

## Group Briefing

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## Extension of phone tapping powers on the regulatory horizon?

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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.

Do regulatory agencies have phone tapping powers? For now, no – but there have been calls for the Government to give certain regulatory agencies, such as the Competition and Consumer Protection Commission (CCPC), powers to mount surveillance and intercept electronic communications to assist in the investigation of white collar crime.

## THE CURRENT POSITION

There are strong protections for privacy rights in the Constitution and the European Convention on Human Rights (ECHR). The right to privacy was recognised by the Supreme Court in a 1987 case involving the tapping of journalists' phones, where the Supreme Court commented that unlawful phone tapping is an attack on human dignity.

Currently, the only state bodies that have the power to intercept communications are An Garda Síochána, the Garda Síochána Ombudsman Commission (GSOC) and the Defence Forces (where necessary in the interests of state security). This power is provided for in the Postal and Telecommunications Services Act 1983 and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.

## INTERCEPTION OF COMMUNICATIONS

Communications may be intercepted

on two grounds only: (i) in the interests of state security; or (ii) to aid in the investigation or prevention of certain crimes.

Where the interception is to aid in the investigation or prevention of crime, a number of safeguards apply:

- » An application to intercept a communication must be made to the Minister for Justice. The application can only be made by the Commissioner of An Garda Síochána or the Chairperson of GSOC.
- » The Commissioner of An Garda Síochána or the Chairperson of GSOC (as the case may be) must satisfy the Minister that:
  - an investigation is being carried out into a serious offence or to prevent a serious offence. (Broadly speaking, a serious offence for this purpose is an offence that carries at least a

5-year prison sentence and an additional aggravating factor such as damage to property or substantial gain);

- without interception the investigation will fail, is unlikely to produce the necessary information, or will take much longer to produce the necessary information;
  - interception is likely to produce that information; and
  - the importance of obtaining the information justifies the interception notwithstanding the interference with privacy.
- » A designated judge of the High Court (currently Ms Justice Marie Baker) oversees the process and may investigate any case in which an application to authorise an interception is made.
- » There is also a “Complaints Referee”, who has the power to investigate complaints of misfeasance.

In her recent annual report, Judge Baker indicated that she was satisfied that the power to intercept communications was exercised reasonably and in a manner that respects the privacy of the persons concerned. She noted, however, that the legislation is somewhat out of date and changes in technology should be

dealt with to ensure a more effective and proportionate response to the balancing of the public and private interest in the exercise of the interception function. The legislation is likely to come under closer scrutiny, particularly having regard to the constitutional and ECHR rights of individuals.

Separately concerns have also been raised as to whether the current level of oversight is sufficient and whether a government minister is the appropriate person to authorise an interception or whether this power should be reserved to a judge.

Legislation providing for a right of access for the Gardaí, the Defence Forces, the Revenue Commissioners and the CCPC to communications data, including the time and location of a call, has recently been found by the High Court to breach EU law and the ECHR. One of the reasons for this was that the legislation does not provide for prior review by a court or an independent authority before the data can be accessed. The EU Directive on which the legislation was based was previously declared by the EU Court of Justice to be invalid.

#### PROPOSALS TO EXTEND THE POWER

Notwithstanding these concerns, it has been reported that the Government is considering extending phone tapping powers to all state agencies investigating

white collar, corporate and regulatory crime offences, including the CCPC.

The interception and surveillance of communications is an intrusive practice that requires significant oversight to avoid overstepping the constitutional boundaries of privacy. Any expansion of phone tapping powers to state agencies would need to be very carefully balanced against the privacy rights of citizens guaranteed by the Constitution and the ECHR.

It would also necessitate a significant extension in manpower and resources afforded to state agencies in order to ensure high investigative and monitoring standards. A full-time commissioner with a staff of 70 monitors the interception of communications in the UK.



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