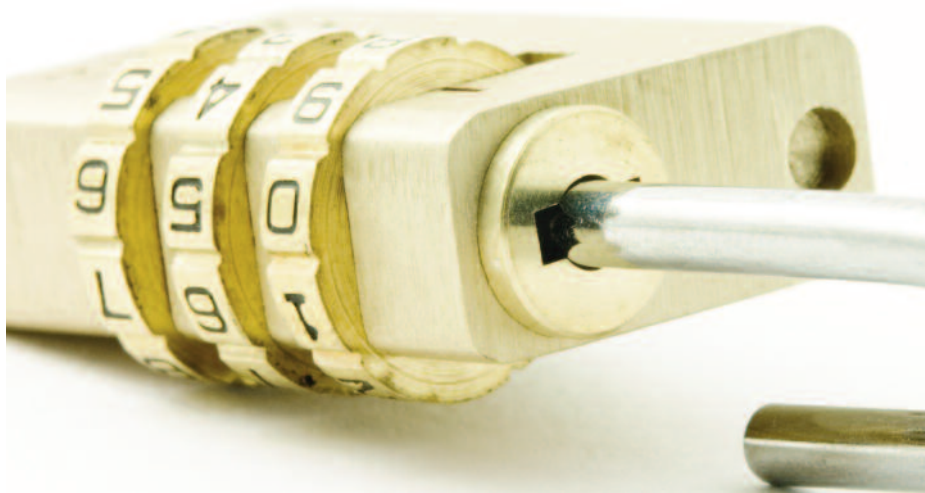


## Obstructing anti-trust inspections in the CEE region



### Key Issues

Obstruction of an antitrust investigation is an offence in itself, which may prove costly

No company is free of the risk of an antitrust dawn raid

More obstruction cases in the CEE region

Differences in regulations in the CEE region

Proper education and responsible approach to minimize the risk

In the nineties, national competition authorities in the CEE region were sometimes passive or lacked effective sanctions against procedural obstructions created by companies under investigation. Times have changed though and now both the European Commission and the national competition authorities in the CEE part of the EU see the obstruction of investigations as a "sin" in itself, worthy of a separate fine. Companies should be warned: obstructing investigations by the antitrust authorities may prove harmful – and quite costly.

This briefing provides an overview of the legal background and relevant precedents before the European Commission and the national competition authorities in Poland, the Czech Republic, Slovakia, Hungary and Romania.

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## Legal overview

Companies' obligations to cooperate with Commission officials during inspections (dawn raids) are laid down in *Council Regulation No 1/2003* (Articles 20(4) and 23). Under Art. 23 of this regulation, **the Commission can impose on a company a fine of up to 1% of its annual worldwide turnover** in particular (i) for refusing to submit to an inspection or producing the required books or records in incomplete form during such inspection; or (ii) where seals affixed by the inspectors have been broken. Most importantly, the fine can be imposed regardless of whether the obstruction was intentional or a result of negligence and no matter whether or not the company is found guilty of the antitrust infringement which gave rise to the dawn raid in the first place.

In addition, a "refusal to cooperate with or obstructing the Commission in carrying out its investigation" constitutes an aggravating circumstance, providing the Commission with grounds to even increase the fine for a substantial antitrust infringement (par. 28 of the *Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003*).

National antitrust laws in the CEE countries listed above work in a somewhat similar way to EU law, but certain provisions differ, in particular regarding the exact scope of the obligation to co-operate, the basis for calculating the fine and its maximum level, as well as the possibility of fining individuals (see Table I).

The cases listed below show that the antitrust authorities will not tolerate any attempts by companies to undermine the fight against anti-competitive practices. The significant number of such cases in the CEE region also demonstrates the need for major effort to ensure compliance and education in the region to reduce the risk of accidental infringement.

## European Union

### E.On Energie (energy)

In January 2008, E.On Energie was fined EUR 38,000,000 for breaking a seal placed by Commission antitrust investigators on an office door at the company's premises in Munich. The Commission said it imposed the penalty to send a clear message that it does not pay to obstruct its investigations. On 15 December 2010, the General Court rejected E.On Energie's appeal, ruling that the Commission was entitled to consider that, at the very least, the seal had been negligently broken.

The General Court stressed that E.On Energie was required to take all necessary measures to prevent any tampering with the seal, having been clearly informed of the significance of the seal and the consequences of any breach. It also ruled that

the fine imposed on E.On Energie, which was approximately 0.14% of its turnover, was not disproportionate, given the particularly serious nature of the infringement, the size of the company and the need to show that it is definitely not to a company's advantage to break a seal affixed by the Commission.

### Lyonnaise des Eaux / Suez Environnement (water)

In April 2010, the Commission carried out dawn raids on several companies operating in the water and waste water sectors in France. During the inspection of the offices of Lyonnaise des Eaux, fully owned by Suez Environnement, a seal affixed to the door of an office was allegedly broken. On 21 May 2010, the Commission opened formal proceedings against Suez Environnement concerning this alleged breach of the seal and the matter is still pending.

### J&T (energy)

Czech financial group J&T is currently under investigation by the Commission for allegedly obstructing a dawn raid at the company's offices in November 2009. The proceedings concern the refusal to submit to an inspection and the production of incomplete records (emails) during it.

### Sanofi-Aventis (pharma)

In May 2008, the Commission opened a formal investigation as to whether French pharmaceutical company Sanofi-Aventis was guilty of illegally obstructing a dawn raid in January 2008 by refusing to hand over certain documents (according to the press, this concerned a single document related to litigation proceedings in the US) until the French authorities produced a national search warrant. The Commission subsequently dropped this investigation. However, this case reinforces the impression that the Commission is prepared to exert significant pressure if it feels investigations are being obstructed by the company being inspected.

## Poland

### PTK Centertel (mobile phone)

In July 2002, the Office for Competition and Consumer Protection (OCCP) initiated antitrust proceedings against Telekomunikacja Polska (TP, a subsidiary of France Telecom) and its mobile phone subsidiary PTK Centertel, to determine whether TP was abusing its dominant position in the fixed line telephone market, and whether TP, with PTK Centertel, were eliminating competition in the mobile phone market.

During the dawn raid carried out on its premises, PTK Centertel refused to make available the files requested by the OCCP, such as commercial offers and presentations. The OCCP fined the company the equivalent of EUR 4,500 and its CEO the equivalent of EUR 3,500. The fine on the company was very close to the maximum level permitted at that time for obstructing inspections (which was EUR 5,000 for a company and EUR 3,500 for an individual holding a managerial post or being a member of a managing authority of the company). The maximum permitted fines have now been substantially increased, as the next case shows.

### Cementownia Ożarów (cement)

In April 2006, the OCCP initiated antitrust proceedings against 11 cement manufacturers suspected of forming a price cartel, setting terms of sale, dividing the market and exchanging confidential business information.

During a dawn raid at Cementownia Ożarów (CRH Group), a secretary of one of the managers destroyed a document, for which the company was fined the equivalent EUR 530,000. This was the first fine for obstructing inspections under the amended Polish regime, which now allows the OCCP to impose a fine of up to EUR 50,000,000 on a company.

### PTC (mobile phone/mobile TV)

In December 2009, the OCCP inspected five companies suspected of forming a cartel in the mobile TV market, including PTC, a major Polish mobile phone operator.

In November 2010, the OCCP imposed a fine of EUR 30,000,000 (which is 60% of the current maximum possible fine) for this obstruction. According to the OCCP, PTC prevented the inspection from beginning promptly, as the OCCP officials were made to wait approximately 90 minutes without any of the key managers meeting them. Also, when the officials began walking around the offices unaccompanied, they found the manager they were interested in interviewing in an office in discussion with several other managers responsible for the area of activity in question.

According to the OCCP, the infringement was intentional, persistent, resulted in significant harm to the public interest and undermined the coordination of five simultaneous dawn raids, as PTC employees made numerous outgoing phone calls during the waiting period. PTC has appealed against this fine.

### Polkomtel (mobile phone/mobile TV)

Polkomtel was one of the other companies inspected by the OCCP during the simultaneous dawn raids in December 2009 following suspicions of a cartel on the mobile TV market. This company also allegedly prevented the inspection from beginning immediately. In addition, it also objected to providing copies of its hard drives to the OCCP (it is understood that Polkomtel agreed to the OCCP reviewing copies of the hard drives on their premises, but did not allow the officials to take the copies with them) and failed to produce the required documents.

In June 2010, the OCCP started proceedings against Polkomtel for obstructing the inspection; the matter is still pending.

## Czech Republic

### Delta Pekárny (bakery)

In 2003, three major bakeries in the Czech Republic were inspected on suspicion of entering into a price-fixing arrangement. During the dawn raid, the manager of Delta Pekárny refused to let the Czech Competition Office (CCO) open some of his emails, arguing that they were personal and irrelevant to the case. He also forcefully took back certain emails which the authority had initially seized.

The maximum fine was imposed on the company, i.e. approx. EUR 12,000. The fine was upheld by the Czech Supreme Administrative Court in May 2009 and the Czech Constitutional Court in September 2010.

## Slovak Republic

### KOOPERATIVA (insurance)

In 2004, the Slovak Antimonopoly Office (SAO) initiated investigations of several insurance companies following suspicions of a cartel agreement.

During the dawn raid of KOOPERATIVA, the SAO requested access to, among other things, diaries and emails. KOOPERATIVA argued that the emails and diaries were not closely related to the company's business and, moreover, that this would infringe its constitutionally guaranteed rights. The SAO imposed a fine of approx. EUR 165,000. In 2007, after a lawsuit filed by KOOPERATIVA, the Regional Court reviewed the decision of the SAO and mitigated the fine to approx. EUR 83,000. The SAO contested the judgment before the Supreme Court but withdrew the appeal in 2008 in its entirety.

## Romania

### Olanesti Riviera and Sind Romania (leisure/hotel)

In 2009, the Romanian Competition Council (RCC) fined the hotel Olanesti Riviera RON 100,000 (approx. EUR 24,000) and tourism agency Sind Romania RON 57,000 (approx. EUR 13,500) for refusing to cooperate during inspections on their premises. The RCC's investigation focused on a number of companies operating in the tourism sector and sought to identify a possible agreement between the companies during auctions organised by the National House of Pensions and Other Social Insurance Benefits (CNPAS).

### BRD - Société Générale (bank)

After inspections conducted in late October 2008, which targeted several banks in Romania, the RCC fined BRD - Société Générale approximately EUR 5,000,000. The fine was imposed for delaying access to the bank's headquarters by the RCC's investigators during a dawn raid and, consequently, the possible exchange of information between the entities being investigated and the alleged alteration of documents subject to the investigation. Following an appeal by BRD - Société Générale, the case is still pending.

## Conclusions

These cases serve as a reminder that a company cannot obstruct antitrust dawn raids with impunity. Obstructing an investigation could also create the impression that the company has something to hide.

Most importantly, however, companies should bear in mind that they might be inspected for reasons other than suspicion of involvement in a cartel. The authority may be gathering evidence against a third party (such as one of their suppliers or clients), as part of a general enquiry into the sector, or as part of merger proceedings. In some countries, like Poland, the antitrust authority can also carry out dawn raids as part of proceedings related to the abuse of general consumer rights (e.g. misleading advertising).

Consequently, no company can completely eliminate the risk of an antitrust dawn raid. Therefore, managers and employees should be reminded that this is not merely another type of "bureaucratic" inspection that can be treated lightly.

Table I: Maximum fines per jurisdiction

EU	<p>For a company, for refusing to submit to an inspection and/or failing to produce the required books or records in complete form: 1% of its total turnover</p> <p>For a company, for breaking seals: 1% of its total turnover</p> <p>An individual representing the company during a dawn raid may not be fined.</p>
Poland	<p>For a company, for failing to cooperate during a dawn raid: EUR 50,000,000</p> <p>For the individual(s) representing the company during a dawn raid, for failing to co-operate : equivalent of 50 times the average monthly Polish salary (the average being currently approx. EUR 900)</p>
Czech Republic	<p>For a company, for (i) breaking seals or (ii) failing to cooperate during a dawn raid: EUR 12,000 or 1% of the company's net turnover</p> <p>A fine for infringements under (i) and (ii) above can be imposed repeatedly and, if so, may reach up to EUR 400,000 or 10% of the company's net turnover.</p> <p>An individual representing the company during a dawn raid may not be fined.</p>
Slovakia	<p>For a company, for (i) not allowing examination of documents or (ii) refusing to submit to an inspection: 1% of its net turnover, or EUR 330,000 if the turnover is below EUR 330 or is impossible to calculate (e.g. the relevant data is incomplete or the SAO considers it untrustworthy)</p> <p>An individual representing the company during a dawn raid may not be fined.</p>
Hungary	<p>For a company, for failing to cooperate during a dawn raid or for providing fake evidence: 1% of its total turnover</p> <p>For the individual(s) representing the company during a dawn raid for failing to cooperate or for providing fake evidence: a maximum of HUF 500,000 (approx. EUR 1800), while the minimum fine is HUF 50,000 (approx. EUR 180)</p>
Romania	<p>For a company, for refusing to submit to an inspection or for providing incomplete documents, information etc. during a dawn raid: 1% of its total turnover (minimum of 0.1% of the total turnover)</p> <p>An individual representing the company during a dawn raid may not be fined.</p>

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