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## What is the fate of evidence already collected during a saisie if the authorisation to perform it is later annulled ?

Louis Bidaine, Anya Murphy (Stibbe) and Matthieu Dhenne (Dhenne Avocats) · Thursday, April 25th, 2024

In Belgium, descriptive seizures (called “saisie-description” in Belgium) are long-standing *ex parte* procedures to collect evidence of infringement. When a Court grants a saisie request, the said authorisation can later be opposed by the seized party. The seized party can in particular argue that IP right invoked was not *prima facie* valid. By the time a decision is issued in the procedure launched by the seized party (and in the potential subsequent appeal procedures), the right holder may already have been given access to the report describing the evidence collected or the report may have been put under escrow.

What if the authorisation is then annulled : can the right holder (continue to) use the evidence? The question may seem trivial and one might be inclined to answer negatively. Yet, over the years, this question has received various answers from the Belgian Courts before finally finding its way up to the Supreme Court of Belgium.

One of the reasons this issue has been under debate is that under Belgian law, evidence which has been illegally obtained may still be used in proceedings under certain conditions (the so-called *Antigone* jurisprudence) : the use of such evidence is allowed unless an express provision of the law provides otherwise, or if the obtaining of the evidence prejudices its reliability or compromises the right to a fair trial.

In its [decision of 14 March 2024](#), in *Prefamac and others v Autodesk and others*, the Supreme Court of Belgium found that if a Court rules that a saisie should not have been authorised, the order granting such a saisie should be annulled and the effects of this annulment should also extend to the evidence obtained. Consequently, the evidence can no longer be used in proceedings on the merits even if the requirement of the *Antigone* case-law are fulfilled. For the time being, the controversy therefore appears to have been settled. Based on this decision, if an opposition is successful, the seized party could request that the collected evidence be returned and/or that the report describing the collected evidence be destroyed. If the decision annulling said order is still appealable, the right holder could request that the report be put or kept under escrow pending the appeal.

While the fate of such evidence was only recently clarified in Belgium, the solution appears somewhat more straightforward in other jurisdictions.

Matthieu Dhenne, French patent litigator, kindly offered to summarise how this situation is handled in France, since the French “*saisie-contrefaçon*” system is quite different to the Belgian one in certain respects. In particular, the grounds for retraction are not the same : only the disproportionality of the granted measures and unfairness are grounds for retraction. These considerations also transpire in the UPC mechanism, which also requires a proportionality and fairness review, as evidenced by the decisions handed down (see [here](#) and [here](#)). Unlike Belgium, the validity of the right invoked is not a consideration under French law. In France, there has also been an emergence of subsidiary requests to maintain seals affixed on the grounds of trade-secrets protection. Retraction is therefore particularly rare in France, not only because the retraction judge is the one who issued the order, but also perhaps because the (*prima facie*) validity of the right cannot be challenged at this stage. In any case, withdrawing the order implies that the *saisie* itself is null and void, and that consequently all the items collected are returned to the seized parties. A partial retraction, on the other hand, would mean that only certain items would be handed back. Hence, the recent decision of the Belgian Supreme Court seems to align with the solution which is retained by French Courts.

In the UPC system, an order to preserve evidence and to inspect premises may also be subject to review in order to determine whether the measures are to be modified, revoked or confirmed. While certain rules do govern the revocation or the modification of the order (see notably 60(9) UPCA and rules 197(4) and 198(2) RoP), neither the UPCA nor the RoP expressly prohibit the use of evidence collected by means of an order that is subsequently revoked or modified.

In the cases UPC CFI NO. 286/2023 and NO. 287/2023 (*Progress Maschinen & Automation v AWM and others*), the Milan local division of the Court of first instance of the UPC received a request by the right holder to access expert reports filed in pursuance of orders for preserving evidence and inspection by the same court. The Court had indeed decided that the right holder had to request access to the expert reports within a certain time-frame. In its decision of 8 April 2024, the Court recalled that the reports could only be used in proceedings on the merits and that the access to the reports was consequently limited to such proceedings against the same parties. The Court found that the applicant had irretrievably failed to start proceedings on the merits within the prescribed deadlines. The Court ruled that the request for access therefore had to be dismissed because the applicant could not use its contents in the only permissible lawful manner.

Although the Court subsequently granted the defendants’ request that the evidence collected be returned, it ruled that the said measure would only be effective after a certain lapse of time to give the applicant sufficient possibility to lodge an appeal and to apply for suspensive effect. If an appeal is filed, it will give the Court of Appeal an opportunity to determine the fate of the evidence collected if the order to preserve evidence is later revoked. Assuming the Court of appeal confirms the first decision, it would remain to be seen whether the same solution should apply if the order is revoked for any other reason. The decision of the Belgian Supreme Court of 14 March 2024 and the French case-law might then serve as a guidance.

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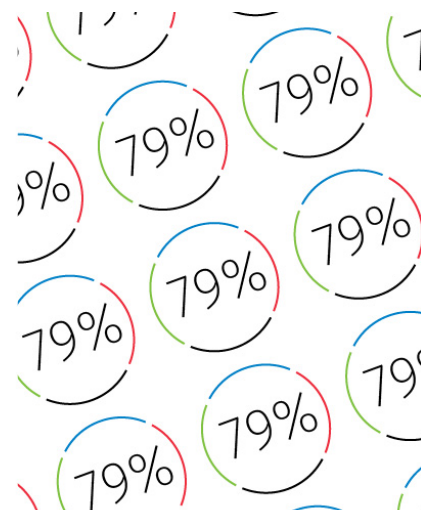
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