

## **For public comments:**

### **Draft amendment of the 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases**

The Commission intends to amend the 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases (the Leniency Notice)<sup>1</sup> in particular by adding an annex with a procedure for corporate statements made for the purpose of obtaining immunity from fines or reduction of fines in cartel cases. The Commission welcomes comments from the public regarding this draft amendment.

#### **Purpose of the intended amendment**

In implementing the current Leniency Notice, the Commission has encountered a major concern from undertakings and their legal representatives. This concerns the risk of discovery in civil damage proceedings, in particular in third country jurisdictions, of corporate statements made to the Commission in the context of its leniency programme. In these corporate statements, which are made especially for the Commission to help it in its investigation, leniency applicants describe in detail their own involvement, as well as that of other undertakings, in a cartel. While the Commission strongly supports effective civil proceedings for damages against cartel participants, it would not like to see undertakings which voluntarily cooperate with the Commission in revealing cartels put in a significantly worse position in respect of civil claims than other cartel members which refuse any cooperation. The ordered production in civil damage proceedings of corporate statements made to the Commission risks, however, to produce exactly this result. If so, it could seriously undermine the effectiveness of the Commission's leniency programme and jeopardize the success of our fight against cartels.

In order to minimize the risk of discovery of corporate statements the Commission therefore intends to add one element to the existing Notice, namely a special procedure for the protection of corporate statements made to the Commission in the context of its leniency programme.

The main purpose of the procedure for corporate statements is to provide, in a clear, transparent and legally secure manner means by which undertakings that want to "confess" their participation in a cartel to the Commission can do so without undue fear of such corporate statements being used against them in procedures that are not in application of the European competition rules.

#### **Form of the intended amendment**

In order to provide legal security to undertakings, the procedure for corporate statements will become part of the Leniency Notice itself, in the form of an annex which will be an integral part of the Notice (point 28 of the amended notice). In addition, a general policy statement on discovery will be added to the introduction of the Notice (point 7 of the amended notice). These changes will take the form of an amended 2002 Leniency Notice.

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<sup>1</sup> OJ C 45, 19.2.2002, p. 3

The Commission also intends to take the occasion of amending the 2002 Leniency Notice to replace the outdated references in the Notice to Regulation No. 17<sup>2</sup> with references to the current Council Regulation (EC) No. 1/2003<sup>3</sup>, as well as to clarify a few minor technical points in the existing text of the Notice, which do not affect its functioning.

Changes to the current 2002 Leniency Notice have been underlined in the attachment.

### **Key features of the intended amendment**

The procedure for corporate statements will have the following main features in order to protect corporate statements from being used for other purposes than the application of the European competition rules:

- The introduction of the Leniency Notice will provide a clear **policy statement** from the Commission indicating that the ordering in civil damage proceedings of corporate statements made to the Commission in the context of its leniency programme could undermine the effectiveness of the Commission's fight against cartels, and thereby indirectly also that of other anti-trust authorities. When needed, the Commission would intervene as *amicus curiae* in such civil proceedings to press home this point.
- Undertakings will be allowed to make their corporate statements in **oral form**. The Commission will record these statements and prepare its own transcript of the statement. Applicants will be required to confirm that the transcript is a correct rendering of the oral statement. This confirmation may be given orally and will then be recorded. The transcript will serve as evidence, if necessary supplemented before the Community Courts with the original recordings.
- Access to the file, including to corporate statements, is given only for the purposes of administrative and judicial proceedings for the application of Article 81 of the Treaty. **Access requested for any other purpose will be rejected**<sup>4</sup>.
- Access to corporate statements will be granted by allowing parties concerned to read written corporate statements and transcripts of oral corporate statement at the premises of the Commission and to take notes. **No mechanical copies of corporate statements will be allowed.**
- Parties seeking access to corporate statements will be required to **sign a document** whereby they commit to abide by the provision of Article 15(4) of Commission Regulation (EC) No 773/2004 of 7 April 2004<sup>5</sup> stating that documents obtained through access to the file may only be used for the purposes of judicial or administrative proceedings for the application of Article 81 of the Treaty.
- If a party concerned by the proceeding abuses its right of access to the file, the Commission may seek to **sanction** such behaviour by lodging a complaint with the bar association of the lawyer who was allowed access to the file and/or by seeking a

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<sup>2</sup> OJ L 13, 21.02.1962, p. 204.

<sup>3</sup> OJ L 1, 4.01.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (L 68, 6.3.2004, p. 1).

<sup>4</sup> The Commission is legally required to grant access to the file to parties concerned by the proceeding when a Statement of Objections is issued to them. This means that already now, corporate statements are not accessible until such time as a Statement of Objections is issued.

<sup>5</sup> OJ L 123, 27.04.2004, p. 18.

higher fine for the undertaking in question either in the cartel decision or in subsequent proceedings before the Community Courts.

The procedural rights undertakings have on the basis of Article 19 of Council Regulation (EC) No 1/2003 and Articles 3 and 17 of Commission Regulation (EC) No 773/2004 when they make a voluntary oral statement to the Commission have also been detailed in the new procedure.

The procedure for corporate statements will be applicable to all new and on-going leniency applications as of the date of publication of the amended 2002 Leniency Notice in the Official Journal.

### **Comments**

The deadline for submitting comments regarding this proposed amendment of the Leniency Notice is **Monday 20 March 2006**.

All comments should be sent in writing to the European Commission, DG COMP, for the attention of Mr. K. Mehta, Director of the Cartels Directorate, rue de la Loi 200, B-1049 Brussels.