EMPOWERING THE NATIONAL COMPETITION AUTHORITIES TO BE MORE EFFECTIVE ENFORCERS

RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION

HOGAN LOVELLS INTERNATIONAL LLP

1. INTRODUCTION

(1) We welcome the possibility to provide feedback to the European Commission on the issues faced by national competition authorities (NCAs) when enforcing antitrust rules, and what action should be taken in this regard.

(2) Hogan Lovells is a multinational legal practice which has around 2,500 lawyers working out of more than 45 offices in Europe, the United States, Latin America, the Middle East, Africa, Australia and Asia. In 2015, Hogan Lovells was the twelfth largest law firm in the world by revenues.

(3) Hogan Lovells’ Antitrust, Competition and Economic Regulation team has more than 130 lawyers spanning 17 countries, and is one of the largest antitrust practices in the world. With over 60 years of experience, we are recognized as a leader in our field by Global Competition Review, Chambers and Partners, and Legal 500. Further information regarding our Antitrust, Competition and Economic Regulation practice area can be found on our website (www.hoganlovells.com).

(4) The comments in this submission are based on our expertise and experience in advising on the application of EU competition law by a large number of NCAs in the European Union. We have offices in Belgium, France, Germany, Hungary, Italy, Luxembourg, Netherlands, Poland, Spain, and the UK, but we also have direct experience of the practices of NCAs in EU Member States where we do not have offices.

(5) The comments contained in this response do not necessarily represent the views of our individual clients or of all individual lawyers at Hogan Lovells.

2. GENERAL QUESTIONS

(6) Competition enforcement in Europe has come a long way in the last decade. Regulation 1/2003 has significantly strengthened and professionalised competition authorities in almost all Member States, many of which had only just joined the EU and which in recent history had a centrally-led economy.

(7) This does not mean that competition enforcement is perfect in all Member States. Simply because of their different track record and experience, there are qualitative and quantitative differences between NCAs. Also the legislative framework and the funding with which they operate impact on their enforcement activities.

(8) Hogan Lovells believes that improvements can certainly be made in the way NCAs enforce competition law, and that these can be made in most, if not all, of the areas listed in the Commission’s questionnaire. Further details on the areas in which there is the most significant need for action are provided below. We have also indicated to what extent
legislative action is required or whether soft law measures can be used, and whether these need to be adopted at the EU and/or the national level.

(9) Effective antitrust enforcement is good for businesses and consumers alike. Before discussing the details, however, we would note that enforcement proceedings also carry a cost for business in terms of legal fees and management time and, obviously, in terms of penalties imposed. Hogan Lovells therefore does not believe that it is worthwhile for NCAs simply to copy and replicate work done by other NCAs. Careful reflection is always needed before initiating enforcement action.

3. RESOURCES AND INDEPENDENCE OF THE NCAS

(10) Hogan Lovells believes that it is very important that competition authorities make their decisions impartially, and are able to do so independently, without political or other external influence or pressure. It would be worthwhile for EU legislation to establish an explicit requirement for Member States to guarantee the formal independence of the authority and to ensure that it exercises its powers impartially. This would bring EU competition legislation in line with other related policy areas, such as telecommunications, energy, and railways where a number of independence requirements exist for the respective national supervisory authorities.

(11) It is also critical that NCAs have sufficient human and financial resources. While most of the NCAs that we deal with have sufficient staff numbers and have been effective in working within any resource constraints, e.g. through the use of prioritisation criteria (see also below), this is not true for all NCAs. We recommend that authorities recruit more from the private sector at all levels on a temporary and permanent basis.

4. ENFORCEMENT TOOLBOX OF THE NCAS

(12) In our experience, most NCAs have an extensive toolbox at their disposal to investigate and enforce possible antitrust infringements. NCAs, especially neighbouring ones, also cooperate with each other in antitrust enforcement, which further enhances the powers of individual authorities. There are nevertheless a few issues which we have experienced, and which are highlighted below.

(13) First of all, in relation to on-site inspections, in our experience, NCAs currently apply widely differing powers to inspect premises. In particular, when it comes to reviewing electronic data, certain authorities search and sift on site, taking away only relevant data at the end of the inspection. Other authorities take a copy of the server and search and sift later at the authority's premises. We believe it is important that each NCA issues a description of its approach to electronic data collection so that it is clear for undertakings being searched what is normal practice by the NCA and what is not.

(14) Furthermore, in most countries, inspectors search not only data which is physically located at the site of the inspection but also data which is accessible from the premises, including data stored on servers outside the country where the inspection is taking place. It would therefore make sense for consistency to be introduced in the approach to data review across different Member States. This applies to the issue of where the NCA carries out the searches (see the previous paragraph), and also to how they do so (e.g. currently some NCAs are more transparent about the keywords they use than others).

(15) NCAs should in any event ensure that their electronic searches are the least invasive and burdensome for companies as possible, that they do not disrupt normal business operations and respect the privacy of the employees involved. As regards the latter,
Hogan Lovells believes that the NCAs should exercise restraint when it comes to searching individual homes, personal devices and private emails: such searches should be executed only when there are concrete indications that relevant information may be found there. The inspections should be in compliance with the European Convention on Human Rights and the EU Charter of Fundamental Rights.

(16) There is also divergence between NCAs in terms of the possibility to reject complaints on the basis of enforcement priorities. For example, in Spain this is considered not to be possible, whereas in Belgium it is. The question of the prioritisation of investigations is a delicate one because it requires the balancing of the interests of possible victims of antitrust infringements against the practical constraints imposed by the NCA's resources. Also the issue of the independence of the authority (or, put another way, the responsibilities of the NCA to its various stakeholders in society) plays a role. It is hard to deny that some form of prioritisation of investigations must be possible although great care should be exercised when doing so. Some differences between NCAs in this field can also be explained by differences in their legal systems which make it more or less difficult for victims to proceed against antitrust infringements through other means (e.g. through direct actions before the courts). However, to the extent that such differences do not seem to be justified some form of harmonisation at EU level – through soft law where possible, and through legislation where required – would be beneficial.

5. **POWER OF THE NCAS TO IMPOSE FINES ON UNDERTAKINGS**

5.1 **Nature of fines**

(17) Hogan Lovells has experience with different competition enforcement systems both within and without Europe, many of them administrative but also several that are prosecutorial. Every system has its upsides and downsides.

(18) Dualist systems, where the investigating powers are separate from the decision-making powers, increase the hurdle for the investigators to establish that an infringement occurred (since they not only need to convince themselves, but also the decision maker). This is even more so if the standard of proof for the investigators is a criminal standard, such as for example in the United Kingdom in some cases or in Ireland.

(19) However, these systems are the most authentic reflection of the principles underlying our shared legal heritage, such as the presumption of innocence and individual freedom. Monist systems where the investigative powers and decision making powers are combined in the same body are vulnerable to the well-known issue of prosecutorial bias which potentially harms not only the businesses subject to the investigation, but also the reputation of the authority and the healthy functioning of the market. Attempts at addressing the problem of prosecutorial bias – such as foreseeing devil's advocate teams within the authority or ensuring judicial review of the authority – go some way to alleviating this, but they are of varying effectiveness.

(20) Most important, however, is that the checks and balances affecting the exercise of investigative powers are increased in line with the severity of the sanctions that can be imposed. Hogan Lovells believes that when the stakes involve prison sentences for individuals, or fines which put into jeopardy the financial survival of individuals or businesses, then an independent third party (a judge) should necessarily intervene as early as possible to ensure the proper administration of justice. If judicial oversight is limited (or takes place only at a later stage), then the sanctions that can be imposed should be limited accordingly.
Given the often highly complex economic assessments that need to be made in order to determine whether a particular practice constitutes an antitrust infringement, Hogan Lovells does not consider it appropriate to systematically punish such infringements as criminal offences. Except for the most egregious and blatant offences against the economic model protected by the antitrust rules, such infringements should be subject to civil penalties only.

In order to achieve this, legislative action will be required at the EU and the national level, because it is often legislation that acts as an impediment to effective enforcement (e.g. because it only allows for criminal prosecution, or does not ensure the rights of defence). In the EU internal market, many businesses operate routinely across borders, and it would therefore be logical for the EU to ensure some harmonisation in this field.

Who is fined

In Hogan Lovells’ experience, there are significant differences between Member States when it comes to the addressees of infringement decisions.

First of all, the EU theory of parental liability is not applied in the same manner in all Member States. This is not necessarily because the NCAs in question consider that the Akzo case law is not applicable in their investigations; often the NCAs simply use their discretion and conclude that it is not necessary to pursue parent companies in addition to the subsidiaries actually involved in the infringement.

Under EU law and the enforcement practice of the European Commission, there has been an evolution in this respect. Before the Cartonboard decision of 1994, the Commission was not so preoccupied with attributing liability to parent companies, but since then it has increasingly done so. Together with the 2006 EU Fining Guidelines, this has probably been one of the main factors contributing to the significant increase in EU fines for cartels over the last 15 years.

While deterrence is obviously an important principle when it comes to fines for the most harmful competition law infringements, there should always be a link of proportionality between the fines and the likely harm done. Under the rule of law, liability for sanctions should in principle also be personal to the perpetrator of an infringement, and should not automatically be extended to others merely because they may indirectly have benefitted.

Hogan Lovells believes that consistency between the practices of the NCAs should be pursued also in respect of parental liability, so as to avoid excessive exposure in one Member State and impunity in another. However, the Commission’s current policy in favour of automatically imputing liability to all indirect controlling parents (and sometimes even minority shareholders) of infringers, is in our view not necessarily the right model for the NCAs.

Secondly, as regards legal and economic succession, the case-law of the courts in Europe is less established, but it is clear that there are divergences in the way this issue is approached in different Member States. In Germany, the question of the liability of successors for antitrust infringements has already led to legislative changes (the 2013 amendments to the German Regulatory Offences Act), but the Federal Cartel Office has called for further amendments in light of press reports of targeted restructurings to attempt to avoid the payment of fines imposed for the sausage cartel in 2014. In Spain, the issue of the liability of successors has led to litigation up to the Supreme Court, in the forwarding agents cartel.
Hogan Lovells agrees that effective antitrust enforcement implies that liability for fines cannot be avoided simply through corporate restructuring. However, there may be legitimate reasons why companies restructure, and the transfer of businesses and assets may be a sensible reaction for undertakings facing fines of a magnitude that threatens their survival.

Consistency between the practices of the NCAs is also preferable in this field, but the expansive approach of the European Commission should not necessarily be the example for the NCAs.

5.3 Amount of fines

In Hogan Lovells' experience, the fining practices of NCAs differ significantly. Although some NCAs follow the methodology used by the European Commission to calculate fines, other deviate from this in more or less significant ways. Also in this field, consistency between NCAs would be beneficial in that it would avoid arbitrarily severe or light punishments depending on the NCA actually investigating the conduct in question. The greater the impact a particular element may have in fine calculation, the more important it is that there is consistency between NCAs. For example, mitigating circumstances usually have less of an impact on the fine than how the authority deals with duration, and therefore consistency in relation to the latter is more important than consistency in relation to the former.

Nevertheless, also in the area of mitigating circumstances, it is desirable to avoid creating mixed incentives for undertakings. For example, the fact that different authorities give more or less weight to the pre-existence of a compliance programme, or its introduction in response to an investigation, does not make a lot of sense for undertakings operating across different Member States.

Even more important that the methodology used by the NCAs to calculate the fine, is the maximum fine they can impose. Again, there are significant differences between authorities. Some authorities (e.g. the Belgian competition authority) set the fine cap only as a percentage of national turnover (or in Belgium, to be more precise, the turnover in Belgium and from Belgian exports), whereas other authorities (e.g. the Dutch competition authority) look at the worldwide turnover of the companies involved. Also the percentage of the turnover in question that acts as the fine cap may differ. To use the above examples, at the moment this is 10% in both Belgium and the Netherlands, but in the Netherlands there is a legislative proposal to increase it to 40%. Consistency would also make sense here.

In addition, Hogan Lovells believes it is important that the existence of parallel investigations in several Member States (or of the Commission and NCAs) does not lead to a further increase of fine as compared with the very significant levels already imposed by the Commission today. In other words, the cap of 10% of worldwide turnover foreseen in Article 23(2) of Regulation 1/2003 should also apply in the case of parallel investigations by different NCAs (or by the Commission and NCAs). In addition, the NCAs should be careful not artificially to divide one infringement covering a number of Member States into separate infringements per Member State, and thereby increase the aggregate fine cap. More generally, an NCA should take into account the fines imposed (or to be imposed) in other Member States when determining whether a fine it imposes is reasonable and proportionate. Put simply, the issue of which authority or authorities intervene should be a matter of investigative efficiency – it should not be a source of arbitrary differences in financial exposure.
In order to achieve the above objectives, some legislative action on the part of the EU will be required, for example in relation to the fine cap. On the other hand, greater consistency in some of the more detailed aspects of fining methodology can also be achieved through soft law tools.

6. **LENIENCY PROGRAMMES**

Hogan Lovells welcomes the significant progress made to date within the European Competition Network in the area of leniency. We consider that the ECN Model Leniency Programme has been a success, and that it has contributed towards a more cohesive set of leniency rules and procedures within the EU.

Nevertheless, there still remain important differences between Member States. First of all, it is worth noting that there are differences as to the behaviour for which leniency applications can be submitted. In many Member States leniency applications can be made only for "secret" cartels, but in other Member States they can be made for other restrictive agreements and concerted practices. Hogan Lovells does not believe that widening the scope of activity that may fall within a leniency programme is problematic.

Problems do arise, however, due to inconsistencies between the requirements to apply for leniency in different Member States. For example, in certain jurisdictions (e.g. the United Kingdom and Spain), the NCAs are only willing to grant leniency if the applicant not only discloses its participation in the conduct in question, but also admits legal liability. These differences make it more difficult for undertakings to apply for leniency in several Member States.

Beyond the differences between Member States, in our experience the existence of parallel enforcement powers (and parallel leniency programmes) of NCAs and the Commission regularly raises questions. A one-stop shop for leniency in the EU would be a very substantial improvement, both in terms of legal certainty and in avoiding unnecessary legal proceedings over the order of leniency applications. We understand that establishing a new system might be complex, but we believe that a single application (filed either with the Commission or with certain NCAs, depending on the number of Member States involved) could work, provided that the Commission and the NCAs are able more quickly to determine which one of them will investigate a given matter.

Finally, we expect that the interplay between leniency policy for companies and criminal or administrative sanctions for individuals is increasingly going to pose problems as more and more Member States target individuals. If it is not clear how these two systems interact, incentives for companies to apply for leniency may be reduced. In Italy, for example, where bid rigging has been criminalized, we understand that the Italian competition authority has never received a leniency application regarding bid-rigging.

Many of the issues listed above may require legislative changes, and harmonisation at the European level.

7. **CONCLUSION**

The modernisation of the enforcement of EU competition law, since 2004, has been an extraordinary success. The NCAs and the Commission should view it as a great compliment that business now increasingly looks to them to act as a system. In our view, it is now time to enhance the consistency of competition law enforcement across the Union, and at the same time strengthen the independence of the authorities charged with this important responsibility.