

**COMMENTS OF THE ABA SECTION OF ANTITRUST LAW
IN RESPONSE TO
THE COMMISSION OF THE EUROPEAN COMMUNITIES'
REQUEST FOR PUBLIC COMMENT ON THE DRAFT AMENDMENT OF
THE 2002 COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

APRIL 2006

The Section of Antitrust Law (the "Section") of the American Bar Association ("ABA") appreciates the opportunity to present its views concerning the Commission of the European Communities' (the "Commission") draft amendments to the Notice on Immunity From Fines and Reduction of Fines in Cartel Cases issued in February 2002 (the "2002 Leniency Notice" or the "Leniency Notice"). The views expressed in these comments are those of the Section and have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

Executive Summary

The Section applauds the Commission's efforts to safeguard the integrity and confidentiality of information obtained from leniency applicants. The Section supports the efforts of the Commission to limit access to oral statements of leniency applicants. These procedures reduce the risk that the Commission's files will be used in other proceedings, particularly in U.S. civil litigation. This enhances the incentives and benefits for the leniency applicant to self report and strengthens the Commission's cartel enforcement system.

The use of oral statements and corporate statements raise issues when such statements are to be used as evidence by the Commission. The Section agrees with the Commission that the primary objective should be that the leniency applicant is in no worse a position than undertakings that do not cooperate in an investigation. The Section favors a "paperless" process – with no written statements at all, and opposes any system that requires the company to endorse or ratify a transcript of its statement. The Section recommends the totally paperless systems in the United States and Canada as useful models.

The Section is particularly concerned about the use of the transcript of an oral leniency statement as evidence in the Statement of Objection issued by the Commission in cartel cases. Statements of Objection are regularly subject to discovery requests in U.S. private litigation and disclosure of such admissions of the leniency applicant places the leniency applicant in a far worse position than the non-cooperating parties in a matter. This clearly removes significant incentives to seek leniency. The Section encourages the Commission to consider alternate means of obtaining "on the record" evidence from the leniency applicant, whether from documents, witness statement or evidence obtained as a result of the leniency applicant's assistance, or to

forbear using an applicant's oral statement transcript as evidence, except when there is no alternative.

In the balance of incentives and disincentives for the leniency applicant, the Section respectfully recommends that the Commission utilize a process that does not tip the balance against applying for leniency in cartel cases.

Introduction

This submission presents the views of the ABA Section of Antitrust Law concerning the Commission's proposed revisions to the 2002 Leniency Notice. The Section has previously commented both on matters relevant to the United States' investigation and criminal prosecution of cartel conduct¹ and issues arising in other jurisdictions related to international cartel enforcement.² In particular, in 2001 the Section provided comments to the Commission with respect to its then-proposed 2002 Leniency Notice.³

As with past comments concerning the Commission's and other jurisdictions' immunity policies, the Section proceeds from the premise that, while consistency among the various competitive enforcement systems is a desired objective, no particular system is necessarily preferred. In the area of immunity – or “leniency” or “amnesty” – the Section has the benefit of substantial experience with international cartel enforcement and has observed a variety of leniency programs in operation around the world. Some of the Section's members have significant direct experience with the 2002 Leniency Notice, including first-hand familiarity with the Commission's prevailing approach to company statements and access to the Commission's

¹ See, e.g., ABA Antitrust Section Comments In Response To The Antitrust Modernization Commission's Request For Public Comment On Criminal Remedies (November 2005) (<http://www.abanet.org/antitrust/comments/2005/11-05/criminal-remedies-comm.pdf>); ABA Antitrust Section Comments On S.443: “Antitrust Criminal Investigation Improvements Act of 2005 (June 2005) (<http://www.abanet.org/antitrust/comments/2005/06-05/com-crmlinal-invest-improv.pdf>).

² See, e.g., ABA Antitrust & International Law Sections' Joint Comments on the Japan Fair Trade Commission Draft Leniency Rules (August 2005) (<http://www.abanet.org/antitrust/comments/2005/08-05/comments-to-jftc-sal-silfinal.pdf>); ABA Antitrust Section Submission to the OECD Competition Committee Working Party 3 Concerning Information Exchanges in International Cartel Investigations (February 2004) (<http://www.abanet.org/antitrust/comments/2004/oecd.pdf>).

³ See ABA Antitrust Section Comments Comment on Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (September 2001) (<http://www.abanet.org/antitrust/comments/2001/commentseu.doc>) (hereinafter, “2001 ABA Leniency Notice Comments”).

files in cartel cases. Members of the Section have interacted with representatives of the Commission with respect to these issues in connection with bar association meetings, conferences, and the International Competition Network. In addition, some of the most significant written interpretive guidance concerning the 2002 Leniency Notice provided by the Commission staff – including the first public comment concerning the Commission’s “paperless” process – was published in the Section’s ANTITRUST magazine and came in response to questions raised by members of the Section.⁴ Based on this depth of experience, the Section offers the observations that follow for the Commission’s consideration.

The Section’s views build from the recognition, now widely viewed as axiomatic, that competition law policy generally, and anti-cartel enforcement policy specifically, finds application in an increasingly global setting in which the actions of both private undertakings and the antitrust agencies frequently have unavoidable cross-jurisdictional implications. This is true with respect to the prevailing laws and policies relevant to enforcement action by government agencies; it is also true with respect to so-called “private enforcement” through civil damages actions initiated by private parties. Although private damages actions have been infrequently observed in the EU, the Commission is exploring the possibility of encouraging private legal remedies in EU cartel cases.⁵ In the United States, private treble damage actions have existed for a considerable period, and the Section believes that appropriate private remedies are an important part of a comprehensive anti-cartel enforcement scheme.⁶

⁴ See Bertus van Barlingen, *A View From the Inside: The European Commission’s 2002 Leniency Notice After One Year of Operation*, ANTITRUST 84 (Spring 2003) (reprinted in Competition Directorate-General of the European Commission, EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003) (http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf)).

⁵ Commission of the European Communities, *Green Paper: Damages Actions for Breach of the EC Antitrust Rules* (Dec. 12, 2005) (http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf).

⁶ That is not to say that the Section believes the U.S. private litigation system and its relationship to government enforcement mechanisms are not without serious need for re-examination and reform. The Section has previously examined these issues and noted the need to explore reforms. See, e.g., ABA Antitrust Section Report to the Antitrust Modernization Commission (September 2004) at (<http://www.abanet.org/antitrust/comments/2004/modernizationcommission.html>); Report Of The Task Force On The Federal Antitrust Agencies--2001, at 21-24 (2001) (http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf); Report Of The Indirect Purchaser Task Force, 63 Antitrust L.J. 993 (1995). At the Section’s encouragement, the Antitrust Modernization Commission is examining the question. See Antitrust Modernization Commission, Request for Public Comment, 70 Fed. Reg. 28,902 (May 19, 2005) (http://www.amc.gov/pdf/meetings/fr_notice28902.pdf).

Private damages actions have a delicate, unavoidably interdependent relationship with government enforcement initiatives. This is especially true with respect to international cartels, where the private-government enforcement relationship can take on international dimensions.

Although the Section's main comments, and indeed the Commission's principal comments introducing the proposed amendments, focus on the manner in which the actions of competition enforcers in the leniency context may impact private litigation outcomes in the United States, it bears noting that discussions of this nature should be a two-way street. The Section recognizes that the scope of private damages claims deemed actionable under the laws of a given jurisdiction, if construed broadly, can directly encroach on the competition law enforcement prerogatives of a different jurisdiction. Considerations of proscriptive international comity with respect to the reach of U.S. antitrust law were recognized by the United States Supreme Court in its 2004 decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).⁷ Principles of international comity counsel caution with respect to the manner in which laws and policies in one jurisdiction are applied in light of any potential to preempt the public or private enforcement schemes of other countries.

The focus of the Section's comments for the Commission's consideration is the U.S. civil litigation consequences that may flow from how the Commission structures and applies its leniency policy. Private damages exposure in the U.S. contributes directly to the cost-benefit calculus that any prospective leniency applicant must undertake before making a decision on whether to self-report. The greater the ability to estimate aggregate economic costs of cooperation, the easier it is for prospective applicants to make a decision. If the aggregate economic cost is highly uncertain or quantitatively larger, this reduces incentives to self-report.

Even within the confines of one jurisdiction's private damages system, the actions of foreign competition enforcers can impact local private litigation results. Ostensibly non-substantive matters of investigative and adjudicatory process related to government leniency and administrative decision making in one jurisdiction can influence, and potentially alter, the private litigation outcomes in another country. This possibility is amply illustrated with respect to private antitrust litigation in the United States, where plaintiffs have sought discovery of Commission-related materials in order to advance and potentially broaden their claims before U.S. courts. The Commission is acutely sensitive to this consideration, having intervened in U.S.

⁷ In concluding that U.S. law does not provide subject matter jurisdiction for a Sherman Act claim seeking foreign damages that are independent of any anticompetitive effect on U.S. domestic commerce, the Supreme Court observed that U.S. statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations." 542 U.S. at 164. As the Court noted, "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Id.* at 169.

proceedings to oppose such discovery,⁸ and this aspect of U.S. litigation discovery plainly contributed to the Commission's motivations for introducing its current access-to-file practices and proposed amendments to the 2002 Leniency Notice.

It is this U.S. civil litigation discovery consideration and its implications for cartel enforcement more broadly that most inform the Section's comments with respect to the proposed amendments to the 2002 Leniency Notice. The Section strongly agrees with the Commission's observations, expressly incorporated in the proposed amendments, that

it [would be] inappropriate that undertakings which cooperate with the Commission in revealing cartels would be placed in a worse position in respect of civil damages claims than cartel members that do not cooperate. The discovery in civil damage proceedings of corporate statements which have been made especially to the Commission in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the Commission's leniency programme, could undermine the effectiveness of the Commission's fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions.⁹

The Section's comments flow directly from these shared foundational conclusions.

The Section believes that the proposed amendments to the 2002 Leniency Notice with respect to access to the Commission's files contribute significantly to protecting against the misuse of Commission documents in unrelated proceedings. With respect to the proposed amendments concerning the oral corporate statement procedure and use of corporate statements, however, much depends on what the Commission would do in practice. Were leniency applicants obligated to affirm written admissions that were then explicitly repeated and cited as evidence by the Commission in Statements of Objections or public decisions, this would be in direct tension with the objective of not disadvantaging a leniency applicant in private litigation because of its cooperation. As such, the positive incentives favoring self-reporting that result from the proposed access-to-file safeguards could in large measure be negated by the Commission's own citation of non-public cooperative admissions in its public documents. Thus, the Section respectfully recommends that the Commission reconsider its proposed approach with

⁸ Results of those efforts have been mixed. Although the Commission did succeed in preventing discovery of a leniency applicant's submissions to the Commission in the *Methionine* litigation before the U.S. District Court for the Northern District of California, it failed to obtain the same result in the *Vitamins* litigation, where the U.S. District Court for the District of Columbia permitted the discovery of a defendant's submissions to the EC, as well as a variety of correspondence with Canadian enforcers. See Memorandum Opinion Re: Bioproducts' Rule 53 Objection, *In Re Vitamins Antitrust Litig.*, No. 99-197 (Dec. 18, 2002).

⁹ Proposed Amended 2002 Leniency Notice ¶ 7.

respect to requiring leniency applicants to affirm written admissions if those “transcripts” will be explicitly relied upon and cited to as evidence in documents issued by the Commission.

Comments

1. Rules And Procedures For Access To File

Before discussing the procedure for making oral corporate statements and the use made by the Commission of such statements, the Section wishes to comment on the procedural safeguards set forth in Section IV of the proposed Annex to the Leniency Notice, addressing access to the Commission’s file containing transcriptions and tape recordings of company statements. The Section’s comments are not intended to evaluate whether the Commission’s proposed access to file rules would or would not impact the rights of defense for parties who do not obtain immunity and must respond to a Statement of Objections. Rather, the Section’s comments focus on the question whether the access to file procedures contribute to reducing the risk that a cooperating undertaking would be placed in a worse position in connection with U.S. civil litigation than a non-cooperating undertaking.

The Section believes that the proposed access-to-file rules would reduce that risk and thus move the Commission’s leniency procedures toward creating stronger incentives for undertakings to self-report under the 2002 Leniency Notice. Section IV makes clear that access to the Commission’s file is granted for limited purposes related to EU competition law enforcement – and for no other purpose. Plainly this is not a platitude; the Commission’s statements and procedures underscore in several ways the seriousness with which the Commission views maintaining the integrity and confidentiality of its files – particularly recordings and transcripts of oral company statements.

The Commission’s amendment would formalize its currently prevailing practice with respect to file access. The revised policy would require any party accessing the files to agree in writing that the party (a) will not “make mechanical copies of the information to which access is being granted,” and (b) will not use information obtained from the file for any purpose other than judicial and administrative proceedings under EU competition law.¹⁰ As is true with respect to its current practice, the Commission would forbid the accessing party to do anything other than take notes as it reviews the file, which may include oral statements the Commission possesses.¹¹ If the party seeking access is unable in good faith to so bind itself and then comply with the Commission’s on-site procedures, access is denied.¹² In addition, if a party accessing the file

¹⁰ Proposed Amended 2002 Leniency Notice Annex ¶ 15.

¹¹ *Id.* ¶ 14.

¹² *Id.* ¶ 15.

(after agreeing to the terms of confidentiality and limited use) later violates the Commission’s proposed rule – and, thus, the confidentiality agreement to which the party bound itself – the Commission reserves the right to report the incident to the bar to which the party’s counsel belongs with a view to disciplinary action.¹³ Finally, Section IV states that non-compliance with the confidentiality and use restrictions could imperil or reduce the leniency benefits obtained by the cooperating undertaking in question.¹⁴

The Section believes that each of these steps serves to reduce the risk that oral company statements or other information contained in the Commission’s files will be used in U.S. civil litigation. As a practical matter, these proposed rules would preclude the possibility that foreign courts could successfully compel production of mechanical copies of oral statements in the Commission’s files – since only the Commission possesses those transcripts and recordings.

These procedures would also greatly reduce the possibility that oral statements would be subject to indirect means of discovery in U.S. litigation. Indirect discovery could arise from requests that counsel for undertakings disclose what counsel learned in reviewing Commission files. Under the proposed amendments, however, obtaining indirect discovery of oral statements found within the Commission’s files in this manner would face substantial, likely preclusive hurdles. In many cases, it would require private plaintiffs to ask a court to pierce the attorney work product doctrine and possibly other recognized privileges. If the plaintiffs were successful in that effort, they would also have to persuade a court to compel disclosures in direct contravention of lawfully promulgated Commission rules.

Compelling parties or their counsel to violate the legitimate, binding legal rules of other governments would be both inappropriate and offend principles of international comity. That is especially true here, where the Commission, in determining that “[a]ccess to the file is granted only for the purposes of administrative and judicial proceedings for the application of Article 81

¹³ *Id.* ¶ 16. The Commission’s draft Annex could be read to suggest that outside counsel for a party before the Commission could be reported for potential disciplinary action independent of whether such counsel participated in or otherwise knowingly abided a violation of the Commission’s proposed rules. The Section encourages the Commission to consider whether such a unilaterally imposed sanction is commensurate with applicable procedural and due process concepts. On the other hand, the Commission’s proposed statement in this regard underscores the seriousness with which the Commission takes these confidentiality obligations and makes clear that violations of the procedures occurring even outside the EU are nevertheless violations that the Commission would seek to sanction through appropriate means. In this regard, the Commission may wish to incorporate into its written confidentiality agreement that the receiving party takes personal responsibility for ensuring compliance with the non-use restrictions, agrees to resist by all legally appropriate means efforts to obtain such information – whether directly or indirectly – for non-permitted uses, and will immediately notify the Commission of any such attempts.

¹⁴ *Id.*

of the Treaty,”¹⁵ would have made a considered, affirmative choice with respect to a matter of EU competition law procedure. As such, it is a judgment that should be respected by foreign jurisdictions, including U.S. courts before which private damages actions are pending.

For these reasons, the Commission’s proposed amendments relevant to accessing the Commission’s file should tend to decrease the likelihood that providing oral company statements will operate to place the cooperating party in a worse position in U.S. civil litigation than parties who do not cooperate with the Commission’s investigation. In this regard, the proposed amendments are likely to encourage self-reporting by cartel participants and strengthen the Commission’s cartel enforcement efforts.

2. The Procedure For Making Oral Corporate Statements & The Use of Corporate Statements

The more difficult issues presented by the Commission’s proposed amendments to the 2002 Leniency Notice relate to substantive aspects of the procedure for making oral statements and the use made of such statements by the Commission. These two issues, encompassed by Sections II (corporate statements) and III (procedure for making oral corporate statements) of the proposed Annex, should be considered together. This is true because Section II indicates that corporate statements – including oral statements – “may . . . be used by the Commission as evidence”¹⁶ and Section III appears directed at setting forth a procedure to ensure that oral corporate statements are ultimately affirmed by the cooperating undertaking such that they constitute binding statements by such undertakings sufficient to constitute evidence for Commission purposes.

In considering these proposed amendments, the Section continues to concur with and be guided by a fundamental premise of the Commission’s amendments – the desire not to place a leniency applicant in a worse position than a non-cooperating party by virtue of the applicant’s full cooperation with all requirements of the Commission’s Leniency Notice. The detailed procedures for making, reviewing, and correcting oral corporate statements recorded by the Commission are, in the first instance, simply procedural and the Section does not offer views on the mechanics of review. But the Commission’s proposed requirement that the leniency applicant review and affirm a transcript, coupled with the possibility that the corporate statements themselves will be used as evidence, creates a tension with the underlying objective behind a “paperless process” for leniency applications – not disadvantaging a leniency applicant because of its cooperation.

As a preliminary matter, the Section notes that it favors the increasing convergence among competition enforcers around the world with respect to the importance and value of a so-

¹⁵ Proposed Amended 2002 Leniency Notice Annex ¶ 13 (emphasis added).

¹⁶ *Id.* ¶ 6.

called “paperless process” for leniency applications. As this time, at least the United States, Canada¹⁷ and, most recently, Australia¹⁸ have adopted clear, pure-paperless policies that do not require first-in immunity applicants to present or affirm any written statements containing a factual overview of the infringements in question.

The Section encouraged the Commission to accept oral statements from leniency applicants in its comments with respect to the then-proposed 2002 Leniency Notice.¹⁹ The Commission did not directly address the issue in the 2002 Leniency Notice. When the issue was raised for potential clarification by the Section’s magazine, ANTITRUST,²⁰ the Commission staff indicated that, until U.S. courts reliably declined to treat such statements as discoverable, the Commission would accept oral applications, transcribe the oral presentation, and then require that the transcript be reviewed and certified by counsel for the applicant.²¹ The potential requirement for written certification of oral transcripts prompted considerable concern within the

¹⁷ See Competition Bureau, *Immunity Program – Responses To Frequently Asked Questions* (Oct. 17, 2005), at 8 (“The Bureau accepts both written and oral proffers. In oral proffers Bureau officers take notes of the information provided. Applicants should take special care in an oral proffer to ensure that all information is clearly stated and that counsel for the applicant and the Bureau officers are in agreement on the nature of the information provided. Accuracy is critical as the Bureau relies on the information to assess the immunity application and to pursue its investigation of other participants in the alleged offence.”)

¹⁸ See generally Australian Competition and Consumer Commission, *ACCC Immunity Policy For Cartel Conduct* (Aug. 26, 2005); Australian Competition and Consumer Commission, *ACCC Immunity Policy Interpretation Guidelines* (Aug. 26, 2005); Australian Competition and Consumer Commission, *ACCC Position Paper, Review Of Leniency Policy For Cartel Conduct* (Aug. 26, 2005).

¹⁹ 2001 ABA Leniency Notice Comments at 8-9 (“It is also unclear from the language of the proposed guidelines in what form that information must be presented. It is difficult to assess whether the information would have to be in writing, as is currently the practice with the submission of corporate statements, or whether oral presentations and documentary evidence would be sufficient. If written corporate statements are still required, cooperation likely would be enhanced if these statements remained confidential and were not attached to publicly available decisions. Moreover, the Sections suggest that *the policy encouraging cooperation would be enhanced to the extent the Commission would accept oral presentations.*”) (emphasis added).

²⁰ D. Jarrett Arp & Christof R.A. Swaak, *A Tempting Offer: Immunity from Fines for Cartel Conduct Under the European Commission’s New Leniency Notice*, ANTITRUST 59, 63-64 (Summer 2002).

²¹ Bertus van Barlingen, *supra* note 4, at 85-87.

private bar. Later, the Commission issued a draft Notice,²² which was read by some to cast doubt on the Commission's preliminary position regarding certification of the oral presentation transcript. In the recent period, the experience of the Section indicates that the Commission has not required parties to sign a written certification of the oral statement transcript.

The present proposed amendments to the 2002 Leniency Notice contemplate what, at a bare minimum, would be a two-step process following presentation of an oral statement. First, the Commission would make available a recording of the oral statement and invite the cooperating party to make comments on the accuracy of the recording.²³ If the cooperating party declines to listen to the recording, it will be presumed by the Commission to have approved the accuracy and substance of the oral statement.²⁴ Second, a transcript of the oral statement will be prepared and then "the undertaking is required to check the transcript and correct any errors in it."²⁵ Once any such corrections are made, "the undertaking will confirm orally or in writing to the Commission that the oral statement and any corrections to it have been accurately registered in the Commission's transcript."²⁶ A failure to comply with this procedure, including confirmation of the transcript's accuracy, may lead to the loss of beneficial treatment under the Leniency Notice.²⁷

In sum, the Commission's proposed amendments would require a multi-step process through which the leniency applicant is encouraged and, in the final instance, compelled to actively review and affirmatively endorse the Commission's transcription of its oral statements. This multi-step review-and-endorse process appears administratively burdensome, but the Section can appreciate that the use of a recording and a transcript may serve to ensure that the Commission obtains an accurate internal record of what the leniency applicant has provided. For the reasons noted above, the access-to-file procedural safeguards the Commission proposes to adopt are likely to diminish the likelihood that *purely internal* materials in the Commission's files are accessed and used for U.S. private litigation purposes.

²² See Draft Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54, and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (Oct. 21, 2004).

²³ Proposed Amended 2002 Leniency Notice Annex ¶¶ 9-10. As to basic accuracy, it is not clear to the Section what the potential concern would be. If an oral statement was recorded using adequate recording equipment, accuracy as such should not be an issue.

²⁴ *Id.*

²⁵ *Id.* ¶ 11.

²⁶ *Id.*

²⁷ *Id.*

Yet if all the Commission required was an accurate capturing of the oral statements counsel for leniency applicants provided, the simple unilateral recording and preparation of an internal transcript by the Commission staff would surely suffice. Although the Section would encourage the Commission to do that but no more, the Commission's proposed amendments obviously contemplate the potential for broader use of the transcript. As presently proposed, the new review-and-endorse process operates to convert a purely oral statement into an adopted written transcript that, as set forth in Section II of the proposed Annex, "may . . . be used by the Commission in evidence."²⁸

Much turns on whether the Commission does or does not use the endorsed transcript of the oral statement as actual identified and attributed evidence. If, for example, the Commission cites specifically to the admission of the leniency applicant in the later-issued Statement of Objections, now regularly subject to discovery requests in U.S. private litigation, or in publicly accessible Commission proceedings or decisions, that citation and use could operate to negate the potential benefits of a paperless process at the front end of the Commission's leniency application procedure.

This is true because such a step could introduce to the public domain – or at least to private plaintiffs if they obtain the Statement of Objections through discovery – what the proposed process attempted to shield through permitting an oral statement in the first instance. Coupled with – and informed by – the then formally documented review-and-endorse process reflected in the proposed amendments to the 2002 Leniency Notice, affirmative reference to statements of the leniency applicant in the Statement of Objections or elsewhere would place the Commission in an awkward position. The Commission itself would be summarizing in writing that which its announced policy would implicitly characterize as leniency applicant-endorsed admissions of liability.

Contrasting this with the situation of non-cooperating parties presents the issue quite starkly. While non-cooperating parties may be characterized in Commission statements and decisions in a manner that undermines their legal defenses in U.S. litigation, only the cooperating leniency applicant would have its own admissions essentially quoted back in a document likely to be seized upon by private litigants.

Thus, if the Commission used oral statements – later converted to transcripts that the Commission requires a leniency applicant to review and endorse – as explicit evidence directly relied upon and cited to in documents that do not remain in its internal files, it may cause the very counterproductive outcome its amendments were in part designed to avoid: placing the immunity applicant in a worse position than a party that refuses to cooperate.

The Section recognizes that the Commission applies its own rules, procedures and traditions, and thus the approaches taken by other jurisdictions may or may not be useful models to consider. Leniency applicants reporting international cartels, on the other hand, must navigate

²⁸ *Id.* ¶ 6 (emphasis added).

a path that accounts for the procedures applicable in multiple jurisdictions. For discussion purposes, the Section would like to contrast the Commission's proposed amendments with the general procedure followed by pure-paperless jurisdictions. In the United States and Canada, for example, enforcers generally take their own notes of the immunity applicant's oral statement, treat those notes as exempt from discovery under local law, and then use that information to guide their investigation. The oral statement is generally viewed as a "proffer" – or non-evidentiary preview – of the ultimate evidence the applicant will provide through its documents and witnesses. At no time is the applicant company required to prepare or endorse a detailed written factual recitation of the infringements covered by its oral presentation.

The approaches adopted in the United States and Canada do not disclaim an obligation by the immunity applicant to admit an infringement. To the contrary, to obtain immunity the applicant must orally admit the violation to the enforcement agency. In addition, if required, the immunity applicant could be obligated to go "on the record" with its evidence in the form of witness testimony and documents in connection with a criminal trial against a non-cooperating party. What the United States and Canadian policies do, however, is avoid forcing the applicant to make such admissions on the record if – as is frequently the case in modern cartel matters subject to leniency applications – there is no need to do so because all or most of the participants end up cooperating and seeking a degree of leniency.

The Commission's proposed approach arises in a different legal setting to be sure, but it adopts a dramatically different tack in prioritizing from the start the compelled accumulation of "on the record" written evidence sponsored by the first-in leniency applicant. As noted above, much depends on whether the Commission cites to the transcript of an oral corporate statement as evidence in the future.

The Section would respectfully encourage the Commission to consider alternate means of obtaining "on the record" evidence from a leniency applicant, whether from documents, witness statements, or evidence obtained from other parties as a result of the immunity applicant's assistance, instead of compelling a written manifestation of company statements. Alternatively, the Section encourages the Commission to forbear in using a leniency applicant's oral statement transcript as cited evidence except where the Commission simply has no other alternative because (a) there is a complete absence of other sources of adequate evidence and (b) the fact at issue is contested by another respondent. In such situations, the Commission may wish to go back to the leniency applicant to request alternate sources of information necessary to prove a particular point.

As is always true with respect to leniency policies in any jurisdiction, what the agency does in practice is as important as what its written policies state. Actual real-world practices are critical and are material considerations factored in by potential leniency applicants. Both in revising the Commission's Leniency Notice and, equally importantly, in the Commission's application of that policy in the future, the Section encourages the Commission to ensure that it keeps the leniency applicant's "net incentives" firmly in mind. In the context of the proposed amendments to the 2002 Leniency Notice, this counsels that the Commission may risk "taking away" through the use of company statements in public documents the very positive incentives it "gave" in terms of access-to-file protections and an initially paperless process.

Conclusion

The Commission's admirable objective of identifying and deterring cartel conduct through the Leniency Notice depends upon the balance of incentives and disincentives that applicants face. The U.S. private litigation system is an unavoidable factor in that calculus. The Section compliments the Commission's careful consideration of these issues and its clear awareness and constructive engagement of the unavoidable cross-jurisdictional consequences of its leniency policy decisions.

Respectfully submitted,

SECTION OF ANTITRUST LAW
AMERICAN BAR ASSOCIATION