



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

EU Damages Directive: Disclosure of Evidence *Observations from a Common Law Jurisdiction*

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Introduction

- Directive 2014/104/EU: Chapter II (Articles 5 - 8)
- Deadline for transposition: 27 December 2016
- In Ireland, expected to be transposed by secondary legislation i.e. statutory instrument made by Minister
- Implications for common law jurisdictions
- Lessons to be learned from common law jurisdictions

Discovery procedure in Ireland

- Well-established disclosure procedures in Ireland
- “Discovery” → pre-trial disclosure of documents
- Large degree of symmetry with Directive
- General observations on Irish practice:
 - Not a **fishing expedition**: *Framus v CRH* [2004] IESC 25
 - Documents in “*possession, power or procurement*”
 - Test: documents **relevant** to matter in dispute and **necessary** for disposing fairly of case or saving costs
 - Obligation extends to **all** relevant documents
 - Can request **categories** of documents

Procedural steps in discovery process

- General obligation to **retain documents**
- Disclosure on **voluntary basis** sought in first instance
- If unsuccessful → apply for **court order**
- Inter partes discovery / non-party discovery
- Disclosing party swears **affidavit** listing documents
- Documents then made available for **inspection**
- Affidavit must list documents over which **legal privilege** is claimed but no obligation to disclose
- Documents typically made available electronically

Issues arising in Irish transposition

- Existing Irish discovery rules refer to disclosure of “documents” rather than “evidence”
- “Documents” construed broadly (e.g. digital recordings, electronic files) but is there distinction?
- **Non-party discovery** currently possible under Irish law but rules will need to be amended to incorporate specific provisions on access to evidence in NCA file
- Protection of **confidential information**: how will this be achieved in practice?
- Implications of **criminal enforcement** regime in Ireland

Lessons from common law jurisdictions

- **Information asymmetry** in private competition cases
- Private litigants do not have same **investigative tools** as NCA (e.g. search and seizure, witness summons, RFIs)
- Experiences from use of disclosure in Irish NCA's **public enforcement** actions in civil courts
- Disclosure is typically a **two-sided process !!**
- Use of **eDiscovery software** providers
- *Good Practice Guide to Electronic Discovery in Ireland (2013)*
- Public and private enforcement must be complementary
- Disclosure not a panacea: **other factors** hindering private enforcement include very high legal costs and court delays



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Thank You

