



## **ECN MODEL LENIENCY PROGRAMME**

**(As revised in November 2012)**

### **I. INTRODUCTION**

1. In a system of parallel competences between the European Commission (hereinafter the Commission) and National Competition Authorities (hereinafter NCAs), an application for leniency<sup>1</sup> to one authority is not to be considered as an application for leniency to another authority. It is therefore in the interest of the applicant to apply for leniency to all Competition Authorities (hereinafter CAs) which have competence to apply Article 101 of the Treaty on the Functioning of the European Union (hereinafter TFEU) in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question<sup>2</sup>.
2. The purpose of the ECN Model Leniency Programme (hereinafter the ECN Model Programme) is to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Programme therefore sets out the treatment which an applicant can anticipate in any ECN jurisdiction once alignment of all programmes has taken place. In addition, the ECN Model Programme aims to alleviate the burden associated with multiple filings in cases for which the Commission is particularly well placed by introducing a model for a uniform summary application system.
3. The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme. The ECN Model Programme does not prevent a CA from adopting a more favourable approach towards applicants within its programme.

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<sup>1</sup> The term “leniency” refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case (see paragraph 37 of the Commission Notice on cooperation within the Network of Competition Authorities (hereinafter the Network Notice)).

<sup>2</sup> See paragraph 38 of the Network Notice.

## **II. SCOPE OF THE PROGRAMME**

4. The ECN Model Programme concerns secret cartels, in particular agreements and/or concerted practices between two or more competitors aimed at restricting competition through, for example, the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets including bid-rigging.

## **III. IMMUNITY FROM FINES**

### *Type 1A*

5. The CA will grant an undertaking immunity from any fine which would otherwise have been imposed provided:
  - a) The undertaking is the first to submit evidence which in the CA's view, at the time it evaluates the application, will enable the CA to carry out targeted inspections in connection with an alleged cartel;
  - b) The CA did not, at the time of the application, already have sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement; and
  - c) The conditions attached to leniency are met.
6. With a view to enabling the CA to carry out targeted inspections, the undertaking should be in a position to provide the CA with the following:
  - The name and address of the legal entity submitting the immunity application;
  - The other parties to the alleged cartel;
  - A detailed description of the alleged cartel, including:
    - The affected products;
    - The affected territory (-ies);
    - The duration; and
    - The nature of the alleged cartel conduct;
  - Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence);
  - Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.

### ***Type 1B***

7. In cases where no undertaking had been granted conditional immunity from fines before the CA carried out an inspection or before it had sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection, the CA will grant an undertaking immunity from any fine which would otherwise have been imposed if:
  - a) The undertaking is the first to submit evidence which in the CA's view, enables the finding of an infringement of Article 101 TFEU<sup>3</sup> in respect of an alleged cartel;
  - b) At the time of the submission, the CA did not have sufficient evidence to find an infringement of Article 101 TFEU in connection with the alleged cartel; and
  - c) The conditions attached to leniency are met.

### ***Excluded immunity applicants***

8. An undertaking which took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines under the programme<sup>4</sup>.

## **IV. REDUCTION OF FINES: TYPE 2**

9. Undertakings that do not qualify for immunity may benefit from a reduction of any fine that would otherwise have been imposed.
10. In order to qualify for a reduction of fines, an undertaking must provide the CA with evidence of the alleged cartel which, in the CA's view, represents significant added value relative to the evidence already in the CA's possession at the time of the application. The concept of 'significant added value' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the CA's ability to prove the alleged cartel.
11. In order to determine the appropriate level of reduction of the fine, the CA will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or third, etc. undertaking to apply) and the CA's assessment of the overall value added to its case by that evidence. Reductions granted to an applicant following a Type 2 application shall not exceed 50% of the fine which would otherwise have been imposed.
12. If a Type 2 applicant submits compelling evidence which the CA uses to establish additional facts which have a direct bearing on the amount of the

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<sup>3</sup> For national programmes, the equivalent national legal basis should be added.

<sup>4</sup> Germany and Greece note that the sole ringleader is not eligible for immunity from fines under their respective programmes.

fine, this will be taken into account when setting any fine to be imposed on the undertaking which provided this evidence.

## V. CONDITIONS ATTACHED TO LENIENCY

13. In order to qualify for leniency under this programme, the applicant must satisfy the following cumulative conditions:

- (1) It ends its involvement in the alleged cartel immediately following its application<sup>5</sup> save to the extent that its continued involvement would, in the CA's view, be reasonably necessary to preserve the integrity of the CA's inspections;
- (2) It cooperates genuinely, fully and on a continuous basis from the time of its application with the CA until the conclusion of the case; this includes in particular:
  - (a) providing the CA promptly with all relevant information and evidence that comes into the applicant's possession or under its control;
  - (b) remaining at the disposal of the CA to reply promptly to any requests that, in the CA's view, may contribute to the establishment of relevant facts;
  - (c) making current and, to the extent possible, former employees and directors available for interviews with the CA;
  - (d) not destroying, falsifying or concealing relevant information or evidence; and
  - (e) unless and to the extent otherwise explicitly authorised by the CA, not disclosing the fact or any of the content of the leniency application at least before the CA has notified its objections to the parties<sup>6</sup>.
- (3) When contemplating making an application to the CA but prior to doing so, it must not have:
  - (a) destroyed evidence which falls within the scope of the application; or

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<sup>5</sup> 'Application' in this paragraph 13 refers to an application for a marker, a summary application or a full leniency application (as the case may be).

<sup>6</sup> Due to the variety of procedures and investigative measures applied in the various jurisdictions, the ECN Model Programme has been drafted in a manner that takes into account both administrative and judicial proceedings. The terms "objections" and "statement of objections" should be read as covering all equivalent steps under the relevant procedures where the investigative stage has been completed and the parties are formally notified of the CA's objections.

- (b) disclosed, directly or indirectly, the fact or any of the content of the application it is contemplating except to other CAs or any competition authority outside the EU.

## **VI. PROCEDURE**

### ***Approaching the CA***

14. An undertaking wishing to benefit from leniency must apply to the CA and provide it with the information specified above. Before making a formal application, the applicant may on an anonymous basis approach the CA in order to seek informal guidance on the application of the leniency programme.
15. Once a formal application has been made, the CA will, upon request, provide an acknowledgement of receipt confirming the date and time of the application. The CA will assess applications in relation to the same alleged cartel in the order of receipt.

### ***Procedure for immunity applications***

#### ***Marker for immunity applicants***

16. An undertaking wishing to make an application for immunity may initially apply for a 'marker'. A marker protects an applicant's place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity.
17. The CA has discretion as to whether or not it grants a marker. Where a marker is granted, the CA determines the period within which the applicant has to 'perfect' the marker by submitting the information required to meet the relevant evidential threshold for immunity. If the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.
18. To be eligible to secure a marker, the applicant must provide the CA with its name and address as well as information concerning:
  - The basis for the concern which led to the leniency approach;
  - The parties to the alleged cartel;
  - The affected product(s);
  - The affected territory (-ies);
  - The duration of the alleged cartel;
  - The nature of the alleged cartel conduct; and
  - Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.

### ***Granting immunity***

19. Once the CA has verified that the evidence submitted is sufficient to meet the relevant evidential threshold for immunity, it will grant the undertaking conditional immunity from fines in writing.
20. If the relevant evidential threshold is not met, the CA will inform the undertaking in writing that its application for immunity is rejected. The undertaking may in that case request the CA to consider its application for a reduction of the fine.
21. The CA will take its final position on the grant of immunity at the end of the procedure. If the CA, having granted conditional immunity, ultimately finds that the immunity applicant acted as a coercer or that the applicant has not fulfilled all of the conditions attached to leniency, the CA will inform the applicant of this promptly. If immunity is withheld because the CA finds at the end of the procedure that the conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any other favourable treatment under this programme in respect of the same proceedings.

### ***Procedure for reductions of fines applications***

22. If the CA comes to the preliminary conclusion that the evidence submitted by an undertaking constitutes 'significant added value' within the meaning of the programme, it will inform the undertaking in writing of its intention to apply a reduction of fines. This confirmation will be given as early as possible and no later than the date the statement of objections is notified to the parties. The final amount of reduction will be determined at the latest by the end of the procedure.
23. If the CA finds that one or more of the conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any favourable treatment under this programme in respect of the same proceedings.

### ***Summary applications***

24. In cases where the Commission is 'particularly well placed' to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant that has or is in the process of filing a leniency application, either for immunity or for reduction of a fine, with the Commission may file summary applications with any NCAs which the applicant considers might be 'well placed' to act under the Network Notice. Summary applications should each have an identical substantive scope to the respective application with the Commission and should include a short description of the following:
  - The name and address of the applicant;
  - The other parties to the alleged cartel;
  - The affected product(s);
  - The affected territory(-ies);
  - The duration;

- The nature of the alleged cartel conduct;
  - The Member State(s) where the evidence is likely to be located; and
  - Information on its other past or possible future leniency applications in relation to the alleged cartel.
25. Having received a summary application, the NCA will acknowledge receipt and grant the applicant a summary application marker based on the date and time when the information was provided to the NCA concerned. In addition, if the summary applicant is the first applicant in respect of the alleged cartel at the NCA concerned, the NCA will inform the summary applicant accordingly.
  26. Should an NCA having received a summary application decide to request specific further information, the applicant should provide such information promptly. Should an NCA decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the applicable threshold. If a Type 1A or Type 1B summary applicant submits such information within the set period to the NCA, the information provided will be deemed to have been submitted on the date when the summary application marker was granted. Type 2 summary applications will be assessed in the order created by summary application markers, subject to the threshold and other requirements applicable under the respective leniency programme. If an NCA requests the applicant to make a full submission, the applicant must submit to the NCA all information and evidence relating to the alleged cartel, subject to the requirements under the relevant leniency programme.
  27. Summary applications are deemed to be applications within the meaning of paragraph 41(1) of the Network Notice.

***Statements under the leniency programme and oral procedure***

28. Upon the applicant's request, the CA may allow oral applications. In such cases the statements<sup>7</sup> may be provided orally and recorded in any form deemed appropriate by the CA. The applicant will still need to provide the CA with copies of all pre-existing documentary evidence of the cartel.
29. No access to any records of the statements (whether oral or written) will be granted before the CA has issued its statement of objections to the parties.
30. Statements (both oral and written) made under the present programme will only be exchanged between CAs pursuant to Article 12 of Regulation No 1/2003 if the conditions set out in the Network Notice are met and provided that the protection against disclosure granted by the receiving CA is equivalent to the one conferred by the transmitting CA.

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<sup>7</sup> The term 'statement' refers both to corporate statements given by legal representatives on behalf of undertakings and witness statements made by employees and directors of the undertakings.

## **VII. REVIEW OF THE ECN MODEL PROGRAMME**

31. The ECN Model Programme may be reviewed on the basis of the experience gathered by the ECN members. In any event, no later than at the end of the second year after the publication of the ECN Model Programme, the state of convergence of the leniency programmes of ECN members will be assessed.



# ECN MODEL LENIENCY PROGRAMME

## EXPLANATORY NOTES

### I. INTRODUCTION

#### *Importance of leniency programmes in the fight against cartels*

1. Cartel activities are very serious violations of competition law. They injure consumers by raising prices and restricting supply. In the long term, they lead to a loss of competitiveness and reduced employment opportunities. Undertakings involved in these types of illegal activities that are willing to put an end to their participation and inform the European Commission and the National Competition Authorities (i.e. CAs) of the existence of such activities should not be dissuaded from doing so by the high fines to which they are potentially exposed. The CAs consider that it is in the public interest to grant favourable treatment to undertakings which co-operate with them.
2. The purpose of leniency programmes is to assist CAs in their efforts to detect and terminate cartels and to punish cartel participants. The CAs consider that the voluntary assistance with the above objectives has an intrinsic value for the economic well-being of individual Member States as well as the Common Market which may justify immunity in certain cases (Type 1A and 1B) and a reduction of a any fine in others (Type 2).

#### *Safeguards for leniency information within the ECN*

3. In order to prevent the mechanisms for cooperation between CAs established by Regulation No 1/2003<sup>8</sup> discouraging applicants from voluntarily reporting cartel activities, the Network Notice sets out special safeguards for leniency related information<sup>9</sup>. These safeguards enable the CAs to exchange and use in evidence leniency related information without jeopardising the effectiveness of their respective programmes.
4. According to paragraph 39 of the Network Notice, leniency related information submitted pursuant to Article 11 of Regulation 1/2003 cannot be used by other CAs to start an investigation.
5. According to paragraph 41, information submitted by a leniency applicant or collected on that basis, may only be exchanged between two CAs in the following circumstances:
  - The applicant consents to the exchange; or
  - The applicant has applied for leniency with both CAs in the same case; or

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<sup>8</sup> OJ L 1, 4.1.2003, page 1.

<sup>9</sup> See paragraphs 39-42 of the Network Notice. Leniency related information covers not only information contained in the leniency application itself, but all information that has been collected following any fact-finding measures that could not have been carried out but for the leniency application.

- The receiving CA provides a written commitment not to use the information transmitted or any information it may obtain after the date of the transmission to impose sanctions on the applicant, its subsidiaries or its employees. A copy of the written commitment is sent to the applicant.

### *Purpose of the ECN Model Programme*

6. Making multiple parallel applications across the ECN is a complex exercise given the existing discrepancies between the different leniency regimes. Certain discrepancies may have adverse effects on the effectiveness of individual programmes. In addition, for cases involving a significant number of jurisdictions and for which the Commission is particularly well placed to act within the meaning of the Network Notice, the multiple filing of complete applications to all other possibly well placed CAs can be a cumbersome process which could discourage certain applicants from applying for leniency under any programme.
7. The purpose of the ECN Model Programme is to address the issue of multiple parallel applications and to provide a greater degree of predictability for potential applicants. The ECN Model Programme is based on the common experience of the CAs having operated a leniency programme for a number of years and has two principal objectives. Firstly, the ECN Model Programme is meant to trigger soft harmonisation of the existing leniency programmes and to facilitate the adoption of such programmes by the few CAs who do not currently operate one. Secondly, it sets out the features of a uniform type of short form applications (so-called summary applications) designed to alleviate the burden on both undertakings and CAs associated with multiple filing in large, cross-border cartel cases.
8. While it is highly desirable to ensure that all CAs operate a leniency programme, the variety of legislative frameworks, procedures and sanctions across the EU makes it difficult to adopt one uniform system. The ECN Model Programme therefore sets out the principal elements which, after the soft harmonisation process has occurred, should be common to all leniency programmes across the ECN. This would be without prejudice to the possibility for a CA to add further detailed provisions which suit its own enforcement system or to provide for a more favourable treatment of its applicants if it considers it to be necessary in order to ensure effective enforcement.
9. The Commission and the NCAs are committed to seeking the alignment of the programmes in their jurisdictions within the framework specified by the ECN Model Programme. It is recognised that some ECN members do not have the power to implement changes in their national leniency programmes as this power is held by other bodies. However, the existence of the ECN Model Programme should assist all relevant bodies (ECN members as well as other decision-making bodies) in implementing an efficient policy and making sure that cooperation within the ECN works as efficiently and effectively as possible.

## II. THE ECN MODEL PROGRAMME

10. The ECN Model Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN Model Programme does not give rise to any legal or other legitimate expectations on the part of any undertaking.

### A. Scope of the programme

11. The ECN Model Programme concerns secret cartels. Secrecy does not imply that all aspects of the conduct should be secret, while in particular such elements that make the full extent of the conduct and the fact that it constitutes a cartel more difficult to detect are not known to the public or the customers/suppliers.
12. Cartels constitute very serious violations of competition rules which are often extremely difficult to detect and investigate without the cooperation of at least one of the participants. The interests of consumers and citizens in ensuring that such cartels are detected, terminated and punished outweighs the interest in fining those undertakings that enable a CA to detect, terminate and punish such illegal practices.
13. For the purpose of the ECN Model Programme cartels are agreements and/or concerted practices between competitors aimed at restricting competition by co-ordinating their competitive behaviour or influencing the relevant parameters of competition within the EEA. Cartel participants would typically collude to fix their purchase or selling prices, and/or to allocate production or sales quotas and/or to share markets. These cartel practices include arrangements which either directly or indirectly affect prices, volumes, market shares and other relevant parameters of competition. By way of example, collusive practices such as restrictions on imports or exports, bid-rigging or joint boycotts fall within the scope of the ECN Model Programme<sup>10</sup>.
14. Other types of restriction such as vertical agreements and horizontal restrictions other than cartels are normally less difficult to detect and/or investigate and therefore do not justify being dealt with under a leniency programme. In addition, including agreements other than cartels within the scope of a leniency programme may risk re-introducing a kind of de facto notification system which would be undesirable. It is not excluded, however, that a cartel which includes vertical elements may be covered by the leniency programme.
15. The ECN Model Programme only concerns corporate leniency. It does not cover sanctions on natural persons which are not undertakings. In order to ensure that corporate leniency programmes work efficiently, it is however important to protect to the greatest extent possible employees and directors of the undertakings applying for immunity. It may also be appropriate to offer

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<sup>10</sup> This is a non-exhaustive list of examples. See also paragraph 59 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 011, 14/01/2011, p. 1 - 72.

protection from individual sanctions to employees and directors of applicants for a reduction of any fine. A number of CAs have leniency programmes that allow both individuals and undertakings involved in a cartel to individually apply for leniency. This is not in any way impeded by the ECN Model Programme's alignment of the corporate leniency programmes.

## **B. Immunity from fines: Type 1A and 1B**

### *Evidential thresholds for immunity*

16. The ECN Model Programme contains two different evidential thresholds for granting immunity:
  - one for the first undertaking that provides the CA with sufficient evidence to enable it to carry out targeted inspections in connection with an alleged cartel (Type 1A); and
  - one for the first undertaking that submits evidence which in the CA's view may enable the finding of an infringement of Article 101 TFEU in connection with an alleged cartel (Type 1B).
17. Immunity is no longer available under Type 1B if it has already been granted under Type 1A.
18. Immunity is available under a lower threshold in Type 1A compared to Type 1B in order to create an incentive for cartel participants to leave the cartel and to report infringements which are not yet known to the CAs.
19. The threshold in a Type 1A situation is that the applicant must provide the CA with sufficient information to allow it to carry out targeted inspections. The assessment of the threshold will have to be carried out *ex ante*, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant. The list contained in the ECN Model Programme and described in more detail below should serve as guidance for the applicant to anticipate what is usually required by a CA.
20. In order to meet the evidential threshold in Type 1A cases, undertakings should generally be in a position to provide the CA with the following information and evidence:
  - The name and address of the legal entity submitting the immunity application, as well as the names of individuals who are or have been involved in the alleged cartel on its behalf;
  - The identity of all the other undertakings which participate(d) in the alleged cartel as well as of the individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel;
  - A detailed description of the alleged cartel conduct, including for instance its aims, activities and functioning; the product(s) or service(s) concerned, the geographic coverage, the duration and the estimated

market volumes affected by the alleged cartel; the dates, locations, content and participants of alleged cartel contacts; all relevant explanations in connection with evidence provided in support of the application;

- Evidence relating to the alleged cartel in the possession of the applicant or available to it at the time of the submission, in particular contemporaneous evidence; and
  - Information on which other CAs, inside or outside the EU, have been approached or are intended to be approached by the applicant in relation to the alleged cartel.
21. If a CA has carried out an inspection or already has in its possession sufficient evidence to carry out an inspection, immunity under Type 1A will no longer be available.

### ***Excluded applicants***

22. An undertaking which has taken steps to coerce one or more undertakings to join or remain in the cartel should, as a matter of principle, be excluded from the benefit of immunity. Considerations of natural justice prevent an undertaking that has played such a role from escaping sanction altogether. The scope of the exclusion is narrow, however, so as to avoid creating uncertainty for potential applicants.

### **C. Reduction of fines: Type 2**

23. It is in the interest of CAs to obtain the cooperation in the proceedings of those undertakings which do not qualify for immunity, either because they failed to meet the relevant evidential threshold or because of the role they played in the cartel. Such cooperation ensures that cartel activities are more efficiently investigated and penalised.
24. The value of the cooperation depends on the timing (including whether the applicant was the first, second or third, etc. to apply) and the quality and nature of the evidence submitted. There are various ways of combining these parameters to reward the contribution of the applicant. However, all systems should ensure that there is a significant difference between immunity from fines and reductions of fines in order to make applications for immunity significantly more attractive. Significant added value for type 2 applications should therefore not be rewarded with a reduction of any fine of more than 50%.
25. Applicants are required to adduce evidence which constitutes in the CA's view significant added value with respect to the evidence already in its possession at the time the application was submitted. The CA will generally consider written evidence originating from the period to which the facts pertain to have a greater value than evidence subsequently created, and incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required to rely on the evidence submitted will have an impact on the value of that evidence.

26. The ECN Model Programme contains a provision to counter any potentially adverse consequences for Type 2 applicants when they submit compelling evidence relating to additional facts which have a direct bearing on the amount of the fines.

#### **D. Conditions attached to leniency**

27. Qualifying for conditional immunity or bringing significant added value to an investigation will entitle an applicant to immunity or a reduction of fines provided that three cumulative conditions are met.
28. The final assessment of full compliance with the conditions attached to leniency is made at the end of the procedure.
29. The first condition relates to the termination of the alleged cartel conduct. Undertakings should terminate all cartel activities as soon as possible. However, experience shows that immediate termination, e.g. sudden unexplained absences from regular cartel meetings, after the application and before the CA has undertaken inspections can seriously undermine the effectiveness of subsequent inspections by alerting other cartel participants and allowing them to conceal or destroy evidence. It is therefore in the public interest to delay the complete termination of all cartel activities until the point in time necessary to safeguard the integrity of the inspection. This derogation to the general rule should be agreed to only when it is necessary and should strike the appropriate balance between bringing an end to the illegal activities of the applicant as soon as possible and protecting the effectiveness of the CA's investigation. This is also necessary to allow coordination between the various CAs in the event of parallel proceedings and to avoid applicants from being exposed to conflicting demands. The need to continue with certain cartel conduct should be discussed between the applicant and the CA at a very early stage.
30. The second condition is the obligation to cooperate with the CA throughout the procedure. This obligation is an essential feature of the leniency programme. It starts from the date of application to the CA and lasts throughout the procedure. In this respect, there is no reason to distinguish between applicants for immunity and those for a reduction of fines. In all cases, the cooperation has to be genuine, i.e., the assistance of the applicant, in addition to being comprehensive and immediate, should reveal a sincere spirit of cooperation<sup>11</sup>. It has various facets and therefore the list of duties that can be drawn is necessarily non-exhaustive. It involves among others:
- providing without delay any pre-existing evidence and information which is available to the applicant or comes into its possession or under its control during the investigation;

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<sup>11</sup> See, for example, the judgment of the Court of Justice of 29 June 2006 in Case C-301/04 P, Commission v. SGL Carbon AG, a.o., at paragraphs 66 to 80; the judgment of the Court of Justice of 28 June 2005 in Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213 /02 P, Dansk Rørindustri A/S a.o. v. Commission, at paragraphs 395 and 399; and the judgment of the General Court of 9 September 2011 in Case T-12/06, Deltafina SpA v Commission, at paragraphs 124 to 134.

- answering without delay any question from the CA and making current and, where possible former, individual employees and directors available for interviews with the CA. This encompasses, inter alia, gathering all relevant information and material relevant to substantiate the leniency application that may be in possession of an employee or a director prior to their dismissal<sup>12</sup> or their voluntary departure;
  - not destroying, falsifying or concealing evidence which falls within the scope of the application after having applied for leniency;
  - not revealing (directly or indirectly) the fact or any of the content of its leniency application before the CA has notified its objections to the parties.
31. The obligation of non-disclosure of the application shall not be considered breached if the applicant informs another competition authority of the existence or the content of the leniency application, in the context of multiple applications by the same leniency applicant. Similarly, the obligation of non-disclosure shall not be considered breached if the applicant involves external counsel for the purpose of obtaining legal advice, provided the applicant ensures that the external counsel does not disclose any such information to any third party. Leniency applicants are encouraged to take necessary internal measures that would allow them to show to the CA, upon request, who has been informed by the applicant, at what date and time, about the fact or any of the content of the (contemplated or submitted) leniency application.
32. Unless otherwise explicitly authorised by the CA, an applicant's obligation of non-disclosure lasts at least until the CA has notified its objections to the parties. CAs may apply the obligation for a longer period, beyond the notification of objections to the parties, for example throughout their entire procedure. Leniency applicants who have submitted multiple applications with several CAs are encouraged to carefully verify throughout the duration of the procedures at the different CAs until when the obligation of non-disclosure is applicable to them under each leniency regime, in order to comply with all of them.
33. The third condition requires that the applicant should not, when contemplating making a leniency application to the CA but before doing so, have:
- a) destroyed evidence which falls within the scope of the application; or
  - b) disclosed, directly or indirectly, the fact or any of the content of its contemplated application except to other CAs.
34. Failure to comply fully with any of these conditions will disqualify the applicant from the leniency programme in the relevant proceedings.

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<sup>12</sup> The applicant is encouraged to inform the CA beforehand of any contemplated dismissal of an employee or director who may be in possession of information and material relevant to the leniency application.

## **E. Procedure**

### ***Approaching the CA***

35. All CAs accept anonymous approaches by potential applicants wishing to obtain guidance on their respective programmes. Some CAs have more formalised systems for such approaches, such as hypothetical applications.

### ***Marker for immunity applicants***

36. A marker protects an applicant's place in the queue for a given period of time. It allows the applicant to complete its internal investigation to gather the required information and evidence in order to meet the threshold.
37. In the ECN Model Programme, markers are available at the discretion of the CA. Some CAs may choose only to grant markers when it is clear that immunity is available or in certain type of situations, whereas certain others may grant markers in every case. Taking account of the specificities of each individual case the CA may decide the duration of the marker. In the event of parallel action by a number of CAs, the CAs will endeavour to use their discretion in a manner that allows their respective investigations to be coordinated smoothly.
38. The ECN Model Programme specifies the information required to secure a marker within the meaning of this programme. It is broadly equivalent to what is required to file a summary application. Some CAs however may decide to protect the applicant's place in the queue on the basis of more limited information, depending on the case at hand. In any event, an applicant would as a minimum have to provide its name and address and to satisfy a CA that it has a concrete basis for a reasonable concern that it has participated in cartel conduct.

### ***Procedure for immunity and reduction of fines applications***

39. CAs should deal with an application in a manner which ensures a high degree of legal certainty for the applicant. This implies that the applicant is informed as early as possible of the status of its application and that it will receive an acknowledgement of receipt of its submission(s).
40. If a CA has granted conditional immunity, no fines will be imposed on the applicant in relation to the cartel which is the subject of the application, provided that the conditions attached to leniency are fulfilled during the procedure and that it is not found that the applicant has acted as a coercer. Similarly, any position taken on an application for reduction of fines is subject to the conditions set out in the programme.

### ***Summary applications***

41. Experience has shown that applicants often choose to apply to several CAs simultaneously in cases for which the Commission is particularly well placed to act under paragraph 14 of the Network Notice. Such precautionary multiple applications are time-consuming both for the NCAs and the applicants. They are however useful to allow network members to have an informed view on



whether or not they want to act on a case and to protect the position of the applicant in the event of a case being reallocated, given that an application to one CA does not count as an application to all CAs.

42. In order to alleviate the burden associated with multiple parallel applications on both undertakings and NCAs, the ECN Model Programme contains a model for a uniform system of summary applications. By filing a summary application, the applicant protects its position under the leniency programme of the NCA concerned for the alleged cartel on which it has submitted, or is in the process of submitting, a leniency application to the Commission. Summary applications will be possible irrespective of the applicant's position(s) in the leniency queue at the Commission and the NCA, i.e. in Type 1A, Type 1B and Type 2 applications.
43. If the applicant files a summary application before 'well placed' NCAs, in accordance with paragraph 24 of the ECN Model Programme, each NCA concerned will grant the applicant a summary application marker. The summary application marker aims at protecting the applicant's position under the leniency programme before the concerned NCAs, in particular during the phase of case allocation. As concerns Type 1A or Type 1B summary applicants, the summary application marker will mean that, if it is perfected at a later point in time, in particular after a reallocation of the case to the NCAs concerned, all information then provided to the NCAs concerned will be deemed to have been submitted by the applicant to the respective NCAs at the time of the summary application marker. Type 2 summary applications will be assessed in the order created by summary application markers, insofar as relevant under the applicable leniency programme.
44. A summary application is an application for leniency and CAs having received such an application are entitled to exchange information without the consent of the applicant, in accordance with paragraph 41(1) of the Network Notice.
45. The NCAs will not process summary applications, i.e. they will not grant or deny conditional immunity or leniency. They will only (a) acknowledge receipt to the applicant, (b) grant the applicant a summary application marker and (c) confirm that the applicant would have a given period of time in which to complete the application, should the NCA at any point later request the applicant to make a full application. In addition, if the summary applicant is the first applicant in respect of the alleged cartel at the NCA concerned (i.e. in Type 1A or Type 1B cases), the NCA will inform the summary applicant accordingly.
46. As long as the CA has not decided to take action in the case, the applicant's duty to provide further information and generally assist with the investigation only exists towards the Commission. However, since the scope of a summary application marker is essentially determined by the content of the leniency application, applicants should consider the following. From a substantive point of view, a summary application should be a proper summary of the leniency application submitted at the Commission. Therefore, if a leniency applicant has received a summary application marker from an NCA, and it subsequently provides information and evidence to the Commission which indicates that the alleged cartel is significantly different in scope than reported

to the NCAs in its summary applications (for example, it covers an additional product), the applicant should consider updating the NCAs where it has filed summary applications in order to keep the scope of its protection at the NCAs identical to the scope of protection at the Commission. The duties specified under paragraphs 13(2)(d) (no destruction, falsification or concealment) and 13(2)(e) (no disclosure of contents or existence of the application) of the ECN Model Programme will also be owed to the NCA which has received the summary application.

47. In addition, the applicant must comply with any specific additional information requests of an NCA which has received a summary application in particular for the NCA to reach an informed view on the issue of case allocation. Failure to comply with such requests by an NCA fully and expeditiously would result in loss of the summary application marker. If the applicant is requested by an NCA to perfect the summary application into a full application, the applicant must submit to the NCA all information and evidence that relates to the alleged cartel. Normally, this would require the applicant to provide NCAs with all information and evidence that it has also supplied to the Commission. In this context, applicants are encouraged to verify the requirements applicable under the relevant leniency programmes with the NCAs concerned. Moreover, the applicant shall provide the NCA with any additional information that may be required under the relevant leniency programme.
48. The timing of the termination by the applicant of its participation in the cartel in summary application cases is for the Commission to determine.
49. The ECN Model Programme lists the information which must be contained in a summary application. Firstly, the information and the level of detail must be sufficient to enable the CA to decide whether it wants to act in the case. Secondly, it must allow the CA to determine whether the applicant should be granted a summary application marker. NCAs agree to show flexibility (to the extent legally permissible) as to the language(s) in which summary applications can be made. **Annex 1** to the explanatory notes contains a template in English that applicants may use when preparing a summary application. Applicants should duly consider the applicable language requirements when submitting a summary application.

#### ***Statements under the leniency programme and oral procedure***

50. The ECN members are strong proponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a CA in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CAs' leniency programmes, could undermine the effectiveness of the CAs' fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated. Experience has so far shown that it is more likely that discovery orders will be

made in cases which the Commission is particularly well placed to deal with than in cartels that are limited to a certain region or a certain Member State.

51. In order to limit any such negative consequences for the CAs' leniency programmes, the ECN Model Programme allows for oral applications (summary, marker or full applications) in all cases where this would appear to be justified and proportionate. Oral applications are always justified and proportionate in cases where the Commission is particularly well placed to act under paragraph 14 of the Network Notice. Some CAs will accept oral applications without requiring the applicant to demonstrate that its request is justified and proportionate.
52. The ECN Model Programme also stipulates that no access will be granted to any records of any statements (oral and written) before the statement of objections has been issued. In addition, given the differences in the rules concerning access to the file and/or public access to documents in the various jurisdictions, the ECN Model Programme stipulates that the exchange of records of statements (oral or written) between CAs is limited to cases where the protections afforded to such records by the receiving CA are equivalent to those afforded by the transmitting CA.

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