



ICLG

The International Comparative Legal Guide to:

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France

Navacelle

Stéphane de Navacelle



1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Under pressure from foreign authorities, the practice of internal investigation has developed in recent years and were made a *de facto* necessity by the Sapin 2 law of December 2016. Absent any dedicated regulation, companies should make sure to address attorney-client privilege (no legal privilege applies to in-house counsel), business secrecy, labour laws, influencing potential witnesses, privacy and data protection. Failing to address these issues will expose the entity to heightened risks in case of raid by enforcement authorities and potential criminal liability.

Plea-bargaining (introduced into the criminal code in 2013), the *Convention Judiciaire d'Intérêt Générale* (CJIG) – a “French DPA” – provided for by the Sapin 2 law and a considerable increase in enforcement tip the balance in favour of knowing the facts earlier rather than later.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

The entity should factor in the likeliness of actual or future involvement of French or foreign enforcement or administrative authorities (protect the confidentiality of the investigation), the press/social media and NGOs. If certain requirements are met, the latter can force criminal proceedings.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Entities must designate a *réfèrent* (compliance officer or compliance department) – a high level executive with adequate training who will assess the credibility of the whistleblower's complaint with complete independence and impartiality. Per the Sapin 2 law, the

réfèrent is to be appointed as part of a wider internal whistleblowing mechanism mandatory for companies employing at least 500 employees, and for companies belonging to a group which employs at least 500 employees and has a turnover higher than €100 million.

When dealing with whistleblowers, entities must comply with Sapin 2 requirements which strengthen whistleblowers' protection. Entities must ensure whistleblowers' anonymity, as well as the anonymity of the persons identified by the whistleblower in the alert and the confidentiality of the information disclosed. Furthermore, entities must never act to impede the disclosure of an alert, and prevent retaliation against the whistleblower.

1.4 How does outside counsel determine who “the client” is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In most instances, internal investigations are coordinated by the legal department and/or the *Secrétariat Général*. Best practice is to put together an independent task force of relevant functions, limited in size to preserve confidentiality and which includes outside counsel to anticipate communications with relevant authorities and preserve privilege.

The Paris Bar Counsel issued recommendations for attorneys conducting internal investigations. Outside counsel must remain independent in the course of the investigation, and determine the scope of his mission in the retainer at the outset of the investigation.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

There is no obligation to self-report in France. However, an entity's cooperation may be taken into account when discussing a guilty

plea and/or CJIG. Also, entities can provide relevant information to Prosecutors and/or investigating magistrates in the course of a criminal investigation and request that specific investigative steps be carried out. Pros and cons should be properly weighed as it usually is an “all in” defence strategy.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

As there is a strong likelihood that enforcement or administrative authorities will revert to a dawn raid if informed of potential criminal and/or regulatory liability, the more you know ahead of time the better. Issues to be considered include the likelihood of information being leaked and evidence destroyed by employees or third parties. It is quite often the case that the entity should file a criminal complaint to place a wedge between itself and the wrongdoer who may be an employee.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

It is often the case that findings should first be reported orally to the competent prosecutorial or administrative authority. At that stage, at least a preliminary report should be ready. Any information provided – regardless of the format – may be used against the entity.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There is no legal requirement to liaise with local authorities before starting an internal investigation. In addition to the legal requirements mentioned above, appropriate measures should be taken to comply with the blocking statute which usually requires liaising with local authorities.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity’s internal investigation do they prefer?

Based on the criteria mentioned above, outside counsel should liaise with the appropriate prosecutorial and/or administrative authority. This is in no way a one size fits all approach.

3.3 If regulatory or law enforcement authorities are investigating an entity’s conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

There is no way to limit the scope of a government investigation but an entity can add documents and testimony to the criminal

and/or administrative file and request that specific investigative steps be executed by the investigative magistrate, i.e., appoint an independent expert or carry out an interview.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

French authorities rely on MLATs and Agreements to cooperate with foreign authorities. A considerable amount of preparation should be put into the gathering of evidence to protect attorney-client privilege and access to information to avoid frustrating domestic or foreign authorities.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

As the development of internal investigations is still at its early beginnings in France, the most important challenge is the lack of legal framework and, thus, that each investigation should be considered in its own self.

4.2 What steps should typically be included in an investigation plan?

The first step should be to assess the allegations of misconduct and potential liability for the entity. Outside counsel should then lead the document gathering whilst bearing in mind the issues mentioned above, including privacy rules. Interviews can then be carried out complying with the guidelines of the Paris Bar Council. The investigation ends with a report on steps carried out and findings.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Outside counsel should carry out the investigation from the outset to preserve privilege. Counsel and forensic consultants should be retained based on their ability to address specific technical challenges and may be relied on to contribute to showing impartiality with respect to the investigative steps. Among issues to be considered are knowledge of the potential local and international jurisdictions.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Attorney-client privilege, which covers attorney work product, applies in the context of an internal investigation when the attorney is designated by the entity whether litigation is immediately

contemplated or not. In order to preserve privilege, entities should rely on outside counsel to conduct internal investigations and make sure the work product is maintained in the lawyer's control. The attorney-client privilege does not apply when the attorney is appointed by separate parties as an independent expert.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Attorney-client privilege does not apply to interactions between the client and third parties engaged by outside counsel during the investigation. A non-disclosure agreement should be agreed upon in order to preserve confidentiality of such exchanges. Attorney-client privilege/work product of documents produced or communicated to vendors has not been tested before courts, documents should therefore stay in lawyers' control.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Attorney-client privilege does not apply to communications with in-house counsel. To preserve privilege the investigation must be carried out by outside counsel every step of the way.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Entities should rely on outside counsel to protect privileged documents, i.e., the documents should stay in the custody of outside counsel. In any event, correspondence should be directed to/from outside counsel.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Once a criminal investigation is over, upon request the prosecutor can decide to turn over part of or the entire criminal file, i.e., if the results are part of the criminal file, they may be turned over. If the parties reach a plea bargaining, the agreement has to be approved by a judge in open court. In the event of a CJIG (as mentioned above), identified victims have to be invited to the homologation hearing. Enforcement agencies generally would keep the results confidential absent any enforcement action or judicial process but may share information with other agencies/authorities in France or abroad.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The French Data protection law of 6 January 1978 and the new regulation of 7 October 2016 set the legal framework for data protection: the right to be informed of the collection of data, the right to refuse the collection of data, the right to access the data and rectify it if need be. The 1978 law created the National Commission for Data Protection and Liberty (CNIL) – the law enforcement

agency in charge of monitoring the compliance with French data protection and freedom of information laws.

The May 25, 2016 European regulation ((EU) 2016/679) will be directly applicable to all Members States starting May 25, 2018. This new regulation creates a data protection officer (DPO) who oversees companies' compliance with data protection laws. In this mission, the data protection officer will be able to issue recommendations to entities to comply with the legislation. In the event of an internal investigation, the DPO will be the *réfèrent* for data protection matters.

Consideration should be given to the Blocking Statute as well as, where relevant, the EU/US privacy shield – the new legal framework designed to ease transfers of personal data for commercial purposes and ensure data protection on both sides.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Although there is no legal requirement to issue such a document, it should be common practice to prepare a document retention notice which clearly states the requirement that documents be preserved. The document retention notice should be followed up upon by team managers for it to be properly understood and questions should be answered. The retention notice alone albeit being specific as to the scope and the purpose of the investigation, and explain what to do (or not) to preserve documents and data, will likely not be enough in a French entity.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Entities must consider compliance with the Blocking Statute, bank secrecy rule, business secrecy rules and data protection rules. Anyone involved in an internal investigation should be very aware of potential tampering with evidence liability attached to manipulating documents ahead of a criminal investigation. Rules and processes should be clear and chain of custody strictly preserved.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Relevant documents should be identified by in house counsel together with external advisors, all documents may be relevant to an internal investigation.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Depending on the scope of the investigation, the entity may rely on either internal or external resources to collect documents. In some specific industries, e.g. banking, entities have specific internal investigation capacities. Generally speaking, there are large number of service providers who can assist with document collection and processing in France, many of which meet international standards.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

When treating a very large amount of data, law enforcement authorities can use predictive coding techniques. Whether the review carried out is satisfactory or not is very much a case-by-case discussion with the relevant authorities based on a reasonableness standard.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There is no specific regulation applicable to this matter. When outside counsel carries out an interview, the interviewee should be put on notice that he/she may retain his/her own outside counsel to assist in the interview and that the interview is not compelled. Entities should bear in mind issues raised above including labour law and potential obstruction to justice liability both of which carry criminal liability. Also, the Paris Bar Council has issued recommendations for lawyers carrying out internal investigations.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

The employees can be compelled to deliver or collect documents which are the company's propriety but cannot be compelled to speak at an interview. If he chooses not to, the entity can draw a negative inference from that refusal.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

Despite no legal requirement, entities would be ill-advised not to provide legal representation to witnesses prior to interview in the event that there is any likelihood that the individual may bear liability due to the underlying facts. Also, separate counsel will ease communications with local authorities which may become involved.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

The Paris Bar Council issued recommendations to lawyers conducting internal investigations. Key issues include: outside counsels should describe to witnesses the scope of the investigation, its non-compulsory nature, and inform them that attorney-client

privilege does not apply to the interview. A document listing applicable procedural rules should be provided to each witness interviewed.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

A very strong effort should be put into explaining, through management – including local management, the ultimate goals of the investigation. Internal investigations are overwhelmingly at odds with mainstream legal culture in France. People conducting interviews should definitely err on the side of relying on a translator as conversant business English can be largely insufficient under the stress of an interview and may lead to counter-productive results.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

The *référént* must stress the confidentiality of the interview and of the information disclosed (to avoid any leak of sensitive information), as well as the anonymity of the whistleblower, and provide a non-retaliation pledge to the whistleblower. The entity may also elect to assign a lawyer to the whistleblower to defend itself against adverse inference made by the whistleblower at the interview.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Amnesty or immunity would be limited in scope to consequences under the entity's control and would, in effect, extend the legal whistleblower's protection to one who would not come "in good faith"/"with clean hands". The appropriateness depends on each given situation. The entity should be cautious not to allow any inference that attempts to unduly influence a potential witness' testimony.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

The recommendation issued by the Paris Bar Council provides that an interviewee should be able to review and sign his statement if a verbatim transcript is made. A copy can be handed over to him except if doing so may harm the investigation.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

The Paris Bar Council recommends that the attorney conducting the interview informs the witness that he can have legal representation before and during the interview. Enforcement authorities would normally not be present.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common practice to provide written investigation reports in the event that internal investigations are conducted. In order to preserve confidentially in the event of a raid, the report should be kept in the lawyer's premises.

8.2 How should the investigation report be structured and what topics should it address?

There are no guidelines describing what an investigation report should contain. It should contain a description of the facts within the scope of the investigation and include a summary of the investigative steps, facts and supporting evidence. It should include remedial measures carried out, including possible business decisions and sanctions.

In a separate report, outside counsel should issue recommendations and remedial measures recommended looking forward based on the investigations' findings.



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In 2010, Stéphane de Navacelle created Navacelle.

Stéphane de Navacelle has been identified as a leading practitioner in white collar/business crime defence & investigations by *The Legal 500*, *Who's Who Legal*, *Décideurs Leaders League France* and *Expert Guides*.

He is an elected member of the Paris Bar Council.

NAVACELLE

Navacelle is a white collar crime, regulatory defence and complex litigation firm.

Navacelle advises both foreign and domestic clients with a wide range of litigation, fraud and corporate governance related issues and in connection with investigations carried out by French, foreign (including DoJ, SEC, SFO and FCA) and international authorities in addition to French matters concerning allegations of insider trading, dissemination of false or misleading information, market abuse, tax evasion, money laundering, embezzlement, organised fraud, involuntary homicide and infliction of bodily harm.

Navacelle is regularly recommended by domestic and foreign market watchers and peers. Stéphane de Navacelle is a regular participant to seminars and is consulted on issues relating to regulatory and criminal investigations in Europe, the United States and Africa.

Navacelle frequently teams up with domestic and foreign firms to provide a team tailored to the clients' needs.

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