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The rules governing appeals against orders authorizing search and seizure operations held non-compliant with article 6§1 of the ECHR

On several occasions (i.e. on June 21, November 2 and 15, 2011)[1], the *Cour de Cassation* (French Supreme Court) quashed, by virtue of Article 6§1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights, hereinafter "ECHR"), three judgments handed down by the Paris Court of Appeals; such decisions rejected the appeals lodged against orders authorizing search and seizure operations that had been issued by the so-called *Juge des libertés et de la détention* (liberty and custody judge, hereinafter the "Judge") on the basis of presumed anti-competitive practices.

Through these three decisions, it is in fact the Ordinance of November 13, 2008 ("Ordinance")[2], and thus indirectly the French legislator, that are sanctioned today for not having met the fair trial requirements set forth in Article 6§1 of the ECHR.

Reminder of the rules governing recourses against orders authorizing search and seizure operations

In our December 2008 e-newsletter, we outlined why the Ordinance significantly strengthened the rights of defendants wishing to challenge the legality of search and seizure orders issued against them.

This Ordinance, which introduced – at last – a second-tier appeal system against the decisions of the Judge authorizing raids was by no means a random choice.

The introduction of this recourse had become necessary because of the *Ravon* judgment[3] rendered by the European Court of Human Rights on February 28, 2008 in which France was found guilty of violating the ECHR for providing only the possibility to lodge an appeal before the *Cour de Cassation* against orders authorizing search and seizure operations in tax-related cases. This recourse before the *Cour de Cassation* was not to be regarded as "*an effective judicial review, in law and in fact, of the legality of the orders*" and "*consequently, such recourse, whose review is limited to questions of law, does not enable a review of the facts on which the search and authorizations were founded*".

The French legislator, who was under pressure after the publication of this judgment, felt obliged to remedy the procedural insufficiencies with respect to recourses against orders authorizing raids in tax-, customs- and competition-related matters. Hence, the adoption of the Ordinance.

For all pending procedures, Article 5, IV of the Ordinance stipulates that: "*if the search and seizure authorization has not been appealed against before the Cour de Cassation or if an appeal has been lodged but rejected by the Cour de Cassation,* another appeal challenging the authorization is available before the Paris Court of Appeals *pursuant to Article L.464-8 of the French Commercial Code*[4]*, except in cases for which an irrevocable decision has been rendered on the date of publication of this Ordinance".*

Under these transitional provisions, defendants can therefore lodge an appeal before the Paris Court of Appeals against the order authorizing the search and seizure operations, provided however that the defendant has already lodged an appeal on the merits before this same Court against the decision rendered by the French Competition Authority.

This restriction to the exercise of the right to lodge an appeal against orders authorizing raids was obviously likely to become a concern for the European Court of Human Rights that has always been striving to guarantee an effective judicial review to citizens.

This is in this context that, two years after the judgment of the ECHR, the transitional provisions of the Ordinance – that was supposed to improve judicial review – are questioned and held non-compliant with the fair trial principle set forth in Article 6§1 of the ECHR.

The transitional provisions set forth in Ordinance n°2008-1161 of November 13, 2008 held non-compliant with Article 6§1 of the ECHR

The three aforementioned decisions of the *Cour de Cassation* were issued in the wake of a judgment rendered on December 21, 2010[5] by the European Court of Human Rights according to which the transitional provisions set forth in the Ordinance – introducing a judicial review of the orders authorizing search and seizure operations by the same court as the one ruling, for the same case, on the merits, on the decision rendered by the French Competition Authority – did not meet the requirements set forth in Article 6§1 of the ECHR.

In a statement identical in each of the three decisions, the *Cour de Cassation* held, in turn, that *"the examination of the existence of presumed anti-competitive practices which triggered search and seizure operations by the same court as that required to rule on the merits of the complaints raised and the sanction ordered in relation to such practices is likely to cast a reasonable doubt on the court's impartiality".*

In its November 15, 2011 decision, the *Cour de Cassation*, transcribing word for word the legal grounds put forth by the Paris Court of Appeals in its judgment, stressed the high risk of impartiality created by the fact that a same Court (i.e. the Paris Court of Appeals) would rule both (i) on the legality of an order authorizing search and seizure operations issued on the basis of presumed anti-competitive practices, and (ii) on the merits of the appeal lodged against the decision of the French Competition Authority that fined the relevant companies for anti-competitive practices after the raid had been carried out.

As such, the *Cour de Cassation* specified that *"to reject the appeal lodged by the company Véolia transport against the order authorizing search and seizure operations issued on December 17, 1998 by the President of the First Instance Court, the challenged judgment pointed out that despite the sanction decision handed down in the meantime by the Competition Council (the Competition Authority's predecessor), such a recourse meets the requirements of Article 6§1 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the* right to a fair trial, ***insofar as the Court of Appeals merely checks, independently of the merits of the case and without any prior assessment of the well-founded nature of the complaints raised and sanction ordered,*** *whether the judge who authorized the search and seizure operations did so (…) on the basis of a sufficient presumption of anti-competitive practices".*

Yet, in reality, how can we expect the Paris Court of Appeals (that must, in parallel, rule on the well-founded nature of the French Competition Authority's decision that sanctioned the concerned companies) to sufficiently distance itself from the merits of this sanction decision (that implicitly endorsed the search and seizure operations carried out) in order to check whether these search and seizure operations were *prima facie* justified?

In its sanction decision, the French Competition Authority not surprisingly pointed out conclusive evidence derived from the conducted raids in order to ground its complaints and justify the imposed sanctions.

In these conditions, it is difficult to imagine how the Paris Court of Appeals – fully aware of grounds of the complaints – could ignore them and verify retrospectively and in all objectivity whether the Judge who authorized the search and seizure operations had, at the time he took his decision, sufficiently reliable elements to substantiate his "presumption" of anti-competitive practices.

As such, requiring the Paris Court of Appeals to act with impartiality amounts to expecting it to be both schizophrenic and amnesic; it is thus legitimate and perfectly sound that the *Cour de Cassation* – quite diplomatically and following the example of the European Court of Human Rights – considered that the examination, by the same Court, of two recourses so connected with each other was "*likely to cast a reasonable doubt on the court's impartiality*".

According to the *Cour de Cassation*, it is up to the Paris Court of Appeals, when asked to rule simultaneously on an appeal against an order authorizing search and seizure operations and on an appeal on the merits against the decision handed down by the French Competition Authority in the same case, to make sure that these two appeals are heard and adjudicated by two separate and distinct benches – which supposes two court compositions comprising experienced judges familiar with anti-competitive practices.

This time, the requirements of the *Cour de Cassation* converge with the legislator's will to create specialized courts[6].

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[1] Commercial Chamber of the *Cour de Cassation*, June 21, 2011, appeal n°09-67793
Commercial Chamber of the *Cour de Cassation*, November 2, 2011, appeal n°10-21103
Commercial Chamber of the *Cour de Cassation*, November 15, 2011, appeal n°10-20527, 10-20851, 10-20881

[2] Ordinance n°2008-1161 on the modernization of competition regulation

[3] ECHR, February 21, 2008, n°18497/03

[4] Pursuant to Article L.464-8 of the French Commercial Code "*the Competition Authority's decisions (…) are notified to the parties concerned and to the Minister of Economy, who may, within one month, lodge an appeal before the Paris Court of Appeals to obtain the nullification or the reversal of such decisions*".

[5] ECHR, December 21, 2010, 29408/08

[6] Cf.Decree No. 2005-1756 of December 30, 2005 laying down the list and the jurisdiction of special courts in competition matters, industrial property and insolvency
Decree 2009-1384 of November 11, 2009 on the specialization of courts in citizenship disputes and practices that restrict competition

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