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The Irish High Court finds that the Irish Competition and Consumer Protection Commission has exceeded its dawn raid powers in seizing digital material in bulk (*CRH / CCPC*)

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Irish High Court, *CRH / CCPC*, [2016] IEHC 162, 5 April 2016

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Introduction

In CRH plc v The Competition and Consumer Protection Commission [*1*] the Irish High Court found that the Irish Competition and Consumer Protection Commission ("**CCPC**") had exceeded its dawn raid powers in seizing digital material in bulk. The High Court granted orders preventing the CCPC from reviewing the seized material pending the agreement of a procedure to sift the in-scope material from the out-of-scope material. The judgment casts doubt on the ability of the CCPC to bulk seize digital data during dawn raids and highlights the importance of protecting individuals and companies' right to privacy when conducting investigations in respect of breaches of competition law.

Background

On 14 May 2015, the CCPC carried out a dawn raid at the premises of Irish Cement Limited (**"ICL"**), a subsidiary of CRH plc (**"CRH"**), in connection with an investigation of ICL for alleged anti-competitive practices in the bagged cement sector. During the raid, the CCPC copied and seized 96 gigabytes of digital content, including the contents of the entire email inbox of former ICL managing director Seamus Lynch, who at the time of the investigation was a senior executive within the CRH Group. The CCPC removed this material and contended that it had a right to examine all material seized in order to determine for itself the relevance, or not, of the information seized.

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During and after the raid, the plaintiffs (CRH, ICL and Seamus Lynch) asserted that the CCPC had acted outside of the scope of the search warrant by seizing information that was not relevant to its investigation. The plaintiff's primary concern was that the email inbox of Seamus Lynch contained correspondence from periods during which he was not employed by ICL, the target of the investigation, but by other subsidiaries of the wider CRH group as well as personal emails. They argued that many of the emails in the inbox contained private information of CRH and Seamus Lynch which had no bearing on the matters under investigation and should not be reviewed by the CCPC.

The plaintiffs sought various declarations that the CCPC had acted ultra vires and in breach of their right to privacy under the Irish Constitution, the ECHR and the EU Charter of Fundamental Rights in seizing material unrelated to the business activities of ICL, as well as an injunction restraining the CCPC from making use of any of the material which did not relate to those business activities. The plaintiffs argued that the CCPC had no right to review the seized material to determine relevance to the investigation, and that to do so would be in breach of their respective rights to privacy.

Judgment

Mr Justice Barrett of the High Court began his judgment by noting that section 37(2) of the Competition and Consumer Protection Act 2014 (the **"Act"**) empowers the CCPC, once issued with a search warrant by a District Court judge, to enter and search "any place at which any activity in connection with the business of supplying or distributing goods or providing a service … is carried on", and to seize and retain "any books, documents or records relating to an activity found at any place." While the Court noted that these powers are "very broad", [*2*] it added that they remain subject to the proviso in section 37(1) of the Act that the search must be "for the purposes of obtaining information which may be required in relation to a matter under investigation under the [Competition Act 2002]." In this case, the "matter under investigation" was determined to be ICL's suspected breaches of competition law (and not, due to intrusive nature of search warrants and potential criminal sanction, the CCPC's broader investigation into the supply of bagged cement). It followed that, in seizing emails in Seamus Lynch's email inbox that did not relate to this investigation, the CCPC had, on the balance of probabilities, seized materials not covered by the search warrant and had exceeded the powers of seizure conferred on it by section 37 of the Act.

The Court noted that notwithstanding the provisions of section 37, the Act "leaves greatly uncharted what is to be done with material, other than legally privileged material, that is seized and ought never to have been seized." [*3*] The Court expressed surprise at this, given what it called the "near, if not absolute inevitability" that a search and seizure process will see items seized that ought never to have been seized. [*4*] The CCPC had argued that subjects of investigations are protected by Section 25 of the Act, which prevents CCPC officials from disclosing confidential information. The Court found, however, that the duty laid down in Section 25 "goes nowhere towards meeting [the] fundamental concern that … the Commission has in its possession information which it has at no time stood entitled to possess." [*5*]

After a lengthy review of the applicable ECtHR and Irish case law concerning the right to privacy, the Court determined that for the CCPC to review seized material that did not relate to the matter under investigation would breach the plaintiffs' right to privacy under both the ECHR and the Irish Constitution. [*6*] The Court considered that an unwarranted intrusion of privacy at the office is "every bit as bad as an unwarranted search of a personal or home computer". [*7*] The review of the irrelevant information would in the Court's view constitute "an entirely unwarranted – not to mention egregious – transgression of the right to privacy". [*8*] Accordingly, the Court granted an injunction preventing the Commission from reviewing any material that fell outside the scope of the matter under investigation pending agreement between the parties as to an arrangement to sift out the material that ought to have been seized from the material that ought not to have been seized.

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Interestingly, the Court drew a clear distinction between the seizure and copying of irrelevant information, which it described as "inevitable … even in the best run dawn raids", and the review of such information, which constitutes a breach of the right to privacy. [*9*] The Court states that its difficulty "is not in the conduct of the 'dawn raid' per se, nor even in the inadvertent taking away of information that is not covered by the warrant". [*10*] Rather, its difficulty was with what was to happen in respect of the materials which were taken but which did not relate to the matter under investigation. [*11*] Aside from alluding to the practical difficulty in avoiding the seizure of private or irrelevant information during a dawn raid, the Court does not explain why the seizure of information without authorisation under section 37 of the Act can be so easily excused, and why such seizure does not constitute a breach of the right to privacy. The practical inevitability of such seizure seems to have been entirely exculpatory.

The Court was also keen to point out that Section 33 the Act provides a "perfectly sensible and practically operable process" for dealing with legally privileged material which "could easily have been used" in respect of the allegedly irrelevant material in this case. [*12*] Section 33 establishes a procedure whereby information alleged to be legally privileged is kept confidential pending a determination of the High Court. In the Court's view, there was "no reason why such a process could not have been voluntarily agreed between the Commission and the plaintiffs in this case." [*13*]

Conclusion

The High Court's judgment marks a significant loss for the CCPC which very clearly curbs its ability to effectively gather information during dawn raids. The judgment makes clear that the CCPC may not simply gather troves of information during dawn raids and determine for itself at a later date what information is relevant and what is not-something which had been the CCPC practice until this case. The CCPC must engage with the target of an investigation and agree a process which ensures that out of scope information is protected.

The High Court (and, on appeal, the Supreme Court) both raised the need for legislation to provide for a procedure to deal with material unrelated to the matter under investigation. The legislature has not responded, though the CCPC has released an extensive Privacy Protocol, ostensibly in response to the Court's concerns. In short, the Protocol specifies a procedure whereby the information claimed by the target of an investigation to be private shall be reviewed by CCPC officers who are not involved in the investigation in question, who will make a determination on the privacy claim. Crucially, the Protocol asserts that "as a matter of principle, the CCPC considers that the CCPC case team is entitled to review, and use in its investigation, any files or documents which the Privacy Review Team has decided are potentially relevant to the CCPC's investigation even if the Search Target has claimed that the files or documents in question contain private information." It remains to be seen whether this procedure adequately addresses the issues identified by Mr Justice Barrett.

[*1*] CRH plc and others v The Competition and Consumer Protection Commission [2016] IEHC 162. The judgment of the High Court was appealed by the CCPC to the Supreme Court. The Supreme Court dismissed the appeal: CRH plc and others v The Competition and Consumer Protection Commission [2017] IESC 34.

[*2*] CRH v CCPC (HC) (note 1) paragraph 15.

[*3*] CRH v CCPC (note 1) paragraph 20.

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[4] Ibid, paragraph 26.

[5] Ibid, paragraph 22.

[6] Curiously, the Court found that the EU Charter of Fundamental Rights did not apply, holding that section 37 did not "implement" EU law within the meaning of Article 51 of the Charter, despite noting that it "may facilitate the enforcement of … European Union law." The Court's conclusion in this regard is based on the fact that section 37 of the 2014 Act does not form part of the Competition Acts 2002-2014 (which, the Court accepted, implement EU law).

[7] CRH v CCPC (note 1) paragraph 65.

[8] Ibid.

[9] Ibid., paragraph 45 and 77 in respect of Article 8 of the ECHR and paragraph 63 and 77 in respect of the Constitutional right to privacy.

[10] CRH v CCPC (note 1) paragraph 63.

[11] Ibid.

[12] Ibid, paragraph 75.

[13] Ibid.

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