

Dawn raids in competition investigations: no direct access to the judge for the visited businesses

[↗](#) Criminal chamber of the Cour de cassation, March 9, 2016, n°14-84.566

Within the framework of its role as market watchdog, the French Competition Authority (the “FCA”) has broad investigative powers. In particular, Article L.450-3 of the French Commercial Code allows FCA officials, when authorized by the judge of liberty and detention (the “JLD”), to enter the premises of businesses targeted by such investigations and to proceed with the seizure of all documents “which facilitate the accomplishment of their mission”. These powers of investigation and seizure are, however, governed by Article L.450-4 of the same Code, which reads as follows: “The visit and seizure are carried out under the authority and control of the judge who authorized them.”

The question has been raised as to whether this provision grants businesses the right to refer the difficulties encountered during these visits directly to the JLD. In a decision dated March 9, 2016, the French Court of Cassation replied in the negative, pointing out that it was the responsibility of the investigating police officer (the “IPO”) present during these visits to inform the judge of any such difficulties. In two other decisions delivered the same day, the court also indicated that the right to contest the JLD’s decision to authorize these visits and seizures before the Chief Judge of the Court of Appeal was sufficient to guarantee an effective judicial remedy.

These decisions raise two major problems. On the one hand, they impose a filter between the company visited and the judge, that is, the IPO. On the other hand, they exclusively allow an ex post facto recourse against these operations, which would in no way prevent the seizure of documents that should not be seized in the first place, such as attorney-client correspondence, and would allow them to be returned only a posteriori.

In a decision issued on July 8, 2016, the French Supreme Court confirmed that this position did not violate the rights provided in the Constitution. A claim before the European Court of Human Rights now appears to be the only way to obtain recognition that the absence of an immediate and autonomous judicial remedy against the investigative measures of the FCA’s officers constitutes a violation of the rights of defense and the right to a fair trial.