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French Enforcement Authorities Publish First-Ever Guidance on Internal Anti-Bribery and Corruption Investigations

On March 7, 2022, the French Anti-Corruption Agency (*Agence Française Anticorruption*, or “AFA”) and the National Financial Prosecutor’s Office (*Parquet National Financier*, or “PNF”) jointly published a draft of their first-ever guidance on how businesses should conduct internal investigations related to bribery and corruption (the “Guide”).¹ While the Guide targets companies with more than 500 employees and whose annual revenue exceeds EUR 100 million, the recommendations and best practices are a useful lodestar for businesses of any size operating in France.

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The Guide is particularly notable given France’s June 2017 enactment of sweeping anti-corruption legislation known as Sapin II. As we have previously discussed,² in passing Sapin II, France replaced its passive (and oft-criticized) approach to anti-corruption efforts with a sophisticated and increasingly proactive enforcement regime. In this context, the Guide—together with the recent AFA and PNF joint guidelines on France’s deferred prosecution agreements (*Convention Judiciaire d’Intérêt Public*, or “CJIP”)³ and the French national bar council (*Conseil national des barreaux*, or “CNB”) guidelines on best practices and ethical considerations for internal investigations⁴—serves as a critical reference for businesses operating in the world’s seventh largest economy.⁵

I. THE GUIDANCE

Although it does not impose any legal requirements on companies operating in France, the Guide provides such companies with a roadmap for best practices when conducting an internal investigation. First and foremost, the Guide repeatedly recommends that companies communicate and cooperate with French enforcement authorities as early in the investigation process as possible. Implicit in these recommendations is that such cooperation increases the likelihood of favorable settlement terms, such as in an ensuing CJIP; however, unlike guidance from peer enforcement agencies in the United States⁶ and United Kingdom,⁷ the Guide does not directly explain how companies can receive credit for their cooperation with the government.

With respect to internal investigations themselves, the Guide outlines best practices when conducting employee interviews. In particular, the Guide recommends that investigators should distinguish between preliminary scoping or fact-finding interviews, and those where a specific employee is accused and the interview may serve as the basis for a disciplinary sanction, as the latter would legally be considered part of a disciplinary procedure rather than an internal investigation. Such guidance is informed by a 2016 decision from the Court of Cassation (*Cour de cassation*, France’s supreme civil and criminal appellate court) that distinguished an employee’s rights depending on the nature of the interview.⁸ As a result, the Guide recommends that practitioners structure their internal investigations such that interviews of key individuals are held later in the process, allowing for a more clear delineation between the investigatory and disciplinary phases.⁹

In the same vein, the Guide also emphasizes that investigations must be justified and proportionate in relation to the potential issue involved and must respect employees’ private lives. To achieve these goals and comply with Article 5 of the EU General Data Protection Regulation (GDPR), the Guide lists six key principles that companies should use to shape their investigations: (1) lawfulness, fairness, and transparency; (2) limitations on the purposes for collection, processing, and storage; (3) data minimization; (4) accuracy of data; (5) data storage limits; and (6) integrity and confidentiality. The Guide notes that penalties for non-compliance with these principles can result in a penalty of up to EUR 20 million or up to 4% of the company’s total worldwide annual revenue of the preceding financial year.¹⁰

Finally, the Guide summarizes recommended procedures for concluding internal investigations. Where an investigation confirms allegations of wrongdoing, the Guide notes that the company must not only discipline its employee in accordance with internal policies, but must initiate any disciplinary proceedings against an employee within two months from the time they have exact knowledge of the incident.¹¹ The Guide also notes that while companies have discretion as to whether they report any incidents to the judicial authorities, the conclusions of internal investigations do not bind the authorities and the court may still seek criminal liability of the legal person.¹² Where an internal investigation does not confirm allegations of corruption, the Guide recommends that the investigative team close the matter and internally archive a confidential report precisely detailing the steps taken in the inquiry.¹³ Where the results of the investigation are inconclusive, the Guide recommends that companies consider an external audit, particularly when a company cannot completely refute allegations of corruption.¹⁴ In all cases, the Guide recommends that companies reflect on any vulnerabilities identified during the investigation and update internal controls accordingly.¹⁵

II. EXPERT INSIGHTS & WHAT TO WATCH FOR

Stéphane de Navacelle, managing partner at Navacelle in Paris, views the guidance as a sign of France’s increasing appetite for enforcement:

“The guidance is the reflection of the PNF reaching a high level of sophistication and wanting to assert complete control over discussions with corporate defendants and, ultimately, individuals who fall within the scope of its investigations. It is likely that the PNF will feel more and more comfortable imposing plea deals (or trials) instead of DPAs when it views cooperation as less than absolute.”

As a result, de Navacelle advises that clients facing scrutiny should consider communicating with French authorities as early as possible: “Gaining credibility with the PNF at a very early stage—and the AFA when it comes knocking—is key. Where multiple enforcement authorities may be involved, the PNF has likely already been coordinating with the U.K. SFO or the U.S. DOJ by the time counsel is on-boarded.”

Ropes & Gray partner Amanda Raad agrees: “This increased desire by regulators around the world to lead investigations locally should not go unnoticed. It is critical to identify all relevant jurisdictions at the beginning of any investigation or review.”

Public comment on the draft Guide closed on April 8, 2022, and a final publication date has not yet been announced. While the draft Guide offers best practices and principles for companies seeking to comply with French anti-corruption laws, it remains to be seen whether and/or how French authorities—particularly the AFA and PNF—will reward businesses for their adoption of recommended best practices or voluntary cooperation with enforcement authorities. Legal observers will also be keeping a keen eye on the second term of newly reelected French President Emmanuel Macron, as well as the ongoing French legislative elections (on June 12 and 19, 2022), particularly given France’s leading parties’ divergent views on Sapin II.

1. AFA & PNF, *Guide pratique, Les enquêtes internes anticorruption* (Mar. 1, 2022), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Projet%20de%20guide%20enqu%C3%AAte%20interne%20_Mise%20en%20consultation.pdf.
2. <https://www.ropesgray.com/en/newsroom/podcasts/2022/February/Podcast-On-the-Ropes-Enforcement-Risk-Anti-Corruption-International-Risk-Perspectives-France>.
3. <https://www.ropesgray.com/en/newsroom/alerts/2019/08/France-National-Financial-Prosecutor-Anti-Corruption-Agency-Corporate-Settlement-Mechanisms>.
4. *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.
5. <https://www.imf.org/en/Publications/WEO/weo-database/2021/October/>.

6. See, e.g., *FCPA Corporate Enforcement Policy*, 9-47.120 (Nov. 29, 2017), <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy>.
7. See, e.g., Serious Fraud Office, *Corporate Co-operation Guidance*, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/>.
8. See Court of Cassation, Civil, Social Chamber, 15-10.503 (Mar. 22, 2016), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000032316563>.
9. AFA & PNF, *Guide pratique*, *supra* note 1, at 20.
10. *Id.* at 16.; see also Regulation (EU) 2016/679 of the Parliament and of the Council of 27 April 2016 on the Protection of Individuals with Regard to the Processing of Personal Data, <https://www.cnil.fr/fr/reglement-europeen-protection-donnees>.
11. AFA & PNF, *Guide pratique*, *supra* note 1, at 27.
12. *Id.* at 27.
13. *Id.* at 26.
14. *Id.* at 28.
15. *Id.* at 30.