The French Association of Large Companies (AFEP) considers that it is necessary to avoid too great a divergence in the enforcement of European competition rules, as that could be detrimental to the consistency of decisions taken at national and at European level. Such a divergence could undermine legal certainty for businesses. Legal certainty must be achieved by harmonising the enforcement and legal assessment of EU rules by all national competition authorities (NCAs).

The harmonisation required should comply with two major principles to apply both at European and national level: effective judicial protection and proportionality of the sanctions.

These principles are elaborated on in part (A) of this document. In addition to the answers provided in the online questionnaire this document then summarises in part (B) the main orientations supported by AFEP.

A/ Two main principles to be applied both at European and national level

1. Effective judicial protection

Generally, competition rules aim to achieve two key objectives: protecting efficiently (economic) public order and protecting fundamental rights (rights of defence in particular). Among these is the need for effective judicial control in the Member States as it already exists at European level.

Should the powers of national competition authorities be strengthened, it would be appropriate to symmetrically strengthen the power of the judge responsible for reviewing the decisions of these authorities. This control should not be limited to legality control but must also be exerted on the merits of the case, including the reasoning relating to the anticompetitive practice and the assessment of the proportionality of the sanction. The sanctioned companies must be able to exercise their rights of defence, which requires an effective right of appeal before a judge.

Several judgments have ruled on the conformity of the control exercised by the General Court on the decisions of the Commission imposing fines in competition matters with the principle of effective judicial protection provided by the Charter of Fundamental Rights of the Union and Article 6 of the European Convention on Human Rights. The Strasbourg Court recalled in its judgment of 27 September 2011 “Menarini Diagnostics v / Italy” the constant principle that ‘recourses of full jurisdiction’ have to cover “all relevant questions of fact and law”. Through this judgment, the ECHR states that the concept of full jurisdiction involves a comprehensive review and a power of reformation of the penalty.

Whereas at European level the ECJ and the ECHR are involved in the effectiveness of judicial review, it must be enforced in all member states. It is the case in France where the decisions on the merits of the case as well as the sanction imposed by the French Competition Authority (‘ADLC’) can be subject to a recourse of full jurisdiction before the Court of Appeal of Paris and then to an appeal before the ‘Court of Cassation’. The Court of Appeal performs a comprehensive review that can lead to the cancellation and the reformation of the administrative decision referred.
However, to be fully effective judicial review must be implemented at all levels. It is necessary to have appropriate legal means, material and human resources. But the latter are often limited as in France (rapid rotation of judges, lack of specialisation in economic law...). In practice, judicial review of the economic analysis is hard even though the administrative decision is based primarily on the damage brought to the economy.

As regards actions for damages in civil proceedings, the judge should not be encouraged to request assistance from the NCA to quantify the amount of damages. This possibility exists in France where the Competition Authority acts on its own or at the request of the courts. However, indemnity litigation and the quantification of individual prejudice are generally not part of the tasks usually assigned to the NCAs.

2. The proportionality of penalties / sanctions

Among the other fundamental rights that should be implemented in a uniform way by the National Competition Authorities is the concept of proportionality applicable to the imposition of financial penalties. Penalties should be proportionate in absolute terms to the gravity of the infringement, its duration, the value of the sales concerned and the damage to the economy (when this criterion exists in national law). If the infringement is local, the penalty must be proportionate to the local activities of the company. The proportionality of the sanction must also apply to the relative participation of each undertaking in the infringement. Finally sanctions should be proportionate and consistent across Member States with regards to the chosen amounts and the number of penalties imposed.

This does not mean that any NCA should be able to impose sanctions instead of a defaulting authority. However, in the case of similar behaviours observed in different member states, the sanctions imposed should be similar in order to ensure real proportionality and consistency in competition policy enforcement in the EU. For this purpose a detailed common methodology must be established; it would to serve as a reference to the NCAs and be disseminated through the European Competition Network (ECN).

B/ Main topics addressed in this questionnaire

About the general questions

Companies wish that any evolution of the NCA’s competences and tools be accompanied by legal predictability. This must be achieved by harmonising the enforcement and legal assessment of EU rules by all national competition authorities. Whereas the application of Regulation 1/2003 helped NCAs to grow in effectiveness and predictability, some NCAs have yet to mature (statutory independence, tools, consistent implementation of the directions given by the ECN...). The harmonisation should lead to an upgrade of all authorities which involves a strengthening of competences and tools for some of them, but also more proportionate competences and tools for others, which currently go beyond the tasks set by European regulation. This harmonisation should stem from measures of hard and soft law, both at the EU and at Member State level.
About the specific topics addressed

1. Resources and independence of the NCAs
   - It is essential to ensure the independence of the NCAs. This primarily involves ensuring independence from the government and any public or private body, establishing rules to fight against conflicts of interest in the management of the NCA, implementing safeguards to ensure that members of the NCA’s management cannot be dismissed on grounds related to the enforcement of competition law by the NCA.
   - Sufficient resources to perform quality work are essential to consolidate the NCAs’ political, hierarchical and technical independence.

2. Enforcement toolbox of the NCAs
   - The investigation and decision-making tools of the NCAs are generally effective but differ between Member States. This generates significant costs for businesses and may lead to legal uncertainty.
   - The power of the NCAs to set their own priorities can be beneficial if priorities are set in an open debate with stakeholders. Judicial review must be possible where a complaint is not dealt with. However, too divergent priorities of the NCAs may lead to uneven enforcement of competition law.
   - Prescription periods must be harmonised in EU law (date of effect and duration): 3 to 5 years would be a reasonable target.
   - Inspection of business and non-business premises by NCAs should not be allowed without a decision from the judge. In principle NCAs should not have the authority to inspect non-business premises. The information collected must be used only for the investigation concerned. Where at national level a division of investigation missions between different authorities exists, this must be preserved.\(^1\)
   - Information requests from the NCAs and the interviews they conduct must be specific, targeted, proportionate and reasoned and should not lead to self-incrimination.
   - NCAs should be able to assist each other but an investigation on the territory of a member state must remain in the hands of the local NCA. With regard to notifications and the enforcement of sanctions, judicial cooperation mechanisms are sufficient.
   - Sector inquiries should comply with clear rules. The information collected must be used only for the investigation concerned. NCAs should not conduct sector inquiries in markets regulated by a sectoral regulator.
   - NCAs should be able to issue interim orders only where the anti-competitive nature of the practices concerned is established. Sanctions should be reversible.
   - Any reform of the NCAs’ tools should be considered at European level with a combination of legislative and non-legislative measures to achieve harmonisation.

3. Power of the NCAs to impose sanctions
   - The division of responsibilities between authorities must be clear. Only administrative competition authorities (NCAs) should be empowered to examine competition law infringements and to sanction them by administrative fines. Civil courts should only intervene in the case of actions for damages and then impose civil fines. Any attempt to introduce criminal fines or punitive damages must be fought.
   - Thus, where they exist, civil fines and criminal fines should be replaced by a system of administrative fines for all infringements of Articles 101 and 102, and for all types of proceedings.

\(^1\) For example, in France, there is a task division between the ADLC and the DGCCRF: the latter thanks to the territorial distribution of its investigators and a fine knowledge of the field contributes to the detection of anticompetitive practices.
• Administrative systems for the enforcement of competition rules are the most appropriate, because the proceedings are generally fast, enforcement decisions are consistent and harmonised, NCAs have the skills and experience needed to make these decisions. However, **effective judicial review of the NCAs’ decisions should always be possible**, both on the merits of the case as well as on the amount of the fine imposed.

• Anti-competitive practices should be sanctioned **in a more harmonised manner**, while respecting the **principle of proportionality** described above. The amount of sanctions varies too much today between Member States. The 2006 Guidelines on the method of setting fines, based on Regulation 1/2003, should be **applied more consistently**. A **more detailed common methodology** should be developed. It should include the following minimum core criteria: **gravity of the infringement, duration, value of the sales and damage to the economy**. If it does not take into account the latter criterion, present for example in the French Commercial Code (Article L. 464-2), it is essential to **maintain it at national level** to preserve the jurisprudential and doctrinal coherence developed over many years.

• See also our remarks in Part A.2. on proportionality.

• Any reform of the NCAs’ powers of sanction should be considered by combining actions at European and national level.

4. **Leniency programmes**: we do not wish to comment on leniency provisions.