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# Seizures of electronics data: The Cour de Cassation indirectly validates the investigation methods applied by the French Competition Authority

## Two decisions of the *Cour de cassation* (French Supreme Court) dated January 18, 2011[1] dashed the hopes of lawyers and their clients on the possibility to request the invalidation of seizures of electronic data when documents covered by the client-attorney privilege (i.e. legal professional privilege, hereinafter "LPP") happened to be seized.

Even though the two cases concerned seizures carried out by French Tax Authorities' investigators, they seem to be transposable to the investigation methods applied by the *Autorité de la concurrence* (French Competition Authority or hereinafter "FCA") as the *Cour de Cassation* seemed to indirectly validate such methods in the aforementioned decisions.

In the two cases at hand, the companies where the challenged seizures were carried out requested the nullification of the bailiffs' seizure reports, arguing that documents covered by the LLP had been seized and that this illegal seizure should result in the invalidity and nullity of all elements contained in the seized e-mail account – due to the indivisibility and unseverability of e-mail accounts (the French Tax Authorities' preferred argument to justify mass seizures of electronic documents).

In the above-referred decisions, the *Cour de Cassation* rejected this argument and considered that the seizure of documents covered by the LLP does not result in the nullity of the whole bailiff's seizure report. It rules that "*the presence in an e-mail account of messages covered by the legal professional privilege does not have the effect of nullifying the seizure of the other elements contained in such e-mail account*".

It also added that *"Even though it is alleged that some of the documents seized at the law firm office were covered by the legal professional privilege, the production of such documents must be ordered, without nullifying the bailiff's seizure report, only the seizure of these documents being likely to be nullified and the*

*return of such documents likely to be ordered".*

According to the *Cour de Cassation*, the unseverable nature of the e-mail account does not allow inferring that the illegality of the seizure of some messages should result in the nullity of the whole documentation that has been seized; only the illegal seizure of protected documents must be invalidated, even if the e-mail account forms an unseverable whole.

The position adopted by the *Cour de Cassation* – that reinforces the FCA's choice to carry out mass seizures of electronic data – seems a particularly conservative stand on an issue that becomes more and more debated.

Indeed, the seizures of electronic data carried out by the FCA are increasingly criticized – quite legitimately. Its method of carrying out mass seizures obviously violates the confidentiality of communications between clients and their lawyers and the subsequent return of such seized communications by the FCA's investigators only partially compensates for the violation of the secrecy of correspondence at the time of the seizure.

To justify its method, the FCA usually relies on Article L.450-4 of the French Commercial Code pursuant to which seizures can apply to "*any data medium*" (including CD, DVD-ROM but also the hard drive itself) and claims that carrying out a mass seizure is the only way to prevent the alteration of the authenticity and integrity of messages; in addition, regarding the principle of secrecy of correspondence, the FCA also considers that the *a posteriori* return of "protected" documents is a sufficient guarantee offered to companies, insofar as the relevant company expressly requires the classification of these documents as business secret.

This justification is neither satisfactory nor likely to reassure companies whose "protected" electronic documents have been seized.

At the time the documents are seized, the damage is already done: how to guarantee that the messages covered by the LPP and read through by the FCA's investigators will not influence – even after such messages have been returned – the FCA's perception of the investigated antitrust practices? And, even beyond, concerning the protection of the secrecy of correspondence, mass seizures of electronic data clearly infringe the rights of defendant companies.

Recently, the Paris Court of Appeals itself seemed to have heard the criticisms formulated by companies and their legal counsels on mass seizures of electronic data and ordered an expertise to study the possibility to carry out a selective seizure of emails[2]. Apparently sensitive to the arguments raised by a company whose documents had been seized, the Paris Court of Appeals considered that the latter *"explains in a plausible way the existence of a method of seizing electronic data and e-mail boxes and of an electronic inventory system that would – subject to all necessary reservations – reconcile the effective rights of the defense with a literal interpretation of Article 56 of the French Code of Criminal Procedure and Article L.450-4 of the French Commercial Code".*

Just like corporations and their legal counsels, the Paris Court of Appeals seems to call for a method of seizure that should "*at the same time preserve the authenticity and integrity of the seized elements and the contents*

*of searched computers (…), enable a legal and practical control of seizure operations by the parties involved in the seizure process and by competent courts, and guarantee to the searched company the possibility to withdraw documents that are unconnected with the investigation or that are covered by legal secrecy before such documents are analyzed by the investigators".*

This possibility to return the seized messages before they are analyzed by the investigators sounds like a reference to the practices implemented not only by other European competition Authorities but also by the European Commission itself (cf. the sealed envelope practice). Even French criminal law seems to provide – to a lesser extent – for this possibility that the FCA has so far refused to implement.

Precisely, pursuant to Article 56 of the French Code of Criminal Procedure, it is possible to place seized objects and documents under official seals if an on-site inventory turns out to be impossible, it being specified that the seals can then only be opened in the presence of the person who has witnessed the search and seizure operation.

As such, apart form the aforementioned decisions of the *Cour de Cassation*, we can therefore still nurture the hope to see the FCA change the way it carries out seizures of electronic data.

In view to preparing his report on potential alternatives to mass seizures of electronic data, the expert appointed on November 2, 2010 by the Paris Court of Appeals is required to obtain technical documentation from other competition authorities (the Dutch Competition Authority, the European Commission or the International Competition Network) on the methods they use to carry out such seizures and to provide any elements likely to enable the President of the Paris Court of Appeals "*to technically assess the possibility to proceed with a selective seizure of e-mails in the email box without jeopardizing the authenticity of such messages*".

Needless to say that the expert's report is eagerly awaited…

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[1] Decision of the Commercial Chamber of the *Cour de cassation* dated 18, 2011; appeals n°10-11778 and 10-11777

[2] Court Order dated November 2, 2010

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