

Competition - Austria

Extension of search warrant after accidental discovery

Contributed by [Preslmayr Attorneys at Law](#)

March 27 2014

[Facts](#)
[Decision](#)

On November 26 2013 the Supreme Court (acting as the Higher Cartel Court) ruled once again on the investigatory powers of the Federal Cartel Authority (FCA) with regard to house searches.

Facts

The FCA had searched the premises of several undertakings (the applicants) on the basis of a search warrant issued by the Cartel Court, following suspicions of participation in anti-competitive agreements and/or concerted practices with regard to vertical price agreements between the applicants and retailers of daily consumer goods, among other things. In the course of this house search, the FCA reviewed documents indicating that the applicants had also regularly colluded on prices with wholesalers of daily consumer goods. On the basis of this new information, the FCA issued a written memorandum and requested that the search warrant be extended to documents concerning vertical price agreements with wholesalers of daily consumer goods.

The extension to the search warrant was granted by the cartel court, but was subsequently challenged by the applicants. In particular, the applicants argued that a search warrant cannot be extended on the basis of an accidental discovery, as this would be contrary to the rules on inadmissible evidence set out in Section 11(1) of the Competition Act. According to the applicants, an accidental discovery could only be regarded as an inducement for an information request and the applicants should submit the respective documents after the house search.

Decision

The Supreme Court elaborated in detail on the legal situation under Austrian and European competition law. Among other things, the court stated that according to Austrian case law,⁽¹⁾ the investigatory powers of the FCA are not hierarchical – that is, an information request by the FCA is not a prerequisite for conducting a house search. Rather, these two investigation instruments are independent from each other, such that the possibility to receive documents by the way of an information request does not preclude the FCA from obtaining an (extended) search warrant.

The Supreme Court confirmed that under Section 11(1) of the act, the information acquired in the course of an investigation should be used only for the purpose pursued by the investigation. However, according to the court, such information may still be used for the initiation of new proceedings, as the purpose of Section 11(1) is not to protect competition infringements or to make them non-pursuable. For example, the court stressed that if, during a house search initiated following allegations of theft, a body were found, it would be possible to use this accidental discovery within the general legal preconditions to initiate a new investigation on the grounds of murder.

Subsequently, the court elaborated on the question of whether it was necessary to initiate a new proceeding in order to investigate the (new) facts discovered accidentally by the house search, or whether it was possible to extend the current search warrant under the same proceeding. The court ruled that it is within the discretion of the FCA to decide whether, for practical reasons, proceedings should be conducted separately or together. Therefore, it is up to the FCA to decide whether it should request a new search warrant for a new proceeding or an extension of the current warrant.

The court also confirmed the legality of the FCA's request for an extension of the search warrant by using a memorandum to support its request. In accordance with European case law and the law on inadmissible evidence, the FCA kept the accidentally

Authors

[Dieter Hauck](#)



[Esther Sowka-Hold](#)



discovered documents internal, did not use them as evidence and merely used the information from the memorandum to support its request. According to the court, such an approach must be accepted, as otherwise the accidental discovery could not be used at all.

Finally, according to the court, and contrary to the applicants' opinion, the FCA is not obliged to give the undertakings concerned the opportunity to apply for leniency before conducting a house search. On the contrary, in order to satisfy the purposes of a house search, such investigations must regularly take place without prior notification.

For further information on this topic please contact [Dieter Hauck](#) or [Esther Sowka-Hold](#) at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95), fax (+43 1 535 56 86) or email (hauck@preslmayr.at or sowka-hold@preslmayr.at). The Preslmayr website can be accessed at www.preslmayr.at.

Endnotes

(1) See, for example, Supreme Court as Higher Cartel Court, March 5 2013, 16 Ok 1/13; RS0127267.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2014 Globe Business Publishing Ltd