Leniency following Modernisation: safeguarding Europe’s leniency programmes

Stephen BLAKE, Directorate-General for Competition, unit E-2 and Dominik SCHNICHELS, Directorate-General for Competition, unit A-4 (1)

1. Introductory

With the entry into application of Council Regulation No 1/2003 (2), the first of May 2004 not only marked the expansion of the European Union from fifteen to twenty-five Member States but also ushered in a new era in the enforcement of European competition law. For the first time not only the Commission but also the national competition authorities of the Member States (NCAs), together with national courts, have the power within their respective territories to apply the competition rules of the Treaty in full (3). Moreover, when applying their national competition law to conduct which is in breach of those rules, the NCAs and national courts are now obliged also to apply Articles 81 or 82 of the Treaty (4). National merger laws are excluded from these provisions.

The public enforcement of Articles 81 and 82 is thus the shared responsibility of the Commission and the NCAs, which together form a network of public authorities known as the ‘European Competition Network’ (ECN). Save where they judicially review the decisions of NCAs, the role of the national courts, on the other hand, is largely confined to the sphere of private enforcement (5).

Under the Regulation the Commission and the NCAs are required to apply the European competition rules in close cooperation (6). To facilitate this and, in particular, to ensure the efficient division of work and the effective and consistent application of the rules, the Regulation makes a number of detailed provisions for the sharing of information and consultation about cases and for the exchange of information for use in evidence (7). The Regulation also makes provision for cooperation between the Commission and NCAs on the one hand, and the national courts, on the other (8).

This article is concerned with one aspect of this new regime, namely the implications for leniency applicants whether under the Commission’s leniency programme or that of an NCA (9).

2. General principles

Article 23 of Regulation 1/2003 sets out the sanctions which may be imposed by the Commission for breaches of Articles 81 and 82 of the Treaty. As regards the sanctioning powers of the NCAs, on the other hand, the Regulation provides only that NCAs may ‘take ... decisions ... imposing fines, periodic penalty payments or any other penalty provided for in their national law’ (10). The sanctioning regimes of the Commission and the NCAs are not, therefore, harmonised by the Regulation. In the case of the NCAs this is left to be determined by the national laws of the relevant Member State.

---

(1) Special thanks to Eddy de Smijter (unit A-4) and Petra Krenz (unit A-4) for their assistance in the preparation of this article.
(3) Articles 5 and 6 of the Council Regulation.
(4) Article 3 of the Council Regulation.
(5) The structure of the NCAs varies between Member States. In a number of Member States the various functions of the NCA are divided between different bodies which in some cases include a court. References in this article to national courts do not include such courts when they act as an NCA.
(6) Article 11(1) of the Council Regulation.
(7) Articles 11, 12 and 14 of the Council Regulation.
(8) Article 15 of the Council Regulation.
(9) The term ‘leniency programme’ is used in this article to describe all programmes which offer either full immunity or a significant reduction in the penalties which would otherwise have been imposed on a participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case, and does not cover reductions in the penalty granted for other reasons. This definition is the same as that used in the Commission notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, page 43). The Commission’s leniency programme is set out in the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, page 3).
(10) Article 5 of the Council Regulation.
Consistent with this approach, the decision as to whether or not to adopt a leniency programme, together with the precise terms of any such programme, is also left to each ECN member, acting within the limits of the laws to which it is subject. Thus, whilst leniency programmes have been adopted by the Commission and in a significant number of Member States, this is not universally the case (1). By the same token, the precise terms of the leniency programmes which have been adopted, although sharing many features in common, are not identical.

It follows from this that there is no leniency programme common to all ECN members to which a cartel participant may apply. Equally, an application for leniency to one authority will not count as an application for leniency to another authority. As a result, a prospective leniency applicant may be advised to apply to more than one authority within the ECN.

Although this has attracted criticism on the part of some businesses and their advisers (2), it is important to recognise that in this respect the situation since 1 May 2004 is no different from that which existed previously. Whilst prior to 1 May NCAs would not necessarily have applied European competition law (3), cartel members, then as now, nevertheless risked being sanctioned by the NCAs whose territories were affected by the infringement, if not under the European competition rules then under the national competition law (5). Not all NCAs were empowered to do so by their national legislation. Others were so empowered, but were also free to apply only their national competition law.

The latter invariably included provisions modelled on Articles 81 and 82. Article 9(3) of Council Regulation No. 17/62 (OJ 13 of 21.2.1962, page 402), which Regulation 1/2003 replaced, provided that the NCAs of the Member States remained competent to apply Articles 81(1) and 82 ‘as long as the Commission [had] not initiated any procedure under Articles 2 [(negative clearance)], 3 [(termination of infringements)] or 6 [(decisions pursuant to Article 81(3)] of that Regulation’). The Regulation was silent, however, on the application by the NCAs of their national competition law (see case 14/68 Walt Wilhelm (1969) ECR 1, paragraph 3).

3. The exchange of leniency information within the ECN

Leniency applicants by definition volunteer self-incriminating information concerning a cartel or cartels in which they have participated. They do so in exchange for either full immunity or a significant reduction in the penalties which would otherwise have been imposed. In many cases the application also triggers the initiation of an investigation which would not otherwise have taken place. Actual or potential leniency applicants are understandably sensitive about the subsequent disclosure both of the information which they have volunteered and of information which the authority’s investigation later uncovers and which, but for the leniency application would not have come to light.

The provisions for the exchange of information within the ECN are, therefore, not surprisingly a source of potential concern for leniency applicants. Recognising the need to avoid discouraging cartel members from applying for leniency, the Commission and NCAs have sought to address these concerns via the Commission notice on cooperation within the Network of Competition Authorities (the Network notice) (6). The Network notice addresses two possible concerns. The first potential concern is that as a result of the cooperation provisions in Article 11 of the Regulation a leniency application to one authority within the ECN might trigger an investigation by another ECN member to which the applicant has not also applied for leniency. The second potential concern is that the information which a leniency applicant has volunteered to one authority within the ECN, together with any information which that authority may obtain as a consequence, might be transmitted to another ECN member under Article 12 of the Regulation and used as evidence to impose sanctions on the applicant.

(3) Not all NCAs were empowered to do so by their national legislation. Others were so empowered, but were also free to apply only their national competition law.
(4) The latter invariably included provisions modelled on Articles 81 and 82.
(5) Article 9(3) of Council Regulation No. 17/62 (OJ 13 of 21.2.1962, page 402), which Regulation 1/2003 replaced, provided that the NCAs of the Member States remained competent to apply Articles 81(1) and 82 ‘as long as the Commission [had] not initiated any procedure under Articles 2 [(negative clearance)], 3 [(termination of infringements)] or 6 [(decisions pursuant to Article 81(3)] of that Regulation’). The Regulation was silent, however, on the application by the NCAs of their national competition law (see case 14/68 Walt Wilhelm (1969) ECR 1, paragraph 3).
3.1. Article 11

Under Article 11(3) of the Regulation, an NCA when acting under Article 81 or 82 must inform the Commission before or without delay after commencing the first formal investigative measure. The Regulation also provides that the information may be made available to other NCAs. The Commission has accepted a similar obligation to inform NCAs under Article 11(2) of the Regulation. In practice, this will be done in each case by means of the completion of a standard form containing limited details of the case, such as the authority dealing with the case, the product, territories and parties concerned, the nature and suspected duration of the alleged infringement and the origin of the case. With one important exception (see below), the information thus submitted will be made available to all ECN members (1).

These provisions apply equally to cases that have been initiated as a result of a leniency application. In such cases, however, the Network notice provides that the information thus submitted to the ECN may not be used by another ECN member as the basis for starting an investigation on its own behalf, whether under Articles 81 or 82 or, in the case of NCAs, under their national competition or other laws (2).

Another ECN member will not be precluded from investigating the case altogether. It will still be free to open an investigation if it receives sufficient information to enable it to do so from another source, such as a complainant, an informant or another leniency applicant. It would not, however, be able to solicit such information. Moreover, it is important to appreciate that the risk to the leniency applicant of another authority independently receiving information and initiating an investigation on its own behalf is not a consequence of Regulation 1/2003. Rather, the same risk existed before 1 May 2004 and is quite independent of and separate from the cooperation provisions of the Regulation.

What is new to the Regulation, however, is the possibility for another ECN member, irrespective of whether or not it has received information from an independent source, to ask the authority to which the leniency application was made to provide it with information under Article 12 of the Regulation. This is the second potential concern for leniency applicants that is addressed by the Network notice.

3.2. Article 12

Under Article 12 of the Regulation ECN members may exchange information and use it in evidence for the purpose of applying Articles 81 or 82. This is an enabling power; there is no duty on an ECN member to transmit information to another member under Article 12. The Network notice sets out how ECN members will exercise their discretion under Article 12 in relation to leniency cases (3).

These provisions of the Network notice apply to two categories of information. The first category covers information that has been voluntarily submitted by a leniency applicant. The second category covers information obtained during or following an inspection or by means of any other fact-finding measure which, in each case, could not have been carried out except as a result of a leniency application.

Under the Network notice, such information may only be transmitted under Article 12 of the Regulation in one of three (4) circumstances (5).

- The first circumstance in which such information may be transmitted to another ECN member is where the leniency applicant has consented to the transmission of the information which it has voluntarily submitted as part of its leniency application (6).
- The second circumstance is where the ECN member requesting transmission of the infor-

(1) See also paragraphs 16 to 19 of the Network notice.
(2) Paragraph 39 of the Network notice.
(3) Paragraphs 40 and 41 of the Network notice.
(4) For the avoidance of doubt, the Network notice also makes explicit that where information has been collected by an ECN member under Article 22(1) of the Regulation on behalf of the ECN member to which the leniency application was made, such information may be transmitted to the latter authority, notwithstanding that the information might otherwise technically be covered by the restriction on the transmission of information obtained during or by means of an inspection or other fact-finding measure that could not have been carried out except as a result of the leniency application.
(5) These conditions will apply to the protected information irrespective of whether or not the applicant meets the criteria for leniency under the programme of the relevant authority; suffice it that the information was either voluntarily submitted as part of a leniency application or was obtained as a result of or following an inspection or other fact-finding measure that could not have been carried out but for such an application.
(6) It should be noted that the transmission of information under Article 12 of the Regulation does not normally require the prior consent of the party that provided the information. This also applies to confidential information. Such information is protected by the provisions of Article 28 of the Regulation.
Information has also received a leniency application relating to the same infringement from the same applicant. Thus, once a leniency applicant has made the decision to apply to more than one authority within the ECN, it must accept that the authorities to which it has applied will no longer require its consent in order to exchange information amongst themselves. The one proviso to this is that at the time the information is transmitted it must not be open to the applicant to withdraw its leniency application from the authority to which the information is to be transmitted (1).

- The third circumstance is where the authority to which the information is transmitted has given certain guarantees concerning the use to which the information, or any information which it may subsequently obtain, may be put.

The guarantee which an authority must give in order to receive protected leniency information in circumstances where the leniency applicant has neither consented to the transmission of the information nor made a parallel application to that authority is very wide. The authority requesting transmission of the information must guarantee that not only the information transmitted to it but also any other information that it may subsequently obtain, will not be used either by it or by any other authority to which the information is subsequently transmitted to impose sanctions on any of the following: the leniency applicant; any other person covered by the transmitting authority’s leniency programme (for example, the subsidiaries of the applicant); or any employee or former employee of either of the former two. It follows from this that, unless the receiving authority was already in possession of sufficient evidence to impose a sanction on the transmitting authority’s leniency applicant, the guarantee will de facto confer on the latter immunity from any fine which the receiving authority might otherwise have imposed on it (2). A copy of the guarantee will be provided to the leniency applicant.

### 3.3. Enforceability of the Network notice

The Network notice is a Commission notice. As such, the provisions described above will create legitimate expectations on which leniency applicants may rely but only insofar as the Commission is concerned. The Network notice alone does not bind NCAs.

For this reason, where a case has been initiated as a result of a leniency application the Network notice provides that any information relating to that case which has been submitted to the Commission under Article 11(3) of the Regulation will only be made available to those NCAs that have committed themselves to respecting the principles set out in the Network notice. The same applies where a case has been initiated by the Commission as a result of a leniency application under the Commission’s leniency policy (3).

All of the NCAs have been invited to sign a declaration, acknowledging the principles of the notice and declaring that they will abide by them. The terms of the declaration are set out as an annex to the Network notice. With only a few exceptions, all of the NCAs had done so by 1 May 2004. These include all of the NCAs that operate a leniency programme. Thus, irrespective of the NCA to which the application was made, protected leniency information will only be transmitted to another ECN member in one of the three circumstances described above.

A list of the authorities that have signed the declaration is published on the Commission's website (4). Those NCAs that have not yet done so will be free to opt in at a later stage.

### 4. Leniency applications to the Commission and Article 11(6)

The other area in which the Regulation has made a difference for leniency applicants is in the provisions of Article 11(6). This article provides that the initiation by the Commission of proceedings relieves the NCAs of their competence to apply Articles 81 and 82. By virtue of Article 3 of the Regulation, the NCAs’ competence to apply their national competition law is also thereby removed. In such cases, leniency applicants to the Commission are arguably placed in a more favourable

---

(1) This proviso is necessary so as not to nullify provisions such as that in the Commission’s leniency programme that allow an applicant for immunity to withdraw its evidence if it fails to meet the requirements for conditional immunity (point 17, Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45 of 19.2.2002, page 3).

(2) This is quite independent of whether or not the applicant qualifies for immunity in the proceedings being brought by the authority that gathered the protected leniency information.

(3) Paragraph 42 of the Network notice.

position under Regulation 1/2003 than they were previously (1).

This does not mean, however, that by applying for leniency to the Commission a leniency applicant can avoid completely the risk of being sanctioned by an NCA, as there is no guarantee that the Commission will necessarily initiate proceedings in the case. Given the very serious nature of cartel infringements, the Commission is clearly likely to do so where the cartel is Europe- or world-wide or where more than three Member States are involved (2). In the case of more local cartels, however, the Commission may choose not to investigate but to focus its limited resources on other cases.

To apply for leniency exclusively to the Commission and rely on Article 11(6) of the Regulation, in particular in the case of a purely national or regional cartel leaves the applicant open to the risk that another cartel member may in the meantime apply for leniency to the relevant NCA or NCAs. If the Commission should choose not to take up the case but to leave it to the NCA(s), the applicant which applied only to the Commission would be likely to find itself at a disadvantage relative to the cartel member that applied to the NCA(s).

5. To which authority or authorities should the leniency application be made?

Any cartel member that is considering whether or not to blow the whistle on a cartel will necessarily as part of the same process need to identify the authority or authorities to which its leniency application should be made. This is necessarily a matter for the cartel member to decide with the benefit of its own legal advice.

In some cases a cartel participant may be advised to apply not only to authorities within the European Union but also to authorities in other jurisdictions, such as, for example, the United States, Canada or Australia. As concerns the European Union, the prospective applicant will need first to identify those authorities which have competence to impose sanctions within the territory affected by the infringement (3). Having excluded those authorities that do not have a leniency programme, it will then need to decide which of the authorities that have jurisdiction over the case is most likely to deal with it (4). Finally, it will need to decide in respect of each authority whether it wants to make an application. This will no doubt be a delicate exercise, taking into account many different factors, including in each case, the risk of otherwise being sanctioned by the authority in question (for example, if another cartel member were to apply to that authority for leniency), the nature and size of the potential sanctions that the authority may impose, the particular terms of the authority’s leniency programme and the costs of making a leniency application to it. The outcome in each case will turn on its particular facts.

Clearly it would be possible for the cartel member to apply to all relevant authorities, thus securing its position under the leniency programme of each authority with jurisdiction to impose sanctions. Businesses and their advisers make the point that this may be both difficult and costly. Realistically, however, an applicant would be unlikely, at least in the vast majority of cases, to need to consider applying for leniency to more than a maximum of four authorities within the ECN, including the Commission. This follows from the principles of case allocation within the ECN set out in the Network notice (5). These envisage the possibility of parallel action by a maximum of two or three NCAs, each acting for its respective territory. Where the effects of the infringement are felt in more than three Member States, on the other hand, the Network notice indicates that the Commission is likely to be considered best placed to act, although there is admittedly no guarantee that it will do so (6).


---

(1) See judgment of the ECJ in Walt Wilhelm (case 14/68 [1969] ECR 1).
(2) See paragraph 14 of the Network notice.
(3) Assuming that trade between Member States is affected and that Article 81 therefore applies these will always include the Commission.
(4) The Commission and the NCAs will apply the principles of allocation as set out in the Network notice at paragraphs 5 to 15. These principles should not be confused with the rules governing jurisdiction. For example, it is possible for several authorities to have jurisdiction in relation to a case, but for those authorities to agree amongst themselves that only one or some of them should deal with it. This will depend in particular on whether the authority or authorities that deal with the case will be able effectively to bring the infringement to an end and, where appropriate, to sanction the infringement adequately.
(5) Paragraphs 8 to 15.
(6) The allocation principles set out in the Network notice are not rules of jurisdiction on which parties can rely. Rather, they are general principles for the allocation of cases, the underlying purpose of which is to ensure the efficient and effective enforcement of competition law within the Community.
Certainly for a Europe- or world-wide cartel it is the Commission that is most likely to investigate the case and it would clearly make sense for leniency applicants in such cases to apply to the Commission, even if, depending on the particular circumstances of the case, they may choose out of prudence also to apply to one or more NCAs. At the other end of the spectrum, it would clearly be sensible for leniency applicants in the case of purely national cartels to apply to the NCA of the Member State concerned. The assessment for those cases which fall in between will inevitably be more difficult. As mentioned above, the situation in this respect is no different under Regulation 1/2003 than under its predecessor, however (1).

6. Cooperation with national courts

In addition to the requirement that the Commission and the NCAs must apply the European competition rules in close cooperation (2), Regulation 1/2003 also makes provision for cooperation between the Commission and the NCAs on the one hand, and the national courts of the Member States, on the other.

In particular, the Regulation provides that the national courts may in proceedings for the application of Articles 81 or 82 ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules (3). This provision is essentially a reflection of the duty of loyal cooperation that already exists under Article 10 of the Treaty (4).

Given that proceedings before the national courts for the application of Articles 81 or 82 may include claims for damages for losses suffered by a party as a result of the infringement of those Articles, a cartel participant would understandably be concerned if the information which it voluntarily submitted to the Commission as part of a leniency application were subsequently to be transmitted to a national court and relied on to support a claim for damages against it. This concern is addressed in the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC (5) (the Cooperation with courts notice).

As is explained in the Cooperation with courts notice, the Commission's duty to disclose information to national courts is not without limit. In particular, the Commission may refuse to transmit information for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it (6). The Cooperation with courts notice makes clear that the Commission would not, for this reason, transmit to a national court information voluntarily submitted by a leniency applicant without the consent of that applicant (7).

7. Concluding remarks

In this article we have identified two areas of potential concern for a cartel member that is considering applying for leniency, whether to the Commission or to an NCA. The first possible concern arises from the provisions in Regulation 1/2003 for cooperation and the exchange and use in evidence of information amongst the Commission and the NCAs making up the ECN. The second potential concern flows from the Commission's duty to cooperate with the national courts of the Member States.

As regards the ECN, whatever difficulties may be encountered when deciding the authority or authorities to which a leniency application should be made, it is important to recognise that these difficulties are not the result of Regulation 1/2003. The situation in that respect is no worse now than it was previously. Whilst this is not an excuse for complacency on the part of the Commission or the Member States, it does serve to show that some of the comments regarding the supposed negative consequences of Regulation 1/2003 have been misplaced.

---

(2) Article 11(1) of the Council Regulation.
(3) Article 15(1) of the Council Regulation.
(7) Paragraph 26 of the Cooperation with courts notice.
Where the Regulation does alter the situation, the potential concerns for leniency applicants are, as we have shown, neutralised by the provisions of the Network notice. Indeed, for those cartel cases where the Commission initiates proceedings, the situation is arguably made more certain for leniency applicants under the Regulation than under its predecessor.

As regards the potential concerns that may flow from the Commission’s duty to cooperate with the national courts, this too is not a new issue, since the duty to cooperate already existed under Article 10 of the Treaty. Leniency applicants can nevertheless take comfort from the reassurance given in the Cooperation with courts notice, namely that the Commission will not, without the consent of the leniency applicant, transmit to a national court information which has been voluntarily submitted to it under its Leniency notice.

As a consequence of the above, a cartel participant that is considering applying for leniency, whether to the Commission or to one or more NCAs, should not in our view hesitate to do so now if it would have felt comfortable making an application under the old Regulation. In this respect it should also be remembered that any authority that operates a leniency programme has a strong interest in ensuring that its programme is not undermined. Rather, it will want to be able to continue to rely on its programme as a valuable tool for detecting one of the most serious and damaging violations of competition law: namely, cartels.