Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations around the World

Third Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

2019

The Practitioner's Guide to Global Investigations

Third Edition

Editors:

Judith Seddon

Eleanor Davison

Christopher J Morvillo

Michael Bowes QC

Luke Tolaini

Ama A Adams

Tara McGrath

GIR

Global Investigations Review

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalinvestigationsreview.com

Enquiries concerning reproduction should be sent to: gemma.chalk@lbresearch.com.
Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

ISBN 978-1-78915-111-4
Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

ALLEN & OVERY LLP

ANAGNOSTOPOULOS

ARCHER & ANGEL

BAKER McKENZIE LLP

BANQUE LOMBARD ODIER & CO LTD

BARCLAYS BANK PLC

BCL SOLICITORS LLP

BDO USA, LLP

BORDEN LADNER GERVAIS LLP

BROWN RUDNICK LLP

BRUNSWICK GROUP LLP

CADWALADER, WICKERSHAM & TAFT LLP

CLIFFORD CHANCE

CLOTH FAIR CHAMBERS

CMS CAMERON McKENNA NABARRO OLSWANG

CORKER BINNING

DEBEVOISE & PLIMPTON LLP

DECHERT LLP

FOUNTAIN COURT CHAMBERS

FOX WILLIAMS LLP

FRESHFIELDS BRUCKHAUS DERINGER

GIBSON, DUNN & CRUTCHER LLP

GOODWIN

GÜN + PARTNERS

HERBERT SMITH FREEHILLS LLP

HL CONSULTORIA EM NEGÓCIOS

HOGAN LOVELLS

KINGSLEY NAPLEY LLP

KNOETZL

LATHAM & WATKINS

MATHESON

NAVACELLE

NOKIA CORPORATION

OUTER TEMPLE CHAMBERS

PINSENT MASONS LLP

QUINN EMANUEL URQUHART & SULLIVAN, LLP

RAJAH & TANN SINGAPORE LLP

RICHARDS KIBBE & ORBE LLP

ROPES & GRAY INTERNATIONAL LLP

RUSSELL McVEAGH

SCHELLENBERG WITTMER LTD

SIMMONS & SIMMONS LLP

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (UK) LLP

SOFUNDE OSAKWE OGUNDIPE & BELGORE

SULLIVAN & CROMWELL LLP

VON WOBESER Y SIERRA, SC

WALDEN MACHT & HARAN LLP

WILLKIE FARR & GALLAGHER (UK) LLP

WILMER CUTLER PICKERING HALE AND DORR LLP

Contents

VOLUME II
GLOBAL INVESTIGATIONS AROUND THE WORLD

1

Introduction to Volume II

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath[1]

Boards and senior executives have never been more concerned that they or their organisation may come under the scrutiny of enforcement authorities. And with good reason. Recent years have seen an upsurge in confidence among enforcement authorities across the globe, which has manifested and led to increased numbers of investigations, fines of unprecedented orders of magnitude and senior executives facing the much more realistic prospect of investigations concerning their own conduct and, in some cases, prosecution, conviction and imprisonment.

In many jurisdictions, the introduction of new offences and changes to the law of corporate criminal liability have provided enforcement authorities with enhanced opportunities to pursue criminal investigations and ultimately to prosecute corporate entities. Coupled to this has been the incentivisation of corporates to co-operate with investigations and provide information to assist authorities in pursuing culpable individuals through negotiated settlements. In some jurisdictions, notably the United States, these are an established feature of the enforcement landscape and are regularly used to bring investigations to a pragmatic conclusion without the commercially destructive consequences prosecution of a corporate entity can bring. In others, such as the United Kingdom and France, legislation enabling corporates to conclude investigations short of prosecution is still comparatively young.

The law relating to criminal and regulatory investigations shows no sign of standing still. Law and practice across the globe has changed, often in response to highly publicised scandals. Relationships between enforcement authorities continue to grow closer, and there is a marked trend in politicians, prosecutors and regulators carefully watching the way other jurisdictions choose to combat corporate crime, to apply the most effective mechanisms in

1 Judith Seddon and Ama A Adams are partners at Ropes & Gray International LLP; Christopher J Morvillo and Luke Tolaini are partners and Tara McGrath is a senior associate at Clifford Chance; Eleanor Davison is a barrister at Fountain Court Chambers; and Michael Bowes QC is a barrister at Outer Temple Chambers.

their own national contexts. Recent examples of changes to legislation in terms of either extending corporate criminal liability or legislating for its resolution through deferred prosecution agreements (or both) include significant changes being made in Singapore, Japan, Canada, Australia and Ireland at the time of writing. A similar trend may be observed in the regulatory sphere through the implementation of individual accountability regimes modelled on or drawing from the UK Senior Managers and Certification Regime in, for example, Hong Kong, Australia and Singapore.

All these macro factors, together with important changes to technical local legislation such as the implementation of the EU General Data Protection Regulation, present numerous, significant challenges to corporates and individuals around the world. Both can quickly find themselves the targets of fast-moving and far-reaching investigations, whose possible outcomes may vary significantly in different jurisdictions.

In Volume II of this Guide, which in the third edition now covers 21 jurisdictions, local experts from national jurisdictions respond to a common set of questions designed to identify the local – continually evolving – nuances of law and process that practitioners are likely to encounter in responding to the increasing number of cross-border investigations they face.

7

France

Stéphane de Navacelle, Sandrine dos Santos and Julie Zorrilla[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

The year 2018 has marked a turning point for corporate investigations in France, with the judicial convention of public interest (CJIP), the French equivalent of a deferred prosecution agreement (DPA), being used for the first time. The CJIP was introduced by the anti-corruption law addressing transparency, anti-corruption and economic modernisation of 9 December 2016 (the Sapin II law) as a type of settlement without admission of guilt or criminal liability. The first CJIP was signed on 30 October 2017 between the National Financial Prosecutor's Office (PNF) and HSBC and approved by a court order on 14 November 2017. The order approves the dismissal of the laundering of tax evasion proceeds and illicit banking solicitations charges, once the bank has complied with its obligations under the CJIP, namely the payment of €300 million to the French Treasury. Three other CJIPs have been signed since, the most recent being in 2018. SET Environnement and SAS Kaeffer Wanner, both charged with corruption, signed a CJIP with the Public Prosecutor of Nanterre, on 14 and 15 February 2018, respectively. The most significant CJIP – coordinated with the US Department of Justice (DOJ) – was agreed to by the PNF and Société Générale in connection with allegations of corruption of foreign public officials, namely employees of the Libyan Investment Authority. Under the latter agreement, Société Générale is to pay a fine of €250,150,755 (the same amount is to be paid under a DPA agreed with the DOJ) and its anti-corruption programme is to be supervised by the French Anti-Corruption Agency (AFA).

1 Stéphane de Navacelle is a partner, Sandrine dos Santos is a counsel and Julie Zorrilla is an associate of Navacelle.

Another relevant development is the hard-line stance taken against companies suspected of terrorism financing and money laundering. In December 2017, LafargeHolcim cement group executives, including the chief executive from 2007 to 2015 and former Syria chief, were charged with financing terrorism for having allegedly paid the Islamic State group and other militants to continue operating in the country.

In a separate matter involving UBS, the balance to be struck between the advantages and disadvantages of resorting to CJIPs and CRPCs (the French equivalent of plea deals) led UBS to choose to stand trial (which started in October 2018) on charges including illegal solicitation and laundering of the proceeds of tax fraud.

Spurred on by PNF leadership, and in light of the considerable backlog of matters to address, prosecutions in France are likely to result in an increase in CJIPs and CRPCs in collaboration with foreign authorities.

2 Outline the legal framework for corporate liability in your country.

Corporations can be held liable on both civil and criminal grounds. Corporate criminal liability is limited to 'offences committed on [companies'] account by their organs or representatives', namely for actions committed by persons who exercise direction, administration, management or control functions, or by persons who act on behalf of an identified delegation of power that meets specific criteria. Thus, corporate liability does not exclude individual liability.

From 2006, a new trend in case law appeared, by which the Criminal Division of the French Supreme Court (the Court of Cassation) found corporations liable without identifying an organ or representative, relying instead on facts that reflect an endorsement by company management. The Criminal Division has nevertheless reiterated that corporate criminal liability implies the identification of an organ or a representative.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Enforcement authorities include judicial, independent administrative and administrative authorities. Mostly, jurisdiction between the authorities is subject matter-based with numerous opportunities for co-operation – and competition – between authorities.

Each superior court has jurisdiction over offences committed within its territory or based on the location of headquarters. Specialised interregional courts have jurisdiction over economic and financial matters of some importance or complexity and whose scope involves several jurisdictions. Some particular fields fall within the scope of specialised sections of the prosecution authorities in Paris; for example, terrorism, war crimes and human rights, health and safety, and the environment. The aforementioned PNF was created in 2013 to deal with major complex financial, economic and tax prosecutions.

Alongside judicial authorities, the main independent administrative authorities with jurisdiction over corporations are the AMF (regulating the integrity of financial markets, ensuring investor protection and information, and preventing market abuse), the Competition Authority (conducting sector enquiries, antitrust activities, merger control, and publishing

opinions and recommendations), the ACPR (investigating wrongdoing, issuing warnings and sanctioning French banks) and the tax authority within the finance ministry. Each administrative authority has its own enforcement policies.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

In respect of criminal offences, there is no minimum standard for a prosecutor to request enquiries to be carried out; prosecutorial discretion is considerable. If the matter is particularly complex, prosecutors may turn it over to an independent investigating magistrate to carry out a comprehensive investigation into the facts and give an opinion as to guilt. Investigating magistrates can also be required to investigate pursuant to a specific complaint filed by alleged victims including, under specific conditions, non-governmental organisations.

Investigations can also stem from authorities' detection of suspicious activities within their material jurisdiction (e.g., if mandated by a foreign authority, responding to a report from a whistleblower or an alert triggered by the anti-money laundering branch of the finance ministry (TRACFIN), or owing to a legal obligation to support facts that may constitute a criminal offence).

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Within the European Union, judicial co-operation has led jurisdictions to apply the *ne bis in idem* principle to defendants already prosecuted in another Member State. French criminal law upholds the double jeopardy defence except in cases of territorial jurisdiction, namely when there is a sufficient nexus to French territory.

The principle of double jeopardy is also enshrined in article 14.7 of the International Covenant on Civil and Political Rights of 19 December 1966, and article 50 of the Charter of Fundamental Rights of the European Union.

On 26 February 2016, in a decision regarding the Oil-for-Food Programme, the Paris Appeal Court refused to apply the double jeopardy provision of the Code of Criminal Procedure to a US DPA. Conversely, the Court gave a cross-border application to article 14.7 of the Covenant, on the grounds that a separate provision of the Code of Criminal Procedure did not distinguish between national and foreign jurisdiction in enforcing double jeopardy. This apparent contradiction is to be reviewed by the Court of Cassation.

On 14 March 2018, the Court of Cassation confirmed the exclusion of the application of the *ne bis in idem* principle in this matter, arguing that article 14.7 of the Covenant applies only when both proceedings are initiated in the territory of the same state. The Court developed a broad appreciation of the concept of territorial jurisdiction, holding that even a very limited nexus is sufficient as long as some material act occurred in France.

This broad appreciation of the concept of territorial jurisdiction, which is the result of a developing jurisprudence, shows that France is determined to fight more effectively against corruption, even for offences committed at a time when the French legal framework had no extraterritorial reach.

The European Court of Human Rights (ECHR) recently adopted a similar position on the *ne bis in idem* principle in the *Krombach* case. The applicant argued that the German decision to drop charges against him prevented France prosecuting him for the exact same facts. The ECHR held that the *ne bis in idem* principle set out in article 4 of the 7th Protocol to the Convention did not have an extraterritorial application. This indicates that a foreign decision does not automatically have *res judicata* in another state, in line with recent French Court of Cassation decisions on the issue.

6 Does criminal law have general extraterritorial effect in your country? To the extent that extraterritorial effect is limited to specific offences, describe those which have extraterritorial effect, the statutory basis and any conditions that must be met for extraterritoriality to apply.

Criminal law can have an extraterritorial effect, based on the nationality of the perpetrator or the victim. It is applicable to any crime committed by a French national outside French territory. It is also applicable to a misdemeanour (*délit*) committed by French nationals outside French territory if the conduct is punishable under the legislation of the country in which it was committed (double criminality). French criminal law also applies to any felony, as well as to any misdemeanour punishable by imprisonment, committed by a French or foreign national outside French territory where the victim is a French national. The extraterritorial effect of French criminal law can also apply when an element constituting the offence takes place on French soil.

The extraterritorial reach of French criminal law can also apply in other limited circumstances, when fundamental interests of the nation, diplomatic or consular premises are targeted, for instance. The Sapin 2 law extends the extraterritorial effect of criminal law for corruption and influence peddling offences involving non-French perpetrators. French criminal law applies to acts of corruption or influence peddling committed abroad by a person carrying out all or part of their economic activity in the French territory.

7 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

To a large extent, pressure to increase enforcement of international financial and corruption issues comes from the United States, and co-operation with the United States usually works well in those matters, despite regular tensions and the overall impression that US prosecutions are, at least in part, carried out in support of US industry. Co-operation with other EU Member States is generally smooth.

Concern arises from the blocking statute that applies when a foreign authority is involved. The purpose of the statute is to prohibit compelled communication of virtually any information of commercial value without some involvement of French authorities. It carries both a fine and a prison term for violations. Appropriate contact with the French authorities that have been taking the lead in explaining its legitimacy, should mitigate risks – the French legislator has stated that the AFA should ensure that the French blocking statute is not violated.

EU-wide data protection and privacy rules are enforced by the French Data Protection Authority (CNIL) and the right of privacy of individual employees and the management

of personal information should be properly addressed. Although burdensome, both can be dealt with effectively by addressing the privacy issue as a firm policy and complying with data protection rules.

Although this is a rapidly changing area, most legal practitioners lack a proper understanding of the purpose of internal investigations (and compliance programmes) and improperly address the usual issues relating to investigations, including the right to representation and attorney–client privilege (which does not apply to in-house counsel). Also, apart from a few exceptions, the judiciary is still suspicious of private investigations.

8 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

See question 5. If a foreign court decision could be recognised by the French jurisdiction, the French authorities could decide to open their own investigation or to send the case before the French tribunals. However, the emerging trend is towards co-operation between French and foreign authorities. Efforts to co-operate with foreign authorities arise in the CJIP agreed with Société Générale this year (the SG CJIP), for instance, although the US authorities were the first to open an investigation, as early as 2014. The PNF started working with the DOJ, reciprocally communicating details of the investigation on account of the mutual legal assistance treaty. It was determined that the fine would be divided equally between the US DOJ and the French PNF and the monitoring would be carried out by the AFA.

9 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Enforcement authorities – with the exception of senior enforcement bodies such as the PNF and the Paris Financial Prosecutor's office – still tend to dismiss internal efforts to avoid violations of criminal law. This mindset is evolving, notably with the implementation of the Sapin II law mandatory compliance programme provisions, which apply to medium-sized and large corporations and provide for individual liability for executives who were aware of the misconduct. The implementation of the duty of care of parent and contracting companies law (National Assembly, TA No. 399 of 27 March 2017), which imposes an obligation on companies to implement monitoring measures, will also contribute to the transformation.

10 What are the top priorities for your country's law enforcement authorities?

The two main priorities of enforcement authorities are tax evasion – for individuals and corporations – and corruption. Since it was established in 2013, the PNF has aggressively moved to fight tax evasion, including in instances when the tax authorities themselves have decided not to impose sanctions, by relying on money-laundering offences. Legislative evolution will extend the PNF's ability to prosecute tax evasion by the end of 2018 by removing or reducing the power of control and appreciation of the Ministry of Economy in this area.

The PNF currently has more than 100 open corruption cases, of which approximately 20 per cent involve international corruption. The Sapin II law created the AFA – headed by a senior former investigating magistrate – which has carried out many audits of compliance programmes and, where a suspicion of crime is identified, referred the facts to the PNF.

11 How are internal investigations viewed by local enforcement bodies in your country?

Far from being embedded in legal culture initially, internal investigations have been accepted by specialised financial investigating magistrates as a necessary evil. Extra caution should nonetheless be taken if a judicial investigation is likely, as speaking to potential witnesses could be regarded as subornation and obstruction of justice, which is a crime in itself. It is indeed useful to note that, in France, there is a monopoly on an investigation by the public authorities.

In a legal culture where negotiating a deal with a prosecutor or an investigating magistrate is uncommon, and as in-house counsel has no legal privilege, close attention will be paid to attorney–client privilege in internal investigations.

Before an internal investigation

12 How do allegations of misconduct most often come to light in companies in your country?

Whistleblowers are an increasingly common source of disclosure of misconduct within corporations. The Sapin II law provides a specific framework to protect them. Whistleblowers cannot be excluded from recruitment procedures or professional training, or face dismissal or discriminatory measures, whether direct or indirect, notably regarding remuneration.

As some specific professions – including financial institutions – are required to report any suspicious activity to TRACFIN, anti-money laundering reports have generated several high-profile cases.

The Sapin II compliance requirement is likely to create a new compliance culture. The transitional phase is likely to generate its share of new matters.

Extensive freedom of the press and protection from disclosure of journalists' sources have led mostly web-based media to reveal facts resulting in prosecution of key political figures in recent years.

Under specific conditions, NGOs can initiate criminal procedures. Several landmark corruption investigations have been initiated by NGOs in recent years. For instance, in 2016, the NGO Sherpa filed a complaint against the cement group LafargeHolcim for alleged terrorist financing in Syria. In 2007, the same NGO initiated criminal proceedings by a joint complaint with Transparency International France on charges of ill-gotten goods against the son of the President of Equatorial Guinea.

The Sapin II law provides a specific framework to protect whistleblowers. Whistleblowers cannot be excluded from recruitment procedures, professional training, face dismissals or direct or indirect discriminatory measures notably regarding remuneration.

13 Does your country have a data protection regime?

France adopted a data protection regime in 1978 with the Law on Information Technology, Data Files and Civil Liberties. This year, legislation has been amended to integrate the EU's General Data Protection Regulation (GDPR) in France's internal legislative framework. Law No. 2018-493, which was passed on 20 June 2018, serves to incorporate the GDPR legislative updates within the existing 1978 Law.

14 How is the data protection regime enforced?

Law No. 2018-493 grants new investigating and sanctioning powers to the CNIL. The major change of this law is that, except for the processing of certain sensitive data and data controllers no longer having to file CNIL declarations, data processing is no longer subject to former formalities. Through the GDPR, data controllers have more prerogatives, having to maintain a record of the processing of data and notify any data protection violation without undue delay.

The right to information and the right of access, rectification and deletion of personal data for the individual are reinforced and the sanctions in the event of obstruction or non-compliance with the legal provisions are increased. The CNIL has the power to impose a periodic penalty (limited to €100,000 per day) in addition to administrative fines (which can be as much as €20 million or 4 per cent of annual global turnover). CNIL agents also have a broader right to survey and investigate places used for the processing of personal data.

15 Are there any data protection issues that cause particular concern in internal investigations in your country?

The use of personal information must not impinge on individuals' right to privacy. Databases containing any kind of personal information must be established in accordance with European and French rules under the supervision of the CNIL. Personal data can only be transferred to countries outside the European Union and the EEA when an adequate level of protection is guaranteed in the foreign country.

16 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Dawn raids are a keystone of enforcement and evidence gathering in an overwhelming majority of cases by judicial and administrative authorities. However, external counsel should be contacted immediately, if for no other reason than to collect valuable intelligence about the investigation. There is little room for a company to object to a dawn raid if it abides by the rules framing the process and is authorised by the public prosecutor for *in flagrante delicto* and preliminary investigations or the investigating judge for judicial investigations. An important procedural rule is that provided the raid does not relate to organised crime or terrorism, it may not start before 6.00am or after 9.00pm.

Companies should ensure they identify everything that is being seized, seek permission to make copies and specifically identify material that is attorney–client privileged or otherwise protected by law. If privileged materials are taken, they should be put under seal. Also, any incident should be reported in the minutes of the dawn raid and the minutes should not be signed if there is a disagreement as to content. Subsequently, if the legal requirements of a dawn raid have been violated, nullity of procedural steps can be obtained. Failure to comply with the legal conditions of a raid will lead to it being considered illegal. The acts resulting from a raid, including the seizure of materials and all legal implications, will be considered ineffective. The company will therefore be able to apply for the return of the materials seized in the event that the raid did not comply with the legal requirements.

17 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

There is a distinction to be made between external and in-house counsel. Legal privilege attaches to any advice provided by external counsel. Very often, privileged materials will be seized along with other material and a specific request must subsequently be filed to have the material covered by privilege returned to the company. There is no in-house counsel privilege, however, thus communications with in-house counsel are not protected by attorney–client privilege.

18 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

An individual and (at least in theory) a company can refuse to answer based on the right against self-incrimination. An individual or company can refuse to answer a question on the basis that the information is privileged. Provided there is no self-incrimination or information under privilege, an individual or a company that is not yet part of the proceedings can be compelled to attend a hearing to testify or face a €3,750 fine.

19 What legal protections are in place for whistleblowers in your country?

The first legal protection for whistleblowers dates back to 2007 and has developed since to target specific areas, including corruption and risks to public health or the environment. The Sapin II law provides for a general whistleblower protection but submits the whistleblower to a three-tier process, consisting of a preliminary report to the whistleblower's supervisor and, in the event of said supervisor's failure to address the report within a reasonable time frame, to the relevant administrative or judicial authorities or professional orders, and, as a last resort, to the public via the press.

20 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Data protection and privacy laws apply to all employees regardless of allegations of wrongdoing. Pursuant to French case law, messages sent by a company's employees using information technology devices made available to them by the company for professional purposes, are presumed to be professional. Hence, the employer is entitled to access the files and folders located on the company's computers or open messages within a professional messaging system without the employee being present, unless that employee has identified the material as personal. Nevertheless, the employee is entitled to impose the right to privacy, which includes the secrecy of correspondence.

Officers and directors of companies who are subject to board decisions have to be fired using similar procedures. In some positions subject to authorisation by a regulatory authority, removal of the authorisation can lead to termination.

An employee deemed to have engaged in misconduct must be allowed the same rights as other employees (i.e., delay in being summoned for a prior interview and the application of legal and statutory conditions of sanctions).

21 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

If the misconduct is confirmed, an employer has a large set of tools to sanction the employee, including releasing the employee from his or her duties until completion of the investigation. An employee can be sanctioned for refusing to participate in the internal investigation, which is considered a sufficiently severe fault by the labour courts.

Commencing an internal investigation

22 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

It should be considered good practice to prepare a document setting out the investigatory scope, especially when judicial review seems likely by labour courts if an employee who is deemed to have engaged in misconduct challenges the findings of the internal investigations, for instance. In 2018, the Paris Bar will publish detailed ethics recommendations for lawyers involved in internal investigations based on a report by Stéphane de Navacelle.

23 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

There is no obligation to report back to authorities nor is there a leniency programme. The company should assess the scope of the facts and the likelihood of a leak as soon as possible without creating unnecessary internal awareness.

24 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

Other than obligations attached to publicly traded companies, there are no obligations as to when a company must disclose the existence of an internal investigation or contact from law enforcement. Self-disclosure is voluntary.

25 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Board briefing by management strongly depends on the materiality of the investigations, the overall operations of the company and on the seniority of the individuals involved.

26 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

It is very likely that the enforcement authority would collect documents or data directly by conducting a raid within the company, having gathered sufficient information from third parties to ensure they are able to collect relevant information. If a company has any reason to believe a raid is likely, it should immediately ensure that any documents that may be seized are created in a privileged manner if possible and consider providing separate representation to key employees. In some specific instances, it may make sense to reach out to the appropriate authority ahead of time.

Administrative authorities, for example the AFA, the AMF, the ACPR, the Competition Authority and the Ministry of Economy, can request communication of data and documents from companies under review or directly from third parties.

27 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

Although exceptions do apply (e.g., the AFA), it is unlikely that an enforcement authority would use a notice or subpoena to collect documents or data. There is little ground for challenging such a request if it is within the scope of the authority's prerogatives and respects the legal requirements (see question 16). The company may argue against communicating data and documents that are covered by attorney–client privilege or medical secrecy, for instance.

Attorney–client privilege

28 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

There is no attorney–client privilege for communications with in-house counsel in France. For privilege to attach, the internal investigation should be carried out by external counsel, namely French lawyers admitted to the Bar. Interviewed employees are bound by contractual obligation to confidentiality, but this obligation cannot be used to avoid answering an investigating magistrate or police investigator's questions. The Paris Bar released an opinion stating that professional secrecy applies between lawyers and their clients, but does not apply to communications between lawyers and the employees of their clients when lawyers interview employees. Lawyers must therefore notify the employees of this, and their right to be represented by a separate attorney.

Professional secrecy applies to conversations between lawyers whether or not there is a common interest between their clients. Providing separate counsel to individuals is recommended to facilitate communications safely.

29 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The principle of the attorney–client privilege was set down in article 66-5 of the Law of 31 December 1971, amended by the Law of 7 April 1997 and by article 226-13 of the French Criminal Code.

These provisions expressly set out that an attorney may not disclose information that contravenes professional secrecy. Article 226-13 of the French Criminal Code states that disclosure of secret information by persons entrusted with such a secret, by virtue of their position or profession, or a temporary function or mission, faces imprisonment for one year and a €15,000 fine. Attorney–client privilege only applies when the lawyer is acting as a lawyer, that is to say, giving legal advice.

The holder of the privilege is the attorney's client, either an individual or a company.

30 Does the attorney–client privilege apply equally to in-house and external counsel in your country?

No privilege attaches to communications with in-house counsel. Privilege only attaches to external counsel.

31 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

Waiver of the attorney–client privilege is not specifically considered a co-operative step in France. The attorney–client privilege cannot be waived by the attorney under any circumstances, save for some exceptions (if an attorney must present his or her defence in a conflict opposing the attorney to his or her client). Only the client is entitled to waive the attorney–client privilege. At this stage, there is still little reliance by enforcement authorities on internal investigations.

32 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

This concept does not exist in France.

33 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Privilege can be maintained in France after a limited disclosure abroad. However, co-operation between enforcement authorities would be likely to make the privilege moot.

34 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privileges do not exist *per se* in French law. However, it is possible, for the purpose of defending a client, to share privileged information with other attorneys (without losing the privilege) – whether the clients share a common interest or not – and retained experts, namely forensic accountants.

35 Can privilege be claimed over the assistance given by third parties to lawyers?

The scope of professional secrecy is very broad and lawyers are expected to rely on experts. That being said, it is usually safer to have the information collected and processed within the law firm's offices.

Witness interviews

36 Does your country permit the interviewing of witnesses as part of an internal investigation?

There are no clear rules when it comes to internal investigations, and interviews with individuals who are not employees or former employees of the company should be regarded with great caution. If the underlying facts amount to an offence under French law, such an interview would be likely to be considered obstruction of justice. The proper alternative is to rely on external counsel.

37 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

There are competing doctrinal opinions as to whether or not internal interviews are covered by attorney–client privilege. Attorney reports are covered by attorney–client privilege as long as the attorney is providing legal advice. On the other hand, attorneys' reports are not covered by attorney–client privilege if the attorney is providing an expertise assignment. If this is the case, attorneys who draft an internal investigation report could be required to testify at a later stage in judicial proceedings.

38 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

Interviews of third parties should be ruled out unless specific precautionary steps are taken. The Paris Bar council recently issued recommendations according to which attorneys should explain the purpose of the interview and its non-coercive nature to employees and inform them that their exchanges are not covered by professional secrecy (equivalent of *Upjohn* warnings). Employees should also be informed that they can be assisted by an attorney, but only when it appears that they may be blamed for their actions at the end of the investigation.

39 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

Assuming external counsel carries out the interview, they should explain both whom the attorney–client relationship is with and how the privilege rule works. Independent counsel should be provided to interviewees if there is any sense that they might be involved in any wrongdoing. Documents are usually provided ahead of time when counsel for the employee is involved, from the counsel for the company to the counsel for the employee directly, as correspondence between attorneys is covered by privilege. This ensures that the employee is not given the opportunity to communicate the documents to third parties and that the authorities are unable to seize such documents.

Reporting to the authorities

40 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

Except for specific crimes that are inchoate and can be avoided, only civil servants have a general obligation to report crimes they become aware of in the context of their employment. There is no requirement to self-report. The AFA, which controls companies by preventing and detecting acts of corruption, has to report offences it is made aware of to the public prosecutor.

41 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

Except for antitrust issues, only in very limited circumstances does a corporation have an interest in reporting wrongdoing to enforcement authorities. It should first determine the scope of the wrongdoing and the responsibilities of those involved to assess potential corporate criminal liability. If the wrongdoing is carried out by a current or former employee, it should weigh the pros and cons of filing a criminal complaint against the perpetrators to deter others, show commitment to compliance and shield itself from prosecution by acquiring the status of victim.

Self-reporting outside France should be based on a decision tailored to the foreign country's laws and enforcement policies. Should the company decide to self-report in a foreign jurisdiction, reporting the facts to French authorities should also be considered. Arguments to weigh up include potential interest of French authorities in the underlying matter, where the facts occurred, whether they are still ongoing and how closely national and foreign authorities work together. The SG CJIP suggests full co-operation between authorities and a real willingness on the part of the French authorities to take up investigations occurring in France or involving a French entity.

In more than 300 ongoing matters, the PNF is working closely on trying to address cases at the preliminary enquiry phase of criminal investigations before an investigating magistrate is appointed, namely, the instruction phase, which limits the leeway for plea bargaining and considerably extends the length of procedures.

42 What are the practical steps you need to take to self-report to law enforcement in your country?

There is no specific procedure to self-report and no legal requirement to do so. Informal contacts should be made, through external counsel, with the competent authority, at the appropriate hierarchical level, after a thorough cost/benefit analysis. This will probably change over time with the implementation of the Sapin II law, although there is no statutory requirement to evaluate self-reporting and co-operation in a CJIP.

Responding to the authorities

43 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

There is no common practice by enforcement authorities of providing advance notice to corporations that may become defendants in criminal procedures. Contact should be made with the police investigator, prosecutor or investigating magistrate depending on the status of the investigation. Challenges can be made against requests beyond the scope of the instruction from the judicial authority.

44 Are ongoing authority investigations subject to challenge before the courts?

Ongoing investigations led by the public prosecutor are not subject to challenge before the courts. Challenges are only possible once the investigation is closed.

Ongoing investigations led by the investigating magistrate can be challenged before the courts.

45 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

The company should answer all the authorities involved separately as the questions that can be raised by different authorities could vary, and it should be borne in mind that authorities communicate with one another. When dealing with foreign authorities, blocking statute, privacy and data protection issues should also be addressed.

46 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

The collection of material abroad will have to be carried out in compliance with the applicable foreign law. However, national authorities will only be concerned about the actual answer to the production request.

47 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

There is extensive co-operation with foreign enforcement authorities both within the European Union and abroad, through mutual legal assistance treaties, agreements between regulators and enforcement authorities and EU co-operation agreements. With the SG CJIP agreed recently, which also signed DPAs with the DOJ and the US Commodity Futures Trading Commission, this co-operation is even more visible.

48 Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?

Except where the law provides otherwise and subject to the defendant's rights, the enquiry and investigation proceedings are secret. Any person contributing to the investigation is bound by professional secrecy, and the disclosure of secret information is punishable by imprisonment for one year and a €15,000 fine. In practice, information is often leaked by people who are under no legal obligation and leaks to the press in sensitive matters occur very frequently.

49 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

The company should retain external counsel to explain to the requesting French authority the foreign country's law and work with the French and foreign authorities for the production to be carried out appropriately, possibly pursuant to formal co-operation agreements.

50 Does your country have blocking statutes? What related issues are implicated by complying with a notice or subpoena?

France has both blocking and data protection and privacy statutes. The French blocking statute, subject to treaties or international agreements and to currently applicable laws and regulations, prohibits communication to foreign public officials of economic, commercial, industrial, financial or technical information or documents if that communication is harmful to France or is to be used as evidence in view of foreign judicial or administrative proceedings or in relation thereto. To ensure that this blocking statute and the data protection law do not affect domestic enforcement, the communication should be properly addressed when responding to a foreign authority.

51 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Voluntary production is limited to very specific circumstances, mostly when foreign authorities are involved, or when, in an ongoing investigation, there is a strategic interest to do so. Criminal files are accessible to all parties involved, including victims and other defendants.

Although legally covered by secrecy rules for legal professionals, parties themselves are free to share information from the file – not documents – with third parties. Information from high-profile cases is regularly leaked to the press.

Global settlements

52 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

There is an increasing recourse to CRPCs and CJIPs in France. The Sapin II law provides for CJIPs limited to instances of corruption and 'probity offences'. Companies should move swiftly to settle if possible as both procedures provide for, and are likely to include, forceful involvement of alleged victims who will pursue their own interests. If the case may involve foreign jurisdictions, companies should assess the consequences of admitting guilt in France.

53 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Corporate liability does not shield individuals from liability. In an overwhelming majority of cases (as required by law) the courts have to identify the individual or organ acting on behalf of the company. The individuals involved are therefore likely to have committed the offence themselves.

Penalties for individuals include fines, imprisonment, payment of civil compensation to victims within the same criminal procedure and prohibition from specific managerial positions in addition to publication of the decision in the press. Except for imprisonment, penalties for companies include all the above, as well as dissolution and debarment for certain specific offences.

54 What do the authorities in your country take into account when fixing penalties?

Although laws provide for very high penalties, including those based on a percentage of overall revenues for companies, penalties will be based on net worth, income, personality and *mens rea*. Although not recognised as such by law, deterrence appears to be a growing component of the rationale for penalties.

55 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution agreements are not part of the French legal system. DPAs will slowly become part of the legal system. As mentioned above, the Sapin II law provides for a DPA procedure limited to corruption and 'probity offences': the CJIP. Plea agreements – also limited to specific offences – have been available for more than a decade.

56 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

Ordinance No. 2015-899 of 23 July 2015, which transposes Directive 2014/24/EU on public procurement, prohibits companies found guilty of specific offences (e.g., corruption, fraud, money laundering, terrorism or embezzlement and misappropriation of property) from competing for government contracts throughout the European Union. This exclusion is automatically for a period of five years unless the sentencing decision specifically provides for a more limited time period (article 45 of the Ordinance). Article 39 of the Sapin II law amended article 45 of the Ordinance, which now allows a declaration on honour as sufficient proof that the candidate is not prohibited from applying for a government contract.

57 Are 'global' settlements common in your country? What are the practical considerations?

Multiple authorities often investigate the same facts at the same time. There is no particular procedure for global settlements as relationships vary from co-operation to competition and sometimes lead to a race to a decision. A prior sanction or decision on the same facts will be taken into account by the other authorities involved. However, and as mentioned above, the SG CJIP demonstrates an intent for stronger co-operation between authorities in the coming years.

58 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel private actions are possible. In most instances, alleged victims will join the criminal procedure as civil parties and will, as such, be granted full access to the file and be able to submit requests for investigative steps to investigating magistrates. Also, alleged victims can start a criminal investigation by filing a specific complaint to that effect.

Private parties do not normally have access to administrative authorities' investigation files.

Publicity and reputational issues

59 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

Secrecy at the investigatory stage is required by law. However, defendants and victims have access to the file. It is sometimes very difficult to keep communication and information taken from the criminal file private. Once a case is before a court, the press can cover the event, be present at the hearing (however, microphones and cameras are prohibited) and attend the debates. Defendants and victims are free to make statements.

60 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

It is very common to have press releases, communications and crisis management strategies prepared, and, when appropriate, public relations firms assisting. The spokesperson is often a lawyer on the case, especially when individuals are involved.

61 How is publicity managed when there are ongoing, related proceedings?

Publicity is part of the overall strategy, especially in high-profile matters that attract political attention and that have numerous civil parties.

Duty to the market

62 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

Unless otherwise specifically requested by an agreement, there is no obligation to disclose settlements to the public. In anti-corruption matters, the Sapin II law makes disclosure compulsory. Any settlement in criminal matters will have to be approved by a judge at a public hearing. Although investigative measures and the result of investigations are to remain confidential, and police officers, judges and legal experts are bound by that confidentiality, administrative authorities are permitted to communicate on sanctions and settlements.

It is interesting to note that CJIPs do not amount to an admission of guilt in France and companies will not have a criminal record, thus allowing them to still participate in public procurement proceedings.

Appendix 1

About the Authors

Stéphane de Navacelle
Navacelle

Stéphane de Navacelle has worked in the field of white-collar crime and corporate crime in New York, London and Paris (at Engel & McCarney and Debevoise & Plimpton LLP).

With more than 10 years' experience in French and US white-collar crime, he has participated in several landmark cases involving the Foreign Corrupt Practices Act and embargo restrictions (OFAC), charges of market abuse and insider trading, fraud (Forex), benchmark manipulation (LIBOR and EURIBOR), investigations by multilateral development banks (World Bank) as well as criminal and internal investigations in Europe, the Americas and Africa. He advises companies with setting up and auditing compliance programmes.

Stéphane de Navacelle has been identified as a leading practitioner by *Chambers and Partners*, *The Legal 500 France*, *The Legal 500 EMEA*, *Who's Who Legal* and the *Expert Guide* for White-Collar Crime / Business Crime, Investigations and Stock Market Litigation.

Stéphane de Navacelle is a regular participant in seminars and is consulted on issues relating to regulatory and criminal investigations in Europe and the United States.

Sandrine dos Santos
Navacelle

Before joining Navacelle, Sandrine dos Santos worked in an elite French litigation boutique and at the Paris Prosecutor's Office from 2007 to 2010. She dealt with cases related to economic and financial crime or organised crime and damages to persons or property and acquired a strong expertise in white-collar crime.

Ms dos Santos has worked on complex international corruption matters involving high-profile political stakeholders and large-scale companies in Africa and South America. She also handled sensitive LIBOR-related matters.

Ms dos Santos has assisted clients in setting up global compliance training. She is a regular participant at conferences organised by the French Institute for Higher National Defence Studies.

Julie Zorrilla
Navacelle

Julie Zorrilla worked as a trainee in the Directorate of Legal Affairs at the French Ministry of Economic Affairs and Finance in 2012 and was a law clerk to the Paris Court of Appeal in 2011.

During the past few years, Ms Zorrilla has worked on complex cross-border financial and criminal matters (including embargo, index manipulation and SSA) involving top executives and large foreign and French lending institutions. Ms Zorrilla has also handled large-scale corruption matters, advising on both legal and communication strategies.

Navacelle
60, rue Saint Lazare
75009 Paris
France
Tel: +33 1 48 78 76 78
Fax: +33 9 81 70 49 00
sdenavacelle@navacellelaw.com
sdossantos@navacellelaw.com
jzorrilla@navacellelaw.com
www.navacellelaw.com

Visit globalinvestigationsreview.com
Follow @giralerts on Twitter
Find us on LinkedIn

ISBN 978-1-912377-34-3