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Limiting Attorney-Client Privilege to the Sole Exercise of Rights of Defence (Crim., 13 Jan. 2026): An Untenable Position

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The case law of the Criminal Chamber of the Court of Cassation limits the scope of protection of attorney-client privilege to exchanges falling solely within the exercise of rights of defence[1], understood in a particularly narrow way, and excludes it where the documents at issue do not relate to court proceedings or proceedings aimed at the imposition of a sanction[2]. Legal advice warning of a risk of litigation of a commercial, financial, civil, or criminal nature is not regarded as falling within the exercise of rights of defence. The French Competition Authority goes even further, since it confines the protection of privilege, in competition matters, to the exercise of rights of defence only in competition cases[3].

In practice, this means that legal professional privilege is reduced to a bare minimum. In competition law, and more generally in business law, the essence of a lawyer's activity consists in advising clients; proceedings properly so called represent only a limited part of that activity in comparison with the lawyer's advisory role toward the company. The development of compliance has further increased the proportion of advisory work in lawyers' practice. This means that advice given by a lawyer to a company, warning it of a risk and urging it to change its conduct, may be used as evidence of an infringement in the event of an inspection. Moreover, even correspondence exchanged for the purpose of defending the client after proceedings have been opened is only very partially protected. While such material may not be used directly as evidence of infringements, it may nevertheless, in practice, be read by the case handlers in charge of investigations, either during the seizure of files in the course of an inspection and seizure operation (*opération de visite et saisie*, "OVS"), or during the sorting of privileged correspondence when sealed provisional envelopes are opened, and may guide their investigations4. In reality, the current case law of the Criminal Chamber and the practice of the French Competition Authority's investigators amount to a complete denial of attorney-client privilege.

Despite the near-unanimous criticism directed at that case law and decision-making practice[5], both the Criminal Chamber and the French Competition Authority maintain their position, against all odds.

This denial of legal privilege is abnormal in a State governed by the rule of law. Legal professional privilege is one of the fundamental guarantees of the proper functioning of a democratic society[6]. Through the confidential assistance it affords, it offers all citizens a minimum safeguard against interference by the State. From a legal standpoint, this denial of privilege

[1] See most recently, Crim., 13 Jan. 2026, No. 24-82.390. The position of the Criminal Chamber is consistent: Cass. crim., 3 June 2025, No. 24-81.304, *RPDA*, June 2025, No. RDA100r1, note R. Amaro; 11 March 2025, Nos. 23-86.260 and 24-82.517; 24 Sept. 2024, No. 23-84.244, *BRDA*, 27/24, 15; D. 2024, 1986, note B. Chaffois; Gaz. Pal., 22 Oct. 2024, No. GPL469h2, note M. Boissavy; RPDA, March 2025, No. RDA100i0, note R. Dalmau, "Le secret professionnel des avocats outragé, martyrisé, mais peut-il être libéré?"; *LEDICO*, Nov. 2024, No. DDC202r3, note E. Dieny; *Rev. Lamy Concurrence*, Oct. 2024, p. 112; JCP 2024, 1349, p. 1877 et seq., note H. Matsopoulo; *Droit pénal*, Nov. 2024, 192, note J.-H. Robert; *JCP éd. E*, 2024, Aff. 425, note P. Wilhelm and E. Dumur; 12 March 1992, No. 91-86.843, *Bull. crim.*, No. 112; 5 July 1993, No. 93-81.275; 7 March 1994, No. 93-84.931; 22 March 2016, No. 15-83.205; No. 93-84.931; 25 Nov. 2020.

[2] Crim., 30 Sept. 2025, No. 24-85.225; 11 March 2025, No. 23-86.260.

[3] Position adopted by the investigation service and the legal service of the French Competition Authority in competition investigation proceedings, those services considering themselves not bound by the Criminal Chamber's case law, which, though highly restrictive, does not go as far as the Authority's practice and considers that protection extends to all correspondence exchanged between a lawyer and his client relating to the exercise of rights of defence, and not solely to the exercise of rights of defence in a competition case (Crim., 20 Jan. 2021, No. 19-84.292; 4 Jan. 2022, No. 20-83.813; 20 Apr. 2022, No. 20-87.248).

[4] Such review being regarded in EU law as an established breach of legal professional privilege: Court of First Instance of the European Communities, 17 Sept. 2007, Akzo, Cases T-125/03 and T-253/03, § 86.

[5] See in particular, in addition to the commentaries cited in footnote 1, D. Rebut, *Absence de protection du secret professionnel de l'avocat en matière de conseil – La Chambre criminelle persiste et signe*, *Gaz. Pal.*, No. 40, 9 Dec. 2025; J. Castellan and V. Gaignard, *Protection du secret professionnel: où va-t-on?*, *Gaz. Pal.*, No. 39, 2 Dec. 2025; T. Bontinck, *La consécration par la CJUE du secret professionnel de l'avocat dans son activité de conseil*, *Journal de droit européen*, 2025, 50; M. Sève, J. Sengupta and D. Apelbaum, *Secret professionnel de l'avocat : résistance et incohérence des juridictions françaises*; A. Portmann and F. Puel, *La réduction du champ du secret peut-elle affecter la conformité des entreprises?*, *La Lettre des juristes d'affaires*, No. 1699, 20 Oct. 2025; M. Boissavy, *Secret professionnel de l'avocat : la nécessaire intervention du législateur*, *Gaz. Pal.*, No. 34, 22 Oct. 2024.

appears all the more untenable because it is contrary not only to European law and to the case law of the Court of Justice of the European Union ("CJEU") and the European Court of Human Rights ("ECtHR") (I), but also to the case law of the Commercial Chamber of the Court of Cassation (II).

I. Limiting Attorney-Client Privilege to the Sole Exercise of Rights of Defence Is Contrary to European Law and to the Case Law of the CJEU and the ECtHR

A. Conflict with European Law

a) Conflict with Articles 7 and 47(2) of the Charter of Fundamental Rights of the European Union, applicable to competition investigations pursuant to Article 3(1) of the ECN+ Directive

Excluding all advisory work performed by lawyers from the scope of attorney-client privilege is unquestionably contrary to European Union law.

Under Article 3(1) and (2) of the ECN+ Directive[7], all procedures conducted by the national competition authorities of the Member States when applying EU law on cartels or abuse of dominant position must comply with the Charter of Fundamental Rights of the European Union, including in the exercise of investigative powers relating to inspections of premises, requests for information, or interviews. The Directive should have been transposed no later than 4 February 2021 (and was partially transposed in France) and, failing that, is binding upon the competition authorities of the Member States. Consequently, the safeguards provided by the Charter with respect to the confidentiality of communications of any person, under Article 7, as well as the right to be advised, defended, and represented, under Article 47(2), fully apply, on the basis of Article L. 450-4 of the French Commercial Code, to competition investigations and therefore to OVS operations conducted for the purpose of establishing infringements of Articles 101 and 102 TFEU. The Criminal Chamber itself has acknowledged the applicability of the Charter, by virtue of the ECN+ Directive, to all investigations involving a provision of EU competition law[8].

Now, on 26 September 2024, the Court of Justice delivered its judgment in *Ordre des avocats du barreau de Luxembourg v. Administration des contributions directes*[9], on the basis of Article 7 of the Charter (confirming a position already adopted in an earlier decision of 8 December 2022), in which it held that:

- the protection of the confidentiality of communications between a lawyer and his or her client "covers not only the activity of defence, but also legal advice";
- the secrecy of legal advice is guaranteed "both as regards its content and its existence";
- persons consulting a lawyer "may reasonably expect that their communications will remain private and confidential."

Restricting attorney-client privilege to exchanges for the purpose of defence is therefore contrary to EU law. It cannot be argued that this judgment, rendered in tax matters, applies only to tax inspections. Since it is based on the Charter of Fundamental Rights of the European Union, it applies to any implementation of EU law, regardless of the field concerned[10].

The restriction of attorney-client privilege also appears contrary to the European Convention on Human Rights.

b) Conflict with Article 8 of the European Convention on Human Rights

It follows from the case law of the European Court of Human Rights that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords enhanced protection to exchanges between lawyers and their clients. Numerous judgments of the Court show that this protection covers not only the activity of defence, but also that of legal advice. The European Court of Human Rights recently recalled, in its judgment of 6 June 2024, *Bersheda*, that "under Article 8 of the Convention, correspondence between a lawyer and his client and, more generally, all forms of exchange between them, whatever their purpose, enjoy a privileged status as regards confidentiality"[11].

Moreover, in its above-mentioned judgment of 26 September 2024, the CJEU expressly recalled that it "follows from the case law of the European Court of Human Rights that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords enhanced protection to exchanges between lawyers and their clients," specifying, according to the Court, that the protection attached to that provision "covers not only the activity of defence, but also legal advice."

In the light of these two recent decisions of the European supreme courts, it appears impossible to limit confidentiality to the sole needs of defence. The judgments of the European Court of Human Rights are binding on the Contracting States, whose courts are required to apply the case law of the Strasbourg Court, while the Charter of Fundamental Rights requires Member States to comply with it whenever they implement EU law[12].

[6] J. Barthélemy, *Le secret professionnel de l'avocat*, Publ. Cons. Const., No. 10, Apr. 2023..
[7] Directive (EU) 2019/1 of 11 December 2018, OJ EU, 14 Jan. 2019, L 11/3.
[8] Cass. crim., 10 Feb. 2026, No. 24-85.281.
[9] CJEU, 26 Sept. 2024, Case C-432/23, §§ 49–51; D. 2024, 1986, note B. Chaffois; *LEDICO*, Nov. 2024, No. DDC202q3, note L. and J. Vogel; *JCP éd. G* 2024, practice 1338, note P. Guédon; *Gaz. Pal.*, 17 Dec. 2024, 5, note A. Lizop; see already CJEU, 8 Dec. 2022, Case C-694/20, *Gaz. Pal.*, 13 June 2023, No. GPL450r7, note A. Andorno.
[10] To that effect, R. Dalmau, *Le secret professionnel des avocats outragé, martyrisé, mais peut-il être libéré?*, *RPDA*, March 2025, No. RDA100i0.
[11] ECtHR, 6 June 2024, Nos. 36559/19 and 36570/19. See earlier, to the same effect, ECtHR, 3 Sept. 2015, *Servulo & Asociados*, § 77; 16 Dec. 1992, *Niemietz v. Germany*, § 32; 25 March 1992, *Campbell v. United Kingdom*, §§ 46–48.

B. Absence of Legal Basis

The Criminal Chamber of the Court of Cassation has on several occasions managed to avoid the debate on whether its case law is contrary to the Charter of Fundamental Rights of the European Union, either because EU law was not applicable, or because it could have been applicable but had not been invoked before the lower court[13].

By contrast, the issue of conflict with the European Convention on Human Rights, which lays down rules similar to those of the Charter and interpreted in a consistent manner, was raised before it. The Supreme Court denied any such conflict in its judgment of 13 January 2026. The reasoning it advances is, however, unconvincing.

The preliminary argument according to which the limitation of attorney-client privilege to defence activity alone, to the exclusion of advisory work, was not held unconstitutional by the Constitutional Council, is ineffective, since the absence of a violation of an internal constitutional provision does not prejudge whether case law complies with EU law or with the European Convention on Human Rights. The argument is all the less well founded given that the Court of Justice recently recalled once again, in a leading judgment, that by virtue of the primacy of EU law, EU law precludes the law of a Member State which, according to that Member State's Constitutional Court, results in obstructing the exercise of rights conferred by EU law[14].

The Criminal Chamber recalls that, under the case law of the ECtHR, however important legal professional privilege may be, it may be subject to restrictions which, in order not to reduce the right in question to the point of impairing its very substance and depriving it of effectiveness, must be foreseeable to litigants, pursue one or more legitimate aims under paragraph 2 of Article 8 of the European Convention on Human Rights, and be necessary in a democratic society, in the sense that they must be proportionate to the aim pursued.

It also recalls that the margin of appreciation left to the State in assessing the necessity of an interference would be broader where the measure concerns legal persons rather than private individuals[15].

The Supreme Court infers from this that its case law, which, in matters of inspections and seizures carried out pursuant to Article L. 450-4 of the French Commercial Code, limits the immunity from seizure of material covered by attorney-client privilege to that which falls within the exercise of rights of defence, would not be contrary to the European Convention on Human Rights as interpreted by the European Court of Human Rights.

That assertion is justified in none of its components.

While it is true that a right guaranteed by the Charter of Fundamental Rights or by the European Convention on Human Rights may be subject to certain limitations, such limitations are governed by strict conditions, none of which appears to be satisfied in the present case, whereas they should all be met cumulatively.

Under the case law implementing the ECHR, or under Article 52 of the Charter of Fundamental Rights, which codified the same test, any limitation on confidentiality must satisfy four cumulative conditions:

• it must be provided for by law;

• it must respect the essence of the right concerned;

• it must comply with the principle of proportionality;

• it must be necessary in relation to an objective of general interest.

Yet the current case law of the Criminal Chamber satisfies none of these conditions.

• Failure to be provided for by law

No French law provides for any restriction on the scope of confidentiality of correspondence that would limit it to correspondence exchanged for the exercise of rights of defence. Article L. 450-4 of the French Commercial Code authorizes inspection and seizure operations by the competition authorities, but subject to compliance with Article 66-5 of Law No. 71-1130 of 31 December 1971, which protects legal privilege "in all matters, whether in the field of advice or that of defence" and expressly covers "legal opinions sent by a lawyer to his client or intended for him," as well as, more generally, "correspondence exchanged between the client and his lawyer." French law, codified and accessible to any litigant, therefore does not authorize the limits laid down by the Criminal Chamber's case law.

The absence of the status of "law" within the meaning of the Charter or the ECHR is all the more obvious because this is contra legem case law, since it directly contradicts the explicit and unambiguous wording of Article 66-5 of the 1971 Law, which clearly states that in all matters, whether in the field of advice or defence, all legal opinions and all lawyer-client correspondence are protected by legal professional privilege. The contradiction between that case law and the statute is evident from its very terms, since it seeks to limit the privilege of defence and advice to defence alone.

This case law all the less satisfies the requirement of "law" and the imperative of foreseeability because it is contradicted by case law to the contrary from the First Civil Chamber, the Second Civil Chamber, and the Commercial Chamber of the Court of Cassation. Indeed, the First Civil Chamber of the Court of Cassation has consistently held that Article 66-5 of the Law of 31 December 1971 contains "no exception"[16]. The Second Civil Chamber likewise holds that "in all mat-

[12] Article 51 of the Charter.
[13] Crim., 13 Jan. 2026, cited above, point 37.
[14] CJEU, 26 Sept. 2024, *Energotehnica*, Case C-792/22.
[15] ECtHR, 2 Oct. 2014, *Delta Pekarny v. Czech Republic*, No. 97/11, § 82.

ters, legal opinions sent by a lawyer to his client or intended for him and correspondence exchanged between the client and his lawyer are covered by legal professional privilege"[17]. The Commercial Chamber of the Court of Cassation has always considered that Article 66-5 of the 1971 Law protects lawyer-client confidentiality "in all matters, whether in the field of advice or in that of defence"[18]. The *contra legem* case law of the Criminal Chamber therefore appears highly isolated and contrary to that of the other chambers of the Court of Cassation, which adhere to the wording guaranteeing lawyer-client confidentiality in all fields.

• Impairment of the essence of the protected right

In competition law, advisory work constitutes the bulk of lawyers' activity. For an experienced lawyer, with 20, 30, or 40 years at the Bar, or even more, 20, 30, or 40 years may elapse before one of his or her clients becomes the subject of an investigation. The French Competition Authority deals with only a limited number of anticompetitive practices cases each year, whereas hundreds of lawyers practise competition law. Refusing to recognize legal privilege for lawyers' advisory work and limiting it to litigation work undertaken for defence in administrative or judicial proceedings impairs the essence of the protected right, as the CJEU also held in the Luxembourg tax case with respect to tax advice[19]. More generally, that position amounts to excluding from legal privilege an activity for which the 1971 Law reserves a monopoly to lawyers, and removing from protection almost the entirety of compliance law, which is primarily aimed at preventing infringements and falls essentially within lawyers' advisory activity.

More broadly, the entire advisory activity of lawyers in all fields is hampered by restricting confidentiality to defence. The lawyer will not be able fully to advise the client. If the lawyer writes to the client that the course of action contemplated constitutes an infringement, or even presents a legal risk, that advice may be used against the client in the event of a search and may found the conviction of the company.

• Lack of proportionality

A total suppression of an essential part of lawyers' activity appears disproportionate, whereas the confidentiality of lawyer-client exchanges in no way prevents the seizure powers relating to all the company's emails or files. As recent OVS operations have shown, these may amount to several million documents, which appears more than sufficient for the exercise of the competition authorities' investigative measures and for proving the infringements sought.

• Lack of necessity

Lastly, it appears that the violation of attorney-client privilege with respect to all lawyers' advisory activity is absolutely not necessary for the enforcement of competition law or for the detection of infringements. As the law currently stands, the competition authorities already enjoy considerable powers enabling them to detect, prevent, and sanction infringements of competition law without any need to abolish the entirety of legal privilege attached to lawyers' advisory work.

The competition authorities may at any time launch unannounced inspections within companies[20], without any judicial authorization whatsoever, enabling them to question employees and summarize their statements in official reports drafted by the investigators, without audiovisual recording and without any real possibility for the persons questioned to challenge the absence of effective information regarding the subject-matter of the investigation, since such information is presumed to have been given through a pre-drafted formula that is neither verifiable nor verified[21].

No notification of the right to remain silent is required, even though those statements may subsequently be used to prosecute and fine companies with penalties of a quasi-criminal nature, or to expose the persons who made those statements or produced documents to imprisonment and criminal fines.

Requests for information concerning tens of thousands of documents may be made in the course of such investigations, without any effective remedy — that is, an immediate and autonomous remedy before a court — currently being available in the case of ordinary investigations[22], notwithstanding the fact that refusal to answer or to produce documents may be punished as obstruction by sanctions of a quasi-criminal nature for companies and criminal sanctions for natural persons. Obstruction may concern not only refusal to provide certain papers or documents, but also the transmission of information deemed incomplete or imprecise, without any requirement of intent whatsoever, any failure to comply with the duty to cooperate being liable to sanction[23].

These investigative powers of the competition authorities, which are not subject to judicial authorization, have moreover been constantly expanded and strengthened in recent years and now also give them access to telephone metadata.

The competition authorities may very easily obtain, on the basis of mere presumptions, search warrants for company premises and employees' homes, the annulment of which is virtually impossible to obtain given the broad interpretation of the notion of presumptions of anticompetitive practices[24]. It is not required that the indicia relied upon be precise, serious, and consistent. In practice, any alignment of conduct on a market may justify a search, even if it results

[16] Cass. civ. 1re, 4 Feb. 2003, No. 00-10.057; 10 Feb. 2004, No. 02-10.283; 7 Dec. 2004, No. 02-16.652; 13 Nov. 2005, No. 02.253.
[17] Cass. civ. 2e, 7 Nov. 1994, No. 92-17.799.
[18] Cass. com., 3 May 2012, No. 11-14.008; 26 Nov. 2013, No. 12-27.162; 6 Dec. 2016, No. 15-14.554, including even fee invoices enclosed with covering letters sent by a lawyer, in the context of tax searches. This position was recently reaffirmed by Com., 4 Nov. 2020, No. 19-17.911, and 8 Oct. 2025, No. 24-16.995, both published in the Bulletin.
[19] See above, footnote 9.

from normal market forces.

In reality, in view of all these investigative powers that are exceptional under ordinary law, the requirements of enforcing competition law do not justify almost entirely suppressing a right guaranteed by the Charter of Fundamental Rights and by the European Convention on Human Rights.

The suppression of an essential part of lawyer-client confidentiality appears all the less necessary and justified by a reason of general interest because it is ultimately contrary to the sound application of competition law. Lawyers' advisory work is also intended to inform clients of infringements not to commit and to implement a compliance policy aimed at training in competition law, preventing anticompetitive practices and, where unlawful conduct is detected, urging the company to put an end to it as quickly as possible. If lawyers' advice or the internal investigations they conduct, identifying an infringement and recommending that it be brought to an end, may be seized because they fall within advisory work not protected by privilege, lawyers are in fact prevented from advising their clients with a view to ensuring compliance with competition law, on pain of seeing that advice used as evidence of past anticompetitive practices.

The fact that the searches are carried out within companies cannot justify a complete denial of the four conditions to which limitations of the protection of attorney-client privilege are subject. The argument is all the less well founded because the seized documents may lead to subsequent criminal proceedings against natural persons at the initiative of the General Rapporteur of the French Competition Authority under Article 40 of the French Code of Criminal Procedure, or of the Authority's Board.

II. Limiting Attorney-Client Privilege to the Sole Exercise of Rights of Defence Is Contrary to the Case Law of the Commercial Chamber of the Court of Cassation

The leading judgment delivered by the Commercial Chamber of the Court of Cassation on 8 October 2025[25], which solemnly reaffirms the unity and general scope of attorney-client privilege both in matters of defence and in advisory work, has highlighted the now untenable character of the position adopted by the Criminal Chamber of the Court of Cassation.

In its decision of 13 January 2026, the Criminal Chamber considers that there is no contradiction as regards the scope of protected legal privilege between the case law of the Criminal Chamber and that of the Commercial Chamber of the Court of Cassation. It bases that assertion on an analysis of the two recent decisions of the Commercial Chamber dated 4 November 2020[26] and 8 October 2025.

That analysis is unconvincing.

A. The Commercial Chamber's Protection of Attorney-Client Privilege, Covering Both Advice and Defence, Is Long-Standing and Consistent

The recent judgments of the Commercial Chamber of the Court of Cassation recognizing the unity and general scope of attorney-client privilege, both in advisory and in litigation matters, form part of the continuity of a long-standing and consistent line of case law of that chamber and are not limited to those two judgments. All of the Commercial Chamber's earlier case law points in the same direction and is devoid of ambiguity.

The Supreme Court thus expressly held that emails relating not to defence activities but to company domiciliation services were protected by legal professional privilege:

Having regard to Article 66-5 of the Law of 31 December 1971;

Whereas, under that provision, in all matters, whether in the field of advice or in that of defence, legal opinions sent by a lawyer to his client or intended for him, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception, for the latter, of those marked "official," interview notes and, more generally, all documents in the file are covered by legal professional privilege;

Whereas, in dismissing the company's challenge to the conduct of the inspection and seizure operations, the order states that the emails bearing the heading of the company's Luxembourg lawyer, provided with a confidentiality notice, related not to defence activities but to management activities concerning the domiciliation of the company's installations in Luxembourg, its telephone connection, the preparation of its balance sheet, delays in payment of tax in Luxembourg, and payment of the auditor's fees, which could have been performed by another unprotected representative;

Whereas, by ruling in this way, the First President violated the aforesaid provision[27].

Likewise, the Court has always reiterated the general nature of privilege both in the field of advice and that of defence, and its application even to mere fee invoices.

In all matters, whether in the field of advice or in that of defence, legal opinions sent by a lawyer to his client or intended for him, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, interview

[20] Under Article L. 450-3 of the French Commercial Code.
[21] Cass. com., 20 Nov. 2001, Nos. 99-16.776 and 99-18.253.
[22] Paris, 26 Oct. 2017, Case No. 17/01658; Com., 26 Apr. 2017, No. 15-25.699; Constitutional Council, decision No. 2016-552 QPC, 8 July 2016, *Société Brenntag*.
[23] S. Sorinas and K. Kumar, *L'infraction administrative d'obstruction à l'enquête de l'Autorité de la concurrence : bilan et perspectives*, Rev. Lamy Concurrence, Sept. 2025, 25.
[24] An application for an OVS may contain only indicia making it possible to presume the existence of the practices whose proof is sought, without it being necessary to identify precise, serious, and consistent presumptions of an infringement: Crim., 22 Jan. 2014, No. 13-81.013.
[25] Cm., 8 Oct. 2025, No. 24-16.995, published in the Bulletin.
[26] Com., 4 Nov. 2020, No. 19-17.911, published in the Bulletin.

notes and, more generally, all documents in the file are covered by legal professional privilege; by holding that, although exhibits numbered 050317 to 050322 were covered by legal professional privilege and could not be seized since it had been accepted by the Directorate General of Public Finances that they "constitute exchanges of correspondence between lawyers," the other documents, by contrast, were not covered by legal professional privilege, whereas correspondence exchanged between the client and his lawyer is likewise covered by legal professional privilege, the First President violated Article 66-5 of the Law of 31 December 1971, in the wording applicable to the case, together with Article L. 16 B of the Book of Tax Procedures[28].

By holding that lawyers' fee invoices could be seized on the ground that they constituted accounting documents that must be issued by any service provider, whereas such invoices, which accompanied documents covered by lawyers' legal professional privilege, could not be seized, the First President of the Court of Appeal violated Articles 66-5 of Law No. 71-1130 of 31 December 1971 and L. 16 B of the Book of Tax Procedures[29].

B. The Recent Judgments of the Commercial Chamber of 2020 and 2025 Strongly Reaffirm the Application of Attorney-Client Privilege in Advisory Matters

The reasoning put forward by the Criminal Chamber's decision of 13 January 2026 to maintain that the two recent judgments of the Commercial Chamber of the Court of Cassation did not take a position in favour of applying attorney-client privilege to lawyers' advisory activity amounts to arguing that the question of the application of privilege to advisory work was neither addressed nor raised.

Yet the wording of the two judgments contradicts that assertion.

In its 2020 judgment, the Commercial Chamber clearly states, with regard to the validity of a seizure during a tax search, that under Article 66-5 of the 1971 Law, legal opinions sent by a lawyer to his client or intended for him and correspondence exchanged between the client and his lawyer are covered by legal professional privilege, without limiting immunity from seizure, as the Criminal Chamber does, to exchanges for the purpose of exercising rights of defence alone. In those circumstances, it is not possible to assert that there is no contradiction between the case law of the two chambers, since their statements of the scope of legal privilege are entirely different.

Court's response — Having regard to Article 66-5 of the Law of 31 December 1971:

15. Under that provision, legal opinions sent by a lawyer to his client or intended for him and correspondence exchanged between the client and his lawyer are covered by legal professional privilege.

16. In annulling the seizure of the correspondence constituting exhibit No. 16 of the appellants, the First President, after stating that he had examined it concretely, found that only the emails exchanged between the officers and employees of the inspected companies and their lawyers were covered by privilege, that exchanges between two correspondents on which a lawyer was copied could not benefit from legal protection, that only exchanges in which a lawyer was the sender or recipient of the email could benefit from such protection, and that disclosure by the companies to third parties of correspondence covered by legal professional privilege caused them to lose the protection attached to privilege.

17. By ruling in this way, without precisely identifying the correspondence at issue and without indicating what resulted from its concrete examination, whereas the AMF contested the list of messages produced by the appellants, arguing that it did not make it possible precisely to identify who the authors or recipients of the emails at issue were and, since it did not permit concrete examination, could not substitute for their production, the First President deprived his decision of legal basis.

The Commercial Chamber's 2025 judgment is equally clear as to the scope of attorney-client privilege. The Commercial Chamber holds, both in its statement of the applicable principles and in its application of them, that where the lawyer acts in his advisory or defence capacity, all correspondence exchanged with the client, together with annexed documents, is covered by legal professional privilege and that the Administration may not lawfully rely on the content of such correspondence to justify a tax reassessment.

Court's response

Having regard to Article 66-5, first paragraph, of Law No. 71-1130 of 31 December 1971:

47. Under that provision, in all matters, whether in the field of advice or in that of defence, legal opinions sent by a lawyer to his client or intended for him, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception, for the latter, of those marked "official," interview notes and, more generally, all documents in the file are covered by legal professional privilege.

48. It follows that, where the lawyer acts in his advisory or defence capacity, all correspondence exchanged between a lawyer and his client, together with annexed documents, is covered by legal professional privilege and that, where the client has not agreed to waive that privilege, the tax administration may not lawfully rely on the content of such correspondence to establish tax liability.

49. In dismissing the plea alleging that the tax administration had violated the legal professional privilege attached to correspondence between a lawyer and his client and dismissing Mr [B]'s claims relating to the reassessments concerning the 1989 David Trust, the judgment states that the correspondence at

[27] Cass. com., 3 May 2012, No. 11-14.008.
[28] Cass. com., 26 Nov. 2013, No. 12-27.162.
[29] Cass. com., 6 Dec. 2016, No. 15-14.554.

issue was the forwarding by Mr [L], protector of that trust, to [F] [B] of a fax addressed to him by the trustee concerning [F] [B]'s wish to establish a new trust for his benefit and, upon his death, for that of his children in respect of the ranch in Kenya, and infers therefrom that this was not confidential correspondence between Mr [H] [B] and his lawyer covered by legal professional privilege.

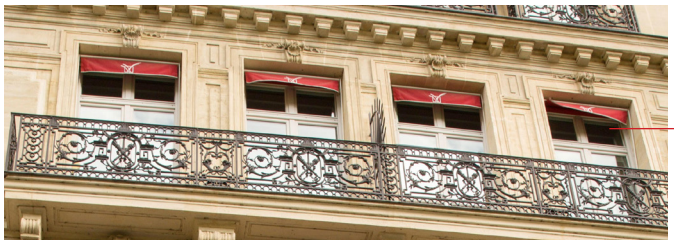
50. By ruling in this way, without investigating, as it was incumbent on it to do once the violation of lawyers' legal professional privilege had been invoked before it, whether the letter at issue had been sent by Mr [L] in his capacity as lawyer in the course of his advisory or defence activity to one of his clients, the Court of Appeal failed to provide a legal basis for its decision.

It is therefore now established that the position of the Criminal Chamber and of the French Competition Authority is in direct contradiction with that of the Commercial Chamber.

The current situation of conflicting case law between the Commercial Chamber and the Criminal Chamber of the Court of Cassation could lead to absurd situations in which lawyer-client exchanges in advisory matters might, in the same case, be regarded as valid evidence by the Criminal Chamber ruling as the court reviewing the regularity of inspection and seizure operations, while the Paris Court of Appeal ruling on the merits, or the Commercial Chamber, would be faced with unlawful evidence (according to the Commercial Chamber's case law), which may have led to convictions by the French Competition Authority. In that scenario, the outcome would be contradictory decisions in the same case.

Nor can one rule out a condemnation of France by the European Court of Human Rights, or infringement proceedings liable to result in a fine imposed by the Court of Justice[30], since a Member State's breach of EU law may result from the case law of its supreme courts[31]. Unless legislative reform is envisaged[32], it appears urgent that the Criminal Chamber of the Court of Cassation revise its case law, or that a preliminary question be referred to the Court of Justice in order to put an end to this uncertainty and restore the force of a principle that, in a State governed by the rule of law, should admit of no exception.

[30] To that effect, R. Dalmau, cited above.
[31] CJUE, 4 Oct. 2018, No. C-416/17, *Commission v. France*.
[32] This solution has been proposed by various authors (see in particular M. Boissavy, *Secret professionnel : la nécessité d'une nouvelle intervention du législateur*, *Gaz. Pal.*, 22 Oct. 2024, 16). However, experience has shown that in the past the Criminal Chamber did not comply with legislative changes intended to put an end to its case law.



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