COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE EUROPEAN COMMISSION’S PUBLIC CONSULTATION ON EMPOWERING THE NATIONAL COMPETITION AUTHORITIES TO BE MORE EFFECTIVE ENFORCERS

February 12, 2016

The views stated in this submission are presented jointly on behalf of the Sections of Antitrust Law and International Law only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (the “ABA”) appreciate this opportunity to submit their views to the European Commission (the “EC”) concerning the effectiveness of the European Union (the “EU”)’s National Competition Authorities (the “NCAs”). The Sections commend the EC for recognizing that the NCAs are “essential partners for enforcing the EU competition rules” and soliciting feedback to ensure that the NCAs have the appropriate independence and resources to be effective enforcers. As the EC acknowledges, strong NCAs working in concert to enforce competition law benefit the EU market, as well as EU citizens, stakeholders, and other market participants.

In its 2007 Report and Recommendation to the U.S. Congress, the Antitrust Modernization Commission similarly found that “state and federal enforcement can be strong complements in obtaining optimal enforcement.” Nonetheless, the Antitrust Modernization Commission discussed, as has an ABA report issued in 2012, how improvements could be made in the coordination and execution of state antitrust enforcement.

In its survey regarding the NCAs, the EC asks whether the NCAs have enough independence, resources, and tools to enforce effectively EU competition rules (the “EU rules”). The survey then asks whether actions should be taken to make NCAs more effective enforcers of the EU rules, including whether a combination of NCAs (with or without the involvement of the

---

5 See NCA Survey, supra note 1, at 13; see also id. at 16-17, 22-25 & 38.
EC), or additional empowerment of the NCAs themselves, may provide a path for more effective enforcement. The survey raises a number of important issues, including legal certainty for businesses, costs to businesses, and cooperation within the European Competition Network (the “ECN”). The survey also inquires as to harmonization issues, such as the ability of NCAs to adopt “settlement decisions,” and leniency issues.

Though the EC has made great progress in encouraging the NCAs to address these issues through its own work and the ECN, the Sections believe that additional progress can be made on these issues that would render the NCAs more effective enforcers, avoid divergent outcomes that hinder effective enforcement of the laws, and buttress due process rights.

Based on the Sections’ members’ collective experience as enforcers and practitioners, we respectfully offer the following observations and recommendations on NCA empowerment for the EC to consider. First, the Sections believe that the NCAs do need the independence, resources and tools necessary to enforce effectively EU rules, including the ability to settle cases jointly. Moreover, the Sections believe that the coordination and harmonization of NCA investigations and decisions is important to ensuring such effective enforcement, especially given that the NCAs can often investigate cross-border conduct, or conduct with effects beyond a single Member State, that allegedly violate EU rules. In addressing these issues the Sections point the EC to potentially helpful examples involving the American States’ joint enforcement of federal and state antitrust laws, while according due process rights such as confidentiality of

---

6 See id. at 14; see also id. at 19, 26-28 & 35-36.
7 See id. at 15; see also id. at 19, 28, 36 & 39.
8 See id. at 29 (discussing costs imposed by different data-gathering rules).
9 See id. at 37; see also id. at 83-87 (soliciting views on the ability of NCAs to protect settlement material).
10 E.g., id. at 67.
12 The Sections have chosen to focus on only a few issues addressed in the NCA survey for purposes of these Comments. The absence of comments on the remaining topics should not be interpreted to mean that the Sections either endorse or disagree with them.
14 Though there are analogies that may be drawn between the American States and Member States in the EU, as recognized by the EU itself in setting up the ECN—see Controlling Costs Report, supra note 4, at 57, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/2013_agenda_cost_efficiency_kolasky_authcheckdam.pdf—there are obviously limitations on those analogies. For general background on the similarities and differences between the American and EU systems as they pertain to antitrust, see Emilio E.
business secrets and respect for legal privilege. To the extent that the experience of the American States has fallen short of the ideal level of coordination and harmonization, such as by not providing uniform confidentiality protections, the EC may find this to be instructive.

The Sections also believe that the present summary leniency program in place for multiple NCAs filings for leniency, while welcome and helpful, needs to be enhanced to avoid delay and divergent outcomes. This can be accomplished by a “one-stop shop” application through the EC and the ECN with a designation as to which NCAs the application would pertain. Such an application would also help implement the Damages Directive.

A. Ensuring That NCAs Have the Resources and Tools, Including Prioritization and Settlement Authority, Necessary to Conduct Effective Investigations While Complying With Due Process

Having the tools necessary to conduct effective investigations, including sufficient resources (e.g., to retain or hire economists to analyze complex cases), to prioritize investigations, and to effectively settle cases (e.g., to offer mitigation in exchange for cooperation or recognition of responsibility and to manage risk) are just as important to NCAs as they are to American States. The Sections have published reports on these issues. Though the NCAs have made strides in these areas, the Sections share the EC’s concerns that such progress should continue.

Varanini, American and European Antitrust Enforcement: Let One Hundred Flowers Bloom and One Hundred Schools of Thought Contend, ANTITRUST RPT. 97-123 (Summer 2004).

Though the Sections do not recommend a particular process or mode of instituting due process for the NCAs that operate in a mix of civil and common law systems, the Sections do believe that due process guarantees are important, including respect for legal privilege and the protection of the confidentiality of documents and testimony submitted as part of the investigative process. See, e.g., Tad Lipsky & Randolph Tritell, Best Practices for Antitrust Law: The Section Offers Its Model, 15 THE ANTITRUST SOURCE 1 (Dec. 2015), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

See, e.g., Controlling Costs Report, supra note 4, at 56. For a reference to the need for economists to perform the analysis required for many issues of antitrust law, e.g., in the merger context, see, e.g., AMC Report, supra note 3, at 171-72.

The ability to exercise discretion in choosing which investigations to conduct, and cases to bring, is so important in the American system that it is almost completely unreviewable by the courts. See Heckler v. Chaney, 470 U.S. 831, 831-32 (1985).


See, e.g., Controlling Costs Report, supra note 4, at 26-28, 32-37, 39-48 & 50-56; cf. AMC Report, supra note 3, at 198-203 (reaching findings on these issues based on input from, inter alia, the American Bar Association).

See NCA Survey, supra note 1, at 16-17 (discussing financing of NCAs).

See, e.g., Communication, supra note 2, at 9-10 & nn.8-9.
Insofar as access to resources is concerned, the American States have obtained funding through a myriad of sources. These include: (i) setting up specialized budget accounts, under operation of law—funded by fines23 or by recoveries of attorneys’ fees and costs from litigated actions and from settlements;24 (ii) obtaining federal grants;25 (iii) establishing joint cost-sharing agreements to fund joint investigations and enforcement actions;26 and (iv) creating multistate funds administered by multistate entities from which grants fund the retention of economists and the conduct of investigations.27 It is important to note that the joint cost-sharing arrangements typically involve a payment of costs for upcoming anticipated investigative expenses, like the hiring of an economist, in which costs are allocated pro rata based on the State’s share of population relative to the total population of the States participating in the joint group, so as to avoid disputes.28 The EC may wish to encourage, through the ECN or otherwise, similar mechanisms for NCAs.

As is increasingly true for all of the NCAs,29 the American States have in place structures that balance independence, public accountability, and a broad range of investigative powers.30 However, the exercise of those powers is not without appropriate and necessary due process protections, including confidentiality protections for documents and testimony in the investigative process, review for attorney-client and other privileges, and (for the most part) judicial review of settlements.31

23 See, e.g., CAL. BUS. & PROF. CODE, § 17206(c).
24 See, e.g., id. §§16750(f), 16760(c)(2).
25 See, e.g., AMC Report, supra note 3, at 188 & note 25 (“In addition, the Crime Control Act of 1976 led to the appropriation of new funds that enabled twenty-five states to establish antitrust enforcement units for the first time.”).
26 See, e.g., Controlling Costs Report, supra note 4, at 53 (referring to the considerable cost savings involved from the joint investigation and prosecution of cases).
27 Two examples of this include the so-called “Milk Fund” run by the National Association of Attorneys’ General Antitrust Task Force (hereinafter “ATF”), see, e.g., Trish A. Conners, Building A Successful Enforcement Unit at 8, available at http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/Conners%20-%20Building%20A%20Successful%20Enforcement%20Unit.pdf, and the State Center, a non-profit organization set up to support state antitrust enforcement, available at http://statecentering.org/.
29 See, e.g., Communications, supra note 2, at 8.
30 The American States conduct investigations through specialized sections, either antitrust sections or joint consumer protection and antitrust sections. See, e.g., Emilio Varanini & Thomas Papageorge, Public Enforcement of California Law, §23.10(A), at 23-29 in Antitrust and Unfair Competition Law Section, The State Bar of California, CALIFORNIA STATE ANTITRUST AND UNFAIR COMPETITION LAW (Cheryl Lee Johnson ed., West Updated 2015) (hereinafter “Public Enforcement of California Law”). Those sections are headed by a state attorney general who is accountable to the public, see, e.g., Hollingsworth v. Perry, 133 S. Ct. 2652, 2666-67 (2013), but has a broad range of investigative powers such as the authority to issue compulsory process, such as investigative demands for written responses, testimony, and the production of documents, and to conduct interviews or even wiretap conversations. See, e.g., Public Enforcement of California Law, supra, §§ 23.08 – 23.09(B), at 23-24 – 23-29.
31 See, e.g., Citigroup Global Markets II, 752 F.3d at 239-95 (judicial review for reasonableness of government settlements involving a judicial order); CAL. GOV. CODE, §§ 11183 (confidentiality guarantees for business secrets and other confidential materials disclosed in investigations); Public Enforcement of California Law, supra note 30, §§ 23.08 – 23.09(B), at 23-24 – 23-29 (discussing generally the investigative process, the tools available and the
Accordingly, the Sections encourage the EC to work with the NCAs to continue to develop similar resources and powers.

B. Ensuring That the NCAs Coordinate Their Investigations, Settlements, and Decisions

When coordinating NCAs’ investigations, settlements, and decisions on cross-border conduct, or conduct with cross-border effects, it is important to avoid the duplication of work and divergent outcomes.32 Though progress has been made,33 the Sections share the EC’s concern that issues remain.34

The American States have mechanisms by which they can coordinate their activity across the board. In the first instance, the American States have their version of the ECN through which they can discuss investigations, cases, and issues without breaching the protections of the work-product doctrine.35 More significantly, the American States can and do often form informal joint working groups. These working groups allow the American States to share documents, data, and work product pursuant to the common interest doctrine36 and statutory guarantees37 by maintaining documents and data together in a shared, Internet-accessible database.38 In a process similar to that contemplated by the EC,39 most American States in the joint working group use the documents and data obtained through compulsory process issued by a single American State as the lead for that group.40

ability to invoke privilege in refusing to divulge information). Citibank has been thought of among American States as encapsulating the type of review that enforcer settlements can and should receive, including state settlements, and that the concepts set out in that case have been applied in a practical way in the judicial review of state settlements.32 See, e.g., Controlling Costs Report, supra, note 4, at 51-56 (discussing problems in intrastate coordination and in coordination between state and federal authorities, and suggesting remedies); cf. AMC Report, supra, at 198 (discussing the need for coordination).

33 European Competition Network, Enforcement and Cases, the French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.com (Apr. 27, 2015), available at http://ec.europa.eu/competition/ecn/brief/index.html (noting that three competition authorities worked together under the auspices of the European Commission and, with one slight exception, imposed identical commitments). The fact that the German NCA reportedly reached a different result suggests, however, that there is still need for harmonization.


35 See, e.g., Tobaccoville USA, Inc. v. McMaster, 692 S.Ed.2d 526, 529-30 (S.C. 2010). The ATF (the American States’ earlier version of the ECN as discussed supra) provides a mechanism by which investigations and cases can be discussed in industry, issue and case-specific working groups pursuant to confidentiality guarantees provided by case law. See generally, e.g., Controlling Costs Report, supra note 4, at 55; AMC Report, supra note 3, at 188.

36 See, e.g., id.

37 See, e.g., CAL. GOV. CODE, §§11180.5, 11181(g).

38 See, e.g., Controlling Costs Report, supra note 4, at 52 (discussing such informal groups); Building a Successful Enforcement Unit, supra note 27, at 7 (same). The Internet-accessible database may be maintained by a third-party vendor. However, the Commission may wish to explore using the ECN given the EC’s privacy regulations.


40 See, e.g., Controlling Costs Report, supra note 4, at 54-55. For examples of the wide scope of such compulsory process for documents and data, see, e.g., Brovelli v. Sup. Ct., 15 Cal. Rptr. 630 (Cal. 1961).
If violations of antitrust law are found, these joint working groups usually enter into joint settlements, either at the investigative or litigation stage, with a single set of remedies. Variances in remedies mostly involve differentiated local impact, as with mergers. The limitations of such informal working groups may also hold lessons for the EC. Some American States are hindered by their own laws from relying on another American State’s subpoena for documents and data and must serve their own. Though these States can use their participation in these working groups to avoid what often amounts to duplicative processes (with separate confidentiality guarantees that often do not impose any additional burdens on producing parties), doing such an “end-run” creates other problems. The most salient example is the lack of uniform confidentiality guarantees that would increase efficiency and provide assurance that business secrets will not become public.

Accordingly, the EC may wish to consider setting up a mechanism for establishing formal versions of these working groups through the ECN (e.g., through Article 12 of Regulation 1/2003) with uniform investigative and settlement powers, as well as adequate guarantees of procedural fairness, so that undertakings dealing with NCAs are confident that the “decision-making process—and the decisions that result from it—are open and respectful to the rights of defence of the parties.” In this way, the EC can learn from the institutional weaknesses as well as strengths in the approach of the American States.

At the same time, the possibility of substantive divergence within such joint groups is also an issue that the EC may want to consider. The American States historically have focused their resources mostly on cases involving per se or hard-core conduct, resale price maintenance, and mergers where localized effects were present. Such cases do not typically present the risk of substantive divergence; in fact, substantive divergence was most notable in the American

---

42 See, e.g., Controlling Costs Report, supra note 4, at 55.
43 The American States have tried to impose a more formal one-size-fits-all solution beyond these joint working groups and the ATF but without success. See, e.g., Controlling Costs Report, supra note 13, at 50-51 (discussing the formation of a Compact under which all American State signatories would share in the production of data and documents to a single American State in exchange for waiving the right to serve additional process, but then noting that various States such California and Florida found the Compact too limiting for purposes of serving their own process). The EU does not necessarily labor under these same limitations.
44 Such individual state process can involve individual confidentiality agreements that often eliminate or minimize differences in confidentiality protections, reports to the contrary notwithstanding. See, e.g., AMC Report, supra note 3, at 187 (referring to the problem among states of inconsistent confidentiality agreements). Still, such agreements have to be negotiated and harmonized, which can waste time and resources.
45 See, e.g., AMC Report, supra note 3, at 202-03. Though that 2007 report notes the need for better coordination (e.g., contrasting those States that request paper records from those that request electronic records), coordination has improved since the date of that report. See, e.g., Controlling Costs Report, supra note 4, at 52-55.
46 See, e.g., Controlling Costs Report, supra note 4, at 56.
49 See, e.g., AMC Report, supra note 3, at 194 & 199.
context in the *Microsoft* monopolization case.\textsuperscript{50} In the EU context, the NCAs appear to have brought far more abuse of dominance cases than the American States have brought monopolization cases.\textsuperscript{51} Though the number of such cases in the EU context vis-à-vis the American context may be explained in part by the EU-specific issues involving liberalization of markets in the Member States, they still raise, even in the EU, the prospect of substantive divergence with an attendant increase in business costs and decrease in legal predictability.

\section*{C. Additional Harmonization of Leniency Programmes Would Be Conducive to the Effective Empowerment of the NCAs}

Citing the Communication on Ten Years of Regulation 1/2003 of July 2014, the NCA Survey “identifies . . . areas for action to ensure that well designed leniency programmes are in place in all Member States and consider measures to avoid disincentives for corporate leniency applicants.”\textsuperscript{52} To that end, the EC properly notes that “[i]t is appropriate to consider possibilities to address the issue of interplay between corporate leniency programmes.”\textsuperscript{53}

As an initial matter, the Sections commend the EC for the success of its Leniency Programme, which has generated €6.4 billion in fines and 146 decisions between 2011 and October 21, 2015.\textsuperscript{54} The success of the Leniency Programme may in part be the result of the EC’s willingness to adapt its policy to encourage applications, as reflected in the Revised ECN Model Leniency Programme.\textsuperscript{55}

One example is the introduction of summary applications, which allow an undertaking “that has or is in the process of filing a leniency application . . . with the Commission [to] file summary applications with any NCAs which the applicant considers . . . well placed to act under the Network Notice,”\textsuperscript{56} mitigating the burden of multiple cumbersome filings and the possibility of obtaining leniency in one jurisdiction but losing it in another.

As commendable as the summary application process is, it reduces—rather than eradicates—the risks borne by the applicants. The Sections urge the EC to move toward further harmonization of leniency procedures across jurisdictions, with respect to, e.g., oral versus written applications and different language requirements.\textsuperscript{57}

The Sections also encourage the EC to consider a “one-stop shop” for leniency applicants, in which such applications could be filed with the EC and ECN for dissemination to the NCAs that may have an interest in the leniency application. If the application does not

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., id. at 193-94 & 196.
\item See, e.g., *Communication, supra* note two, at 4.
\item *NCA Survey, supra* note 1, at 67 (alterations and inner quotation marks omitted).
\item Id.
\item Id. at 6 (inner quotation marks omitted).
\end{enumerate}
\end{footnotesize}
sufficiently qualify as a Community matter, a lead NCA could act on behalf of the other NCAs in processing the application and granting amnesty status. This measure would eliminate the burden of separately contacting individual NCAs and facilitate the coordination of investigations and settlements among NCAs. It would avoid inconsistent results and increase legal certainty for defendants, which would in turn bolster the credibility of NCA enforcement.\footnote{See, e.g., Case C-428/14, DHL Express (Italy) Srl and DHL Global Forwarding (Italy) Srl v. Autorità Garante della Concorrenza e del Mercato, Advocate General’s opinion of 10 Sept. 2015, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=167321&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1117697. The practice of the American States is to defer to the investigations and prosecution of antitrust-related crimes by the Division and bring only those cases regarded as too “local” for federal prosecutors.}

This one-stop shop could also be used to implement the guarantees of Directive 2014/104 on antitrust damages actions (the “Damages Directive”).\footnote{See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, 2014 O.J. (L. 349), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN.} According to the Damages Directive, which the Member States must implement no later than December 27, 2016, the national courts must have procedures to protect the confidentiality of business secrets,\footnote{See id. at 4.} create a common approach on the disclosure of information from the file of a NCA,\footnote{See id.} and avoid disclosure of information that could compromise ongoing investigation, leniency, or settlement programs, either of the EC or of an individual Member States.\footnote{See id. at 5.} The proposed one-stop shop, especially when taken in conjunction with the formation of joint working groups, can thus advance the goals of the Damages Directive.

**Conclusion**

The Sections commend the EC for its attention to the important issue of NCA empowerment, which will improve the enforcement of EU rules in the EU market. The Sections appreciate the opportunity to comment on the EC’s survey. The Sections would be pleased to respond to any questions the EC may have regarding these comments or to provide any additional comments or information that may be of assistance.

---

\footnote{See id. at 4.}

\footnote{See id.}

\footnote{See id. at 5.}