

CARTEL IMMUNITY PROGRAMME

PREFACE

The Cartel Immunity Programme ('the Programme') outlines the policy of both the Competition and Consumer Protection Commission ('the Commission') and the Director of Public Prosecutions ('the DPP') in considering applications for immunity from prosecution for criminal cartel offences under the Competition Act, 2002 (as amended) ('the Act') and it outlines the requirements on parties in order to qualify for immunity.

This Programme, in line with the European Competition Network's ('the ECN') revised Model Leniency Programme, encourages self-reporting of unlawful cartels by cartel participants at the earliest possible stage in return for immunity from prosecution.

The Programme will be reviewed from time to time.

1. INTRODUCTION

- 1.1 The Competition Act, 2002 (as amended) establishes rules regulating the competitive process in Ireland, including anti-competitive agreements and abuses of dominant positions.
- 1.2 The most serious forms of anti-competitive behaviour are agreements between and/or concerted practices involving two or more undertakings¹, or decisions by associations of undertakings, aimed at coordinating competitive behaviour on the market. Such agreements seek to limit or reduce competition by agreeing to fix prices and/or other trading conditions, limit output or sales and/or share markets or customers. This conduct, generally described as “hardcore” cartel activity, is expressly prohibited by section 6(2) of the Act.
- 1.3 The Act provides for criminal penalties upon conviction for such cartel activity of up to ten years imprisonment (for individuals) and fines of up to €5 million or 10% of turnover (whichever is the greater) for individuals and undertakings.
- 1.4 The Commission and the DPP recognise the importance of this Programme in contributing to the detection, investigation and prosecution of cartels.
- 1.5 This Programme outlines the approach of the DPP to the grant of immunity from prosecution for a cartel participant who is the first to come forward and complies with the requirements as set out in this document. The Commission’s role in the immunity and investigative process is also outlined².
- 1.6 This Programme is an application of the general discretion of the DPP in the exercise of her functions and powers to grant immunity from prosecution. Nothing in this Programme shall limit or otherwise affect the exercise by the DPP of her general discretion to grant immunity which could, in exceptional circumstances, extend to the grant of immunity to more than one cartel participant in a given case.
- 1.7 **It is important to note that immunity, under this Programme, is only available to the first participant in a given cartel that satisfies all the requirements as set out in this document.**
- 1.8 Any individual or undertaking may apply for immunity. This includes any individual or undertaking that has materially facilitated the formation or operation of a cartel, even where they themselves are not engaged in the same line of business as the cartel.

¹ An undertaking is defined in the Competition Act 2002 as a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service and, where the context so admits, shall include an association of undertakings.

² Further information on this Programme, including detailed FAQs, can be obtained from the Commission’s website (www.ccpc.ie)

- 1.9 An undertaking may apply on its own behalf and on behalf of its employees, directors and officers who require individual immunity. Directors, officers and employees of an undertaking who require immunity may also apply on their own behalf.
- 1.10 For the purposes of this Programme, the term *undertaking* is as defined in section 3(1) of the Act.
- 1.11 Potential applicants are referred to the Act and asked to contact the Commission's Cartel Immunity Phone (**087 763 1378**) if they have any queries relating to this Programme. Readers are reminded that the Programme does not constitute legal advice and it does not in any way affect the right of any potential applicant to obtain legal advice and/or arrange legal representation.
- 1.12 In this document, the term immunity refers to a grant of conditional immunity by the DPP from criminal prosecution under the Act unless otherwise specified.

2. ROLES OF THE COMMISSION AND THE DPP IN AN APPLICATION FOR IMMUNITY

- 2.1 Applications for immunity under this Programme are made to the Commission. Where appropriate, the Commission will make a recommendation to the DPP to grant immunity.
- 2.2 Subject to the requirements set out below, the DPP may decide to grant immunity to an applicant under this Programme on the recommendation of the Commission.

3. OBTAINING IMMUNITY

- 3.1 The Commission will recommend that the DPP grant immunity if the applicant is the first participant in a given cartel that makes an application in line with the requirements of this Programme.
- 3.2 The Commission may not make such a recommendation if the Commission already has sufficient evidence to warrant a referral to the DPP.

Requirements attached to immunity

- 3.3 The applicant must not have taken steps to coerce another party to participate in the illegal cartel activity.
- 3.4 The applicant must do nothing to alert its associates in the cartel that it has applied for immunity under this Programme and must refrain from commenting publicly on the activities of the cartel in which it has been involved pending the conclusion of any prosecutions.
- 3.5 From the time that the applicant first considered applying for immunity it must not have destroyed, hidden, made unusable or falsified any evidence relating to the offence(s).

- 3.6 An applicant in an ongoing cartel must take effective steps, to be agreed with the Commission, to ensure that it does not involve itself in any further illegal cartel activity following its application for immunity. However, in exceptional circumstances the Commission may require an applicant to act in a manner that would, in the Commission's view, be required to preserve the integrity of the Commission's investigation.
- 3.7 Throughout the course of the Commission's investigation and any subsequent prosecution, the applicant must provide comprehensive, prompt and continuous co-operation.
- 3.8 In particular, the applicant (including individuals who require personal immunity) has a positive duty to:
- Reveal any and all cartel offences under the Act in which the applicant may have been involved and of which it is aware;
 - Provide full, frank and truthful disclosure of all the evidence and information in the possession or control or known or available to the applicant, including all documentary, electronic and other records, wherever located, relating to the offences under investigation;
 - Preserve and not tamper with any evidence that is capable of being under the applicant's control;
 - Ensure to the best of the applicant's ability that current and former directors, officers and employees cooperate fully with the Commission's investigation and any subsequent prosecutions;
 - Subject as hereinafter provided, from the time that the applicant first considered applying for immunity, not disclose to third parties any dealings with the Commission (including the fact of its immunity application) without the Commission's prior written consent, except where required to do so by law. If disclosure is required, the Commission must be notified prior to the applicant releasing any such information. This restriction shall not, however, prevent the applicant from disclosing the existence or content of the application (i) to another competition authority or (ii) to an external lawyer for the purpose of obtaining legal advice provided the applicant ensures that such lawyer does not disclose any such information to any third party;
 - Disclose to the Commission, unless otherwise prohibited, all applications made by the applicant for immunity in other jurisdictions;
 - Co-operate fully with the Commission, on a continuing basis, expeditiously and at no expense to the Commission throughout the investigation and with any ensuing prosecutions; and
 - Provide individuals who give clear and comprehensive statements of evidence that will be recorded by the Commission. Such individuals must also provide complete and truthful evidence in any ensuing prosecutions.
- 3.9 Failure to comply with the requirements set out in this Programme may result in the DPP revoking the grant of conditional immunity (see Section 6).

- 3.10 If the first applicant to request immunity fails to meet the requirements of this Programme or conditional immunity is later revoked, another applicant can be considered for immunity under this Programme.

4. IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS AND EMPLOYEES, APPLICATIONS FROM INDIVIDUALS

- 4.1 In the case of an applicant that is an undertaking, whatever its legal form, the applicant must be able to show that it has made a formal decision to apply for immunity. A person making an application on behalf of a corporate undertaking must satisfy the Commission that he/she is duly authorised to act on behalf of the corporate undertaking in question.
- 4.2 If an undertaking qualifies for immunity, all current and/or former directors, officers, partners and employees who admit their involvement in the anti-competitive activity and who comply with the conditions of this Programme will also qualify for immunity.
- 4.3 Applications can be made on behalf of an individual who is not an undertaking. Such an application will not be regarded as made on behalf of an undertaking.

5. THE IMMUNITY PROCESS

Step 1: Obtaining a Marker

- 5.1 Applications for immunity can only be made by calling the Cartel Immunity Phone (**087 763 1378**). The Cartel Immunity Phone may be contacted between the hours of 10am and 5pm (local time) Monday to Friday, except public or bank holidays.
- 5.2 In order for the Commission to determine whether immunity is available in a particular instance, the applicant or its legal advisor must present an outline of the facts of the case, including the market and the kind of practice involved. Such an enquiry may be made without disclosing the applicant's identity. This will enable the Commission to determine whether a marker can be granted in this case.
- 5.3 The marker protects the applicant's place in the queue for immunity for a short period of time. This is intended to allow the applicant time to gather the necessary information and evidence needed to complete its application for immunity.
- 5.4 In order to obtain a marker, the applicant or its legal advisor must provide a contact name and number. Applications for immunity will be queued and dealt with in the order of receipt.
- 5.5 The applicant will be given a reasonable period of time within which to perfect the marker by submitting its full application for immunity. Where a marker is perfected, the information that is then provided will be deemed to have been submitted on the date when the marker was granted.

Step 2: Perfecting the Marker

- 5.6 To perfect the marker, the applicant must provide the Commission with its name and address as well as information concerning:
- An outline of the process which led to the immunity application, including the form of formal decision to make the application
 - The parties to the alleged cartel
 - In the case of a corporate applicant, the individual(s) that require immunity;
 - The affected product(s);
 - The affected territory(ies)
 - The duration of the alleged cartel;
 - The nature of the alleged cartel conduct (including a description of the applicant's role): and
 - Information on any past or possible future immunity/leniency applications in other jurisdictions in relation to the alleged cartel
 - An outline of the nature of the evidence at the applicant's disposal
- 5.7 The applicant may provide all of the above information orally.
- 5.8 If a marker expires before it is perfected, or the application is otherwise refused by the Commission or by the DPP, the Commission will consider any other applications for immunity in the queue and/or any subsequent applications. Nothing prevents the holder of an expired marker from re-applying, but in those circumstances, its original place in the queue will not be protected.
- 5.9 Joint applications for immunity by two or more independent undertakings will not be considered. This does not preclude applications by a single economic entity on behalf of its constituent companies.

Step 3: Conditional Immunity

- 5.10 If the Commission is of the opinion that the application discloses a likely criminal breach of the Act that warrants a formal investigation, the Commission will formally write to the DPP recommending a grant of conditional immunity for the applicant.

Step 4: Full Disclosure

- 5.11 Upon receipt by the Commission of the decision to grant conditional immunity from the DPP, the Commission will advise the applicant accordingly in writing. The applicant must then provide the Commission with full, frank and truthful disclosure, including (in addition to the obligations outlined in Section 3):
- all dates, locations, content of and participants in alleged cartel contacts and/or meetings;
 - contact details of all current and former officers, directors, partners, managers and employees who have been identified as likely witnesses;

- all relevant explanations in connection with evidence provided in support of the application;
- all evidence relating to the alleged cartel in the possession of the applicant or available to it, in particular electronic and contemporaneous evidence.

5.12 The applicant will provide such evidence and information on the understanding that it will not be used in a criminal prosecution of the applicant unless the grant of conditional immunity is revoked due to the applicant's failure to comply with the requirements of the Programme.

Step 5: Full Immunity

5.13 When the terms, obligations and conditions set out in this Programme have been fully satisfied, including where any resulting prosecutions have been disposed of, the DPP will confirm that the applicant has full immunity.

6. FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE PROGRAMME

6.1 Failure to comply with the requirements set out in this Programme may result in the DPP revoking the grant of conditional immunity.

6.2 The Commission will recommend that the DPP revoke conditional immunity where an applicant fails to cooperate, an applicant makes false statements, or where the applicant interferes with witnesses and/or where evidence is uncovered suggesting that the applicant coerced others into participating in the cartel.

6.3 In the event that an applicant fails to comply with the requirements of the Programme and/or fails to provide complete and timely cooperation, the Commission will give the applicant written notice of any such failure. Where such failures are capable of being remedied the notice shall specify a period within which the applicant must remedy its default, failing which the DPP may, without further notice, revoke the conditional immunity granted to the applicant. Without prejudice to any of the above, failure to comply with the requirements of the Programme includes failure by an applicant to fully promote the complete and timely co-operation of its directors, officers and employees and failure to disclose any and all known offences under section 6(2) the Act in which the applicant may have been involved.

6.4 The revocation of an applicant's immunity, where that applicant is an undertaking, will not affect the immunity granted to individual directors, officers and employees who continue to comply with the requirements of the Programme.

7. CONFIDENTIALITY

7.1 An immunity applicant's identity will be kept confidential as long as permissible under Irish and European law. Information disclosed pursuant to this Programme will not be disclosed to any third party other than in accordance with the normal practices and procedures pertaining to criminal investigations and prosecutions. In particular, information may be disclosed:

- Where disclosure is required by law;
- Where disclosure is for the purpose of the administration and enforcement of the Act;
- Where disclosure is necessary for the prevention of the commission of a criminal offence;
- Where disclosure is required in the course of an investigation or prosecution; and/or
- Where an applicant agrees to and signs a waiver on disclosure allowing the Commission to share information with another competition authority investigating the particular cartel in another jurisdiction where the same applicant has also applied for immunity or leniency.