

Brussels, 29th September 2006

Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions

(see also [IP/06/1288](#))

The ECN has launched a Model Leniency Programme that will improve the handling of parallel leniency applications in the ECN. The Model Programme responds to the call for a one stop leniency shop and offers a set of rules on which all ECN programmes can align. It is therefore a first step towards a harmonised leniency policy throughout the EU. It sets out the main procedural and substantive rules which the ECN members believe should be common in all programmes. For cases concerning more than three Member States, it introduces a model for a uniform summary application system for immunity applications. The aim of the Model Programme is to increase the predictability for applicants and avoid applicants being faced with differing requirements when they have to deal with several leniency programmes. Streamlined procedures will also lead to cost and time savings for applicants and authorities without jeopardizing the flexible work-sharing within the ECN.

The heads of the European competition authorities have agreed to use their best efforts to align their current and future European leniency programmes on the provisions of the ECN Model Programme. The ECN members will assess the state of convergence with the Model Programme in 2008.

European Competition Authority (ECN)

What is the ECN?

The [European Competition Network](#) (ECN) consists of the European Commission and the competition authorities of the 25 Member States. It was established during the modernisation reform of the EC antitrust rules as a forum for discussion and cooperation of Member States competition authorities in cases where Articles 81 and 82 of the EC Treaty are applied. The ECN ensures an efficient division of work and an effective and consistent application of EC competition rules. More information about ECN and its activities can be found at on the Europa website (http://ec.europa.eu/comm/competition/antitrust/ecn/ecn_home.html).

Leniency within the ECN

What is leniency?

Leniency programmes allow authorities to grant full immunity or a reduction in the penalties that would otherwise have been imposed on a participant in a cartel, in exchange for freely volunteered disclosure of information on the cartel and continuous cooperation in the authorities' investigation.

Leniency is a successful and powerful tool to detect and terminate cartels. A well-functioning leniency programme can also destabilise existing cartels and prevent the creation of new cartels. It is consequently in the interest of all ECN members to ensure that the European leniency programmes remain efficient and attractive.

How many ECN members operate leniency programmes today and what are the links between them?

Besides the Commission's Leniency Notice, there are today 19 national leniency programmes within the ECN and two more will soon come into force. The programmes are operated in parallel and independently from each other. Safeguards have been put in place to ensure that the exchange of information and cooperation within the ECN does not jeopardise the effectiveness of the respective programmes. A list of the Member States that operate a leniency programme can be found on the Europa website:

<http://ec.europa.eu/comm/competition/antitrust/legislation/network.html>

ECN Model Leniency Programme

Why did the ECN decide to embark on this exercise?

Today, the Commission and the overwhelming majority of the national competition authorities operate leniency programmes. Concerns have been raised that the co-existence of several leniency programmes with different rules and procedures might dissuade applicants from reporting cross-border cartels.

How has the work been conducted?

In February 2005, Commissioner Kroes announced the need to reflect on one stop shop options for the handling of leniency within the ECN. In parallel, an ECN working group, co-chaired by the UK's Office of Fair Trading (OFT) and the French Competition Council, had analysed deficits and problems with the handling of leniency issues within the ECN and had arrived at similar conclusions. In September 2005, an expert group within the ECN started to develop a Model Leniency Programme that would address the issue of the burden of multiple filings within the ECN. The result was endorsed by the heads of the competition authorities within the ECN on 29 September 2006.

What is the purpose and the content of the ECN Model Leniency Programme?

The purpose is to provide a basis for soft harmonisation of the European programmes. It has been drafted as a coherent programme setting out the essential procedural and substantive requirements that the ECN members believe every leniency programme should contain. The ECN Model Programme is accompanied by Explanatory Notes providing further explanations and practical guidance. The programme has been drafted and endorsed in English and translated into all official languages.

The ECN Model Programme sets out the principal elements which the ECN members believe should be common in all programmes. This includes the type of information an applicant should be prepared to provide in order to get immunity, a coherent set of termination and cooperation duties and a streamlined procedure for processing applications. The aim is to provide a greater degree of predictability for potential applicants and to avoid applicants being faced with contradictory demands when more than one leniency programme is applicable.

The ECN Model Programme also introduces a new procedure for a uniform summary application system for cases concerning more than three EU Member States. If a full application has been made with the Commission, national competition authorities can accept temporarily to protect the applicant's position on the basis of very limited information that can be given orally. Should any of the national competition authorities want to act on the case it will grant the applicant an additional time to complete its application. The summary application system will save resources

for both applicants and authorities without jeopardising the flexible work-sharing within the ECN.

Lastly, the ECN Model Programme encourages the adoption of leniency programmes in the few EU Member States that do not yet operate such a programme.

Is this a real programme or more of a report of what a leniency programme should ideally contain?

The Model Programme is not a programme under which applicants can apply and does not give rise to any legitimate expectations on the part of any undertaking. It is for each jurisdiction to ensure that their respective programme reflects the provisions of the ECN Model Programme. The details and the implementation may however vary depending on the particular enforcement system. The ECN Model Programme explicitly recognises that not all competition authorities have the power to decide their own leniency policy. The commitment to align on the basis of the ECN Model Programme does also not prevent a competition authority from adopting a more favourable treatment if it considers this to be necessary to ensure effective cartel enforcement in its jurisdiction.

Will the ECN Model Programme really lead to convergence of the different leniency programmes or would this not require more traditional regulatory methods?

The ECN Model Programme is not a legally binding document. That being said, the work leading up to the ECN Model Programme as well as the document itself is in many aspects unique and groundbreaking. It illustrates well how the ECN is able to combine its forces and jointly develop new instruments to address real and perceived deficits in the current system. The nature, content and political endorsement of the ECN Model Programme goes far beyond what has until now been achieved through more traditional forms of international cooperation.

The ECN members believe that the ECN Model Programme is a first and important step towards a harmonised leniency system. This does not rule out that other options could be considered at a later stage.

How will the summary application system improve the current problem of multiple filings?

It is for the applicant to decide if it wants to protect itself under more than one leniency programme. The summary application system will help applicants make immunity applications, and help authorities process them, in cases where it is likely that the Commission will deal with the case. Rather than having to file full and complete applications with authorities that could (under the work-sharing criteria in the ECN) be considered “well placed” to act on the case, national competition authorities could agree to receive only a short description of the cartel that has been reported to the Commission. This system has already been put in place in some Member States and seems to function well.

The ECN Model Programme specifies the type of information that would be needed for a summary application and clarifies that such information can always be given either in writing or orally. The summary application system works very much like a marker system and the information needed to secure a so-called marker may often be equivalent to what would be required for a summary application.

The national competition authority will not grant or deny immunity on the basis of a summary application. Instead, it will confirm that the applicant is the first to file with that authority and protect that applicant's place in the queue. A summary application system operates like an indefinite marker, i.e. contrary to traditional marker systems,

the applicant would not need to complete its application unless the competition authority requests it to do so. If the authority wanted a full and complete application, it would grant the applicant a given period of time to complete the application.

One stop shop

Why does the current system require applicants to file with several authorities?

There is – contrary to merger systems for example – no requirement on an applicant to file for leniency with any authority. Companies that take part in cross-border cartels expose themselves to penalties in several jurisdictions and would therefore only be fully protected if they apply for leniency with all authorities that could pursue a case against them. This is a logical consequence of the system of parallel competences which is the enforcement system we have opted for in the EU.

Multiple filings are sometimes necessary simply because more than one authority will investigate the case (parallel actions by several national competition authorities) and each authority would need the information for its respective investigations.

Would mutual recognition of decisions taken by another ECN authority not be an option?

The possibility to create a mutual recognition system has also been discussed within the ECN and was not felt to be a realistic or workable alternative at this stage. Concretely, it would mean that any authority could decide on a leniency application with binding effects in the whole Community. It is not possible for such a system to work in the ECN: from a practical point of view, it would require that all national competition authorities would be willing and able to collect and assess information covering all concerned Member States and that they would be able to check that no authority had sufficient information to launch an *ex officio* investigation. This is unrealistic. In addition, authorities preparing inspections want to have direct contacts with the applicant that is providing the information. In a mutual recognition system, this is not guaranteed since the authority that decides on the application might not be the one that will investigate the case. This could have serious consequences for the success and effectiveness of inspections.