

# **Competition: European Competition Network refines its Model Leniency Programme – Frequently asked questions**

(see also [MEMO/06/356](#) and [MEMO/12/887](#))

## **Leniency within the European Competition Network (ECN)**

### **How many ECN members operate leniency programmes today?**

Leniency programmes operate in 26 Member States and at the European Commission. A list can be found on the Europa website: [http://ec.europa.eu/competition/ecn/leniency\\_programme\\_nca.pdf](http://ec.europa.eu/competition/ecn/leniency_programme_nca.pdf)

### **Why is there a need to submit multiple leniency applications within the ECN?**

Companies that take part in cross-border cartels expose themselves to penalties in several jurisdictions. In the European Union, national competition authorities and the Commission have parallel competences to enforce antitrust rules under the Treaty on the Functioning of the EU (TFEU). Therefore, companies will only be able to benefit from leniency in all relevant jurisdictions if they apply for leniency with all authorities that could pursue a case against them.

## **ECN Model Leniency Programme (MLP)**

### **What is the purpose and the content of the MLP?**

The MLP was endorsed by the heads of ECN authorities in September 2006. The purpose of the MLP is to provide a basis for soft harmonisation of the European leniency programmes. It sets out the essential procedural and substantive requirements that the ECN members believe every leniency programme should contain. Its purpose is to achieve convergence of ECN leniency programmes, so as to ensure that potential leniency applicants are not discouraged from applying as a result of discrepancies between the leniency programmes within the ECN. The MLP is accompanied by explanatory notes providing further explanations and practical guidance.

The MLP also introduced a procedure for a uniform summary application system for cases concerning more than three EU Member States. If 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 that can be given orally. Should any of the national competition authorities pursue the case, it will grant the applicant additional time to complete its application.

### **What has been the impact of the MLP?**

The MLP is not a programme under which applicants can apply for leniency and does not give rise to legitimate expectations on the part of companies. It is for each jurisdiction to ensure that their respective programme reflects the provisions of the MLP. The MLP has been a major catalyst in encouraging Member States to introduce leniency programmes and in promoting convergence between them (see also [MEMO/09/456](#)).

The commitment to align on the basis of the MLP does not prevent ECN members from adopting a more favourable treatment for leniency applicants if it is considered necessary to ensure effective cartel enforcement in their jurisdiction (see also [MEMO/06/356](#)).

## **Refinements to the MLP**

### **Why has the ECN revisited the MLP and what are the changes implemented?**

In the six years since the endorsement of the MLP, ECN members have gained substantial experience in the domain of leniency, including in cases involving several jurisdictions. This experience shows that the MLP has been widely used as a reference point for setting-up aligned leniency programmes in the EU. Based on the practical experience acquired, the ECN has now introduced a range of refinements particularly concerning the handling of multiple leniency applications in the ECN and a few further modifications and explanations to the MLP. In particular,

the system of summary applications has been expanded to make it available for all leniency applicants. Moreover, certain clarifications have been introduced (see below). However, the basic elements of the MLP remain unchanged providing stability and certainty for companies.

### **What is the scope of the MLP?**

The MLP concerns secret cartels. The refined MLP now clarifies that this does not mean, that all aspects of the conduct in question need to be secret. Similarly, it is clarified that a cartel which includes vertical elements may also be covered under the MLP.

### **How has the summary application system been improved by the changes?**

The MLP revision extends summary applications to all leniency applicants, who apply to the Commission in cases concerning more than three Member States. They will be able to submit a summary application at national competition authorities which the applicant considers "well placed" to act in the case. Previously, only the first – immunity applicant – could do so under the MLP principles. Based on experience, ECN members agreed to improve the position of applicants that are not the first to cooperate with the authorities in multiple leniency proceedings. In practice, a few national authorities have already been offering summary applications for all applicants. Now, ECN members have all agreed to expand the summary application system to cover all applicants.

The MLP introduces the notion of "summary application marker" at national authorities where an applicant lodges summary applications alongside its application to the Commission. This summary application marker protects the applicant's position under the respective national leniency programmes and in fact operates as an indefinite marker, in particular during the phase of case allocation. The revision also clarifies when applicants are expected to update summary applications at the national level. This is in particular the case, when applicants subsequently provide evidence and information to the Commission which indicates that the alleged cartel is significantly different in scope than originally reported to the national authority in a summary application (for example, it covers an additional product).

Moreover, the ECN has prepared a [uniform template for summary applications](#), which leniency applicants will be able to use throughout the entire EU. Along with that, the ECN publishes a [list of authorities which accept summary applications in English](#) as well as other details on applicable language requirements to submit a summary application.

### **What clarifications have been introduced concerning the leniency conditions?**

- **Continuous cooperation**

Further explanations and clarifications in the MLP highlight the applicant's expected conduct following the leniency application and throughout the procedure. The applicant needs to cooperate fully, genuinely, expeditiously and in a sincere spirit of cooperation. In order to stress the multi-facet character of the expected cooperation, the MLP clarifies that a list of elements of cooperation spelled out in it is indicative and non-exhaustive.

- **Derogations from the duty to discontinue cartel participation**

The MLP clarifies that derogation from the applicant's duty to discontinue its participation in the cartel immediately after the leniency application will be authorised by the competition authority only when it is necessary and should strike an appropriate balance between bringing an end to the illegal activities as soon as possible and protecting the effectiveness of the investigation.

- **Duty to make employees and directors available for interviews**

The MLP clarifies that the applicant is obliged to collect all relevant information and material relevant to substantiate the application which may be in possession of an employee or a director prior to their voluntary or involuntary departure. Furthermore, the MLP encourages the applicant to inform the competition authority of any contemplated dismissal of any such employee or director.

- **Obligation of non-disclosure of the leniency application**

The MLP clarifies that the obligation of non-disclosure will not be breached if the fact or contents of the leniency application is communicated to another competition authority. Similarly, the applicant will not be in breach of its non-disclosure obligation when it involves external counsel for the

purpose of seeking legal advice provided that the applicant ensures that the external counsel does not disclose any information relating to the leniency application to any third party.

The MLP clarifies that the obligation of non-disclosure lasts at least until the time when the objections have been notified to the applicant but, based on applicable provisions in each jurisdiction, may extend beyond this stage. The applicant is therefore obliged to verify the duration of the obligation of non-disclosure each time it applies for leniency, especially in case of multiple applications. In order to prevent any disclosure and to be able to demonstrate its compliance with the obligation to the competition authority, the applicant is encouraged to keep track of all persons who have been informed about the fact and contents of the leniency application.

Finally, any departure from the obligation of non-disclosure must be explicitly authorised by the competition authority.

### **How should written leniency statements be treated under the MLP revision?**

The MLP clarifies that both written and oral statement will be offered the same level of protection.

### **When will the new MLP refinements enter into force?**

The MLP does not as such create rights or obligations for applicants or competition authorities. In order to become operational, the principles set out in the MLP need to be implemented under the respective leniency programmes of ECN members either by introducing them to the programmes or implementing them in practice, as the case may be. By endorsing the refinements to the MLP, the ECN members have committed to use their best efforts, within the limits of their competence, to align their respective programmes. In practice, there may be a transitional period before these changes are introduced into the respective systems.

See also [MEMO/12/887](#)