



Handling Irish Competition Investigations

Introduction

This briefing is intended to give you a head start in dealing with investigations under the Irish Competition and Consumer Protection Act 2014.

Irish competition rules are designed to protect consumers from anti-competitive behaviour. Agreements and other multilateral arrangements that restrict competition in all or part of the State are prohibited, subject to the possibility of exemption under certain conditions. Abuses of a dominant position are also banned. Investigations may also be conducted under EU competition rules. These rules will apply only where the activity in question affects trade between EU Member States.

Breaches of Irish competition rules may result in significant civil and criminal sanctions. In addition to declaratory and injunctive relief, undertakings in breach may be liable to pay damages. They may also be liable to fines of up to 10% of their worldwide turnover or €5 million, whichever is the greater. In the case of price-fixing and other cartel-type arrangements between competitors, individuals may be imprisoned for up to ten years. These penalties apply not only to undertakings in breach, but also to complicit directors and managers and to persons who aid or abet an infringement.

If you feel that there is a risk of an investigation – even if you have nothing to hide – you should be prepared. If appropriate, you should seek specific legal advice. Our contact details are provided at the end of this briefing.

Witness Summons

The Competition and Consumer Protection Commission (“CCPC”) may, by issuing a witness summons, require an individual to

attend before it – usually at its offices – to be examined on oath and to produce documents in his or her power or control.

The person summoned is entitled to important immunities and privileges, including the privilege against self-incrimination and the right to refuse to produce documents covered by legal privilege. The CCPC can take possession of materials which may be legally privileged. There are procedures to ensure the confidentiality of such materials is maintained pending the High Court ultimately deciding whether such materials are legally privileged. He/she is also entitled to have a solicitor present during the hearing.

It is an offence to fail to attend; to refuse to take an oath, produce documents or answer questions; or to do anything amounting to contempt of court. This can result in a fine of up to €250,000 and/or imprisonment of up to five years.

The witness summons procedure has frequently been used as a means of obtaining documents and other information for use in an investigation. The CCPC’s requests for documents are often quite onerous.

Dawn Raids

The CCPC can arrive unannounced at business premises and private dwellings to carry out investigations. Such visits are often called dawn raids because they usually begin first thing in the morning. However, they can take place at all times of the day.

Authorised officers of the CCPC enjoy significant powers where they possess a valid search warrant issued by a District Court judge in the area where the investigation is to be held. In particular, they can:

- enter, if necessary by force, business premises or private dwellings of directors, managers or staff members of an undertaking as specified in the warrant;
- seize and retain any book, document and record relating to the activity under investigation, such as discs (including computer hard drives), computer records, tapes, soundtracks, films and photographs;
- require the person carrying on the activity under investigation or an employee to:
 - provide his or her name, private address and occupation;
 - provide books, documents or records under his or her power or control;
 - give information reasonably required in relation to such material;
- inspect and copy or make extracts from books, documents or records;
- require the person carrying on the activity under investigation or an employee to provide information required relating to the persons carrying on the activity or employed in connection with it;
- require such a person or employee to provide any other information which is reasonably required regarding the activity under investigation.

A person who obstructs or impedes an authorised officer in exercising a power or who does not comply with a lawful requirement or who gives false or misleading information is guilty of an offence and liable to a fine of up to €50,000 and/or imprisonment for up to three years.

It is therefore important to know *in advance* of any dawn raid what your rights and obligations are. By the time it happens, it may already be too late.

Handling Dawn Raids

It makes sense to have a plan in place to deal with the risk, however unlikely, that you may be subject to a dawn raid. The fact that a raid takes place does not necessarily mean you or your firm has done anything wrong.

The following is designed as a “rough and ready” guide to deal with a dawn raid as it happens. It should be tailored to the specific requirements of your business.

General

Authorised officers of the CCPC have the power to enter the business premises and private dwellings of directors, managers and other employees of an organisation to carry out an investigation. This power can only be exercised on foot of a valid search warrant issued by a District Court judge. The officers may use force if necessary to gain entry to the premises. Members of the Gardaí (police) may accompany authorised officers to assist in a dawn raid.

When the CCPC arrives

- Everyone must stay calm. Receptionists should be able to identify and inform the senior persons within the organisation responsible for handling the dawn raid.
- External legal advisers and/or in-house counsel should be immediately contacted.
- The warrant authorising entry to the premises should be checked (and a copy taken and faxed/e-mailed immediately to your external legal advisers).
 - Access should be given only to the places identified in the warrant;
 - Check that the officers present are those identified in the warrant (accompanying Gardaí need not be identified);
 - Check the date of issue. The powers specified must be exercised within 1 month from that date.
- If the warrant is in order you must allow the officers to enter and proceed with their investigation. Obstructing an authorised officer is an offence and may result in fines or imprisonment.
- You may request the officers to await the arrival of your legal advisers. However, they are under no obligation to do so and can proceed with the investigation at once.

During the dawn raid

- The officers may inspect and copy or seize and retain any book, document and record relating to the matter under investigation. This includes discs (including computer hard drives), computer records, tapes, soundtracks, films and photographs.

- Designated individuals should accompany the officers during the inspection and make a note of all documents copied or seized. You should make photocopying facilities available to the officers and, where they copy materials, arrange to have a second copy of everything so as to have a duplicate of the CCPC's file. If original documents are to be seized, ask to have a copy made.
- The officers should not "browse" through all your files, in the hope of stumbling across evidence of a breach. However, it is difficult to draw the line and when appropriate you should produce information "under protest". If in doubt, consult your legal adviser.
- Do not attempt to hide or destroy any documentation, as this may be a criminal offence.
- Members of the Gardaí have the power to arrest individuals **without warrant** in cases of suspected cartel-type offences. This power may be exercised in the context of a dawn raid. The rights and obligations of detained persons are described in a separate section below.

Obligation to Answer Questions

- You are obliged to answer any reasonable questions regarding the matter under investigation or relating to any of the persons carrying on the business under investigation.
- You are also obliged to give the officer your name, home address, occupation and any books, documents or records within your power or control relating to the matter under investigation.
- Anything said during an investigation may be used in evidence. You may use a dictaphone or secretary to record all questions and answers, but ensure that this is done openly and with the knowledge of the officers.
- The CCPC maintains that directors, managers and other persons who may be criminally liable for breach of competition law cannot rely on the privilege against self-incrimination to refuse to answer questions during a dawn raid. The issue of self-incrimination is relevant only in the context of later criminal proceedings, if these are instituted.

When the CCPC leaves

Once the officers have left the premises you should debrief all personnel involved, ensure you have a complete record of all documents inspected, copied or retained by the officers and all questions asked and the answers given.

Powers of Arrest

A member of the Gardaí has the power to arrest individuals **without warrant** under Section 4 of the Criminal Law Act 1997 where he or she has reasonable cause for suspecting that an arrestable offence (including a cartel-type offence) has been committed. **The individual may be questioned for up to twenty-four hours.** He or she may also be arrested for the purposes of charging and brought directly to the District Court.

Although it may be highly unlikely, if you or anybody else in your company is arrested, it is vital to seek legal advice. Anyone arrested for a suspected cartel-type offence has a right of access to his or her solicitor. This right should be exercised. Doing so does not imply guilt. You can contact a member of our Competition & Regulation Team at the telephone numbers provided at the end of this briefing paper.

The power of arrest may be exercised at any time and may be exercised in the context of a dawn raid. The Gardaí may enter, by using reasonable force if necessary, to search premises (including vehicles and private residences) and to carry out an arrest.

If a power of arrest is exercised by a member of the Gardaí

- Stay calm: the exercise of these powers does not mean you have done anything wrong!
- Adopt a co-operative approach and do not seek to resist or obstruct the arresting officer.
- Ask to see his or her identification and note the time of arrest.
- Ask where you are going and ask if you can inform your colleagues/family and ensure that your legal advisers are informed.

Detention

- If arrested, you may be detained on arrival at a Garda station only where the Garda member in charge has reasonable grounds for believing that detention is necessary for investigating the offence fully.
- Initial detention shall not exceed six hours from the time of arrest. However, detention can be extended twice: first for six hours and secondly for a further twelve hours where it is considered necessary for the proper investigation of the offence. The total detention must not exceed twenty-four hours (excluding rest periods).
- In the case of overnight detention (between midnight and eight a.m.), the period for questioning may be suspended to allow you to rest. Your written consent to suspend the interview is required. This may mean spending a night in a cell. The Gardaí can question a person overnight where the Gardaí believe that there is a risk of the destruction of or interference with evidence.
- Where there are no longer reasonable grounds for suspecting that you have committed an arrestable offence or when the detention period expires, you must be released.
- A detention may be suspended twice over a maximum period of four months if the member in charge has reasonable grounds for believing it necessary.

Rights and Obligations while in Custody

- While in custody you have a number of important rights and obligations. Your name and address should be given on demand and you may be photographed, searched or fingerprinted. You must also be informed in “ordinary language” of the offence in question.

Right of Access to a Solicitor

- You are entitled to consult a solicitor and you must be informed of this right. You are also entitled to have notification of your detention sent to one other person. Your solicitor and the other person must be notified as soon as practicable.

- You have a right to reasonable access to a solicitor of your choice and you have the right to communicate with him or her privately. Do not volunteer any statement until you have spoken to your solicitor.
- You have the right to have your solicitor present during the interview.

Interviews and Questioning while in Custody

- You should not be questioned, or make a voluntary statement, without first being cautioned. You will be told that you are not obliged to say anything unless you wish to do so, but that whatever you say will be taken down in writing and may be given in evidence.
- Interviews may be recorded in writing by a Garda or electronically (by tape or by video).
- Where an interview has lasted for an unbroken period of four hours, it must be suspended to allow you time to rest.
- Statements made are likely to be taken down in writing by a Garda and you will be asked to make any corrections you wish. You will be invited to sign the statement, but you are not obliged to do so.
- Electronic recordings of interviews or a transcript of the recordings may be admitted in evidence in the event of a trial. Written statements recorded by a Garda during questioning may also be admitted regardless of whether you have signed them.

Other Rights while in Custody

- You have a right to receive medical treatment if required. The period of detention will be suspended while treatment is provided.
- You may receive a visit from a relative or friend, subject to supervision and provided it will not hinder or delay the investigation. Anything said by you during such a visit may be given in evidence.
- You may also make a telephone call free of charge, but the Gardaí may listen to the call.

Cartel Immunity and Leniency

The CCPC and the DPP operate a joint programme providing immunity from criminal prosecution for cartel offences where the applicant co-operates and provides information on the cartel to the CCPC. Immunity is only available to the first applicant who meets the conditions under the programme and for the precise offence detailed.

The European Commission operates a cartel leniency programme and can grant immunity from or a reduction in fines in cartel cases where the applicant co-operates and provides information to the Commission.

Please contact us for further details on these programmes.

Compliance Programmes

With increasing powers of enforcement available to the CCPC and the severity of sanctions for breaches of competition rules, it is essential to factor competition issues into your everyday business planning. This is best achieved by introducing a competition law compliance programme within your organisation.

A competition compliance programme will assist the organisation by identifying the key areas of risk and will help to ensure its business activities are conducted in full compliance with the law. Deliberate and inadvertent breaches may be avoided by making all concerned aware of the rules and of the powers of enforcement in the event of a dawn raid. If a breach has occurred, internal reporting procedures will assist in early identification. This will allow the firm to identify the problem, to take corrective measures and may help to prevent possible investigations.

Typically a compliance programme will contain a description of the rules and the internal procedures for adhering to those rules. Our Competition & Regulation Team can assist you in developing and implementing a compliance programme specific to the needs of your organisation.

William Fry's Competition & Regulation Team

William Fry's Competition & Regulation Team advises on all aspects of Irish and EU competition law including:

- Cartels;
- Restrictive agreements and arrangements;
- Monopolies and abuses of dominant positions;
- Merger control;
- State aid; and
- Public procurement.

We regularly represent clients in relation to notifications and competition investigations before the CCPC and the European Commission in Brussels. Members of the Team also have wide experience of practising competition law outside Ireland.

We also have extensive experience of merger control notifications under Irish and EU rules. We also frequently co-ordinate multi-jurisdictional merger control filings.

If you need competition advice on any of the issues raised in this briefing, please contact a member of our team:



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