

CCPC and ComReg Joint Policy on leniency applications in the electronic communications sector



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission



An Coimisiún um
Rialáil Cumarsáide

Commission for
Communications Regulation

Reference: ComReg 23/89

Version: Final

Date: 21/09/2023



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1. Introduction

- 1.1 This document outlines the joint policy of the Competition and Consumer Protection Commission (“CCPC”) and the Commission for Communications Regulation (“ComReg”) in relation to applications for leniency from administrative financial sanctions received from undertakings that are participating, or have participated, in an alleged cartel in the provision of an electronic communications service,¹ electronic communications network², or associated facilities³ (the “electronic communications sector”).
- 1.2 The approach set out in this Policy applies only to leniency from administrative financial sanctions. This Policy is separate from, and in addition to, the DPP/CCPC Cartel Immunity Programme (“CIP”)⁴, which outlines the policy of the CCPC and the Director of Public Prosecutions (“DPP”) in considering applications for immunity from criminal prosecution for cartel offences under the Competition Act 2002, as amended (“2002 Act”).⁵
- 1.3 This is a new policy and the approach of the CCPC and ComReg to the handling of leniency applications concerning cartels in the electronic communications sector may evolve over time. The CCPC and ComReg reserve the right to depart from this Policy, where the CCPC and ComReg agree that it is appropriate to do so, considering all the facts and circumstances of a particular case. This Policy 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 The definition of electronic communications service is set out in section 2 of the Communications Regulation Act 2002 as amended by section 119 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (the “Communications Regulation Act 2023”).

² The definition of electronic communications network is set out in section 2 of the Communications Regulation Act 2002 as amended by section 119 of the Communications Regulation Act 2023.

³ The definition of associated facilities is set out in section 2 of the Communications Regulation Act 2002 as amended by section 119 of the Communications Regulation Act 2023.

⁴ The CIP is available on the website of the CCPC. (<https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/2015-01-20-Revised-CIP-Final.pdf>) and on the website of the DPP (<https://www.dppireland.ie/publication-category/cartel-immunity-programme/>).

⁵ ComReg does not at present have a criminal immunity programme with the DPP.

2. Role of the CCPC and ComReg in enforcing competition law

- 2.1 Both the CCPC and ComReg are “competent authorities” for the purposes of enforcing Irish and EU competition law in the State in the electronic communications sector.⁶ Part 4A of the 2002 Act sets out specific provisions relating to the exercise by the CCPC and ComReg of their overlapping competition law functions in the electronic communications sector.
- 2.2 Under the 2002 Act (as amended by the Competition (Amendment) Act 2022), both the CCPC and ComReg have the power to impose administrative financial sanctions on undertakings and associations of undertakings for, *inter alia*, cartel infringements (i.e. infringements of section 4 of the 2002 Act and/or Article 101 Treaty on the Functioning of the European Union (“TFEU”)). The maximum level of these administrative financial sanctions is €10 million or 10% of total worldwide turnover (whichever is greater) of the undertaking or association of undertakings in the business year preceding the competent authority’s decision.
- 2.3 Each of the CCPC and ComReg is required under the 2002 Act to put in place an administrative leniency programme for cartels which provides for the grant of immunity from administrative financial sanctions, or a reduction of administrative financial sanctions, to undertakings that disclose their participation in an alleged cartel subject to meeting the required conditions.⁷ As a result, both the CCPC and ComReg are required to operate concurrent leniency programmes in respect of cartels in the electronic communications sector. In this Policy, the term “leniency” refers to both immunity from administrative financial sanctions and a reduction of administrative financial sanctions.
- 2.4 A cartel is an agreement or concerted practice between two or more competing undertakings, aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices including, but not limited to, the following:

⁶ See section 47A of the 2002 Act, as inserted by the Communications Regulation (Amendment) Act 2007.

⁷ See Part 2E of the 2002 Act, as inserted by section 13 of the Competition (Amendment) Act 2022 (the “2022 Act”).

- a) the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights;
- b) the allocation of production or sales quotas;
- c) the sharing of markets or customers;
- d) bid-rigging⁸;
- e) restrictions of imports or exports; or
- f) anti-competitive actions against other competing undertakings.⁹

2.5 The CCPC's Administrative Leniency Policy (the "CCPC ALP") is published on the CCPC's website.¹⁰ ComReg's Administrative Leniency Policy (the "ComReg ALP") is published on ComReg's website.¹¹ This Policy should be read in conjunction with the CCPC ALP and the ComReg ALP.

2.6 The 2002 Act provides for the CCPC and ComReg to co-ordinate our leniency programmes, take steps to align our respective policies as to how such programmes will operate and co-operate including by sharing information and evidence in relation to any leniency statement that is submitted.¹² The purpose of this Policy is to set out the joint policy of the CCPC and ComReg in relation to the handling of leniency applications concerning cartels in the electronic communications sector.

2.7 Under section 15AP of the 2002 Act, the CCPC and ComReg may put in place leniency programmes for infringements of competition law other than cartels. The CCPC ALP and the ComReg ALP set out the terms upon which the CCPC and ComReg, respectively, may grant leniency in respect of resale price maintenance ("RPM"). Accordingly, the provisions of the present document that apply to leniency applications by participants in cartels shall, where relevant, apply *mutatis mutandis* to applications in respect of RPM.

⁸ Bid-rigging is defined in section 4(11) of the 2002 Act, as inserted by section 5 of the 2022 Act.

⁹ See section 3 of the 2002 Act, as amended by section 4 of the 2022 Act.

¹⁰ The CCPC ALP is available on the CCPC's website here: <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2023/07/CCPC-Administrative-Leniency-Policy.pdf>.

¹¹ The ComReg ALP is available on ComReg's website here: <https://www.comreg.ie/publications/>.

¹² See section 15A(9) of the 2002 Act, as inserted by section 12 of the 2022 Act.

3. Leniency applications in the electronic communications sector

Single-queue system

- 3.1 The CCPC and ComReg operate a ‘single-queue system’ for applications for leniency from administrative financial sanctions in respect of cartels in the electronic communications sector. Under this system, leniency applicants should make an application to the CCPC and this is treated as an application for leniency under both the CCPC ALP and the ComReg ALP. The leniency applicant is not required to and shall not also make a separate application for leniency to ComReg.
- 3.2 Provided the conditions for leniency set out in the CCPC ALP and the ComReg ALP are met, where an applicant applies for and is granted a marker by the CCPC under the CCPC ALP, this secures the applicant’s place in the queue for leniency with both the CCPC and ComReg.
- 3.3 This system ensures that the applicant’s place in the queue for leniency is determined by the order in which any other applicant applied for leniency. The benefits of a single-queue system include:
- (a) clarity that the granting of more than one marker for Type 1A or Type 1B immunity from administrative financial sanctions in respect of the same alleged cartel is precluded;
 - (b) clarity on when a marker is granted and the type of marker granted;
 - (c) certainty for leniency applicants in respect of their place in the queue for leniency;
 - (d) a reduced administrative burden on applicants who would otherwise have to apply to both the CCPC and ComReg for leniency; and
 - (e) efficient use of resources by avoiding duplication of work by the CCPC and ComReg.

Making an application under the single-queue system

- 3.4 In order for the single-queue system to work effectively, the CCPC will act as the 'lead authority' for the purposes of receiving leniency applications and making a decision on whether to grant a marker in respect of a particular application.
- 3.5 All undertakings that wish to apply for leniency from administrative financial sanctions should in the first instance approach the CCPC in order to secure their place in the queue for leniency. Applications for leniency can only be made by calling the CCPC's Immunity and Leniency Phone (+353 87 763 1378). The full process for making an application to the CCPC for leniency is set out in the CCPC ALP and this Policy.
- 3.6 If a potential leniency applicant approaches ComReg in the first instance, ComReg will immediately direct the applicant to the CCPC. The applicant's place in the single queue for leniency is therefore determined only by the order in which applications for leniency are made **to the CCPC**.

Applying for a marker

- 3.7 An undertaking wishing to make an application for leniency may initially apply to the CCPC for a 'marker'. All applications for markers shall be made to the CCPC in accordance with the CCPC ALP and this Policy. Where an application for a marker appears to relate to an alleged cartel in the electronic communications sector, the CCPC will inform ComReg of the application prior to the CCPC making a decision on whether to grant a marker.
- 3.8 Following a decision by the CCPC to grant a marker, the CCPC will, in accordance with the CCPC ALP, grant the applicant a period of time within which the applicant shall perfect the marker by submitting its full application for leniency.

Perfecting the marker and granting conditional leniency

- 3.9 In order to perfect the marker, the applicant shall provide the CCPC with certain specified information and evidence as specified in paragraph [4.8] of the CCPC ALP (which is the same information and evidence as specified in paragraph [3.8] of the

ComReg ALP). The CCPC will assess the information and evidence provided by the applicant in order to determine whether it is sufficient to perfect the marker.

- 3.10 Once the marker has been perfected, the CCPC and ComReg shall seek to reach an agreement as to which competent authority is best placed to perform the functions conferred on a competent authority in relation to the matter¹³.
- 3.11 That competent authority (as agreed by the CCPC and ComReg or, failing agreement, as determined by the Minister for Enterprise, Trade and Employment) will then proceed to make a decision on whether the application meets the conditions for granting conditional leniency from administrative financial sanctions under its own policy. The competent authority will inform the applicant whether or not it has been granted conditional leniency (i.e. immunity from administrative financial sanctions or a reduction of administrative financial sanctions, as appropriate).

Summary applications

- 3.12 An undertaking seeking to make a summary application for leniency in respect of an alleged cartel in the electronic communications sector, where it has already applied to the European Commission for leniency in respect of the same behaviour, shall apply to the CCPC and the CCPC shall deal with any summary application in accordance with the CCPC ALP.
- 3.13 In circumstances where the European Commission decides not to pursue a case, a leniency application by an undertaking shall be made in accordance with the terms of this Policy (and in accordance with paragraphs 4.29-4.30 of the CCPC ALP and paragraph 4.24 of the ComReg ALP) and it shall be assessed according to the terms set out in this Policy by the appropriate competent authority.

¹³ See section 47E of the Competition Act 2022 (as amended).

Binding nature of decision on marker or conditional leniency

3.14 A decision made by one competent authority in relation to granting a marker, the perfection of a marker or granting conditional leniency shall be binding on the other competent authority.

Immunity from prosecution under the DPP/CCPC CIP

3.15 Cartels continue to constitute a criminal offence under the 2002 Act with significant criminal penalties including fines for undertakings and both fines and imprisonment for individuals. An undertaking that has participated in a cartel may therefore be the subject of criminal or administrative sanctions.¹⁴

3.16 The DPP/CCPC CIP sets out the policy of both the CCPC and the DPP in considering applications for immunity from criminal prosecution for cartel offences. The DPP/CCPC CIP will continue to operate and the CCPC will continue to administer the DPP/CCPC CIP alongside the CCPC ALP.¹⁵

3.17 This means that all enquiries regarding the availability of immunity from criminal prosecution and any application for immunity from criminal prosecution under the CIP should be made **to the CCPC**. If any such enquiry or application is made to ComReg in the first instance, ComReg will immediately direct the applicant to the CCPC.

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¹⁴ See section 15K of the 2002 Act, as inserted by section 12 of the 2022 Act. Further guidance on this is set out in the *Guidance Note on the CCPC's Choice of Enforcement Regime* which is available on the CCPC's website at the following link: [Drafting note: insert link once available].

¹⁵ Undertakings wishing to apply for leniency are strongly advised to review the provisions of CCPC ALP, the ComReg ALP and the DPP/CCPC CIP and to seek legal advice before making an application. The CCPC has published a Guidance Note on the interaction between the DPP/CCPC CIP and the CCPC ALP. The Guidance Note is available on the CCPC's website at the following link: [Drafting note: insert link once available]. The Guidance Note explains the circumstances in which an undertaking applying under the ALP is encouraged to make a simultaneous application under the CIP.

