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LES AVOCATS

GUIDE

THE FRENCH LAWYER AND INTERNAL INVESTIGATIONS

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National Council of Bars and Law Societies/Research and Study Centre

EDITORIAL

One of the effects of the Sapin II Act of 9 December 2016, which defined new rules on combating corporate corruption, in particular through the use of prevention and detection mechanisms, has been an upsurge in internal investigations. Nevertheless, this type of investigation was developed long before the Sapin II Act became law, as a means of shedding light on suspected acts of competition infringement, fraud and harassment.

Internal investigations have developed in line with a national and international shift in the **philosophy** and practice of law and, consequently, in the role played by its incumbent stakeholders. A company that is the subject of an internal investigation also participates in and organises that investigation. In order to conduct internal investigations, companies require the services of independent legal professionals, chief among whom are modern-day lawyers.

This involves lawyers assuming a role for which they must secure the requisite trust and backing from the companies concerned, which are both the setting and the subject of internal investigations. To this end, lawyers must call on their technical expertise, while ensuring compliance with the core ethical principles that govern the practice of the profession.

For lawyers, this does not mean altering their fundamental role as advisors, but rather expanding the range of expression of their professional qualities, so as to anticipate and resolve disputes whenever and wherever they may arise.

Internal investigations therefore have their own methodology and techniques, which this guide aims to summarise through the joint work of experienced lawyers who have compared their concerns and their practices in order to formulate recommendations.

This guide has thus been designed to be of interest to all lawyers who wish to **enhance** their services in this field and deepen their knowledge of the relevant best practices.

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CONTENTS

INTRODUCTION

Legal entities that are confronted with conduct which could lead to criminal or administrative penalties have always called on lawyers to conduct direct or indirect investigations into the related facts in order to obtain as much information as possible, so that they can fulfil their remit, build their cases and prepare their clients' defence, or assist them in managing these situations.

Nevertheless, the lawyer's role has evolved significantly in recent years, in particular under the influence of common law practices.

The entry into force of the Sapin II Act and the introduction of the deferred prosecution agreement have led to a proliferation of internal investigations, which are a new form of engagement for lawyers.

Nevertheless, internal investigations are not confined to corruption-related matters or breaches of ethics targeted by the Sapin II Act. For many years, internal investigations have been standard practice when addressing suspected violations of competition law. Similarly, internal investigations are far from being a recent technique for cases involving infringements of labour laws and regulations (such as occupational accidents, harassment and discrimination).

In this context, lawyers have a decisive role to play, firstly, as they are often in the best position, due to their experience of judicial matters, to carry out the investigation in compliance with the law and, secondly, due to the legal privilege which applies to the attorney – client relationship.

When it is in the client's interest, internal investigations may require lawyers to liaise with the prosecuting authorities as part of an initiative to cooperate with judicial proceedings, even though this may appear to be at odds with the traditional French conception of the lawyer's role. Incidentally, such cooperation has always existed when it is in the client's interest.

However, this cooperation is reflected in an objective obligation that lawyers must honour in their relations with the prosecuting authorities, which expect them to help in "*revealing the truth*"[1]. Therefore, lawyers who assist their clients with internal investigations when a criminal investigation is also being conducted will face three potentially difficult challenges:

1 Guidelines, page 9.

1) With regard to the prosecuting authorities, they must come across as trustworthy participants who are not seeking to conceal evidence or hinder the progress of the judicial investigation[2],

2) With regard to corporate clients, lawyers must be perceived as an effective defender of the company's interests, while fulfilling the requirements mentioned in point 1).

3) With regard to the persons the lawyers will contact for internal investigations, but will not represent, they must behave fairly so that these persons can defend themselves effectively in the event of a criminal or administrative investigation.

To this end, the Paris Bar, in particular, has been working on the subject, and on 13 September 2016 issued the Handbook, which was updated on 10 December 2019. However, although this publication is major step forward and its recommendations are still relevant, more than three years after the Sapin II Act was introduced, and after several deferred prosecution agreements were signed, it seemed appropriate to examine the subject in more depth in order to identify the best practices to be implemented by lawyers in conducting internal investigations, while bearing in mind that the investigation, in many cases, is preceded by or concomitant with judicial proceedings, and must be undertaken with the aim of preserving the right to a fair trial and its corollary, the rights of defence.

2 Guidelines, page 9.

OPENING REMARKS

An internal investigation is the process that is initiated when a company is confronted with suspicions of conduct that could constitute a breach of its internal rules or of the regulations and legislation that are applicable to it, in order to determine whether or not these suspicions are justified. The aim of an investigation is to identify the circumstances surrounding an event or events so that, where necessary, the company can take appropriate steps (terminate contracts, issue disciplinary penalties, bring in new management, or tighten controls and its compliance policy, for example), as well as manage the potential consequences of the situation (for example, contact with the authorities and preparation for a criminal or regulatory investigation, or for litigation).

An internal investigation differs from an audit or compliance review in terms of both its form and its purpose. It aims, on a preventive and periodic basis[3] or in respect of certain events, to assess the correct implementation of the compliance programme within a given entity[4]. While French lawyers may be required to assist a company in conducting both internal investigations and compliance audits, this practical guide and the recommendations it contains are solely focused on internal investigations.

On the date of publication of this guide, the practice of internal investigations in France is a new, thriving discipline that is very much in a growth phase[5]. The working group is aware that practices in this field continue to evolve under the impetus of various stakeholders, but nevertheless wished to provide an initial summary of the issues that French lawyers who are engaged to conduct internal investigations should examine. This guide aspires to provide input for ongoing discussion and to guide fellow lawyers who are looking for information. Nevertheless, this guide is not intended to be either exhaustive or binding, and will be updated in the future.

3 Or, on an ad hoc basis, where required by the circumstances (an acquisition, for example)

4 The fact remains that any shortcomings which are identified by a compliance audit may give rise to a parallel or subsequent internal investigation

5 It is worthwhile recalling here Portalis' words of wisdom concerning a much more significant work: "*A code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new combination, some new fact, and some new outcome.*" Portalis, Preliminary Address on the First Draft of the French Civil Code

ENGAGING A LAWYER FOR AN INTERNAL INVESTIGATION, PREVENTING CONFLICTS OF INTEREST, THE LAWYER'S MANDATE

I. ENGAGING A LAWYER FOR AN INTERNAL INVESTIGATION AND PREVENTING CONFLICTS OF INTEREST

The lawyer-client relationship is based on trust. This presupposes, for each person, freedom to choose a lawyer and, for each lawyer, freedom to accept or refuse an engagement, which is analogous to the nature of the profession:

"***The profession of lawyer shall be practised freely and independently, regardless of the chosen form of practice***" (Article 1 of the National Regulations of the Profession - "RIN").

There are only a few restrictions on lawyers' freedom to choose their cases.

In addition to (i) a lawyer exercising his/her conscience clause and (ii) declining a mandate due to not having the required skills or the necessary time, or due to difficulty in identifying the client (Articles 1.3 and 1.5 of the RIN), (iii) the prevention of conflicts of **interest** is a fundamental ethical obligation for the practice of the profession.

Article 4.1 of the RIN states:

"*A lawyer cannot be the counsel or representative or defender of more than one client in the same case if there is a conflict between the interests of his/her clients or, unless the parties agree, a serious risk of such a conflict.*

Unless there is a written agreement between the parties, the lawyer shall refrain from handling the cases of all the clients concerned when a conflict of interests arises, when legal privilege is at risk of being breached or when the lawyer's independence may be undermined.

The lawyer cannot accept the case of a new client if the confidentiality of the information provided by a former client is liable to be breached, or if the knowledge by the lawyer of the former client's cases could place the new client at an advantage.[6]

6 See in particular: French Supreme Court, First Civil Division, 30 June 1981, no. 80-15557 (the cases were not identical but there were opposing interests); French Supreme Court, First Civil Division, 3 March 2011, no. 10-14012 (the lawyer did not use information obtained in an initial engagement for the purposes of a second engagement, therefore, there was no breach of legal professional privilege).

When lawyers are members of a practice, the provisions of the above sub-paragraphs are applicable to said practice as a whole and to all its members. They also apply to lawyers who practise their profession by pooling resources, inasmuch as there is a risk of legal privilege being breached."

Article 4.2 of the RIN specifies:

"*There is a conflict of interests:*

- in the role of counsel, when, on the date the matter is referred to him/her, the lawyer, who is under an obligation to provide complete, fair, unreserved information to his/her clients, cannot fulfil his/her engagement without compromising, either by the analysis of the situation presented, or by the use of the recommended legal resources, or by achieving the desired outcome, the interests of one or more of the parties;
- in the role of representation and defence, when, on the date the matter is referred to him/her, assisting one or more of the parties would lead to the lawyer presenting a different defence, in particular the development, the line of reasoning or the finality thereof, from that which s/he would have chosen if s/he had been entrusted with the interests of only one party;
- when a modification or change in the situation that was initially submitted to him/her reveals one of the difficulties mentioned above to the lawyer.

Risk of a conflict of interest

There is a serious risk of a conflict of interest when a foreseeable modification or change in the situation that was initially submitted to him/her is reason enough to anticipate one of the difficulties mentioned above."

One author interprets this as being "*situations in which one person who is entrusted with the interest of another does not act, or may be suspected of not acting, fairly or impartially with regard to said interest, but with the aim of favouring another interest, whether his/her own or that of a third party*"[7].

In other words, aside from the specific matter of lawyers' liability for drafting legal documents (Article 7 of the RIN), there is a conflict of interest:

- In the field of counsel, "*when the lawyer, who must provide complete, fair, unreserved information, cannot fulfil his/her engagement without compromising the interests of one or more parties, either by the analysis of the situation presented, or by the use of the recommended legal resources, or by achieving the desired outcome*"[8];
- In the field of assistance or representation, "*when assisting more than one party would cause the lawyer to present a defence that is different from that which s/he would have chosen if s/he had defended solely one party*"[9].

7 J. Moret-Bailly, *Définir les conflits d'intérêts*, Dalloz 2011, no. 1100.

8 Stéphane Bortoluzzi, Dominique Piau, Thierry Wickers, Henri Ader, Adrien Damien, *Règles de la Profession d'avocat*, no. 441.15.

9 Idem.

1. Types of conflicts of interest

There are three specific types:

- Conflict between clients' interests;
- Lawyers' knowledge of former clients' cases;
- Lawyers' liability for drafting legal documents.

1.1. Conflict between clients' interests

A lawyer cannot counsel, represent or defend more than one client in the same case if the clients' interests diverge, irrespective of whether there is in fact a conflict of interest or a "*serious risk*" of such a conflict, unless the written consent of the parties is obtained.

1.2. Lawyers' knowledge of former clients' cases

Moreover, a lawyer cannot accept the case of a new client if the confidentiality of the information provided by a former client may be breached or if the lawyer's knowledge of a former client's cases could place the new client at an advantage.

A lawyer may, however, defend a new client against a former client unless there is proof that the privileged nature of the information was breached, and on the condition that the knowledge the lawyer may have had of the former client's affairs does not provide him/her with any means to grant the new client an advantage over the former client[10].

Similarly, unless there are specific circumstances, a lawyer who is the usual counsel of a company that is represented by its legal representative is not faced with a conflict of interests if s/he advises said company in a case against said legal representative after the representative was removed from office[11].

A conflict of interest must be assessed within the structure through which the lawyer practises; the provisions concerning conflicts of interest are applicable to such structures as a whole, as well as to all their members. These provisions apply within a structure used for pooling resources. They also apply to associates' personal cases (Article 4.1 of the RIN).

When one or more lawyers who work on an internal investigation have practised in another firm, any cases transferred between the firms should be taken into consideration.

10 Paris, opinion no. 252947, 3 June 2014 (it was found to be acceptable to represent a company for declaring insolvency, then its employees when filing claims for the payment of salaries, as the lawyer did not gain any advantage from having first defended the company).

11 Paris, opinion no. 221259, 13 September 2011.

Thus, when a lawyer, in a firm where she was formerly an associate, previously advised a company under circumstances that provided her with "*knowledge of its situation*" and of the "*conditions under which the company (...) organised its defence in such cases*", she can no longer represent another client against that company and must withdraw from such cases[12].

In the same vein, if a lawyer shares an office with a colleague who was responsible for designing a strategy for a client, he can no longer, even if he has left the firm, defend a person whose interests are opposed to those of said client in the same case[13].

Consequently, unless there is a written agreement between the parties, lawyers must refrain from advising on cases of which they were aware in a previous firm or from representing a new client in a case against a former client, if there is a risk of breaching legal privilege and if knowledge of information could potentially place the new client at an advantage, in particular through the use of information obtained solely through the relationship of trust the lawyer had with his/her previous client[14]. In the event of difficulties, analysis on a case-by-case basis is necessary.

In all cases, a conflict of interest must be analysed in light of the organisation implemented by the firm:

"In the event of difficulties, the situation should be analysed on a case-by-case basis in light of the case in question, and it is the responsibility of the President of the Bar to assess, according to the factual circumstances, whether all the members of the practice structure will also have to refuse cases on which the same lawyer personally advised at an earlier date. The circumstances must be analysed, in particular, in light of the organisation implemented in the second firm and, if that organisation is such that there is no risk of legal privilege being breached (watertight allocation of litigation cases between partners under all circumstances, with separate, closed offices), the rules on conflicts of interests apply solely to the lawyer concerned and not necessarily to all the members of the firm"[15].

1.3. Lawyers' liability for drafting legal documents

According to Article 7.1 of the RIN, a lawyer is regarded as having drafted a legal document if s/he, alone or in association with another person, prepared a legal document on behalf of one or more other parties, who may or may not be assisted by counsel, and who obtained their signature on the instrument.

12 Paris, opinion no. 203863, 5 May 2010.

13 Paris, opinion no. 230487, 5 June 2012.

14 CNB, *Comm. RU*, notice no. 2017-008, 16 March 2017.

15 Stéphane Bortoluzzi, Dominique Piau, Thierry Wickers, Henri Ader, Adrien Damien, op. cit. no. 441.39.

Article 7.1 of the RIN describes two separate situations:

- If the lawyer was the only person who drafted the legal document, s/he cannot take action with regard to or defend the validity of the performance of the document s/he drafted, unless the objection is raised by a third party to the instrument.
- If the lawyer merely drafted the legal document without being the parties' counsel, or if s/he was not the only person who drafted the document, the lawyer may take action with regard to or defend the implementation of the interpretation of the document that s/he drafted or was involved in drafting.

2. The main forms of conflicts of interest identified by the working group

In light of the above, the main conflicts of interest identified by the working group with regard to internal investigations are as follows:

- The internal investigation concerns or is likely to concern, in addition to the company and its employees, a client or a former client of the company's usual lawyer, whose interests may be separate from those of the company (another company, an executive or employee of another company, a supplier, sub-contractor, intermediary, public official, etc.);
- The usual lawyer of a company that is undergoing an internal investigation has in the past assisted a subsidiary or executive of the company, one of its employees, or a person who joined the company, with respect to a case**,** and at that time obtained information that s/he is at risk of disclosing or that could favour the interests of the company in the running of the internal investigation;
- The lawyer, or a colleague in his/her practice, was involved in the events that are the subject of the internal investigation, in particular by participating in all or part of the negotiations, or entering into or performing an agreement, the lawfulness of which is at issue;
- In contrast, the fact that the lawyer implemented or worked on a compliance programme within the instructing company does not constitute a conflict of interest that could preclude him/her from participating in an internal investigation in the interest of said company. Indeed, there is no reason why, under such circumstances, the lawyer could not fulfil his/her engagement without compromising the interests of his/her client. By definition, if an internal investigation has been opened, it is often as a result of a mechanism that detected the events which are the subject of the investigation being triggered; the lawyer may or may not have implemented said mechanism. There is also the relatively rare scenario in which the event that is the subject of the internal investigation may have occurred despite the implementation of a compliance programme or, more generally, of a mechanism to prevent it, where said programme or mechanism was implemented or drafted, **even** partially, by the lawyer who is approached to conduct the internal investigation (see the following recommendations by the working group).

3. The working group's recommendations

Our recommendations are as follows:

- Implement a procedure to monitor conflicts of interest, which includes the review of clients who, as the case may be, are represented personally by associates or who were represented by them in a previous firm;
- If, following this initial verification, the existence or risk of a conflict of interest is identified, the lawyer(s) concerned should not be assigned to the internal investigation, and within the firm the services concerning the internal investigation should be kept strictly separate and reserved for only those lawyers who are authorised to have knowledge of them;
- Lawyers must ensure that their involvement in an internal investigation does not compromise the interests of another natural or legal person of whom they are or were the counsel;
- If a lawyer feels that an internal investigation is liable to compromise the interests of his/her usual contacts in the company (CEO, General Counsel, Head of Compliance, etc.), of whom s/he is not the counsel for their personal requirements, but who are his/her contacts for the engagement, s/he should advise them, from the outset, to engage another lawyer for their personal requirements;
- If the lawyer, or a colleague in his/her practice, was involved in the events that are the subject of the internal investigation, in particular by participating in all or part of the negotiations, or entering into or performing an agreement the lawfulness of which is at issue, s/he must refrain from participating in the internal investigation. This scenario, which is extremely rare, is referred to in Article 5 of the Handbook, as follows: "*A lawyer who is entrusted with an internal investigation must refrain from accepting an investigation which would require him/her to assess services that s/he previously provided.*" The working group endorses this solution;
- In the relatively rare scenario in which the event that is the subject of the internal investigation may have occurred despite the implementation of a compliance programme or, more generally, of a mechanism to prevent it, where said programme or mechanism was implemented or drafted, including partially, by the lawyer who is approached to conduct the internal investigation, the following points should be addressed:
- Firstly, whether the mechanism at issue was managed properly;
- Secondly, whether the person who committed the acts under scrutiny attempted to circumvent said mechanism.
- If the mechanism was managed properly and if the perpetrator of the acts that are the subject of the internal investigation did not attempt to circumvent said mechanism, the lawyer must ensure and have the profound conviction that his/her running of or involvement in the internal investigation will be completely independent, with no impact on the quality of his/her services.

II. THE LAWYER'S MANDATE

1. Summary of the applicable law

Article 6.2 of the RIN provides that:

"*The lawyer is the natural representative of his/her client, for counsel and the drafting of legal documents, as well as for litigation. S/he may perform services for natural or legal persons in any form or for trust funds or any asset management instrument.*

When s/he assists or represents his/her clients in court, before an arbitrator, a mediator, an administration or a public service representative, the lawyer does not have to provide a written mandate, unless required by the law or regulations on an exceptional basis.

In the other cases, the lawyer must provide proof of a written mandate, except in instances where one is presumed to existence pursuant to the law or regulations. ***The written mandate, or engagement letter, must specify the nature, the scope, the duration, conditions and termination methods of the lawyer's engagement****.*

S/he may be authorised to negotiate, act and sign for and on behalf of his/her client. Such authorisation must be specific and consequently cannot be general in nature.

The lawyer must first ensure that the operation for which s/he is being engaged is lawful. ***S/he must comply strictly with the authorisation and ensure that an extension of his/her powers is obtained from the client where required by the circumstances.*** *If it is impossible for the lawyer to fulfil the engagement that is entrusted to him/her, s/he must inform the client immediately.*

The lawyer may not, without having been specifically authorised in writing by the client, enter into a settlement for and on behalf of the client or commit the client irrevocably to a proposal or an invitation to treat (...)".

The mandate, or engagement letter, that is entrusted to the lawyer forms the basis for his/her future services. It is this document which defines the scope of the lawyer's actions in the interest of his/her client, regardless of the field of law concerned:

"*Therefore, the statutory and regulatory rules that are applicable to the* ***relevant*** *mandate should be consulted, such as a mandate to represent a client in court or as a sports agent, or a mandate to represent a client's interests for a real estate transactions, or for an* ***internal investigation****, etc., as well as the contents thereof, inasmuch as the mandate defines the lawyer's engagement, and in particular the lawyer's obligations with regard to his/her client*"[16].

16 Stéphane Bortoluzzi, Dominique Piau, Thierry Wickers, Henri Ader, Adrien Damien, *op. cit.* no. 412.53.

The scope of the lawyer's intervention, therefore, needs to be defined precisely for the purposes of conducting the internal investigation, concerning both the subject-matter of the internal investigation and the lawyer's precise role in that investigation (head of the investigation, joint head of the investigation alongside the client, or participation in the investigation to assist the client and the head of the investigation, for example).

The lawyer may not, under any circumstances, take initiatives on behalf of his/her client without first obtaining the client's consent:

"An ultra vires *act by a lawyer may trigger his/her liability, not only in civil law, but also in respect of disciplinary regulations. As a general rule, relations between a lawyer and his/her client are based on trust; however, over and above procedural requirements, professional ethics require judicial officers to fulfil a duty of care.* ***They must obtain instructions from their client and, as applicable, ensure that the client approves their initiatives and actions. They must comply strictly with the mandate and ensure that an extension of their powers is obtained from the client where required by the circumstances****"*[17].

The same applies to appeals, for which lawyers must necessarily obtain the client's agreement.

In a decision handed down on 28 April 2015, the disciplinary board of the Paris Bar stated, in particular, that *"the lawyer is the client's counsel, and it is not up to him to make a decision to initiate any form of judicial or administrative proceedings for a client, without having first obtained that client's consent. (...) In the case at hand, notwithstanding any questions concerning the existence of a written mandate,* ***the lawyer cannot, without first having obtained his client's agreement, initiate any form of proceedings or administrative formality on behalf of that client****"*[18].

Similarly, a lawyer cannot, without breaching the principles of honour and probity, sign a definitive settlement in the place of his/her client and without the client's agreement, for example with an insurance company[19].

Therefore, specific attention must be paid in the mandate to the conditions under which the lawyer corresponds with the judicial or regulatory authorities in connection with the internal investigation[20].

Although the Guidelines advocate *"informal preliminary talks"* between the Public Prosecutor and lawyers, these talks can only be held with the client's express authorisation. This also applies to the viewpoint, which is reproduced in these Guidelines, that *"regular exchanges between prosecutors and the counsel of the legal person must make it possible to ensure proper coordination"*[21]. The *"proper coordination"* between the Prosecutor's Office and the legal person's counsel echoes a very firm conviction expressed by the members of this working group, but which cannot under any circumstances override the successful coordination that is

17 Minister's response to written questions, no. 75215, JOAN Q. 27 Dec. 2005, p. 12117.

18 Opinion no. 258905, 28 April 2015.

19 Opinion no. 01.2992, 29 April 2008.

20 We note in passing that the mandate for a lawyer who is tasked with running an internal investigation is not a mandate for representation in litigation, and therefore does not grant the lawyer, *per se*, power to represent the client in legal proceedings.

21 Guidelines, p. 7.

vital between lawyers and their clients.

Incidentally, if an independent initiative relates to an internal investigation, it would be more than a mere breach of the agreements signed with the client, since it would **evince** a clear violation of legal privilege, which is the cornerstone of our profession.

2. THE WORKING GROUP'S RECOMMENDATIONS

The working group's recommendations are as follows:

- Identify the contact person for the lawyer in the company and plan for the resolution of any deadlock in the event that said contact person is indisposed or is implicated by the investigation;
- Define strictly in the mandate the scope of the lawyer's involvement regarding:
- The events that are the subject of the internal investigation;
- The contact persons within the company with whom the lawyer may discuss the internal investigation;
- As applicable, if they are anticipated, the conditions under which the lawyer will interact with the judicial or regulatory authorities in connection with the internal investigation.
- If, during the internal investigation, events that are unrelated to those referred to in the lawyer's mandate are brought to light, the lawyer must immediately inform the client and refrain from extending his/her enquiries to these events;
- If, following the internal investigation, criminal acts that are compatible with the search for a negotiated solution are identified, the lawyer may only contact the judicial authorities if so instructed by the client. Similarly, the lawyer may not respond to requests from these authorities without having first obtained the client's authorisation. In any event, the working group wishes to point out that, under all circumstances, lawyers must refrain from initiating any form of discussion with the judicial or regulatory authorities without first obtaining their client's agreement.

INTERNAL INVESTIGATIONS: IDENTIFICATION OF THE CLIENT

Numerous stakeholders may have a role to play in the phases of the internal investigation, from a possible report by a whistleblower or decision to carry out compliance checks, through to the reporting of the investigation's findings, including the running of the investigation itself. The lawyer who is responsible for the internal investigation, whether the company's usual counsel or a lawyer engaged specifically to run the investigation, is only bound by an engagement letter with regard to his/her client, and the lawyer's correspondence is only covered by legal privilege with regard to that client. The client therefore needs to be identified precisely (1) as does the person representing the client, who will be the key contact for the lawyer during the internal investigation (2).

I. WHO IS THE CLIENT?

A lawyer who is tasked with conducting an internal investigation and his/her client are bound by an engagement letter which, in addition to the terms of the lawyer's fees, defines the subject-matter of the lawyer's engagement.

It is therefore solely the person (natural or legal) who is designated in the engagement letter who has "client" status.

1. Identifying the client in the case of a group of companies or a joint venture

The lawyer's client is often a company that is part of a group. Now, while each of the group companies is a legal entity in its own right, under French law the group itself does not have **a** legal personality.

Accordingly, when a company that belongs to a group engages a lawyer, only that company becomes the client and obtains the associated benefit of the legal privilege. Therefore, in the event that a parent company engages a lawyer to conduct an internal investigation into the activities of one or more of its subsidiaries, care should be taken to ensure that the lawyer is acting on behalf of both the parent and the subsidiary, which should therefore be jointly designated as clients. This does**,** however**,** mean taking steps to check for possible conflicts of **interest** between these companies with respect to the running of the internal investigation.

The case of joint ventures. For joint ventures, the probability of a conflict of interest is much higher, insofar as the companies that form the venture are frequently competitors in other areas. Before engaging a lawyer who is tasked with conducting the internal investigation, it is advisable to ensure that said lawyer does not have a conflict of interest, in particular with the joint venture's shareholders. To avoid any difficulties, it would be preferable for the joint venture to have its own lawyer.

2. The specific case of a lawyer who is engaged by the board of directors or a specialised committee

Under certain specific circumstances, the lawyer who is tasked with running the internal investigation may be engaged by the board of directors or a specialised committee, such as the audit committee. As neither the board of directors/supervisory board nor the audit committee has a legal personality in their own right, particular care should be taken in the wording of the engagement letter, in order to specify that the company is the client.

II. THE LAWYER'S CONTACT

1. The lawyer's key contact

1.1. The *de jure* contact

Under French law, only the client of the lawyer who is tasked with running the internal investigation benefits from the legal privilege. Persons or entities that are not identified as the client, in particular in the engagement letter, cannot claim the benefit of the confidentiality of their correspondence with the lawyer.

Thus, when the client is a legal person, the contact person for the lawyer tasked with running the internal investigation will be the legal representative who is vested with the broadest powers to act on behalf of the company in all circumstances, in order to ensure that legal privilege is not breached.

In practice, this is therefore the CEO and possibly the deputy CEOs in corporations with a one-tier board, the chair of the executive committee or the sole CEO for corporations with a two-tier board, the manager for limited liability companies, and the president and possibly general managers/deputy general managers for joint-stock companies.

It should be noted that directors, supervisory board and management board members are not legal representatives, nor are shareholders or their representatives.

1.2. The designated contact person

The General Counsel or the Head of Compliance and his/her team are often key contact persons when it comes to framing the investigation procedure and, as necessary, designing a judicial strategy that is adapted to the client's interests. Regarding the Head of Compliance and his/her team, for internal investigations that are international or potentially international, the recommendation is to ensure ahead of time that all correspondence will indeed be covered by legal privilege in each jurisdiction that is targeted by the investigation[22].

They will therefore be the key contact persons for the lawyer who is tasked with running the internal investigation.

However, if the legal representative or his/her delegate are themselves suspected of the acts that are the subject of the internal investigation (whether from the outset or as the investigation progresses), a third party should be designated as the lawyer's key contact for the purposes of the internal investigation.

2. Precautions to be taken with third parties who have a connection with or who are involved in the running of the investigation

With regard to third parties whose involvement in the investigation may be necessary for specific technical reasons (such as a computer expert, or a forensic accountant or forensic accounting firm that will process the data), it is advisable for them to be engaged by the lawyer who is tasked with running the investigation to ensure that they benefit from legal privilege[23]. This also means that the lawyer will be the intermediary for communication between the third party/ies concerned. In all cases, extreme care should be taken in communications with such third parties as they are not bound by legal privilege with regard to the client.

3. Disclosure to the board of directors

Even if it did not directly engage the lawyer who is tasked with conducting the internal investigation, the board of directors (or, as the case may be, the supervisory board) may ask to be kept apprised of the progress and findings of the internal investigation, or even request permission to consult the lawyer who is heading up the investigation. It may be useful to advise the client to remind its directors of the confidentiality of the information provided and of **their** obligations.

Indeed, the board may take it upon itself to examine all matters that concern the smooth running of the company, and to make the checks and verifications that it deems relevant (Article L225-35 (1) of the French Commercial Code).

22 See the section on "Internal Investigations and Legal Professional Privilege"

23 See the section on "Internal Investigations and Legal Professional Privilege".

The board of directors may also ask to be provided with the internal investigation report[24], on the basis of its right to ask the chairman or the CEO for all the documents and information needed for the fulfilment of its remit (Article L225-35 (3) of the French Commercial Code).

Even though the directors are required to maintain the confidentiality of the information that is provided to them (Article L225-37 (5) of the French Commercial Code), it may be useful to remind them of the extremely confidential nature of internal investigations and of the data that they generate.

24 If such a report is prepared.

INTERVIEWS WITH THIRD PARTIES

This section covers the practical aspects of interviews with executives, employees and third parties that are conducted by lawyers who are mandated by a company to run an internal investigation.

An internal investigation may require interviews with the company's employees and verification of documents and files, where necessary using information technology.

This section does not cover the employer's obligations pursuant to personal data regulations or labour law, even though these matters are touched on in order to provide an overview[25].

I. SUBSTANTIVE LAW

1. National Regulations for the Profession of Lawyer ("RIN")

An investigation conducted by a lawyer must comply with the basic principles of the profession, in particular:

- **Fairness**[26]: when legal proceedings are contemplated or pending, the lawyer can only meet with the adverse party after informing them that it is in their interest to be represented by a lawyer. If the adverse party has made known its intention to be represented by a lawyer, this lawyer must be invited to attend all meetings;
- **Caution:** contacting a witness in any related criminal proceedings may lead to disciplinary proceedings[27];
- **Tact:** lawyers must act tactfully in dealings with clients and fellow lawyers[28].

25 See the section on "Internal Investigations and the GDPR"

26 Article 8.3 of the RIN.

27 Paris Lawyers' Governing Board disciplinary decision, session of 8 December 2003, adjudication panel no. 3, no. 23.353.9.

28 Article 1.3 of the RIN.

2. Appendix XXIV of the Paris Bar Internal Regulations: Handbook for lawyers who are tasked with running an internal investigation

The following table summarises the various ethical obligations that are incumbent upon lawyers who are tasked with running an internal investigation, as shown in the Handbook.

GENERAL OBSERVATIONS THAT ARE APPLICABLE TO ALL INTERNAL INVESTIGATIONS

• Lawyers must refrain from exerting any form of pressure on the persons with whom they have contact[29].
• Before the start of any interview, the lawyer must provide the following information[30]:
  • The contents of the interview and its non-coercive nature:
  • The fact that s/he is not the lawyer of the interviewee and that s/he is not, therefore, bound by legal privilege with regard to the interviewee, and may thus disclose to his/her client and to the prosecuting authorities the contents of the discussions that take place during the interview;
  • The fact that the legal privilege by which s/he is bound with regard to his/her client is not binding on the client, who can therefore use, as it sees fit, the statements and information obtained during the interview and, more generally, during the investigation.
• There are no restrictions on the persons who may be interviewed by the lawyer, e.g. executives, current or former employees and third parties (including clients, suppliers and business partners).
• If statements are recorded verbatim, the interviewee must be able to review, sign and receive a copy of the record of his/her statement. The copy that is annotated by the interviewee should then be kept.
• The interviewee must be informed that s/he can be assisted or advised by a lawyer if it becomes clear, before or during his/her interview, that s/he may be accused of a violation upon completion of the internal investigation[31].

3. General obligation to act fairly

Article L.1222-1 of the French Labour Code obliges employees and employers to perform employment contracts in good faith. In light of this, they are therefore under an obligation to act fairly.

29 Article 1 of the Handbook.

30 Article 2 of the Handbook.

31 Article 8 of the Handbook.

3.1. The employer's obligation to act fairly

For internal investigations, this obligation takes the following forms in practice:

- The prohibition for the employer to use contrivances or ploys, or hidden devices, in order to ensnare the employee;
- The obligation set forth in Article L.1222-4 of the French Labour Code to inform the employee beforehand of any devices used to collect information that personally concerns him/her[32]. The information provided in Article L.1222-4 of the French Labour Code concerns not only the devices used, but also their purpose and scope.

Failure to inform the employee beforehand of any devices used to collect information that personally concerns him/her renders the evidence obtained unlawful[33]. However, the monitoring of an employee's activity, during working hours and at the workplace, by an internal company department that is entrusted with this task, is not an unlawful means of gathering evidence *per se*, even if the employee is not informed beforehand[34].

3.2. The employee's obligation to act fairly

The obligation to act fairly means that the employee must refrain from any action that is contrary to the company's interest. The employee's obligation to act fairly is generally described as being an obligation of loyalty, non-competition and confidentiality. The confidentiality obligation concerns information that is confidential in nature, of which the employee becomes aware in the performance of his/her duties.

4. The obligation to follow the employer's instructions

The obligation to follow the employer's instructions results from the relationship of subordination, which is a fundamental characteristic of the employment contract. The employee's refusal to perform a task that falls within the scope of his/her responsibilities and qualifications constitutes a fault, which may warrant his/her dismissal, unless the task entails a breach of the law or a risk to the employee's health and safety[35].

When a person leaves the company during an investigation, a cooperation clause should be inserted in his/her severance agreement to ensure that s/he will cooperate with the investigation and attend interviews, if necessary.

32 Information is deemed to be personal if the disclosure thereof could infringe employees' rights and freedoms. It may, for example, take the form of personal data concerning the employee or data concerning the employee's family situation.

33 French Supreme Court, Labour Division, 10 January 2012, no. 10-23.482.

34 French Supreme Court, Labour Division, 5 November 2014, no. 13-18427.

35 Pau Court of Appeal, Labour Division, 24 April 2014, no. 12/01540.

5. Precautions during interviews

- **Criminal offence of false imprisonment**[36]: the Criminal Division of the French Supreme Court ruled that preventing an employee from leaving the office during a meeting (at which a lawyer was not present) under threat of dismissal was justified for the purposes of an internal investigation and, therefore, did not constitute a deprivation of freedom of movement or the criminal offence of false imprisonment[37].
- **Psychological harassment:** the Saint-Denis Court of Appeal found that the "methods used, unpleasant as they may have been (such as continual questioning from 3:00 pm to 8:30 pm) cannot constitute psychological harassment within the meaning of Article L.1152-1 of the French Labour Code, even though they may have had consequences for the health [of the person questioned, for whom] sick leave was prescribed"[38].
- **Criminal offence of witness tampering**[39]: in order to avert any risk of witness tampering, lawyers should avoid actual or potential promises, offers, gifts, pressure, threats, illegal action, subterfuges or contrivances with the aim of obtaining a false statement[40].

6. Admissibility of evidence

If the investigation confirms wrongdoing, the employees concerned may be subject to disciplinary measures, provided, however, that the **factual** evidence established by the investigation is lawful. In view of this, and in order for the evidence collected to be enforceable against the employees in the event of disciplinary measures, the persons tasked with **conducting** the investigation must ensure that the rules defined by French labour law are followed.

In this context, it should not be forgotten that the employer is vested with management power and, accordingly, has the right to monitor and check the activities of employees **in** the workplace during working time.

In the exercise of this power to monitor employees' activity, the employer must**,** however**,** comply with (i) the obligation to act fairly that results from Article L.1121-1 of the French Labour Code, which provides that *"no one may infringe upon the rights of persons and upon individual and collective freedoms in a manner that is not warranted by the nature of the task to be accomplished, or that is not proportionate to the intended objective"*, as well as (ii) the obligations to inform and consult the employee representative bodies and the employees if the employer uses monitoring and preventive techniques and devices to ensure employee safety.

- **In criminal proceedings:** proof is discretionary**;** therefore**,** interview conditions do not determine the admissibility of evidence before the criminal courts[41]. It should

36 Article 224-1 of the French Criminal Code.
37 French Supreme Court, Criminal Division, 28 February 2018, no. 17-81.929.
38 Saint-Denis (Reunion Island) Court of Appeal, 25 August 2009, no. 08/02071.
39 Article 434-15 of the French Criminal Code.
40 Article 434-15 of the French Criminal Code.
41 Article 427 of the French Code of Criminal Procedure.

nevertheless be emphasised that the presence of a lawyer alongside the employee who is being interviewed can potentially reinforce the admissibility and the weight of the employee's statements.

- Before the labour courts:
  - In principle, proof is discretionary[42]:
  - However, it must have been obtained fairly.
    - It cannot constitute an undue invasion of the employee's privacy[43];
    - The interview cannot be recorded without the employee's knowledge[44].
- **In administrative and civil** proceedings: proof of wrongdoing must have been obtained fairly.

7. Interview minutes

The Handbook only requires the review and signature of interview minutes when the statements are recorded verbatim. In practice, in light of the requirements of the investigation, its purpose and the facts in question, thought should be given as to whether it is appropriate to record the interviewee's statements verbatim.

As a general rule, the employer is at liberty to adduce the internal investigation report, assuming one is prepared, in proceedings against an employee[45] and can therefore refuse to adduce the report, without this violating the employee's rights of defence. Indeed, the Paris Court of Appeal ruled that an employer that conducts an internal investigation is entitled to refrain from providing the report to an employee before a preliminary meeting prior to a possible dismissal, even though the report may have proved the employee's misconduct, inasmuch as, regardless of the circumstances, employees do not have a right to access their disciplinary records[46].

II. RECOMMENDATIONS

These recommendations are not exhaustive and only concern lawyers' professional obligations.

1. Non-coercive nature of the interview

Employees who participate in an investigation should be informed of the non-coercive nature of the interview they are requested to attend. This means that employees are at liberty to refuse to attend or to leave an interview at any time**;** in the knowledge, however, that the

42 French Supreme Court, Labour Division, 23 October 2013, no. 12-22.342.

43 French Supreme Court, First Civil Division, 25 February 2016, no. 15-12.403.

44 French Supreme Court, Labour Division, 20 November 1991, no. 88-43.120.

45 For two examples, see: Paris Court of Appeal, 30 November 2016, no. 15/01947; Angers Court of Appeal, 9 June 2015, no. 12/01512; for an example of an investigation conducted after a whistleblowing report by an employee: Nancy Court of Appeal, Labour Division, 24 October 2018, no. 16/03043.

46 Paris Court of Appeal, 29 August 2018, no. 16/13810.

employer will draw all potential conclusions from this[47].

As a general rule, employees are required to:

- Attend the interviews that are scheduled during their working time, unless they have a legitimate reason to be absent;
- Answer the questions that are put to them by their employer on the tasks they carry out for said employer;
- Report on their work for the employer.

Nevertheless, lawyers must ensure that the basic principles of the profession are upheld and refrain from pressuring or intimidating the interviewees in any way.

2. The right to the presence of a lawyer

In light of the obligation to act fairly, employees who are interviewed, regardless of whether they are suspected of having committed acts that may lead to disciplinary measures, should be offered the assistance of a lawyer.

Therefore, the following two circumstances may arise:

(i) The lawyer knows that the person is suspected of having committed an offence or a breach of the company's internal rules before interviewing him/her: the person should be notified in writing, before the interview, that s/he has the right to be assisted by a lawyer;

(ii) It emerges during the interview that the interviewee may have committed an offence in the company or a breach of the company's internal rules: at that point, the interview should be stopped and a proposal made to the person concerned to postpone the interview so that s/he can be assisted by a lawyer.

3. Confidentiality

The employees who participate in the investigation should be informed of its confidential nature. They should also be reminded of their obligation to maintain confidentiality and not to discuss the interview with their colleagues, or disclose the fact that an interview took place.

4. Language used/right to an interpreter

It is recommended that the interview be conducted in a language in which the employee is fluent.

Under certain circumstances, it may be necessary to arrange for an interpreter to assist the interviewee so that s/he understands everything.

47 Pau Court of Appeal, Labour Division 24 April 2014, no. 12/01540.

5. Interview minutes

When a verbatim record is made of an interview, the interviewee should be offered the option of reviewing his/her statements and of signing them, if s/he agrees to this.

The interviewee may request a copy, which can be provided, unless ensuring the complete confidentiality of the investigation requires the retention of interview transcripts.

It is recommended that interviewees be informed of the following points in writing before the interview, where this is deemed necessary for evidence preservation purposes. Alternatively, at the start of the meeting, the lawyer may ask the employee if s/he consents to being recorded, inform him/her of the essential points below, and ask whether s/he has fully understood this. This information may be provided orally if a verbatim record is signed by the company employee.

1) The lawyers of ***[firm name]*** represent the interests of ***[company name]*** in this internal investigation, which is not coercive in any way.

2) Consequently, legal privilege applies, but only in the relationship between the lawyers of ***[firm name]*** and ***[company name]***; you therefore cannot benefit from said privilege. ***[Company name]*** may use all the information and statements obtained through the investigation and our interview.

   [***To be added if the interviewee may be accused of wrongdoing***]

3) You have the possibility, if you so wish, of being assisted by the counsel of your choice.

4) This internal investigation is confidential in nature; therefore, you must not disclose the existence and/or contents thereof (questions, answers and information obtained) to anyone whatsoever within or outside [**company name**]. You may nevertheless discuss this with your lawyer, if you decide to retain one.

   [As applicable, and if this has not already been done elsewhere in the company's procedures for the collection and processing of personal and general data from the internal investigation, the following sentence should be added:

5) Information concerning you is collected and processed as part of the internal investigation. Your rights and how to exercise them are explained in the attached leaflet, a copy of which has been provided to you[48].

6) You should retain and ensure the safekeeping of all professional documents in your possession. Accordingly, you are asked not to alter, destroy, dispose of or delete them electronically or in any other way.

48 See the section on "Internal Investigations and the GDPR".

INTERNAL INVESTIGATIONS AND LEGAL PRIVILEGE

This section covers issues related to the legal privilege of lawyers who provide services for company internal investigations, specifically substantive law (I) as regards the persons who are concerned by legal privilege (1), the content that this privilege in principle protects (2) and its exceptions (3), in particular for criminal and administrative investigations.

In light of this, recommendations are provided below on how to conduct an internal investigation with regard to lawyers' legal privilege (II).

I. SUBSTANTIVE LAW

1. The persons who are concerned by legal privilege

1.1. Lawyers are bound by legal privilege

In the event that information covered by legal privilege is disclosed, the lawyer may face criminal action (Article 229-13 of the French Criminal Code) and disciplinary proceedings (Article 2.1 of the RIN) and may also be held liable under civil law. French law provides that no one may release a lawyer from his/her obligation to uphold legal privilege, not even a client.

1.2. The client *per se* is not bound by legal privilege

Insofar as legal privilege is only binding on lawyers and not on their **clients**[49], clients are at liberty to disclose correspondence with their lawyer to a third party, who in turn is then at liberty to use or pass on that correspondence[50]. It should therefore be borne in mind that if a client voluntarily hands over to an authority documents that are protected by legal privilege, said documents no longer benefit from that protection.

49 French Supreme Court, First Civil Division, 30 September 2008, no. 07-17.162.

50 French Supreme Court, First Civil Division, 4 April 2006, no. 04-20.735.

2. Counsel and defence work-product that is protected by the lawyer's legal privilege

Legal privilege covers all the information that is disclosed in confidence to a lawyer on the basis of his/her status and profession, whether in the field of counsel or defence[51]. This includes not only information disclosed in confidence by the client, but also information received from third parties in connection with said client's case[52], as well as anything s/he may have been able to observe, discover or infer over the course of his/her professional activity[53].

On the contrary, the following correspondence was refused the benefit of legal privilege: events that were not confidential in nature[54], material facts that were known to third parties and that had no connection with the exercise of the rights of defence or counsel[55], and meetings that took place in the presence of third parties.

3. The challenges to legal privilege by criminal and administrative investigations

Opening remarks on in-house counsels

The Court of Justice of the European Union and the French Supreme Court do not extend the benefit of legal privilege to correspondence within a company that is sent to or from an in-house counsel[56].

In the event of dawn raids or searches of business premises or homes, correspondence between the companies' employees or third parties who are not bound by legal privilege and the company's in-house counsel therefore does not benefit from the protection of legal privilege.

51 Article 66-5 of Law no. 71-1130 of 31 December 1971, which reformed certain judicial and legal professions, contains the following provision: *"For all subjects, whether in the field of counsel or defence, the legal opinions that a lawyer sends his/her client or that are intended for said client, the correspondence exchanged between the client and his/her lawyer, between the lawyer and his/her fellow lawyers, with the exception of those labelled as "official", meeting notes and, more generally, all case exhibits, are covered by legal professional privilege (...)".*

52 Paris Court of Appeal, 30 November 1994, D. 1996, 311, commentary by J. Castelain.

53 Paris Court of Appeal, 30 November 1994, D. 1999. 230 - French Supreme Court, Criminal Division, 2 March 2004, no. 03-85.295; Paris Court of Appeal, 14th Division, 13 Nov. 1979.

54 Paris Disciplinary Board, decision no. 236168, 14 December 2004.

55 Paris Disciplinary Board, decision no. 185182, 10 July 2009.

56 CJEU, 14 September 2010, Akzo Nobel Chemicals Ltd. v Commission; First Civil Division, 3 November 2016, no. 15-20495.

However, in the *Whirlpool*[57] case, the senior president of the Paris Court of Appeal found that correspondence between a company's in-house counsellors was protected, inasmuch as said correspondence reiterated a defence strategy that had been implemented by the company's lawyer. The seizure of said correspondence and the attached documents therefore violated legal privilege and was annulled, and all reference thereto prohibited in the proceedings[58].

It should however be emphasised that this decision was handed down in respect of search and seizure operations that were ordered by the Magistrate for Custody and Release, who authorised the investigating officers of the French Competition Authority to carry out this operation with the aim of finding evidence of anti-competitive practices.

3.1. Dawn raids and seizures at lawyers' homes or offices during a criminal investigation

There is no case law regarding the protection of internal investigations by legal privilege in the event of a dawn raid on law offices pursuant to Article 56-1 of the French Code of Criminal Procedure[59]. In this working group's opinion, internal investigations are protected by legal privilege inasmuch as they contribute to the rights of defence within the meaning of the decisions of the French Supreme Court's Criminal Division that are handed down on the basis of Article 56-1 of the French Code of Criminal Procedure[60].

3.2. Dawn raids and seizures on clients' premises of documents that are covered by legal privilege

The comments on dawn raids on law offices are also applicable to dawn raids on clients' premises.

57 Paris Court of Appeal, Order of the Senior President, 8 November 2017, no. 14/13384, Whirlpool. This decision was overturned by the French Supreme Court and the case referred to a different Senior President for a new hearing; however, the Criminal Division did not rule on the protection of correspondence between the in-house **counselors** and the lawyer, Criminal Division, 13 June 2019, no. 17-87.364.

58 Christophe Lemaire, Simon Naudin (8 November 2017, *Revue Concurrences* no. 1-2018, Art. no. 86239, pp. 159-163) welcomed the principle underlying the Senior President's order – the application of the confidentiality of correspondence between lawyers and clients to companies' internal correspondence – but also criticised the implementation of this principle, as well as the penalty for failure to comply therewith. In acknowledging the principle, the Senior President "*aligned his position with that - which is already well-established - of the European courts, according to which 'the principle of the protection of written communications between lawyers and clients must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications'*" (Court of First Instance, 17 September 2007, Akzo Nobel Chemicals, and Court of First Instance, 4 April 1990, Hilti v Commission). An alternative solution would, in their opinion, have been unmanageable in practice, as we know that "*the very purpose of a legal opinion is to be used and circulated within the company, which is in fact (among other things), the role of in-house counsel*".

59 Article 56-1 (1) of the French Code of Criminal Procedure states, *inter alia*: "*A dawn raid on the offices of a lawyer or of his/her home may only be carried out by a judge or prosecutor and in the presence of the president of the Bar Association or of his/her representative, after a written and reasoned decision has been handed down by this judge or prosecutor, which indicates the nature of the offence or offences concerned by the investigations, the reasons that justify the dawn raid and the purpose thereof. The substance of said decision shall be brought to the attention of the president of the bar association or his/her representative by the judge at the start of the dawn raid. The judge and the president or his/her representative alone have the right to consult or be informed about the documents or items that are found on the premises, prior to the possible seizure thereof. No documents or items may be seized relating to offences other than those mentioned in the decision referred to above. The provisions of this paragraph shall be enforced under penalty of invalidity […]. The president or his/her representative may object to the seizure of a document or item if s/he regards such seizure as being non-compliant [...]".*

60 French Supreme Court, Criminal Division, 30 June 1999, no. 97-86318, *Bull*. no. 172; 22 March 2016, no. 15-83206, *Bull*. no. 96.

However, it should be noted that the protection afforded by legal privilege ceases if a client voluntarily hands over to the authorities documents that are covered by legal privilege, which is then undermined inasmuch as:

- During a search, even if it is brief, the investigators become aware of matters that are covered by legal privilege;
- The investigators consult/take possession of an entire hard drive that contains both data that is covered by legal privilege and data that is not, even if the privileged data is not admissible as evidence; and
- Documents covered by legal privilege are widely circulated within the company (even more so if they are circulated outside of the company).

Moreover, the Guidelines[61], which only reflect the position of the French Anti-Corruption Agency and the National Financial Prosecutor's Office, state that legal privilege is not binding on the client, who is at liberty to hand over privileged documents. They specify that it is up to the Prosecutor's Office to determine, in a deferred prosecution agreement, whether the refusal to disclose certain documents is warranted in light of the rules that apply to legal privilege. In the event of a disagreement, the National Financial Prosecutor's Office will determine whether the failure to hand over the documents concerned has had a negative impact on the extent of the company's cooperation.

The working group emphasises that the client may do as s/he pleases with his/her lawyer's work-product. The Prosecutor's Office will form its own opinion of the release or retention of a given document.

3.3. The threat to legal professional privilege of premises searches and administrative audits

The rules governing the powers of the administrations and/or administrative authorities to obtain or consult documents recognise the protection required by legal privilege[62].

61 On 27 June 2019, the National Financial Prosecutor's Office and the French Anti-Corruption Agency published Guidelines on the implementation of deferred prosecution agreements. Concerning lawyers' legal professional privilege in connection with the running of internal investigations, the Guidelines state, in particular, that "*where the internal investigations are conducted by a lawyer, it is the responsibility of the company and its counsel to determine which documents they wish to make available to prosecutors to be included in the case file of the criminal investigation. Not all the evidence appearing in the report of the internal investigation is necessarily covered by legal professional privilege.*"

62 Concerning tax matters, the French Supreme Administrative Court has ruled that legal professional privilege is indeed enforceable against the tax administration: Combined third to eighth chambers, 24 December 2018: according to Article 66-5 of Law no. 71-1130 of 31 December 1971, as amended in light of Law no. 97-308 of 7 April 1997, all correspondence exchanged between a lawyer and his/her client, and in particular legal opinions that are drafted by the lawyer for the client, are covered by legal professional privilege. However, the confidentiality of correspondence between lawyers and their clients is only binding on lawyers, not on clients who, as they are not bound by legal professional privilege, can decide to waive **confidentiality** without being compelled to do so. Thus, the fact that the administration may have consulted the contents of correspondence between a taxpayer and his/her lawyer has no bearing on the compliance of the taxation procedure that is followed with regard to said taxpayer, provided that the taxpayer agreed thereto. In contrast, **the disclosure of the contents of correspondence between a taxpayer and his/her lawyer vitiates the taxation procedure implemented against the taxpayer and entails relief from the tax where, despite not obtaining the taxpayer's prior agreement, the contents of said correspondence were used as a basis for all or part of the tax adjustment.**

For example, in its Investigation Guide, the AMF reiterates the value and enforceability of legal privilege[63]. The Competition Authority also has a system that makes it possible to exclude from its seizures the documents that are covered by legal privilege following search and seizure operations that are carried out on corporate premises on the basis of Article L. 450-4 of the French Commercial Code.

More specifically, with regard to email records, the courts dismiss claims for complete annulment of "*massive indiscriminate seizures*". They nevertheless accede to requests to annul seizures where they are based on those documents alone that are protected by legal privilege[64]. In so doing, case law preserves the confidentiality of lawyer-client correspondence while upholding the principle that email records can be divided into admissible and **inadmissible** evidence[65].

Conclusion regarding substantive law

- Lawyers are bound by legal privilege and cannot be exempt from this other than for "the strict requirements of their own defence before all courts" and "in the cases of declaration or disclosure provided for or authorised by the law"[66].
- Although clients are at liberty to disclose documents and information that are generated by correspondence with their lawyers, such disclosure will nevertheless result in the items concerned losing the benefit of the protection of legal privilege.
- The texts do not contain any specific provisions concerning the protection of legal privilege in connection with internal investigations, and at present there is no case law on this subject.
- The working group's position is that internal investigations are covered by legal privilege. They contribute to the rights of defence, as they aim to determine whether breaches of the law or regulations were committed and, therefore, seek to facilitate the preparation of a defence strategy (cf. English case law in this regard[67]). This means that for criminal or administrative investigations, even in the event of a dawn raid, a client can still refuse to hand over documents concerning an internal investigation that is conducted by a lawyer and, if said documents are seized, note the requisite reservations in writing.
- As French case law is not yet settled in this regard, lawyers and their clients must be cautious and vigilant, and ensure that legal privilege is upheld, without which the fundamental right to a fair trial, rights of defence and right not to incriminate oneself

63 Article L. 621-9-3 of the French Monetary and Financial Code, which is mentioned in the AMF's Investigation Guide, provides that: *"Within the scope of the inspections and investigations referred to in Articles L. 621-9 and L. 621-9-1, legal professional privilege may not be asserted against the Autorité des Marchés Financiers (...) except by judicial officers*." The AMF Investigation Guide also takes care to point out that "*the status of 'judicial officer' includes all professions whose primary and usual occupation is to help administer justice, including in particular lawyers, bailiffs and agents of the court (court-appointed administrators and receivers)*".

64 French Supreme Court, Criminal Division, 5 April 2018, no. 17-81.831; Paris Court of Appeal, 13 January 2016, no. 13/16225.

65 French Supreme Court, Commercial Division, 29 January 2013, no. 11-27333.

66 Article 4 of the Decree of 12 July 2005.

67 Court of Appeal of England and Wales, 5 September 2018, SFO v ENRC: the Court of Appeal held in its decision that (internal) investigations were often necessary in order to assess the likelihood of legal proceedings and that this uncertainty does not in itself prevent **the reasonable contemplation of proceedings**; and, that **legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings.** Moreover, even though the matter was not referred to it, the Court, in an *obiter dictum*, nevertheless stated that **large corporations must be able to seek and receive legal advice from their lawyers without fearing a violation of legal advice privilege.**

cannot exist.

II. RECOMMENDATIONS

- Regarding the decision to open an internal investigation:
  - Ensure that the matter is mentioned only to a restricted number of named persons who are authorised to have knowledge of the investigation and to handle the matter within the company that is the lawyer's client;
  - Where necessary, through the intermediary of one of said authorised persons, request the lawyer's opinion on whether it is appropriate to open an internal investigation;
- **Subject matter of the internal investigation:** before opening and conducting the internal investigation, the lawyer should sign an engagement letter with the company that specifies:
  - The lawyers from his/her firm (together referred to as the "lawyer") who will work on the internal investigation;
  - The context of the internal investigation, as well as the various stages of the investigative procedure. This involves presenting briefly the facts that form the basis for the subject matter of the internal investigation;
  - That the purpose of the internal investigation is to shed light on the facts under scrutiny and to prepare the company's defence and/or assist the company if facts are discovered which could lead to litigation, and if the company is potentially a claimant or respondent;
  - The lawyer's contacts who are empowered to represent the company for the purposes of the contemplated internal investigation;
  - The possibility, for the lawyer, of delegating some of the tasks to experts who are specifically mandated by him/her, who will answer to the lawyer and whose work will be covered by legal privilege.
- Obtaining and analysing the company's documents:
  - As part of the strategy s/he will implement, the lawyer must ensure that the scope of the documents that need to be obtained and analysed is strictly defined;
  - Said documents should be collated by the persons whom the lawyer designates in the company, and who will implement the lawyer's recommendations in this regard;
  - Particular vigilance is required concerning written correspondence on the subject of said documents, which must be factual and objective. This means, in particular, refraining from all legal classification, in order to prevent any errors of interpretation or misunderstanding; and
  - The lawyer must exercise caution when drafting engagement letters. Working papers must be dated and labelled as "Confidential - Document Protected by Legal Privilege".

- Communication with third parties whose involvement may be required for technical reasons.
  - The lawyer will mandate these third parties and will be their contact in order for the correspondence to be protected by legal privilege[68].
- Interviews:
  - See the section on "Internal investigations and interviews with company employees".
- Drafting and circulation of the internal investigation report:

The drafting of the investigation report is a particularly delicate phase of the investigation. Therefore, the lawyer will discuss with the client the appropriateness of recording in writing the analyses and findings and, as applicable, will determine which form the report will take (a complete report or an executive summary of the key aspects, for example). In the event that it is decided to record the investigation's findings in writing, the lawyer will write the investigation report, while at all times being mindful of the risk of the report being disclosed, in particular at the various draft stages. Drafts should be labelled "*Draft*" and "*Confidential - Document Protected by Legal Privilege*".

If s/he sees fit, the lawyer will include the comments and additional information that the lawyer's contacts may wish to contribute to the internal investigation report, while taking care to remain independent. The lawyer should not merely transcribe wording that is provided by the company, if it does not correspond to the observations made when conducting the internal investigation and/or the analyses that are generated by the lawyer's engagement. If a sticking point is identified, the lawyer must not**,** however**,** breach legal privilege, but rather terminate his/her mandate if necessary.

The disclosure of the report to the company: the report can only be disclosed to the designated contact persons, under conditions which ensure that legal privilege will be upheld.

The disclosure of the report to third parties: the lawyer must not disclose the internal investigation report or any information in connection therewith to third parties. The client may use the report as it sees fit; however, caution dictates that the client should discuss this with the lawyer beforehand. The issue then arises of disclosing the report to the company's auditor: the appropriateness of such disclosure should be reviewed by the client and the lawyer. If several lawyers have successively worked on the investigation, all the lawyers will be required to maintain the confidentiality of the information that was brought to their attention, regardless of whether they identified or wrote the information concerned.

68 See the section on "Internal Investigations and Legal Professional Privilege".

- In the event of a dawn raid or search:

In order to identify quickly the documents that are protected by legal privilege in the event of a request for disclosure or a dawn raid, documents may be labelled as follows: "*Confidential - Protected by Legal Professional Privilege*" or "*Document Prepared in the Defence of [Company Name] on [date]*".

In any case, the possibility of a search or dawn raid should always be envisaged. The company's awareness of this possibility should therefore be raised by informing it of the risk of the breach of legal privilege and of seizure, including of items that are in principle protected by the legal privilege that applies to lawyer-client correspondence. In this case, it is appropriate to remind the client that it can object to the seizure of documents that are protected by legal privilege, and that if the client voluntarily discloses such documents, the protection afforded by legal privilege ceases.

Moreover, as a matter of principle, an objection should be lodged against the seizure of any document or correspondence that is protected by legal privilege, regardless of the contents and of the authority that is attempting to seize them. Consequently, the exclusion on the spot may be requested of correspondence that is protected by legal privilege. In this case, labelling documents that are protected by legal privilege will be particularly useful in practice. In the event of a seizure, a written record should be made of the requisite objections.

INTERNAL INVESTIGATIONS AND THE GDPR

The GDPR entered into force on 25 May 2018 and is directly applicable. It aims to harmonise the Member States' domestic legislation and create new obligations for personal data processing. It was detailed at the national level by the amended French Data Protection Act[69] and the recommendations of the CNIL (French Data Protection Agency). In December 2019, the CNIL published a personal data processing framework for the implementation of whistleblowing systems, which includes numerous solutions that can be adapted and applied to internal investigations.

The GDPR seeks to protect the rights of natural persons, by giving them back control of their data, through increased accountability of personal data processors. In order to achieve this objective, the responsibility of the controller is combined with a transparency obligation, so that persons whose data is processed can know that their data is being used, what it is used for, and, where necessary, can restrict or object to the processing.

How does this transparency requirement mesh with the confidentiality requirement for internal investigations and the legal privilege that binds lawyers tasked with conducting internal investigations?

This section merely provides an overview of the principles that flow from the GDPR and how they combine with the legal profession's rules, in the context of lawyer-led internal investigations. It is not designed to cover all the issues raised by the processing of personal data during an internal investigation. In particular, it does not cover the period during which the data that is processed as part of an internal investigation is stored. Moreover, it does not analyse issues related to the transfer of personal data outside of the EU, which is discussed in the section on internal investigations and the disclosure of information to other countries.

I. SUBSTANTIVE LAW

1. Processing of personal data: general principles

Article 5 of the GDPR lays down the principles for the processing of personal data, and states, in particular, that all processing must be lawful, fair and transparent, and limited to what is necessary in relation to the purpose of the processing. The data must be accurate, stored for a limited duration and comply with the data minimisation principle, **meaning** only data that is strictly necessary must be collected, as well as with the principles of data integrity and confidentiality.

The controller is responsible for the compliance of the processing with the GDPR[70]. The GDPR defines the controller as "**the natural or legal person**, [...] which, **alone or jointly with**

69 Act no. 78-17 of 6 January 1978 on Computerised Data Processing, Personal Data and Freedoms.

70 Article 24 of the GDPR.

others, determines the **purposes and means of the processing of personal data"**[71].

As the person who is responsible for the processing's GDPR compliance, the controller must ensure that the data is protected, carry out the impact assessment, and answer requests to exercise rights by the persons whose data is collected and processed.

In the guide *"Les avocats et la loi informatique et libertés"*, published 2011, the CNIL stated that it regards lawyers as acting in the capacity of controller for the management of litigation cases[72]. However, the same guide states that lawyers who provide services for due diligence-type work, on the "basis of instructions that are strictly defined by their clients", are regarded as processors[73]. Accordingly, it is only if the client instructs the lawyer on how s/he must conduct his/her engagement at a granular level that the lawyer can be regarded as a processor.

Moreover, the Article 29 Working Party (now the European Data Protection Board) has specified that a lawyer can be regarded as a data controller if s/he plays a predominant role in the engagement[74].

More generally, due to their independence, lawyers are regarded as controllers of the processing they undertake.

We may infer from this that, for internal investigations, lawyers are deemed to be data controllers, due to their independence, as this means that it is the lawyer who determines the techniques and resources that are used.

2. Basis and purpose of the processing

The purpose and the lawful basis of the processing delineate the controller's obligations and the rights that are conferred on the persons whose data is collected and processed (hereinafter the "data subjects").

"Purpose" means the aims of the processing. The purpose must be legitimate and explicit. The purpose determines the data that needs to be collected for the requirements of the aim pursued, and the storage duration. For internal investigations, the purpose may be to verify employees' compliance with their contractual obligations and the disciplinary rules that are applicable in the company, or to follow up on allegations that an offence was committed within the company**,** or of a breach of the company's internal rules.

Processing is only lawful if its purpose has one of the legal bases that are listed in Article 6 of the GDPR. Moreover, when processing has more than one purpose, each purpose must have a lawful basis. Internal investigations, depending on their purpose, may have two legal bases, both of which are provided for by the GDPR:

- **Compliance with a legal obligation,** as is the case for investigations that are

71 Article 4-7 of the GDPR.
72 "*Les avocats et la loi informatique et libertés*", p.8.
73 *Ibid*, p.7.
74 Article 29 Working Party Opinion 1/2010 on the concepts of "controller" and "processor", p.28.

undertaken (i) in response to whistleblowing via a mandatory whistleblowing mechanism, or (ii) in respect of the obligation to ensure the employees' safety that is incumbent upon employers[75];

- **Legitimate interest,** which can only be justified if the data subject can reasonably expect at the time and in the context of the collection of the personal data, that processing for that purpose may take place. For example, according to the GDPR, preventing fraud also constitutes a legitimate interest[76].

3. The data protection impact assessment (DPIA)

The GDPR specifies that where a type of processing **is likely to result in a high risk to the rights and freedoms** of natural persons, prior to processing the controller must assess the impact of the envisaged processing operations on the protection of personal data.

The Article 29 Working Party (now the European Data Protection Board) published a list of criteria based on recital 75 of the GDPR that determine the need for a DPIA[77]. Thus, when two or more of these criteria apply to the processing, a DPIA will be necessary: evaluation or scoring, automated decision-making with legal effect, systematic monitoring, collection of sensitive data, collection of data on a large scale, matching of data, data concerning vulnerable data subjects (employees are deemed to be vulnerable with regard to the employer), innovative use of technological solutions, and prevention of data subjects exercising a right.

Inasmuch as the purpose of an internal investigation is to determine whether breaches of the law or regulations were committed, and whether penalties should be handed down or legal proceedings initiated, such an investigation should be preceded by a DPIA.

Incidentally, on 11 October 2018 the CNIL published a list of the types of processing for which it regards a DPIA as being necessary. This list is not exhaustive. **It** includes processing, the purpose of which is the management of whistleblowing and reports by employees, and therefore any internal investigations that are triggered by them. By analogy, an internal investigation, including one that is conducted independently of any whistleblowing or reports, constitutes a form of personal data processing that requires a DPIA. The CNIL nevertheless states that it is not necessary to perform a new impact assessment for similar processing. Therefore, if all the investigations are conducted in the same way and lead to the same type of data being collected, only one DPIA will be required[78].

75 See the recent case law of the French Supreme Court regarding the employer's obligation to investigate as soon as an employee reports harassment: French Supreme Court, Labour Division, 27 November 2019, no. 18-10.551.

76 Recital 47 of the GDPR.

77 Article 29 Data Protection Working Party, *Guidelines on Data Protection Impact Assessment (DPIA)*, pp. 10-13.

78 Articles 50 to 53 of CNIL Deliberation no. 2019-055 of 9 May 2019 containing an opinion on the draft implementing decree of Act no. 78-17 of 6 January 1978 on Computerised Data Processing, Personal Data and Freedoms.

The DPIA must contain:

- A systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;
- An assessment of the necessity and proportionality of the processing operations in relation to the purposes;
- An assessment of the risks to the rights and freedoms of the data subjects; and
- The measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with the Regulation.

The controller is also required to consult the CNIL prior to processing where a data protection impact assessment indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk[79].

4. Data subjects' rights

The *ratio legis* of the GDPR is to safeguard the right to the protection of personal data. There are nevertheless exceptions to this right, since, as this Regulation states in its recitals, "The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality"[80]. Consequently, the GDPR determines the extent to which the rights and freedoms of others can restrict the right to the protection of personal data.

4.1. The obligation to provide information - Articles 12, 13 and 14 of the GDPR

The obligation to inform data subjects of the processing of personal data is the first obligation imposed by the GDPR on the controller. In fact, this is a genuine prerequisite upon which the effectiveness of the data subjects' other rights is contingent, since without it these rights cannot be exercised (in particular the right of access and the right to object to processing)[81].

There is an obligation to inform:

- All potential data subjects prior to the implementation of the processing. The information in question must be concise, transparent, intelligible and easily accessible[82]. It must contain the following information for each type of processing undertaken: the identity and the contact details of the controller and of the Data Protection Officer (DPO), the purpose of the processing, the lawful basis (and therefore, where necessary, the legitimate interest), the potential recipients of the data, the storage period, the rights of

79 Article 36-1 of the GDPR "Prior consultation".

80 Recital 4 of the GDPR.

81 This was the position of Advocate General Cruz Villalon in his opinion of 9 July 2015 in the Bara case (C-201/14), paragraph 74: "*the requirement to inform the data subjects about the processing of their personal data, which guarantees transparency of all processing, is all the more important since it affects the exercise by the data subjects of their right of access to the data being processed, referred to in Article 12 of Directive 95/46, and their right to object to the processing of those data, set out in Article 14 of that directive*."

82 Article 12 of the GDPR.

the data subject and his/her right to file a complaint with the CNIL. Once this information has been provided, the data processing that is necessary for the investigation can be undertaken without any other formalities, under the supervision of the DPO (or equivalent) and provided that a record is kept.

- As soon as data is recorded, all persons whose data has been collected. This obligation to provide information differs depending on whether the data was obtained directly (the personal data was collected directly from the data subject) or indirectly (the personal data was collected from a third party). When data is collected from third parties, the data subject must be informed of this within one month of the collection. The source of the information must also be provided.

The European legislators have nevertheless provided for exceptions to the obligation to provide information in the event of indirect collection, in particular as it may be wholly incompatible with the purposes of the processing, for example during an internal investigation. Among the exceptions cited, those which are relevant to internal investigations concern instances where:

- Informing the data subject(s) would involve **a disproportionate effort** or would render impossible or **seriously impair the achievement of the objective of the processing**; or
- The data must remain confidential pursuant to a **professional secrecy obligation**.

Concerning the "disproportionate effort", in its 2011 guide for lawyers, the CNIL stated that this exception did not apply to lawyers in the management of their clients' litigation, since "inasmuch as judicial proceedings may be initiated on the basis of this type of processing, the formalities to be carried out do not appear to be disproportionate"[83]. We can assume that the entry into force of the GDPR has not altered the CNIL's position, and that said position also applies to internal investigations. In contrast, it should be possible to validly assert the exceptions based on (i) the fact that informing data subjects could seriously impair the achievement of the objective and/or (ii) legal privilege, in order to justify not informing the data subjects whose data was collected indirectly as part of the internal investigation with which the lawyer is tasked. It should be noted that the exception based on the fact that informing the data subjects could seriously impair achievement of the processing objectives does not make it possible to circumvent the obligation to inform the data subject, but merely to defer informing him/her, whereas the exception based on legal privilege is permanent.

83 "*Les avocats et la loi informatique et libertés*", p.4.

Data subjects' rights

The GDPR establishes several rights, the purpose of which is to safeguard the more general right to the protection of personal data. Nevertheless, as stated previously, there are exceptions to these rights, where the right to the protection of personal data adversely affects the rights and freedoms of others.

The following table summarises and maps the data subjects' rights and the potential exceptions to them in the context of an internal investigation.

RIGHT	DEFINITION AND CONDITIONS (relevant to internal investigations)	EXCEPTIONS (relevant to internal investigations)
RIGHT OF ACCESS - ART 15	Makes it possible to obtain confirmation that one's personal data is/is not being processed and, if so, to have access to said data, as well as to the information that must be provided, as mentioned above.	Adversely affects the **rights and freedoms of others**, including trade secrets or intellectual property[84]. Requests must not be unfounded or excessive.
RIGHT TO RECTIFICATION - ART 16	Enables the data subject to have inaccurate personal data concerning him or her rectified[85].	No relevant exception concerning internal investigations. However, these rights are both direct consequences of the right of access (without access to his/her data, the data subject has no possibility of rectifying or restricting the processing of said data). Accordingly, we can infer that the limits on the right of access also apply to the rights to rectification and to restrict processing, all the more so as, once the processing is restricted, the data can only be processed with the consent of the data subject, except for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person.
RIGHT TO RESTRICTION OF PROCESSING - ART 18	Makes it possible to restrict data processing during the rectification period, the objection period or when the date is no longer needed for the purpose of processing but required by the data subject for the establishment, exercise or defence of legal claims.	

84 Recital 63 of the GDPR, reiterated by the CNIL.

85 According to the CNIL in its framework for whistleblowing reports, this right can only be exercised with regard to factual data, provided that the controller checks the data and that the data that was initially collected, even if incorrect, is not deleted. This position can also be applied to internal investigations.

* If the lawful basis of the processing is a **legal obligation**, this makes it possible to oppose the exercise of the rights to erasure and objection. On the contrary, where the processing is only based on a legitimate interest, the controller can only oppose the exercise of these rights in certain exceptional cases.

RIGHT TO ERASURE - ART 17	Makes it possible to erase personal data concerning the data subject; can only be exercised where the data is no longer necessary in relation to the purposes for which it was collected or otherwise processed, or where the data subject objects to the processing and there are no overriding legitimate grounds for the processing.	• *Processing is necessary for compliance with a **legal obligation***;* • Processing is necessary for **the establishment, exercise or defence of legal claims**.
RIGHT TO OBJECT - ART 21	Enables the data subject to object at any time, *on grounds relating to his or her particular situation*, to the processing of personal data concerning him or her. This right can only be exercised where the processing is based on a legitimate interest.	• *Processing is necessary for compliance with a **legal obligation***;* • There are **compelling legitimate grounds** for the processing which override the interests and rights of the **data subject**; • **Processing** is necessary for **the establishment, exercise or defence of legal claims**.

The above table calls for the following observations:

- Exception based on legal privilege

Although the GDPR does not expressly mention legal privilege among the exceptions to the right of access, the right to rectification, the right to restrict processing, the right to erasure and the right to object, it is**,** however**,** reasonable to assume that a lawyer cannot accede to the exercise of one of these rights if doing so would violate legal privilege, all the more so as legal privilege is one of the exceptions to the right of data subjects**,** whose data is collected indirectly**,** to be informed.

- Exception to legal privilege that the client may assert

At the same time, it should be noted that for internal investigations conducted by a lawyer, the client has the benefit of legal privilege. For the client it is a fundamental right, insofar as it is part of the client's rights of defence, right to a fair trial and right not to incriminate himself/herself. Accordingly, the legal privilege from which the client benefits is a legitimate argument against data subjects exercising their rights, where the GDPR states, as an exception, "the establishment, exercise or defence of legal claims".

In contrast, it cannot be argued that the legal privilege from which the client benefits can be asserted by that client based on the "rights and freedoms of others", even if the right to a fair trial and its corollary, the rights of defence, are part of the rights and freedoms of others. The

CNIL provides examples of exceptions based on the "rights and freedoms of others" that can be used to oppose the right of access but does not precisely delineate the scope thereof. Thus, the exercise of the right of access cannot adversely affect "(i) third party rights: only [your] data can be disclosed in respect of the right of access and not that of third parties, (ii) intellectual property: for example, copyright, where it protects software, (iii) trade secrets, (iv) etc."[86]. It therefore appears that despite the choice of the general term "rights and freedoms of others", the CNIL's interpretation of this is actually restrictive, with the exception, on the basis of the CNIL's comments, confined to rights that aim to protect the personal data of others.

- **Establishment, exercise or defence of legal claims**

Another approach would be to argue that although the purpose of an internal investigation is to bring to light a violation of the law, the regulations or internal rules, it is inevitably linked to the establishment, exercise and defence of the legal claims of a person or entity. Usually this means the company.

5. Obligations of secrecy with regard to the supervisory authority

Article 90 of the GDPR provides that some professions may cite the obligation of secrecy when dealing with the supervisory authorities. The French Data Protection Act[87] specifies this restriction on the CNIL's power, by providing that "Secrecy cannot be asserted against them [CNIL staff and officers] other than for information that is covered by the legal privilege that is applicable to relations between a lawyer and his/her client, by the secrecy of journalists' sources or, without prejudice to sub-paragraph two of this section III, by medical secrecy."[88]

Accordingly, as the information obtained by a lawyer during an internal investigation is covered by legal privilege, it cannot be examined by the CNIL. Nevertheless, there is no provision to the effect that the CNIL cannot verify the existence of procedures and means that are implemented in order to comply with the GDPR, without having access to data that is protected by the lawyer's legal privilege. The CNIL could thus check that an impact assessment was performed, that the information obligations provided for in the GDPR were fulfilled, or that the data subjects have been able to exercise their rights.

86 See: https://www.cnil.fr/fr/le-droit-dacces-connaitre-les-donnees-quun-organisme-detient-sur-vous.

87 Act no. 78-17 of 6 January 1978 on Computerised Data Processing, Personal Data and Freedoms.

88 Article 19 III, French Data Protection Act no. 78-17 of 6 January 1978 on Computerised Data Processing, Personal Data and Freedoms.

II. RECOMMENDATIONS

- Prepare a DPIA.
- Ensure that the information notice was indeed sent by the client to all the data subjects, and that it states, in particular:
  - That the data collected is also being collected for litigation purposes,
  - That the lawyer is one of the persons who may be the recipient of the data.
- Ensure that anyone who is potentially concerned by the processing (the employees in particular) was informed prior to the implementation thereof.
  - Determine which is the most appropriate approach in response to a request for a right of access, if necessary:
    - Extract all the personal data from the documents where it concerns the data subject (potentially a very time-consuming process),
    - Disclose the documents that contain personal data concerning the data subject (potentially incompatible with the aim of the investigation).
- Respond to requests from data subjects in a timely manner and at the latest within one month, while providing reasons when any requests are refused.[89]
- Preserve the confidentiality of the investigation and of the rights of defence, as well as the rights and freedoms of others, while bearing in mind that the exceptions mentioned above can be asserted against the data subjects' rights.

89 Recital 59 and Article 12 of the GDPR.

INTERNAL INVESTIGATIONS AND DISCLOSURE OF INFORMATION TO OTHER COUNTRIES

As part of an internal investigation concerning matters that may have extraterritorial implications, French companies may be requested or compelled by foreign prosecuting authorities or regulations to disclose certain pieces of evidence concerning their activities and their employees. Now, this information can only be provided to other countries in compliance with the provisions of the Blocking Statute, on the one hand, and of the GDPR, on the other hand.

These two texts form a legal framework which allows the French authorities to regulate the disclosure outside France of information held by persons who are subject to French and European laws. The aim is not to "block" the flow of information, but to protect these persons from the risks of prosecution abroad and from the use of their personal data for purposes that do not comply with the requirements of the GDPR and the Blocking Statute.

In practice, compliance by French companies with the GDPR and the Blocking Statute, as they are currently worded, is becoming increasingly problematic with respect to internal investigations that are undertaken to prevent or respond to foreign proceedings. Companies and their counsels frequently have no choice other than to decide between two opposing defence strategies when compliance with the texts proves to be difficult: resist pursuant to French law or cooperate out of necessity with the foreign authorities, at the risk of breaching French law and the GDPR.[90]

Consequently, the French government has decided to recast the system that governs the implementation of the Blocking Statute, the initial measures of which were introduced by the Sapin II Act and detailed by the Gauvain Report, in April 2019.

After examining the relevant applicable provisions of the Blocking Statute and the GDPR (I), recommendations will be made with the aim of making it possible for lawyers, in the context of an internal investigation, to reconcile diverging legal standards while safeguarding their clients' interests (II).

90 See also the section "Internal investigations and cross-border issues".

I. SUBSTANTIVE LAW

Whereas the Blocking Statute applies under all circumstances where an internal investigation requires the disclosure of information to another country (1), the provisions of the GDPR solely concern personal data pertaining to natural persons (2).

1. Blocking Statute

1.1. Current state of the law

Article 1 of the Blocking Statute contains the following general obligation:

"*Without prejudice to treaties or international agreements, it is prohibited for any natural person of French nationality or who usually resides on French territory and for any officer, representative, agent or employee of a legal person that has a head office or establishment in France to disclose to foreign public authorities, in writing, orally or by any other means, in any place whatsoever, documents or information relating to economic, commercial, industrial, financial or technical matters, the disclosure of which could be detrimental to the sovereignty, security or essential economic interests of France or public policy, as specified by the administrative authorities where required."*

Article 1 *bis* of the Blocking Statute, which for its part is applicable to the disclosure of information in connection with foreign proceedings that aim to constitute evidence, provides that:

"*Without prejudice to international treaties or agreements and to the laws and regulations in force, it is forbidden for any person to request, seek or communicate in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial nature leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection with such proceedings.*"

According to the above provisions:

- **The Blocking Statute regulates the disclosure of, requests for and searches for relevant information, with reference to** "international treaties and agreements and the laws and regulations in force".
- All disclosure, requests for and/or searches for information outside of these frameworks is strictly prohibited and renders the requesting and/or disclosing party liable to penalties.

The disclosure of information – whether in writing or orally – that is obtained in the context of an internal investigation by an company must therefore obligatorily be effected via "official channels"[91], i.e., following international letters rogatory that are exchanged between France and the central authority that is designated by the foreign court or the appointment of a commissioner. This involves implementing the mutual judicial assistance mechanisms that are provided:

- **For civil and commercial matters**, by the Hague Convention[92],
- **For criminal matters**, by any mutual assistance treaty signed between France and a foreign jurisdiction (in particular, for example, the Treaty with France on Mutual Legal Assistance in Criminal Matters between the USA and France of 10 December 1998) or, in the absence of a mutual assistance treaty, by Articles 694 et seq. of the French Code of Criminal Procedure[93];
- **For administrative matters**, by any cooperation agreement signed between France and a foreign jurisdiction, for example the Memorandum of Understanding ("**MoU"**) between the AMF and the Securities and Exchange Commission ("SEC") of 14 December 1989 and 22 July 2013[94], or on the basis of the aforementioned Hague Convention, in the absence of an agreement[95].

Article 2 of the Blocking Statute also requires persons who are subject to the law *"to inform the relevant minister without delay when they receive any requests concerning such disclosures"*. Traditionally, the Foreign Affairs Minister was regarded as the relevant minister for all requests for mutual judicial assistance (until bilateral mutual assistance treaties were signed, in particular for criminal matters, which institutionalised the role of the Justice Ministry).

Thus, all disclosures of information to foreign authorities outside of the scope of intervention of the French authorities and the control of the French courts[96] carry criminal penalties. According to Article 3 of the Blocking Statute, breaching Article 1 *bis* of the Statute constitutes an offence that is punished by *"a six-month prison sentence and a fine of €18,000 or only one of these two penalties"* for a natural person (multiplied by five, i.e., €90,000, for a legal person), *"without prejudice to the more severe penalties that are provided for by law*".

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91 Originally, the Blocking Statute was adopted with the aim of protecting French businesses from US pretrial discovery, the result of which was to obligate a person who was **a** party to proceedings to which discovery applied to disclose extensive information to the adverse party, with the only limit being that imposed by the US trial court.

92 The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970.

93 Regarding the cooperation mechanisms implemented between France **and** the Member States of the European Union for criminal matters, information is transferred pursuant to a European Investigation Order (provided for by Directive 2014/41/EU of 3 April 2014 - see also Articles 694-14 to 694-49 of the French Code of Criminal Procedure).

94 See: https://www.amf-france.org/en US/L-AMF/Relations-institutionelles/Accords-et-actions-de-cooperation/Conventions-bilaterales.

95 See in particular: Paris Administrative Court, 6th Division, 2nd Court, 17 December 1985, no. 51546/6.

96 See Le Berre, Y., Pataut, E., *La recherche de preuves en France au soutien de procédures étrangères au fond - Revue de Droit des Affaires Internationales no. 53, section 56*, 2004.

French Supreme Court, Criminal Division, 12 December 2007, *Executive Life*

This decision is the first application of the Blocking Statute and the only criminal penalty handed down on the basis of Article 1 *bis* of that Statute. It was seen by some commentators as the sign of "renewed interest in the Blocking Statute"[97]; however, others remain sceptical regarding its significance[98] due to, *inter alia*, the specific nature of the case facts.

According to the decision, the US counsel of the California Insurance Commissioner had asked his French counterpart – a lawyer with French and US nationality and a member of the Paris and New York Bars – to obtain information from a former executive of Mutuelle d'Assurance Artisanale de France (MAAF) on the circumstances of his involvement in the takeover of Executive Life, a **California** life insurance company that went bankrupt in 1991.

The French Supreme Court found that the information requested and obtained by the lawyer in France on the "*circumstances under which the MAAF board of directors had made its decisions regarding the takeover of Executive Life*" was indeed of an economic, financial or commercial nature and was an attempt at "constituting evidence in foreign judicial proceedings", and ruled that this disclosure had taken place outside of the procedures stipulated by the Hague Convention, and that this lawyer had breached Article 1 *bis* of the Blocking Statute.

In this regard, the French Supreme Court recalled the findings of the Appeal Court, and stressed that the lawyer "*did not merely approach, in a neutral manner, the persons whose testimony could have subsequently been sought through a procedure that was compliant with the provisions of the Hague Convention, but obtained, or, at any rate attempted to obtain, evidence that the directors of MAAF had taken their decision in full knowledge of the facts*" and that, in acting in this manner, the lawyer "*despite not having any authorised mandate within the meaning of the aforementioned Convention, requested information of an economic, commercial or financial nature leading to the constitution of evidence, which was liable to justify the person approached being subpoenaed as a prosecution witness before the Californian court and to influence his subsequent testimony*".

Moreover, and as was confirmed by a decision (*Taitbout*) handed down by the Criminal Division of the French Supreme Court on 30 January 2008[99], the scope of application of the Blocking Statute is not confined to acts committed in France. Therefore, it is prohibited to disclose directly to foreign parties/authorities information that was collected/obtained abroad through an internal investigation (as may be the case when interviews are conducted on foreign soil,

97 See for example Barlow, D., *La loi du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique: un état des lieux* - La Semaine Juridique Entreprise et Affaires no. 43-44, 25 October 2007, 2330.

98 See for example Danis, M., *Sanction de la communication illicite de renseignements à une autorité judiciaire étrangère*, La Semaine Juridique Entreprise et Affaires no. 35, 2016.

99 French Supreme Court, Criminal Division, 30 January 2008, no. 06-84098.

for example) to the extent that said information meets the criteria stipulated in Articles 1 and 1 *bis* of the Blocking Statute.

French Supreme Court, Criminal Division, 30 January 2008, *Taitbout*
This decision is interesting as it concerns criminal proceedings on the grounds of a breach of the Blocking Statute and confirms the extraterritorial application of the law. In this case, a French defendant in civil proceedings in California transferred to his lawyer in the USA (outside of the scope of the Hague Convention) documents for review so that the lawyer could consult the case and prepare possible disclosure of documents in the US proceedings. As the French-origin documents were already on US soil when they **were** disclosed to the adverse party, the Court of Appeal, in the decision that was overturned, did not find that there was a strong enough connection with French territory **in** a document disclosure between two lawyers, both of whom were located in the USA, to warrant the French criminal courts claiming jurisdiction. In contrast, the French Supreme Court held that "*the Prosecuting Chamber, on grounds taken from the first instance decision, wrongly rejected the jurisdiction of French laws and courts over acts that were supposedly committed in the USA, whereas the victim, Taitbout Prévoyance, is a French company and the charges were filed by a motion of the Public Prosecutor following a complaint by said company, which means that the offence could have been prosecuted in France, pursuant to Articles 113-7 and 113-8 of the French Code of Criminal Procedure [...]*".

The considerable effectiveness of the treaty-based procedures to obtain evidence confirms that the penalties referred to above are not used to block the disclosure of evidence, but rather to regulate the procedure in compliance with the principles of international comity that form the basis for the Hague Convention[100].

However, the limited number of criminal court decisions[101] concerning the application of the Blocking Statute has led certain foreign courts, in particular US courts, to set aside any impact of said Statute in their domestic laws and procedures. Indeed, since the 1987 Aérospatiale decision, the US Supreme Court has ruled that Hague Convention procedures are merely optional[102]. Since then, recourse by the US courts to treaty-based procedures is rare, as it must be justified, in each case, by the importance of the sovereign interests of the foreign

100 In the Executive Life case, the Paris Court of Appeal confirmed that requests for documents which are very broadly worded, and which refer to a large number of documents over a period of ten years, are valid, on the grounds that the French declaration of reservations with regard to Article 23 of the Hague Convention do not require an exact description of the exhibit requested; "**The** list of the documents is limited provided that they are identified with a reasonable degree of specificity on the basis of a certain number of criteria, such as their date, their nature or their author." In the same vein, the Court dismissed the argument that the requests for documents would oblige the French party to incriminate itself in breach of the fundamental freedoms guaranteed by the European Convention on Human Rights. Paris Court of Appeal, 18 September 2003 (2002/18509). See, *contra*, Nancy Court of Appeal, 4 June 2014, no. 1335/4 (annulment of an interim enforcement order for a request to disclose documents made by a US court to two French companies, as the request was for an excessive number of documents).

101 There have nevertheless been civil decisions concerning the Blocking Statute. In 2014, the Nancy Court of Appeal annulled an interim enforcement order for a request for disclosure of documents that was made outside the scope of the Hague Convention in US proceedings, as it was in reality an intelligence-gathering operation against which a serious objection could be raised, as provided for by the 1968 Statute.

102 U.S. Supreme Court, *Société nationale industrielle aérospatiale v. U.S. District Court,* 107 S. Ct 2542 (1987)

country that is asserting a Blocking Statute[103] in order to stop US procedures for the taking of evidence.

Now, the 2007 Christopher X decision, despite the criminal penalty, has not brought about a change in the US courts' position with regard to the Blocking Statute, even though voluntary Hague Convention procedures are regularly ordered by said courts[104].

In response to the increase in the number of cross-border investigations involving French companies, a series of measures was recently introduced in order to reinforce the application and monitoring of the implementation of the Blocking Statute, in particular:

- Article 3 of the Sapin II Act conferred jurisdiction on the French Anti-Corruption Agency to monitor the effective application of the Blocking Statute in the enforcement of decisions by foreign authorities that require a company, the registered office of which is located on French territory, to submit to supervised compliance remediation (a mandatory procedure for bringing internal procedures for preventing and identifying corruption into compliance). This implies that, aside from monitoring compliance remediation, the French Anti-Corruption Agency does not have a role to play in the transferring of information abroad;
- Article 3 of Decree no. 2019-206 of 20 March 2019 reaffirmed the role of the Strategic Intelligence and Economic Security Department ("SISSE"), which is part of the Ministry for the Economy and Finance, in monitoring the application of the Blocking Statute by the persons who are subject thereto, *"without prejudice to the jurisdiction conferred by the statute in this area on another authority and, as applicable, in connection therewith"*[105].

1.2. The Gauvain Report's proposals for reform

As an extension of the Sapin II Act and the numerous parliamentary debates, which, for several years, have recommended reinforcing the Blocking Statute[106], the Gauvain Report recommends, *inter alia*, the following measures:

- Reinforce the role of the SISSE as a "*single Blocking Statute contact for companies*"[107], in particular by obliging French companies to declare to it the foreign procedures to which they are subjected[108]. This obligation would carry a six-month prison sentence and/or a criminal fine of €50,000 for natural persons (five times this amount, i.e., €250,000 for legal persons) in the event of non-compliance;

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103 *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51 (E.D.N.Y. 2010) (France's sovereign interests set out in the 1968 Statute and the Christopher X decision did not oblige said US court to use treaty-based procedures, which are merely optional); *Strauss v. Crédit Lyonnais S.A., 249 F.R.D. 429 (E.D.N.Y. 2008); In re Global Power Equip. Group, 418 B.R. 833* (Bankr. D. Del. 2009).

104 *In re: Commodity Exchange, Inc., Gold Futures and Options Trading Litigation, No. 14-md-02548, Sullivan v. Barclays PLC, No. 13- cv-02811; Lataillade v. LVMH Moet Hennessy-Louis Vuitton SE, No. 16-cv-06637. A. Blumrosen, International Comity and Chapter II of the Hague Evidence Convention,* The International Dispute Resolution News, page 2, https://www.yumpu.com/en/document/read/62639932/idr-news-spring-2019-4-17-19-final .

105 Decree no. 2016-66 of 29 January 2016 had set up a Commissioner for Strategic Intelligence and Economic Security and founded the SISSE, which is vested with the power to monitor the application of the Blocking Statute.

106 Law on business secrecy, law on economic growth, etc.

107 See: Job description for a "*Blocking Statute and Data Sovereignty*" Manager published by the Ministry for the Economy and Finance in March 2019.

108 As the SISSE is in its early stages and probably not yet fully operational, the impact of this new institution on the day-to-day practices of taking evidence is not conclusive for the moment.

- Introduce an "assisted pathway for the declaring company"[109] by the SISSE;
- Increase the criminal penalties in the event of breaches of the Blocking Statute to a two-year prison sentence and/or €2 million for natural persons (up to €10 million for legal persons under Article 131-38 of the French Criminal Code);
- Create rules to regulate monitoring of French companies in France when monitoring is ordered by a foreign authority;
- Specify in the Blocking Statute that said Statute does not prevent cooperation by the French authorities with their foreign counterparts on the basis of international treaties and bilateral agreements, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the agreements signed by the Prudential Supervisory Authority and the AMF;
- Incorporate the Blocking Statute into the French Criminal Code, which entered into force on 1 March 1994 and replaced the former Criminal Code of 1810, which reflected the growth of industrialisation and democracy in the 19th century.

These proposals are expected to lead to the adoption of new legislation that aims to modernise the Blocking Statute, which was amended for the last time in July 1980. The Statute's wording does not correspond to the current reality of the law: the proliferation of multi-jurisdiction proceedings and the sharp increase in France of the number of internal investigations that may lead to criminal proceedings.

2. GDPR

2.1. Current state of the law

2.1.1. Data transfers to third countries

The transfer of personal data to EU third countries is regulated by Articles 44 to 50 of the GDPR and Articles 112-113 of Order no. 2018-1125 of 12 December 2018, which amended Act no. 78-17 of 6 January 1978 on Computerised Data Processing, Personal Data and Freedoms and various provisions concerning the protection of personal data[110].

With regard to such transfers, the GDPR sets forth a general principle that is intended to ensure compliance with the conditions for protecting natural persons that are stipulated by the Regulation. Such a transfer is only possible:

- In the event of an adequacy decision (Article 45 of the GDPR) by the European Commission with regard to a third country, a territory, or an international organisation, which confirms the adequate nature of the level of protection provided by the third country, territory, the specified sector within that third country or the international organisation;
- If there are appropriate safeguards (e.g. standard protective clauses, an approved code of conduct or an approved certification mechanism) and, for the data subjects,

109 Gauvain Report, pp. 69-70.

110 See also, CNIL Deliberation no. 2009-474 of 23 July 2009 (containing recommendations on transfers of personal data as part of US discovery procedures) and Opinion WP 158 of the Article 29 Working Party that was adopted on 11 February 2009 (on pre-trial discovery for cross border civil litigation); https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp158_en.pdf).

enforceable data subject rights and effective legal remedies (Article 46 of the GDPR);

- If there are binding corporate rules (Article 47 of the GDPR);
- If there is an international agreement such as a mutual judicial assistance treaty, which is in force between the requesting third country and the Union or Member State (Article 48 of the GDPR);
- If there are derogations for specific situations with an equivalent level of protection for personal data**;** in particular if (i) the data subject has explicitly consented to the proposed transfer, or (ii) the transfer is necessary for the establishment, exercise or defence of legal claims. If none of these derogations is applicable, the text provides that the transfer may be justified on the basis of compelling legitimate interests (Article 49 of the GDPR).

It is therefore not prohibited under the GDPR for a French company to disclose personal data voluntarily to a third country prior to any judicial or administrative procedure outside France, provided that the above conditions are met.

2.1.2. The specific case of binding corporate rules

Binding corporate rules (BCR) are a tool that enables a group of companies to define a legal framework for its transfers of data outside the European Union, and to ensure group-wide compliance. For the specific case of internal investigations, BCR therefore offers a possibility, which is not to be underestimated, of transferring data quickly, in a secure, compliant manner. The CNIL published content dedicated to codes of conduct and binding corporate rules (BCR) on 7 February 2020[111].

BCR must be (i) legally binding, (ii) applied by all the entities concerned in the group of companies, and (iii) confer enforceable rights on data subjects. They must also fulfil the requirements stipulated by the GDPR in Article 47-2, and specify at least:

- The application of liability rules to the European headquarters, which places the burden of proof on the company in the event of a breach,
- The procedures for managing complaints, audits, updates, as well as DPIA if applicable, as is the case for internal investigations,
- The implementation of a network of data protection officers (DPOs),
- The training of personnel,
- The declaration of the material and geographical scope.

Moreover, the BCR must comply with the general principle of transparency, i.e., be accessible to all the data subjects and written in clear, intelligible language.

111. [111] https://www.cnil.fr/fr/la-cnil-publie-des-contenus-dedies-aux-codes-de-conduite-et-aux-regles-dentreprise-contraignantes.

2.1.3. The GDPR and the Blocking Statute

Moreover, Article 48 of the GDPR confirms the ineffectiveness in France of any request issued by a foreign authority that is not made on the basis of an international agreement[112]:

"***Transfers or disclosures not authorised by Union law***. *Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter."*

Contrary to the Blocking Statute, the current wording of Article 48 of the GDPR:

- Has a much more restricted scope of application, since it concerns "any judgment of a court or tribunal and any decision of an administrative authority" and not information "leading to the constitution of evidence in light of foreign administrative or judicial proceedings";
- Introduces an additional means of defence that allows a company to challenge a request to transfer information, but is not a formal prohibition by which the controller or processer is bound, provided that the conditions referred to in Articles 44-47 of the GDPR are respected.

2.2. The Gauvain Report's proposals for reform

In order to extend the scope of application of Article 48 of the GDPR to include the transfer of legal persons' digital data to foreign authorities, and in response to the USA's adoption of the 2018 Clarifying Lawful Overseas Use of Data Act, the Gauvain Report recommends the following measures:

- Introduce a prohibition on any supplier of data storage or processing services transferring the data of a French legal person outside the scope of mutual judicial assistance, which would carry an administrative penalty of a maximum amount of €20 million or 4% of the worldwide annual turnover of the preceding financial year (similar to Article 83-5 of the GDPR). The total amount of this fine would be modulated on the basis of criteria such as the harm caused to the economy, the nature of the information concerned, the seriousness and the frequency of the infringement, as well as the perpetrator's previous offences, if any.
- Confer on the Autorité de Régulation des Communications Electroniques et des Postes (French Electronic Communications and Postal Regulatory Authority - "ARCEP") the role of monitoring and penalising individuals and companies as regards obligations concerning the prohibition on transferring legal persons' data.

112 Contrary to the attitude of the US courts to the Blocking Statute, European personal data protection laws appear to be treated more favourably in proceedings; some courts thus appoint a Privacy Monitor on the basis of the recommendations by the CNIL and the Article 29 Working Party. This is a third party who is tasked with monitoring the compliance of all taking of evidence from Europe with personal data protection laws. *Lataillade v. LVMH Moet Hennessy-Louis Vuitton SE,* No. 16-cv-06637 (United States District Court for the Southern District of New York, 2016)

II. RECOMMENDATIONS

While awaiting the possible adoption of the proposals made in the Gauvain Report, certain procedural solutions (**1**) and practical solutions (**2**) could make it possible to alleviate the difficulties associated with the application of the provisions of the Blocking Statute and the GDPR in the context of an internal investigation.

1. Procedural solutions

Outside the scope of and prior to any commencement of criminal proceedings, the use of the procedures provided for by the Hague Convention, in particular that described in Chapter II, which allows for the appointment of a commissioner who is authorised to take evidence on French territory, could prove to be effective. This procedure offers a rapid, streamlined solution, which is only applicable to civil and commercial matters, **that** could help to establish the company's good faith and its intention to cooperate with the foreign authorities ahead of potential criminal proceedings. It does**,** however**,** require the authorisation of the relevant judicial authority, which determines the specific conditions for its implementation.

Depending on what is at stake in the case, recourse to a criminal or civil court in order to obtain an urgent reasoned opinion (based on the US Protective Order[113]) could be contemplated. This solution could make it possible to empower a judge to intervene in order to prohibit, restrict or authorise the disclosure of evidence or exhibits in an order that could be asserted against the foreign authorities.

In all cases, the foreign authorities should be reminded that a request for mutual judicial assistance must be made to their French counterparts, in accordance with procedures that may appear to be onerous. **Still,** the speed of execution depends on the extent of cooperation between the requesting authority and the company concerned.

In any event, the courts that hear applications for interim rulings have authority to block requests for the taking of evidence outside the scope of the Hague Convention or that do not meet the conditions established by France in its treaty reservations if such requests constitute a manifestly unlawful interference.

113 A restrictive order issued in the USA or Canada by a civil court, which contains a injunction to take or refrain from taking certain actions.

2. Practical solutions

The solutions explained below are based on internal investigations conducted in France by French lawyers, which were initiated following (i) requests sent by foreign authorities to corporate clients, or (ii) whistleblowing reports that made it possible to bring to light certain acts for which criminal charges could potentially be filed.

2.1. Compliance with the Blocking Statute

As **is true** from the start of the investigation, it is advisable to initiate negotiations with the foreign authority that is likely to initiate proceedings, with the aim of reducing the scope of the request that is submitted. Depending on the information that is requested and the provisions of law that are cited by the request, it may be relevant to argue that, in light of its nature, the information that is liable to correspond to "documents or information relating to economic, commercial, industrial, financial or technical matters" cannot be transferred.

In view of this, in order to avoid needless transfers of data outside of French territory, it is preferable to choose a forensic service provider that can host all the data in France and enable a review of the information and documents that match the request made by the foreign authorities in France.

2.2. Compliance with the GDPR

All transfers of data to a third country that take place outside of the scope of an investigation must comply with the GDPR in two stages:

- Insofar as such a transfer falls within the scope of personal data processing, it must respect the conditions stipulated by the provisions that introduced the GDPR into French law, which are based on Articles 5 and 6 of the GDPR (principles and lawful basis)[114].
- Insofar as it is a transfer to a third country, it must comply with the provisions contained in chapter V of the GDPR, which are detailed above.

As a result, compliance with the provisions concerning data transfers must follow a layered approach: the controller determines the lawful basis for the transfer by examining firstly if there is an adequacy decision**;** then**,** if there are appropriate safeguards, if binding corporate rules have been defined and, moreover, as a last resort, if derogations for specific situations may apply.

These derogations must be interpreted restrictively[115]:

- The consent must be explicit, confined to the transfer, and the data subject must be informed of the risks that said transfer may entail;
- The establishment, exercise or defence of legal claims is only applicable for a transfer that is occasional (i.e., not regular) and necessary.

114 See the section on practical aspects of "Internal Investigations and the GDPR".

115 Recital 111 of the GDPR, Guidelines on Article 49, adopted on 6 February 2018 by the European Commission data protection Working Party.

Moreover, the final exception, which provides for the existence of compelling legitimate interests, can only apply for transfers that are "not repetitive and that only concern a limited number of data subjects"[116], when those interests are not overridden by the interests or rights and freedoms of the data subject and when the controller has assessed all the circumstances surrounding the data transfer to protect the fundamental rights and freedoms of the data subjects. The Regulation also specifies that "such transfers should be possible only in residual cases where none of the other grounds for transfer are applicable"[117], and that the controller should inform the supervisory authority and the data subject about the transfer, which is a significant provision with regard to internal investigations. In practice, however, transfers in connection with an internal investigation should be covered by the general provisions of the GDPR or, in the last resort, should be able to be justified by the establishment, exercise or defence of legal claims.

As a general rule, prior to any investigation, it is vital to ensure that the company complies with the GDPR[118] and with the provisions that are applicable to the transfer of personal data during an internal investigation, in particular: (i) as part of the general information provided to employees concerning the processing of their personal data, state the possibility of data being transferred during the investigation and the applicable lawful basis, in particular mentioning the legitimate interest that the company may have in the establishment, exercise or defence of its rights[119], (ii) involve the DPO**,** as from the start of the investigation, with the aim of the DPO monitoring and cooperating closely with the lawyers who are conducting the internal investigation on behalf of the company, (iii) restrict the collection and the transfer of information, in order to confine the processing to that data alone which is relevant and useful for the investigation, (iv) prepare the DPIA in connection with all potential transfers of data outside of the EU, it being specified that in the event that the DPIA identifies risks and/or uncertainties, the DPIA must be submitted to the CNIL.

In the event that the lawyer who is conducting the internal investigation acts as the controller, said lawyer must also prepare a DPIA concerning the risks for the employees of the company (the lawyer's client) whose personal data will undergo processing[120].

116 Recital 113 of the GDPR.

117 Ibid.

118 See the section on "Internal Investigations and the GDPR".

119 Article 49 of the GDPR and Article 113 of Order no. 2018-1125 of 12 December 2018.

120 See the section on "Internal Investigations and the GDPR".

In all cases, irrespective of whether the controller is the client and/or the lawyer, a DPIA that is common to all the internal investigations[121] that involve similar data processing, on a large scale, with identical purposes and implementation conditions, may be contemplated in order to limit unnecessary costs and to ensure timely operational readiness[122].

As regards employees or third parties (suppliers, clients, service providers, etc.) who are not directly concerned by the investigation and/or with regard to whom providing information beforehand or obtaining written consent is impossible or at the very least difficult, redacting relevant personal data is an option that makes it possible to preserve confidentiality and anonymity[123]. If subsidiaries of the French company under investigation are located abroad, it is useful to check the nationality and the law that is applicable to the relationship with the employees and the third parties concerned, as some data may also be available on the foreign territory.

In all cases, before and over the course of the internal investigation, efforts should be made to ensure that the actions to be undertaken and/or that have been undertaken are proportionate to the nature and extent of the risks incurred by the company, on the one hand, and the individuals who are involved (or potentially involved), on the other hand.

121 See the section on "Internal Investigations and the GDPR".

122 The Guidelines on DPIA, which were adopted on 4 April 2017 by the European Commission Data Protection Working Party, mention the possibility of preparing and using a single DPIA to **assess** multiple processing operations that are similar in terms of nature, scope, context, purpose, and risks, in particular in the cases (processing operations performed in a specific context and for a specific purpose) that have already been studied. This might be the case where similar technology is used to collect the same sort of data for the same purposes. Article 50 of CNIL Deliberation no. 2019-055 of 9 May 2019 that provided an opinion on a draft decree for the implementation of Act no. 78-17 of 6 January 1978 on Computerised Data Processing, Personal Data and Freedoms appears to confirm such a possibility for investigations that involve similar processing of personal data.

123 This process must meet extremely demanding criteria that make identification impossible, in particular by cross-referencing information. A specialised service provider should be used to carry out this work. See https://www.cnil.fr/fr/lanonymisation-des-donnees-un-traitement-cle-pour-lopen-data

INTERNAL INVESTIGATIONS AND CROSS-BORDER ISSUES

I. INTRODUCTION

This section aims to present the various procedural and ethical issues associated with the cross-border nature of internal investigations that are conducted by French-registered lawyers.

A more reasonable objective is to determine, for the various issues identified as potentially arising in connection with a cross-border internal investigation, the relevant analytical thrusts that should enable the lawyer concerned to define an appropriate framework for the investigation in the interest of his/her client.

This section covers several subjects that are examined elsewhere in this guide, but from the standpoint of a cross-border internal investigation.

A distinction should be made between the issues that could impact the actual running of the investigation and those that should be anticipated with a view to a more strategic analysis of the defence of the client in question.

The national specifics that have to be combined so that the internal investigation can be conducted in compliance with applicable imperatives (or not) are primarily:

- The rights and duties of the persons involved in the running of the investigation and/or who may be implicated (see section III);
- The forms of protection attached to the information that is likely to be relevant (see section IV);
- The nature and the scope of the lawyer's legal privilege (see section V).

The national specifics that should be anticipated from a strategic perspective primarily concern relations with the prosecuting and/or administrative authorities and cover matters such as:

- Clear identification of the authorities that are likely to declare that they have jurisdiction (see section VI);
- Analysis of the multi-jurisdictional environment and the consequences thereof in terms of the authorities (see section VII);
- Identification of the procedural rules and practices that are applicable to the lawyer (see section VIII).

II. AT WHAT POINT SHOULD AN INVESTIGATION BE REGARDED AS "CROSS-BORDER"?

The cross-border dimension of an internal investigation may result from *de facto* or *de jure* circumstances.

The extraneous factors to be taken into account when defining the practical conditions of the investigation generally include, for example, the following:

- The fact that all or part of the events under investigation took place in a foreign State;
- The fact that all or some of the legal subjects who are likely to be involved in the **conduct** of the investigation (whether as suspected perpetrators, victims, or merely persons who may help to shed light on the events in question) are located abroad;
- The fact that all or part of the information that may have to be analysed for the purposes of the investigation is located abroad;
- The fact that the French lawyer will have to conduct his/her investigation outside of France;
- The fact that a foreign authority conducts an investigation involving events that took place or persons who are located on French territory.

In this context, *de jure* circumstances should be understood to mean factors that do not necessarily impact the practical running of the investigation, but which could justify certain foreign authorities having jurisdiction. They should also be taken into consideration when ensuring that the analysis of the situation in question is comprehensive and thus makes it possible to best serve the client's interests. In order to identify such circumstances, the following questions should be asked:

- Do the events under investigation together constitute an offence under the foreign law?
- Are the events under investigation likely to be regarded as time-barred?
- Are the events under investigation likely to constitute an offence for which the authorities tend to claim extraterritorial jurisdiction (for example, bribery, influence peddling, money laundering, the financing of terrorism, international economic sanctions, etc.)?
    - Are the jurisdictions thus identified party to an international mutual legal assistance or jurisdiction distribution treaty?
    - What is the practice in terms of prosecution of the jurisdictions thus identified?
    - Are there factors in connection with international relations that could incite the authorities thus identified to take an interest therein?

III. RIGHTS AND DUTIES OF PERSONS WHO CONTRIBUTE TO THE RUNNING OF AN INTERNAL INVESTIGATION

Concerning the safeguards associated with whistleblowing systems (if such a system was activated), it should be determined whether the jurisdiction concerned:

- Requires the implementation of a whistleblowing system;
- Offers legal protection to whistleblowers;
- Restricts the subjects that can form the basis of a whistleblowing report which then grants entitlement to legal protection;
- Has specific requirements concerning the way in which a whistleblowing report is processed (concerning confidentiality, for example).

Concerning the safeguards that are generally stipulated by labour law, it should be determined whether specific measures:

- Regulate the collection and examination of employees' e-mail correspondence (in particular private correspondence) and, where applicable, the rules that are applicable to such regulation;
- Apply to the way interviews are conducted with employees, for example:
  - The obligation to inform the employee ahead of time;
  - The requirement to let the employee know the topics that will be discussed with him/her;
  - The obligation to request that the employee be accompanied and/or represented, irrespective of any implication;
  - Any formalities concerning the convening notice;
  - The consequences of refusal to cooperate.

Concerning the safeguards that are specific to the person(s) who may be implicated, the following should be determined ahead of time:

- If it is necessary for them to be assisted, as soon as it becomes likely that they will be implicated;
- If specific rules govern disciplinary measures that are handed down against an employee**,** such as, for example, a waiting period initiated by discovery of the person implicated;
- If it is possible for employees to avail themselves of the right not to incriminate themselves, or an equivalent right.

IV. PROTECTION OF DATA

Information should be obtained on the national and international obligations that apply in various countries concerning the processing of data obtained through an investigation. Where necessary, confirmation should also be obtained if binding corporate rules have been implemented between the Group's entities[124].

Initially, for the purposes of conducting the investigation *per se*, the regulations that are applicable to the use and/or transfer of data should be clearly identified, in the form of:

- Rules that protect data transfers which are regarded as protecting the interests of the country concerned (Blocking Statute-type regulations);
- Rules that protect access to, processing of and transfers of personal data;
  - Distinction between European countries (GDPR)/and non-European countries[125];
  - The issue of the rights of the data subjects (in particular, providing information and obtaining consent)[126];
  - The issue of data storage periods.

In order to be able to determine which information could be collected by foreign authorities and, in so doing, determine the risks of the accessibility of the information, the existence of bilateral or multilateral mutual judicial assistance agreements and/or agreements that organise cooperation between the authorities of the signatory countries should be checked (while also identifying the countries and authorities concerned).

V. NATURE AND SCOPE OF THE LAWYER'S LEGAL PRIVILEGE

Several issues related to legal privilege may arise when a French-registered lawyer is involved in a cross-border internal investigation.

It should be noted that the legal privilege of a French-registered lawyer applies regardless of the location of the French lawyer who conducts the internal investigation. All the information that may be brought to the attention of lawyers who are members of a French bar, in respect of their profession, whether in the field of counsel or advocacy, in France and abroad, is protected by French legal privilege[127].

Nevertheless, as the protection afforded to French lawyers' legal privilege in France is not necessarily recognised abroad, in the jurisdictions in which French lawyers may intervene for the purposes of the investigation they conduct, one best practice could be for lawyers to obtain information ahead of time on the treatment and recognition of their legal privilege by the country in which the investigation will take place.

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124 See the section on practical aspects of "Internal investigations and disclosure of information to other countries"

125 See the section on practical aspects of "Internal investigations and disclosure of information to other countries"

126 See the section on practical aspects of "Internal Investigations and the GDPR"

127 See the section on "Internal Investigations and Legal Professional Privilege"

Having said that, when a lawyer is admitted to several bars, in both France and another country or countries, the legal privileges can be accumulated and therefore mean that the lawyer concerned can submit to/avail himself/herself of a cumulative or alternative application, in France and/or abroad, depending on the circumstances.

It is recommended to consult any rules on conflicts of laws in the various jurisdictions in which the lawyer is registered, and to bear in mind that a French authority may possibly not recognise the rules that are applicable to a foreign legal privilege or, conversely, that a foreign authority may possibly not recognise French legal privilege.

A best practice could be to discuss with the client at the start of the investigation the rules that are applicable to legal privilege in a cross-border context, in order to optimise the protection that they can provide.

VI. IDENTIFICATION OF THE FOREIGN AUTHORITIES THAT ARE LIKELY TO INTERVENE

In order to plan, in advance, the strategy to be adopted in the event that one or more legal authorities are likely to concern themselves with the subject-matter of the internal investigation, these authorities should be identified clearly. In order to so, it is advisable to consider the following questions:

- Which acts are potentially punishable in the various jurisdictions?
- Which penalties are incurred?
- What are the internal procedures in each jurisdiction and what are their time frames?
  - Which authorities are likely to concern themselves with the subject-matter of the investigation?
  - What is their status (judicial, administrative or other type of authority)?
  - What is their field of jurisdiction (criminal, civil, regulatory or specialised)?
  - What are their powers (dawn raids, seizures, arrests, etc.)?
  - What are the practices/rules for negotiating with them?
    - Is this provided for/encouraged?
    - What is expected in terms of cooperation from a company or an individual who wishes to negotiate? Conversely, what are the consequences for refusing to cooperate?
    - Are there time-limits for doing so?
  - What are the policies of the relevant authorities regarding internal investigations?
    - Do they expect the company to provide them with all the resulting notes and findings (and, if so, is it preferable for the lawyer to give counsel orally and avoid any written legal opinions)?
    - What are their expectations concerning the scope of the investigation (in particular regarding personnel: which employees should be involved or avoided)?

VII. ANALYSIS OF THE MULTI-JURISDICTIONAL ENVIRONMENT AND ITS CONSEQUENCES IN TERMS OF THE AUTHORITIES

In order to plan, in advance, the strategy to be adopted in the event that one or more legal authorities are likely to concern themselves with the subject-matter of the internal investigation, the following questions should be addressed:

- What are the bilateral or multilateral mutual assistance agreements between the various authorities that are involved and/or likely to be involved?
- To what extent do the jurisdictions that are likely to be involved apply the double jeopardy principle?

When internal investigations are carried out in parallel in more than one jurisdiction and when there is a risk of legal proceedings in more than one country, it will be in the interest of the lawyers who are representing the person implicated to agree on an overarching defence strategy.

VIII. IDENTIFICATION OF THE PROCEDURAL RULES AND PRACTICES THAT ARE APPLICABLE TO THE LAWYER

The professional ethics that are applicable to lawyers may vary considerably from one country to another and therefore must be considered as a whole. For example, preparing a witness for an appearance in court is a standard practice that is perfectly legal in certain jurisdictions (e.g. witness preparation in the USA), but could constitute a serious breach of a lawyer's professional obligations in some other countries.

There are also differences in terms of legal culture and practices (in other words, "how things are done") which must be taken into consideration by French lawyers who conduct an investigation in which foreign lawyers are involved. For example, it should be determined whether other representatives of the person implicated in other jurisdictions are expecting to have informal conversations with the prosecuting authorities and/or the judge on the subject of the internal investigation and its findings, and/or the defence strategy. Indeed, these conversations could be regarded as a standard practice or, on the other hand, constitute breaches in their own right of the applicable professional ethics.

INTERNAL INVESTIGATIONS AND LAWYERS' FEES

In this section we will cover the payment of the fees of the lawyers who are involved in internal investigations, including lawyers who represent the employees who are interviewed as a part of the internal investigation, those who advise the corporate officers, or those who were mandated by the company to conduct the investigation.

I. SUBSTANTIVE LAW

In the absence of a provision of substantive law concerning the fees for internal investigations, the existing rules on fees that are incurred as part of a criminal defence can be used as a guide for internal investigations.

1. Fees of the lawyer who represents an employee

Regardless of whether or not the lawyer is paid by his/her employer, the employee remains at liberty to choose his/her lawyer.

According to the Labour Division of the French Supreme Court[128], employers are under an obligation to pay the criminal defence costs of their employees, if the litigation is linked to the performance of an employee's duties: "*The events that had triggered the criminal proceedings were committed within the scope of the activity that was performed on behalf of the employer, which means that it was the employer's responsibility, in accordance with Article 1135 of the French Civil Code and Article L. 121-1 of the French Labour Code, and, more simply, under the obligation imposed by equity, custom or the law, to assume the consequences thereof, and at least cover the costs incurred for the employee's criminal defence.*"[129]

However, when an employee abuses his/her position, this is not necessary.

128 French Supreme Court, Labour Division, 18 October 2006, no. 04-48.612, D. 2007. 695, commented by J. Mouly; *Dr soc. 2007*, 103, commented by J. Savatier.

129 Catherine Puigelier, *Obligation de l'employeur relative à la «protection juridique» d'un salarié poursuivi par un client de l'entreprise*, *La sem. Jur. Entreprise et Affaires no. 47*, 23.11.2006, 2679.

Here are some examples of what is meant by “linked to the performance of duties”, according to current case law:

- It was ruled that the person concerned had acted within the scope of his duties, inasmuch as the acts that were the subject of proceedings for aiding and abetting in the misuse of corporate assets were committed by the employee at the request and under the authority of the chairman of the management board, who had tasked him to sell certain items of real estate; that the employee had never concealed the slightest aspect of these transactions, all of which had been approved by the bank’s strategy and supervisory board, and that the employee had not abused his position for personal motives[130].
- It was also ruled that a person had acted within the scope of his duties, inasmuch as he committed the acts in question (fraudulent operation in the interest of the company) under instructions of the chairman of the company’s management board, without **having abused his position for personal motives**[131].

Thus, in order to rule on the issue of the abuse of a position, the French Supreme Court takes into consideration the transparency of the employee’s behaviour with regard to his/her employer, and the lack of any personal motive on the part of the employee.

It should be noted that the concept of abuse of a position that would enable a company to avoid paying its employee’s legal costs has been interpreted by case law in a particularly strict manner since a French Supreme Court decision of 1988[132]. Indeed, the Court requires the employee to have acted outside the scope of the duties for which s/he is employed, without authorisation and for purposes that are unrelated to his/her duties.

130 French Supreme Court, Labour Division, 5 July 2017, no. 15-13.702

131 French Supreme Court, Labour Division, 5 July 2017, no. 15-13.702

132 French Supreme Court, Labour Division, 5 July 2017, no. 15-13.702

Noteworthy case, Paris Court of Appeal, 14 June 2018

BNP Paribas was ordered to reimburse the **entire** defence costs of its former employee who was involved in fraudulent acts that were the subject of an internal investigation.

In the matter at hand, BNP had signed (i) a settlement with the US judicial authorities (DOJ) to put an end to the investigations into transactions that were liable to be in breach of US legislation on financial embargos and (ii) a settlement agreement with one of the legal managers of one of the divisions that was the subject of the US investigations. A few years later, the US central bank (Federal Reserve) launched an investigation with a view to a possible personal action against said in-house counsel, who had to retain the services of a US attorney for his defence. The question of the payment of the attorney's fees then arose. In this regard, aside from determining whether the settlement agreement entailed the employee's waiver of the action to obtain payment of the attorneys' fees (in this instance, it did not), the Court found that (i) it was in the performance of his employment contract that the general counsel in question acted in connection with the dispute between his employer and the US authorities; (ii) that no accusations are/were made against him concerning the way in which he carried out his work and (iii) that in any case he was a subordinate of the company that had signed the settlement agreement with the authorities. In view of this, BNP was therefore ordered to pay the fees of the attorney who had been engaged to defend its former employee.[133]

2. Fees of lawyers who represent corporate officers

2.1. Faults committed within the scope of the officer's duties

In the absence of specific case law on this subject, according to legal commentators, the same solution as that identified for employees applies to the lawyers' fees of corporate officers (a connection between the acts and the corporate officer's duties is taken into consideration, along with the lack of a personal motive). The provisions on mismanagement by corporate officers should also be taken into consideration.

Thus, if the offence is committed as part of the corporate officer's duties, if the officer did not act out of a personal motive, and if s/he did not abuse his/her position, then the company must pay the lawyer's fees incurred for the officer's defence.

In fact, there is a good reason for legal persons to support their corporate officers. Indeed, according to the circular of 13 February 2006 on the entry into force on 31 December 2005 of the provisions of Law no. 2004-204 of 9 March 2004[134], which made the criminal liability of

133 Paris Court of Appeal, Section 6, Division 2, 14 June 2018, no. 17/14295.

134 Circular issued by the Directorate for Criminal Affairs and Pardons, on the entry into force on 31 December 2005 of the provisions of Law no. 2004-204 of 9 March 2004, which made the criminal liability of legal persons the general rule - CRM 2006 03 E8/13-02-2006 NOR:

legal persons the general rule[135], their criminal and/or civil liability can be triggered by the wrongdoing of the natural persons who represent them:

"*In the event of an intentional offence, the rule must in principle be the prosecution of both the natural person who is the perpetrator or accomplice, and the legal persons, if the acts were committed on its behalf by one of its management bodies or one of its representatives.*

In contrast, in the event of an unintentional offence, but also for offences of a technical nature for which the mens rea *may result, in accordance with the settled case law of the French Supreme Court, from the mere deliberate breach of a specific regulation, charges must as a priority be filed against the legal persons, and the natural person must only be charged if there is sufficient evidence of a personal fault against that person to warrant a criminal conviction. This must in fact necessarily be the case."*

However, this position should be qualified regarding the payment of the corporate officer's legal costs, when the said officer was guilty of mismanagement or of a breach of the provisions of the laws or regulations that are applicable to French *sociétés anonymes* (corporations).

This is what results from Article L.225-251 of the French Commercial Code, which provides that: "*The directors and CEO shall be individually or jointly and severally liable, as applicable, with regard to the company or third parties, either for infringements of the provisions of the law or regulations that are applicable to* sociétés anonymes*, or for breaches of the by-laws, or for acts of mismanagement.*"

On the basis of this article, the Montpellier Court of Appeal found that an executive who had committed offences in breach of said Article L. 225-251 was required to reimburse the legal person who had advanced his lawyer's fees for his criminal defence, inasmuch as the executive in question was guilty of mismanagement by participating in fraudulent acts intended to deceive a training organisation and obtain reimbursements of training hours that were not owed[136].

Mismanagement is defined broadly and can very well include acts of bribery, for example. The company should then demand the reimbursement of the lawyers' fees if a corporate officer is convicted of acts of bribery.

Thus, while a legal person appears to be obliged to pay the lawyer's fees of one of its corporate officers who acted within the scope of his/her duties, the company must request the reimbursement of said fees if said corporate officer is found guilty of an offence.

2.2. Faults committed outside the scope of the corporate officer's duties

If the offence is not linked to the performance of the corporate officer's duties and if the company nevertheless pays his/her lawyer's fees, charges of misuse and concealment of the

JUSDO630016C.

135 Circular issued by the Directorate for Criminal Affairs and Pardons, on the entry into force on 31 December 2005 of the provisions of Law no. 2004-204 of 9 March 2004, which made the criminal liability of legal persons the general rule - CRM 2006 03 E8/13-02-2006 NOR: JUSDO630016C.

136 Montpellier Court of Appeal, Division Two, 26 March 2013, no. 11/08719.

misuse of corporate assets may be filed against the company.

II. RECOMMENDATIONS

1. Fees of lawyers who are tasked with running the internal investigation

The situation described below concerns the case where an internal investigation is implemented by a company and conducted by lawyers. There are two types of investigations: those that are conducted independently of any judicial proceedings, and those that are tied to judicial proceedings.

1.1. Internal investigations that are independent of any judicial proceedings

When an internal investigation is conducted independently of any judicial proceedings, the lawyers who are responsible for conducting it are paid by the company. In this type of situation, insurance contracts do not, as a general rule, cover these fees.

1.2. Internal investigations following judicial proceedings in France or abroad

When an internal investigation is implemented for the purposes of parallel judicial proceedings in France or abroad, the company's insurance contracts may cover the associated expenses. However, this is specific to each insurance contract.

2. Fees of the lawyers who represent employees who are interviewed as part of an internal investigation

As stated previously[137], a company's employees may, for the purposes of an internal investigation that is conducted within their company, be interviewed as part of the investigation and, depending on the circumstances, be assisted by a lawyer during the interview[138].

2.1. Internal investigations that are independent of any judicial proceedings

The purpose of an internal investigation is to determine the reality of suspicions of breaches of the law or of the company's internal rules.

While the employer may under certain circumstances pay the fees of the employees' lawyers, in our opinion there is no obligation. In this respect, the case law according to which an employee's criminal defence costs must be paid by his/her employer does not apply here, except in the event that the employer is informed of the existence of a criminal law investigation.

137 See the section on "Internal investigations and interviews with company employees".

138 See the section on "Internal investigations and interviews with company employees".

If the fees incurred by employees who are targeted by an internal investigation are reimbursed by the employer, it would be logical to think that the employer could request reimbursement of these fees**,** provided that the internal investigation brings to light an offence that results from the person concerned abusing a position, and that the employer had informed the employee of the possibility of demanding reimbursement of the fees[139].

2.2. Internal investigations in which the company's criminal liability is at stake

When an internal investigation is tied to judicial proceedings, it appears that the case law on criminal defence applies. Employers must pay the lawyers' fees for their employees.

Therefore, it is advisable from the start of said representation to inform the employee in writing of the following:

- The hourly rates authorised for the lawyers with whom they will sign a fee agreement,
- The maximum limit authorised, with the possibility of entering into a new agreement when this limit has been reached,
- Moreover, if the internal investigation reveals that the employee committed a deliberate offence outside of the scope of his/her duties or by abusing his/her position, or if the employee receives a criminal conviction for such an offence, the company may require full reimbursement of the fees that were advanced.

3. Fees of lawyers who assist corporate officers

Corporate officers may also call upon a lawyer to assist them in connection with an internal investigation, in particular during interviews[140].

3.1. Internal investigations that are independent of any judicial proceedings

Corporate officers may be assisted by a lawyer during their interviews with the lawyers who are tasked with running the internal investigation. As with employees, there is no obligation for the company to pay the lawyers' fees for corporate officers.

If a company pays these lawyers' fees, then the procedure for the signature of related-party agreements must be followed: this will entail disclosing to the management bodies that an internal investigation is being conducted. The issue of the possible reimbursement of fees by the corporate officer must be addressed at this time.

3.2. Internal investigations in which the company's criminal liability is at stake

If an investigation could result in prosecution, the provisions of substantive law which provide that the lawyers' fees must be advanced by the company apply.

Therefore, it is only if the corporate officer is definitively convicted that the company will be able to recover said fees.

139 See the section on "Internal investigations and interviews with company employees".

140 See the section on "Internal investigations and interviews with company employees".

INTERNAL INVESTIGATIONS AND COMPETITION / ANTITRUST LAW

Internal investigations in the field of competition law are an effective means of preventing and identifying conduct that infringes competition rules. For convenience, the term "compliance programme" will be used to describe all internal investigations into compliance with competition rules.

An internal investigation is generally implemented as part of a competition law compliance programme, the use of which has been encouraged by the competition authorities for many years, and which, until 2017, led to fines being reduced under circumstances by the French Competition Authority (hereinafter the "Authority").

Although the Authority's framework document is no longer enforceable against companies per se, it is still an essential working document for implementing an effective compliance programme.

A competition law compliance programme must be based on:

"***the commitment to implement*** *effective monitoring, audit and whistleblowing mechanisms, in compliance with labour law:*

a) the implementation of measures to ensure and assess individual compliance with the compliance policy of the company or organisation (such measures may, for example, take the form of provisions that are incorporated into the internal regulations, clauses inserted into employment contracts, or individual statements of compliance);

c) the performance of regular evaluations of various aspects of the compliance programme, as well as of legal and commercial due diligence reviews, in particular at the time of events that are liable to create new risks for the company or organisation concerned (for example, the acquisition of a new company or the development of a new business line); these evaluations and these due diligence reviews, which must be documented, are imperative for assisting the company or organisation to evaluate the effectiveness and efficiency of its compliance programme, and to improve it if necessary; it may be necessary to entrust them to third parties in order to ensure that they are objective"[141].

Accordingly, an efficient competition law compliance programme contains measures for evaluating and detecting risks that are inherent in the company's activity. This statement calls for theoretical observations and practical recommendations that are specific to the implementation of competition law.

141 Framework agreement of 10 February 2012 on competition rules compliance programmes, section 22, §4.

1. Preparatory phase: competition law investigations and criminal law investigations

When preparing a competition law investigation, the risks that are not associated with competition law but that are nevertheless likely to call the authorities' attention to the company should be acknowledged and assessed. When identifying the context and the key issues of the internal investigation, specific attention should be paid to relations with criminal law investigations. Although we know that, on the basis of Article L. 420-6 of the French Commercial Code, natural persons who have actively participated in anti-competitive practices already risk triggering their criminal liability[142], the general trend clearly seems to be towards a closer connection between the two types of investigation, pursuant to Article 40 of the French Code of Criminal Procedure. The Competition Authority Rapporteur General will thus report to the Prosecutor's Office events and evidence that may constitute the offence defined in Article L.420-6 of the French Commercial Code, which allows for criminal law to be applied to the case.

The Competition Authority Rapporteur General stated[143] in September 2019 that four cases were also undergoing criminal law investigations.

This use of Article 40 of the French Code of Criminal Procedure by the investigating authorities is nevertheless regulated: the Authority Rapporteur General stated that mere "knowledge" of an anti-competitive practice, in and of itself, cannot justify criminal law being applied to a case. In contrast, his position is that "*informing the prosecutor is relevant when the personal, decisive involvement of certain natural persons can clearly be seen from the initial evidence*"[144].

Several investigations and search-and-seizure operations have been based on both suspicions of anti-competitive practices and criminal offences that were separate from those practices. For example, on 6 September 2018, the Paris Prosecutor's Office carried out a dozen or so dawn raids against four manufacturers and distributors of electrical equipment (Legrand, Schneider Electric, Sonepar and Rexel) that were suspected of implementing cartels within the meaning of competition law, but also of being guilty of fraud, use of fraudulent documents, abuse of trust, misuse of corporate assets, laundering the proceeds of tax evasion, and bribery of public officials[145].

The exceptional use of dawn raids should not, on the other hand, hide the extremely severe potential consequences for the legal or natural person who is under investigation. In particular, it is important to bear in mind that this procedural method is characterised by the lack of an immediate possible appeal against the dawn raid operations, a lack of access to the case file,

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142 On the basis of this article, any natural person who "*plays a personal and decisive part in the design, organisation or implementation of the anti-competitive practices may have criminal charges filed against him/her*."

143 Seminar organised by the EFB with Stanislas Martin (Competition Authority), in partnership with the Association des avocats pratiquant le droit de la concurrence (Association of Competition Law Lawyers - APDC): Criminal law and competition law - Round table 2: Coordination between criminal law proceedings and competition law proceedings, 26 September 2019, Paris.

144 Dinner and Debate organised by Revue Concurrences with Stanislas Martin (Competition Authority), in partnership with Bredin Prat and Analysis Group: *Enquêtes pénales & transaction: entre efficacité de l'action de l'Autorité de la concurrence et effectivité des droits de la défense*, 6 December 2018, Paris, https://www.concurrences.com/fr/conferences/ enquetes-penales-transaction- entre-efficacite-de-l-action-de-l-autorite-de-la.

145 The application of criminal law to these cases followed a report to the AFA and Competition Authority on the grounds of Article 40 of the French Code of Criminal Procedure.

which is only available to the parties once they are placed under investigation or granted target witness status, and a restricted right to assistance from a lawyer. Some rights that are portrayed as fairly "immediate" in competition procedures then appear to be "deferred" or even missing from criminal law investigations.

2. Intervention phase

As in criminal law investigations, the intervention stage is divided into three phases:

1. Review and analysis of the identified documents (2.1);
2. Holding interviews designed, in particular, to confirm identified or suspected competition law infringements[146]; (See the section with practical advice on holding interviews with company employees, page 17);
3. The investigation report and recommendations (2.2).

2.1. More specifically, the review and analysis of documents

The review and analysis of documents should be as comprehensive as possible. For the record, analysis of documents by the competition authorities is designed to be exhaustive and combines a review of electronic documents (use of key words) with a review of printed documents.

The practice of the US Department of Justice makes it possible to understand the usefulness of an exhaustive analysis. In this respect, the US regulatory authority has opened numerous criminal investigations after discovering proof of potentially anti-competitive practices when reviewing documents submitted by the parties at the time of merger transactions. For example, when Bumble Bee and Chicken of the Sea merged, the antitrust division of the DOJ was able to discover a price cartel. In the same vein, when investigating the Wabtec-Faiveley merger, the antitrust division of the DOJ discovered illegal "no-poach agreements" between the two companies. Clearly, the documents produced by the parties could have been reviewed attentively ahead of time as part of an effective compliance and reporting programme. The problematic documents thus brought to light would have made it possible to plan the strategy for filing a possible application for leniency.

146 See the section on "Internal investigations and interviews with company employees".

The Competition Authority's practice with regard to the obstruction of investigations or review also shows the importance of compliance programmes. Indeed, as the Authority stressed in the Brenntag decision, obstruction "*may, 'in particular', result from the company providing incomplete or inaccurate information, or disclosing exhibits that are incomplete or misleading*"[147].

This case underlines the fact that operators who are targeted by an Authority investigation must firstly ensure that their personnel and management comply with the obligation to cooperate, but also to disclose documents that are complete and accurate. An effective means of achieving this is to carry out an internal investigation, then implement a compliance programme.

Note that particular attention should now be paid **to the issue of detailed telephone records**. Indeed, following the introduction of the PACTE Act on 11 April 2019, the officers of the Competition Authority and the Directorate General for Competition Policy, Consumer Affairs and Fraud Control can access detailed records kept by telecommunications operators, in particular of calls that are placed and received, in accordance with Article 212 of said Act[148].

In the event that the Competition Authority rapporteurs have recourse to Article 40 of the French Code of Criminal Procedure, the rapporteurs in charge of the investigation will also be in a position to request the contents of the criminal case file from the criminal court, in accordance with Article L.465-3 of the French Commercial Code.

It should not be forgotten that the Whirlpool France decision mentioned in the section "*Internal investigations and legal privilege*" was handed down in connection with litigation concerning search-and-seizure operations that were conducted by the Authority's investigations department. The Senior President of the Paris Court of Appeal found that, even though the emails in question were not sent by or to a lawyer, they referred to a defence strategy that was implemented by the company's law firm, which meant that the seizure thereof by the Authority's officers infringed the privilege of lawyer-client correspondence.

Consequently, the seizure of the emails was annulled, and the Competition Authority was prohibited from making reference thereto in any way whatsoever[149].

147 Competition Authority, Decision no. 17-D-27 of 21 December 2017 regarding obstruction practices implemented by Brenntag, §187.

148 Article 212 of the PACTE Act (on corporate growth and transformation) provides that "By way of derogation from the last two sub-paragraphs of Article L. 450-3, for identifying and establishing the existence of the breaches and infringements provided for in Section II of this book, access to the data that is stored and processed by telecommunication operators, under the conditions and within the limits provided for in Article L. 34-1 of the French Postal and Electronic Communications Code, and by the service providers mentioned in sub-sections 1 and 2 of section I of Article 6 of Act no. 2004-575 of 21 June 2004 on trust in the digital economy shall be implemented under the conditions defined in this article.

II. - Access to the data mentioned in section I of this Article by the officers mentioned in Article L. 450-1 must be requested ahead of time by applying to the Rapporteur General of the Competition Authority or of the administrative authority that is responsible for competition matters, specifically to a connection data applications controller. "The connection data applications controller shall be alternatively an active or honorary member of the French Supreme Administrative Court, who is elected by the general assembly of that Court, and an active or honorary French Supreme Court judge, who is elected by the general assembly of that Court (...)".

149 See the section on "Internal Investigations and Legal Professional Privilege"

2.2. The investigation report and recommendations

As with any internal investigation that is the subject of this guide, once an investigation has been completed, there is the pressing matter of the form that the report will take. The findings of the investigation can be presented orally or in a written report. Whether or not it is appropriate to make written observations should not be neglected and must be discussed with the client[150].

This approach should be based on two criteria: firstly, the probability of a risk (illegal behaviour) arising and, secondly, the consequences of this risk and, in particular, its impact and the harm that it may cause.

The issue of the recipient of the report is just as important. In that regard, one approach would be to use summary reports, the contents of which may differ depending on the recipient (members of the board of directors, committee members, senior executives and management bodies).

150 See the section on “Internal Investigations and Legal Professional Privilege”.

GLOSSARY

AFA: French Anti-Corruption Agency

AMF: French Financial Markets Authority

Blocking Statute: Act no. 68-678 of 26 July 1968 on the disclosure of economic, industrial, financial or technical documents and information to foreign natural or legal persons (Accessible at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000501326)

Circular: Circular on the presentation and implementation of the criminal law provisions stipulated by Law no. 2016-1691 of 9 December 2016 on transparency, combatting corruption and the modernisation of economic life (Accessible at: http://www.justice.gouv.fr/bo/2018/20180228/JUSD1802971C.pdf)

CNIL: French Data Protection Agency

DGCCRF: Directorate General for Competition Policy, Consumer Affairs and Fraud Control

DoJ: Department of Justice

DPA: Deferred prosecution agreement

DPIA: Data Protection Impact Assessment

Engagement letter: an agreement for legal assistance and counsel between the lawyer tasked with running the internal investigation and his/her client

Gauvain Report: Report prepared by Raphaël Gauvain at the request of Mr Edouard Philippe entitled "Re-establishing the sovereignty of France and Europe and protecting our companies from laws and measures with extraterritorial scope" (26 June 2019) (Accessible at: https://www.vie-publique.fr/sites/default/files/rapport/pdf/194000532.pdf)

GDPR: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679)

Group: A group of companies

Guidelines: Guidelines on the Implementation of the Deferred Prosecution Agreement Published jointly by the National Public Prosecutor's Office for Financial Crimes and the French Anti-Corruption Agency, this document only reflects the position of these two authorities, and cannot, consequently, benefit from the same scope as a decree or even an implementing circular. (Accessible at: https://www.agence-francaise-anticorruption.gouv.fr/files/2019-09/EN_Lignes_directrices_CJIP_revAFA%20Final%20%28002%29.pdf)

Handbook: New Appendix XXIV of the Paris Bar Internal Regulations: Handbook for Lawyers who are tasked with running an internal investigation, adopted on 13 September 2016 by the Governing Board and amended during the meeting of 10 December 2019 (Accessible at: http://avocatparis.org/mon-metier-davocat/publications-du-conseil/annexe-xxiv-vademecum-de-lavocat-charge-dune-enquete)

Hague Convention: The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970

Lawyer tasked with running the internal investigation: the lawyer instructed by his/her client to carry out an internal investigation

RIN: National Regulations for the Profession of Lawyer in France (Accessible at: https://www.cnb.avocat.fr/fr/reglement-interieur-national-de-la- profession-davocat-rin)

Sapin II/2 Act: Law no. 2016-1691 of 9 December 2016 on transparency, combatting corruption and the modernisation of economic life (Accessible at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id)

SISSE: Department of Strategic Intelligence and Economic Security

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A public interest body
Art. 21-1 of Law no. 71-1130 of 31 December 1971
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