

Wave of Dawn Raids Prompts Welcome Clarifications

In the space of just three months, three rounds of dawn raids were conducted by the Competition and Consumer Protection Commission (CCPC). Separately, the Commission for Communications Regulation (ComReg), which regulates the communications sector in Ireland, carried out a dawn raid of Eircom Limited's (Eir) premises last year. These are some of the first dawn raids since the Supreme Court handed down a landmark judgment in 2017 harshly criticising the CCPC's over-inclusive approach to seizing documents.

These dawn raids present a welcome opportunity for the CCPC's and ComReg's approach to seizing documents during a dawn raid to be clarified and refined. This is especially important for documents that may be the subject of privacy or legal professional privilege (LPP) claims. In fact, recent High Court proceedings appear to have set this train in motion.

This wave of dawn raid activity occurs against the backdrop of the implementation of the Competition (Amendment) Act 2022 (2022 Act) in September 2023. It is expected to continue in view of the CCPC's and ComReg's newly acquired powers to impose significant administrative fines.

Significant investigative powers

Since their inception, the CCPC and ComReg have had extensive powers to investigate suspected competition law infringements. These include the powers to:

- Summon witnesses
- Examine witnesses under oath
- Require witnesses to produce any books, documents and records in their possession or control
- Conduct dawn raids, on foot of a District Court warrant, which includes the powers to:
 - Enter into and conduct searches in any premises used for or in connection with business activities or individuals engaged in the business
 - Seize and retain any electronic or hardcopy books, documents or records relating to the business activities under investigation
 - Inspect and take copies or extracts of any such books, documents or records, or
 - Require any persons in the business to provide any information required for carrying out an investigation or to provide any records under the person's control



The CCPC and ComReg now have the option of initiating administrative proceedings, instead of criminal proceedings. They can impose administrative fines of up to €10 million or 10% of a company's total worldwide turnover, whichever is the greater, on parties that have infringed competition law. These fines are subject to court approval. On the criminal front, the 2022 Act substantially increased the potential criminal penalties for hardcore cartel offences to €50 million or 20% of global turnover.

Historically, the CCPC's practice following the conclusion of an investigation was to agree legally binding commitments with the party(ies) under investigation. In return, the CCPC would agree to discontinue its investigation and not bring criminal proceedings. The CCPC could then apply to the High Court to have the agreement made an order of the court. In light of the CCPC's new power to impose administrative fines under the 2022 Act, this practice may be discontinued.

Limitations on search and seizure

The CCPC and ComReg's extensive search and seizure powers are not without limits. The Competition and Consumer Protection Act 2014 Act (2014 Act) sets out specific rules for the CCPC's treatment of legally privileged material during an inspection or investigation. If there is a dispute as to whether documents are protected by LPP, the CCPC may compel their disclosure provided confidentiality can be maintained pending a determination by the High Court or an independent adjudicator. Conversely, the 2014 Act does not address the treatment of documents that are potentially outside the scope of the CCPC's investigation. This is in contrast to the Communications Regulation Act 2002 which sets out ComReg's investigation powers and deals with the treatment of both privileged and irrelevant/private material.

The scope of the CCPC's search and seizure powers came under scrutiny in *Irish Cement Limited v the CCPC (Irish Cement)*. The Supreme Court ruled that emails seized during a CCPC dawn raid were outside the scope of the CCPC's search warrant. The Court heavily criticised the seizure of an entire mailbox as disproportionate and "*an unnecessary, irrational, incursion which went well beyond what should have been the objective sought to be achieved*". Further, the Court recommended that the CCPC develop a Code of Practice for future dawn raid searches.

Following the Supreme Court decision, regulators needed to take a more cautious, refined, and nuanced approach to search and seizure. Against this backdrop, in March 2023, the CCPC published a Statement on Privacy and Legal Professional Privilege Rights. This Statement provided guidance on the treatment of material seized during a dawn raid. However, we understand that the CCPC's position on privacy and LPP rights may be under review by the CCPC. It is possible this is as a result of court proceedings arising from the recent dawn raids.

High Court proceedings

In recent months, the CCPC and ComReg have carried out the following unannounced inspections:

Ryanair

The CCPC assisted the Italian competition authority, in March 2024, in searching Ryanair's headquarters in a probe related to complaints by online travel agencies.

Home alarm systems

The CCPC, supported by the Garda National Economic Crime Bureau and An Garda Síochána, carried out a number of searches of businesses active in the home alarm industry in February 2024. This was part of an on-going criminal investigation into potential breaches of competition law.

Public transport

The CCPC, in December 2023, searched the offices of businesses in Cork as part of a criminal investigation into potential competition law breaches in the publicly funded transport sector. As the investigation is still ongoing, full details are not yet public.

Telecommunications sector

ComReg conducted an unannounced search of the premises of Eir in summer 2023. This search was regarding a proposed discount scheme for access to its fibre to home/businesses scheme by its wholesale customers. It was suspected that it did not meet regulatory requirements and gave rise to concerns about the impact on competition.

In *ComReg v Eircom Limited*, ComReg asked the High Court to rule on a step plan which it had proposed for the review of 320,000 digital documents for privileged and irrelevant confidential material that were seized during the raid at Eir's offices. The Court confirmed it has jurisdiction to approve the use of a step plan which provides for the use of keywords to determine whether seized information is privileged or irrelevant. While it recognised Eir's right to maintain privilege and confidentiality, it determined that the search for these documents must be conducted by ComReg in accordance with an agreed step plan. It appears from this case that the Court does not have the power to order that search terms are used if an agreement is not reached. However, it may give other directions, including to appoint an independent legally qualified person to prepare a report to assist the Court in determining whether the seized information is privileged or irrelevant to the CCPC's investigation. The more recent case of *CCPC v Homeseure* and *CCPC v Phonewatch* has been adjourned in the hope that the parties will agree a step plan with search terms to identify legally privileged materials.

These recent High Court proceedings reveal that the regulators are responding to the concerns raised in the Irish Cement case. Regulators are attempting to formalise their approach to searching documents by agreeing a proposed 'step plan' with the parties involved and, where agreement cannot be reached, requesting the High Court to intervene.

This brings welcome clarity. However, the CCPC's approach will differ if it is playing a supporting role in a dawn raid alongside the European Commission or another national competition authority. This can be seen from the recent inspection of Ryanair's premises where it is being disputed whether the 2014 Act applies, although the CCPC has demonstrated a willingness to engage with Ryanair on this matter.

Preparing for a dawn raid

This trend of greater dawn raid activity is expected to continue. Given the increased likelihood of dawn raids, the reputational risks involved and the potential for fines for competition law infringements, it is more important now than ever that businesses prepare for and respond appropriately to an unannounced inspection. This includes making appropriate privacy and legal privilege claims over documents early in the investigation. Dawn raids happen quickly and can come with or without advance notice, so it is crucial to have adequate protocols in place.

Our cross departmental [dawn raid response team](#) is market leading and internationally recognised. We advise clients to put in place and maintain robust competition law compliance protocols to lower any risk of being subject to competition law enforcement proceedings. We also provide bespoke advice to clients to ensure they are 'dawn raid ready' by providing training and guidelines so staff know what to do in the event of a dawn raid.

If you have any queries about dawn raids and how you can prepare for them, please contact a member of our [Competition & Antitrust](#) team.

Competition & Antitrust

Our Competition & Antitrust team is internationally recognised and widely regarded as market-leading in its field in Ireland. We are centrally involved in the most complex merger cases before the CCPC and have established new precedent in Irish merger control law and on media mergers in particular.

We help clients to address novel competition law issues, such as matters at the intersection of competition law and privacy, and successfully navigate the fast-evolving regulatory environment, including advising on the incoming Irish Foreign Direct Investment regime.

We have significant expertise in competition law enforcement and advised on the CCPC's recent investigations into the ticketing and insurance sectors. We are also at the forefront of competition litigation in Ireland.

This is an experienced team with diverse backgrounds. Many of our team have previously worked with leading US and Magic Circle Competition/Antitrust practices in New York, London and Brussels.

About Us

We are a business law firm with 120 partners and offices in Dublin, London, New York and San Francisco.

Our legal services are grounded in deep expertise and informed by practical experience. We tailor our advice to our clients' business and strategic objectives, giving them clear recommendations. This allows clients to make good, informed decisions and to anticipate and successfully navigate even the most complex matters.

Our working style is versatile and collaborative, creating a shared perspective with clients so that legal solutions are developed together. Our service is award-winning and innovative. This approach is how we make a valuable and practical contribution to each client's objectives.

What Others Say

Our Competition & Antitrust Team

"Sought after for experience in developing area of administrative fines for breaches of EU law. Enviably client roster of US tech and data clients..."

Legal 500, 2024

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