1. INTRODUCTION

Contributions to the debate during the Competition Day of the Italian Presidency by vice-president Almunia, Alexander Italianer, Bruno Lasserre, Andreas Mundt others and myself as well as recent publications show a high degree of consensus if not on the developments we suggest for the regulations 1/2003 and 139/2004, at least on the agenda for change. i) Convergence in respect of sanctioning policies of NCAs; ii) Enhanced cooperation between NCAs in related cases; iii) Enhanced guarantees for the independence and the availability of adequate investigative powers and resources of NCAs; iv) Procedural convergence in merger control.

Given the success of the Regulation 1/2003 in organising the cooperation between the EU Commission and the NCAs, it is no surprise that suggestions for the next steps tend to focus on horizontal relations between NCAs.

2. FINING RULES AND POLICIES

We need to seek a balance between the efficient use of resources (case allocation), effective enforcement (i.e. neither under- nor over enforcement), and respect for the ne bis in idem principle. I refer to the reports on the conference organised in June by our Luxembourg colleagues that will soon be published in Concurrences and to the efforts of the ad hoc ECN Working Group chaired by Bruno Lasserre.

Enhanced consultation between NCAs dealing with related cases during proceedings and before determining sanctions is certainly an issue we can work on.

The ability to strike a balance between over- and under enforcement depends to a large extent on the ability to modulate the calculation base for fines (domestic turnover or EU/worldwide turnover). If only one or a few
authorities decide to proceed with a case, there is a significant risk of under enforcement if these authorities can only impose fines with regard to the domestic turnover of the infringing undertakings. But if a significant number of NCAs impose sanctions having regard to the EU or worldwide turnover, such decisions are, even if they are compatible with the ne bis in idem principle\(^5\) nevertheless likely to result in over enforcement.

The Commission Staff Working Document indicates as did vice-president Almunia in his contribution to the Competition Day that the safeguarding of the effective decentralised enforcement of the rules of competition may also require common rules in respect of the liability of parent companies\(^6\) and a more common approach to ability to pay issues.

As I suggested in the conference organised by our Luxembourg colleagues, it would be welcome if future rules on procedural convergence required:

1) Member states to enable their NCA to calculate fines on the basis of the worldwide or at least EU turnover.

2) NCAs (with the ability to calculate fines on the basis of the worldwide or EU turnover) to coordinate the calculation of fines whenever several NCAs envisage the imposition of sanctions in respect to the same infringement, or at least to refrain from the calculation of fines on the basis of a larger than domestic turnover when this may lead to over-enforcement because the same turnover would be taken into account by more than one competition authority.

3) The organization of the exchange of information on domestic cases necessary to trigger the required concertation.

In the absence of mandatory rules on procedural convergence we could adopt best practices: i) on the relevant exchange of information between NCAs; ii) on the principle that whenever one NCA is given the lead in respect of infringements that affect a number of Member states, priority should be given to NCAs that can take into account turnover in all of the affected markets.

3. SANCTIONING OF INDIVIDUALS, LENIENCY AND CRIMINAL SANCTIONS

I do not think that the time has come that we can have common rules with regard to the sanctioning of individuals. But NCAs with the ability to impose sanctions on individuals need to provide for a leniency programme for individuals in order to minimise the risk that their ability to sanction individuals jeopardises the effectiveness of the leniency programmes for undertakings in other Member states.

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\(^5\) Case C-17/10, 19 December 2013, *Toshiba*.

\(^6\) See the abovementioned Commission Staff Working Document § 76.
The new Belgian competition law provides in this respect that: i) individuals may apply for leniency and if the conditions are fulfilled they will always be granted immunity regardless of their ranking; ii) individuals actively participating in an immunity application of an undertaking will automatically be granted immunity; iii) the application for immunity by an individual does not exclude the granting of immunity to the first undertaking filing a leniency application.

Even better is to add a rule as e.g. in Sweden where immunity can be granted to individuals who contributed significantly to a competition law investigation in another Member state.

Issues are obviously more complicated with regard to criminal sanctions (esp. jail sentences).

4. ENHANCED COOPERATION BETWEEN NCAS IN RELATED CASES

Enhanced information exchange between NCAs on prima facie domestic cases included leniency applications will be facilitated if all NCAs are allowed to exchange information freely among each other as well as with the EU Commission. This will enhance even further the useful effect of neighbours’ meetings and similar forms of regional cooperation that have become e.g. to the BCA the 2nd most important source of leads to cartel cases (after leniency).

5. ADEQUATE POWERS FOR NCA

When defining minimum standards with regard to the ‘toolkit’ that should be at the disposal of NCAs, I refer to the seven recommendations of the ECN and the abovementioned Communication and Staff Working Document. We can draw further on the work of the OECD Competition Committee and the ICN.

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7 Article IV.46, § 2 of the Code of Economic Law. Articles IV.1, § 4 and IV.70, § 2 CEL provide for the imposition of administrative fines.

8 Article 3, § 3 of the Swedish Trading Prohibition Act.

9 See e.g. article IV.69 of the Belgian Competition Act. This freedom to exchange information only applies with regard to the application of the articles 101 and 102 TFEU and the EU merger regulation, but it is unlikely that information exchange might be relevant when there is not even the possibility that these provisions might apply.


11 See note 3.


13 See in particular the documents prepared by the Agency effectiveness Working Group: http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=12&type=0&workshop=0
We should however not only think of investigating powers such as inspections etc. As suggested by Bruno Lasserre in his contribution to the Competition Day we should also look at interim relief procedures, and I would like to add that it will also be useful to have best practices on communication on when and how do we communicate about ongoing cases. Both elements can be powerful tools to bring the useful effect of infringement cases forward, but both require a careful balancing between the public interest and the rights of defendants.

National legal cultures differ widely with regard to interim relief procedures. From my perspective we need e.g.: i) to strike a balance between giving guidance on the outcome of the main case (thus perhaps facilitating settlements), and avoiding the need for an extensive analysis of the prima facie case in order to safeguard the ability to provide swift protection against an imminent risk of damage; ii) to have preferably convergent policies with regard to the distinction between damage that can be remedied post factum by monetary compensation and damage that requires ex ante or at least immediate damage limitations by other remedies.

And given the increased importance of advocacy we also need to ask ourselves whether the capacity to engage in advocacy is part of the minimum requirements for the effective enforcement of EU rules of competition in the light of the case law of the ECJ. 14

6. STANDARD OF EVIDENCE AND USE OF ICT FORENSIC TOOLS

Litigation concerning the legality and scope of dawn raids, legal privilege and related issues tends to paralyse investigations for sometimes more than one year in a number of jurisdictions. Judges especially lack guidance and common standards with regard to the rights of authorities and parties in a digital environment. Sufficiently detailed best practices will therefore be most welcome in order to assist review courts in the appreciation of our investigations.

7. ADEQUATE GUARANTEES WITH REGARD TO THE INDEPENDENCE OF NCAS

7.1 Independence

I refer to the contributions by vice president Almunia and Alexander Italianer to the Competition Day and to the above mentioned ECN recommendations and the Commission Communication and Staff Working Document. 15

14 See e.g. Case C-438/08, 7 December 2010, Vebic.

15 See note 3. See also J. Steenbergen, ‘Some reflections on legitimacy, accountability and independence’ in N.Charbit and E. Ramundo (eds), William E. Kovacic
It is indeed important for the legitimacy of competition authorities that the authorities are independent when they take decisions in individual cases, especially when imposing sanctions. And it is not less important that the authority can decide independently on the opening of cases given the burden and sometimes already adverse publicity the opening and conduct of an investigation implies for companies. Authorities should for the acts for which they must be independent, be independent from the government, from industry and various pressure groups. As a corollary, they should give effective guarantees with regard e.g. to conflicts of interest.

Independence can be organised in different ways, but the structure should ensure that all who are involved in the handling of cases can only accept instructions from officers who are appointed for a sufficiently long term of office and on terms and conditions that allow them to feel independent and to be perceived as being independent.

Independence also implies that authorities can rely on stable funding of which they can dispose within the limits of their budget without the need for a preliminary authorisation by the government or other government agencies.

One of the more delicate issues, and one on which consensus seems unlikely, is concerned with the question whether the decision makers in individual cases should also be independent from the officers who decide on the opening of cases and who direct the investigations. Lawyers are generally convinced that they should be independent from each other in infringement cases but they may have different views in respect of 1st phase merger control procedures. Economists seem to be rather uninterested or tend see the distinction as a source of inefficiencies. Stakeholders are mostly, but not always, more in line with the lawyers.

7.2 Accountability

Competition Authorities must also be accountable. A lack of accountability affects legitimacy and authors rightly insisted on the need to make accountability and independence mutually supportive. Credibility, accountability, independence and effectiveness are often mentioned more or less together in the search for benchmarks for good regulation.

The obligation to publish an annual report as well decisions seems a minimum condition to organise meaningful accountability. The adoption of budgets by Parliament after hearing the authority may be another way of

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17 See for a recent survey e.g. S. Keegan, Legitimacy in the EU single market: the role of normative regulatory governance, PhD thesis at the University of Edinburgh 2013, e.g. 56-54
organising accountability without undue restrictions of independence.

The issue is less clear with regard to the extent to which the need to balance independence and accountability requires e.g. that secondary rules (implementing regulations of the competition law, guidelines etc.) and priorities for the authority’s enforcement or advocacy efforts should be defined by the legislator, by the government, by the agency, or in cooperation between two or more of these entities. One may e.g. as is the case in Belgium provide that regulations are issued by the government after hearing the authority, and guidelines and priorities by the authority after hearing the government and/or parliament.

8. ADEQUATE GUARANTEES WITH REGARD TO THE FUNDING OF NCAS

When you know the Belgian Competition Authority you will not be surprised that we are in particular interested in minimum standards for staffing and funding. Unless authorities have adequate resources, independence may mean in practice that they are independent to do a little bit more than nothing. Given the major spread between the size of Member States and their economy, between the resources allocated to competition authorities and the organisation of their funding, the definition of minimum standards promises to be a major challenge. In the mean time we appreciate the support the Commission already gives in the framework of the European Semester.\(^\text{18}\)

With regard to minimum standards, one might e.g. seek an understanding between authorities and governments or parliaments on the number of infringement and merger cases an authority should be able to handle in a fiscal year. That would allow to determine the required staffing for case-handling and decision making on the basis of the average number of staff days per case. And if that staffing level is increased by number of staff necessary for the other tasks in an authority, such as advocacy, EU and international cooperation, management etc., one could arrive at a minimum level of funding on the basis of the average budgetary cost per staff member (including operating costs) in a given Member state.

9. IS THERE A NEED FOR EU LEGISLATION ON ADEQUATE GUARANTEES WITH REGARD TO THE INDEPENDENCE AND FUNDING OF NCAS?

As indicated above, the Belgian Competition Authority appreciates very much the support of the Commission in the framework of the European Semester. But we understand that

such recommendations are not always effective where governments wonder on what legal basis the Commission requires them to strengthen their competition authority in the absence of clear legal rules as applicable to sector regulators. And the available case law of the ECJ is by its nature too case specific to translate into mandatory funding obligations that are always understood as such by governments. It is in any case surprising that unlike sector regulations, the regulations 1/2003 and 139/2004 do not include provisions in respect of the required levels of independence and funding of national competition authorities in the ECN.

It would therefore be useful to include in future EU legislation an obligation for the Member states to offer adequate guarantees for the independence and adequate and stable funding of their competition authority, including the right to recruit and decide independently on all other relevant matters within the limits of their budget.

10. MERGER CONTROL

There are in my opinion primarily three issues:

i) The presently most discussed issue is concerned with the safeguards against conflicting decisions of NCAs. I refer to the French Zivy report and the recent bundle of reports in Concurrences;²⁰

ii) The referral issues are already dealt with in the Commission White paper;²¹

iii) There are moreover good reasons to abolish the by now artificial distinction between the ECN and the framework in which NCAs and the Commission cooperate with regard to merger control.

With regard to additional safeguards against conflicting decisions, it should in the first place be emphasised that there have been very few cases. Conflicting decisions present moreover only a problem when competition authorities reach conflicting conclusions with regard to the same relevant market. If they examined the impact of a concentration on, e.g. the same product market in different geographic markets, they may well be justified if they arrive at divergent assessments. I further reiterate my previous suggestions which, I think, may significantly alleviate the risk of conflicting decisions without the need for a full harmonisation of merger control procedures.²²

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²⁰ Concurrences, 1-2014, 10-23 with contributions by D. Bosco, F. Zivy, J.D. Briggs with D.K. Oakes, the APDC (French association of competition law practitioners) and myself.
²¹ See the white paper Toward more effective EU merger Control and accompanying Staff Working Document (COM(2014)449final) as well as the recently closed public consultation on the white paper (http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html).
i) An obligation in all Member states for undertakings to mention in every notification the list of jurisdictions in which a concentration is notified;  

ii) An obligation for the NCAs to contact the other NCAs to whom a concentration is notified in order to verify whether two or more authorities will examine the impact of the transaction on the same relevant market, with an obligation for the NCAs concerned to signal this fact to a contact point at DGComp.;  

iii) An enhanced harmonisation of the assessment criteria and methods, or an obligation to apply the assessment criteria of Regulation 139/2004 at least in cases in which it is established that two or more authorities will examine the impact of a transaction on the same relevant market;  

iv) An obligation for all Member states to provide in their national competition law for a suspension of procedures in cases in which it has been established that two or more NCAs make their assessment with regard to the same relevant market, in order to allow for a synchronisation of their decision making processes.

Not directly related to the reform agenda in respects of the Regulations 1/2003 and 139/2004, but relevant to the relation between antitrust and merger control policies, I would finally like to point to the need for refining our tools to fight tacit collusion. The present wave of mergers and acquisitions by industrial buyers is likely to result in a significant increase of the risk of (tacit) collusion in more concentrated and interrelated industries and supply chains, and prohibiting such developments is unlikely to be the right answer.