

International League for Competition Law, 24 October 2009, Vienna

Resolution for Question A: “*Should competition authorities (“CAs”) enjoy an unfettered discretionary power in the context of the investigation of competition law infringements or should their margin of discretion be subject to certain limits?*”

The League recognizes the importance of entrusting competition authorities (“CAs”) with a certain degree of discretion in the context of the investigation of competition law infringements. However, the League also underlines the importance of adequate controls on the exercise of discretionary powers by CAs. Whilst acknowledging that striking the optimal balance between discretion and control is a daunting task, the League makes the following recommendations:

- First, CAs favoring reactive detection policies should be incentivized to increase their share of *ex officio* detection activities and, where necessary, should be entrusted with additional resources to this end.
- Second, CAs should be entitled to engage in effective priority setting, on the basis of clear, well-defined, published, criteria (for example, impact on consumer welfare, sending deterrence signals, establishing case-law, realistic alternative of private enforcement). CAs should in addition be requested to clarify publicly their enforcement priorities on a regular basis.
- Third, CAs should endeavor, as soon as possible, and in accordance with fundamental rights and the public interest, to inform all interested third parties when deciding to open proceedings. CAs should also inform complainants in a reasonable timeframe when deciding to dismiss complaints.
- Fourth, as a matter of good administration, CAs should set reasonable timelines for their review when opening proceedings. Those deadlines should be established on a case-by-case basis. CAs may be entitled to extend those deadlines subject to adequate reasoning. CAs should publish statistics on compliance with the deadlines and the duration of proceedings (for example, in annual reports).
- Fifth, in so far as decisional powers are concerned, CAs should avoid negotiating commitments in cases involving severe restrictions of competition, in particular when they have had long-lasting effects. By contrast, in so far as positive enforcement is concerned, national legislations should enable CAs to adopt reasoned, published, non-infringement decisions and to provide individual guidance to firms.

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