

## **The Cartel Immunity Programme FAQs**

***This document supplements the Immunity Programme that came into effect on 22 January 2015.***

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## **Preliminary Questions**

### *1. What is an immunity programme?*

The Cartel Immunity Programme outlines the special arrangements concerning applications for immunity on behalf of undertakings and/or individuals who have reported the activities of criminal cartels in which they have participated. The Director of Public Prosecutions (the DPP) and the Commission have agreed how to consider such applications. The Programme sets out the policy of both the DPP and the Commission in relation to immunity and outlines the process through which parties must agree to cooperate in order to qualify for immunity from criminal prosecution. The Programme is an application of the general discretion of the DPP in the exercise of her functions and powers to grant immunity from prosecution.

### *2. Why is there a programme specifically for cartels?*

Criminal cartels are secret conspiracies and participants in any cartel have a common vested interest in protecting information on their activities from competition law agencies. Over the last decade enforcement agencies worldwide have prioritised and strengthened cartel enforcement. In recent years competition authorities have been enforcing anti-cartel legislation with greater rigour using more sophisticated investigative and analytical techniques and obtaining more far reaching investigative powers.

Immunity programmes have proven to be effective enforcement tools to tackle cartels in many jurisdictions across the world. These programmes have not only assisted in the detection and dismantling of both domestic and international cartels in many jurisdictions but also resulted in record breaking fines and (in some instances) prison sentences including in Ireland, the United States and the United Kingdom. In addition these programmes also serve to deter undertakings and individuals from engaging in anti-competitive cartel activity.

In Ireland the Cartel Immunity Programme is the most important tool available to the Commission to detect secret cartels.

An immunity programme, such as the one in place in Ireland, encourages participants in a cartel to break the conspiracy and give information on the activities of other members, thus facilitating the successful prosecution of the remaining cartel members.

### *3. What is a cartel?*

Cartel conduct has been criminalised in Ireland since 1996. Section 4 as read with Section 6 of the Competition Act, 2002 set out the criminal cartel offence. A cartel is the most serious breach of competition law and it involves two or more competing undertakings/businesses seeking to limit or reduce competition by -

- agreeing prices and/or trading conditions, which occurs when competitors enter into an agreement that has the object or effect of fixing, controlling or maintaining the price of goods or services, or any

other conditions of trade in such goods/services. Also agreeing on levels of price increases or discounts;

- limiting output or sales, which occurs in the form of production or sales quota arrangements involving an agreement between competitors to limit the volume of particular goods or services available on the market;
- sharing markets and/or customers, which refers to agreements between competitors to divide up the market, for example, on a geographic, product or customer basis, so that the participants are sheltered from competition from one another;
- bid-rigging, where two or more competitors agree they will not compete genuinely with each other for particular tenders, sharing information on their tenders and allowing one of the participants in the agreement to win the tender, normally at an inflated price.

#### 4. *Why is a cartel considered to be such a serious offence?*

Cartels can result in increased prices, lower quality products and narrower choice for consumers. The cartel offence stands out from most other offences in that consumers do not know that they have been a victim.

In categorising cartel offences, Mr Justice McKechnie in the prosecution of the chairperson of the Irish Ford Dealer Association stated as follows:

*"This type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime: and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have mentioned were liable to be defrauded, and many surely were by the scheme and by the practices which unashamedly this cartel operated. These activities in my view have done a shocking disservice to the public at large".*

#### 5. *What are the penalties for participating in a cartel?*

Section 8 of the Competition Act, 2002, sets out the penalties for the criminal cartel offence in terms of which an undertaking shall be liable, upon conviction on indictment, to a fine of up to €5 million or 10% of its turnover for the preceding year, whichever is greater. An individual convicted on indictment faces the same fine or imprisonment for up to 10 years, or both. Besides having a criminal record, the individual is also automatically disqualified from holding a directorship in any company in the State for a period of five years.

#### 6. *Why should someone who has broken the law by participating in a cartel avoid prosecution?*

Given the secret nature of cartels, the view taken internationally, which is shared by Ireland, is that the interests of justice are best served by breaking up the cartel and punishing the remaining members even though the immunity applicant escapes criminal sanctions. This has an important deterrent effect which both destabilises other extant cartels and discourages further cartels from forming. In the alternative, the cartel would likely remain in place and there would be no deterrent effect.

The DPP is therefore willing to forsake a sanction against a single cartel member that has applied for immunity in return for the applicant's assistance in prosecuting the other members of the cartel.

#### *7. Who can apply for immunity?*

Any undertaking (whether an individual or a business entity as defined in the Competition Act, 2002) involved in cartel activity can make an application for conditional immunity from prosecution.

Separately, any individual who has personally been involved in cartel activity can make an individual application.

The term "involved in cartel activity" includes undertakings or individuals that aided and abetted others in the cartel activity.

Applications can be made through an undertaking's or individual's legal advisor as long as it can be demonstrated to the Commission's satisfaction that the legal advisor has been granted the capacity to make the application.

#### *8. Who can qualify for immunity under this Programme?*

Only the first applicant that successfully complies with the requirements of the Programme will have its application forwarded for the consideration of the DPP. Conditional immunity under the Programme can only be granted by the DPP. Only when the terms, obligations and conditions set out in the Programme have been fully satisfied may the DPP confirm that the applicant has full immunity from prosecution in respect of the offences under which they made the application.

Conditional immunity can extend to employees, officers and directors of an undertaking, who were at the undertaking during the relevant time period, so long as they individually require immunity and comply with the requirements of the Programme. In such cases these individuals will have an obligation to reveal all cartel activity that they have personally been involved in or are aware of.

Individuals who have not themselves breached Section 4 the Act Competition Act, 2002 (or caused an undertaking to breach the Act) or have not aided and abetted others in breaching the Act do not require individual immunity. The Commission treats such individuals as potential witnesses. If information was to emerge at a later stage that called this status into question the Commission would inform that person of this change at the earliest opportunity.

#### *9. How do you apply for immunity?*

Immunity applications can only be made by calling the Cartel Immunity Phone (087 763 1378) Monday to Friday between the hours of 10am and 5pm (local time) on all working days except public or bank holidays.

It is not possible to leave a message on the Cartel Immunity Phone.

A staff member from the Commission can talk the potential applicant through the process and answer any questions they may have.

10. *What is the role of the Commission under the Cartel Immunity Programme?*

The Commission manages immunity applications and makes recommendations on granting conditional immunity to applicants to the DPP in appropriate cases. If the DPP grants conditional immunity the Commission will remain as the intermediary between the applicant and the DPP.

11. *Can immunity be granted to an undertaking/individual that attempted to coerce others into entering/remaining within the cartel?*

No.

An undertaking or individual who has coerced or attempted to coerce or pressurise others to join or remain in a cartel would not be eligible to apply for immunity under the Programme.

12. *Can immunity be granted to a firm that instigated the cartel?*

Yes.

An instigator of a cartel can apply for immunity under the Programme so long as its actions in initiating the cartel did not go as far as coercing or attempting to coerce others to join or remain in the cartel.

13. *What if you are not the first applicant in a particular cartel to come forward?*

The Commission will not consider second and subsequent applicants under the Programme. Nothing in the Programme precludes subsequent applicants from approaching the DPP directly in such cases.

Second and subsequent applicants can ask to have their position in a queue noted and can consent to being contacted if the first applicant no longer requires immunity, has withdrawn from the Programme or has its conditional immunity revoked.

14. *What information does the Commission make public in relation to immunity applications?*

The Commission treats all applications for immunity as strictly confidential and information made available under the Programme will not be disclosed unless disclosure is required by law or must be made public by the Commission to enforce the Competition Act, 2002.

15. *How can an applicant be sure that it is providing comprehensive, prompt and continuous co-operation?*

The requirements under the Programme are set out clearly in sections 3.3 to 3.10 of the Programme.

The Commission will ensure throughout the investigation that the applicant understands what is required to provide comprehensive, prompt and continuous co-operation. This may involve the Commission making a specific request or highlighting any omission by the applicant that would raise concerns.

## **The Immunity Process**

### **STEP 1: Obtaining a Marker**

#### *16. Why have a marker system?*

A marker holds an applicant's position in the queue whilst it has an opportunity to take steps to make a full and proper application to the Commission.

An application for a marker can be made on an anonymous basis.

#### *17. How does an applicant obtain a marker?*

A marker can only be obtained by calling the Cartel Immunity Phone (087 763 1378). If the applicant meets the requirements set out in the Programme a marker will be granted once the Commission has had time to ensure that no previous applicant exists.

The marker will protect the applicant's place in the queue for a limited period of time in order for the applicant to perfect the marker.

#### *18. Who answers the Cartel Immunity Phone?*

A member of staff of the Commission who is knowledgeable about the Programme will answer the Cartel Immunity Phone.

#### *19. Can the applicant keep their identity secret when obtaining a marker?*

Yes. There is no need for the applicant to identify themselves when obtaining a marker. However, in order for a marker to be granted it will be necessary to outline the sector/industry involved and other details of the practices involved with sufficient detail to enable the official dealing with the call to come to a conclusion about whether a marker is still available. If there is no outstanding marker already in place the marker will be granted.

#### *20. What happens if there is an existing applicant?*

The applicant will be told at the earliest possible time that a marker is not available. No further details will be revealed but the unsuccessful applicant will be reminded not to destroy or otherwise dispose of any evidence in its possession or under its control.

*21. Can I appeal a decision not to give a marker to the Commission?*

No. There is no appeal to the Commission for a decision not to give a marker.

## **Step 2: Perfecting the Marker**

*22. What is required to perfect the marker?*

The elements that are required to perfect the marker are set out in paragraph 5.6 of the Programme. The information required can be submitted orally.

Where appropriate, the applicant must show that there has been a formal decision to apply to enter into the Programme.

All applicants should outline the parties involved in the cartel, the products and territories covered by the cartel and how long the cartel has been/was in existence. The applicant should also provide a clear description of the cartel and the role undertaken by the applicant (including relevant employees, officers and directors) in the cartel activity. The applicant should also outline any past or intended future applications for immunity/leniency by the applicant in other jurisdictions that relate to the same cartel.

If, in the course of perfecting the marker, the Commission officials dealing with the application come to the view that the application does not disclose a criminal cartel the applicant will be informed of this. Any further interactions between the applicant and the Commission on the matter will be outside the scope of the Cartel Immunity Programme.

*23. How do I assess whether a director, officer or employee may personally require immunity?*

Any director, officer or employee that agreed to or directed on the part of the applicant to enter into the cartel should be identified when the applicant perfects the marker. This will serve to identify a core list of persons who may require individual immunity as part of a recommendation that may be sent to the DPP.

Blanket requests for personal immunity will not form part of any recommendation made by the Commission to the DPP.

Individuals who were not identified at the time of perfecting the marker but are subsequently identified as individuals requiring individual immunity will be entitled to personal conditional immunity so long as they satisfy the requirements of the Programme. The DPP will be informed of the identity of any such individual when they are added to the original list.

*24. How long will I have to perfect the marker?*

In normal circumstances, a short period of time will be sufficient for the applicant to meet this standard. This period of time will be agreed with the



official dealing with the particular applicant but should not normally extend beyond a six week period.

If there are difficulties in meeting the deadline the applicant should apply in good time for an extension and provide clear reasons for the delay. An extension will only be granted at the discretion of the Commission official dealing with the application.

Further requests for extension of time will not normally be entertained unless, in the opinion of the Commission official handling the application, there are exceptional circumstances. Any such further requests for extension may be rejected at the discretion of the Commission official handling the application.

*25. What is my status if the marker expires?*

If your marker expires the Commission is free to consider other potential applicants from the same cartel.

If the applicant fails to perfect the marker in a timely manner and soon thereafter re-applies for a marker, the Commission official dealing with the application can reject the application unless the applicant can demonstrate, to the Commission official's satisfaction, that there is a realistic prospect that the marker can now be perfected within an agreed timeframe.

*26. Will an application under the Programme cause a criminal investigation to be opened?*

Applications for immunity are treated as strictly confidential.

In relation to applications under the Programme, it is only when the DPP grants conditional immunity that a formal criminal investigation is opened.

This does not preclude the Commission from continuing with any pre-existing investigations or from opening an investigation into any matter if information comes to the attention of the Commission from any other source.

*27. Can I apply with another company involved in the cartel?*

No, unless the companies are part of the same single economic entity.

In all other circumstances joint applications will automatically be rejected. Discussions with or between undertakings not within a single economic entity in contemplation of making an application under the Programme will be seen as a failure to comply with the requirements of the Programme. Entry into the Programme of either party to such discussions is then precluded.

*28. Is it automatic that when a marker is perfected the Commission will make a recommendation to the DPP?*

Normally the Commission will make a recommendation to the DPP once the Commission is satisfied that the application complies with the Programme and discloses a likely criminal breach of the Act that warrants a formal criminal investigation.

However if, after the marker is perfected to the satisfaction of the Commission officials dealing with the application, the Commission in using its discretion formally decides not to make a recommendation to the DPP, the applicant will be informed of this decision. The Commission will keep on the record that the applicant has perfected its marker in relation to this matter. No subsequent applications relating to the same cartel will be accepted by the Commission. So long as the applicant continues to comply with the requirements of the Programme the perfected marker will remain.

Where an applicant fails to continue to comply with the requirements of the Programme the Commission may formally decide to remove the perfected marker from the applicant. The Commission may then accept other applications for immunity in the matters covered by the removed perfected marker.

### **Step 3: Conditional Immunity**

*29. Who grants conditional immunity?*

Only the DPP can grant conditional immunity under the Programme.

*30. Who will inform me that the DPP has granted conditional immunity?*

As soon as the Commission receives a letter from the DPP granting conditional immunity, the Commission will write to the applicant setting this out.

There is no prescribed time period for the DPP to consider recommendations to grant conditional immunity.

In instances where the DPP requires further information from the applicant, the Commission will communicate this to the applicant and will continue to act in its intermediary role.

*31. What if the DPP refuses to grant immunity?*

If the reasons for refusing to grant conditional immunity are capable of being addressed by the applicant, the Commission will make clear to the applicant what is required. The applicant will not have to re-apply for immunity in these circumstances and the Commission will re-submit to the DPP its updated recommendation to grant conditional immunity.

In all other cases the Commission will write to the applicant informing them of the DPP's decision.

### **Step 4: Full Disclosure**

*32. How do I comply with full disclosure?*

The Commission will outline to the holder of conditional immunity what is required from it in order to comply with the ongoing obligation of full

disclosure. The Commission will approach the holder of conditional immunity from time to time to assist as its investigation proceeds.

The disclosure requirements are set out formally in paragraphs 5.11 and 5.12 of the Programme.

These obligations continue until all criminal proceedings in the matter have been completed or until the Commission has reached a formal decision on closing the investigation (which may happen before or after any file is sent to the DPP).

For an officer, director or employee to obtain individual immunity they must make a full and frank signed statement of their involvement in the cartel.

Any failure to make such statements will be communicated to the DPP by the Commission and may result in any personal conditional immunity already granted being revoked at the discretion of the DPP. Such individuals will then be treated as suspects in the investigation and liable to be prosecuted as participants in the alleged cartel.

Natural persons with individual conditional immunity are expected to give complete and truthful evidence at trial in line with their previously signed statements.

An undertaking with conditional immunity will be expected to provide whatever current officer, director or employee of the undertaking who can give witness evidence to appear as witnesses at trial, should the need arise. Such an undertaking is also expected to make best efforts to secure the co-operation of former officers, directors and employees.

### *33. When will I have complied with my obligation of full disclosure?*

The obligation to comply with full disclosure extends to the formal closure of the Commission's investigation and may include (in the case of an individual) having to provide complete and truthful oral evidence in Court during any subsequent trial or appeal process.

The Commission will inform the applicant and the DPP if the Commission formally closes the investigation.

### *34. What happens if the Commission comes to the view that I have failed to comply with the requirements of the Programme?*

The Commission will outline to you in writing how it believes that there has been a failure to comply with the requirements of the Programme. You will then have an opportunity to explain the non-compliance and, if possible, address the non-compliance (if that has been offered in the Commission's notification letter).

A failure to comply may lead to a decision by the Commission to inform the DPP of its opinion on non-compliance.

Upon receipt of a recommendation to withdraw conditional immunity from the Commission the DPP will make her own decision. The DPP will inform the Commission of its decision and the Commission will then inform the holder of conditional immunity of the DPP's decision.

*35. If an undertaking/individual has conditional immunity removed by the DPP can evidence provided so far be used in a trial?*

Yes.

All evidence provided to the Commission by an undertaking/individual with conditional immunity can be used against them in a criminal trial if the DPP has decided, following a recommendation from the Commission, to revoke conditional immunity.

**Step 5: Full Immunity**

*36. When do I obtain full immunity?*

The DPP will execute a final grant of immunity if, following a trial and any subsequent appeal, the holder of conditional immunity has complied with all the obligations under the Programme.