The state of ECN leniency convergence

Vita Juknevičiūtė, Jeroen Capiau (1)

1. What was the rationale for convergence and what is the state of play?

On 13 October 2009, the heads of the national competition authorities making up the European Competition Network (ECN) endorsed a Report assessing convergence in the field of leniency (2). The report reviews the state of ‘convergence of ECN members’ leniency programmes with regard to the provisions of the ECN Model Leniency Programme.

On 29 September 2006, the ECN Model Leniency Programme (3) (the ‘Model Programme’) was endorsed by the ECN members. The Model Programme is a unique document providing a basis for ‘soft harmonisation’ of members’ leniency programmes. It is not legally binding; however, the national competition authorities made a political commitment to use their best efforts to align their leniency programmes with it or, if they did not have any, to introduce aligned programmes (4).

The Model Programme was an important step towards a harmonised leniency system within the European Union. The nature, content and political endorsement of the Model Programme went far beyond what was achieved through more traditional forms of international cooperation.

Such harmonisation is based on the premise that EU leniency programmes are interdependent and that their overall success depends on the ECN. Leniency instruments operate in the system of parallel competences in which national competition authorities are active enforcers of Articles 101 and 102 TFEU alongside the Commission. A logical consequence of such a system is that leniency programmes may apply in parallel and the applicant may need to file an application with more than one authority (5). In such a system, harmonisation of the key elements of leniency policies and a joint response to alleviate the burden of multiple filings through the instrument of summary applications (6) enhances the attractiveness of leniency programmes. On the other hand, leniency programmes must properly serve authorities in their efforts to detect and terminate cartels and to punish cartel participants.

As an integral part of the Model Programme (7), it was agreed that the state of convergence of ECN leniency programmes was to be assessed no later than at the end of the second year after the publication of the Model Programme. In the course of 2006-2009, a significant process of alignment with the Model Programme took place. Just three years after the endorsement of the Model Programme, the report assesses the state of convergence and concludes that work within the ECN has encouraged leniency convergence. The report reviews in detail textual convergence on provisions of the Model Programme. Before reviewing those findings, this article briefly recapitulates the content of the Model Programme.

2. The content of the Model Programme (8)

The Model Programme was designed to address problems arising from the co-existence of different leniency programmes in a system of parallel competences within the EU (9). To ensure that such a system fosters efficient enforcement against cartels, discrepancies among different leniency programmes would require a certain degree of harmonisation. The Model Programme was designed with a two-fold purpose. First, to remove certain discrepancies between various programmes concerning the treatment which potential applicants can anticipate from

(1) The content of this Article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.
(2) The report is available at http://ec.europa.eu/competition/ecn/documents.html. The ‘ECN’ is the Network of Competition Authorities of the European Union, i.e. national competition authorities and the European Commission.
(4) The Model Programme explicitly recognises that not all national competition authorities have the power to implement changes in their national leniency programmes as this power is held by other bodies; see point 9 of the Explanatory Notes to the Model Programme.
(5) As explained in paragraph 38 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43 (the ‘Network Notice’), it is for the applicant to decide whether it wants to protect itself under more than one leniency programme.
(6) See section 2 of this article.
(7) See point 31 of the Model Programme.
(8) See also C. Gauer and M. Jaspers, ECN Model Leniency Programme — a first step towards a harmonised leniency policy in the EU, CPN Spring 2007, pp. 35-38.
(9) Detailed Explanatory Notes accompany the Model Programme and provide more detailed guidance on the various provisions.
The Model Programme was drafted as a document setting out the essential procedural and substantive elements that the ECN members believe every leniency programme should contain. However, the Model Programme is not a programme as such under which applicants could apply for leniency. It endorses the political commitment of the ECN members to implement those rules in their leniency programmes (10).

The Model Programme sets out principles concerning a number of substantive issues including the scope of leniency programmes, the exclusion of certain applicants from immunity, the type of information immunity applicants should provide and a coherent set of duties of leniency applicants. It also contains certain procedural conditions covering, for instance, anonymous guidance, the introduction of a marker system, the time and manner for competition authorities to take a position on applications and the availability of oral applications.

The Model Programme also introduced an innovative system of summary applications in order to alleviate the burden for the applicant in filing parallel immunity applications with the Commission and several national authorities and for the national authorities in processing them. This form of application is only available for so-called ‘type 1A’ immunity in cases where the Commission is ‘particularly well placed’ to deal with the case (11). It allows undertakings to file a full immunity application with the Commission and summary applications with the national competition authorities. The summary application works as an indefinite marker protecting the position of the applicant as the first in the leniency queue with the national competition authorities concerned. National authorities will not process the application but only confirm that the applicant is the first to file with them, if this is the case. If a national competition authority decided to take action, it would give the applicant a certain period to complete its application. The Model Programme also contains detailed rules on the information required in a summary application in order to achieve a uniform standard.

3. Main findings of the report

3.1. Concept of ‘convergence’

For the purpose of the Model Programme and the Report, convergent provisions are not only those which are identical or equivalent to the Model Programme. Programmes with more favourable or more detailed provisions are also considered convergent with the Model Programme. Such specific features should, however, be without prejudice to the principal objectives of the Model Programme.

3.2. Overall state of convergence

The report reviews the state of convergence and concludes that the work within the ECN was a major catalyst in encouraging Member States to introduce leniency programmes and in promoting convergence between them. At the date of the report, 25 Member States (all except Malta and Slovenia) and the European Commission operated leniency programmes (12). The first Slovenian leniency programme started operating on 1 January 2010; the Maltese competition authority is considering introducing a leniency programme in the near future. During the reporting period, a significant process of alignment with the Model Programme took place.

ECN members essentially followed the key features of the Model Programme: defining the scope of application of programmes, thresholds for leniency, introducing a marker system, the possibility of summary applications and of oral submissions as well as introducing aligned conditions for leniency. There still appeared to be some divergences in the ECN concerning certain aspects of the Model Programme. At the time the report came out the efforts towards convergence were still on-going however.

The report observes that the convergence of leniency programmes is a tool to enhance the effectiveness of leniency programmes within the Network. In this context, convergence of certain elements plays a crucial role, while other elements serve to facilitate the functioning of programmes. In particular, incentives for filing immunity applications, the obligation to grant immunity automatically if the established

(10) See footnote 3 above.
(11) Type 1A immunity refers to situations where the undertaking is the first to submit evidence which in the authority’s view enables it to carry out targeted inspections provided that at the time of submission the authority did not have sufficient evidence to initiate an inspection. Concerning the criterion where the Commission is ‘particularly well placed’ to deal with the case, see paragraph 14 of the Network Notice.

Footnote 12: In the report, Estonian laws were not assessed. At that date, the Estonian Code of Criminal Procedure contained a provision of a general nature that allowed lenient treatment for any kind of criminal offence, including participation in a cartel, but did not lay down detailed specific rules. On 20 January 2010, a law was adopted amending the Competition Act, the Penal Code and the Criminal Procedure Code. The amending law came into force on 27 February 2010. This law introduces a specific detailed leniency programme in Estonia.
conditions are met, the narrow scope of exclusions from immunity, conditions for the immunity marker, and the oral procedure are pertinent elements. As regards the system of summary applications, in order to optimally achieve its aim of alleviating the burden of multiple filings, the uniform and widespread functioning of this system is essential.

3.3. Substantial findings

The Model Programme concerns secret cartels. These are difficult to detect by other means. The report finds that all leniency programmes in the ECN cover secret cartels. A few programmes apply to a wider range of infringements.

The Model Programme stipulates that coercers of a cartel are excluded from immunity (but not from a reduction in fines). The scope of this exclusion is narrow, so as to avoid creating uncertainty for potential applicants. The report finds that about half of the programmes have convergent provisions and exclude coercers from immunity without excluding additional types of immunity applications. However, several programmes exclude more applications from immunity than provided for in the Model Programme. Two programmes are more favourable in this respect: immunity is also available to coercers.

Most leniency programmes contain an equivalent evidential threshold for immunity to that stipulated in the Model Programme. Most of the programmes also contain equivalent conditions for leniency. The Model Programme stipulates among other leniency conditions that the applicant must end its involvement in the alleged cartel immediately following its application save to the extent that its continued involvement would, in the authority's view, be reasonably necessary to preserve the integrity of the authority's inspections. Equivalent requirements are applicable under 18 assessed leniency programmes. According to five leniency programmes, however, the applicant must end its involvement in the cartel following the application without the exception stipulated in the Model Programme.

3.4. Procedural findings

The Report also reviews the state of convergence concerning the set of procedural rules stipulated in the Model Programme. It finds that 20 leniency programmes provide for a marker system. Most leniency programmes (16 of them) introduced a discretionary marker system, as provided for in the Model Programme. Full leniency applications are accepted orally under 19 leniency programmes while oral summary applications are accepted under 17 programmes. Most programmes provide for the necessity to make an explicit application for leniency and stipulate that immunity will be granted or rejected in writing. Nearly all programmes also provide that the applicant for a reduction in fines will be informed in writing of the authority's intention to apply such a reduction.

Importantly, on the date of the report summary applications were accepted under 23 leniency programmes, of which 20 required equivalent information to that stipulated in the Model Programme.

4. Conclusion

The report shows that the work within the ECN has been a major driving force in promoting convergence between members' leniency programmes. The report highlights the achievements in the field of leniency convergence; its findings should serve as a basis for reflections as to whether any further convergence is needed.

See point 13 of the Model Programme.

The Czech, Greek, Finnish, Luxembourg and Polish programmes; see point 41 of the report and in particular footnote 44. In Greece, Finland and Luxembourg, there are legislative proposals pending concerning this condition.

When this article was drafted, summary applications were available under 24 leniency programmes: from 1 January 2010, the Slovenian leniency programme becomes operational and it includes inter alia the possibility to submit a summary application for immunity, see the article ‘Slovenia: Leniency Programme starts functioning from 1 January 2010’ in the first edition of the ECN Brief, available at http://ec.europa.eu/competition/ecn/brief/index.html. A list of national competition authorities accepting summary applications is available at http://ec.europa.eu/competition/ecn/list_ofAuthorities.pdf.

In particular, 13 programmes do not limit their scope to ‘secret’ cartels but cover all cartels: BE, ES, FI, FR, HU, IT, LU, LV, NL, PL, RO, SE, UK. The Luxembourg Competition Council has discretion as to whether or not to grant leniency to non-secret cartels on a case-by-case basis. See paragraphs 15-16 of the Report.

See point 22 of the Explanatory Notes to the Model Programme.

The Finnish and Italian programmes. However, there is a legislative reform pending in Finland to exclude coercers from immunity.