

Competition & Antitrust - Austria

Use of spyware during dawn raids

Contributed by [Preslmayr Attorneys at Law](#)

July 02 2015

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

In 2013 the Federal Cartel Authority (FCA) conducted a dawn raid of the business premises of one of the biggest companies in the Austrian food retail industry due to, among other things, suspicions of vertical and horizontal price coordination. Following the dawn raid, the company challenged the Cartel Court's order to conduct the raid and the FCA's actions during the raid.

Facts

According to the applicant, the FCA's activity during the dawn raid was excessive – in particular, due to the (unsuccessful) use of espionage software (osTRIAGE and DumpIT). This software enabled the authority to extract the applicant's administrative passwords. The applicant argued that the use of the software was unnecessary, not covered by law and, according to the private expert opinion it presented, "inadequate as well as pointless".

The applicant also argued that the Cartel Court's order covered access to physical and electronic files that were actually present in the premises mentioned in the Cartel Court's order only, and that data stored at external locations (eg, a central server outside the premises) was not covered by the Cartel Court's order.

Decision

On April 22 2015 the Supreme Administrative Court dismissed the applicant's appeal and ruled that the use of forensic software to access electronic data during a raid was unquestionably legal and covered by Section 14(2) of the Competition Act. The applicant's argument that the FCA's use of the specific software is disproportionate (particularly with regard to the ability to access the applicant's passwords) was held to be insufficiently reasoned. Further, the court clarified that search warrants cover data stored outside the premises mentioned in a Cartel Court order if that data can be accessed from the premises mentioned in the order. According to the court, where the relevant data is actually stored is not decisive.

Comment

With this decision, the Supreme Administrative Court has clarified questions of law which are of great importance in practice. Unsurprisingly, the court held that authorities may use forensic software and that companies cannot prevent access to their data merely by storing it on servers outside their premises.

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