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French Competition Law Newsletter

Highlights

- The French *Cour de cassation* provides further clarification of the scope of the protection afforded to attorney-client communications in the context of dawn raids
- The French *Cour de cassation* confirms that French rules on practices restricting competition apply to subcontracting agreements
- The French Competition Authority opens an in-depth investigation into the proposed creation of an airport catering joint venture between Aéroports de Paris and British caterer Select Service Partner

The French *Cour de cassation* provides further clarification of the scope of the protection afforded to attorney-client communications in the context of dawn raids

In a ruling dated January 10, 2023, the French *Cour de cassation* quashed an order of the Paris Court of Appeals that had annulled the seizure of attorney-client communications during a consumer law dawn raid on the grounds that they were covered by “legal privilege,” thereby excluding the application of the concept under French law.¹ Although the case relates to alleged breaches of consumer law, its reasoning can be transposed to matters relating to competition law dawn raids.

Background

The case stemmed from a series of consumer complaints filed with the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (“DGCCRF”) against SFK Group (“SFK”, now Indexia Group), a company active in the insurance brokerage sector, between September 2019 and May 2020. Specifically, consumers alleged that whenever they tried to terminate their insurance contracts, SFK would lead them to believe that such termination was effective, even though withdrawals continued to be made from their bank accounts.

¹ French *Cour de cassation*, Criminal Division, January 10, 2023, No. [21-85,526](#).

Following these complaints, the DGCCRF opened a formal investigation into the existence of unfair trading practices infringing the French Consumer Code on September 8, 2020, and, on September 24 and 25, carried out dawn raids on the premises of SFK Group and its subsidiaries.

In an appeal before the Paris Court of Appeals, SFK challenged both the validity of the search warrant delivered to the administration and the legality of the conduct of the dawn raids. Although the Court dismissed the search warrant appeal,² it held, with regard to the conduct of the dawn raid, that a number of documents had been illegally seized and that their seizure should consequently be annulled.³ However, the Court did not annul the dawn raids in their entirety. Both SFK and the DGCCRF appealed the ruling on the conduct of the dawn raids before the French *Cour de cassation*.

The French *Cour de cassation*'s ruling

SFK's appeal relied mainly on the following two pleas in law. First, SFK argued that the Court of Appeals had wrongfully refused to assess its claim that the minutes of the dawn raid were unlawful. Second, SFK argued that the dawn raids as a whole were invalid because the seizures made by the DGCCRF agents were "*massive and undifferentiated*."

The French *Cour de cassation* dismissed both pleas. On the first plea, the Court noted in particular that SFK had not indicated any specific harm suffered as a result of the formal irregularities affecting the minutes of the dawn raids. On the second plea, it noted that only 15 of SFK's 2,400 employees had been targeted, which was sufficient to show that the seizures were not "*massive and undifferentiated*." Furthermore, the Court noted that the administration was under no obligation to inform SFK of its dawn raid *modus operandi* or of the search terms used to identify relevant documents.

The DGCCRF, on the other hand, claimed that the Court of Appeals had wrongfully annulled the seizure of certain documents on the grounds that they constituted attorney-client communications. This claim was based on two pleas in law. First, the DGCCRF noted that it had never been provided with a copy of the documents in question. Second, it claimed that consumer law does not prevent the seizure of attorney-client communications if such communications do not concern the exercise of the rights of defense.

As regards the first plea, the French *Cour de cassation* noted that the DGCCRF had only received an inventory and a summary table of the documents that allegedly constituted attorney-client communications. This had prevented any genuine debate on the privileged nature of the documents before the Court of Appeals, in breach of the right to adversarial proceedings.⁴

This alone would have been sufficient to justify a quashing of the Court of Appeals' order, but the French *Cour de cassation* also ruled on the DGCCRF's second plea in law, thereby providing further explanations on the principles applicable to the protection of attorney-client communications during dawn raids.

In its ruling, the Court of Appeals had held that the seizure of attorney-client communications should be canceled because such documents were covered by "*legal privilege*".⁵ However, the French *Cour de cassation* noted that (i) under French law, attorney-client communications are protected from seizure only if they relate to the exercise of the rights of defense, (ii) the notion of "*legal privilege*" does not exist as such in French law and (iii) in other countries where the concept exists, exchanges may be covered by "*legal privilege*" despite having no relation with the exercise of the rights of defense. Accordingly, given that it had not established that the attorney-client communications at stake related to the exercise

² President of the Paris Court of Appeals, September 15, 2021, Order No. 57 (RG n° 20/13926), confirmed by the French *Cour de cassation*, Criminal Division, January 10, 2023, No. 21-85524.

³ President of the Paris Court of Appeals, September 15, 2021, Order No. 58 (RG n° 20/13949).

⁴ Article 6, §1 of the European Convention on Human Rights.

⁵ « *Privilège légal* » in the original French version of the ruling.

of its rights of defense, the French *Cour de cassation* quashed the Court of Appeals' ruling and remanded the case to the Paris Court of Appeals.

Takeaways

While the outcome of the case (namely, that only attorney-client communications relating to the exercise of the rights of defense are protected from seizure) is consistent with the Criminal Division of the French *Cour de cassation*'s previous case law,⁶ it is nevertheless worth noting that the Commercial Division of the court, which has jurisdiction to rule on the legality of dawn raids in tax matters, has regularly ruled that attorney-client communications are protected from seizure, whether they relate to the dawn raided company's rights of defense or whether they merely convey advice not related to specific proceedings.⁷

Such a contrast between the *Cour de cassation*'s Criminal and Commercial divisions in fact reflects a more fundamental tension within French legislation itself. Indeed, since 1971, French law clearly provides that “*in all matters, whether they relate to legal advice or to [the client's] defense, consultations sent or addressed by an attorney to his client [...] are covered by professional secrecy*”, and as such, confidential. However, since the reform of the French Criminal legal system initiated in 2021,⁸ the French Code of Criminal Procedure now authorizes the seizure of attorney-client communications from an attorney's professional or personal premises, except if such communications relate to the exercise of the rights of defense.⁹

It remains to be seen whether the discrepancy between the case law of the *Cour de cassation*'s various divisions will remain in the future.

The French *Cour de cassation* confirms that French rules on practices restricting competition apply to subcontracting agreements

On January 11, 2023, the French *Cour de cassation* partly quashed a decision of the Paris Court of Appeals. The French *Cour de cassation* considered that the Paris Court of Appeals had rightly held that the provisions of the French Commercial Code on practices restricting competition apply in the context of subcontracting relations, but erred in its application of these provisions.¹⁰

Background

The case involved OC résidences, a company active in the construction and sale of individual houses, and one of its subcontractors, 3J. In 2013, 3J challenged the application of a systematic 2% reduction on the price it charged to OC résidences, which was allegedly based on a French tax credit

⁶ See French *Cour de cassation*, Criminal Division, November 25, 2020, No. 19-84.304. In this case, the DGCCRF had seized communications between the company *Au Vieux Campeur* and its outside legal counsel during dawn raids at the company's premises. Following *Au Vieux Campeur*'s successful challenge of the seizure of these documents before the Court of Appeals of Chambéry, the French *Cour de cassation* ruled that, although attorney-client communications are always protected by professional secrecy, they may nevertheless be seized provided that they do not relate to the exercise of the rights of defense. Consequently, the *Cour de cassation* remanded the case to the Court of Appeals to assess whether the documents in dispute related specifically to the exercise of the rights of defense.

⁷ See French *Cour de cassation*, Commercial Division, May 5, 1998, No. 96-30.116. In this case, following a dawn raid conducted by the tax administration at a law firm's premises, the administration claimed that legal consultations, opinions and interview notes which did not relate to the rights of defense should not be protected from seizure. The French *Cour de cassation* nevertheless ruled that consultations prepared by an attorney for his client as well as attorney-client communications are covered by professional secrecy, and therefore could be seized only if they provided evidence of the lawyer's participation in the alleged tax fraud. See also French *Cour de cassation*, Commercial Division, October 20, 1998, No. 96-30.117 and French *Cour de cassation*, Commercial Division, May 3, 2012, No. 11-14.008, ruling that, in all matters, whether they relate to legal advice or to the client's defense, legal consultations, attorney-client communications and interview notes are covered by professional secrecy regardless of their connection with the rights of defense, and therefore cannot be (or remain) seized.

⁸ Law No. 2021-1729 of December 2021 for confidence in the judiciary (*Loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire*) aimed at restoring confidence in the judicial institution by improving the conduct of criminal proceedings and reinforcing judicial guarantees during criminal investigations and trials. *Inter alia*, the law strengthens the control of preliminary investigations, the respect of the adversarial principle and the protection of the investigation secrecy. It also – *prima facie* – increases the protection of the attorney's professional secrecy, which is now recognized in criminal proceedings by the preliminary article of the French Code of Criminal.

⁹ See French Code of Criminal procedure, Article 56-1, as modified by Law No. 2021-1729 of December 2021 for confidence in the judiciary (*Loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire*).

¹⁰ French *Cour de cassation*, Commercial Division, January 11, 2023, No. 21-11.163.

for competitiveness and employment (the “2% price decrease”). In 2017, the French Minister for the Economy intervened in support of 3J and argued that both the 2% price decrease and a 3% discount that OC résidences granted itself on 3J invoices that it paid late (the “3% discount”) infringed the provisions of Article L. 442-6, I, 1° of the French Commercial Code as applicable until March 19, 2014.¹¹

Article L. 442-6, I, 1° of the French Commercial Code prohibited companies from obtaining or attempting to obtain from a commercial partner any advantages that would not correspond to commercial services actually provided, or that would be clearly disproportionate to the value of such services.

On November 4, 2020, the Paris Court of Appeal found that the provisions of Article L. 442-6, I, 1° of the French Commercial Code were applicable to the business relations between a company and its subcontractors. However, it rejected any claim that OC résidences had breached these provisions in the case at hand, whether through the application of the 2% price decrease or the application of the 3% discount.

Appeal to the French *Cour de cassation*

Both the French Minister for the Economy and OC résidences appealed to the French *Cour de cassation*. OC résidences challenged the finding that Article L. 442-6, I, 1° of the French Commercial Code applied to subcontracting relations. It argued that the French Commercial Code provisions on practices restricting competition were not applicable on the grounds that more specific provisions already applied to subcontracting agreements to protect the “weaker” party (in practice, the French Construction and Housing Code establishes a special regime protecting construction subcontractors). The French Minister for the Economy, on the other hand, challenged the Court of Appeals’ decision in that it rejected its claims that the 2% price decrease and 3% discount infringed Article L. 442-6, I, 1° of the French Commercial Code.

Ruling of the French *Cour de cassation*

In its ruling, the French *Cour de cassation* partially quashed the decision of the Paris Court of Appeals. First the French *Cour de cassation* rejected OC résidences’ appeal and confirmed the Court of Appeals’ conclusion that Article L. 442-6, I, 1° of the French Commercial Code applied to the relations between OC résidences and 3J. The Court found that because this Article was not contrary to the provisions in the French Construction and Housing Code, it was applicable to relations between an undertaking and its subcontractors. This means that the law governing practices restricting competition does apply to subcontracting relations insofar as it does not contradict more specific applicable legal provisions.

Second, the French *Cour de cassation* annulled the part of the Court of Appeals’ decision on the interpretation of former Article L. 442-6, I, 1° of the French Commercial Code. It held that, given that the price had not been freely negotiated, the Court of Appeals had erred in law by finding such provisions could not apply in the absence of significant imbalance in the parties’ obligation. According to the French *Cour de cassation*, Article L. 442-6, I, 1° only required that one of the parties had obtained or attempted to obtain an advantage which did not correspond to a service effectively rendered or that was disproportionately high. The nature of such advantage was irrelevant, and therefore Article L. 442-6, I, 1° was applicable to the 2% price increase.

As regards the 3% discount, the French *Cour de cassation* found that the Court of Appeals had breached its procedural obligation to provide reasons for its decision because it had failed to assess the relevant evidence submitted by the French Minister for the Economy.

Accordingly, the case was remanded to the Paris Court of Appeals.

¹¹ This provision was amended by a law of March 17, 2014 and subsequent laws and no longer exists.

The French Competition Authority opens an in-depth investigation into the proposed creation of an airport catering joint venture between Aéroports de Paris and British caterer Select Service Partner

On January 9, 2023, the French Competition Authority (“FCA”) opened an in-depth (“Phase 2”) investigation into the proposed creation, by Aéroports de Paris (“ADP”) and British caterer Select Service Partner (“SSP”), of a full-function joint venture for the operation of catering services at Paris-Orly and Paris Roissy-Charles de Gaulle airports.¹²

ADP is the state-owned operator of the three main Paris airports, where it operated various airport infrastructures, including retail shops and restaurants. In particular, ADP is active in the provision of food catering services at Orly airport through its subsidiary Extime Food & Beverages Paris (“Extime”). SSP is a multinational group active in concession food services and typically operates in airports, train stations, shopping malls, museums and other similar venues. In France, SSP is present in several airports (Marseille, Nice, Nantes, Bordeaux, Lyon, Paris Roissy-Charles de Gaulle and Orly), train stations (Gare de Lyon and Gare Montparnasse) and motorway service areas, as well as in the Paris underground.

In 2021, ADP issued a call for tenders in view of finding a suitable co-shareholder for Extime, which led to the selection of SSP on October 25. The rationale of this proposed transaction was to allow ADP to “strengthen its integrated model and unite the commercial offer across its terminals”.¹³ In this respect, in 2016, ADP and SSP had already created a joint venture based on the same integrated model, EPIGO, which currently manages around 30 outlets in Paris airports.

The parties notified the FCA of the proposed joint venture on October 28, 2022.

Following its first phase examination of the transaction, the FCA has identified competition concerns in the market for concession food services and the market for the provision of commercial catering services in airports. Specifically, the FCA has noted that as a result of the transaction, Extime would manage, in the long term, almost all the food service areas in the two largest French airports, and is concerned that this leadership position may confer on SSP a significant competitive advantage in the national market for concession food services in airports, enabling SSP to systematically prevail in calls for tender issued by ADP or other French airports. Further, as regards the market for the provision of commercial catering services in airports, the FCA is concerned that the joint venture could ultimately have a virtual monopoly in Paris airports, presenting the risk of price increases and a decline in the quality and diversity of catering offerings.

In a statement published in reaction to the opening of the Phase 2 investigation, ADP noted that “the joint venture model is commonly used by many airports around the world, and [that] the Groupe ADP itself has been using it for more than a decade.”¹⁴ It added that, during this second phase of the investigation, ADP and SSP would continue to provide the FCA with evidence showing the benefits of the transaction in terms of both price management and quality of service.

¹² FCA Press Release, “Airport catering: the Autorité de la concurrence opens an in-depth examination in the context of the proposed creation of a joint venture by the Aéroports de Paris and Select Service Partner groups”, January 9, 2023, available at: <https://www.autoritedelaconcurrence.fr/en/press-release/airport-catering-autorite-de-la-concurrence-opens-depth-examination-context-proposed>

¹³ ADP Press Release, “Groupe ADP selects Select Service Partner (SSP) as joint venture partner to develop more than 100 food and beverage units at Paris airports”, October 25, 2021, available at: <https://presse.groupeadp.fr/ssp-joint-venture/?lang=en>

¹⁴ ADP Press Release, “Précisions Regarding Extime Food & Beverage Paris”, January 10, 2023, available at: <https://presse.groupeadp.fr/extime-food-beverage-precisions/?lang=en>

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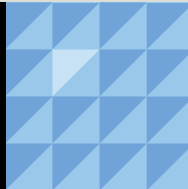


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