

## 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

those of an individual who could go to goal in his or her home state for a related criminal offence (where the advice may be to keep silent).

## **2. Introduction of a marker system**

The Proposed Leniency Notice introduces a "marker" system enabling an applicant to apply to reserve its place whilst it conducts further internal investigations and perfects its application for immunity. A "two-stage" (i.e. initial contact with the Commission and then provision of comprehensive application) marker process described in the Proposed Leniency Notice is already used by the Department of Justice in the United States' Amnesty Programme and the United Kingdom's Office of Fair Trading.

The CLA considers that the "marker" system proposed in the Proposed Leniency Notice would be helpful in encouraging firms to self-report more quickly than under the present Leniency Notice. The marker system provides some degree of certainty for applicants in a line of applicants. In order to be considered as the first in and receive potential immunity, the burden on the applicant at present is a heavy one since it needs to provide full information at the time of the application. There may be a delay between the time a firm discovers an antitrust violation and the time when the Commission is informed owing to the fact that the applicant has to prepare a comprehensive application. The Proposed Leniency Notice gives applicants the opportunity to report to the Commission shortly after learning about a violation. The applicant is then given sufficient time within a deadline set by the Commission to conduct an investigation and obtain facts and put together a complete and coherent corporate statement to perfect the marker. This is a helpful development. However it is noted that the Commission reserves to itself a discretion whether to grant a marker and it would be helpful to understand the circumstances in which a marker would not be granted.

The CLA notes that when granting the marker to an applicant, the Commission also grants "a period to be specified on a case-by-case basis" to allow the applicant to make a comprehensive application for leniency. The length of the period between the marker and the full application is entirely at the discretion of the Commission and this discretion should be operated fairly and consistently so as not to infringe principles enshrined in EC law, such as equality of treatment and legal certainty.

## **3. Clarification relating to corporate statements and their protection**

The Proposed Leniency Notice introduces a new section on corporate statements, which may be in writing or oral, and which describes the procedure to protect access to and transmission to competition authorities of corporate statements. The Proposed Leniency Notice provides that "any statement made vis-à-vis the Commission in relation to this notice forms part of the Commission's file and thus can be used in evidence." Despite the fact that such statement may be used as evidence, the Commission then sets out how corporate statements are protected from third party access under the Proposed Leniency Notice.

The CLA notes the clarification sought to be brought about by the new section on corporate statements. The CLA notes that the Proposed Leniency Notice sets out the circumstances when corporate statements may be accessed and that they are not "discoverable" in the European Union - "other parties such as complainants will not be granted access to corporate statements" (Point 33). Member States are precluded from using their knowledge gained through the information exchange system of an immunity or leniency application to start their own investigation as a result of the safeguards of the Network Notice provided by Article 12 of Regulation No. 1/2003. However it is not clear to the CLA that the courts, either in the Member States or in third countries, would necessarily refuse to require the production of evidence whose

existence can be deduced from an infringement finding, even if part of a protected corporate statement, particularly in a civil action for damages, following an infringement decision. Nor is it clear what is to be expected of a report to the bar of counsel who disclosed the existence of evidence - unless there are clear rules in the relevant jurisdictions on this point, which override any rule about acting in the best interests of a client.

#### **4. Treatment of evidence provided to the Commission**

With regard to the reduction of fines in a leniency application, the Leniency Notice provides that an applicant must provide evidence which represents "significant added value" to the evidence already in the Commission's possession. The Proposed Leniency Notice also refers to the concept of added value in the corroboration of the Commission's evidence and goes a step further than the Leniency Notice by stating that such added value varies in function of whether the corroborating evidence is "compelling evidence" or not. Under the Proposed Leniency Notice, compelling evidence which will help the Commission to establish with more certainty that a cartel exists will not increase the fine of the applicant for leniency.

The CLA notes the concept of "compelling evidence" in the Proposed Leniency Notice on top of the concept of "added value". It queries what the new criterion seeks to add and how it will be applied in practice.

**3 November 2006**  
**Competition Law Association**