The European Commission’s 2002 Leniency Notice after one year of operation

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As François Arbault and Francisco Peiro have rightly stated in their Article ‘The Commission’s new notice on immunity and reduction of fines in cartel case: building on success’ in the June 2002 issue of the Competition Policy Newsletter, the Commission’s leniency notice of February 2002 (2) (the Notice) offers much greater legal certainty than the former 1996 notice (3) in guaranteeing immunity to companies involved in cartel behavior if they are the first to denounce a cartel (4). The Notice also offers clearer rules regarding reductions of fines for subsequent applicants. In the second part of their article, Arbault and Peiro spell out the conditions imposed by the Notice. There is no need to repeat these. The purpose of this Article is to explain the Commission’s actual operation of the Notice, as it can be distilled from its first year of application. In doing so, some interpretative issues raised by Jarrett Arp and Christof Swaak, a US and EU lawyer respectively, will be responded to (5).

Some figures

To set the scene, and mindful that action speaks louder than words, it may be useful to provide some figures on the actual use companies have made of the Notice. In the first year, more than twenty applications for immunity were received in separate cases. For cartels, this is a huge number. By comparison, during the six years of operation of the 1996 Notice, leniency was requested in a total of sixteen separate cases (6). Moreover, those requests concerned mainly reductions of fines. In fact, under the 1996 Notice, full immunity was granted in only three cases in six years. Apart from the strongly increased number of applications, the main difference with the 1996 Notice is therefore that under the 1996 Notice most leniency applications were made following Commission inspections, with the objective of receiving a reduction in the fines to be imposed, whereas under the 2002 Notice, most applications are immunity applications, made before the Commission has taken any investigative steps.

Clearly, therefore, the 2002 Notice has been very successful so far in persuading companies to come clean. Indeed, one can observe something of a snowball effect. Some applicants have taken the opportunity of full immunity offered by the Notice to make a clean sweep in the company and present the Commission with immunity applications for every cartel they could discover internally, while pursuing at the same time strict internal compliance programs to ensure a new business philosophy for the future. Then, as the Commission started to investigate the cartels denounced to it, a second wave of applications was made by companies seeking the largest possible reduction of fines. These new applicants have sometimes also brought in new cases in other product areas. And so, one case leads to the next.

Were these companies right in applying for immunity or reduction of fines? After all, as Arp and Swaak say, ‘if the Commission appears inclined to deny full immunity to otherwise qualifying candidates in close cases based on subjective interpretive issues, the EC policy — and in turn the analogue policies of other jurisdictions — will not be as successful as they could be’ (7). Fortunately, it can be said that virtually every new application for immunity made until now has led, within just a few weeks of the application, to an official Commission Decision granting the applicant conditional immunity from fines (8). More than ten such decisions have already been taken, and several others are in

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(2) OJ C 45, 19.2.2002, pp. 3 to 5.


(6) Arbault and Peiro, p. 15.

(7) Arp and Swaak, p. 63.

(8) The immunity is conditional upon compliance with the conditions in point 11 of the Notice. See further below under ‘Requirements For A Successful Immunity Application’.
the pipeline at the time of writing (1). There have, of course, been several instances where immunity could not be granted because it had already been given to another, prior applicant. In those cases, applicants have, until now, chosen to apply for a reduction of fines. In some of these cases, the Commission has already informed the applicant of its intention to grant a reduction of between 30 and 50%, while other cases are still under consideration (2). But for applicants for immunity in new cases, there has been, to the author’s knowledge, only one company that simply did not provide enough information for the Commission to be able to grant conditional immunity. There have been no ‘subjective interpretive issues’ that have prevented applicants from getting immunity. Indeed, most participants in these proceedings would probably agree that the Commission has shown considerable pragmatism in its interpretation and application of the Notice with a view to enhancing its effectiveness in providing immunity and revealing cartels (3).

The main reason why the Commission has been able to grant conditional immunity in so many cases, is that the threshold of point 8(a) of the Notice (4) is low, much lower than the threshold in the 1996 Notice (5). It is precisely the combination of the instrument of immunity with the Commission’s own powers of investigation that makes the current Notice so effective. Most conditional immunity decisions until now have indeed been decisions on the basis of point 8(a) of the Notice, rather than point 8(b) (6) and they have, in most cases, been followed by surprise inspections (so-called dawn-raids) by the Commission. Where appropriate, these have been coordinated with competition authorities in other jurisdictions, notably those in the United States, Canada and Japan (7).

Experience in handling immunity applications by US companies or European companies with important business interests in the United States has led the Commission to introduce a procedure not foreseen in the Notice, that of the oral application (8).

First inquiries

Arp and Swaak raise the question whether the Commission will allow non-prejudicial immunity inquiries, i.e. anonymous inquiries into the availability of immunity without any need to apply (9). The short answer to this is ‘no’. It would be too easy for a cartel member to abuse such a possibility to get confirmation that none of the other members has blown the whistle, that the cartel is therefore safe, and then simply to walk away. In the Commission’s practice, it is not necessary, in a first inquiry, for an applicant to identify itself. But it must necessarily identify at least the larger product sector within which the product concerned is located, before the Commission can determine whether immunity is available. An example would be the construction sector, the transport sector, or the chemical sector. Then, if the Commission already has information of its own or has received a prior immunity application regarding this larger product sector, the applicant will have to become more specific, until the Commission can state with certainty whether immunity is available. This logical necessity to reveal at least the product sector in which the cartel operates probably deters any abusive inquiries. In any case, the Commission has not had any abusive inquiries. All inquiries that were made have been serious ones, and if

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(1) February 2003. By comparison, in the six years of operation of the 1996 Notice, full immunity was granted in only three cases. Conditional immunity Decisions are not published, for understandable reasons.

(2) Applications for reductions of fines take longer for the Commission to evaluate than immunity applications. This is because the Commission must compare the information received in the application for a reduction of fine with the information already in its possession (because of a prior immunity application or the Commission’s own investigation) and come to a position on whether the new information constitutes significant added value. See points 26, 21 and 22 of the Notice. It is, however, Commission policy to inform applicants as soon as possible in writing after the Commission has reached a position, thereby creating legal certainty for the applicant and clarifying the position of other applicants. If the Commission comes to a positive preliminary conclusion, it will issue a formal Decision announcing its intention to grant a reduction within a certain band. See point 23(b) of the Notice.

(3) The basic rationale behind the new Notice was clearly stated by Commissioner Monti when he announced the new policy: ‘This new Notice should not, in any way, be understood as reflecting a more lenient approach in the fight against price-fixing and other anti-competitive practices. On the contrary, the new policy will increase the likelihood that cartels will be detected which, together with the Commission’s determination to impose fines at dissuasive levels, should deter companies from entering into collusive behaviour in the first place’. Commission press release of 13 February 2002, entitled ‘Commission adopts new leniency policy for companies which give information on cartels,’ IP/02/247, p. 3.

(4) ‘…the undertaking is the first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with an alleged cartel affecting the Community’.

(5) Under the 1996 Notice, a company had to be the first to ‘adduce decisive evidence of the cartel’s existence’.

(6) Immunity can be given under point 8(b) if the undertaking is the first to submit evidence which in the Commission’s view may enable it to find an infringement of Article 81 EC.

(7) It is Commission policy not to publicise the particulars of surprise inspections.

(8) This procedure will be described further below under ‘Oral Applications’.

(9) Arp and Swaak, p. 63.
immunity was available, all of them have resulted in actual applications. The Commission does indeed expect applicants to proceed with the application and submit the evidence as soon as they receive confirmation that immunity is available. If immunity is not available, the potential applicant is of course free not to apply for a reduction of fine, although until now those companies that were in this situation have chosen to apply for a reduction of fine.

**Requirements for a successful immunity application**

Immunity can only be granted once for a particular infringement. In cases where no inspection has been carried out yet, applicants usually apply for immunity under, point 8(a) or, in the alternative, 8(b) of the Notice and submit all the information at their disposal, as they are required to do (1). Whether the Commission grants immunity under point 8(a) or point 8(b), the practical consequences for the applicant are the same, namely conditional immunity from fines. If the Commission has not yet undertaken an inspection, it will usually grant conditional immunity under point 8(a). To qualify under point 8(a), evidence regarding names, functions, and office locations of participants of other companies in the cartel is especially important, and sometimes overlooked by applicants.

The Commission will not consider other applications for immunity before it has taken a position on an existing application (2). The point in time at which an application is made is therefore of great importance, as it will determine the place in line of the applicant. The Commission does not operate an official ‘marker’ system, whereby an applicant could secure its place simply by informing the Commission that it wants to apply. In order to be recognized as an application, the application has to be substantial and provide all the evidence and information the applicant has at its disposal at that point in time. However, it does happen that a company is in a great hurry to apply. Provided the application then has sufficient ‘meat’ to it, the Commission will accept it and grant the applicant an additional one or maximum two weeks within which to supplement its application. The date of application will, however, be the first date. Other applications for the same infringement will not be considered until the Commission has taken a position on the first application. However, the moment a second applicant submits evidence, the first applicant can no longer supplement its application with further evidence. Its application will then be evaluated on the basis of the evidence it had submitted until the moment the second application was made. It is therefore in the interest of applicants to file a maximum of evidence immediately.

Whether the application is made under point 8(a) or 8(b) of the Notice, it should ideally contain the following information:

- A corporate statement, especially prepared for and addressed to the Commission, in which the company formally applies for immunity from fines and describes its participation in a cartel. Based on the information in the applicant’s possession at the time of the application, this statement should describe the product or service concerned, the production process, the market, the customers and, in particular, the precise functioning of the cartel, including its membership, period of functioning, geographic area covered, activities, internal rules, meetings and other contacts;

- This synthesis should be supported by copies of previously existing documents, whenever such documents are available to the applicant. All written evidence that can be found should be submitted.

- The written evidence may be supplemented by written statements of company employees or former employees on behalf of the corporate applicant, describing their participation in the cartel.

- Especially important for the Commission’s purposes under point 8(a) of the Notice, the application should include precise information about the names, functions, and office locations of participants of other companies in the cartel.

- If the company is represented by counsel, the application should include a power of attorney.

The company must, in accordance with point 11 of the Notice, cooperate fully with the Commission throughout the administrative procedure. In this respect, it should make all efforts to supply whatever additional (relevant) information the Commission may request from it. This includes taking legally available measures to ensure that officials still working for the company participate in explanatory meetings with the Commission (if so requested by the Commission) and making best efforts to persuade officials no longer in its employment to co-operate (again, if so requested by the Commission). Moreover, the applicant should, throughout the Commission’s administrative procedure, spontaneously offer whatever additional relevant information it uncovers.

(1) See point 13(a) of the Notice.

(2) See point 18 of the Notice.
This duty of full cooperation includes, in the interpretation of the Commission, the obligation not to reveal to third parties the existence of the immunity application, without prior approval from the Commission. The Commission is aware, for example, that companies quoted on the US stock exchange have certain publication obligations under SEC rules regarding risks to investors. The Commission will not, however, accept any publication by the applicant before it has undertaken surprise inspections. These usually take place within weeks of an application. Violation of this obligation could endanger the inspections and would disqualify the applicant for immunity. Following the inspection, there is, in general, no longer a predominant necessity for the Commission to preserve the confidentiality of the immunity application.

In order to qualify for immunity, the applicant must not have coerced other companies to participate in the cartel (1). This requirement has been significantly limited compared to the 1996 leniency notice (where a company could not qualify if it had instigated the cartel activity or had played a determining role). The purpose clearly is to encourage immunity applicants to come forward, even if they would have been considered under the 1996 notice to be ‘ringleaders’. The advantage to society of uncovering and terminating cartels is considered greater than any ethical considerations about punishing each and every active cartel member. But the Commission draws the line where actual coercion is used to force other companies to participate in the cartel.

The applicant must also have ended its involvement in the cartel no later than the moment when the evidence is submitted (2). Application of this condition requires a delicate balance with the need to ensure that the other members of the cartel do not prematurely become aware that one of them has blown the whistle. Active continued participation in the cartel cannot be allowed. The applicant must stop going to cartel meetings and must stop seeking or using information from the cartel. But often the other cartel members will still call or fax the applicant to pass on information (for instance about intended price increases). This kind of passive participation may be accepted by the Commission, as long as the applicant does not act on the information. In the short run, the creation of a ‘Chinese wall’ within the company around those who receive information from the cartel may be necessary. Once inspections have taken place, the applicant should take more structural steps to follow its own autonomous commercial policy. Evidence thereof must be supplied to the Commission.

**Hypothetical applications**

To provide greater reassurance to nervous potential applicants, the Commission has devised the mechanism of the hypothetical application (3). Its main advantage compared to the normal procedure is that applicants will receive a Commission Decision ensuring them conditional immunity before they have to provide the actual evidence. This procedure has now been used a number of times, in particular by US companies.

In a hypothetical application, the applicant initially presents the evidence in hypothetical terms only, i.e. in the form of a descriptive list of the evidence it can disclose. A hypothetical application is like a normal 8(a) or 8(b) application, except that it takes place in two stages (4). In a first Decision, the Commission determines that the evidence as described in the list will meet the requirements of points 8(a) or 8(b). After this first Decision has been issued and the applicant has revealed the evidence, the Commission will verify whether the evidence received corresponds to the description of it in the list. If so, the Commission grants conditional immunity in a second Decision. The substantial evaluation of the evidence therefore takes place at the stage of the first decision. This is why the hypothetical list initially supplied should be sufficiently detailed to permit an evaluation of whether the actual evidence will meet the conditions of points 8(a) or 8(b). The description of a document should for instance be: report of a meeting among cartel members A, B, C and D in place X on date Y to discuss prices and market sharing agreements in country Z. The Commission also insists that the evidence described in the list must already be in the possession of the applicant when the list is handed over.

**Oral applications**

The Commission considers that a written corporate statement, in which the company describes its participation in a cartel with effects in the EU, and which has been produced for the sole purpose of applying for immunity under the Commission’s leniency program, should not be discoverable in third country jurisdictions, including the United States. In this respect, the Commission recently intervened

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(1) Point 11 of the Notice.
(2) Idem.
(3) Points 13(b) and 16 of the Notice.
(4) See point 16 of the Notice. The same rule applies that the Commission will not consider any other applications for immunity before it has taken a position on an existing hypothetical application. To be able to do so, it is clear that the Commission will need to know the product sector, at least, even if all the other information remains hypothetical in the first stage.
successfully as *amicus curiae* in a case before the US District Court in the Northern District of California, where the District Court Judge denied the plaintiff’s request for discovery of the defendant’s written corporate statement to the Commission (1). It is to be hoped that this jurisprudence will become generally accepted in the United States. The effectiveness of the world-wide fight against cartels, including by the US authorities, can only suffer if the Commission’s leniency policy were undermined by EU immunity applications turning up in US courts.

Arp and Swaak ask whether the Commission will also accept oral applications (2). The answer is ‘yes’. As long as the new and encouraging US jurisprudence mentioned above is not yet generally accepted, the Commission will allow corporate statements to be made orally only. It will do so where a serious risk exists that the applicant will face civil legal actions in third country jurisdictions that may result in the production of the corporate statement to the Commission in which the company describes its participation in a cartel (which may be global in scope). The forced production of such a document by the company could result in awards of very significant damages. While the Commission certainly does not want to hinder civil litigation, in any jurisdiction, neither does it believe that plaintiffs in civil litigation should gratuitously benefit from the entirely unrelated and autonomous procedure of the Commission’s leniency program, thereby undermining the latter program in the process.

In such cases, in order not to deter applications, the Commission may agree to take notes registering the information given orally. To avoid possible misunderstandings and omissions, the oral statement in which the information is given may be taped and transcribed. The minutes drafted by the Commission services are considered to contain corporate statements as evidence. It is therefore essential that the minutes be reviewed and their accuracy certified by the applicant or its legal representative. Their status is, however, that of an official Commission document and not a company document.

When it comes to documents that already existed in the company and that do not have to be especially prepared for the Commission, such as reports on meetings of the cartel, these were already discoverable in third country jurisdictions and they remain so. For the same reason, copies of these documents have to be submitted to the Commission as part of the application. The Commission does not claim that these documents become non-discoverable by reason of their inclusion in an EU immunity application.

In the context of oral applications, it can be agreed that all documents produced by the Commission (including the acknowledgement of receipt and the decision granting conditional immunity) will be notified at the premises of the Commission and will not be sent to the applicant. The notification of the decision to grant conditional immunity will then be made in agreement with the applicant, for instance by presenting the decision to the applicant and having him or her sign for (oral) notification.

**Confidentiality**

Immunity applicants usually want to preserve confidentiality regarding their application, in particular towards the other cartel members, even after inspections have taken place. The Commission services will not, without the applicant’s prior permission, reveal its name to any private parties until the statement of objections is issued (but no later). This is usually at least a year after inspections have taken place. But the applicant should realize that if a second formal immunity application is made for the same facts, the Commission services have to inform the second applicant that another immunity application has already been made (without, however, revealing the identity of the applicant).

The Commission services also will not, without the agreement of the applicant, pass on information from an immunity application made to the Commission under Community law to a Member State for the purpose of an investigation under national law. This is different, of course, if the Commission handles the case itself, under Community law. In that case, the Commission is required to pass on information from the immunity application to the Member State in the course of the normal preparation of inspections (3) and subsequently to prepare a Commission decision fining the cartel (4). In this respect, Member State authorities are subject to the obligation of professional secrecy of Article 20 of Regulation No 17 and cannot use the information they receive for purposes of national law enforcement (5).

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(2) Arp and Swaak, p. 63.
(4) See Article 10 of Regulation No 17.
(5) For discussion of the situation under the new Regulation 1/2003, see below under ‘Member States’.
Moreover, in the case of an international cartel, the applicant may decide to also apply for leniency with the US Department of Justice and anti-trust authorities in other jurisdictions (notably, in Canada, Japan and Australia). In such cases, the Commission will ask the applicant to provide a waiver so that the Commission can fully discuss the case with these authorities and share information. Such a waiver allows, in particular, coordination of simultaneous surprise inspections in various parts of the world.

The decision granting conditional immunity

In order to enhance legal certainty, the Commission grants conditional immunity through a formal Commission Decision, signed by the Commissioner in charge of competition matters by delegated authority from the College. It normally takes about 14 days to issue such a Decision, starting from the day the evidence is provided. The Decision is addressed to the company making the application. Hypothetical applications take about twice as long to process, as they require two Commission Decisions. Each separate infringement reported in the immunity application will be evaluated separately in terms of whether the information supplied qualifies for immunity. Whether separate infringements exist can only be decided on a case-by-case basis depending on whether the product markets are different, the geographic markets are different, the cartel members are different and other factors. The Decision granting conditional immunity is not published. It is relatively short and does not go much beyond the language of the Notice itself. No other conditions for immunity are posed than those mentioned in the Notice itself. The only clarification that is made (at this time of writing) is that the obligation of full co-operation in point 11 of the Notice includes the obligation not to reveal to third parties the existence of the immunity application, without prior approval from the Commission. The Decision states clearly that at the end of the administrative procedure, the Commission will grant the applicant immunity from fines with regard to any infringement(s) that the Commission has found as a result of its investigation in connection with the evidence the applicant submitted in relation to the alleged cartel, provided that the applicant has met the conditions set out in point 11 of the Notice.

Arp and Swaak observe that conditional immunity letters of the US Department of Justice contain ‘many of the precise obligations and burdens attendant to satisfying the conditions of immunity’ (1). As is clear from the above, the Commission’s practice is different, at least in this relatively early stage of application. The Commission cannot introduce in its immunity Decisions any conditions that are not covered by the conditions in the Notice itself. The Commission may specify certain conditions of the Notice, such as the duty of continued cooperation in the example above. But it cannot invent new ones without adding those to the Notice, given that the Notice creates legitimate expectations upon which companies can rely (2).

Rejection of an application for immunity

If, on the basis of the Commission services’ analysis of the dossier, it is concluded that the application does not qualify for immunity, a letter is sent at services level informing the applicant that the evidence does not meet the requirements set out in points 8(a) or 8(b) of the Notice. This letter is not a legal act that can be challenged in its own right. But if the Commission were to impose a fine on the applicant in its Decision prohibiting the cartel, this Decision can, of course, be challenged before the Court of First Instance.

If immunity is rejected, the application may still be considered for a reduction of fines, if this is requested. The applicant may also try to submit a new immunity application that does meet the conditions of points 8(a) or 8(b).

Member States

Arp and Swaak note that, in view of the trend in some Member States to render cartel behavior a criminal offense, the Commission’s leniency program risks being undermined if the immunity granted by the Commission does not protect the employees of the company concerned from criminal prosecution in the Member States (3). It should be underlined at the outset that until now, there have been no instances where the Commission granted a company immunity and a Member State prosecuted employees of that company. In practice, cartel cases have been dealt with either by the Commission, or, when the infringement was focused on a single national territory, by a Member State.

This kind of practical division of labor will be continued under the newly adopted Regulation 1/2003, which will replace Regulation 17/62 as of

(1) Arp and Swaak, p. 64.
(2) Point 29 of the Notice.
1 May next year (1). It is accepted by all Member States that the Commission is particularly well placed to deal with a case if more than three Member States are substantially affected by an agreement or practice. This will be the case for the great majority of immunity applications filed with the Commission. Once the Commission has initiated proceedings, Article 11(6) of Regulation 1/2003 provides that Member States are relieved of their competence to apply Articles 81 and 82 of the Treaty. They are then also no longer able to apply national competition law (2).

The Commission may occasionally want to transfer an immunity case to a Member State, because the agreement or practice is focused on its territory. However, if a Member State were unable to provide immunity under equivalent conditions as those applied by the Commission, the Commission could decide to handle the case itself and not refer it to a Member State. Ultimately, the Commission could, if necessary, even take a case previously referred to a Member State back by invoking Article 11(6) of Regulation 1/2003 which, as mentioned, releases the Member State of its competence.

With respect to individuals, Article 12(3) of Regulation 1/2003 provides that information which the Commission exchanges with Member States can only be used by them in evidence to impose sanctions on natural persons if the information has been collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for under the rules of the receiving authority. This condition is clearly not met in the case of immunity applications filed with the Commission, as their voluntary, co-operative nature is entirely different from the nature of criminal proceedings. Therefore, any information from immunity applications which the Commission exchanges with Member States under Article 12 of Regulation 1/2003 cannot be used in evidence by Member States to impose sanctions on employees or former employees of the immunity applicant that have co-operated with the Commission in the context of the immunity application.

This does not, in theory, preclude a Member State from acting against individuals on the basis of national laws that are not competition laws, provided it does not use in evidence information received through the Network under Article 12. If a Member State were to bring criminal proceedings against the employees of a company that had received immunity from the Commission, based for instance on the Commission’s Statement of Objections or final Decision in the case, such action would indeed be at cross purposes with the Commission’s leniency policy. It is, therefore, desirable in the view of the author that this scenario, which until now has remained entirely theoretical, be adequately dealt with in the close cooperation between Member States and the Commission leading up to the entry into force of Regulation 1/2003.

**Conclusion**

Judging by the number of applications made so far, the Commission’s 2002 leniency notice has been very well received by the business and legal community. In its first year of application of the Notice, the Commission has tried to be pragmatic and flexible, with a view to allowing the highest number of applications to succeed and thereby to reveal and fine as many cartels as possible. Conditional immunity has been granted in virtually all applications made so far, other than those cases where another company had filed for immunity first.

Two aspects of the leniency policy in particular require the continued attention of the Commission in the year ahead:

Firstly, the Commission must ensure that its leniency policy is not undermined by the risk of discovery of applicants’ corporate statements in third country jurisdictions. Preferably this issue should be resolved by foreign courts recognizing that such documents especially prepared for the Commission’s leniency program are not subject to discovery. If not, the trend towards oral applications will be increased.

Secondly, the Commission must ensure that its leniency policy is not undermined by the risk of criminal sanctions being imposed in Member States on employees of companies that have received immunity from the Commission. As neither the Commission nor Member States can possibly benefit from a faltering leniency policy, they will have to resolve this issue in close cooperation before Regulation 1/2003 enters into force in May 2004.

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(2) Article 3.1 of Regulation 1/2003.