



BRUSSELS À JOUR

## Casino Royale

### The European Court of Human Rights Weighing in on Companies' Rights of Defense in Commission Inspections

In recent years, European Commission dawn raids conducted with the support of national authorities have been a bone of contention before the European Court of Human Rights ("ECtHR"). Interestingly, in most of these cases, it was France which the ECtHR found to have infringed upon the European Convention on Human Rights ("ECHR"). Venturing beyond the mainstream antitrust space, this edition of Brussels à Jour is reflecting on the Casino case, the latest addition to that list. The case unveils potential loopholes that the regime governing Commission inspections (Article 20 of Regulation 1/2003) and the interplay between the judicial review in Luxembourg and at Member State level might create.

#### Background of the case

In February 2017, the Commission, with the help of French officials, conducted dawn raids in France as part of a probe into potential collusion in the grocery retail sector. Casino, one of the firms targeted by the Commission, filed appeals before Paris and EU courts against the dawn raids.

The appeals were rejected by two French courts holding that the dawn raids were legal and that the companies' rights had been sufficiently safeguarded. In *Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) v Commission* (T-249/17, 5 October 2020), in *Intermarché Casino Achats v Commission* (T-254/17, 5 October 2020) and in *Les Mousquetaires and ITM Entreprises v Commission* (T-255/17, 5 October 2020), the EU's General Court also ruled that the dawn raids had not violated the companies' fundamental rights. It did, however, find fault with a part of the Commission's justification for carrying out the inspections. According to the Court, the Commission had not



provided sufficient evidence for the alleged anticompetitive coordination and thus infringing the companies' right to the inviolability of the home. The judgments are currently under appeal before the Court of Justice (C-690/20 P, C-693/20 P and C-682/20 P).

Casino also lodged a complaint with the ECtHR, arguing that the dawn raid was not subject to effective judicial review in France, and that EU law did not allow them to challenge the inspections efficiently. If it had opposed the dawn raid, the company could have gone to court in France to challenge the search warrant. However, the companies chose to allow the inspection to go ahead, being afraid that, otherwise, they could have been fined under EU law for obstruction of the investigation. As a consequence, Casino argues, its cooperation with the authorities put them in a worse situation than if they had obstructed the dawn raid. In early July 2021, the ECtHR addressed a number of questions to the French government and to the retailers asking about how the French courts enable appeals against inspection warrants.

#### To oppose or not to oppose ...

Article 20 of Regulation 1/2003 authorizes the Commission to conduct inspections at the premises of companies that it suspects to be involved in anticompetitive behavior. If ordered by a formal Commission decision, companies are under a legal obligation to submit to such inspections. If they do not, the Commission can sanction firms in accordance with Article 23(1) of Regulation 1/2003 and/or consider their (alleged) obstruction as an aggravating factor when determining the fine to be imposed if the Commission ultimately succeeds in proving an antitrust violation. At the same time, the Commission can seek the assistance of national officials to overcome a firm's obstruction, for example by having them force the inspectors' way into the premises. If, in order to lend such assistance, national officials require a judicial authorization – a search warrant – they may apply for that authorization in advance as a precautionary measure. The national judges' jurisdiction extends to confirming the authenticity of the Commission's inspection decision and establishing that the proposed coercive measures are neither arbitrary nor disproportionate. They must not, however, question the necessity of the inspection as such.<sup>1</sup>

The *Casino* case reveals how that interplay between the Commission's and national enforcer's investigative powers, and between the judicial review of these powers by the EU's and the Member States' courts can create real loopholes in companies' rights of defense. At a national level, in *Bureau Veritas*, *Bull. Crim.*, the French Supreme Court held that a search warrant can be requested preventively if necessary to overcome a firm's opposition during a dawn raid. However, if such a preventive warrant has been issued, but not used (because the searched company subjected to the dawn raid), the French judiciary does not have the competence to rule on the legality of the dawn raid operations.<sup>2</sup> So, if a company does not oppose the dawn raid, it effectively "waives" its right to appeal in the French courts. This is what happened in *Casino*.

<sup>1</sup> Article 20(6)-(8) of Regulation 1/2003.

<sup>2</sup> See Cass., crim. 2 June 2010, nr. 08-87.326, *Bureau Veritas*, *Bull. Crim.* 2010, no. 100.



### The issue before the ECtHR

France has a track record of cases before the ECtHR in relation to inspection warrants, both regarding natural and legal persons. Its track record culminated – so far – in *Ravon and Others v. France case*<sup>3</sup> which concerned searches of premises in tax-related cases. There, the Court held that the applicants had not had access to a “tribunal” in order to challenge the lawfulness of the searches to which they had been subjected, in breach of Article 6 ECHR. As a consequence, the French authorities amended the domestic legislation in November 2008 to enable persons who had been subjected to a search to appeal the authorization decision. However, in the *Casino* case, the core issue is whether there is right to judicial review if a dawn raid is not opposed and the authorization is not used, a scenario that the ECtHR has not explored yet.

Based on the replies to its questions, the ECtHR will need to determine whether the substantial guarantees and judicial supervision offered by France can be considered at least equivalent to those of the ECHR.<sup>4</sup> It might be the case that the ECtHR will hand out its judgment as early as 2023 and, based on its previous judgments against France regarding dawn raids, will find it in infringement of the guarantees and judicial supervision as provided in the ECHR. Going forward, the French government will have to fill the current legislative loophole by creating a judicial review mechanism for cases where the dawn raid authorizations are not enforced during the inspection.

### Will there be EU-level ripple effects to the *Casino* case?

Not excluded. If successful, *Casino*’s appeal will broaden the rights of defense of companies subject to dawn raids in France by allowing the enforcement of Article 20(8) of Regulation 1/2003, which is currently not possible. These companies will have recourse to French courts for review of the proportionality of coercive measure and the authenticity of the Commission’s inspection decision. However, while the ECtHR judgment is only addressed to the French authorities, any legal doctrine that the ECtHR might establish will become a general principle of EU law in accordance with Article 6(3) TEU and, as such, bind the EU courts when adjudicating of future Commission inspections. A successful complaint would also raise the question what, if any, consequences the previous shortcomings in the French legislation has for evidence that the Commission seized during the dawn raid. Article 20 of Regulation 1/2003 is silent on any repercussions and European Courts have – to date – not taken a view in this respect either.

The *Casino* case might also afford the ECtHR an opportunity to weigh in on the perhaps more fundamental issue in which circumstances – if at all – it might be permissible to sanction a company for insisting to see a national search warrant in addition to the Commission’s inspection, without otherwise obstructing the investigation. In *Deutsche Bahn v Commission*, the General Court had proclaimed a “right to oppose” under Article 20(6) of Regulation 1/2003 as one of the safeguards that rendered the Commission’s inspection powers compatible with Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 ECHR even though it does not, as such, require prior judicial authori-

<sup>3</sup> Case no. 18497/03, *Ravon and Others v. France*, 21 February 2008.

<sup>4</sup> See case 45036/98, *Bosphorus Airways v Ireland*, 30 June 2005, para 155.



zation.<sup>5</sup> However, the basis and scope of that “right to oppose” remain vague, and a company may well shy away from asserting that right in view of the hefty sanctions that it might face if the Commission considers the company to “overreact”. Since the *Deutsche Bahn v Commission* is based on ECtHR case law, namely *Harju v Finland* and *Heino v Finland*,<sup>6</sup> the ECtHR could use the *Casino* case to clarify what the ECHR’s requirements are for a “right to oppose” – if any. Of course, there is a fair chance that the ECtHR does not “pick up the ball”.

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<sup>5</sup> T-289/11 et al., *Deutsche Bahn et al. v Commission*, ECLI:EU:T:2013:404, 6 September 2013, at para82.

<sup>6</sup> Case No. 56716/09, *Harju v Finland*, 15 February 2011 and 56720/09, *Heino v Finland*, 15 February 2011.