

# **CARTEL IMMUNITY PROGRAMME**

*Introduced 20<sup>th</sup> December 2001*

## **PREFACE**

This notice outlines the policy and procedures involved in applying for immunity from prosecution for criminal offences under the Competition Act, 2002 ("the Act"). The Competition Authority ("the Authority") has identified the pursuit of cartels as a top priority. Cartel behaviour is almost inevitably harmful to consumers as it results in their having to pay more than they should for goods and services. Cartels are by their very nature conspiratorial. The participants are secretive and hard-core cartels are notoriously difficult to detect and prosecute successfully. This programme encourages self-reporting of unlawful cartels by offenders at the earliest possible stage.

This notice makes transparent the policy of both the Authority and the Director of Public Prosecutions ("the DPP") in considering applications for immunity in such cases of self-reporting. It also outlines the process through which parties must agree to cooperate, in order to qualify for immunity.

This Programme comes into effect on 20th December 2001.

## **CONTENTS**

- A. Introduction
- B. Roles of the Authority and the DPP when a request for Immunity is made
- C. Obtaining Immunity
- D. Impact of Corporate Immunity on Directors, Officers and Employees
- E. The Immunity Process
- F. Failure to Comply with the Requirements of the Agreement
- G. Disclosure

## **A. INTRODUCTION**

1 The Act establishes rules for the conduct of business in Ireland. It prohibits anti-competitive agreements, decisions and concerted practices, and abuse of dominance. The most serious forms of anti-competitive agreements are price-fixing, bid rigging and market sharing by competitors – generally described as cartel activity.

2 For the purposes of this notice, the term *undertaking* is as defined in section 3(1) of the Act.

3 The Competition Act 1991 established the Authority as an independent body responsible for administering and enforcing the Acts, and gave it the power to carry out investigations. The Competition Act 1996 Act created criminal and civil provisions that prohibit amongst other things, horizontal price-fixing agreements and "bid-rigging". The 1991 and 1996 Acts are now revoked, but the 2002 Act, which continues the Authority in being, provides for criminal penalties of up to five years in

prison (for individuals) and fines of up to €4,000,000 or 10% of turnover (whichever is the greater) for individuals and undertakings.

4 When there has been a violation of the Act, the Authority's objective is to investigate the anti-competitive behaviour, prosecute the undertakings and individuals responsible, and deter similar offences. The Authority recognises the importance of programmes that contribute to the detection, investigation and prosecution of cartels. This notice details the approach of both the Authority and the DPP to the grant of immunity for an offender who violates the Act, but nevertheless comes forward and volunteers information to the Authority which leads to the detection and prosecution of other offenders who might otherwise escape detection. A cartel necessarily involves at least two conspirators. Immunity would be granted to one conspirator in order to bring the other conspirator to justice.

5 This notice does not give legal advice. Readers should refer to the Act and obtain independent legal advice when questions of law arise or if a particular situation causes concern.

6 Nothing in this programme shall affect the discretion of the DPP in the exercise of his functions.

7 In this notice, the term immunity refers to a grant of full immunity from prosecution in criminal cases under the Act.

8 Any person or undertaking implicated in an activity that violates the Act may offer to co-operate with the Authority and request immunity. An undertaking may choose also to initiate an application on behalf of its employees including its directors and officers. Employees who are neither directors nor officers of the corporate undertaking may approach the Authority on their own behalf.

## **B. ROLES OF THE AUTHORITY AND THE DPP WHEN A REQUEST FOR IMMUNITY IS MADE**

9 The Authority investigates alleged breaches of the Act. The DPP has sole responsibility to prosecute offences on indictment.

10 Applications for immunity should be made to the Authority. Only the DPP can grant immunity. Subject to the requirements set out below, the Authority will make a recommendation to the DPP to grant immunity.

## **C. OBTAINING IMMUNITY**

11 The Authority encourages parties (which may include corporate undertakings, partnerships and individuals) to come forward as early as possible.

12 Subject to the requirements set out below, the Authority will recommend immunity to the DPP if the applicant is the first to come forward before the Authority has gathered sufficient evidence to warrant a referral of a completed investigation file to the DPP.

### **The requirements:**

13 The applicant must take effective steps, to be agreed with the Authority, to terminate its participation in the illegal activity.

14 The applicant must do nothing to alert its former associates that it has applied for immunity under this programme.

15 The applicant, including all its relevant past and present employees, must not have coerced another party to participate in the illegal activity and must not have acted as the instigator or have played the lead role in the illegal activity. The applicant must be able to show this to the satisfaction of the Authority.

16 Throughout the course of the Authority's investigation and any subsequent prosecution, the applicant must provide complete and timely co-operation. In particular, the applicant must:

a) Reveal any and all offences under the Act in which it may have been involved;

b) Provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control, including all documentary and other records, wherever located, relating to the offences under investigation with no misrepresentation of any material facts; and

c) Co-operate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions.

17 In the case of a corporate undertaking, the application for immunity must be a corporate act. While applications from individual directors or employees will be considered they will not be regarded as made on behalf of the undertaking in the absence of a corporate act. Corporate undertakings must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

18 If the first applicant to request immunity fails to meet these requirements, a subsequent applicant that does meet these requirements can be considered for immunity

## **D. IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS AND EMPLOYEES**

19 If a corporate undertaking qualifies for a recommendation for full immunity, all past and present directors, officers and employees who admit their involvement in a cartel as part of the corporate admission, and who also comply with Paragraph 16 (a) to (c) will also qualify.

20 Applications for immunity for an individual employed by an undertaking involved in a cartel will be considered, even where the employer undertaking does not apply or otherwise co-operate under this programme.

## **E. THE IMMUNITY PROCESS**

### **Step 1: Initial Contact**

21 Applications for immunity must be made to the uniquely designated officer in the Authority who will receive all applications for immunity. Contact with the designated officer must be in person or by telephone. Applications made to any other person or body that is not at that time the officer designated for that purpose would be invalid. The officer designated by the Authority may be contacted at telephone number 087 763 1378 between the hours of 10am and 4pm Monday to Friday, except public or bank holidays.

22 The applicant should present an outline of the facts of the case to the designated officer of the Authority. The applicant may initially present the case through its own legal advisors in hypothetical terms so as to protect its anonymity.

23 Applications for immunity will be queued and dealt with in the order of receipt. An applicant will be allowed to place a "marker" with the designated officer for a period to be determined by the designated officer in order to retain the applicant's place in the queue for immunity until such time as the applicant is in a position to complete its application for immunity.

24 Joint applications for immunity by two or more conspirators will not be accepted and will be invalid.

### **Step 2: Qualified Guarantee of Immunity**

25 If the applicant decides to proceed with the immunity application, a description of the illegal activity must be furnished to the Authority, which in the Authority's opinion is sufficient for its purposes. If the Authority is of the opinion that the case falls within this programme, the Authority will then refer the matter to the DPP seeking a written qualified agreement to grant immunity from the DPP.

### **Step 3: Full Disclosure**

26 Upon receipt by the applicant of a written qualified agreement to grant immunity from the DPP, both the DPP and the Authority must be informed with sufficient detail and certainty what evidence can be provided by the applicant. Full disclosure is required at this stage and will be conducted with the understanding that neither the Authority nor the DPP will use the information against the applicant, unless there is a failure to comply, as described in Part F, below.

27 The applicant will make full disclosure after the applicant has been reminded of its legal privilege against self-incrimination. This will ensure that should there be a subsequent failure by the applicant to comply with the terms of the immunity agreement, the Authority in continuing its investigations can then use information given by the applicant under full disclosure.

### **Step 4: Immunity Agreement**

28 Once the terms of the qualified guarantee have been satisfied the DPP will execute an immunity agreement that will include all continuing obligations as described in paragraph 16, above.

## **F. FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE AGREEMENT**

29 Failure to comply with any of the requirements set out in this programme may result in the DPP revoking the immunity agreement made with the applicant. The Authority will then continue its investigation and will include the applicant that has failed to meet its obligations under the agreement in the investigation.

30 Without prejudice to the generality of the above, failure to comply with requirements under the agreement includes failure by an undertaking to fully promote the complete and timely co-operation of its employees, failure to disclose any and all offences and failure to provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

## **G. DISCLOSURE**

31 Information becoming available pursuant to this programme will not be disclosed other than in accordance with the normal practices and procedures pertaining to criminal investigations and prosecutions. In particular, information may be disclosed:

- a) When there has been public disclosure by the applicant;
- b) Where disclosure is required by law;
- c) When disclosure is for the purpose of the administration and enforcement of the Act;
- d) When disclosure is necessary for the prevention of the commission of a criminal offence; and/or,
- e) When disclosure is made in the course of an investigation or subsequent proceedings.