

# LAW SOCIETY SUBMISSION

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**PROPOSAL TO EXTEND THE ADMINISTRATIVE LENIENCY POLICY (ALP) TO  
COVER CONDUCT INVOLVING RESALE PRICE MAINTENANCE (RPM)**

**COMPETITION AND CONSUMER PROTECTION COMMISSION**

**July 2022**

## 1. **Introduction**

1.1 The Law Society of Ireland (the “**Law Society**”) welcomed the opportunity to participate in the CCPC’s previous ECN+ Consultation Forums and is glad to contribute to the discourse on the addendum to the CCPC’s Administrative Leniency Policy relating to resale price maintenance (the “**Addendum**”).

1.2 As resale price maintenance (“**RPM**”) is a hardcore infringement that attracts a high level of penalisation, it is our view that a greater degree of clarity for potential immunity and leniency applicants is required. The Addendum appears to limit the availability of immunity and leniency when this is not provided for in the 2022 Act. Similarly, these limitations do not appear to align with UK or EU guidance on this matter.

## 2. **The Instigator versus the Coercing Party in Immunity and Leniency Applications**

2.1 Paragraph 1.5 of the Addendum states that:

*‘... it is the CCPC’s policy that an undertaking which instigated the RPM should generally not be eligible for Type 1A immunity or Type 1B immunity under this Policy’.*

2.2 This wording is vague and introduces the concept of ‘the instigator’ when there is no reference to same in the Competition (Amendment) Act 2022.

2.3 Section 15A(5) of the Competition (Amendment) Act 2022 states that, in order to qualify for immunity from administrative financial sanctions, the undertaking must:

- (a) disclose the fact of its participation in the cartel concerned;
- (b) be the first undertaking to submit evidence; and
- (c) comply with the conditions for leniency set out in section 15AK.

Section 15A(5)(d) requires that *‘the undertaking has not taken steps to coerce other undertakings to join the cartel or to remain in it’*. The legislation therefore focuses on the concept of a coercing party, rather than the instigator.

2.4 The UK’s Competition and Markets Authority (“**CMA**”) applies the coercer test in its guidelines on ‘Applications for Leniency and no-action in cartel cases’<sup>1</sup>. The test means that *‘[u]ndertakings who have taken steps to coerce another undertaking to take part in the cartel activity are not eligible for corporate immunity (whether Type A or Type B) but can receive a maximum reduction in penalty of 50 percent for Type C leniency*’<sup>2</sup>.

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<sup>1</sup> OFT’s detailed guidance on the principles and process, July 2013, OFT1495.

<sup>2</sup> Ibid, see para 2.50.

2.5 Similarly, the European Commission states that:

*'An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements'*<sup>3</sup>.

2.6 The UK and the European Commission have focused on the acts of the 'coercer' rather than the leader in, or 'instigator' of, the infringement in their guidance documents on immunity and leniency. While both the UK and the European Commission refer to 'an instigator' amounting to an aggravating factor for administrative fining purposes<sup>4</sup>, the focus remains firmly on the role of the 'coercer' in the context of their respective immunity and leniency programmes. We believe that a similar approach should be adopted with respect to the Addendum.

We hope that the CCPC will find these comments to be constructive. The Law Society will be happy to engage further on any of the matters raised.

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<sup>3</sup> [Commission Notice on Immunity from fines and reduction of fines in cartel cases](#) (2006/C 298/11), see para 13

<sup>4</sup> [Guidelines on the method of setting fines imposed pursuant to Article 23\(2\)\(a\) of Regulation No. 1/2003 \(2006/C 210/02\)](#), see para 28; CMA's guidance as to the appropriate amount of a penalty, see para 2.16.