs below show the results which indicate that a wide majority of stakeholders supports that action should be taken and that such action should preferably be a combination of EU and Members States action.¹

¹ The figures used will not necessarily add up to 100% because some respondents may have answered "do not know" or "not applicable".



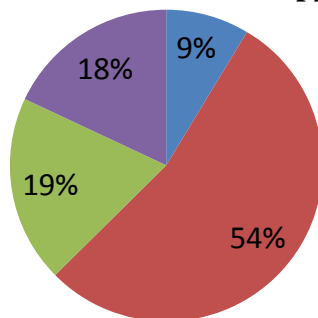
- (Strongly) Agree
- Neutral
- (Strongly) Disagree
- Do not know/Not applicable



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

Respondents also consider that, if EU action were to be taken, it should preferably take the form of a mix of legislative and non-legislative action.

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

Finally, the overall view of stakeholders is that taking action at EU level would have a (very) positive impact on various aspects, as shown in the table below:

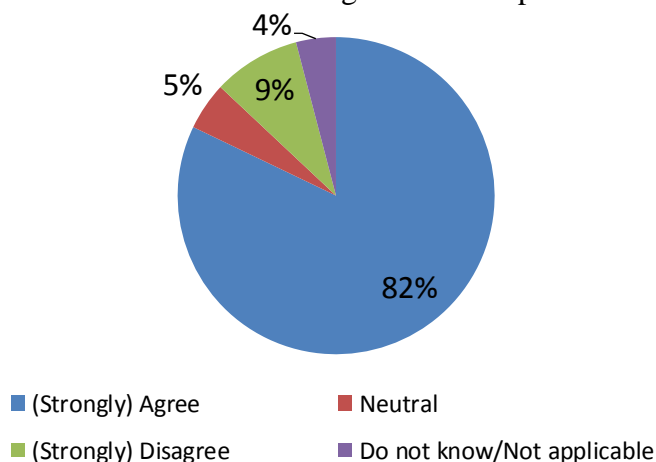
Impact of EU action

	(Very) Positive
Effective enforcement of the EU competition rules	92%
Legal certainty for businesses	85%
Cooperation within the European Competition Network	83%
Legitimacy of national competition authorities' decisions	83%
Investment climate/economic growth	79%
Costs for businesses	52%

III. SUMMARY OF RESULTS OF THE DETAILED QUESTIONS

A. RESOURCES AND INDEPENDENCE OF THE NATIONAL COMPETITION AUTHORITIES

A wide majority of stakeholders agree with the findings of the Commission's Communication on Ten Years of Regulation 1/2003 that it is necessary to further guarantee the independence of NCAs and that they have sufficient resources when enforcing the EU competition rules.



Many respondents consider that the following measures are needed to ensure NCAs independence when they enforce the EU competition rules (stakeholders were asked to identify and rank the three measures they considered to be of most importance):

	Supported by: (# respondents)	Importance		
		1	2	3
Guarantees ensuring that NCAs are endowed with adequate and stable human and financial resources to perform their tasks	96	50%	28%	22%
Guarantees that NCA's top management/board or decision-making body are not subject to instructions from any government or other public or private body	97	45%	37%	18%
Guarantees ensuring that dismissals of members of the NCA's top management/board or decision-making body can only take place on objective grounds unrelated to its enforcement activities	67	13%	31%	55%
Rules on conflicts of interest for the NCA's top management/board or decision-making body	46	20%	39%	41%
Rules on accountability of the NCA (e.g. requiring that NCAs report annually on their activities)	37	19%	43%	38%
Other measures (*)	7	43%	0%	57%

(*)e.g. budgetary autonomy and transparent appointment procedures for NCAs' management

The majority of stakeholders prefer action to be taken at both EU and national level on resources (59%) and on independence (54%).

In terms of those who consider that EU action is appropriate, approximately 43% consider that a mixture of legislative and soft action is the best solution.

B. ENFORCEMENT TOOLBOX OF THE NATIONAL COMPETITION AUTHORITIES

A lack of effective powers for NCAs is considered by stakeholders to be a problem, firstly, in terms of the effective enforcement of the EU competition rules (e.g. NCAs may refrain from taking action/carry out more limited action/take action which does not meet the desired objective), and secondly, for cooperation within the ECN (e.g. it can impinge on the ability of NCAs to carry out inspections etc. on each other's behalf under Article 22 of Regulation 1/2003).

Divergences in NCAs' powers is seen as a problem in terms of legal certainty for business (63%), costs for business (62%) and for cooperation in the ECN, e.g. different rules on what evidence can be gathered on behalf of another NCA (57%).

The table below shows the investigation and decision-making tools stakeholders think that NCAs need to have in order for them to be effective enforcers of the EU competition rules.

Tool	% of support
Power to inspect business premises	92
Power to inspect non-business premises	63
Power to issue requests for information	93
Power to effectively gather digital evidence	89
Power for the officials of one NCA (NCA A), which requests another NCA (NCA B) to carry out an inspection on its behalf, to assist in the inspection carried out by NCA B (e.g. to be present during the inspection, to have investigative powers)	80
Power to conduct interviews	90
Power to conduct sector inquiries	89
Power to adopt prohibition decisions	87
Power to adopt formal settlement decisions (formal decision and reduced fine)	86
Power to adopt commitment decisions	91
Power to issue interim measures	87
Power to impose dissuasive fines for non-compliance with investigative and decision-making powers	83
Power to compel compliance with investigative and decision-making powers, e.g., power to impose effective periodic penalty payments	76
Power to fully set enforcement priorities, including the power to reject complaints on priority grounds	75
Power for NCAs to act within a certain time period (limitation periods)	77
Power for one NCA (NCA A) to ask another NCA (NCA B) to notify acts (e.g. a Statement of Objections) on its behalf in the territory of NCA B (e.g. if NCA A cannot notify acts to a company in its own territory because it does not have a subsidiary/other legal representation there)	71
Power for one NCA (NCA A) to ask another NCA (NCA B) to enforce fining	61

decisions on its behalf in the territory of NCA B (e.g. if NCA A cannot fine a company in its own territory because it does not have a subsidiary/other legal representation there)	
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A majority of stakeholders consider that ensuring that the NCAs have an effective toolbox should be addressed by a combination of EU and national action.

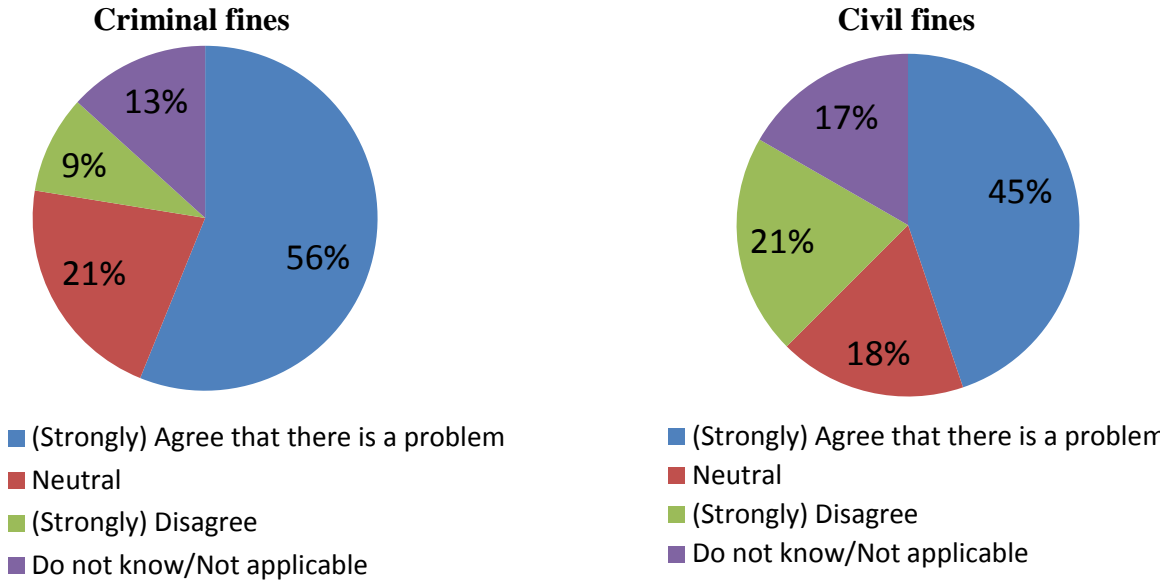
Those who consider EU action appropriate prefer a mixture of legislative and non-legislative action (48%), with a smaller number opting for exclusive legislative action (41%).

C. POWERS OF NATIONAL COMPETITION AUTHORITIES TO FINE UNDERTAKINGS

The public consultation has covered three main issues: the nature of the fines imposed by NCAs (criminal, civil or administrative); who can be fined (concept of undertaking, parental liability and succession); and fines methodologies/legal maximum of the fines.

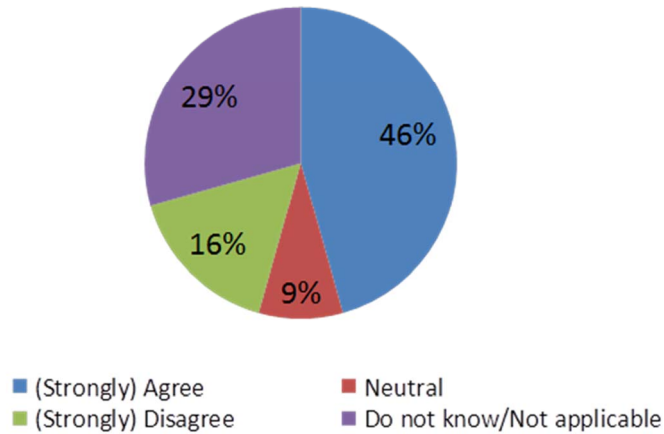
The graphs below show to what extent stakeholders considered that there are problems in the three areas identified:

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



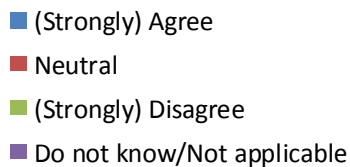
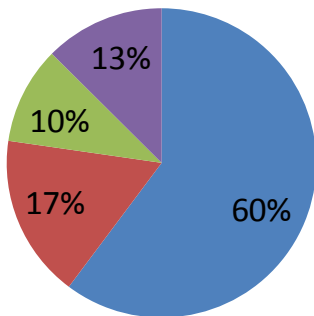
Regarding the measures which could be taken to address the issues identified in those Member States where no administrative fines are available, stakeholders' views are approximately evenly split between those proposing the introduction of a pure administrative system (27%), introducing administrative fines as a complement to the current criminal/civil systems (27%), or to take measures to make the current criminal/civil systems more effective (23%).

Who can be fined: 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?

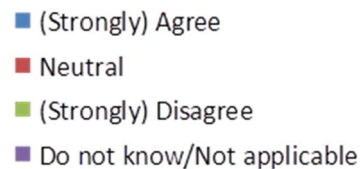
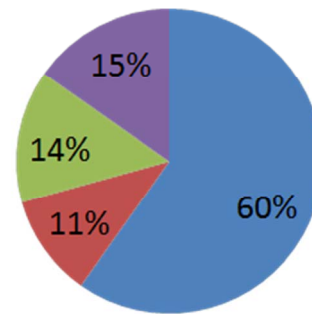


Are differences in legal maximum of the fines/fines methodologies a problem?

Legal maximum

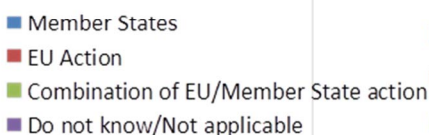
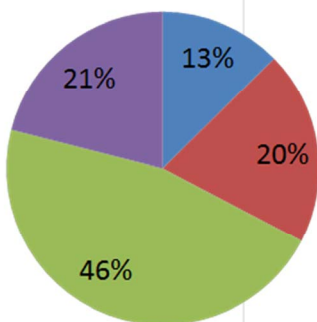


Fines methodologies

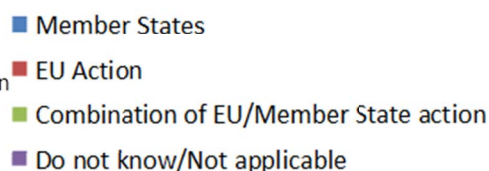
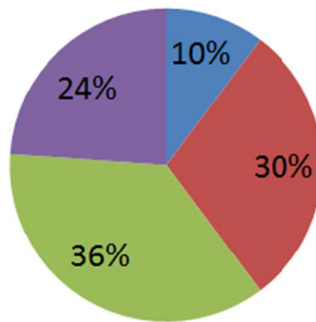


With respect to who should take action on all of these three areas, stakeholders generally support either a combination of EU and Member States action or EU action alone.

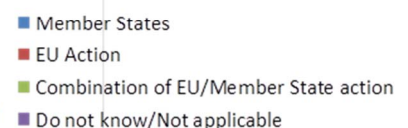
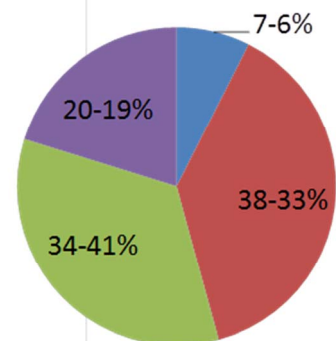
Nature of fines



Who can be fined

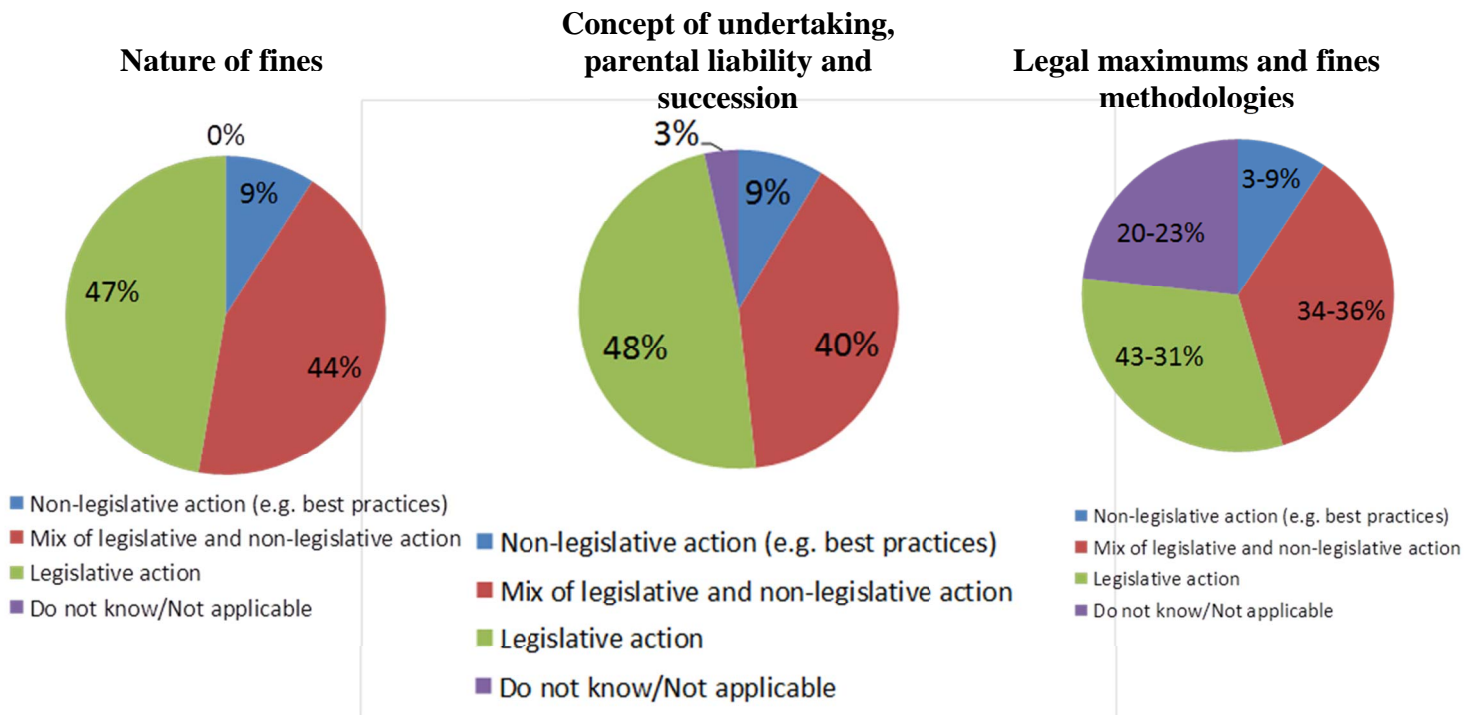


Legal maximum and fines methodologies



Finally, the majority of stakeholders considering that EU action should be taken have the view that such action should be either a mixture of legislative and non-legislative action or pure legislative action. In general, non-legislative action is supported by a minority of respondents.

What type of action is most appropriate?



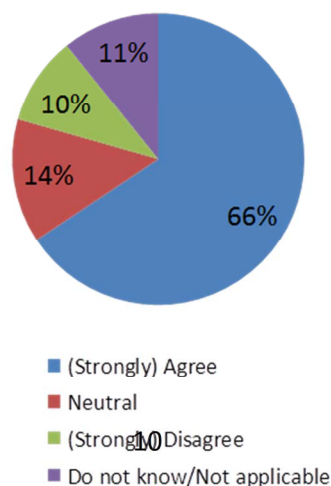
D. LENIENCY PROGRAMMES

The public consultation has addressed four main topics: the need of a legal basis for leniency and divergences in leniency programmes; facilitating multiple applications for leniency; the protection of leniency and settlement material; and the interplay between leniency programmes and sanctions on individuals.

Legal basis for leniency and divergences in leniency programmes

The majority of respondents consider that the lack of a legal basis in EU law for leniency programmes is a problem:

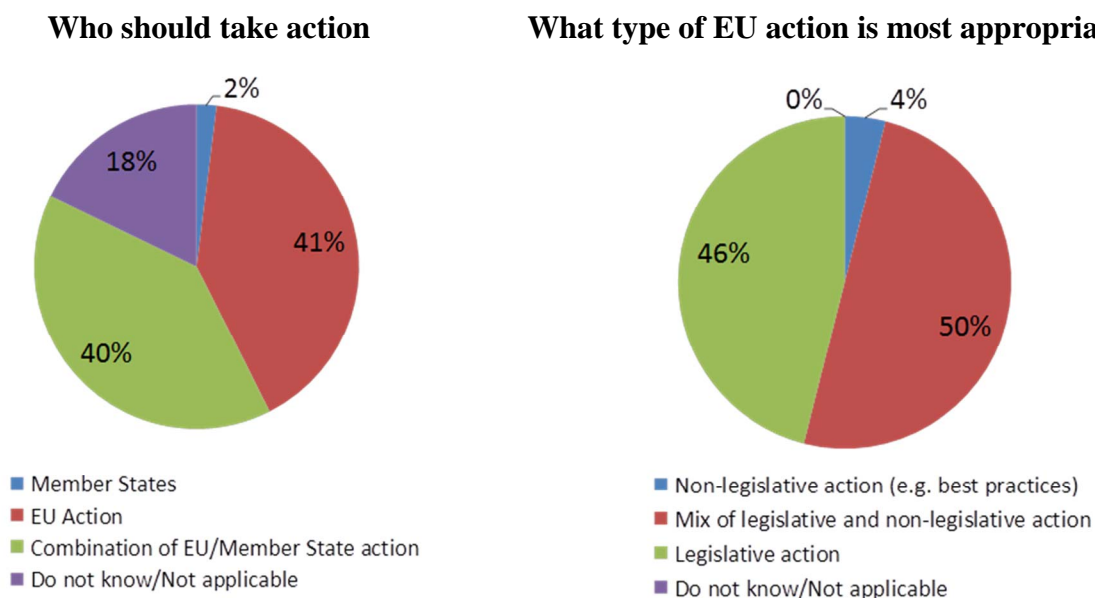
Is the lack of EU legal basis for national leniency programmes a problem?



Moreover, 43% consider that the existence of divergences in the leniency programmes could have an impact on who can benefit from leniency and under which conditions (10% not sharing this view and 46% answering “do not know” or “nor applicable”). This is considered to be a problem in terms of effective and consistent enforcement of EU competition law and legal certainty for business.

40% of respondents consider that the ECN Model Leniency Programme ensures a sufficient degree of alignment of Member States' leniency programmes. However 61% finds a lack of implementation of the ECN Model Leniency Programme by Member States, and 44% consider that additional rules are needed.

With respect to potential action, there is wide a support for EU action either alone or combined with action by Member States. The type of EU action should be either a mix of legislative and non-legislative action or purely legislative.



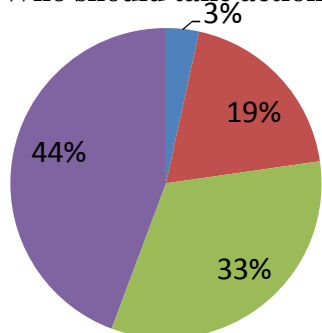
Multiple applications

Summary applications is a system set up by the ECN Model Leniency programme under which leniency applicants make a full application for leniency to the Commission and can make short form "summary applications" to NCAs on the basis of limited information to protect their place in the leniency queue if the Commission decides not to take up, a part of, or the entire case. Only 19% of stakeholders consider they have experience or knowledge of the system of summary applications.

Divergences in the way summary applications are applied are considered to be a problem by nearly half of respondents in terms of the effective and consistent application of EU rules, legal certainty for business and incentives to apply for leniency.

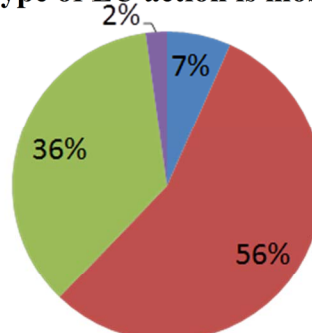
With respect to taking action, the majority supports EU action either combined with action by Member States, or exclusively by the EU action. The type of EU action should mainly be either a mix of legislative and non-legislative action or purely legislative.

Who should take action?



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

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

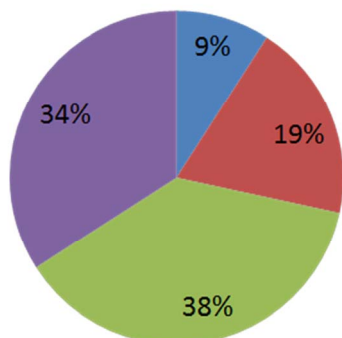
Protection of leniency and settlement material

About half of the respondents are in favour of extending the protection provided for by the Damages Directive (protection from use/disclosure in civil damages actions before EU courts) to other types of proceedings (another 48% replied that they "do not know"). A broad majority of these stakeholders support extending such protection to the following types of proceedings:

Civil proceedings other than damages actions (for example injunctive relief)	79%
Administrative proceedings (such as proceedings before tax authorities or regulators)	72%
Criminal proceedings	69%
Proceedings under the "transparency" rules/public access to documents	69%

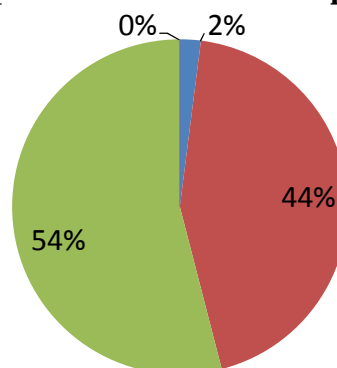
They consider that measures to protect leniency and settlement materials should be addressed through a combination of EU and Member State action or through EU action alone. In terms of EU action, a majority is favour of legislative action.

Who should take action?



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

What type of EU action is most appropriate?

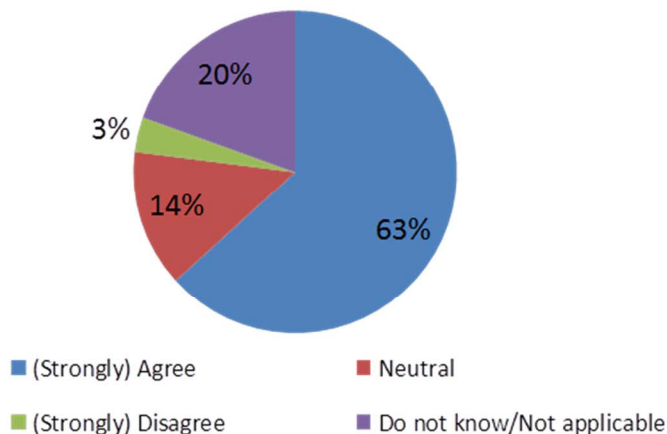


- Non-legislative action (e.g. best practices)
- Mix of legislative and non-legislative action
- Legislative action
- Do not know/Not applicable

Interplay of corporate leniency programmes with sanctions on individuals

A majority of stakeholders considers it a problem that only a few Member States have arrangements to protect employees of companies cooperating under a leniency programme from individual sanctions.

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

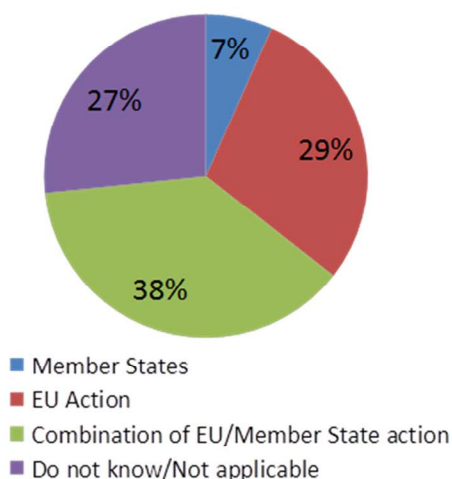


And also a majority is in favour of establishing safeguards to protect such employees, mainly regarding the ones detailed in the table below:

<u>Current employees</u>	74%
<u>Former employees</u>	64%
Protection from <u>administrative</u> sanctions in all MS (director disqualification orders)	60%
Protection from <u>criminal</u> sanctions in all MS (imprisonment)	62%
Employees of companies which obtain <u>immunity</u>	72%
Employees of companies which benefit from a <u>reduction in fines</u>	60%
Employees of leniency applicants with <u>any NCA</u>	67%
Employees of leniency applicants with the <u>Commission</u>	64%

They consider that the interplay between corporate leniency programmes and sanctions on individuals should be addressed through a combination of EU and Member State action or through EU action alone. In terms of EU action, a majority favours a mix of legislative and soft action.

Who should take action?



What type of EU action is most appropriate?

