The European Competition Network
Achievements and challenges – a case in point: leniency

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1. Introduction
Council Regulation 1/2003 (1) entered into force on 1 May 2004 and with that a new antitrust enforcement regime in the EU. This article will look at the first achievements of the European Competition Network (ECN), set up as the vehicle to ensure effective and coherent application of Community competition rules in the modernised enforcement system. Special focus will be given to the work undertaken in the leniency field, as a good example of how the ECN can foster a common competition culture beyond the coherent application of EC competition law in a particular case. (2)

The foundation of the new antitrust enforcement regime under Regulation 1/2003 (3) is a system of parallel competences and flexible case-allocation rules. In practical terms, this means that any well placed authority can take action in a case. Indicative, non-binding rules explaining when an ECN member is well placed to act are set out in the Commission Notice commonly referred to as the Network Notice. (4) The Commission is always well placed to act and in certain circumstances even particularly well placed to do so. (5)

Regulation 1/2003 sets out three mechanisms to ensure a coherent application of the Community antitrust rules; namely the obligation to apply Community law whenever there is an effect on trade in a manner that ensures convergence between national and Community law (Article 3), the obligation to inform the Commission at least 30 calendar days before an envisaged decision (Article 11(4)) and the possibility for the Commission to intervene if there is a risk of incoherence, by relieving the national competition authority of its competence to act (Article 11(6)).

The ECN neither decides which cases should be pursued nor which authority/authorities would be well placed to do the investigation. It is a forum in which the competition authorities can exchange information, share experiences, support and assist one another in fact-findings and investigations.

2. First achievements: an efficient handling of individual cases
As far as individual cases are concerned, the ECN provides a flexible framework for an efficient allocation of cases, a mutual assistance between competition authorities in their investigations and a consistent application of EC competition rules. From this triple perspective, the first two years of experience of the system are extremely promising.

2.1. Allocation of cases
The ECN can present an impressive result of enforcement actions during the first two years. More than 560 cases have been reported in the common ECN case-management system and the Commission has within this time period reviewed more than 130 envisaged decisions pursuant to Article 11(4). (6)

The first experiences of the work-sharing within the Network have confirmed that the flexible and pragmatic approach introduced by the Regulation and the Network Notice functions very well in practice. There are relatively few cases where case-allocation discussions have at all been needed and even less occasions where a case has changed hands. The situations where work-sharing has played a role to date, is typically where a complainant or a leniency applicant have chosen to contact both the Commission and one or more national competition authorities. The experiences have shown that the ECN is well equipped to identify attempts of forum-shopping and likewise equipped to

(2) For a detailed analysis, see also ‘Antitrust Reform in Europe: a year in practice’, IBA 2005.
(5) This would for example be the case where the infringement has effects in more than three Member States or where there is a need to adopt a Community act to develop EC competition policy (Network Notice paragraph 14-15).
(6) DG Competition publishes aggregated statistics of cases reported in the common ECN case-management system on its website www.europa.eu.int/comm/competition.
avoid unnecessary duplication of work. It has also manifested the ECN members’ readiness to solve case-allocations issues in a manner that ensures the most efficient work-sharing arrangement for a particular case.

2.2. Mutual assistance

The instruments created by Regulation No 1/2003 in order to foster mutual assistance between Network members have also had a promising start. There have already been numerous cases where national competition authorities have assisted each other in different fact-finding measures. This greatly enhances the overall efficiency of all ECN members. Exchanges of market information and intelligence at an early stage have also enabled the ECN to uncover European-wide cartel arrangements that might otherwise have remained undetected.

2.3. Consistent application of EC competition law

The practical experience with the information obligations under Article 11(4) has been very encouraging. The Commission has to date not used the possibility of relieving a national competition authority from its competence by initiating formal proceedings under Article 11(6) following a consultation pursuant to Article 11(4). The Commission has, however, on several occasions used the possibility provided for in the Network Notice to submit observations on a case. This has proven to be a useful tool that has triggered creative, informative and productive dialogues with the concerned national competition authority. It is however important to underline that every case is investigated and decided under the full and sole responsibility of the authority dealing with the case.

3. Towards a greater degree of convergence of procedural rules?

The example of leniency

The first two years have shown that the ECN cooperation mechanisms also contribute to fostering a common competition culture within the ECN and work as a catalyst for further convergence.

A significant level of convergence of national laws towards Community law — over and beyond legal obligations of implementation — has already been achieved. The trend towards the abolition of the notification system at national level is a clear example thereof. Another area where a considerable convergence has already taken place is the alignment of national investigative powers to those of the Commission. (7) But the most prominent example of how the sharing of experiences within the ECN can influence national policy considerations and streamline national procedures is certainly the current developments in the field of leniency.

The Commission and 18 Member States operate leniency programmes in the EU today. (8) Seven of these programmes were adopted after Regulation 1/2003 entered into force. There are moreover ongoing reflections in four of the remaining six Member States. This trend can only be wholeheartedly welcomed by both competition authorities and the business community. Leniency programmes have proven to be efficient and successful tools in the ECN members’ fight against hard core cartels. Despite this very positive evolution, the current system could still be improved.

3.1. The current system: strict safeguards for leniency related information (9)

Regulation 1/2003 did not introduce an EU-wide leniency policy and did not harmonise the substance and procedures of existing programmes. The new possibilities under the Regulation to exchange and use information in evidence did, however, require certain measures to ensure that the leniency applicant remains protected when information is shared within the ECN. For that reason, two sets of special safeguards were introduced in the Network Notice concerning leniency related information. (10)

The first ensures that leniency related information submitted to the ECN pursuant to Article 11 of Regulation 1/2003 cannot be used by other ECN members to start an investigation. It is understood by the ECN members that this commitment covers all forms of communications about such cases, not

(7) This concerns different aspects such as the power related to on the spot investigations (power to seal business premises, books and records; power to inspect non-business premises), as well as the power to adopt interim measures, commitment decisions or to make general sector enquiries.

(8) A list of all ECN authorities which operate a leniency programme is published on DG Competition’s website (www.europa.eu.int/comm/competition.)


(10) See paragraphs 39-42 of the Network Notice. Leniency related information covers not only the leniency application itself, but all information that has been collected following any fact-finding measures that could not have been carried out except as a result of the leniency application.
only the specific information which is submitted to the common case-management system in order to comply with the information obligation in Article 11(3) of Regulation 1/2003. The obligation not to use leniency related information to start an investigation applies irrespective of whether the authorities intend to apply EC competition law, national competition law or any other provisions.

ECN members that want to use leniency related information from other ECN members either as intelligence or as direct use in evidence have to request it under Article 12 of the Regulation and start their investigation upon receipt of the information. Such request will trigger the second set of safeguards in the Network Notice. Pursuant to these safeguards, information submitted by a leniency applicant or collected on that basis, may only be exchanged between two authorities in the following circumstances:

— The applicant consents to the exchange;
— The applicant has applied for leniency with both authorities in the same case;
— The receiving authority commits in writing not to use the information received or any information collected 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.

In practice, these safeguards enable the authorities to exchange and use in evidence leniency related information without jeopardizing their respective programmes. The first experiences show that all ECN members apply the rules strictly and with caution. A leniency applicant can therefore rest assured that it will not expose itself to any additional risks by voluntarily disclosing information to a Network member.

3.2. Current system – deficits and scope for improvements

The current system protects adequately leniency applicants but entails however certain deficits, both from the perspective of the applicant and from the perspective of the authority.

As mentioned above, the enforcement system under Regulation 1/2003 is a system of parallel competences with flexible case-allocation rules. This has certain consequences for the handling of leniency cases within the ECN. First, in the current system, an application for leniency to a given authority is not to be considered as an application for leniency to any other ECN member. (11) Secondly, the fact that an authority would, according to the case-allocation criteria, appear particularly well placed to deal with a case does not prevent another well placed authority from acting. In order to be fully protected, an applicant must therefore apply for leniency with all authorities that could realistically pursue a case against it. It should be underlined that Regulation 1/2003 has in this respect not created any risks for the immunity applicant that did not already exist before 1 May 2004.

Apart from the fact that such multiple filings impose a certain burden on both applicants and authorities, there are currently also a number of discrepancies between the various ECN programmes. Such discrepancies relate to the conditions to obtain immunity or leniency, to procedural aspects as well as to the level of protection afforded under the respective programmes. Since a potential applicant might be hesitant to go lenient if the leniency policy in one jurisdiction is not sufficiently attractive, these discrepancies can have important consequences for both applicants and authorities.

3.3. Next steps – towards a uniform leniency system?

The ECN members are working ambitiously together to guarantee that discrepancies between the various programmes and the flexible enforcement system do not dissuade applicants from coming forward.

Some results have already been achieved in this respect. To start with, the ECN members have agreed on a mechanism that should ensure that applicants are not exposed to conflicting demands under the various programmes. The only example of a truly conflicting demand that has so far been detected is where one authority would require the applicant to immediately stop its cartel activities whereas another would request it to continue in order not to endanger the investigation. Should this materialise in an individual case, the ECN members have agreed on a mechanism that should ensure that the authorities would use their discretion to order termination in such way that a conflicting demand would not arise in the concrete case.

The sharing of experiences of the practical handling of leniency cases has also streamlined and improved the procedure applied by individual authorities in their contact with leniency applicants, for example with regard to oral applications and access to file issues. Such discussions have also fine-tuned the handling of leniency cases within the ECN to ensure that parallel leniency cases are dealt with in the most efficient manner.

(11) See paragraph 38 of the Network Notice.
The next step would be to reduce the burden associated with multiple filings, to reduce the discrepancies between the existing leniency programmes and to ensure that all NCAs operate such programmes. All these issues are currently being thoroughly discussed within the ECN.

As concerns the issue of multiple filings, it would appear feasible to design a system that would allow leniency applicants to protect their position within the Network without having to provide full and complete information to all Network members that could pursue a case against it. Indeed, some national competition authorities already accept short form pro forma applications in cases where the Commission is investigating the case. This does not mean that one Network member would be designated to receive all applications with binding effects for the rest. In a system of parallel competences, multiple filings are to a certain extent necessary, since more than one authority may decide to investigate the case and would need the information upfront. The level of information that must be given to such authorities that will in the end not deal with the case is, however, a different issue.

Apart from streamlining the filing process within the ECN, it would also appear useful to align, to the extent possible, the conditions and procedures of the different programmes. This would help potential applicants in deciding whether to come forward and would facilitate their applications once they have decided to do so.

**Conclusion**

The first experiences of the competition authorities’ cooperation within the ECN have been very positive. The work-sharing and information exchanges have resulted in an enhanced, strategic and coherent application of Community competition rules. The ECN members have shown a readiness to hear and learn from other competition authorities and to openly discuss general policy issues as well as individual cases. One can already observe the influence that the ECN has had on policy reflections beyond what is required under Regulation 1/2003. The growing convergence of national procedural rules and the work in the leniency field are good examples of this. By sharing the knowledge of a particular sector or the experiences of a particular competition issue, the ECN members will continue to shape a common competition culture and to streamline the way their respective investigations are carried out.

The ECN has proven to be well-equipped and ready to deal with the opportunities and the challenges of the new antitrust enforcement regime. The achievements reached so far give an indication of the enormous potential that this unique and revolutionary cooperation form can have when it is used to the fullest.