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France's National Bar Council Publishes Guidelines on Internal Investigations

I. Introduction¹

On July 2, 2020, France's national bar council—the *Conseil national des barreaux* (“CNB”)—released comprehensive guidelines that outline best practices and ethics considerations for attorneys conducting internal investigations in France and elsewhere (the “Guidelines”).² The CNB formed a Working Group to draft the Guidelines in response to what many practitioners in the country still consider a “new, dynamic, and booming” area within the legal profession. The Guidelines offer useful perspectives regarding the most common issues and problems French lawyers face when conducting internal investigations and provide unique contextual explanations and recommendations on overcoming obstacles created by cross-border proceedings and enforcement actions.

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The Guidelines follow similar efforts by French anti-corruption bodies to provide guidance to French and foreign practitioners in the period following the entry into force in June 2017 of France's sweeping anti-corruption legislation, commonly referred to as *Loi Sapin 2*, or the “Sapin 2 Law.” For example, in June 2019, France's National Financial Prosecutor's Office (*Parquet National Financier*) and the French Anti-Corruption Agency (*Agence Française Anticorruption*) published joint guidelines on the relatively new corporate settlement mechanism in France known as a Judicial Public Interest Agreement (*Convention Judiciaire d'Intérêt Public*).³

In this alert, we provide an overview of the CNB Guidelines and offer analysis and takeaways regarding specific considerations that attorneys should keep in mind when conducting an internal investigation in France or when leading a global investigation with a French nexus or component.

II. Overview of CNB Guidelines

The Guidelines focus predominantly on how to navigate concerns of professional ethics arising within internal investigations, namely in the following areas: (i) potential conflicts of interest; (ii) attorney-client privilege; (iii) scope of an engagement; (iv) interviewing company employees; (v) data privacy legislative considerations; and (vi) issues stemming from a renewed interest in the French blocking statute.⁴ Each section of the Guidelines provides an overview of general rules and regulations applicable to the subject matter of that section, identifies the primary issues and challenges that arise during internal investigations concerning the subject matter, and issues recommendations geared towards overcoming existing obstacles.

The Guidelines offer a helpful reminder that practitioners should carefully consider which rules and guidelines might apply in the various jurisdictions where a transnational investigation and related judicial proceedings will be conducted.

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² *Guide: L'avocat français et les enquêtes internes*, Conseil national des barreaux (June 12, 2020) (“Guidelines”), available at https://www.cnb.avocat.fr/sites/default/files/guide-cnb_enquetes-internes_juin2020.pdf.

³ <https://www.ropesgray.com/en/newsroom/alerts/2019/08/France-National-Financial-Prosecutor-Anti-Corruption-Agency-Corporate-Settlement-Mechanisms>

⁴ The French blocking statute (*La loi de blocage*) (Law No. 68-678 of 26 July 1968) prohibits natural persons and legal persons from sharing information of an economic, commercial, industrial, financial or technical character with foreign authorities when doing so would affect or violate France's essential economic interest. Such a prohibition applies in particular with regard to evidence gathering relating to foreign judicial (criminal and civil) or administrative proceedings.

For instance, while preparing a witness for a judicial proceeding might be permissible in the U.S., in other jurisdictions it could be a serious violation of professional ethics requirements.⁵ Or, for example, if operating across multiple jurisdictions for the same core investigation, attorneys must be mindful of informal discussions and overtures with enforcement authorities, which, even if standard practice for some, might nonetheless be inappropriate under other jurisdictions' ethical codes.⁶

A significant portion of the Guidelines is derived from France's national internal regulations pertaining to the practice of law (*Règlement Intérieur National de la profession d'avocat*), which harmonizes rules and norms applicable to the legal profession.

a. Conflicts of Interest

The Guidelines explain the primary rules governing attorney conduct and decision-making in potential conflict-of-interest situations. The Working Group noted that an attorney conducting a company's internal investigation may be at risk of prejudicing a company's interests if the attorney had acquired adverse information in the past while previously representing the company's affiliate or the company's individual personnel, such as executives and employees. The Guidelines advise attorneys leading internal investigations to be aware of whether other attorneys in their law practice were parties to the events that are the focus of the internal investigation or whether such attorneys otherwise participated in the negotiation, finalization, or the execution of an agreement whose lawful nature is at issue.⁷

However, the Working Group notes that there would be no conflict of interest should an attorney (external counsel)⁸ who designed a company's compliance program also be mandated with conducting an internal investigation stemming from alleged violations of the same compliance program. Nonetheless, the Guidelines recommend that when there is no indication that the targets of the investigation sought to evade the compliance system's controls (*i.e.*, the compliance program was functionally normally and pursuant to its design), the attorney who designed the compliance program should only conduct the internal investigation if he or she is able to do so independently and without any impact on his or her capabilities.⁹

Foreign attorneys should be aware that under French law, a "Group" of corporate entities under common ownership does not have self-standing legal personhood. Thus, if counsel seeks to represent multiple corporate entities in the same internal investigation—for example, a parent entity and its subsidiary—counsel must be vigilant for potentially diverging interests that could arise between them.¹⁰ Additionally, other corporate structures, such as joint-ventures, should also typically retain counsel separately from either of the parent entities.¹¹

b. Attorney-Client Privilege

Under French law, the rule of "professional secrecy" (*le secret professionnel*) binds the attorney absolutely—neither the client, nor third parties, can discharge the attorney of the obligation to keep secret the confidential conversations, observations, correspondence, and documents relating to the client's representation.¹² Indeed, the client is not bound by professional secrecy and if they choose to disclose previously privileged documents, those documents lose their

⁵ Guidelines at 64.

⁶ *See id.* at 64.

⁷ *Id.* at 13.

⁸ In France, in-house counsel are not members of the Bar because they are not considered sufficiently independent from their employer.

⁹ Guidelines at 16.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 19.

¹² *Id.* at 29-30.

privileged nature.¹³ In contrast to the U.S., in-house counsel in France are not permitted to hold bar memberships and are therefore not considered lawyers bound by the professional code of conduct. As a result, communications between in-house counsel and company personnel in the context of internal investigations generally do not benefit from the professional secrecy privilege.¹⁴ Legal privilege thus does not attach to such in-house counsel communications even when the substance of said communications is “legal” in nature. French courts have, however, recognized limited exceptions to this rule in recent years. For example, in November 2017, the Paris Court of Appeal ruled that discussions by in-house counsel of a legal strategy formulated by outside counsel are privileged.¹⁵

With regard to third-party investigation consultants, such as forensic accountants, the Guidelines advise that counsel leading the investigation engage the third parties directly and be their primary point of contact on behalf of the client, so as to bring the consultants within the scope of professional secrecy protections.¹⁶

c. Scope of Engagement

The Guidelines note that for French counsel, determining the scope of an internal investigation at the outset is an essential ethical requirement. French counsel must receive a specific and strictly binding mandate for the scope of the internal investigation and their role therein.¹⁷ For instance, if the investigation uncovers additional potential misconduct that does not fall within the scope of the initial engagement, counsel must refrain from investigating those facts without first receiving client approval to do so.

Because the French defense bar has long leaned against close cooperation with government actors,¹⁸ the client must clearly outline the limits of counsel’s engagement with authorities. The Working Group strongly recommends that counsel strike a balance between obtaining appropriate client consent while also maintaining the ability to coordinate closely and efficiently, as needed, with authorities. Ultimately, however, client consent is required for the attorney to initiate any discussions with enforcement officials.

d. Conducting Employee Interviews

The Guidelines note that counsel in France have duties of loyalty, prudence, and tactfulness, which also apply in the context of investigations interviews with employees of the client.¹⁹ There are some notable differences between the manner in which attorneys in France and in the U.S. are expected to conduct internal investigation interviews. In the U.S. for example, attorneys conducting investigations on behalf of a company must inform company employees that the attorney represents only the company and not the employee individually, and that the company alone may decide to waive the privilege. Such warnings are commonly known as *Upjohn* warnings, which derive their name from a Supreme Court case, *Upjohn Company v. United States*.

The protections in France are similar, but encourage more formal documentation of the warnings. For example, when conducting interviews for internal investigations, the Guidelines recommend that counsel consider advising the interviewee of the following points, and ideally in writing:

¹³ *Id.*

¹⁴ *Id.* at 30.

¹⁵ Cour d’Appel de Paris, ordonnance du premier président, 8 novembre 2017, n°14/13384, Whirlpool.

¹⁶ Guidelines at 20.

¹⁷ *Id.* at 16.

¹⁸ *Cf. id.* at 6.

¹⁹ *Id.* at 22.

- The counsel represents the client’s employer (*i.e.*, the company); the interview is confidential; and the interviewee cannot avail himself or herself of any professional secrecy privilege relating to the interview.
- If the interviewer knows that the employee is potentially implicated in a violation of company policy or a violation of law, the interviewee has the right to be represented by counsel.²⁰
 - The Guidelines provide that when the interviewer is aware *prior to the interview* of possible violations committed by the interviewee, the interviewer should endeavor to notify the interviewee in writing of their right to be assisted by counsel;
 - If, *during the interview* itself, the interviewer becomes aware of possible violations committed by the interviewee, the interviewer should pause the interview and propose that it be postponed to enable the interviewee to obtain counsel.²¹
- The interviewer may inform the company and enforcement authorities of the contents of the interview;
- If applicable, documents containing the interviewee’s personal information have been collected for the purposes of the internal investigation, unless the company has already communicated this or unless the investigation is part of routine internal monitoring.²²

e. *GDPR Considerations*

In effect since May 2018, the European Union’s General Data Protection Regulation (GDPR) aims to harmonize European Union member states’ legislation regarding the handling of personal data and requires adherence to principles of accountability for entities handling European Union residents’ personal data.²³ The Guidelines first clarify that the GDPR mandates apply to counsel as “controller” of personal data collected and handled in the context of an internal investigations that the attorney is conducting.²⁴ The GDPR’s foundational requirement is that the subjects of any personal data collection must be informed thereof, as well as various specifics of the data collection and its legal grounds. However, if the data is collected from a third party, rather than from the subject directly, several exceptions exist to the notice requirement. The Working Group highlights that two such exceptions apply in the investigations context: (1) if disclosure of the data collection would violate counsel’s obligations of professional secrecy to the corporate client, notice need not be provided; (ii) if the full required disclosure would seriously jeopardize the objective for which the data is being collected, the extent of the notice can be tailored accordingly.

Given GDPR restrictions on sharing personal data of French persons outside of the European Union, the Guidelines recommend that attorneys engage forensic accounting firms that are capable of hosting all relevant investigative data in France.²⁵ Along the same lines, if the investigation touches on foreign subsidiaries of a French parent company, counsel should evaluate whether any relevant data is already available at the non-French entities and accessible under local law.²⁶ In any internal investigation, counsel should specifically assess the client’s compliance with GDPR when it comes to collecting documents and communications that may contain protected personal data.²⁷

²⁰ *Id.* at 23, 28.

²¹ *Id.* at 27.

²² *Id.* at 28.

²³ *Id.* at 37.

²⁴ *Id.* at 38.

²⁵ *See id.* at 56.

²⁶ *See id.* at 58.

²⁷ *See id.* at 57.

Additionally, attorneys conducting internal investigations in France or that involve data located in France would do well to note that any transfer of personal data outside of the European Union requires that counsel submit a “data protection impact analysis” or AIDP (*Analyse d’impact relative à la protection des données*) to France’s data privacy regulator CNIL (*Commission nationale de l’informatique et des libertés*, or National Commission on Data Protection and Liberties). To save time and effort, attorneys should consider seeking a universal AIDP for multiple internal investigations if they are similar in purpose, scope, and methods.²⁸

f. French Blocking Statute

The Guidelines also refer to the French blocking statute (*La loi de blocage*) (Law No. 68-678 of 26 July 1968), which prohibits natural persons and legal persons from sharing information of an economic, commercial, industrial, financial or technical character with foreign authorities when doing so would affect or violate France’s essential economic interest. Such a prohibition applies in particular with regard to evidence-gathering relating to foreign judicial (criminal and civil) or administrative proceedings. The French blocking statute provides exceptions to this prohibition when the sharing or exchange of information is executed pursuant to an international treaty or agreement.

The Guidelines provide that the foreign transmission of all information—written or oral—gathered by a company during an internal investigation must occur through official channels (*canaux officiels*). Attorneys following such guidance would in theory only hand over information if compelled to do so by French criminal law enforcement authorities seeking to execute a mutual legal assistance request received from a foreign jurisdiction (*e.g.*, pursuant to the Mutual Legal Assistance Treaty between the United States of America and France)²⁹ or pursuant to a letter rogatory issued by a foreign court in a civil matter. While this area has received renewed interest in recent years, enforcement of the blocking statute remains nearly non-existent. Nonetheless, attorneys should monitor developments in this area due to the clear letter of the law and meaningful penalties for blocking statute violations. For example, for entities that share information with foreign authorities without notifying and involving French authorities or a French judge, Article 3 of the statute provides for various penalties, including up to six months’ imprisonment and a EUR 18,000 fine for natural persons and EUR 90,000 for legal persons.

Despite the lack of enforcement of the French blocking statute, French authorities have provided counsel navigating the statute with some guidance and direction. For example, as discussed above, in June 2019, the French National Financial Prosecutor’s Office (*Parquet National Financier*) (“PNF”) and the French Anti-Corruption Agency (*Agence Française Anticorruption*) (“AFA”) published guidelines on the relatively new corporate settlement mechanism in France known as Judicial Public Interest Agreement, or *Convention Judiciaire d’Intérêt Public*. In those guidelines, the PNF and AFA permit French companies subject to a monitorship imposed by a foreign enforcement authority (*e.g.*, U.S. Department of Justice) to share information with said authority. Additionally, the PNF-AFA guidelines also indicate that Article 3(5) of France’s anti-corruption legislation, the Sapin 2 law, vests the AFA with the authority to ensure that the sharing of such information with foreign authorities does not violate the French blocking statute (for more on the PNF-AFA guidelines, see our [alert](#) from last year). That said, in light of the renewed interest of French authorities in the French blocking statute, attorneys conducting internal investigations in France should ensure compliance with the statute before moving forward with plans to disclose information to a foreign enforcement authority or regulator.

III. Conclusion

The Guidelines are a welcome development for attorneys navigating the ever-evolving multijurisdictional enforcement landscape and the nuanced complexities inherent to internal investigations. Recent anti-corruption reforms in France as

²⁸ See *id.* at 58.

²⁹ See Treaty on Mutual Legal Assistance in Criminal Matters between the United States of American and France (entry into force on December 1, 2001), available at <https://www.state.gov/wp-content/uploads/2019/02/13010-France-Law-Enforcement-MLAT-12.10.1998.pdf>.

well as increased cross-border enforcement and cooperation amongst government authorities require attorneys investigating allegations of potential wrongdoing in France (or with a French nexus) to possess a sophisticated and comprehensive understanding of local requirements and practices. The advantages of succeeding in such an endeavor cannot be overstated as doing so allows for a smooth investigation process and reflects positively on the investigating entity's ability and desire to comply with applicable legislation and professional guidelines and requirements.