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Soulhier Bunch, Cabinet d'avocats d'affaires basé à Paris et Lyon

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A company subject to a raid by agents of the French Competition Authority may not directly petition the judge

A company subject to a raid by agents of the French Competition Authority that raises concerns during the search and seizure operations is not entitled to refer itself the matter to the *Juge des Libertés et de la Détention* (Liberty and Custody Judge). This can only be done by the law enforcement officers who attend such operations.

Consequently, the Liberty and Custody Judge's refusal to hear the concerns raised by the company during the raid is not a ground for annulment of the search and seizure operations.

This is the finding of the Criminal Chamber of the *Cour de Cassation* (French Supreme Court) in a landmark decision dated March 9, 2016 which is commented herein.

In order to fully grasp the reach of the decision commented herein^[1], it may be useful to briefly recall the role played by the *Juge des Libertés et de la Détention* (Liberty and Custody Judge, hereinafter the "LCJ") in investigations and raids conducted by agents of the French Competition Authority (the "FCA").

1. Reminder of the role played by the LCJ in investigations conducted by FCA agents

The role of the LCJ is set forth in Article L. 450-4 of the French Commercial Code that deals with investigations conducted under the authority and control of a judge.

Wherever investigations are carried out under the authority and control of a judge, FCA agents have extended investigation powers, which is not the case in so-called “simple” investigations (addressed in Articles L. 450-3 to L. 450-3-2 of the French Commercial Code). As such, agents who suspect anti-competitive conducts/practices by one or several companies may visit any place between 6 a.m. and 9 p.m., seize any document and data medium, place any document and object under official seal or even hear the occupant of the premises or its representative.

However, this type of investigations may only be conducted at the request of the European Commission, the French Ministry of Economy or the Head of Investigation of the FCA, and after a court authorization taking the form of an order issued by the LCJ of the First Instance Court having jurisdiction over the territory where the to-be-searched premises are located.

The provisions set forth in Article L. 450-4 of the French Commercial Code stipulate that the LCJ must first verify that the request submitted to him/her is properly grounded. They also stipulate that the search and the seizure operations are carried out under the authority and control of the LCJ and that the latter must designate a case-handler who will appoint the law enforcement officers who will be responsible for attending the operations, providing support by making the appropriate requisitions, and keeping the judge informed of the progress of the operations. Lastly, still pursuant to the above-mentioned Article L. 450-4, the LCJ may go on location during the investigations and decide to suspend or stop the raid at any time.

2. The concerns associated with the role of the LCJ in the commented case

In the commented case, the question arose as to whether the investigated company could, during the search and seizure operations, directly petition the LCJ in charge of the control of such operations in order to inform him/her of a concern related to the seizure of materials covered by the client-attorney privilege (i.e. legal professional privilege, hereinafter “LPP”).

Indeed, during the raid, the FCA agents seized all of the e-mailboxes and archived emails of a number of employees, including the CEO, the administrative and financial officer and the regulatory affairs manager.

The company’s lawyer, who was present during the search and seizure operations, drew the FCA agents’ attention to the fact that the seized materials included correspondence and documents covered by the LPP as well as correspondence and exhibits concerning the exercise of the rights of the defense in a dispute that was pending before a court of law. He invited the agents to carry out a keyword search in order to extract such

correspondence and documents before the seizure. The agents refused to do so, and they also refused to note this request in the minutes of the search and seizure operations.

At 6:15 p.m., while the operations were still underway, the company's lawyer went to the First Instance Court to notify the LCJ of this concern. As the latter was not present, a member of the Public Prosecution Department contacted him by phone but the LJD refused to talk to the lawyer and said that he should come back the next day during the opening hours of the clerk of the First Instance Court.

The lawyer was of course dissatisfied with this answer since the LCJ's responsibility to control the search and seizure operations ends when such operations are duly completed. While the operations were far from being completed at 6:15 p.m. (they were completed at 00:25 a.m.), they would necessarily be over the next day.

The company thus brought the matter to the First President of the Court of Appeals and requested that the search and seizure operations be invalidated. The First President granted this request on the ground that the company, entitled to go to the LCJ without the intermediary of the law enforcement officers, had not fully and effectively benefited from the fundamental guarantee of control of the operations by the LCJ whereas it had raised serious concerns related to the seizure of client-attorney correspondence.

This is the order of the First President that was quashed by the *Cour de Cassation* in the commented decision.

To the best of our knowledge, this is the first time that the *Cour de Cassation* set out the principle according to which *"the occupant of the premises does not have the right to go itself to the judge that has authorized the raid and the seizure operations, as the law enforcement officers responsible for attending the operations must, during the raid, keep said judge informed of any difficulties encountered"*.

3. Consequences of the commented decisions for companies subject to raids and search and seizure operations

As a result of the above, according to the *Cour de Cassation*, whatever the concern(s) raised during the search and seizure operations, the investigated company or its lawyer may raise such concern(s) to the LCJ only by asking the law enforcement officers to refer them to the LCJ, and may not complain directly to him/her.

If the law enforcement officers refuse to raise the concern(s) to the LCJ, the company may not obtain the suspension or the discontinuation of the search and seizure operations but merely request *a posteriori* the First President of the Court of Appeals to invalidate such operations within 10 days from the delivery or receipt of the minutes of the operations and inventory drawn up onsite by the FCA agents^[2].

It should be underlined that the seized materials are kept until a final decision is made, and that the action before the First President of the Court of Appeals has not a suspensive effect, which means that the proceedings before the FCA will continue in the meantime.

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In any event, even if, in the commented case, the law enforcement officers had, during the search and seizure operations, agreed to reach the CLJ to inform him/her of the concerns related to the seizure of confidential materials, the CLJ would probably have refused to set aside these materials. Indeed, according to a recent case-law, FCA agents are entitled to seize any document and IT storage medium (hard drive, email accounts, etc.) insofar as this possibility has been granted in the order issued by the CLJ, that the seized files are unseverable, useful to establish evidence of the suspected conduct(s)/practice(s)[3], identified and listed, that a copy of the medium that contains the inventory be delivered to the investigated company and the files be then placed under seal. It is up to the investigated company to appeal *a posteriori* to the First President of the Court of Appeals to seek the annulment of the seizure of the documents held confidential[4], and not of all the seizures carried out.

[1] Criminal Chamber of the *Cour de Cassation*, March 9, 2016, n°14-84566

[2] Article L. 450-4 §12 of the French Commercial Code

[3] Criminal Chamber of the *Cour de Cassation*, December 14, 2011 n°10-85293; Criminal Chamber of the *Cour de Cassation*, November 14, 2013 n°12-87346

[4] Criminal Chamber of the *Cour de Cassation*, November 27, 2103, n°12-85.830

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