

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

The views expressed herein are presented on behalf of the American Bar Association Section of Antitrust Law and Section of International Law and Practice (hereinafter "Sections"). The views have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

The Sections respectfully submit the following observations and comments on the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases issued on 18 July 2001 (hereinafter "Draft Commission Notice").

The Sections proceed from the premise that while consistency among the various competitive enforcement systems is a desired objective,¹ no particular system is necessarily preferred. In the area of immunity (sometimes referred to as "leniency" or "amnesty"), the Sections, through the collective experience of their members (including government and private attorneys), have the benefit of substantial experience in connection with international cartel enforcement and have observed a variety of leniency programs in diverse parts of the world. Based on the experience in those matters, the Sections offer the following observations and comments for the consideration of the Commission. In submitting these comments, the Sections recognize that the Commission itself has a substantial experience base from which the proposed leniency policy emanates. The Sections' position is that the proposed revisions to the Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases are a substantial improvement to the current regime and generally promote the goal of encouraging disclosure of illegal cartels and the cessation of such cartels. An effective program which encourages the disclosure of cartels will have an important deterrent effect on the formation of illegal cartels.

BACKGROUND

The Commission has authority to impose fines of up to 10 percent of overall turnover (total annual revenue) on cartel participants and other violators of Commission competition rules. Commission guidelines define cartels as very serious infringements and set 20 million Euros as the starting point for fines, with adjustments to reflect the seriousness and duration of

¹ If the United States and European Union tests for immunity are at least similar, corporations involved in global conspiracies will more likely provide assistance if they can be assured of comparable and not disparate treatment by the different governments. Without that certainty, the Boards of Directors of those corporations may calculate the risks as too high to cooperate with any government entity, thereby disrupting effective enforcement of competition laws on both continents and elsewhere.

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

the offense and the presence of aggravating or mitigating circumstances.² Since mid-1998, for example, Commission-imposed fines have totaled more than 1 billion Euros (approximately \$870 million).

Current Commission policy, adopted in 1996, provides under certain conditions for a reduction of at least 75 percent, up to a total exemption, from the fine that would have been imposed on a cartel participant that first informs the Commission of a secret cartel.³ To qualify for such leniency, the reporting entity must (1) inform the Commission of the cartel before the Commission has undertaken an investigation, provided that the Commission does not already have sufficient information to establish the cartel's existence; (2) be the first entity to adduce decisive evidence of the cartel's existence; (3) terminate its involvement in the illegal activity no later than the time of its disclosure to the Commission; (4) provide the Commission with all relevant information, documents and evidence in its possession and maintain continuous and complete cooperation throughout the Commission's investigation; and (5) not have compelled another entity to take part in the cartel, have acted as an instigator, or played a determining role in the illegal activity.⁴ An entity that satisfies the last four of these conditions, but comes forward after the Commission has undertaken an investigation, may qualify for a 50 to 75 percent reduction in fine. Other cooperating entities, not meeting these conditions, may qualify for 10 to 50 percent reductions.

The revised policy would guarantee complete immunity from fines for the first participant to inform the Commission of the existence of a cartel of which the Commission previously had not been aware. To qualify, the entity would have to (1) provide the Commission with evidence and information sufficient, in the Commission's view, to support an authorization of unannounced inspections of the entities involved ("dawn raids"); (2) provide the Commission with all evidence and information in its possession relating to the infringement, cooperate fully and expeditiously on a continuous basis; (3) end its involvement in the suspected illegal activity no later than when it makes its disclosure to the Commission; and (4) not have coerced others to participate.⁵ The revised policy would also allow the use of "hypothetical" presentations during the qualifying phase and would require the Commission to confirm provisionally (subject to continued and full cooperation) acceptance of the applicant for immunity.⁶

² Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ESCS Treaty, Official Journal 98/C9 (January 14, 1998).

³ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, Official Journal 96/C207/04 (July 18, 1996).

⁴ Id.

⁵ July 18, 2001 Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, at paragraphs 9(a)-(d).

⁶ Id. at paragraphs 11 and 13.

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

Once the Commission has granted conditional immunity, subsequent cooperating entities would also qualify for fine reductions, but at lower levels.⁷ A second entity that provides evidence representing “significant value added” to the evidence already in the Commission’s possession would qualify for a 30 to 50 percent reduction, a third entity meeting the same standard would qualify for a 20 to 30 percent reduction, and subsequent entities meeting that standard would qualify for a reduction of up to 20 percent.⁸

OBSERVATIONS AND COMMENTS

The Sections support the Commission’s goal of instituting an immunity and fine regime in cartel cases that promotes greater transparency and increased levels of certainty for entities considering self-reporting and cooperation. While counsel for a corporation involved in wrongdoing will certainly advise the Board of Directors that illegal behavior must cease, the practical reality is that a high level of certainty in outcome is critical to encouraging self-reporting and cooperation by the corporation. Because of the global nature of many antitrust conspiracies, a Board of Directors must consider not only the EU’s position on immunity and fine reductions, but also the policies in the United States, Canada, and elsewhere.⁹ In the Board’s multi-faceted analysis of whether it is in the best interests of the corporation to notify the various authorities and voluntarily provide significant evidence of the existence of (and its participation in) a cartel, the Board must have an understanding of the economic benefits to be received from such cooperation, as well as the risk that full or partial immunity will be denied. Increased transparency and certainty in the immunity process facilitates the Board’s determinations, thereby likely increasing the frequency and quality of cooperation.

COMMENTS ON IMMUNITY FROM FINES

A. Comment on Underlying Rationale of Commission's Draft Immunity Policy

The Sections' first specific comment relates to the underlying rationale of the Commission's draft immunity policy. The Draft Commission Notice does not afford an opportunity for immunity to entities that come forward to self-report and cooperate after the Commission has undertaken an investigation. The Sections submit that this unutilized opportunity likely will result in significant costs to the Commission, a less-effective policy, and a possible reduction in the percentage of entities that would have otherwise self-reported. Furthermore, this difference between the Draft Commission Notice and the policies in the United States and Canada re-establishes that entities considering whether to self-report cartel activity in

⁷ Id. at paragraphs 16 and 17.

⁸ Id. at paragraph 19(b).

⁹ A Board must also consider the potential risks associated with civil damages from litigants around the world that may follow as a result of such cooperation.

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

many instances would face the certainty of disparate treatment among the major competition enforcement authorities.

The United States' experience, according to statements of Department of Justice officials, is that approximately one-half of all immunity (amnesty) applications are submitted after an investigation has begun. Moreover, it is well known that the biggest and highest profile cartel prosecutions fall in that category. For example, the successful prosecutions of recent international cartels involving vitamins, graphite electrodes, and fine art auctions would not have come to fruition without the assistance given by immunity (amnesty) applicants months, if not years, after the U.S. government first became aware of the general facts at issue. By the same token, the Sections believe that the removal of the "awareness" bar to immunity will not have an adverse effect on competition enforcement. Accordingly, the Sections suggest that the Commission consider affording the opportunity for immunity to those reporting entities that self-report after the Commission has opened an investigation or is otherwise aware of an infringement, but that otherwise meet the criteria for immunity.

B. Increased Transparency and Certainty

The Sections support the Commission's efforts to enhance transparency and certainty in Paragraph 8,¹⁰ where the Commission affirmatively commits to granting immunity to a first-in entity when the Commission is unaware of the alleged cartel. The Sections also support the effort of the Commission to lessen the burden associated with obtaining immunity. The newly formulated standard found in Paragraph 9(a),¹¹ that the Commission must believe that the evidence and information provided would support a "dawn raid," unequivocally invites and rewards more cooperation from wrongdoers than the previously higher burden of "adduc[ing] decisive evidence of the cartel's existence."¹² In the Sections' view, Paragraph 9(d),¹³ requiring

¹⁰ Paragraph 8 of the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases states:

Subject to the requirements below, the Commission will grant an undertaking immunity from any fine which would otherwise have been imposed where the Commission is unaware of the alleged cartel affecting the Community and the undertaking is the first to disclose its existence.

¹¹ Paragraph 9(a) of the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases states:

The undertaking is to meet the following requirements: (a) it must provide evidence and information which in the Commission's view may enable it to adopt a decision ordering a verification under Article 14(3) of Regulation n° 17². . . .

¹² Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, Official Journal 96/C207/04 (July 18, 1996).

¹³ Paragraph 9(d) of the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases states:

The undertaking is to meet the following requirements: . . . (d) it must not have coerced other undertakings, through its economic strength or otherwise, to participate in the illegal activity.

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

that the cooperator must not have coerced others to participate in the illegal activity, is generally an appropriate requirement for leniency, as well as more transparent and certain than the previous provision broadly disqualifying entities that had "compelled another enterprise . . . acted as an instigator or played a determining role in illegal activity."¹⁴

There are certain aspects of the new requirements for obtaining immunity, however, that may in practice compromise the goals of transparency and certainty, and may jeopardize the Draft Commission Notice's full potential to invite self-reporting, cooperation, and, ultimately, the breaking up of cartels.

First, the precise meaning of the term "unaware" as used in Paragraph 8 is unclear. Skeptical entities may have concerns about the Commission claiming it was "aware" of an infringement when it did not have an open investigation, but rather, had only mere suspicions of an infringement. The Section submits that this existing ambiguity could be cured by changing the language of the condition to a more objective event, such as "where the Commission does not have an open file [open investigation] on the alleged cartel affecting the Community. . . ." (As noted above, the Sections believe that elimination of the "awareness" condition would assist, and not harm, competition enforcement.)

Second, Paragraph 9(a) of the Draft Commission Notice mandates that entities satisfy a certain minimum quality of cooperation in order to qualify for immunity. A minimum requirement for cooperation may be counter to the Commission's stated goals since circumstances could easily exist where information received from a cooperator might not be of the type or quantity sufficient to enable a "dawn raid," but would be useful, and even essential, to the investigation. The proposed standard for cooperation would in those circumstances discourage, rather than encourage, those that possess relevant information about a possible violation from cooperating. Furthermore, entities conducting an internal investigation of potential wrongdoing would have the incentive under the proposed guidelines to wait and collect all information to be sure that the standard for immunity is met, rather than approach the Commission as soon as practicable after illegal activity is suspected. The discretion awarded the Commission under Paragraph 9(a), which permits the Commission to deny immunity based on a self-perceived inability to conduct a "dawn raid," may undermine the certainty promised in Paragraph 8. From the entity's perspective, the ambiguity associated with the actual requirements necessary for a "dawn raid," as well as the possibility that the disclosures may be insufficient to qualify for immunity and may instead bring prosecution, may thwart the incentive to make disclosures. The Sections' view is that this standard would provide greater certainty if it allowed an entity to qualify for immunity by disclosing the existence of a violation and providing all information and evidence available to the entity.

Third, the language in Paragraph 9(d) disallowing immunity if a cooperating entity coerced another by use of its "economic strength" is ambiguous and perhaps needlessly broad

¹⁴ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, Official Journal 96/C207/04 (July 18, 1996).

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

and creates an unnecessary disincentive to cooperation. Whether a corporation has coerced another, and therefore should be disqualified from obtaining immunity, is likely not best judged by the profitability of the company, the size of its relevant market share, or any other economic marker. Indeed, the largest, most profitable, most financially viable companies are often those with the most information, and therefore the most valuable cooperators. Such companies may also have the greatest incentives to self-report. Immunity should not be presumptively unavailable to them merely because of their status as compared to others. While denying immunity to an entity engaged in coercion is an important principle, this can still be maintained without the sole reliance on an entity's economic strength.

COMMENTS ON REDUCTION OF A FINE

As to the reduction of fines for those who offer assistance after full immunity is not available, the Sections support the concept of requiring "added value" before a reduction in fine is granted.¹⁵ The proposed level of reduction of fines under Paragraph 19(b),¹⁶ however, may not adequately reflect the real value frequently offered by those qualified for such a reduction. Cartel participants that do not receive a substantial reduction in fines, similar to the percentage reductions in the 1996 version of the leniency guidelines,¹⁷ may not have an incentive to offer the needed evidence. Simply put, while information provided by the first cooperator may support the execution of a "dawn raid," there is no guarantee that this evidence will adequately provide the factual support required for the prosecution of the case. The experience of the members of the Sections is that the value added by the information provided by subsequent cooperators, particularly the second cooperator, is frequently worth more than a 50 percent reduction in the actual fine that otherwise would have been imposed. Thus, on balance, the

¹⁵ July 18, 2001 Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, at paragraphs 16 ("Once the Commission has granted conditional immunity from fines to an undertaking or if the Commission is otherwise aware of the alleged cartel affecting the Community, undertakings may still be eligible to benefit from a reduction of a fine.") and 17 ("In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected illegal activity.").

¹⁶ Paragraph 19(b) of the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases states:

The Commission will determine in any final decision adopted at the end of the administrative procedure: . . . (b) what level of reduction an undertaking will benefit from on the basis of the timing and the amount of significant added value which the evidence submitted to the Commission represents. For these purposes, the following reductions of the fine which would otherwise have been imposed will be applied. For the:

- First undertaking to meet 19(a): a reduction of 50-30%;
- Second undertaking to meet 19(a): a reduction of 30-20%;
- Subsequent undertakings that meet 19(a) a reduction of up to 20%.

¹⁷ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, Official Journal 96/C207/04 (July 18, 1996) (offering a reduction in fines from 50 to 75 percent, but only to the first entity to report).

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

cooperation of subsequent entities may be more valuable than the incentives reflected in the Draft Commission Notice.¹⁸

COMMENTS ON PROCEDURES

Going beyond the requirements for immunity and reduction of fines, the Sections generally support the procedures proposed by the Draft Commission Notice.¹⁹ Specifically, the ability of an applicant to use a hypothetical presentation in the first instance will serve to encourage applications and protect companies whose applications are not accepted.²⁰ The Sections also support the proposal to provide written acknowledgment of the application for immunity within five business days,²¹ the granting of conditional immunity in writing,²² as well as the proposal to refrain from considering other applications for immunity while an application is pending.²³ The Sections, however, note some practical difficulties associated with a few provisions of the procedures proposed by the Commission.

Proposed Paragraph 12 provides for a written acknowledgement from the Commission's Directorate General for Competition of the entity's application for immunity within five business days which, as stated above, the Sections support. The Sections would suggest, in accordance with the objective of encouraging cooperation through increased certainty, that the Commission

¹⁸ The Sections also suggest that if there is a situation wherein the first cooperating entity for some reason proves ineligible for immunity, the Commission should consider extending immunity to the next-in cooperating entity, if that entity satisfies all the other requirements for immunity. This possibility may serve to motivate cartel members to continue the “race” for immunity.

¹⁹ In light of the EU’s proposed modernization of competition law, the Commission should also consider expressly addressing issues arising from the decentralized application of EC competition law enforcement and the exchange of information between the Commission and the national authorities.

²⁰ July 18, 2001 Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, at paragraph 11 (“If necessary, the undertaking may initially present this information in hypothetical terms to enable it to clarify with the Commission whether it is in a position to qualify, at this stage, for immunity from any fine. Should it become apparent that the conditions set out in point 8 above are not met, the undertaking will immediately be informed of this situation. Otherwise a deadline of no more than 5 working days will be set for the undertaking to disclose fully all information and evidence in accordance with the description and lists it has provided previously.”).

²¹ *Id.* at paragraph 12 (“The Directorate General for Competition will provide a written acknowledgement of the undertaking’s application for immunity from fines, confirming the date on which the undertaking either submitted information and evidence to the Commission or agreed to do so within 5 working days.”).

²² *Id.* at paragraph 13 (“After the Commission has received the information and evidence from the undertaking and has had the opportunity to verify and come to the conclusion that it meets the requirements as set out in points 8 and 9(a) above, it will grant the undertaking a conditional immunity from fines in writing.”).

²³ *Id.* at paragraph 14 (“The Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same suspected infringement.”).

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

also consider providing written, timely notice of the conditional amount of the reduction in fines for subsequent cooperators. Currently, the proposed revisions do not provide for certainty as to what the reduction in fine will be for subsequent cooperators. Under Paragraph 19 of the Draft Commission Notice, they will not know what reduction will be granted until the Commission issues its final decision, which may not occur until years after the entity has completed its cooperation. Unlike the U.S. and Canadian systems, where a particular entity may cooperate, enter a plea, and be fined while the government continues its investigation of other alleged conspirators, the EU's policy is to issue one final decision covering all participants in a cartel. The Sections suggest that certainty would be substantially enhanced if subsequent cooperating entities received conditional reductions in fine analogous to the conditional immunity provided in the Draft Commission Notice.

Proposed Paragraph 11 requires an entity to disclose "fully all information and evidence" within five working days of first approaching the Commission. Given the global nature of many international cartels, this timeliness requirement is unrealistic and may, in fact, delay the cooperation process. In international cartel cases, where documents and witnesses may be located all over the world and the internal investigations of entities are encumbered by the logistical difficulties of collecting reliable evidence in multiple jurisdictions, five days is too short a period of time in which an entity should be required to act and substantially complete its cooperation. Rather than risk a denial of immunity, an entity would likely wait until all information is collected and then approach the Commission, thereby undermining the concept of a "race" among the participants to be the first to offer their assistance to the authorities. The United States Department of Justice has found that under its (amnesty) policy, where no minimum standard is imposed on the quality of information required for immunity, it frequently takes a period of weeks for the information to be properly gathered and communicated from the cooperating entity to the Department. The Sections suggest that the Commission can achieve its objective by insisting on "prompt" cooperation in the circumstances of each application and utilize the overriding and broad principle requiring cooperation throughout the investigation.

Proposed Paragraphs 10 and 11, taken together, suggest that the Commission will require a cooperating entity to provide *all* information and evidence in its possession. As an initial matter, the Commission's use of the word "may" in Paragraph 10 is at odds with the mandatory requirement in Paragraph 11, and it may be useful, as a first step, for the Commission to clarify whether this is a requirement or a suggestion. If it is a requirement, and if that means that entities cannot subsequently provide substantial and frequent changes and additions, then the procedure envisioned by the Commission may be too limited. In reality, initial information provided by the cooperating entity at the beginning of the investigation process may be inaccurate and incomplete. The process of uncovering and deciphering sometimes complicated factual scenarios is an evolutionary one, where clarification and supplementation are common. Disallowing immunity because of the practical difficulties facing entities that wish to cooperate is not consistent with the concept of promoting self-reporting and cooperation. Paragraph 11 should be expanded to expressly acknowledge the Commission's willingness to receive updates, supplements, and clarifications as necessary in order to ensure that the Commission is in

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

possession of the most accurate information and that entities are not penalized for conducting a thorough investigation.

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.²⁴ Moreover, the Sections suggest that the policy encouraging cooperation would be enhanced to the extent the Commission would accept oral presentations.

Finally, Paragraph 18²⁵ articulates the Commission's view that written evidence originating from the period of time to which the facts pertain will have greater qualitative value than those subsequently created. Experience in the United States has shown that corporate or witness statements are as valuable, if not more helpful, than contemporaneous documents that are often of uncertain probative value absent an explanation. Many times contemporaneous documents appear to be innocuous and do not help to support the existence of illegal wrongdoing unless explained and supported by witness statements or other subsequently created documents; other times, contemporaneous documents appear to be incriminating when in fact they are not. Moreover, recent experience has shown that one of the key tenets of most cartels is to disguise or destroy documentation. The Sections thus suggest that rather than assessing whether a cooperating entity has contributed "added value" by the type of written evidence provided, the standard could be similar to that under Paragraph 9(b);²⁶ namely, that the cooperating entity must

²⁴ July 18, 2001 Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, at paragraphs 10 and 29 ("The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an illegal practice. In this respect, if the information provided by an undertaking regarding a cartel leads the Commission to take a decision pursuant to Article 81(1) of the EC Treaty, the part played in the illegal practice by the undertaking benefiting from immunity or reduction of the fine will be described in full in the decision. The fact that the undertaking co-operated with the Commission will also be indicated in the decision, so as to explain the reason for the immunity or reduction of the fine.").

²⁵ Paragraph 18 of the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases states:

The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to fully establish the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater qualitative value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater qualitative value than that with only indirect relevance.

²⁶ Paragraph 9(b) of the Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases states:

The undertaking is to meet the following requirements: . . . (b) it must provide the Commission with all evidence and information in its possession or available to it relating to the suspected infringement and cooperate fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure. It must not misrepresent

**THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND
PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES
AND REDUCTION OF FINES IN CARTEL CASES**

provide “all evidence and information in its possession or available to it” in order to qualify for a reduction in fine.

CONCLUSION

Through these observations and comments, the Sections seek to share recently learned lessons taken from some of the largest cartel cases ever prosecuted and defended. These comments are not intended to suggest that the proposed amendments do not address the stated goals of transparency and certainty in the leniency program. These comments seek to highlight some possible difficulties that the Commission may encounter with the proposed changes, as well as to provide some suggestions that may further increase transparency and certainty. The Sections wish to thank the Commission for the opportunity to submit their comments for consideration.

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any material facts. In particular, it will remain at the Commission’s disposal to answer swiftly any request that may contribute to the establishment of the facts concerned. . . .