

**COMMENTS OF THE ABA SECTION OF ANTITRUST LAW AND
SECTION OF INTERNATIONAL LAW IN RESPONSE TO
THE COMPETITION COMMISSION OF SOUTH AFRICA'S REQUEST FOR PUBLIC COMMENT ON
THE CORPORATE LENIENCY POLICY REVIEW DISCUSSION PAPER**

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The Section of Antitrust Law and the Section of International Law (the "Sections") of the American Bar Association ("ABA") appreciate the opportunity to present their views concerning the Competition Commission of South Africa's (the "Commission") Corporate Leniency Policy Review Discussion Paper ("Discussion Paper"). The views expressed in these comments are those of the Sections and have been approved by the Sections' Councils. 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.

INTRODUCTION

This submission presents the views of the ABA Section of Antitrust Law and Section of International Law concerning the Commission's proposed revisions to the South African Corporate Leniency Policy as outlined in the Discussion Paper. The Sections have 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

As with past comments concerning the United States' and other jurisdictions' immunity policies, the Sections proceed 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 Sections have the benefit of substantial experience with international cartel enforcement and has observed a variety of leniency programs in operation around the world. Many of the Sections' members have

¹ See, e.g., ABA Antitrust Section's 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's 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., Comments of the ABA Section of Antitrust Law and Section of International Law In Response To The Commission of the European Communities Request For Public Comment on the Draft Commission Notice of Immunity from Fines and Reduction in Fines in Cartel Cases (November 2006) (<http://www.abanet.org/antitrust/at-comments/2006/11-06/european-communities.shtml>); 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's Comments on the Canadian Competition Bureau's Consultation Paper on Immunity (May 2006) (<http://www.abanet.org/antitrust/at-comments/2006/05-06/com-canadian-leniency.pdf>); ABA Antitrust Section's 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/oe.cd.pdf>).

significant direct experience with leniency policies in numerous jurisdictions, including substantial familiarity with leniency policies that: (1) do and that do not provide for significant enforcement authority discretion in the decision to grant or withhold immunity; (2) do and that do not require written company statements in connection with an application for immunity; (3) exclude and that do not exclude from qualification for immunity a company that the enforcement authority deems to be the instigator of the cartel activity or coerced other firms to participate in the cartel; (4) provide for and that do not provide for a “marker” system; and (5) lack clarity regarding who the potential applicant should approach regarding a possible application. Members of the Sections also have substantial experience with leniency policies that state a specific level or quantum of evidence sufficient to qualify an applicant for leniency. Based on this experience, the Sections offer the observations that follow for the Commission’s consideration. In general, the Sections applaud the Commission’s efforts to provide more guidance, clarity, and predictability for companies applying for immunity from fines, the adoption of a marker system for those applying for immunity from fines, and the efforts to safeguard the integrity and confidentiality of information obtained from leniency applicants as outlined in the Discussion Paper.³

COMMENTS

A. Increased Transparency and Certainty in the Immunity Process

The Sections commend the Commission for its proposal to amend or remove sections of the Corporate Leniency Policy that have been interpreted to retain in the Commission the discretion to grant or deny immunity even where firms have fulfilled all the conditions of the policy. As the Commission notes in the Discussion Paper, an effective leniency program has been identified internationally as one of the most potent tools in the fight against cartel behaviour.”⁴ Furthermore, an effective leniency policy requires that firms considering applying for leniency have confidence in the outcome should they apply and meet all the requirements of the program. A firm applying for immunity must necessarily reveal very sensitive and damaging information about its prior business conduct to the enforcement authority. In order to effectively induce companies to disclose that type of damaging information, a leniency policy—and the practices of the enforcement authority—must be as transparent and predictable as possible. Corporate entities will apply for immunity in direct proportion to their ability confidently to predict how they will be treated by the enforcement authority should they apply for immunity and fulfill the conditions of the policy.⁵ Retention of discretion in the enforcement authority simply deters firms from coming forward and applying for immunity.

³ In addition to the matters commented on herein, the Discussion Paper notes the existing uncertainty about the legal standing of the Corporate Leniency Policy and any agreements reached pursuant to that policy and the lack of clarity regarding to whom leniency applications should be addressed. The Sections agree with the Commission that clarity in both regards is key to public confidence in and the effectiveness of the Corporate Leniency Policy and commends the Commission’s determination to take the steps necessary to remove any uncertainty in these areas.

⁴ Discussion Paper at 3.

⁵ See, e.g., Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004) (<http://www.usdoj.gov/atr/public/speeches/206611.htm>) (“Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the

For these reasons, the Sections fully support the proposal outlined in the Discussion Paper to amend or delete Paragraphs 1.2, 1.3, 6.3, and 10.2 from the Corporate Leniency Policy. The Sections also note that there are other provisions in the Corporate Leniency Policy that might also be read as retaining an unwarranted level of discretion in the enforcement authority and that the Commission may well consider clarifying or eliminating. Specifically, paragraph 3.1 states that the Corporate Leniency Policy is “a process through which the Commission *can* grant a self-confessing cartel member . . . immunity or indemnity for its participation in cartel conduct.”⁶ Changing the discretionary “can” to the nondiscretionary “will” would increase the certainty and confidence in the outcome of the immunity application in the potential applicant and remove the possibility that the increased clarity and predictability the Commission seeks to achieve in the proposed amendments do not fall victim to the apparent retention of discretion in Paragraph 3.1.

Likewise, the Commission may wish to give consideration to amending Paragraph 3.9 to avoid the interpretation that immunity is available only in cases where the Commission, without the leniency applicant, would “not have been able to detect”⁷ the cartel behavior. Whether the Commission could have detected the cartel behavior without the assistance of the leniency applicant could be viewed as a highly discretionary decision. Even worse, because the enforcement authority has at its disposal investigative tools other than the Corporate Leniency Policy, this language might be interpreted as giving the Commission the discretion to decide against the interest of the immunity applicant in every case.

Finally, the Commission may wish to consider clarifying Paragraph 3.10, which provides that the existence of the Corporate Leniency Policy does not preclude the Commission from deciding to investigate a cartel “without considering the matter under the Corporate Leniency Policy, if the Commission deems it appropriate to do so in certain instances.”⁸ If this language is read to mean that the Commission may decline an otherwise qualifying leniency applicant because the Commission deems it appropriate to do so, all of the other clarifying and discretion reducing amendments contemplated by the Discussion Paper will be of little value in achieving the Commission’s stated goal of making it clear “that where firms have met all the requirements in the policy, they will be granted immunity.”⁹

program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.”).

6 Corporate Leniency Policy ¶ 3.1 (emphasis added).

7 Corporate Leniency Policy ¶ 3.9

8 Corporate Leniency Policy ¶ 3.10

9 Discussion Paper ¶ 4.2 at page 5.

B. Oral Submissions

The Sections fully support the Commission's consideration of adopting a "paperless" amnesty application process. A paperless leniency application process allows the corporate leniency applicant to cooperate fully with the Commission's investigation without creating additional incriminating materials. Such materials likely would be subject to discovery in private damage suits (particularly in the United States) and would place the fully cooperating amnesty applicant in a worse position in those treble damage cases than all other cartel participants—even those who refuse to cooperate in any fashion with the enforcement authorities or the representatives of the purported injured parties. A number of other jurisdictions, including the U.S. Department of Justice, have found that the oral or paperless process is fully consistent with the fulfillment of their law enforcement mandate. In addition, such a process avoids the disincentive to self-reporting and cooperation mentioned above, *i.e.*, placing the cooperating amnesty applicant in worse position than its non-cooperating co-cartelists in the damage cases. In addition, false statements, oral or written, to South African government investigators are presumably a violation of South African law. As such, a paperless process provides the same protection against false reporting as does a requirement of written applications. The Sections note that a successful paperless process must also establish procedures that limit emails and other written communications sent by the Commission to applicants, as such documents may contain key and discoverable information.

As mentioned in the Discussion Paper, notes taken by Commission staff of an oral submission to the Commission by an amnesty applicant should not be subject to discovery in private damage litigation. However, as the Commission develops the structure of its oral submission policy, the Sections strongly recommend that it carefully consider the consequences of any requirement that the oral submission be electronically recorded or that the amnesty applicant be required to certify the accuracy of, or otherwise have access to, any electronic recording or writing prepared by Commission staff. These requirements could have unintended adverse consequences on the discovery of those materials in third-party litigation, which the Commission is commendably trying to avoid by adopting an oral submission process.

Finally, the Commission should give careful consideration to the extent to which it will seek to use the notes or transcription of an oral statement by an amnesty applicant as direct evidence in proceedings against non-cooperating cartel members. Public disclosure of such admissions or their disclosure to subjects of the Commission's proceedings likely would result in their discovery in U.S. private damage litigation, which would place the amnesty applicant in far worse position than the non-cooperating parties in the matter. The Sections encourage the Commission to consider alternative means of obtaining "on the record" evidence from the leniency applicant, whether from pre-existing documents, witness statements or evidence obtained as a result of the leniency applicant's assistance and to forbear using an applicant's oral statement transcript as evidence, except when there is no other alternative. In the balance of incentives and disincentives for the leniency applicant, the Sections respectfully recommend that the Commission adopt and utilize a process that does not tip the balance against applying for leniency in cartel cases and follow the principle that the leniency applicant should never be worse off for having applied for leniency than it would have been if it did not cooperate with the Commission.

C. Role in the Cartel

The Sections note the decision whether to disqualify from eligibility for leniency a company that acted as the leader or the instigator of a cartel requires the Commission to draw a delicate balance between fairness in the law enforcement process and clarity and predictability in its leniency policy. On the one hand, one could question the fairness of a public policy that grants immunity to a company that has coerced other firms to join or remain in a cartel and use that company's cooperation to prosecute the firms it coerced into participating in the cartel. On the other hand, such a disqualifier introduces a level of discretion into the grant of immunity decision that could be a disincentive to cooperation, resulting in the failure to detect and dismantle cartels that otherwise would have been discovered and ended with the assistance of an amnesty applicant. The Discussion Paper weighs these competing policy interests in favor of ensuring that the leniency program is as free of confusion and disincentives to cooperation as is possible and the Sections support that outcome. The Sections also note that even in those jurisdictions that have adopted the leader/instigator disqualifier in their leniency programs, members of the Sections who are experienced in cartel matters are aware of only a very few instances of disqualification on that basis.

D. Marker Procedure

The Sections applaud the Commission for its decision to introduce a marker system into its immunity program.¹⁰ The Commission's decision is in line with the approach taken by antitrust authorities in the United States, Canada, and Australia, among others, and the recommendations of the Cartel Working Group of the International Competition Network.¹¹ The Sections agree that the availability of a marker system serves further to destabilize cartels and provides further incentives for corporations to act immediately upon the discovery of evidence indicating the existence of cartel conduct.

However, a number of issues will arise as the Commission drafts the details of its marker system. For instance, to what extent should the marker system be discretionary with the enforcement agency and how much detail will the corporation have to disclose in order to obtain a marker? Many of the same considerations that are set out in the Discussion Paper regarding the appropriate level of discretion in the Corporate Leniency Policy and the need for a paperless process in the immunity process will be relevant to, and the Sections submit should guide, the Commission's decisions regarding the structure of the marker system. The experience of the Sections' members is that there must be certainty that a marker procedure is available in a

¹⁰ Discussion Paper ¶ 4.5 at page 7.

¹¹ See Competition Bureau (Canada), *Immunity Program Under the Competition Act* (2000) and *Responses to Frequently Asked Questions* (October 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2000&lg=e>; U.S. Department of Justice *Corporate Leniency Policy*, available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>; Australia Competition and Consumer Commission *Immunity Policy for Cartel Conduct and Immunity Policy Interpretation Guidelines* (August 2005), available at <http://www.accc.gov.au/content/index.phtml/itemId/708758>; International Competition Network, Cartel Working Group, http://www.internationalcompetitionnetwork.org/cartels/gen_framework2.html.

particular jurisdiction in order to encourage potential applicants to come forward in that jurisdiction, to secure their place in the queue, and to conduct an internal investigation to collect the information and evidence regarding the suspected cartel conduct. The predictability that an enforcement authority will grant a marker is often critical to a corporation's decision to initiate the process. If a corporation were not confident in a jurisdiction's implementation of its marker policy, it would believe that it had to meet the requirements for immunity at the time that it first reports to the enforcement authority. The Sections are concerned that the introduction of prosecutorial discretion about whether to grant markers when immunity is available is a disincentive to undertakings considering whether to self-report.

The Commission also should consider the level of detail required for a marker. The Sections note that the United States and Canada permit companies seeking a marker to do so on the basis of very limited information, such as the suspected type of infringement and the affected product. In fact, those jurisdictions will grant a marker on a no-names (anonymous) basis.

The Sections recommend that the Commission adopt an approach similar to that used in the North American jurisdictions. The experience of those jurisdictions over many years confirms that a program requiring only a minimal amount of information up front is sufficient to permit the Commission to determine if the company seeking a marker is indeed "first in" to initiate a claim for immunity. More detailed information about the cartel can be provided subsequently as part of the formal immunity application process. The Sections also suggest that it could be beneficial if the Commission, prior to the adoption of a particular procedure, seeks public comment on its proposed marker system.

E. Other Provisions

In reviewing the Commission's Corporate Leniency Policy, the Sections noticed several provisions that appear to vest discretion in the Commission and that, therefore, may act as a disincentive to companies contemplating self-reporting and cooperation in cartel matters and that were not addressed in the Discussion Paper. For instance, Paragraphs 3.4 ("information that would result in the institution of proceedings against a cartel") and 5.5 ("sufficient information or evidence to enable the Commission to institute proceedings") seem to adopt a quantum-of-evidence rather than an admission-of-wrongdoing standard that an amnesty applicant must meet to obtain leniency. This required quantum-of-evidence standard retains in the leniency process the level of discretion that the Discussion Paper notes "has the effect of deterring firms from coming forward with incriminating information."¹² In addition, to the extent that the Competition Act imposes individual criminal liability for cartel violations of the Act, the exclusion of those penalties from the immunity provisions of the Corporate Leniency Policy¹³ may be a huge disincentive to corporate and individual self-reporting and cooperation.

The Sections suggest that the Commission consider seeking public comment on a draft revised Corporate Leniency Policy prior to the formal adoption of the amendments discussed in the Discussion Paper. In doing so, it may be useful to the Commission to receive comments also

¹² Discussion Paper ¶ 4.2 at page 5.

¹³ Corporate Leniency Policy ¶ 5.9

on those provisions not being amended that may be interpreted to create the disincentives to self-reporting and cooperation that the Commission has so commendably sought to address in the Discussion Paper and to eradicate from its Corporate Leniency Policy.

CONCLUSION

It is now an accepted principle in anti-cartel enforcement that successful leniency programs eliminate, to the extent reasonably feasible, prosecutorial discretion as a factor in the determination of whether an applicant is entitled to immunity.¹⁴ The Commission's achievement of its admirable objective of identifying and deterring cartel conduct through its Corporate Leniency Policy depends upon the balance of incentives and disincentives that applicants face when determining whether to be the "whistleblower." One of the most important factors in tipping that balance in favor of self-reporting and cooperation is the extent to which the leniency program—in its form and application—is certain, predictable, and, to the greatest extent possible, lacking in prosecutorial discretion. The Sections commend the Commission's desire to provide additional guidance and clarity through the Discussion Paper and the adoption of amendments to the 2004 Corporate Leniency Policy and provides these comments and suggestions as means by which the stated goals of the Commission may be enhanced.

Respectfully submitted,

SECTION OF ANTITRUST LAW
AND
SECTION OF INTERNATIONAL LAW
AMERICAN BAR ASSOCIATION

¹⁴ Competition officials in the United States and elsewhere comment frequently about the importance of removing prosecutorial discretion from the leniency process. *See, note 4 supra.*