

COMPETITION LAW ASSOCIATION

Comments on draft Commission Notice on immunity from fines and reduction of fines in cartel cases

These comments are submitted on behalf of the Competition Law Association (CLA). The CLA is an association of lawyers and other professionals including economists and intellectual property practitioners. Our members include private practitioners, employed professionals and academics.

PROPOSAL FOR A REVISED COMMISSION NOTICE ON IMMUNITY FROM FINES AND REDUCTION OF FINES IN CARTEL CASES ("The Proposed Leniency Notice")

1. Immunity thresholds

The Commission Notice on immunity from fines and reduction of fines in cartel cases 2002 ("the Leniency Notice") states that an applicant should provide "the Commission with **all** the evidence related to the suspected infringement" (emphasis added). The Leniency Notice does not describe the type or nature of evidence required by the Commission. In the Proposed Leniency Notice, the Commission sets out in Points 9(a) and (b) a list of information and evidence that an undertaking must provide in order to enable the Commission to carry out a **targeted** inspection in connection with an alleged cartel or make a finding of infringement. Such information includes a corporate statement detailing the functioning of the cartel and the participants in it, documentary evidence available to the applicant at the time of the submission and any contemporaneous evidence. It is not clear to the CLA what the use of the word "targeted" adds to the existing procedure - although it is accepted that the word reflects the provisions of the ECN model leniency procedure.

The CLA acknowledges the importance both to the authorities and to firms seeking leniency that there should be an effective and clear policy for dealing with leniency applications. The CLA however considers that Point 9 may be overly onerous on an applicant. For example the applicant "must" provide the Commission with the documents mentioned in Points 9(a) and "**all** relevant explanations in connection with the pieces of evidence provided in support of the application". The firm seeking leniency may not have all this information or may have inadvertently failed to identify it during a nonetheless detailed review of internal documents. This is a particular risk when the cartel operates within a large organisation or at various levels in various jurisdictions.

As currently drafted Point 9 contains no leeway to allow more flexibility in relation to an application for immunity. By providing a detailed and compulsory list of requirements for applications, the Commission imposes a heavy burden on an applicant very early on in the process (before an inspection has even taken place) in circumstances where the applicant is obliged to co-operate throughout the application process (Point 12(a)). The CLA recommends that provisions are inserted in Point 9 to provide a materiality threshold or to give the Commission some discretion to vary from these strict requirements in appropriate circumstances.

Nor as drafted does Point 9 allow for the problems posed for an applicant from a jurisdiction where there is personal criminal liability for individuals. This will often result in a conflict of interest between those of the applicant (full cooperation with the competition authorities) and

