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French Competition Law Newsletter

Highlights

— The French Competition Authority publishes its third study on the leniency procedure

— The French Supreme Court confirms that the FCA may seize attorney-client documents not prepared for a client's defense in ongoing or anticipated proceedings

The French Competition Authority publishes its third study on the leniency procedure

On January 9, 2026, the French Competition Authority ("**FCA**") published the results of its third study on the French leniency procedure.[1] The Study publishes feedback from more than 60 competition law practitioners on (i) the impact of procedural changes introduced in 2023, (ii) the key factors that encourage or discourage undertakings from applying for leniency, and (iii) the impact of potential follow-on damage actions on leniency applications. The FCA will determine on the basis of the responses whether and how to adapt its leniency program.

Background

The FCA last reformed its leniency procedure in December 2023.[2] The reform implemented the "DDADUE" law, which transposed the ECN+ directive[3] harmonizing the leniency procedure at EU level.[4]

The Study notes several general trends:

— First, the number of leniency applications has increased steadily in recent years, at an average of 45% per year since 2020.[5]

[1] French Competition Authority, *3ème étude relative au programme de clémence* ("**Study**"). Previous studies in 2014 and 2018 have assessed the French leniency procedure.

[2] French Competition Authority, Communiqué de procédure du 15 décembre 2023 relatif au programme de clémence français (the "**Revised Leniency Guidelines**"). For more information, see French Competition Law Newsletter article "*The French Competition Authority publishes its revised leniency guidelines*" of December 15, 2023, available here.

[3] Law No. 2020-1508 of December 3, 2020 concerning various provisions of adaptation to European Union law in economic and financial matters ("**DDADUE law**").

[4] Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ("**ECN+ directive**"), transposed into French law by Decree No. 2021-568 of May 10, 2021 and Order No. 2021-649 of May 26, 2021

[5] The Study, p. 6.

— Second, the scope of sectors covered in leniency applications has expanded. While they initially mostly concerned traditional sectors such as equipment, construction, consumer goods, and agri-food, leniency applications now extend to all types of sectors.[6]

Third, reported practices are increasingly complex. Applications covering cartels for pure price-fixing or market-sharing agreements are now relatively rare.[7]

— Finally, leniency applicant profiles have considerably evolved in recent years. French applicants were still relatively uncommon as recently as five years ago. Today, they represent 30% of applications, ahead of US (20%), German or Dutch (11.5% each), and Swiss firms (7%).[8]

Observations on the operation of the new leniency procedure

The Study sought observations on two changes introduced by the 2023 Revised Leniency Guidelines:

— The *Rapporteur Général*, rather than the FCA's Collège, was granted the ability to examine leniency applications and define ranges for fine reductions. 72% of practitioners considered the change has contributed to improving the leniency's procedural efficiency. Respondents valued the *Rapporteur Général's* new responsibility to authorize continued participation in the practices pending the *Collège's* formal approval of the leniency application. Under the previous procedure, parties faced significant uncertainty pending the *Collège's* approval of the leniency application as they continued to engage in prohibited practices in the meantime.[9]

— The possibility of submitting a leniency application through a secure electronic form was introduced, complementing the existing options (*i.e.*, applying by registered letter with acknowledgment of receipt or orally, by telephone or in person at the FCA). A majority of respondents (53%) welcomed the possibility of submitting leniency applications via a secure electronic form, although 70% of practitioners have favored in-person meetings at the FCA's premises when reporting cartel practices.[10]

Factors deterring/prompting leniency applications

The Study identified the following main factors as deterring leniency applications:

— The "psychological barrier" of acknowledging an involvement in unlawful practices that can damage a firm's reputation and entail civil liability. Respondents suggested that leniency applicants should benefit from additional anonymity measures to avoid reputational risks and potential retaliation, for example by not publishing a decision in cases where a leniency application was made to avoid revealing the identity of the leniency applicant.[11]

— The fear of criminal prosecution, as criminal immunity applies only to executives of leniency applicants that are granted full immunity.[12] Employees are otherwise subject to criminal sanctions.[13]

[6] *Ibid*.

[7] *Ibid*.

[8] The Study, p. 4.

[9] The Study, pp. 8-9.

[10] The Study, pp. 10-11.

[11] The Study, p. 27.

[12] The Study, p. 28. *See also* Article L. 420-6-1 of the French Commercial Code.

[13] Article L. 420-6 of the French Commercial Code.

The Study identified the following incentives to promote leniency applications:

— Fine reductions are the most effective incentive to leniency applications.[14]

— These are followed closely by the initiation of investigations[15] and dawn raids,[16] as well as by the perceived detection risk,[17] and the filing of leniency applications with another competition authority.[18]

— Less significant factors include compliance programs within the company,[19] and due diligence conducted before or after a merger,[20] which can help detect violations.

— Mistrust among cartel members and the cartel's lack of profitability[21] are only moderately likely to prompt a leniency application. The perspective of a change in the company's market position[22] and the potential improvement in the company's image following the submission of a leniency application[23] are also less significant factors.

The impact of potential follow-on damage claims

Finally, the FCA inquired about the impact of the risk of follow-on damage actions on incentives to apply for leniency after the transposition into French law of provisions of the ECN+ and Damages directives.[24] The French Commercial Code now exempts from civil liability leniency applicants that have received full immunity from a fine if (i) a victim of the practice did not contract "*directly or indirectly*" with the applicant, and (ii) the victim of the anticompetitive practice was able to obtain damages from other parties to the infringement.[25] It also prohibits judges from ordering the production of self-incriminating statements submitted in a leniency application.[26], [27] Nevertheless, despite this limited immunity from civil liability, the Study reports that 93% of respondents indicated that the risk of follow-on actions still deters firms from submitting leniency applications.[28]

The Study also tested the possibility of introducing broader civil immunity provisions, as envisaged by the *Monopolkommission* in Germany, whereby firms granted full immunity would be shielded from damages actions if victims can obtain damages from other parties to the practices.[29] A majority of respondents (67%) favored this proposal, while a minority raised the concerns that (i) it could undermine victims' compensation rights as firms that are granted full immunity are, in practice, most likely to settle; (ii) firms could exploit this tool to eliminate competitors, as they would have to pay damages without being able to bring a claim against the first leniency applicant; and (iii) the measure could discourage other leniency applicants.[30]

[14] The Study, p. 12.

[15] The Study, p. 13.

[16] The Study, p. 17.

[17] The Study, p. 13.

[18] The Study, p. 14.

[19] The Study, p. 15.

[20] The Study, p. 16.

[21] The Study, p. 17.

[22] The Study, p. 18.

[23] The Study, p. 17.

[24] Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("**Damages directive**"), transposed into French law by Order No. 2017-303 of March 9, 2017.

[25] Article L. 481-11 of the French Commercial Code.

[26] Article L. 483-5 of the French Commercial Code.

[27] For more information, see French Competition Law Newsletter article "*The French Competition Authority publishes its revised leniency guidelines*" of December 15, 2023, available here.

[28] The Study, p. 19.

[29] The Study, p. 25.

[30] The Study, pp. 26-27.

Conclusion

The recent increase in leniency applications since 2020 suggests that the changes to the leniency procedure introduced in 2023 – such as faster processing of leniency applications and liability limitations in damages actions – have certainly contributed to the upward trend. However, the Study suggests that there remain areas of possible improvement, such as further liability limitations. The FCA will now determine whether to further adapt its leniency practices based on these market responses.

The French Supreme Court confirms that the FCA may seize attorney-client documents not prepared for a client's defense in ongoing or anticipated proceedings

On January 13, 2026, the Criminal Chamber of the French Cour de cassation ("**French Supreme Court**") confirmed its established case law according to which the French Competition Authority ("**FCA**") may seize attorney-client documents covered by legal professional privilege ("**LPP**") where these were not "*prepared for the exercise of a party's rights of the defense*", *i.e.*, to defend a client who committed, or believes it committed, an offense liable to result in ongoing or anticipated judicial or regulatory proceedings and sanctions.[31]

Background

In November 2022, the FCA conducted dawn raids to gather evidence of anticompetitive practices, including potential supply allocation agreements, in the dairy products sector. Two parties challenged the dawn raids before the President of the Paris Court of Appeal, arguing, *inter alia*, that the FCA had seized 77 documents relating to attorney-client communications covered by LPP.[32] The President denied the requests to annul the seizures and order restitution, on two grounds.

First, the President held that the applicants had failed to substantiate with sufficient precision certain documents' connection to "*the exercise of the applicants' rights of the defense*". Second, the President found that a further set of documents bore no connection with the rights of the defense, as they consisted of Excel tables, reports and business contracts that did not appear to have been prepared in connection with pending or anticipated proceedings against the applicants.[33]

Both companies appealed the President's order before the French Supreme Court.

The French Supreme Court's decision

The applicants challenged the Court of Appeal's findings on LPP on two main grounds.

First, they argued that the FCA could not seize privileged documents in dawn raids as the 1971 Legal Professions Statute protects all attorney-client correspondence, irrespective of whether it relates to advice or defense, and no legal provision authorizes the seizure of LPP-protected documents unrelated to the exercise of the rights of the defense. The applicants also submitted

[31] *Cour de cassation*, judgment of January 13, 2026, No. 24-82.390, available here, ("**Judgment**").

[32] Paris Court of Appeal, judgment of March 27, 2024, No. 22/19211, available here.

[33] One of the parties also sought the annulment, in the same proceedings, of the FCA's request that it produce, after the closure of the inspections, certain electronic messages that had not been seized during the inspection. The First President annulled this post-closure production of electronic messaging files on the ground that Article L. 450-4 of the French Commercial Code does not provide for the voluntary submission of files to the FCA after the closure of inspection operations and that such a production constituted a misuse of powers.

that such seizures violate Articles 6 and 8 of the European Convention on Human Rights ("**ECHR**").[34]

Relying on established case law,[35] the Court rejected these arguments and held that attorney-client correspondence is only immune from seizure in FCA inspections where connected to the exercise of the rights of the defense.[36] This connection is established where a client who committed, or believes it committed, an offense consults outside counsel in connection with ongoing or anticipated judicial or regulatory proceedings liable to result in criminal or administrative sanctions,[37] including at the pre-litigation stage. This protection applies to all proceedings in which the client is involved, not merely the specific investigation giving rise to the inspection.[38] Conversely, the rights of the defense are not engaged where a person seeks advice absent any offense, solely to secure a legal position, ensure the compliance of a prospective commercial practice, or identify the risks of a specific situation.[39]

The Court found its case law compatible with the ECHR. As to Article 6, the right to a fair trial is guaranteed both by (i) judicial verification of the administration's application to conduct a dawn raid and seize documents and (ii) review by the Supreme Court. As to Article 8, the Court found that seizing attorney-client correspondence constitutes a "serious interference" with the right to privacy, which however remains justified because such seizure is (i) prescribed by law under Article L. 450-4 of the French Commercial Code, (ii) foreseeable for the individual concerned, (iii) applied in pursuit of the legitimate aim of detecting serious infringements of competition rules, (iv) necessary in a democratic society, and (v) proportionate to that aim.[40]

Second, the applicants argued that the Court of Appeal's ruling was inconsistent with two previous Supreme Court judgments on financial[41] and tax law,[42] that protected legally privileged documents without further requiring a connection with the rights of the defense. The Court rejected this argument and declined to reason by analogy. It held that those judgments addressed the distinct question of whether the documents at issue fell within the scope of legal privilege,[43] not whether a further nexus with the rights of the defense was required for immunity from seizure.[44]

Accordingly, the Supreme Court dismissed the applicants' ground of appeal.[45]

Key takeaways

This judgment confirms that attorney-client communications covered by LPP are not, as such,

[34] Judgment, para. 9.

[35] *Cour de cassation*, judgment of November 25, 2020, No. 19-84.304, available here and judgment of June 25, 2024, No. 23-81.491, available here.

[36] Judgment, paras. 19-20.

[37] Conseil constitutionnel, Decision of January 19, 2023, No. 2022-1030 QPC, para. 11, available here.

[38] Cour de cassation, judgment of January 20, 2021, No. 19-84.292, available here.

[39] Cour de cassation, judgment of March 11, 2025, No. 24-82.517, para. 27, available here; *Cour de cassation*, judgment of September 30, 2025, No. 24-85.517, paras. 28 and 32, available here.

[40] Judgment, paras. 28-31.

[41] *Cour de cassation*, judgment of November 4, 2020, No. 19-17.911, available here. In the area of financial regulation, following a seizure of documents by the French Financial Markets Authority, the Supreme Court's Commercial Chamber held that the Paris Court of Appeal had to conduct a concrete examination of the documents allegedly covered by legal privilege to determine whether or not they could be seized.

[42] *Cour de cassation*, judgment of October 8, 2025, No. 24-16.995, available here. This concrete examination is limited to verifying whether the conditions of attorney-client privilege under the 1971 Legal Professions Statute are met (e.g., that a lawyer has authored a document). In tax proceedings, the Supreme Court similarly held that tax authorities could not lawfully rely on the content of attorney-client correspondence to support a tax assessment, without requiring a specific nexus with the rights of the defense.

[43] The Court noted that in the financial law judgment (*Cour de cassation*, judgment of November 4, 2020, No. 19-17.911, para. 17, available here) the issue was whether documents disclosed to third parties remained covered by legal privilege. Regarding the tax law judgment (*Cour de cassation*, judgment of October 8, 2025, No. 24-16.995, para. 48, available here), the Court found that the issue was whether the tax administration could rely on the documents at issue to support its assessment, and whether the client had waived the benefit of legal privilege by producing those documents in separate proceedings.

[44] Judgment, paras. 25-27.

[45] However, the Supreme Court upheld the FCA's appeal regarding post-inspection document production. The Court ruled that a party's voluntary handover of electronic messaging files after a dawn raid fell outside the scope of Article L. 450-4 of the French Commercial Code, even where the commitment to hand over such files was recorded in the inspection report. The President of the Court of Appeal had exceeded his jurisdiction in annulling the document production. The Supreme Court further held that such production did not constitute an interference requiring an immediate judicial remedy under the ECHR. Rather, its lawfulness could be contested on appeal against the FCA's final decision. Judgment, paras. 45-46, 49-50.

immune from seizure in case of investigations and dawn raids. Two cumulative conditions must be met for those communications to be protected:

— First, **a document must be covered by LPP ex Article 66-5 of the 1971 Statute**. LPP imposes a duty of confidentiality on the attorney and extends to all attorney-client communications, including attorneys' communications to their clients, notes from attorney-client meetings, and exchanges between outside counsel except for those labeled "official", regarding "*all matters, whether in the field of advice or defense*".

— Second, **the document must present a sufficient nexus with the exercise of a party's rights of defense** in a concrete proceeding. The document must have been specifically prepared for the client's defense in ongoing or anticipated judicial or regulatory proceedings liable to result in sanctions. Conversely, the FCA may seize materials through which outside counsel merely advise a client on the legality of a contemplated practice, even when covered by LPP, as they are prepared to secure a legal position and do not, as such, establish the requisite connection with the rights of the defense.

Alongside these significant limitations on the protection of attorney-client communications in competition matters, the French Parliament has recently enacted a legislation broadening the scope of LPP to encompass in-house legal advice.[46,47] Under these rules, judicial and administrative authorities may no longer seize in-house legal advice, in the context of civil, commercial, or administrative proceedings. **Unlike attorney-client privilege, in-house confidentiality does not require a nexus with the exercise of the rights of the defense to be exempted from seizure.** However, the practical operation of in-house LPP may be limited as it is subject to strict requirements on the author's qualifications as a legal advisor, the content of the document (a personalized legal consultation addressed solely to the company's management or supervisory bodies), its labeling,[48] and its classification within the company's internal records.[49,50]

In practice, (i) companies should identify documents potentially covered by LPP (e.g., using the label "Privileged & Confidential" in email subject-lines and memos); (ii) during inspections, companies and their counsel should systematically request that any document whose privileged status is disputed be placed under provisional seal; and (iii) legal teams should be briefed on the distinction between LPP and the narrower seizure immunity requiring a defense nexus.

When applicable, companies should frame their requests to outside counsel as directed at preparing a defense against actual or anticipated proceedings, for instance by referencing recent enforcement actions, sector inquiries, or publicly announced enforcement priorities signaling a heightened risk of investigation into the practices at issue. Conversely, clients solely seeking competition law advice on the lawfulness of a contemplated commercial practice should bear in mind that such exchanges would not be immune from seizure in a subsequent antitrust investigation.

[46] Law No. 2026-122 of February 23, 2026, on the confidentiality of legal advice given by in-house counsel, available here.

[47] For a detailed overview of the new French regime for the protection of in-house LPP, see our Alert Memorandum of January 22, 2026, available here. The practical significance of this reform is illustrated by the FCA's Doctolib decision of November 2025, in which the FCA relied on advice from Doctolib's in-house lawyers as evidence of anticompetitive intent, underscoring the vulnerability of in-house counsel communications under the prior legal framework. FCA Decision, No. 25-D-06 of November 6, 2025, regarding practices implemented in the online medical appointment booking and remote medical consultation solutions sector, available here.

[48] The document must contain the following label: "*confidentiel – consultation juridique – juriste d'entreprise*".

[49] Article 58-1. I. of the 1971 Statute, as modified by Law No. 2026-122 of February 23, 2026, on the confidentiality of legal advice given by in-house counsel, upon its entry into force, available here.

[50] Where the FCA contests the privileged nature of a document during a dawn raid, the document is immediately placed under seal. Within 15 days, the FCA may then submit an application before the *juge des libertés et de la détention*, who may lift the protection where (i) the statutory conditions for privilege are not satisfied, or (ii) the document was instrumental in facilitating the conduct under investigation by the FCA.

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