

# **REVISED CARTEL IMMUNITY PROGRAMME**

## **PREFACE**

The Cartel Immunity Programme (the 'Programme') outlines the policy and procedures involved in applying for immunity from prosecution for criminal cartel offences under the Competition Act, 2002.

The Competition Authority (the 'Authority') has, in line with international precedent and as part of its membership of the International Competition Network (the 'ICN'), identified the pursuit of cartels as a top priority. Cartel behaviour is harmful to consumers as it results in restricted choice and higher prices for goods and services. This Programme, in line with the European Competition Network (the 'ECN') Model Leniency Programme, to which Ireland became a signatory in September 2006, encourages self-reporting of unlawful cartels by offenders at the earliest possible stage in return for immunity from prosecution.

Recognising the importance of maximising certainty in any immunity process, the Authority and the Director of Public Prosecutions (the 'DPP') have agreed to procedures that will facilitate the granting of immunity in relation to cartel offences. This Programme makes transparent the policy of both the Authority and the DPP in considering applications for immunity in such cases of self-reporting and outlines the process through which parties must agree to cooperate, in order to qualify for immunity.

The Programme was introduced on 20 December 2001 and revised on [[DATE MONTH YEAR]] and will be reviewed from time to time.

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## **A. INTRODUCTION**

1. The Competition Act, 2002 (the 'Act') establishes rules for the conduct of business in Ireland. The Act prohibits anti-competitive agreements, decisions and concerted practices and abuses of dominance. The most serious forms of anti-competitive behaviour are agreements between and/or concerted practices involving two or more competing undertakings, or decisions by associations of undertakings, seeking 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 – generally described as cartel activity. Also included are collective anti-competitive practices such as bid rigging or collusive tendering for goods or services and/or joint boycotts.
2. For the purposes of this Programme, the term *undertaking* is as defined in section 3(1) of the Act and means 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.
3. The Act prohibits amongst other things, horizontal price-fixing agreements, agreements limiting output or sales, market sharing agreements and provides for criminal penalties upon conviction of up to five years in prison (for individuals) and fines of up to €4 million or 10% of turnover (whichever is the greater) for individuals and undertakings.
4. When there has been a breach of the Act, the Authority's objective is to investigate the anti-competitive behaviour, refer completed investigation files to the DPP recommending prosecution when appropriate and to deter similar offences. Both the Authority and the DPP recognise the importance of programmes that contribute to the detection, investigation and prosecution of cartels. This Programme details the approach of the Authority and the DPP to the grant of immunity for an offender who breaches 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 and immunity would be granted to one conspirator in order to bring the other conspirator(s) to justice.
5. Any person or undertaking implicated or involved in cartel activity, either at present or in the past, that breaches the Act may offer to co-operate with the Authority and request immunity. An undertaking may also choose to initiate an application on behalf of its employees including its directors and officers. Directors, officers and employees of an undertaking may also approach the Authority on their own behalf.
6. Potential applicants are referred to the Act and asked to contact the designated Cartel Immunity Officer (the 'Immunity Officer') in the Authority with any queries on this Programme. Readers are reminded that the Programme does not provide 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.

7. This Programme is in addition to the general discretion of the DPP in the exercise of his functions and powers to grant immunity from prosecution, and nothing in this Programme shall affect the exercise by the DPP of his general discretion to grant immunity.
8. In this Programme, the term immunity refers to a grant of qualified immunity from prosecution in criminal cartel cases under the Act unless specified otherwise.

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

9. The Authority is an independent statutory body that investigates alleged breaches of the Act and recommends prosecution to the DPP. In Ireland the DPP has sole responsibility to prosecute offences on indictment and while the Authority can prosecute minor breaches of the Act on a summary basis, cartel offences which are of a more serious nature may be prosecuted by the DPP.
10. Applications for immunity under this Programme are made to the Authority. Only the DPP can grant immunity from prosecution on indictment. Subject to the requirements set out below, the Authority will make a recommendation to the DPP to grant immunity.

## **C. OBTAINING IMMUNITY**

11. Subject to the requirements set out in this Programme, the Authority will recommend immunity to the DPP only if the applicant is the first to come forward to confess their involvement in illegal cartel activity and before the Authority has decided that it has gathered sufficient evidence to warrant a referral of a completed investigation file into the particular cartel to the DPP.
12. The Authority therefore encourages parties (which may include corporate undertakings, partnerships and sole traders/individuals) to come forward as early as possible and if necessary make use of the marker system in the Programme (discussed at paragraphs 22 to 23 below) to ensure its position as being the first to come forward.

### **The requirements:**

13. The applicant in an ongoing cartel must take effective steps to terminate its participation in the illegal cartel activity immediately following its application for qualified immunity in accordance with the directions of the Authority.
14. 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.
15. The applicant, including all of its relevant current and/or former directors, officers and employees, must not have coerced another party to participate in the illegal cartel activity and must not have acted as the instigator of the

cartel activity. In assessing whether to refer an applicant's request for qualified immunity to the DPP, the Authority will take account of the degree of participation by that applicant in the illegal cartel activity.

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 cartel 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;
  - c) Ensure to the best of its ability that none of the relevant information, documents or evidence relating to the particular cartel are destroyed, falsified or concealed;
  - d) Ensure to the best of its ability that current, and to the extent possible, former directors, officers and employees cooperate fully with the Authority investigation and are available for interviews;
  - e) Not disclose to third parties any dealings with the Authority and/or its application without consent, except where required to do so by law. If disclosure is required, the Authority must be notified prior to the applicant releasing any information;
  - f) Disclose to the Authority all applications made by it for immunity in other jurisdictions;
  - g) Co-operate fully, on a continuing basis, expeditiously and at its own expense throughout the investigation and with any ensuing prosecutions; and
  - h) Provide complete and truthful evidence in any ensuing prosecutions.
17. If the first applicant to request immunity fails to meet the requirements of this Programme, a subsequent applicant that does meet these requirements can be considered for immunity.

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

18. In the case of a corporate undertaking, the application for immunity must be a corporate act, as opposed to an isolated admission and cooperation by individual representative(s). If a corporate undertaking qualifies for immunity, all current and/or former directors, officers and employees who admit their involvement in the anti-competitive activity as part of the

corporate admission, and who provide complete, timely and ongoing co-operation with the investigation and any subsequent prosecution, will also qualify for the same recommendation for immunity. While applications from individual directors, officers 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 and secure the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

19. 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**

20. Applications for immunity must be made to the Immunity Officer in the Authority who will receive all applications for immunity either 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 Immunity Officer may be contacted by telephone at 087 763 1378 between the hours of 10am and 4pm Monday to Friday, except public or bank holidays.
21. The applicant or its legal advisors should present an outline of the facts of the case to the Immunity Officer of the Authority. The applicant or its legal advisors may initially present the case to the Authority in hypothetical terms so as to protect the applicant's anonymity.
22. Applications for immunity will be queued and dealt with in the order of receipt. An applicant will be allowed to initially apply for a "marker" with the Immunity Officer, which will protect the applicant's place in the queue for immunity for a given period of time in which to gather the necessary information and evidence needed to complete its application for immunity.
23. Where a marker is granted the Immunity Officer will determine the period within which the applicant has to 'perfect' the marker by submitting its application for immunity. Where a marker is perfected within the set period, the information that is then provided will be deemed to have been submitted on the date when the marker was granted.
24. If a marker expires before it is perfected the Immunity Officer will consider any other applications for a marker or for qualified immunity and nothing prevents the former holder of an expired marker from re-applying, but its original place in the queue is not protected.
25. Joint applications for immunity by two or more conspirators will not be accepted and will be invalid.

## **Step 2: Qualified Immunity**

26. 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 to identify the conduct, as well as the particular cartel. If the Authority is of the opinion that the application falls within this Programme, the Authority will then refer the matter to the DPP seeking a written grant of qualified immunity to the applicant by the DPP.

## **Step 3: Full Disclosure**

27. Upon receipt by the Authority of the written grant of qualified immunity from the DPP, the Authority will advise the applicant in writing accordingly and 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.
28. 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**

29. Once the terms and conditions of the qualified immunity have been fully satisfied and any resulting prosecutions have been disposed of, the DPP will execute an immunity agreement that will include all obligations as set out in this Programme.

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

30. 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.
31. 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 power or control.

## **G. DISCLOSURE**

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

## **H. CONCLUSION**

33. The Authority encourages both business and the public to take advantage of all policies and programmes which facilitate compliance with the provisions of the Act.
34. Anyone wishing to apply under this Programme may contact the Immunity Officer on 087 763 1378.
35. Further information on this Programme can be obtained from the Authority's website ([www.tca.ie](http://www.tca.ie)) and/or the DPP's website