

Client Briefing

Enhancement of Competition Law Enforcement under the Competition and Consumer Protection Act 2014

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The Competition and Consumer Protection Act 2014 (the “**2014 Act**”) came into effect on 31 October 2014. The Act establishes a new body called the Competition and Consumer Protection Commission (the “**CCPC**”), which replaces the former Competition Authority (the “**Authority**”) and National Consumer Agency.

The 2014 Act gives the CCPC powers to investigate and enforce suspected infringements of competition law. These powers largely mirror the investigative powers that the Authority previously had under the Competition Act 2002 as amended (the “**2002 Act**”). However, the 2014 Act also grants some additional powers to the CCPC, which are described in further detail below.

NEW POWER TO COMPEL THE PROVISION OF WRITTEN INFORMATION

In addition to its “dawn raid” powers, the CCPC has the following powers to enable it to perform its functions under the 2014 Act:

- » summon witnesses to attend before it (existed under the 2002 Act);
- » examine on oath the witnesses attending before it (existed under the 2002 Act);
- » require any such person to produce to the CCPC any books, documents and records in his or her power or control

(existed under the 2002 Act); and

- » require any person, by notice in writing, to provide it with such written information as the Commission considers necessary for it to carry out its functions (new power introduced under the 2014 Act).

A person who does not comply with any of these provisions is guilty of an offence and can now be convicted on indictment, and subject to a fine of up to €250,000 or imprisonment for up to 5 years, or both. Previously, a person guilty of this type of offence could only be convicted summarily.

DISCLOSURE OF LEGALLY PRIVILEGED DOCUMENTS

The 2014 Act provides for the compelled disclosure or taking possession of information which may constitute legally privileged material. However, this must be done in such a way that the confidentiality of the information can be maintained pending determination by the High Court of whether the information is legally privileged or not.

Where information over which privilege is claimed is disclosed to or seized by the CCPC, the CCPC must apply to the High Court for a determination on whether the information is legally privileged or not within 30 days of the disclosure or seizure. However, a person who is compelled to disclose or hand over information that may be legally

privileged can apply to the High Court for such determination at any time.

The High Court may give such interim or interlocutory directions as it considers appropriate pending the making of a final determination. These can include directions as to the preservation of the information in a safe and secure place in any manner specified by the Court and the appointment of an independent person to examine the information and prepare a report for the Court. An application for a determination on legal privilege can be heard in camera if the High Court so directs.

NEW POWERS OF AUTHORISED OFFICERS TO ATTEND AT AND PARTICIPATE IN QUESTIONING OF SUSPECTS

Like the 2002 Act, the 2014 Act provides for the appointment of “authorised officers”, who have wide-ranging “dawn raid” powers to investigate suspected infringements of competition law. Under the 2014 Act, authorised officers may now attend at and participate in the questioning of a person detained by An Garda Síochána on suspicion of committing an offence under section 6 or 7 of the 2002 Act or if the person has been detained pursuant to Section 4 of the Criminal Justice Act 1984 for an indictable offence.

In addition, a person who obstructs or impedes an authorised officer in carrying out his or her functions can now be convicted on indictment, and subject to a fine of up to €50,000 or imprisonment for up to 3 years, or both. Previously, a person guilty of this type of offence could only be convicted summarily.

NEW REPORTING OBLIGATIONS TO AN GARDA SÍOCHÁNA

The offence under section 6 of the 2002 Act of engaging in an agreement to fix

prices, limit output or share markets (i.e. a serious cartel offence) is now designated a “relevant offence” under the Criminal Justice Act 2011. This means that it is a criminal offence for any person, without reasonable excuse, to fail to disclose to An Garda Síochána, as soon as practicable, information which he or she knows or believes might be of material assistance to An Garda Síochána in preventing the commission of a serious cartel offence or securing the apprehension, prosecution or conviction of any other person for a serious cartel offence. This offence is punishable by fines of up to €5 million or imprisonment, or both.

DATA RETENTION REQUIREMENTS FOR INTERNET AND PHONE SERVICE PROVIDERS

The 2014 Act extends the provisions of the Communications (Retention of Data) Act 2011 to serious cartel offences under section 6 of the 2002 Act. The CCPC is empowered to order the disclosure of internet and call data where it is satisfied that the data are required for the prevention, detection, investigation or prosecution of a competition offence. The data is required to be retained by service providers for up to two years.

CONCLUDING REMARKS

The 2014 Act provides the CCPC with new tools which should assist it in carrying out investigations. In particular, the CCPC is likely to make use of the new power to compel the provision of information. The increase in the penalties for non-compliance with the CCPC’s investigation powers is intended to send out a message.

It is important to take note of the new reporting obligation in respect of serious cartel offences as set out above.

The CCPC’s new power to take possession of legally privileged material may seem radical, but the CCPC is required

to apply to Court within 30 days for a determination of whether the material is legally privileged and in the meantime confidentiality of the material must be maintained. Material that is determined by the Court to be legally privileged cannot be viewed or used by the CCPC. Where this power is exercised, steps should be taken as soon as possible by the owner of the seized documents to ensure that legally privileged material is identified to the CCPC so that its confidentiality can be maintained pending a Court determination.

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