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 vigorous competition drives productivity growth, innovation and value for all
 consumers
 innovation
 productivity
 economy
 growth
 productivity
 economy



productivity
 productivity
 economy
 innovation
 growth
 productivity
 economy

Cartel Immunity Programme Review

Consultation Paper

15 July 2010



The Competition Authority
 An tÚdarás Iomaíochta

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1. INTRODUCTION

- 1.1 The Cartel Immunity Programme ("the Programme") was adopted by the Competition Authority ("the Authority") and the Director of Public Prosecutions ("the DPP") in 2001 to encourage self-reporting by cartel members in return for immunity from prosecution.
- 1.2 The Programme, which incorporates international best-practice in immunity and leniency programmes, outlines the policy and procedures involved in applying for immunity from prosecution for criminal cartel offences in Ireland.
- 1.3 Cartel activity has been a criminal offence in Ireland since 1996 and exposes participants to severe financial penalties and custodial sentences. In deciding to penalise cartels in this way, the legislature acknowledged the extortionate impact of cartels on customers (whether consumers or businesses) as well as their negative implications for the competitiveness of the economy.
- 1.4 The Irish courts have also recognised the pernicious nature of cartels. Since 2006 a total of 32 convictions on indictment have been secured by the DPP for offences under the Competition Acts. These involved the imposition of fines totalling just under €600,000 (with the maximum fine imposed on a single individual reaching €80,000) and suspended custodial sentences ranging from six to twelve months. In one instance an individual was sentenced to 28 days in prison for failure to pay the fine imposed on him by the Court. As Mr Justice McKechnie said in a recent High Court judgment:

*"[Cartels]... stifle competition, they damage economic and commercial liberty and, in fact, if they were to continue unabated, they could seriously impact upon the economic and commercial welfare of, not only customers and consumers, but of an entire nation."*¹

- 1.5 The Authority has the statutory responsibility to detect and investigate cartels and to prosecute or assist the DPP in prosecuting them. Its ability to discharge those responsibilities depends on the quality of the available evidence. The effectiveness of immunity programmes as a means of gathering evidence of cartel activity is well-established internationally; it has also been a significant factor in a number of recent criminal prosecutions in Ireland. Self-reporting pursuant to an immunity programme by individuals involved in cartels provides advantages in terms of the quality and completeness of information, the quantity of information, and the speed with which the matter is progressed to prosecution. For these reasons, authorities are willing to forsake a sanction against the first member of a cartel to apply for immunity in return for assistance in prosecuting other members of the cartel.
- 1.6 The Programme has been in operation for almost nine years and there has been ample opportunity for the Authority and the DPP to evaluate the way the Programme operates in practice and to measure its effectiveness. The review process has enabled the Authority and the

¹ DPP v James Bursey and Bursey Peppard Limited, unreported, 3 April 2009, p.3.

DPP to identify strengths and weaknesses in the Programme and reflect on international developments in the area of immunity and leniency programmes and/or policies.

- 1.7 The Authority and the DPP have reviewed the Programme and propose to make some changes in an attempt to make the Programme more self-contained, transparent and attractive for potential applicants and thus a more effective tool in the fight against cartels. The fact that the Authority and the DPP are working closely together on a review of the Programme not only confirms a continued commitment to the Programme, but also contributes towards greater transparency and legal certainty in the Programme. The current review process should contribute towards a renewed awareness of the use of the Programme in Ireland and a resulting increase in the number of immunity applications and ultimately the dismantling of cartels. This will have a positive effect on both the economy and consumers in Ireland.
- 1.8 The Authority invites submissions from interested parties on the Revised Cartel Immunity Programme ("revised Programme"). The proposed amendments are summarised in this Consultation Paper. Submissions should be received by the Authority no later than 5pm on Friday, 3 September 2010 and should be sent, preferably in electronic format, to immunityconsultation@tca.ie. Hard-copy submissions can be sent to:

Cartel Immunity Programme Consultation,
The Competition Authority,
Parnell House,
14 Parnell Square,
Dublin 1.

- 1.9 Submissions may be published on the Authority's website. Where submissions contain confidential or commercially sensitive information it should be clearly marked as such.

2. PROPOSED REVISIONS TO THE CARTEL IMMUNITY PROGRAMME

2.1 In the course of reviewing the Programme, the Authority and the DPP identified two broad categories of possible amendments to the Programme that merited consideration:

- 1) structural impediments that may be affecting uptake of the cartel immunity offering in Ireland; and
- 2) perceived uncertainty as to how portions of the Programme work in practice, which may be causing potential immunity applicants not to apply.

The proposed amendments to the Programme are set out below and incorporated in the revised Programme.

A. ECN Model Leniency Programme

2.2 In September 2006, Ireland became a signatory to the European Competition Network's Model Leniency Programme, which seeks to provide additional certainty to leniency/immunity applicants who may be applying for leniency/immunity in more than one EU Member State. The revised Programme therefore takes into account the ECN Model Leniency Programme.

B. International Competition Network

2.3 The revised Programme provides for the Authority's membership of the International Competition Network.

C. Self-Contained Document

2.4 In order to promote transparency and legal certainty in the Programme, the Programme has been revised, to the extent possible, to provide for a self-contained document. The revised Programme does not require reference to any other document as all relevant definitions are contained in the document itself. In this regard the following changes were made:

- a) An expansion of the definition of "cartel activity".
- b) The reference to section 3(1) of the Act for a definition of the term "undertaking" was expanded to include the actual definition.
- c) An explanation of what is meant by "a corporate act" provides greater clarity within the Programme.

D. Role in the Conspiracy – Removing the Ringleader Bar

2.5 The roles that undertakings play in a particular cartel can change over time and an undertaking that, for instance, acted as ringleader at an earlier stage might play a less active role in the cartel later on. Having a perpetual disqualification in the Programme for an applicant, including all its relevant past and present employees, who might have played a lead role in the cartel in the past, would potentially preclude a number of participants in the cartel from ever applying for immunity.

- 2.6 The revised Programme therefore removes ringleaders from the category of cartel participants who are excluded from the Programme. Removing the ringleader bar also provides greater convergence between the Programme and the ECN Model Leniency Programme, which only excludes from immunity an undertaking that has taken steps to coerce one or more undertakings to join or remain in the cartel. The reason for this exclusion in the ECN Model Leniency Programme is grounded in natural justice, which should not allow an undertaking that has played a role as coercer to escape sanction altogether. A further reason for the ECN Model Leniency Programme in keeping the exclusion narrow is to avoid creating uncertainty for potential applicants.
- 2.7 However, undertakings that have coerced others to participate in the cartel or have acted as the instigator of the cartel activity are still excluded from the benefit of the Programme.

E. Immunity Process

- 2.8 The immunity process, as applied in practice and all of the terms and conditions for immunity, both qualified and final, should be set out in the Programme itself. In this regard the Programme has been amended accordingly to provide for more clarity and certainty. These amendments reflect the manner in which the Programme operates in practice.

Do you agree with the proposed amendments to the Programme? If not, please provide details on why you do not agree.

Are there any further amendments that should be considered by the Authority and the DPP?

