



EU, COMPETITION AND REGULATED MARKETS

Legitimacy of Dawn Raids Conducted by the European Commission Questioned

by **Marco Hickey**

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Three recent judgments of the General Court of the European Union have partially annulled decisions of the European Commission, which had ordered an unscheduled dawn raid to be carried out on two French food retail chains, on the grounds that these raids had partially been carried out on illegal grounds.

What is a dawn raid?

Dawn raids are scheduled or unscheduled inspections by either a national competition law authority or the European Commission where there is a suspected infringement of competition law. Dawn raids occur at the premises of companies suspected of being in breach of competition law and sometimes they also occur at the premises of their customers or competitors.

The Commission's investigation

In 2017, the Commission adopted decisions authorising dawn raids to be carried out on two French food retail chains, Casino and Intermarché. These decisions were adopted pursuant to Article 20 of Regulation No. 1/2003 on the implementation of the rules on competition, which grants the Commission extensive powers of investigation to conduct all necessary inspections in the event of a suspected infringement of competition law.

The Commission was investigating whether Casino and Intermarché had implemented anti-competitive practices through their joint venture, Intermarché Casino Achats.

The anti-competitive practices suspected of having been carried out were alleged exchanges of information on:

1. Discounts obtained from suppliers on the markets for the procurement of everyday consumer goods, and on the price of the services provided to manufacturers of branded products or so-called commercial cooperation.
2. Their respective future commercial strategies, in particular in terms of product mix, retail expansion, e-commerce and promotional policy in the markets for the procurement and sale of everyday consumer goods.

During the course of its investigations, the Commission visited the premises of the companies and seized copies of the content of computer equipment.

General Court judgments

Casino and Intermarché subsequently brought actions seeking annulment of the Commission's decisions.

While the General Court rejected a large number of arguments brought forward by the companies, it did partially agree with them on the point that when the Commission carried out its inspections, it had insufficient evidence of infringement of competition law infringement.

Findings of the General Court

The General Court found that the Commission had sufficiently strong evidence to suspect a concerted practice relating to the exchange of information on discounts obtained on the supply markets of certain everyday consumer products and the prices on the market for the sale of services to manufactures of branded products.

However, the Commission did not have sufficiently strong evidence to suspect exchanges of information concerning the future commercial strategies and it was on that basis that the General Court decided to annul this part of the Commission's decisions.

Key findings

1. The General Court confirmed that the Commission has extensive powers of investigation, but that these powers are not unlimited and due account must be given to the fundamental rights of the companies being investigated.
2. The General Court clarified the level of evidence required to legitimately suspect an infringement of competition law and justify an on-site inspection. The standard of proof will depend on the nature of the infringement concerned and is to be assessed on a case-by-case basis.
3. In relation to alleged exchanges of information, general and non-strategic statements communicated to the public cannot, on their own and without further evidence, be considered sufficient to raise suspicions of a potential infringement that would justify an inspection.

Thoughts

It is seldom that a court finds a decision of a competition authority to inspect competition law infringement to be illegal. The General Court's judgments are a timely reminder to competition law authorities and the Commission that their powers of enforcement do not entitle them the leniency to go on a fishing expedition when it comes to dawn raids.

Contact

If you wish to discuss any queries, please contact a member of our team.

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