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French Competition Law Newsletter

Highlights

- The French *Cour de cassation* clarifies the scope of French legal privilege in the context of dawn raids
- The European Commission approved an ambitious French aid plan for RDI

The French *Cour de cassation* clarifies the scope of French legal privilege in the context of dawn raids

On April 20, 2022, the *Cour de cassation*, the French Supreme Court, upheld the judgment of the First President of the Paris Court of Appeal validating dawn raids carried out by the French Competition Authority (“FCA”) in the wine and spirits sector in 2019. The *Cour de cassation* held that the scope of the French legal professional privilege (“LPP”) (*secret professionnel*) is not limited to attorney-client correspondence relating to conduct in the scope of the proceedings at stake but to any and all proceedings, even unrelated to competition law, where any outside lawyer is representing his or her client’s rights of defense.¹

Background

In early 2019, the FCA suspected market allocation and price fixing practices in the wine and spirits sector as well as a gun jumping infringement from a player in the same sector. The FCA requested and obtained an authorization of the liberty and custody judges (“LCJ”) (*juges des libertés et de la*

détention) to conduct dawn raids at the premises of four companies: Compagnie Financière Européenne de Prises de Participation (“COFEPP”), COPAGEF, Castel Frères, and Marie Brizard Wine and Spirits France (“MBWSF”). The FCA conducted dawn raids in April and May 2019. The four companies appealed the LCJ orders, claiming (i) that the evidence presented by the FCA to the LCJ included documents and e-mails protected by French LPP and (ii) that the dawn raids were disproportionate in light of the evidence on which the FCA relied to justify them and the alternative means of investigation available (*i.e.*, requests for information).

The Court of Appeal’s ruling

On December 9, 2020, the First President of the Paris Court of Appeal dismissed the companies’ appeal and upheld the LCJ orders authorizing the dawn raids.²

¹ *Cour de cassation*, Criminal Chamber, April 20, 2022, No. 20-87248.

² Paris Court of Appeal, December 9, 2020, No. 19/07453.

The First President first recalled that the legal advice provided by an outside lawyer to its client is protected by French LPP. As such, correspondence between an outside lawyer and its client containing legal advice cannot be seized, regardless of the channel through which it was exchanged or its format (e.g., e-mail, text message, letter).³ The First President specified, however, that such correspondence is protected by French LPP if (i) “*there is evidence that it is issued or addressed by a lawyer independent of the company*” and (ii) it is exchanged “*for the exercise of the rights of the defense in relation to the actual subject matter of the investigation determined on the basis of the evidence of an infringement of competition law*” (underlining added).

Further, the First President ruled that, to claim LPP protection, companies must identify the documents that are allegedly covered by LLP with “*sufficient precision.*” Those documents must be put in a sealed envelope by the FCA’s agents, and the company must be allowed to submit observations to the FCA. If the company does not specifically identify the documents allegedly covered by LLP, the FCA may lawfully reject the company’s request and seize the documents.

In the present case, the First President of the Court of Appeal found that it did not result from the case file that the FCA would not have returned lawyer-client correspondence relating to the exercise of the client’s rights of defense in relation to the ongoing investigation. The Court also found that the companies did not claim that the FCA agents would have gone beyond a “*summary review*” of the documents allegedly covered by LLP or would have rejected a specific request to withdraw documents.

The four companies appealed the First President of the Court of Appeal’s ruling before the *Cour de cassation*. They claimed, in particular,

that the First President of the Paris Court of Appeal unlawfully restricted the scope of LPP to correspondence between a lawyer and its client for the exercise of the client’s rights of defense relating to the actual subject matter of the competition proceedings at stake.

The *Cour de cassation*’s ruling regarding the scope of French LPP

On April 20, 2022, the *Cour de cassation* largely rejected the companies’ appeal whilst clarifying the scope of French LPP.⁴

The *Cour de cassation* held that the First President of the Court of Appeal erred in considering that only the lawyer-client correspondence made for the exercise of the client’s rights of defense relating to the actual subject matter of the competition proceedings at stake are covered by LLP and thus cannot be seized. In line with its recent decisions,⁵ the *Cour de cassation* held that it is in *all proceedings* where any outside lawyer defends his or her client that correspondence between them are protected by LPP.

In the present case, however, the *Cour de cassation* noted that the companies did not claim that the seizure of lawyer-client correspondence had violated their defense rights in any proceeding other than the proceedings at stake. And the First President of the Court of Appeal had already ruled that the few correspondences relating to the ongoing proceedings had to be returned to the companies. Therefore, the *Cour de cassation* upheld the First President of the Court of Appeal’s ruling.

Takeaway

While in line with the latest precedent,⁶ the *Cour de cassation*’s ruling reinforces the principle according to which correspondences between clients and their outside lawyers are covered by

³ Article 66-5 of Law No. 71-1130 of December 31, 1971, modified by Law No. 2004-130 of February 11, 2004.

⁴ The *Cour de cassation* found in favor of one of the companies’ claims by ruling that the First President of the Court of Appeal wrongfully rejected for lack of relevance the company’s claim to exclude certain e-mails from the scope of the dawn raid.

⁵ See in particular *Cour de cassation*, Criminal Chamber, January 20, 2021, No. 19-84.292 (*EDF et Dalkia*); *Cour de cassation*, Criminal Chamber, January 4, 2022, No. 20-83.813 (*Akiolis groupe*).

⁶ See in particular *Cour de cassation*, Criminal Chamber, January 20, 2021, No. 19-84.292 (*EDF et Dalkia*); *Cour de cassation*, Criminal Chamber, January 4, 2022, No. 20-83.813 (*Akiolis groupe*).

French LLP, as long as they relate to the exercise of the right of defense, and regardless of the proceedings they concern.

Interestingly, EU courts have considered that correspondence between an outside lawyer and his client may only be covered by EU LLP if it

relates to the competition proceedings at stake, or has a relationship to the subject-matter of those proceedings⁷ - in line with the initial findings of the French First President of the Court of Appeal. In practice, however, the European Commission has often shown a certain degree of flexibility in applying this principle.

The European Commission approved an ambitious French aid plan for RDI

On April 27, 2022, the European Commission (the “**Commission**”) approved a State aid scheme of €700 million of the French State “to support research, development and innovation projects by companies of all sizes and active across all sectors”⁸ (the “**French Scheme**” or the “**Scheme**”). The French authorities estimate the number of beneficiaries of the scheme to range between 11 and 50 companies.⁹ The scheme will be in place until December 31, 2023.

Background

As with several other national State aid schemes over the past two and a half years, the Commission assessed the French Scheme within the framework of the State Aid Temporary Framework (the “**Temporary Framework**”),¹⁰ adopted following the Covid-19 outbreak and set to be phased out as of June 30, 2022.¹¹ The French Scheme is part of the “France 2030” recovery program, a €30 billion plan over five years, aimed at developing industrial competitiveness and future technologies following the pandemic.

The Commission’s substantial assessment

On the basis of the Temporary Framework, as well as the 2014 Framework for State aid for research and development and innovation (the “**RDIF**”), the Commission assessed, notably, whether the French Scheme meets the following conditions:

- Necessity, *i.e.*, whether the aid allows for the development of an economic activity that would not have taken place in the absence of the measure or, at least, would not have taken place under the same conditions;
- Incentive effect, *i.e.*, whether the aid motivates the beneficiary to create new activities that it would not normally carry out or would carry out in a limited or different manner absent aid;
- Appropriateness of the selected aid instruments, *i.e.* whether the proposed form of aid is appropriate to achieve the aid’s main purpose in the context of the relevant market failures;

⁷ Court of Justice, Case C-155/79, May 18, 1982, *AM&S Europe Limited v. Commission*.

⁸ SA.102230.

⁹ See Commission’s decision SA.102230, §21.

¹⁰ Communication from the commission temporary framework for State aid measures to support the economy in the current Covid-19 outbreak of March 19, 2020. Amendments were adopted on April 3, May 8, June 29 and October 13, 2020 and January 28 and November 18, 2021, extending the scope of the Temporary Framework.

¹¹ However, investment support towards a sustainable recovery will be possible until December 31, 2022, and solvency support until December 31, 2023. See Cleary Gottlieb Alert Memorandum of May 24, 2022, available [here](#).

- Proportionality, *i.e.*, whether the aid amount and intensity are limited to the minimum necessary to carry out the activity being supported; and
- Effect on competition, *i.e.*, whether the scheme sets out safeguards to limit any possible distortion of competition and has positive effects that outweigh the possible negative effects.

The Commission found that the French Scheme meets all these conditions. In particular, with respect to necessity, the Commission held that the French Scheme has been designed to promote a wide dissemination of patented or unpatented knowledge within the European Union thanks to public funding.¹² In addition, the Commission found that the French Scheme sets out relevant safeguards to limit any distortions to competition, such as (i) the condition that one group may not receive more than 10% of the whole budget nor allocate more than 30% of the budget of the measure to a single research area, or (ii) a control mechanism to ensure that the aid does not create or strengthen overcapacity in the relevant market.

How to benefit from such aid

The French Scheme allows aid in the form of direct grants, soft loans or repayable advances¹³ to support two types of research, development and innovation (“**RDI**”) projects: research and development on the one hand, and process and organizational innovation on the other hand.¹⁴ Only projects relating to the four following

thematic areas can benefit from the scheme, namely: (i) energy transition and environmental protection, (ii) digital transition, (iii) innovations in production processes, and (iv) European value chains and the security of supply.

French public authorities can grant aid under this scheme on the basis of transparent public procedures (in particular, call for projects) to all companies, regardless of their size.¹⁵ However, depending on the aid envisaged as well as the size of the company, the maximum aid intensity ranges from 25% to 100% of the eligible costs, with possible additional bonuses.¹⁶

In addition, the French Scheme sets out several additional conditions, including rules on cumulation with other aid, dissemination of results, eligible costs and granting procedures, as well as possible aid thresholds, in order for companies to benefit from the scheme.¹⁷

Outcome

The French Scheme is one of the last schemes that will be authorized within the Temporary Framework. It shows the great diversity of the aid schemes adopted by the member states within the framework of the health crisis and the directions for recovery. According to Vice-President Margrethe Vestager, the Commission adopted more than 1,300 decisions under this framework, approving nearly 950 national measures, for an estimated total State aid amount approved of nearly 3.2 trillion euros.¹⁸

¹² See Commission’s decision SA.102230, §94.

¹³ Aid exceeding thresholds laid down by the French Scheme is not eligible and should be, in any case, formally notified to the Commission (*see* Commission’s decision SA.102230, §40 and 41).

¹⁴ See Commission’s decision SA.102230, §22 to 27.

¹⁵ Subject to meeting specific requirements in the case of process and organizational innovation projects.

¹⁶ For example, a 25% maximum aid intensity is allowed for experimental development projects to “large companies”, whereas fundamental research projects could benefit from a 100% aid intensity, regardless of the size of the company.

¹⁷ See Commission’s decision SA.102230, §41. For example, aid for process and organizational innovation, exceeding a threshold of €11,250,000 per undertaking and per project have been excluded from the scope of the notified scheme, and should therefore be individually notified to the Commission.

¹⁸ See Commission’s press release of May 12, 2022, available [here](#).

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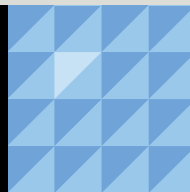


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