European Commission  
Directorate-General for Competition  
Attention: Mr. Philip Lowe  
Director F - Cartels  
Leniency Notice Review  
B—1049 Brussels  

3 November 2006  

Re: Comments on the Draft Commission Notice on Immunity from fines and reduction of fines in cartel case.

Dear Mr. Lowe:

On behalf of the International Bar Association, Antitrust and Trade Law Section, we are pleased to submit the comments of one of our Working Groups, these comments being related to a proposed amendment of the 2002 Leniency Notice for purposes of responding to the Commission’s request for public comments.

We hope that our views will provide a positive contribution to the Commission’s work and we will certainly be pleased to answer any questions members might have.

Yours Sincerely,

Michael Reynolds  
Chair of the Legal Practice Division of the International Bar Association
1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1. This submission is made to the European Commission (the “Commission”) on behalf of the Working Group on Leniency Programmes of the International Bar Association’s Antitrust Committee. The Antitrust Committee of the International Bar Association (“IBA”) brings together antitrust practitioners and experts among the IBA’s 20,000 individual members from across the world, with a unique blend of jurisdictional backgrounds and professional experience. The Working Group’s comments and recommendations draw on the Members’ experience with leniency and immunity programmes in Europe and in other jurisdictions around the world. The Members of the Working Group are set out in Annex A. The Working Group appreciates the opportunity to comment on these important matters and would be pleased to continue to work with the Commission on the issues raised.

1.2. The Working Group commends the Commission’s objective to clarify its leniency programme and its intention to pronounce explicitly and clearly what the evidentiary threshold should be for immunity, as well as its endeavour to facilitate coordinated immunity applications to the Commission and to competition enforcement agencies in other jurisdictions. In addition, the Working Group strongly supports the introduction of a marker procedure but believes that both the concept and the criteria for obtaining a marker need further consideration by the Commission. Finally, the Working Group also supports the
efforts by the Commission and other ECN members to increase uniformity in leniency programmes across Europe through the ECN Model Leniency Programme.

1.3. The Working Group has, however, four overriding concerns about the new Notice:
- predictability and certainty;
- the new marker procedure;
- the need for a one stop shop; and
- the lack of congruence between the Commission’s leniency programme and other Agencies’ policies.

**Issue One: Predictability and Certainty:** The first concern is that, contrary to the Commission’s declared objectives, the criteria in the Draft Notice for obtaining and maintaining immunity are not clear and may be even less predictable than under the 2002 Notice. The Commission also reserves to itself significant discretion – more than under the 2002 Notice – to decide whether an application will be successful. The Working Group believes that this degree of discretion and lack of certainty for an applicant are both unnecessary and inimical to the success of the Commission’s Draft Notice.

**Issue Two: Marker Procedure:** The Working Group applauds the creation of a marker procedure for Europe, which would parallel the best practices of other jurisdictions. However, the Working Group believes that there are serious questions about the conditions for its application that could make the marker procedure ineffective. As a result, the proposed marker regime is unlikely to resolve the serious problems that applicants have faced in the past in seeking to obtain immunity in appropriate jurisdictions on a global basis, due to the inability to obtain a marker in Europe.

**Issue Three: One Stop Shop:** The Working Group strongly favours a one stop shop approach to leniency applications to the Commission and relevant NCAs. The proposed “summary” application procedure, however, falls short of achieving this objective. The Working Group would suggest that, once the lead application has been made (not just when the Commission is “particularly well placed”), a simplified application should be sufficient for other relevant authorities. Such a simplified application would simply state the name of the applicant undertaking, the product market concerned and identify the lead application.
Issue Four: Lack of congruence with other Agencies’ policies: The Working Group believes that the Commission’s leniency programme will still lack sufficient coherence with the corresponding programmes of competition agencies in other jurisdictions. The threshold that must be met for immunity, when an applicant will be in a position to apply for immunity and the time it will take to obtain an immunity decision, are all issues that are dealt with very differently in North America and Europe – often the main jurisdictions where immunity is sought regarding an international cartel. The significantly higher threshold requirements and the lack of predictability of outcome in Europe not only generate delay and uncertainty in making the decision to report the cartel misconduct in Europe, but these factors may be serious enough to diminish the willingness of cartel participants with exposure in Europe to report misconduct anywhere. That would be a regrettable development and the Commission may wish to give further consideration to the significant value to potential applicants, other competition agencies and the Commission itself that would flow from improved coherence in the conditions that apply to immunity decisions internationally.

1.4. The Working Group believes that the fundamental objectives of an effective leniency programme are to promote:

(i) termination of cartel activity;

(ii) self-reporting to the relevant competition authorities, in return for immunity from penalties; and

(iii) cooperation with those authorities to maintain the immunity granted.

The first two objectives are so important in themselves that they justify an enforcement policy of taking all reasonable steps to facilitate a leniency application and to enhance the applicant’s expectation of success. The risk of uncertain outcomes necessarily inhibits a decision to report the misconduct. The establishment of unclear or excessively onerous evidentiary thresholds and the retention of broad discretion to accept or reject an application will create delay and indecision, as the parties concerned must evaluate the evident risks and uncertain benefits of disclosure. The possibility of excessive delay, or worse, a rejected application, due to unpredictable discretion and stringent or variable evidentiary standards, may discourage a party from engaging with the Commission, and thus, with other agencies. The experience of the Working Group suggests that simplicity and predictability are the critical features of a successful programme. Providing an applicant with certainty facilitates the objectives of a leniency policy and therefore goes a long way to ensuring that society
will benefit from the termination of the cartel activity and that the Commission is positioned to use its powers to investigate and penalise other cartel members.

2. REQUIREMENTS FOR AN IMMUNITY APPLICATION

Targeted Inspections

2.1. The proposed change in the standard of Point 8(a) does not have the support of the Working Group. The apparently heightened standard, from requiring evidence that is sufficient to carry out “an inspection” to that which would justify a decision to carry out a “targeted” inspection is a step in the wrong direction.

2.2. First of all, it is quite unclear what is meant by a “targeted” inspection. Point 9 provides a list of information which would enable the Commission to carry out such an inspection, but it does not differentiate an “inspection” (as referred to in other Community policies and in Point 10 of the draft Notice) from a “targeted” inspection. It is unknown if, in using this description in Point 8(a), the Commission contemplates some additional quality to the required evidence. Nor is it clear if this qualitative determination is being left to the discretion of the Commission to decide if a prospective inspection that could flow from the immunity application would be “targeted”. Reference to a targeted inspection without objective criteria is unhelpful, if the aim of the Notice is enhanced clarity and predictability.

2.3. The concept of a “targeted” investigation is unknown elsewhere in the language of European (and other) competition law and, as noted above, elsewhere within the Draft Notice itself. By the lack of clarity on the concept, it gives the Commission excessively wide latitude in deciding whether to accept an immunity application. In that respect, it is useful to recall the concept of “decisive evidence” in the 1996 Notice, which was equally subject to a lack of clarity and excess discretion. The requirement of “decisive evidence” was heavily criticised because it made it very hard to know what would be sufficient to satisfy upfront granting of (conditional) immunity. The proposed Point 8(a) suffers from the same deficiency: it makes it very hard to advise how much information and evidence might be required to be successful.

2.4. In summary, in the Working Group’s opinion, the introduction of the concept of a targeted inspection creates unnecessary uncertainty and provides too much discretion for the
Commission in assessing the evidence provided by an immunity applicant. The Commission is also conferred discretion, in the first phrase of Point 8, to grant immunity to the undertaking that has “in the Commission’s view” provided sufficient evidence. That discretion was already provided for in the 2002 Notice but the Working Group considers that phrase confers excessive discretion that diminishes predictability and thus the effectiveness of the Commission’s policy.

Evidentiary Requirements

2.5. The Working Group supports the Commission’s aim of clarifying the information that will be required in support of an immunity application. It has become a matter of concern recently that leniency has not been granted in some cases because the applications were deemed too summary or insufficiently precise. Those outcomes, which may not be open to public explanation, are destructive of the confidence and predictability that an effective leniency policy must generate. We welcome the clarification in Point 9, but at the same time believe that the Commission appears to raise the bar very high. The list of requisite information that is prescribed in Point 9 is excessively detailed. Much of that information in most cases would not be known, or even capable of being determined, at the critical time when the applicant is considering whether to apply for immunity. Worse, it is simply unclear if providing the information and evidence mentioned in Point 9 would invariably be sufficient for a successful immunity application.

2.6. Specifically, the opening language of Point 9 suggests that strict compliance with the extensive list of essential information may not always satisfy the evidentiary threshold. By calling for “at least” the information set out in Point 9, the Draft Notice undermines the ability to assess in advance whether something further might be required in any particular case, before the Commission would form the view that an applicant has met the standard of Point 8(a). To enhance clarity and predictability, the Working Group recommends that the words “at least” be removed in the opening sentence. Furthermore, the retention of the sole discretion of the Commission to assess the sufficiency of the evidence, in Point 8(a), is inimical to predictability and thus fails to facilitate decision-making by potential applicants. It is the view of the Working Group that there should be an explicit or implicit assurance that immunity will be granted if an applicant furnishes all or much of the information that is called for by the very extensive list in Point 9.
2.7. The Working Group questions whether a full-fledged corporate statement, in addition to all the details referred to in Point 9(a), is really essential before immunity can be granted. In the first place, the requirement will certainly cause considerable delay in the application process and in making the determination to grant or withhold immunity. To alleviate a risk that seems implicit in cases of delay, the Commission should provide an unequivocal assurance that the initial applicant will not be displaced by a later party, while the initial application is being perfected. Secondly, unless the reference to a “targeted” investigation has in fact raised the evidentiary threshold for an applicant, the other information sought by Point 9(a) would, in the Working Group’s view, normally suffice for a decision to conduct an inspection. The requirement for such a statement is testimony to the trend of the Commission relying first and foremost on corporate statements to make its case.

2.8. In any event, it is difficult to see how some of the details suggested in the list are required to enable the Commission to carry out an investigation, albeit a targeted one. It is submitted that an investigation can be conducted on the basis of less evidence and that further evidence can always been provided by the applicant in the context of its duty of continuous and full cooperation.

2.9. The excessive nature of the requirements to qualify for immunity is equally apparent from Point 11 of the Draft Notice. Why would the Commission in that provision require that the immunity applicant must submit both “evidence sufficient to find an infringement” as well as a corporate statement? A corporate statement appears redundant if the Commission has already received sufficient evidence to find an infringement. Furthermore, the “contemporaneous incriminating evidence” required under Point 11 essentially means written cartel materials from the date of operation of the cartel. This is an unnecessarily high burden which will make it very hard for a leniency applicant to apply, particularly in the increasingly common case of an extremely secretive cartel, where there is little or no written evidence. This requirement is counter-productive as it would make it extremely difficult, if not impossible, for members of secret cartels – often those that the Commission will have greatest difficulty detecting – to apply for leniency in the EU.

2.10. The process of completing the corporate statement has increasingly become a cause for concern. The time and effort involved in collecting and verifying the evidence, and then articulating it in a manner that meets the Commission’s perceived requirements, may be extended. During that period, there is a risk that another party may in the meantime by-pass
the applicant and obtain immunity. The existence–or indeed the promotion–of that risk does not square with a policy of creating a race to be the first to apply. It makes the process prone to uncertainty and unpredictability. The language of the Draft Notice gives rise to a perception that the Commission is preserving an inappropriate discretion. Both features may discourage applicants from coming forward. The proposed marker system may aim to overcome this difficulty but here again the Working Group believes that the proposed marker system is subject to unnecessary evidentiary requirements and consequential uncertainty (see further below).

2.11. Forcing the applicant to collect and verify such a detailed level of information before it can apply for immunity causes the European immunity programme to be more and more out of step with other immunity programmes, in particular in the U.S., Canada and Australia. If the company seeking to apply for immunity has complete and candid cooperation from the individuals involved in the cartel and if all of them are readily available, it might be able to put together such a complete statement in a short period of time. But in many instances the company will not be able to do so. That is even more the case for long standing cartels, where significant investigation may have to take place before the apparently requisite level of detail can be obtained. It is true that the duty to provide this information is qualified by the words “in so far as it is known to the applicant”, but that qualification itself is fraught with ambiguity. It should be amended to make clear that it means “known at the time the application is made”. Even with those qualifications, however, potential applicants should have an expectation that if they are unaware of some of the information specified, they will not be deprived of the opportunity to complete the application, if further information comes to light, and that they will not lose their immunity if they have provided all relevant information that is in fact known and under their control.

2.12. Some of the information which might have to be submitted is clearly problematic. For example, seldom will “precise” dates, locations and content of meetings be available. Even if the applicant knows them, home addresses of individuals who have been involved may be out of date and their disclosure in conflict with privacy laws in certain jurisdictions.

2.13. Moreover, according to Point 9(b), an immunity applicant must also provide all other evidence in its possession or available to it at the time of the submission of its application. This catch-all provision further decreases the predictability of the Commission’s leniency
programme and adds even more discretion to the Commission’s decision of whether to grant immunity.

2.14. In conclusion, the Working Group would strongly urge the Commission to clarify the relationship between Point 8(a) and Point 9(a) and to be less demanding in the information to be submitted.

3. ORAL APPLICATIONS

3.1. As indicated in the previous submission of the Working Group on the procedure for corporate statements to the Commission, the Working Group commends the Commission’s proposals to prevent corporate statements made to the Commission for leniency purposes from being discovered in civil damages litigation by private parties. The Working Group therefore wishes to endorse the concept expressed in Point 32 of the Draft Notice for an oral procedure for the submission of corporate statements. We also acknowledge the sensitivity of the Draft Notice in recognising the practical obstacles and difficulties that the procedure represents, both for the parties concerned and the Commission.

3.2. The Working Group would, however, like to raise several issues of particular concern in relation to the procedure as proposed in the Draft Notice.

3.3. Rights of Defence: the Draft Notice correctly states at Point 7 that the corporate statement should be disclosed to the addressees of the statement of objections in order to safeguard their rights of defence. However, limiting the addressees’ access to the corporate statement to a single occasion seems unnecessarily restrictive. It is assumed that the Commission does not intend that on such single occasion the addressees will be required – or able - to create a complete transcript of the corporate statement for their own legitimate purposes. This being the case, in order not to impede the exercise of the rights of the defence, the addressees may require access to the recordings of the corporate statement on more than one occasion and, perhaps, as often as they deem appropriate (within certain time constraints) in order to be able to test their contents in the light of consultations with internal and external experts. While the Working Group appreciates that allowing addressees

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1 IBA Antitrust Committee, Working group on leniency programmes, Submission to the European Commission’s consultation document: procedure for corporate statements made for the purpose of obtaining immunity from fines or reduction of fines in cartel cases.
repeated access to the recordings may give rise to logistical difficulties, curtailing the addressees’ rights of defence is not an adequate or acceptable solution.

3.4. **Verification of transcripts:** by Point 32 of the Draft Notice, the applicant would have to check the Commission’s transcript of the oral corporate statement for accuracy within a certain time limit. As previously indicated, a requirement for confirmation of the oral statement would create serious concern about the discoverability of that statement in civil proceedings in the U.S. and Canada. It is not at all clear that a requirement to “listen to the recordings” and “check the accuracy of the transcript” would diminish the risk of discovery, especially where the applicant is virtually required to go through the checking process or lose the benefits of its application. While the Working Group recognises the Commission’s evident effort to reduce that risk through the revised formulation of Point 32, the original concern is undiminished. The Working Group consequently questions the need for this verification process for a corporate statement in every case. Because any allegations in the corporate statement must be corroborated by contemporaneous evidence, the need for reassurance of the accuracy of the corporate statement itself is difficult to understand. Of course, if the corporate statement were ambiguous, or if there were discrepancies between the statement and the evidence provided, it would presumably be open to the Commission to seek clarification.

3.5. **Written Notice of rejection:** The Working Group notes the Commission’s intent, in the case of an unsuccessful application for immunity, to notify the applicant in writing of the result. The Working Group observes that the party might very well be compelled to produce such a written communication from the Commission in civil damages claims in other jurisdictions, to the detriment of the applicant in those proceedings. The Working Group sees no persuasive rationale for a step that could undermine the objectives of the proposed oral procedure and put the immunity applicant in a worse position than if it had not approached the Commission in the first place. The Working Group considers such written notification to be unnecessary.

3.6. To conclude, steps that seek to protect corporate statements from discovery are a vital move towards the objective of self-reporting, and for this reason we commend the Commission for its efforts in this area. Nonetheless great care must be taken to ensure that
the oral procedure will correctly balance fundamental rights with reduction of the risk of discovery.

4. **FURTHER CONDITIONS TO QUALIFY FOR IMMUNITY**

4.1. Generally, the Working Group welcomes the increased clarity provided by the Commission as regards the further conditions an applicant needs to meet to secure immunity in Point 12 of the Draft Notice, in particular as regards the duty to cooperate with the Commission throughout its procedure. The Working Group believes that Point 12 is generally compatible with the requirements of other competition agencies in other jurisdictions, but has several comments on specific aspects of this Point.

4.2. **Destruction/Concealment of Evidence:** The Draft Notice clarifies in Point 12(a), fourth bullet, that the immunity applicant must not destroy, falsify or conceal relevant information or evidence relating to the alleged cartel. This obligation is imposed on the applicant from the time it submits its application, as the applicant would not be acting in good faith if it committed to cooperating with the Commission, but deliberately or knowingly withheld material evidence from it. The circumstances when an immunity applicant might choose to withhold evidence that is relevant to its application are somewhat opaque and would likely be exceptional. The Commission is correct to record its concern about possible obstruction of its procedures. The Working Group considers that the Commission’s treatment of this important issue would be more appropriate if the disqualification is restricted to cases where the withholding of evidence is a conscious and deliberate act of the immunity applicant itself, with the knowledge or acquiescence of the management of the corporate applicant. The same applies to the provision in Point 12(c).

4.3. In this respect, it is not clear whether the Commission would disqualify the corporate applicant because an employee has destroyed or concealed evidence, on his or her own initiative and without the knowledge or acquiescence of management. If so, potential applicants may be discouraged from coming forward as soon as they learn of the misconduct. The search for certainty on this question would be, at best, both difficult and time-consuming, and in many cases impossible, even if the corporate representatives directing the process for seeking leniency have taken the time to attempt to verify that there has been no destruction or concealment of relevant records at any time. Disqualifying the corporate applicant in such circumstances would effectively penalise a party for the
misconduct of another, at least where the misconduct was unknown to the management of the corporate applicant. This is also true in the situation where, at the time the company becomes aware of an infringement, it had decided not to come forward at first, but revisits the issue and approaches the Commission at a later stage. Is that company then at risk of being considered to have concealed or destroyed evidence prior to the ultimate application, if it has merely continued its normal document management programmes? It would be against the spirit of the Draft Notice, and at least against its purpose, to deter potential immunity applicants as a result of such uncertainty.

4.4. **Non-Disclosure: Para 12(a): fifth bullet:** Until the Statement of Objections emerges, an applicant may not disclose the fact of its application or the content of what it has disclosed to the Commission, unless otherwise agreed. In the case of publicly traded corporate applicants, and in investigations of extended duration, this fetter on disclosure may become a trap for the unwary. It clearly creates a risk that compliance with the Commission’s requirements will put the applicant in breach of other legal obligations. In a cartel case with an international dimension, it is quite possible that an application for leniency would be a material fact that must be disclosed to securities regulators inside and outside Europe. Under the *Securities and Exchange Act, Sarbanes Oxley* and comparable legislation elsewhere, exposure to serious personal and corporate penalties may be incurred by a failure to disclose material facts. Furthermore, during a potentially extended European investigation, it is foreseeable that civil litigation in other jurisdictions will give rise to discovery obligations that require the applicant to disclose all applications for, or grants of, immunity or leniency by any competition authority. When such obligations arise, it will often be in circumstances where a person being deposed cannot refuse to answer. Third, with regard to the interests being protected by the non-disclosure obligation, it is generally the case that other cartel members will deduce the identity of an immunity applicant shortly after an enforcement authority has taken public action. After that time, there seems little purpose to a restriction on disclosure at least of the status of the party’s application. Finally, the Working Group would point out that under the wording of this provision, the applicant would not be at liberty to approach another competition agency without the agreement of the Commission, if that agency required information comparable to that demanded by the Commission under Point 9(a). The language of this provision seems inconsistent with the latitude for disclosure to other Competition authorities that seems implicit in Point 12(c). The Working Group assumes that this apparent procedural asymmetry - or conflict - must be
an unintended consequence of a reasonable concern on the part of the Commission about premature disclosure of a potential investigation.

4.5. The Working Group appreciates the need for confidentiality during the period while the Commission is preparing for inspections, to prevent premature disclosure and prejudice to the Commission’s investigation. However it might be desirable to add a further adjustment to the non-disclosure obligation. The preferable principle would be non-disclosure unless otherwise agreed between the applicant and the Commission, except where disclosure is legally required. In the latter case, the Commission might require advance notice of an intended disclosure, at least during the period when its investigation has not been made public. The Commission should also clarify that an applicant is entirely free to approach other competition authorities and to make all appropriate disclosures to such authorities, without reference to the Commission. Once the investigation has become public, through enforcement action against other parties, the Working Group questions whether obligatory non-disclosure of the applicants’ status continues to serve a purpose. In any event, loss of immunity due to breach of a non-disclosure obligation in such circumstances seems quite disproportionate.
5. THE INTRODUCTION OF A MARKER

5.1. The Working Group firmly supports the introduction of a marker procedure in the Commission’s Leniency Notice to improve the coherence between the Commission’s procedure and that of other competition enforcement agencies. It is important to be clear from the outset about the legal significance of a marker. In the practice of other agencies, a marker does not confer legal rights as such. The marker merely confirms (i) that the party is the first to come forward with the good faith intention to submit an immunity application and (ii) that it will not lose its place in the immunity queue during the limited time it needs to amass the information to perfect its application. The object of the marker is to ensure that the first party to come forward cannot be displaced by another cartel participant while the marker holder promptly completes its application. Its effect is therefore inherently procedural, not substantive. But the marker procedure should enable the Commission to promote a fair “race” among cartel participants to disclose their anti-competitive conduct. It should create incentives to come forward as soon as possible, by establishing a minimal threshold for the first contact with the Commission and by giving greater certainty that the initial party will not be overtaken by later applicants in the process.

5.2. The main conditions for an effective marker procedure are, therefore, for the Commission to give a high degree of certainty to the company coming forward and to establish a low threshold for the company to secure a marker. The current Commission proposal falls short on both counts.

5.3. First, the Commission retains too much discretion in granting - or withholding - a marker. Point 15 indicates that the Commission may grant a marker if certain conditions are fulfilled. A marker is not essentially automatic, under this formulation, unlike the situation in other competition agencies’ systems. A marker procedure will not work if the company coming forward is denied significant comfort that it will be successful in securing a marker if it is the first through the door. Secondly, a party will be reluctant to come forward if it could be worse off by testing the waters than if it did not contact the Commission at all. If the requirements for seeking a marker are too onerous, or if the party must disclose facts that would prejudice its legal position if a marker were not available, the experience of other agencies suggests that the marker procedure will not promote more, or earlier, applications. The Working Group considers that an application for a marker should require no more than a description of the product market in which the cartel operated, so that the Commission can
ascertain whether it has already initiated an investigation, or granted first place to another party. That is the only essential issue for determination, when a potential applicant approaches the Commission. No other information should be needed to assess whether the party is the first to come forward. If the marker is granted, the Commission is then in a position to procure the information required to perfect the full immunity application.

5.4. The Working Group considers that under the Draft Notice, the information required to secure a marker is unrealistic and excessive. The Commission would require the applicant to reveal its identity and the affected product market. The applicant must also provide information on the parties to the alleged cartel, the geographic area that is affected, the duration and the nature of the alleged cartel and other past or future leniency applications to other authorities (Point 15 of the Draft Notice). The Working Group is not aware of any other competition agency’s marker rules requiring the provision of such “self-incriminating” information, before the party can determine whether it would be eligible for immunity if it proceeds with a full application for immunity. Some of these factual elements, including the duration and the nature of the cartel, may not be known to the company at an early stage. Identification of other parties may, to a hesitant or poorly advised potential applicant, simply give the Commission an opportunity to by-pass it, in favour of a differently situated party. The development and verification of such information through an internal investigation is precisely why the marker procedure has been found necessary by other agencies: to create the conditions in which a party can come forward to confirm its opportunity to be the first to apply, at a time when it has not yet definitively determined the precise contours of the apparent misconduct. In the same vein, there is no reason why the applicant would need to justify its request for a marker. The Working Group believes that under the circumstances outlined in this submission, a marker should be granted as a matter of course.

2 Compare the Canadian Competition Bureau’s marker requirement: “If contacting the Bureau by telephone, an applicant should indicate that it is making a marker call. The applicant should take care to ensure that all information is clearly stated and that it and the Senior Deputy Commissioner or Deputy Commissioner are in agreement that a marker has been requested, on the time of the request and on the description of the relevant product. The Bureau will advise within a few days, by telephone, whether the requested marker is available to the applicant”. See: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1980&l=e
In Australia, the Australian Competition and Consumer Commission requires that “[i]n order to obtain a marker, a person must provide a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that no other person has applied for immunity or obtained a marker in respect of the cartel and that the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to conduct arising from the cartel. The person is not required to satisfy all the requirements for conditional immunity at the time of the request”. See: http://www.accc.gov.au/content/index.phtml/itemId/708758
5.5. It should be acknowledged that there will be cases where a party that obtains a marker may be unable to perfect its application. For example, the internal investigation may not confirm the initial perception of illegal conduct. Or the party may determine that in fact, the cartel was terminated at a time that is outside the limitation period. The Working Group believes that it is nevertheless important to promote applications for a marker in such cases, to develop a culture of confidence in the administration of the immunity system.

5.6. The Commission may have a justifiable concern to avoid abuse of the system. There may be a risk of an applicant placing a marker and then walking away, delaying the capacity of the Commission to advance its investigation. Such a situation would also be unfair to other would-be applicants, whose ability to apply for immunity is blocked unfairly. Similar considerations have troubled other competition agencies that administer a marker procedure. The Working Group submits, with respect, that such situations should be most exceptional in practice. The Commission has an unfettered capacity, once the marker has been granted, to work with the marker holder to develop an effective process for perfecting the immunity application, including the establishment of strict deadlines and other procedural safeguards against abuse. The Working Group suggests that the process for perfecting a marker should be case-specific. For example, where the case is entirely intra-European, it might be appropriate to establish different procedures and timetables than in a situation where the party has been granted a marker in other jurisdictions and is simultaneously seeking to cooperate with other competition agencies.

5.7. As indicated above, the requirements proposed by the Commission for a marker go beyond what is required in the immunity programmes in other jurisdictions, especially in the U.S., Canada and Australia. The Working Group considers that a failure by the Commission to align its marker procedure with the programmes of these other agencies would be a missed opportunity to enhance convergence and to facilitate multi-jurisdictional immunity applications in international cases. In the context of international cartels, immunity applicants must be able to easily adopt a coordinated approach internationally and thereby secure immunity in all relevant jurisdictions. If it is too difficult or too uncertain to apply in any one jurisdiction, it will affect the potential applicant’s ability and willingness to move quickly everywhere. Or the applicant may proceed in one or more jurisdictions, but withhold consent for them to communicate with agencies whose conditions are considered too stringent. That is a recipe for international incoherence in
cartel enforcement and the Working Group suggests that for marker administration, it is wholly unnecessary. Finally, as suggested above, excessively onerous or uncertain conditions in one jurisdiction may have a negative impact on the operation of other agencies’ immunity programmes. It is therefore advisable, in the view of the Working Group, to align with the U.S. and Canada in particular. On that approach, the Commission should signal that a marker would be granted to the party that is the first to come forward to disclose its participation in a cartel in a product market which the Commission was not already investigating, and in which no other party has applied for a marker or for immunity. The initial approach could be on a “no-names” basis, and if the party is granted a marker, the Commission could then stipulate the process for supplying the additional information required to perfect the marker with an immunity application.

5.8. The Working Group concludes that the introduction of a marker procedure is a very welcome improvement to the Commission’s leniency programme. However, for the proposed marker procedure to be truly successful, the Commission must provide certainty and predictability to potential applicants, reduce its discretion in granting a marker and limit its initial information requirements. The Working Group also suggests that the Commission coordinate, to the furthest extent possible, the conditions for seeking a marker with other enforcement authorities in Europe and other jurisdictions.
6. REVISION OF THE NOTICE AS REGARDS A REDUCTION OF THE FINE

6.1. The Commission has proposed a limited number of amendments as regards the requirements and procedure for an application for a reduction of the fine. In the Working Group’s view, some of these amendments are unhelpful.

6.2. The requirement in Point 23 in particular, but also in Point 8, that an applicant disclose their “participation in an alleged cartel” would discourage potential leniency applicants if this condition means that a company has to positively “plead guilty” to an infringement of Article 81. Companies may not always be in a position to attest that a particular activity is in fact contrary to Article 81, particularly at an early stage in its own investigative process. As such, as long as the company provides information, in a “genuine spirit of cooperation” (as required by the courts), that can be used to establish an infringement, whether or not they have pleaded guilty to the alleged offence should be immaterial.

6.3. As with the concept of a “targeted inspection”, in Point 8(a) of the Draft Notice, the introduction in Point 25 of a new concept of “compelling evidence” is inappropriate. First, it is not clear whether “compelling evidence” adds to the concept of “evidence that has significant added value” or whether it is merely an example of evidence which has significant added value. Linking this concept to the degree of corroboration required from other sources makes the fine reduction too dependent on factors that the applicant does not control (e.g. the information provided by other cartel participants) instead of an objective and verifiable criterion related to the nature or intrinsic value of the evidence provided. Moreover, the reference in the last bullet point of Point 26 to “compelling evidence” seems to suggest that evidence that merely has “significant added value” could be used against the applicant, unless it constitutes “compelling evidence”. If the regulators should choose not to characterise that evidence as “compelling,” a party could reasonably treat this as a very strong disincentive to offer up significant self-incriminating evidence that might be used against it. Contrary to the Commission’s aims, this creates significant legal uncertainty. The Working Group therefore suggests that the concept of “compelling evidence” should be either abandoned or objectively defined. It is suggested that the scope of the last bullet point of Point 26 should be extended to all evidence that is submitted by leniency applicants.
6.4. In Point 29, the Commission suggests that it may disregard any application for a reduction of fines on the grounds that it has been submitted after the notification of the statement of objections. Such a provision seems evident, as regards any application for immunity (Point 14). However, it appears inappropriate to exclude, as a matter of principle, any fine reduction. A party might very well come forward with value added evidence after it has received a statement of objections. It could be useful for the Commission to have such evidence, which might, for example, enable it to broaden the scope of its investigation by issuing a second statement of objections. The Working Group fails to see the Commission’s policy objective in excluding any leniency in such a context, and thus, in excluding any possibility of obtaining such evidence.

6.5. In conclusion, the Working Group submits that both a requirement for a “guilty plea” and the new concept of “compelling evidence” should be abandoned. Moreover, it is not helpful to extend the application of the condition set out in Point 12(c) to applications for fine reductions and it is not advisable to exclude, as a matter of principle, any applications for a fine reduction submitted after the Commission has issued its statement of objections.

7. THE ECN MODEL LENIENCY PROGRAMME

7.1. The Working Group wholeheartedly supports this effort to harmonise the EU Member State leniency programmes. An efficient, effective and integrated EU leniency programme would encourage leniency applicants to come forward and consequently be beneficial to the enforcement of competition law in the EU. However we note that at the present time only nineteen Member States offer leniency programmes, there is a high degree of residual discretion left to Member States in implementing the Model and that, in its current form, the ECN Model Leniency Programme (The Model) falls considerably short of offering one-stop leniency.

7.2. It remains disappointing that leniency applications will still need to be made to all national authorities. The Working Group considers an optimal solution is that once a leniency application has been submitted to the Commission, the leniency applicant should be required only to submit a standard notification to all relevant competition authorities to the effect that such a notification has been submitted. Such notification is described further below.
7.3. The Working Group recognises and applauds the practical benefits that would arise from a requirement to file only a summary leniency application to national competition authorities once a leniency application had been submitted to the Commission. The summary application as described in the Model, however, would still include a significant amount of information. Indeed, in so far as it requires the identification of Member States where the evidence is likely to be located, this goes beyond the scope even of the original formal application to the Commission. We would propose that once the application to the Commission has been made, national competition authorities need only be notified of the name of the applicant undertaking and the product market concerned (provided that, by specific agreement or pursuant to Point 1 of the Network Notice, all Member State competition authorities are able to access the information provided to the Commission).

7.4. The marker system under the Model is discretionary. It is our expectation that a number of Member States will not implement the marker system and as a consequence there will be a disjointed leniency framework, which will deter potential leniency applicants. The Working Group would suggest that there should be an exception to such discretion so that where the Commission, or any other lead competition authority, has granted a marker, the other competition authorities must follow suit. As is evident throughout the present commentary, it is the Working Group’s strong belief that (1) the existence of a qualitative discretion is simply incompatible with an effective immunity policy, and; (2) the initial party to apply should be assured that it will not be by-passed by a later applicant, at least in the absence of deliberate non-cooperation.

7.5. The summary application process detailed in the Model would only apply where the Commission is “particularly well placed”. We would argue that the situation in this regard may well not always be clear, particularly in the early stages of an immunity application, and pre-eminently at the time when an potential applicant is considering whether to come forward to seek immunity. Such a requirement introduces an important element of risk into that assessment that undermines the certainty and predictability of the process. The Working Group proposes that the summary application process should apply whenever a full application has been made to the Commission. Indeed, we further propose that where the original leniency application is submitted to a “particularly well placed” national

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3 Commission Notice on cooperation within the Network of Competition Authorities, (2004/C 101/03).
competition authority, summary applications should be permitted to other competition authorities, including the Commission.

7.6. The Working Group submits that language will remain a significant problem in practice, in particular in view of the level of detail required in summary applications. This will be the case in spite of the provisions of Point 45 of the Explanatory Notes which states that competition authorities should agree to show flexibility regarding languages where legally possible.

7.7. We note that the summary application process does not extend to individuals. While this problem is recognised in Point 15 of the Explanatory Notes it is not otherwise addressed. We submit that this is a major outstanding concern that will continue seriously to limit the usefulness of the summary application process.

7.8. Footnote 3, linked to Point 7(a), suggests that the summary application process should extend to national laws equivalent to Article 81 EC. In our view it would be useful for this extended application to be made explicit throughout the Model. The Working Group would like to indicate, however, that it does not underestimate the complexity of applying the Model to criminal laws, laws which are not specifically antitrust laws and laws applicable to individuals.

7.9. Point 8 of the Explanatory Notes suggests that individual competition authorities may add further detailed provisions to their leniency systems, tailored to their specific enforcement systems. The Working Group recommends an express statement that such provisions should not apply to summary applications, as these additional elements would greatly diminish the value of the summary application procedure as a step towards one-stop leniency. The key to the summary application procedure is that an applicant should not be required to prepare a number of different leniency applications, tailored to each competition authority’s requirements, but can rather submit one leniency application and a set of uniform summary applications. If the Model falters in this regard, there will have been very limited progress towards one-stop leniency.

7.10. Point 11 of the Model suggests that reductions of fines pursuant to a Type 2 application should not exceed 50%. The Working Group submits that this contradicts the
principle, given in Point 3, that the Model does not prevent national competition authorities from adopting a more favourable approach than that given in the Model.

7.11. We submit that the Model should indicate that legitimate expectations are recognised to be created by any competition authority which adopts a leniency programme (even if, as detailed in Point 10 of the Explanatory Notes, the Model itself does not create such an expectation).

7.12. While recognising that this may be viewed by some as a somewhat radical suggestion, the Working Group submits that the Commission should insist that Article 10 EC already requires that Member States and their competition authorities must fully support and not undermine the Community leniency programme. These parties would then be prohibited from proceeding against any beneficiary of the Community leniency programme (or at least any undertaking granted immunity). At the very least, we suggest that Article 10 EC should be referred to in the introduction to the Model.

8. CONCLUSION

8.1. Overall, the Working Group submits that the Commission has made a positive step in the right direction in modernising its leniency programme. However, in the view of the Working Group, the amendments do not successfully meet the Commission’s intended aims of increased predictability and congruence with the immunity programmes of other competition agencies. The Working Group hopes that the above comments, that arise from a mutual goal of enhancing predictability and coherence, will be taken into account by the Commission.

8.2. As a final comment, the Working Group would encourage the Commission to open up the discussion on plea bargaining in the amendments. The Working Group recognises, however, the complexity of plea bargaining and would be willing to prepare a separate submission on that topic if the Commission would find this helpful.
Annex A

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