ECN MODEL LENIENCY PROGRAMME

REPORT ON ASSESSMENT OF THE STATE OF CONVERGENCE[1]

1. GENERAL

1.1. Adoption and purpose of the ECN Model Programme

1. On 29 September 2006, the ECN Model Leniency Programme[2] (hereinafter the "Model Programme") was adopted by the Network members as a response to the need to enhance the effectiveness of leniency programmes[3] and to simplify the burden for applicants and authorities in case of multiple filings. Regulation 1/2003 is based on a system of parallel competences in which national competition authorities are active enforcers of Articles 81 and 82 EC 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 in more than one authority. At the same time, leniency programmes are interdependent and their overall success depends on the Network.

2. The Model Programme endeavours to harmonise the key elements of leniency policies within the ECN, including *inter* alia the scope of leniency programmes, the exclusion of certain applicants from immunity, conditions

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1 This Report is prepared based on information received from authorities. It does not give rise to any legitimate expectations on the part of any undertaking. Nothing contained in this Report can be interpreted as containing any official or binding interpretation of legal rules of leniency programmes (or of the Model Programme) or any practice of authorities. Moreover, information contained in this Report is not exhaustive and may be given for the purpose of illustration only.

2 Available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf. The "ECN" (sometimes referred to as the "Network") refers to the Network of Competition Authorities of the European Union, i.e. national competition authorities and the European Commission (referred to as "authorities").

3 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.

for leniency, marker system, the maximum percentage and threshold for reduction of fines and certain procedural issues. *Inter alia*, it introduces the system of summary applications, which allows an undertaking that applies for immunity to the Commission, in case the Commission is "particularly well placed" to deal with a case, to secure its place in the leniency queue by submitting very limited information to other well placed authorities.[4]

3. The purpose of the Model Programme is thus two-fold. First, to remove certain discrepancies between different programmes concerning the treatment which potential applicants can anticipate from authorities. This is in order to ensure that potential applicants are not discouraged from applying for leniency. Second, it aims to alleviate the burden of multiple filings in cases where the Commission is "particularly well placed" to deal with a case through the introduction of the uniform summary application system. This system simplifies procedures and saves resources for both applicants and authorities. The above-mentioned purpose of the Model Programme should be viewed in the light of the rationale of leniency programmes, which is to assist authorities in their efforts to detect and terminate cartels and to punish cartel participants.[5]

4. The Model Programme was endorsed unanimously by the heads of the competition authorities within the ECN. The Model Programme is not a legally binding document. However, the authorities made a political commitment to use their best efforts to align their leniency programmes with the Model Programme or, in case of absence, to introduce aligned programmes.[6]

5. The Model Programme was drafted as a coherent document setting out the essential procedural and substantive elements that the ECN members believe every leniency programme should contain. However, this document is not a programme as such under which applicants could apply for leniency. It does not give rise to any legitimate expectations on the part of any undertaking.[7] The Model Programme is accompanied by the Explanatory Notes providing further explanations about its clauses and practical guidance.

1.2. Convergence assessment

6. Already in the run-up to the Model Programme, there was a rapid development in a number of national leniency programmes. In 2002, only

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4 See points 22-25 of the Model Programme and paragraph 14 of the Commission Notice on cooperation within the Network of Competition Authorities (the "Network Notice"), OJ C 101 of 27.04.2004, p. 43.

5 See point 2 of the Explanatory Notes.

6 The Model Programme explicitly recognises that not all 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.

7 See point 10 of the Explanatory Notes.

four Member States had leniency programmes, while on the date when the Model Programme was endorsed there were 19 national programmes.

7. In 2006-2008, a significant process of alignment with the Model Programme took place. Today, all the Member States, except two, have leniency programmes. Most Member States have already revised their existing programmes or adopted new ones to align with the Model Programme.[8] In the revision process, the ECN members have essentially followed the key features of the Model Programme: defining the scope of application of programmes and types of excluded applications, introducing a marker system, the possibility of summary applications and of oral submissions as well as introducing aligned conditions for leniency. It appears that there still remain some divergences in the ECN concerning certain aspects of the Model Programme. They are reviewed in detail in Chapter 2.

8. The Model Programme did not set out a deadline when the alignment of leniency programmes with the Model Programme was expected to be completed. However, as an integral part of the Model Programme[9], it was agreed that the state of convergence of leniency programmes of ECN members will be assessed no later than at the end of the second year after the publication of the Model Programme. The date for which the assessment has been performed is 31 December 2008. Nevertheless, given the importance of reforms which took place (or were on-going) in certain Member States after this date, such reforms are mentioned in this Report insofar as relevant information was available up to 1 October 2009.

9. The present Report reviews the state of convergence based on information from competition authorities. The purpose of this Report is to provide an overview of the status of convergence of the applicable provisions contained in ECN leniency programmes.

10. It should be noted that in general the Model Programme does not prevent ECN members from adopting a more favourable approach towards applicants. Such particularities, however, should be without prejudice to the principal objectives of the Model Programme. Furthermore, leniency programmes may add further detailed provisions which would suit the legal systems in which they apply.[10] Programmes with such more favourable or more detailed provisions are considered convergent with the Model Programme. On the other hand, certain programmes may not specify provisions to the detail equivalent to the Model Programme. Nevertheless, authorities may interpret and apply respective rules in line with the Model Programme. Such *de facto* convergence may indeed achieve the same purpose. However, a question could arise about the degree of legal certainty for undertakings.

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8 For the leniency programmes in process of revision, see section 1.3.

9 See point 31 of the Model Programme.

10 See point 3 of the Model Programme; see also point 8 of the Explanatory Notes

11. As is stated above, the Model Programme was adopted with a view to enhance the effectiveness of leniency programmes within the Network. The convergence of leniency programmes is a tool to achieve this aim. 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 requirement to grant immunity automatically if the established conditions are met, the narrow scope of exclusions from immunity, conditions of marker for immunity and oral procedure are pertinent elements. As concerns the system of summary applications, in order to optimally achieve its aim of alleviating the burden of multiple filings, the uniform and wide-spread functioning of this system is essential.

1.3. ECN leniency programmes

12. At the date of this Report, twenty five Member States and the European Commission operated leniency programmes.[11] The list of applicable leniency programmes is attached to this Report (see Annex 1).[12]

13. Currently, legislative reforms (including any amendments to leniency programmes or related laws) are pending in five Member States: Cyprus, Greece, Estonia, Finland and Luxembourg. The Slovenian Competition Act was recently amended (Prevention of the Restriction of Competition Act - ZPOMK-1). One of the amendments which came into effect on 13 June 2009 foresees also the possibility of reduction of fines in matters of hard-core restrictions, as under previous provisions only immunity was assured. The leniency provisions could be applied immediately, however, a detailed procedure for leniency is to be adopted in a form of a Government Decree, coming into force on the 1st of January 2010. At the entry into force of such a decree, a leniency programme will start functioning in Slovenia. The rules are being drafted taking into account the Model Programme.

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[11] Austria (AT), Belgium (BE), Bulgaria (BG), Cyprus (CY), Czech Republic (CZ), Denmark (DK), the European Commission (EC), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Hungary (HU), Ireland (IE), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), the Netherlands (NL), Poland (PL), Portugal (PT), Romania (RO), Slovak Republic (SK), Spain (ES), Sweden (SE) and the United Kingdom (UK). For CY and EE, see footnote 12.

[12] In CY, the authority may, under a specific provision of the new Law on the Protection of Competition 13(I)/2008, grant an undertaking immunity from any fine or may reduce the fine, in practice, on the basis of a leniency application following the information standards set up by the ECN Leniency Programme and the European Commission's Notice. CY does not have secondary legislation, setting out leniency rules at the moment, as the previous notice issued by the authority has been withdrawn. However, it is in the process of adopting a new leniency notice as secondary legislation, in line with the provisions of the above-mentioned Law. According to the Estonian Code of Criminal Procedure, the Public Prosecutor's Office may accept applications regarding lenient treatment and terminate the criminal proceedings with regard to a person who has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence, subject to the conditions provided for in the law. The legal basis for the termination of the criminal procedure is paragraph 205 of the Code of Criminal Procedure. This provision is of a general nature and allows lenient treatment for any kind of criminal offence, including participation in a cartel. In this Report, therefore, the Estonian laws have not been assessed.

2. ASSESSMENT OF CONVERGENCE BY SUBJECTS

14. The purpose of this Chapter is to assess legislative convergence of specific provisions or blocks of provisions of the Model Programme. Before going into the assessment, each section would briefly introduce the respective subject. The subjects are grouped for convenience (various elements may not, however, have the same significance for the effectiveness of Network leniency programmes, see paragraph 11).

2.1. Scope of programmes

15. The Model Programme concerns secret cartels, in particular, agreements and/or concerted practices between two or more competitors aimed at restricting competition through the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets including bid-rigging.[13] Secret cartels are difficult to detect by other means. The Explanatory Notes underline the importance of leniency programmes in the fight against cartels.[14] By contrast, other types of restrictions are normally less difficult to detect and/or to investigate and therefore do not justify being dealt under a leniency programme. The Model Programme only concerns corporate leniency.[15]

16. All ECN leniency programmes are applicable to secret cartels. Some of the programmes, however, provide for a broader scope of application.[16] In particular, certain programmes do not limit leniency applications to "secret" cartels but cover all cartels.[17] A few programmes are applicable also to other horizontal and/or to vertical restrictions.[18]

17. Finally, in general national programmes are applicable to equivalent infringements of national competition laws.

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13 See point 4 of the Model Programme and points 11-14 of the Explanatory Notes.

14 See points 1-2 and 12-14 of the Explanatory Notes.

15 Even though the Model Programme concerns only corporate leniency, it is understood that where laws provide liability for individuals, the effectiveness of leniency programmes may be to a certain extent dependent on the availability of instruments on preferential treatment of individuals of cooperating undertakings (see point 15 of the Explanatory Notes). These issues are outside the Model Programme and not addressed in this Report.

16 AT, BE, DK, ES, FI, HU, LT, LU, LV, NL, PL, PT, RO, SE and UK.

17 BE, ES, FI, FR, HU, LT, LU, LV, NL, PL, RO, SE, UK. The LU Competition Council has discretion whether to grant or not leniency to non secret cartels on a case-by-case basis.

18 Under the FI programme, immunity is limited to cartels only, while reduction of fines is also applicable for other restrictions. There is a legislative reform pending in FI concerning this point. The LT programme is applicable to all prohibited horizontal agreements; the SE programme authorises applications for other horizontal restrictions as well as for vertical infringements; the PL and RO programmes are applicable to horizontal and vertical agreements; the UK programme also applies to vertical price fixing – resale price maintenance.

2.2. Excluded immunity applicants

18. Point 8 of the Model Programme sets out that an undertaking which took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines. Hence, coercers of the cartel are excluded from immunity (but not from reduction of fines). The scope of this exclusion is narrow, so as to avoid creating uncertainty for potential applicants.[19] About half of the programmes have convergent provisions and exclude from immunity coercers without excluding additional types of immunity applications.[20]

19. At the time when the Model Programme was endorsed, Germany and Greece noted that the sole ringleader was not eligible for immunity from fines under their respective programmes.[21] On the date of this Report, the German programme excludes the sole ringleader. The Greek programme appears to exclude still the sole ringleader as well through the requirement that the undertaking must not have urged other undertakings to participate in the infringement. Furthermore, the Greek programme excludes recidivists.

20. Certain other programmes exclude not only coercers but also initiators and/or leaders of cartels. In particular, the Czech programme excludes leaders and initiators. Under the Lithuanian programme, immunity is not available to the initiators of the anticompetitive agreement and to undertakings which induced other undertakings to participate in the agreement. The Latvian and Slovak programmes also exclude initiators. Under the Polish programme, immunity shall be granted to the undertaking which was not the initiator of the agreement and did not induce other undertakings to participate in the agreement. These conditions are cumulative. Under the Irish and Romanian programme, in order to qualify for immunity the applicant must not have acted as the instigator or have played the lead role in the illegal activity. In Luxembourg, coercers are also excluded from reductions of fines (not only from immunity).

21. The Finnish and Italian programmes are more favourable in this respect. Under these programmes, immunity is also available to coercers.[22]

2.3. Thresholds for immunity

22. The Model Programme sets out what information an applicant should provide in order to receive immunity. It envisages two types of immunity: so-called “type 1A” and “type 1B” immunity. Type 1A immunity refers to

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19 See point 22 of the Explanatory Notes.

20 AT, BE, BG, DK, EC, ES, FR, HU, LU, NL, PT, SE, UK. In CY, this approach is followed in practice.

21 See footnote 4 of the Model Programme.

22 However, there is a legislative reform pending in FI to exclude coercers from immunity.

situations where the undertaking is the first to submit evidence which in 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. The Model Programme lists the information which the undertaking should be in a position to provide the authority. Type 1B immunity is where no undertaking had been granted immunity before the authority carried out an inspection or had sufficient evidence to initiate an inspection and the undertaking is the first to submit evidence which enables finding an infringement, when at the time of submission the authority did not have sufficient evidence to find an infringement.[23] In addition, in both cases all other conditions attached to leniency shall be met.

Type 1A immunity: evidential threshold

23. In order to meet the evidential threshold in type 1A cases, undertakings should generally be in a position to provide the authority with the information and evidence listed in point 6 of the Model Programme.[24] Most of the ECN leniency programmes contain an equivalent evidential threshold.[25]

24. Some of the programmes, however, do not provide a detailed list of information and evidence to be submitted with an immunity application. For example, under the Greek programme the threshold is the same as in the Model Programme but the detailed list of information is not provided. According to the Latvian programme, the undertaking is obliged to provide all information and evidence available to it, which would be sufficient to commence an investigation and no particular differentiation between types of immunity is provided.

25. The Danish, Finnish, Irish, Italian and the UK authorities consider that the threshold for type 1A immunity under their respective programmes is to a certain extent more lenient than envisaged in the Model Programme. In particular, in Denmark there is no requirement to provide the authority with information about possible future leniency applications to any other authorities (inside or outside the EU) in relation to the alleged cartel.[26] The Finnish programme requires the applicant to provide information, which

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23 See points 5-7 of the Model Programme.

24 Point 6 of the Model Programme specifies the following information: "-*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.*"

25 BE, BG, CZ, DE, EC, EL, ES, FR, LU, LV, NL, PL, PT, RO, SE, SK, UK. The LU law does not explicitly provide for such list, however, the required information is published at the authorities' website following the same standard.

26 The same applies for type 1B immunity under the DK programme.

allows the authority to intervene with the restriction and commence further investigation. No information on past or possible future leniency applications is explicitly required under the programme, although in practice the authority may require such details as a part of the duty to cooperate.[27] The Irish programme does not specifically list what type of information shall be contained in the application. However, one of the conditions for the immunity is the disclosure of all the evidence and information known or available to it or under its control. Under the Italian programme, the threshold for immunity is that in the opinion of the authority, with reference to the nature and the quality of the elements submitted by the applicant, information or evidence is decisive for the finding of an infringement, possibly through a targeted inspection, and the authority did not already have sufficient information or evidence to prove the alleged infringement. Nevertheless, the Italian programme provides a detailed list of information to be submitted in the immunity application.

26. In the UK, the evidential threshold is equivalent to the Model Programme. However, even where the Office of Fair Trading (the "OFT") already has sufficient evidence to launch a formal investigation, the first undertaking to apply may still qualify for corporate immunity provided the authority has not used its statutory powers of investigation. Otherwise the evidential threshold is convergent, that is, the applicant must provide information that gives the OFT a sufficient basis for taking forward a credible investigation. In practice, this means that it must be at least sufficient to allow the OFT to exercise its statutory investigation powers. Under the Hungarian law, the applicant shall provide evidence which enables the competition authority to obtain in advance a judicial authorisation to carry out an inspection in connection with the infringement. Otherwise, the list of information to be provided by the applicant (determined in the application form) is in line with the Model Programme. Finally, the Lithuanian programme sets a specific timing: information needs to be provided before the investigation into the respective anticompetitive agreement has been commenced.

27. The Austrian leniency programme merely requires that immunity applicants inform the competition authority about the infringement before the authority learned about it by other means, without setting any evidential threshold.

Type 1B immunity: evidential threshold

28. In order to meet the evidential threshold in type 1B cases, the undertaking shall submit evidence which in the authority's view enables the finding of an infringement in respect of the alleged cartel.[28] The majority of the ECN leniency programmes contain an equivalent evidential threshold for type 1B immunity.[29] Leniency programmes of certain Member States (for example, Italy, Ireland, Poland) do not distinguish, however, between type 1A and

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[27] The pending legislative proposal in FI contains an evidential threshold, which is equivalent to the Model Programme.

[28] See point 7 of the Model Programme.

[29] BE, BG, CZ, EL, EC, ES, FR, HU, IE, LV, PT, RO, SE, SK. In CY, this approach is followed in practice.

type 1B immunity. Under the Italian programme, however, immunity is always available to the undertaking who is the first to submit voluntarily information or evidence, provided that in the opinion of the authority such information or evidence is decisive for the finding of an infringement, possibly through a targeted inspection, and the authority did not already have sufficient information or evidence to prove the alleged infringement. Under the Irish programme, the immunity is available if the applicant is the first to come forward before the authority has gathered sufficient evidence to warrant a referral of a completed investigation file to the Director of Public Prosecutions. According to the Polish programme, immunity shall also be granted to the undertaking that has been the first to present, upon its own initiative, proof rendering it possible to issue a decision requiring that an infringement be brought to an end, or a decision finding that a practice had been restricting competition and declaring it discontinued in the past, provided that the authority did not have at that time any information or evidence sufficient for issuing such a decision.

29. Pursuant to the German programme, even though the immunity in type 1B applications will be granted as a rule, in exceptional cases it might be refused. Under the Dutch programme, in type 1B cases there is no automatic immunity. In the UK, the grant of type 1B immunity is discretionary.

30. According to the Dutch and UK programmes, to qualify for type 1B immunity the threshold is "significant added value". In the Netherlands, a reduction of the fine with a maximum of 100% and a minimum of 60% may be granted. Nevertheless, if the type 1B applicant provides information which enables the authority to find an infringement the percentage shall be 100%.

31. Currently, the Austrian, Finnish, Lithuanian and Luxembourgish programmes do not foresee equivalents to type 1B immunity.[30]

2.4. Reduction of fines and "*de facto*" partial immunity

Reduction of fines

32. The Model Programme sets out conditions to qualify for a reduction of fines. An undertaking must provide evidence which represents significant added value. The Model Programme states that reductions shall not exceed 50% of the fine. The reason behind such limitation is that all systems shall ensure that there is a significant difference between immunity and reductions, in order to make applications for immunity significantly more attractive.[31]

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[30] The AT programme does not set any evidential threshold for immunity and does not differentiate between any types of immunity, see paragraph 27. In LU, a legislative proposal which would oversee possibility of type 1B immunity is under consideration. In FI, there are also amendments proposed in this field. In LT, if the authority has already started an investigation, it may grant a reduction of 50-75% to the applicant which is the first to submit evidence of significant value in directly proving the infringement, provided all other conditions are met.

[31] See point 24 of the Explanatory Notes.

33. More than half of leniency programmes provide that the maximum band or reduction is 50%.[32] The Luxembourgish programme does not set the maximum band but the authority has discretion to apply it. Finnish laws do not stipulate equivalent provisions.[33] The Dutch programme provides a band of 10-40%.

34. In a few Member States a reduction may exceed 50%. The Portuguese programme foresees a possibility of reduction exceeding 50% for the first undertaking which does not qualify for immunity. Reduction for the second undertaking is up to 50%, however, a special or additional reduction may be granted to an undertaking who is the first to report another agreement or concerted practice. Under the Italian programme, the reduction of fines shall normally not exceed 50%, but it is not excluded that it may be higher. The Lithuanian programme sets three types of reduction, one of which exceeds 50%.[34] In the UK, where an undertaking is the first to apply but does not qualify for immunity, it may qualify for a reduction of up 100%. In Ireland, even though the reduction of fines is not foreseen in the programme, cooperation may be taken into account as a mitigating circumstance by the courts.

35. Concerning the substantial criteria to qualify for a reduction of fines, the Model Programme specifically foresees that evidence provided by the applicant shall represent, in the authority's view, significant added value and that the authority will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or third, etc.). Most of the leniency programmes set forth equivalent criteria for reduction.[35] The Latvian Programme provides for, concerning reduction of fines, that the undertaking is obliged to provide all information and evidences available to it, however, does not provide for the requirement of significant added value for evidence provided. The Luxembourgish programme does not specifically pronounce the requirement of significant added value, however, in practice the authority interprets the programme in line with the Model Programme. The Polish programme has stricter criteria than provided for in the Model Programme, as it requires the applicant, on its own initiative, to provide the authority with a proof which to an essential extent will contribute to issuing a decision requiring that an infringement would be brought to an end or a decision assessing the practice as restricting competition and declaring that it was discontinued in the past. The Estonian and Irish laws do not set forth conditions for a reduction of fines in such circumstances.

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32 AT, BE, BG, CZ, DE, DK, EL, EC, ES, FR, HU, LV, PL, RO, SE and SK (16 programmes).

33 However, a legislative proposal on this point is pending in FI.

34 See footnote 30.

35 AT, BE, BG, CZ, DE, DK, EL, EC, ES, FR, HU, IT, NL, PT, RO, SE, SK, UK (in the UK, timing is a relevant, however, not decisive factor for a reduction); in CY, this approach is followed in practice (19 programmes). The FI programme is more favourable, but there are legislative proposals pending concerning reductions of fines. Also, the authority may propose a reduction, but the powers to reduce the fine lie with the Market Court.

*"*De facto*" partial immunity*

36. The Model Programme provides that if an applicant for a reduction submits compelling evidence which the authority uses to establish additional facts which have direct bearing on the amount of the fine, this will be taken into account when setting any fine to be imposed on that undertaking. This is so called "*de facto*" partial immunity. The purpose of such clause is to counter any potentially adverse consequences for applicants when they submit compelling evidence concerning additional facts.[36]

37. Eleven ECN leniency programmes contain provisions on *de facto* partial immunity.[37] The leniency programmes of Austria, Denmark, Germany, Finland, Ireland, Latvia, Luxembourg, Portugal and Sweden do not explicitly foresee such provisions. Nevertheless, some authorities do grant partial *de facto* immunity in practice (in Austria, Germany and Poland) and/or are competent to do so (Luxembourg). In Lithuania, partial *de facto* immunity may only be granted to the applicant which is the first one to submit compelling evidence after the authority has commenced its investigation (such an application is not eligible for immunity). In some countries, such cooperation may be considered as mitigation (Ireland, Latvia).

38. In the UK, the OFT will adopt the Commission's practice regarding the use of evidence of previously unknown facts relevant to the gravity or duration of the infringement that is submitted by a leniency applicant.[38] There is no qualification in the OFT's policy, however, that such evidence of previously unknown facts must be 'compelling'. There is no such qualification either under the Hungarian leniency programme.

2.5. Conditions attached to leniency

39. The Model Programme sets out cumulative conditions attached to leniency (both immunity and reductions). The first condition stated in the Model Programme is 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.[39] Second, the applicant shall cooperate genuinely, fully and on a continuous basis from the time of its application with the authority until the conclusion of the case.[40] Third, when contemplating making the application the applicant must

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36 See point 12 of the Model Programme and point 26 of the Explanatory Notes.

37 BE, BG, CZ, EL, EC, ES, HU, IT, NL, RO. The SK programme does not explicitly provide such provision, but the authority would follow this provision in practice. In NL, *de facto* partial immunity is also applied to 1B type of applicants since they are not necessarily granted immunity.

38 Type B or Type C leniency applicants according to the UK programme.

39 Point 13 (1) of the Model Programme. See also point 29 of the Explanatory Notes.

40 Point 13 (2) of the Model Programme specifies what is included into the duty to cooperate. See also point 30 of the Explanatory Notes.

not have destroyed evidence which falls within the scope of the application or disclosed the fact or any of the content of the application (except to other competition authority).[41]

40. According to points 21 and 27 of the Model Programme, if conditions attached to leniency have not been fulfilled, the undertaking will not benefit from any favourable treatment under the leniency programme in the relevant proceedings.[42]

Obligation to end involvement in the cartel (point 13 (1))

41. Most of the programmes (eighteen) contain an equivalent condition.[43] Certain programmes have some particularities. Under the German and Romanian programmes, the applicant must terminate the infringement at the respective authority's request, thus the fact of the application as such does not impose an obligation to end the infringement. Under some national programmes, for example the UK OFT, the possibility to allow continued involvement is drafted in wider terms, without a specific reference to the necessity to preserve the integrity of the inspections. The Lithuanian programme refers to the integrity of the investigation; the French programme to the effectiveness of investigative measures. Such provisions have an equivalent purpose and indeed cover the integrity of inspections. According to certain programmes the leniency applicant must, however, end its involvement following the application without exceptions.[44]

Genuine cooperation (point 13 (2))

42. All leniency programmes provide for a condition of genuine cooperation in order to qualify for leniency under the respective programme.[45] A few programmes set to a certain extent more lenient requirements of cooperation than envisaged in the Model Programme.

43. The Danish programme specifically foresees that if former employees and directors of the applicant do not cooperate, this will not be considered as a breach of the undertaking's cooperation obligation. Under the Greek programme, the authority may also take into account the extent and consistency of the cooperation provided by the undertaking following the date of submission of the evidence.

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41 Point 13 (3) of the Model Programme. See also point 31 of the Explanatory Notes.

42 See also point 32 of the Explanatory Notes.

43 AT, BE, BG, DK, EC, ES, FR, HU, IE, IT, LT, LV, NL, PT, SE, SK, UK. In CY, this approach is followed in practice.

44 According to the CZ programme, the infringement must be terminated following the application; EL: no later than the time the applicant submits evidence; FI: the applicant is required to immediately end its involvement in the infringement; according to the LU law, the undertaking has an obligation to stop any cooperation in the cartel; PL: the applicant must end the involvement in the infringement no later than on the date where it notified to the authority. In EL, FI and LU, there are legislative proposals pending concerning this condition.

45 In particular, the equivalent provisions as in the Model Programme are considered to be in AT, BE, BG, CZ, DE, DK, EC, ES, FI, FR, HU, IE, IT, LV, LU, LT, LV, NL, PL, PT, RO, SE, SK, UK programmes.

Pre-application obligations (point 13 (3))

44. About half of the leniency programmes specifically set forth the third condition to qualify for leniency, i.e. the obligation when contemplating making the application not to destroy evidence which falls within the scope of the application nor to disclose the fact or any of the content of the application (except to other competition authority). While some other programmes do not specifically provide for this, such pre-application obligations are understood to form part of the duty to cooperate or otherwise are expected from the applicant under the legal framework.[46]

45. Under the Irish programme, the third condition is not a requirement. It states however, that the applicant must do nothing to alert its former associates that it applied for immunity. German, Italian, Portuguese and Romanian authorities consider that their programmes are more favourable concerning this condition. Under the Lithuanian programme, the disclosure of the fact of the application or its contents is allowed only to the European Commission or competition authorities of other Member States (third country authorities are not mentioned). Austrian, Greek and Polish programmes do not provide for the equivalent condition for leniency. However, under the Polish programme, destroying, forging or concealing any evidence related to the prohibited agreement (both prior to and after submitting the leniency application), shall receive negative evaluation from the authority.

Failure to comply (points 21 and 27)

46. The vast majority of the leniency programmes provide that in case of a failure to fully comply with the conditions attached to leniency, the undertaking will not benefit from any favourable treatment under the respective programme.[47] The Austrian programme does not provide for an equivalent provision while the Swedish programme is more favourable to applicants.

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[46] BE, BG, CZ, EC, ES, FR, LV, NL, SE, SK programmes (ten) specifically set forth the third condition (the SK programme specifically provides for one of the two mentioned conditions - the condition not to disclose the fact or any of the content of the application. The condition not to destroy evidence is not specifically mentioned but is understood as part of the duty to cooperate). Under the DK programme, the two requirements in the third condition are not explicitly mentioned, however, failure to comply with one of these requirements would be considered as a breach of the anticipated obligation to cooperate. In HU, the leniency programme states that the applicant cannot be in bad faith when it applies for leniency. This obligation covers only the circumstances of the application and prohibits equivalent behaviour in line with the Model Programme. Overall, the HU provision is in line with the Model Programme. The LU law does not explicitly stipulate the equivalent condition, however, as explained at the authorities' website this condition is a requirement for leniency. In the UK, the OFT would treat any unauthorised destruction of evidence or disclosure of the leniency application as an act of 'bad faith'. As such, it would be a bar to the grant of leniency. In FI and LU, there are legislative proposals pending on this point.

[47] BE, BG, CZ, DE, DK, EL, EC, ES, FI, IE, FR, HU, IT, LV, LT, LU, NL, PL, PT, RO, SK, UK. The LU law does not contain an explicit provision, however, this is applied in practice, as it is stated in the description at the authorities' website. In CY, this approach is also followed in practice. Under the Polish programme, if relevant conditions for immunity are not met, the applicant may still benefit from a reduction of fines, provided that the cumulative conditions set in the programme are fulfilled.

2.6. Procedural issues

47. In addition to substantive clauses, the Model Programme covers a number of procedural issues in order to align throughout the ECN the way how leniency applications will be dealt with and to introduce certain procedural simplifications (in particular, through the system of summary applications). The main clauses are addressed below.

Anonymous approaches

48. The Model Programme envisages that before making a formal application the applicant may on an anonymous basis approach the authority to seek informal guidance on the application of the leniency programme. At the date of the Model Programme, it was stated that all authorities accepted anonymous approaches by potential applicants wishing to obtain guidance on their respective programmes. Some of them had more formalised systems such as hypothetical applications.[48]

49. On the date of this Report, most of the programmes specifically provided for a possibility of anonymous approaches.[49] According to the Romanian programme, initially, the applicant may present hypothetical information about the alleged cartel. However, in such a situation, the applicant has to submit a list of evidential documents that are to be revealed at a later moment. The Latvian and Spanish programmes do not specifically provide for anonymous approaches, however, they are accepted in practice. The Austrian programme does not provide for anonymous applications.

Requirement for explicit application

50. Point 14 of the Model Programme states that an undertaking wishing to benefit from leniency must apply to the authority and provide it with the information foreseen in the programme. Hence, it is required that the applicant would provide an explicit application to benefit from immunity and/or a reduction of fines. Virtually all programmes provide for a requirement for explicit application for leniency.[50] In Sweden, however, this requirement is applicable only for "type 1A" immunity applications.

Marker for immunity applicants

51. The Model Programme sets up a marker system for immunity applicants.[51] A marker protects the applicant's place in the queue for a given period of time and allows it to gather necessary information and evidence to qualify for immunity. The Model Programme foresees the authority's discretion to grant

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48 Point 14 of the Model Programme. See also point 33 of the Explanatory Notes.

49 BE, BG, CZ (CZ: hypothetical applications), DE, DK (DK: however, hypothetical applications not possible), EC, EL (EL: hypothetical applications), FI, FR, HU, IE, IT, LU, LT, NL, PL (PL: hypothetical applications), SE, SK (SK: hypothetical applications), UK (19 programmes).

50 AT, BE, BG, CZ, DE, DK, EL, EC, ES, FI, FR, HU, IE, IT, LT, LV, NL, PL, PT, RO, SK, UK. The LU programme does not expressly state such requirement but it is required in practice. In CY, this approach is also followed in practice.

51 The Model Programme does not, however, foresee markers for anonymous applications.

a marker. It is understood that the discretion also covers the authority's choice in what situation to grant a marker: e.g. in certain types of situations or in every case. Authorities may also chose to decide to grant a marker on the basis of more limited information than stated in the Model Programme.[52] Where a marker is granted, the authority determines the period within which the applicant has to 'perfect' the marker, i.e. to submit the information and evidence required to meet the relevant evidential threshold for immunity.

52. Under most of the ECN leniency programmes, marker systems are discretionary.[53] The Austrian, Danish, Greek and Swedish programmes do not set up a discretionary marker system.[54] The German, French, Hungarian and UK authorities consider their marker systems to be more favourable to the applicants: they are not discretionary. Under certain programmes a marker may also be granted for reduction of fines (for example, France, Germany, the Netherlands, Lithuania, Poland. In France, a marker may be granted after inspections: while full immunity is no longer available, the applicants may benefit from a partial immunity).

53. Under the majority of programmes it is required that in the application for marker applicants shall provide information equivalent to what is stipulated in the Model Programme.[55] The Spanish and Lithuanian programmes set forth to a certain extent stricter requirements for information to be provided. In particular, under the Lithuanian programme the applicant needs to already provide a list of evidence that will be submitted later. Under the Spanish programme, the authority may grant as an exception, upon a prior reasoned request from the applicant, additional stipulated time for submitting evidence relating to the cartel, in the possession of the applicant or available to it, in a reasonable time period, in particular, contemporaneous evidence of the cartel.

Summary applications

54. The Model Programme has introduced a uniform summary application system for cases where the Commission is "particularly well placed" to deal

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52 See points 16-18 of the Model Programme and points 34-36 of the Explanatory Notes.

53 BE, BG, CZ, EC, ES, FI, IE, IT, LU, LT, LV, NL, PL, PT, RO, SK. In LU, there is no explicit provision in the law, however a discretionary marker system is applied by authorities as it is stated in the practice description available at the authorities' website. In LT, if an application for a marker complies with the requirements, the authority has discretion to set the period of time to perfect the application.

54 In EL, there is legislative proposal pending concerning the marker system. In AT, there is no evidential threshold for immunity (see paragraph 27).

55 BE, BG, CZ, DE, EC, FR, IE, IT, LU, LV, NL, PL, PT, RO, SK, UK (16 programmes). Under the LU law, there is no explicit provision, however, an equivalent standard is applied in practice as is explained in the authorities' website. In the UK, formally, the applicant is required to identify the concrete basis for suspicion that it participated in cartel activity. In practice, this includes the information provided for in the Model Programme. In FI, a pending legislative proposal contains an equivalent list of required information for a marker along the lines of the Model Programme. In HU, the applicant shall disclose its identity and shall provide information on the details and on the evidences of the infringements as it is known to the undertaking at the time of the application. AT, DK, EL and SE programmes do not foresee such provisions: markers are not available under these programmes (see also paragraph 52 and footnote 54).

with the case. The latter criterion is to be understood in terms of paragraph 14 of the Network Notice.[56] If in such case a full application has been made with the Commission, national competition authorities can accept temporarily to protect the applicant's position on the basis of very limited information, foreseen in the Model Programme. This information is broadly equivalent to information needed for a marker. Such information can be given orally.[57] Should a national competition authority want to act on the case, it will grant the applicant a period of time to complete its application.

55. It is for the applicant to decide whether it wants to protect itself under more than one leniency programme.[58] The summary application system helps applicants make immunity applications, and helps authorities process them, in cases where it is likely that the Commission will deal with the case. Rather than having to file full and complete applications with authorities that could (under the case allocation criteria in the ECN) be considered "well placed" to act on the case, national competition authorities could agree to receive only a short description of the cartel that has been reported to the Commission.

56. According to the Model Programme, the national competition authority does not grant or deny immunity on the basis of a summary application. Instead, it will confirm that the applicant is the first to file with that authority and protect that applicant's place in the queue. A summary application system operates like an indefinite marker. Contrary to the standard marker systems, the applicant does not need to complete its summary application unless the authority requests it to do so.

57. Summary applications for type 1A applications for immunity are available under twenty three national programmes.[59] Cypriot and Estonian laws do not provide for a summary application system. Concerning the information to be provided in a summary application, most of the programmes which foresee summary applications provide for conditions equivalent to the Model Programme.[60] Certain programmes may, however, contain some specific

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[56] Paragraph 14 of the Network Notice provides that the Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).

[57] See in particular point 48 of the Explanatory Notes.

[58] See also point 38 of the Network Notice.

[59] AT, BE, BG, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LU, LT, LV, NL, PL, PT, RO, SE, SK, UK. It is not applicable for the European Commission, hence the EC programme does not contain a respective provision. Under the EL, IT, LV, NL programmes, summary applications are also available for 1B type of applications. In AT, even though the legislation does not explicitly provide for summary applications, the authority will accept them in practice. The current FI programme does not include an explicit provision on summary applications but in practice information required for the summary application according to the Model Programme may fulfil the requirements of the FI national legislation for "initial information" and therefore enable summary applications. There is a legislative reform pending on this point in FI. Under the LU programme, summary applications are available in practice as it is explained in the authorities' website.

[60] In particular, BE, BG, CZ, DE, EL, ES, FR, HU, IE, IT, LU, LT, LV, NL, PL, PT, RO, SE, SK, UK programmes (20 programmes).

clarifications or requirements. Under the Hungarian and UK programmes, the competition authority may also need to be provided with relevant country-specific information relating to the reported cartel. If so, the applicant will be expected to provide such information promptly. Under the Danish programme, however, the applicant is not required to give a description of the Member State(s) where the evidence is likely to be located and information on its possible future leniency applications in relation to the alleged cartel.

Procedure for granting and rejecting immunity

58. The Model Programme foresees that conditional immunity from fines will be granted in writing, that the authority will inform the undertaking in writing in case its immunity application is rejected if the relevant threshold is not met and that the authority will take its final position on the grant of immunity at the end of the procedure. The authority should deal with an application in a manner that ensures a high degree of legal certainty for the applicant.[61] All leniency programmes provide for that immunity will be granted and rejected in writing, in line with the Model Programme.[62]

Procedure for reduction of fines

59. Pursuant to the Model Programme, if the authority comes to a preliminary conclusion that the applicant qualifies for a reduction of fines, it will inform the undertaking in writing of its intention to apply a reduction. Moreover, it is stated that 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 end of the procedure.[63]

60. Nearly all programmes provide for that the applicant for a reduction of fines will be informed in writing on the authority's intention to apply a reduction.[64] The Italian programme does not set a time limit for such confirmation. Under the Dutch programme, the authority informs the applicant not only on its intention to apply a reduction, but also on the exact reduction percentage no later than the date the statement of objections is notified to the parties. The Latvian leniency regulation does not, however, contain specific provisions regarding the duty to inform about the intention to apply a reduction of fines at the latest when the statement of objections is notified to the parties.

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61 See points 19-21of the Model Programme and points 37-38 of the Explanatory Notes.

62 AT, BE, BG, CZ, DE, DK, EL, EC, ES, FI, FR, HU, IE, IT, LV, LU, LT, NL, PL, PT, RO, SE, SK, UK. In CY, this approach is followed in practice. Under the DK, HU and NL programmes, if the relevant evidential threshold for immunity is not met, the authority will automatically consider the application as an application for a reduction of the fine. For PL, see also footnote 47. In the UK, before entering into the formal leniency agreement, the OFT will expect to have received and analysed at least the substantial and most evidentially probative elements of the relevant information available to the applicant. In practice, the OFT will also expect to have interviewed relevant current and former employees and directors.

63 See point 26 of the Model Programme and points 37-38 of the Explanatory Notes.

64 AT, BE, BG, CZ, DE, DK, EL, EC, ES, FI, FR, HU, IE, LU, LT, NL, PL, PT, RO, SE, SK, UK; in CY, this approach is followed in practice (23 programmes). Under the PL programme, the leniency application may only be submitted in writing, however leniency information can be presented orally for the record prepared by the authority.

Oral procedure

61. In order to limit any negative consequences for leniency programmes by risk of discovery of leniency information in respect of civil damage claims, putting leniency applicants in a worse situation than other cartel participants, the Model Programme allows for oral applications[65] (summary, marker or full applications) in all cases where this would appear to be justified and proportionate. Taking into account experience, it is considered that 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. The Model Programme also stipulates that no access will be granted to any records of any oral statements before the statement of objections has been issued to the parties.[66] Moreover, the Model Programme foresees that the exchange of records of oral statements between authorities is limited to cases where the protections afforded to such records by the receiving authority are equivalent to those afforded by the transmitting authority.

62. Full leniency applications are accepted orally under nineteen leniency programmes.[67] The Czech, Greek, Lithuanian, Polish and Portuguese programmes do not provide for oral applications. Seventeen programmes allow for summary applications to be submitted orally.[68] The remaining programmes do not allow an oral procedure for summary applications either because summary applications are not available at all (see para 57) or they do not provide for availability of oral submissions in such cases.[69]

3. CONCLUSIONS

63. The overview of the state of convergence of ECN leniency programmes with the Model Programme shows the achievements of the convergence process. Pending legislative reforms demonstrate that the convergence is still an on-going process. The work within the ECN has been a major catalyst in encouraging Member States and/or authorities to introduce and develop their

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65 The Explanatory Notes underline that 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 (see point 47).

66 See points 28-30 of the Model Programme and points 47-49 of the Explanatory Notes.

67 AT, BE, BG, DE, DK, EC, ES, FI, FR, IE, HU, IT, LV, LU, NL, RO, SE, SK, UK. Under the LU programme, oral applications are accepted in practice by the authorities as it is described in the authorities' website. Concerning the FI programme, see footnote 59. The current FI programme does not explicitly provide for summary applications, but in practice such applications may be possible also in a form of an oral submission.

68 AT, BE, BG, DE, DK, ES, FI, FR, HU, IE, IT, LU, LV, RO, SE, SK, UK. It is not applicable for the European Commission, hence the EC programme does not contain a respective provision. Under the ES and LV programmes, even though they do not specifically provide for oral summary applications, it is possible in practice.

69 CZ (n/a), EL, LT, PL (see also footnote 64), PT. In CY, summary applications are not accepted in practice.

leniency policies and in promoting convergence between them. However, there are still a few Members which do not have any leniency programme or do not have a written programme in general or on certain key issues.

64. As this Report reveals, the scope of leniency programmes in the ECN cover secret cartels, while a few programmes extend their respective leniency systems to a wider scope of infringements. Several programmes exclude more applications from immunity than provided for in the Model Programme. The majority of leniency programmes contain an equivalent evidential threshold for immunity as in the Model Programme. Moreover, most of the programmes contain equivalent conditions for leniency as stipulated in the Model Programme. As concerns the applicant's obligation to end involvement in the cartel following its application, according to certain programmes the leniency applicant must end its involvement following the application without the exception foreseen in the Model Programme.

65. Concerning procedural issues, most programmes provide for the necessity to make an explicit application for leniency and foresee that immunity will be granted and rejected in writing. Twenty programmes provide for a marker system. Summary applications alongside an application with the Commission in cases for which the latter is particularly well placed are available in twenty three Member States; seventeen of them accept oral summary applications. Full leniency applications are accepted orally under nineteen leniency programmes.

66. This Report will raise awareness within the Network on the achievements in the field of leniency convergence and should serve as a basis for reflections whether any further convergence is needed.