

Competition & Antitrust - Romania

Revised criminal codes bring new requirements for Competition Council raids

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Introduction

The entry into force of the new Criminal Code and Criminal Procedure Code on February 1 2014 has brought a number of changes to the Competition Law (21/1996, as republished and amended), with one of the most significant changes pertaining to the manner in which the Competition Council carries out dawn raids.

Since its enactment in 1996, the Competition Law stated that Competition Council inspectors could carry out dawn raids at the business premises of a company based on an order of the chairman of the Competition Council. Judicial approval was required only for dawn raids at private and personal premises, such as the homes and vehicles of managers, directors and employees of the relevant undertakings.

With the entry into force of the new Criminal Code and Criminal Procedure Code, prior judicial approval in the form of a warrant is now required to carry out dawn raids at a company's business premises. The court warrant is granted by a Bucharest Court of Appeals judge, following submission of a grounded request by the Competition Council. The company may challenge the judge's decision before the High Court of Cassation and Justice within 48 hours of notification of the court warrant, but filing an appeal will not suspend the dawn raid. In order to be valid, the warrant must expressly stipulate the scope of the inspection and identify the premises that are subject to the procedure.

European Convention on Human Rights compliance

The recent changes bring the Competition Law closer into line with both the dawn raid provisions of a number of EU member states (eg, France, Austria and Germany) and – perhaps more importantly – with the relevant provisions of the European Convention on Human Rights (to which Romania is a contracting party), as interpreted by the European Court of Human Rights (ECHR).

One of the main objections raised with respect to the former dawn raid procedure was that it failed to meet the criteria imposed by the convention. Many commentators argued that the procedure was in direct violation of Article 8 of the convention, which expressly guarantees the right to privacy and states that any interference with this right by a public authority must be:

"in accordance with the law and [if] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The ECHR has stated that the rights guaranteed by Article 8 are to be construed as including the right to respect of an undertaking's registered office, branches or other business premises.⁽¹⁾ Further, while competition authorities have the right to carry out dawn raids to prevent the disappearance or concealment of evidence of anti-competitive practices, the companies involved must benefit from adequate and effective safeguards against abuse. The ECHR identified the following safeguards against abuse:⁽²⁾

- A motivated judicial warrant must be granted by an impartial tribunal in the sense of Article 6(1) of the convention.
- The inspection team's powers must be limited by the judicial warrant.
- The judicial warrant's correct execution must be ensured by a representative of a neutral public authority (eg, a police officer).
- Proportionality must be exercised between the interference with the applicant's rights and the legitimate aim pursued.

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Although these conditions are not cumulative, they are indicators of whether the inspection procedure – in the manner of its undertaking – is necessary in a democratic society according to the standards of ECHR jurisprudence.

A brief look at the first two safeguards shows that before the entry into force of the new Criminal Code and Criminal Procedure Code, neither was complied with. The chairman of the Competition Council, responsible for issuing the orders for dawn raids, is not an impartial tribunal or even a judge; nor can he claim to be impartial. Further, the chairman's orders were seldom motivated and contained no limitations, except in relation to the duration of the dawn raid. From this perspective, the amendments introduced by the new Criminal Code and Criminal Procedure Code can be seen as a positive development, as they will ensure that the Competition Council's rights are not exercised in an abusive manner.

However, the third safeguard has not been complied with as readily. The new Criminal Code and Criminal Procedure Code contain no provisions for the presence of a representative of a neutral public authority at dawn raids. According to the ECHR, the participation of a representative of a neutral public authority (ie, independent of the Competition Council, such as a police officer) is required for on-site inspections conducted by competition authorities in order to ensure that the inspection is conducted in line with legislation and within the strict limits of the impartial judicial warrant. During the dawn raid, the neutral public authority is considered the representative of the judge who authorised the warrant.

Finally, in order for the fourth safeguard to be enacted, the judge granting the warrant must ensure that the dawn raid is proportionate in light of the interference with the company's right to privacy and the legitimate aim pursued. As such, the dawn raid must be justified through previous evidence regarding the availability of any relevant documents or information held by the company at the raided premises – that is, the raid must not amount to a fishing expedition.

Comment

While the amendments to the Competition Law by the enactment of the new Criminal Code and Criminal Procedure Code should be seen as a step in the right direction – insofar as compliance with the European Convention on Human Rights is concerned – further steps still need to be taken. As stipulated in the Constitution, international treaties such as the convention take precedence over domestic law. Consequently, the domestic courts, irrespective of their jurisdiction, are obliged to enforce the convention directly and ensure compliance with all of the specified safeguards - even those not expressly provided for in the Competition Law and the new Criminal Code and Criminal Procedure Code. However, in practice, the courts have been reluctant to do so.

It can be argued that the new amendments will not result in a significant reduction in the number of dawn raids, as Competition Council officials consider them the main tool for gathering useful information. Nevertheless, the new provisions should ensure that any request for a judicial warrant is properly substantiated and grounded in actual evidence, rather than speculation.

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Endnotes

(1) ECHR Case 37971/97 (April 16 2002), *Société Colas Est v France*, para 41.

(2) *Chappel v United Kingdom*, *Crémieux v France* and *Société Colas Est v France*.

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