GIR Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

SIXTH EDITION

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

2021

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations around the World

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This article was first published in December 2021
For further information please contact insight@globalinvestigationsreview.com

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalinvestigationsreview.com

ISBN 978-1-83862-272-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

Addleshaw Goddard LLP

Anagnostopoulos

Association of Corporate Investigators

Baker McKenzie LLP

BCL Solicitors LLP

BDO USA, LLP

Borden Ladner Gervais LLP

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France

Stéphane de Navacelle and Julie Zorrilla[1]

GENERAL CONTEXT, KEY PRINCIPLES AND HOT TOPICS

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

Since the Law of 9 December 2016 addressing transparency, anti-corruption and economic modernisation (known as the Sapin II Law) entered into force, 13 judicial public interest agreements (CJIPs, which are the French equivalent of deferred prosecutions agreements) have been agreed to by corporations. Since December 2020, the field of application of CJIPs has widened to include environmental crimes. In the past two years, seven CJIPs have been signed, one of which stands out.

On 9 February 2021, two companies, Bolloré SE and Financière de l'Odet SE, had signed a CJIP with the French Financial Prosecutor to settle corruption allegations pertaining to public procurement contracts for the concession of the port of Lomé, in Togo, by paying a fine of €12 million. This company is owned by Vincent Bolloré, one of the wealthiest businessmen in France.

In parallel with the CJIP, company executives and Mr Bolloré agreed to sign a plea agreement (CRPC) with the prosecutor to settle the allegations levied against them personally by each paying a fine of €375,000 fine. Although CJIPs, which are available only for legal persons, do not imply an admission of guilt, the CRPC carries the same legal effects as a criminal conviction. Both CJIPs and CRPCs, when they are concluded between a defendant and the prosecutor, must be homologated during a public hearing before a homologation judge. The homologation judge must verify that the alleged facts

1 Stéphane de Navacelle and Julie Zorrilla are partners at Navacelle. The authors thank their colleague Clémentine Duverne for her contribution to this chapter.

are real, that the legal charges are justified and that the defendant acknowledges his or her guilt during the hearing.

In the *Bolloré* case, although the CJIP was homologated, the judge refused to homologate the CRPC and sent the case back to the investigating judge, who may order a subsequent trial. The homologation judge held that the alleged offences 'seriously undermined public economic order' and 'undermined Togo's sovereignty'. According to this judge, a public trial was warranted.

This case is of interest for cases of white-collar crime in which a CRPC for the executives and a CJIP for the company are negotiated. This method is supposed to afford predictability on the outcome of the case for the defendants. In the *Bolloré* case, during the public hearing, which was attended by the press, Mr Bolloré acknowledged the charges publicly and acknowledged his guilt. Despite this acknowledgement and because the homologation was refused, he is due to appear on trial most likely in 2022. This raises the question of the risks that a plea bargain in French law represents when a defendant acknowledges his or her guilt in open court during a homologation hearing as required by law, but the homologation is subsequently refused. This could be viewed as a direct breach of the subsequent right to a fair trial and violation of the presumption of innocence at the subsequent trial.

Alongside the signing of CJIPs and CRPCs, the investigative and judicial authorities in France continue to investigate corporations for offences, such as the investigation and charges of money laundering and financing of terrorism brought against global manufacturer LafargeHolcim. The manufacturer's target status was partially confirmed by the Supreme Court for which a corporate can be an 'accomplice to crimes against humanity' even if it does not intend to be associated with the commission of those crimes.

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

Corporations can be held liable on both civil and criminal grounds.

Corporate civil liability is incurred via contract or outside the framework of a contract (a tort).

Corporations can be held criminally liable for offences committed on their behalf by their organs or representatives (i.e., individuals who have executive, administrative, managerial or control functions or those who act pursuant to a valid delegation of power). Corporate criminal liability does not exclude liability of the individual having committed the offence or an accomplice to the offence, since the highest French judicial court (the Court of Cassation) gives weight to management endorsement of corporate misconduct. Although corporate criminal liability can also be found independently of individual liability, the Criminal Division of the Court has nevertheless reasserted that corporate criminal liability requires the identification of an organ or a representative.

3 Which law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies or protocols relating to the prosecution of corporations?

Corporations are regulated by judicial authorities – with investigative and prosecutorial functions – but also administrative and regulatory authorities. For the most part,

jurisdiction between the authorities is dependent on subject matter, with numerous opportunities for co-operation and competition.

Jurisdiction of the judicial courts is usually defined by the location of the offence or the location of the corporate headquarters.

Moreover, specialised interregional courts have jurisdiction over complex economic and financial matters, or multi-jurisdictional matters.

Furthermore, specialist sections of the prosecution authorities in Paris have national jurisdiction to handle specific offences (e.g., financial crime and corruption, terrorism and crimes against humanity). One example is the National Financial Prosecutor's Office (PNF), which investigates and prosecutes financial crimes (such as public and private corruption, favouritism, aggravated tax fraud, VAT fraud, insider trading and index fund manipulation).

Administrative and regulatory authorities also oversee the activities of corporations. The French Financial Markets Authority (AMF) regulates the integrity of financial markets, ensuring investor protection and information, and preventing market abuse. The French Competition Authority combats antitrust practices and ensures the lawful functioning of the markets by conducting field enquiries, overseeing corporate mergers, and publishing opinions and recommendations. France's Supervisory and Resolution Authority (ACPR) preserves the stability of the financial system, working with international bodies that supervise insurance and banking industry corporations' operating conditions and compliance with rules designed to protect customers. The French Anti-Corruption Agency (AFA) controls and sanctions corporations covered by Article 17 of the Sapin II Law (i.e., corporations with more than 500 employees, or a group with headquarters in France with more than 500 employees and a turnover that exceeds €100 million) for flawed or insufficient anti-corruption processes and policies, and monitors the implementation of anti-corruption programmes.

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

Investigations can be initiated by the public prosecutors, or by civil parties via the filing of a formal complaint with an investigating judge.

With respect to public prosecutors, investigations are initiated pursuant to complaint, reporting, voluntary disclosure or *flagrante delicto*. Prosecutorial discretion with respect to the following steps is considerable. The public prosecutor can choose to prosecute, to settle or to drop the charges, to investigate itself or to appoint an investigating judge to handle complex cases. There is no minimum threshold of suspicion provided by law for prosecutors to initiate investigative acts and the latter cannot be challenged in court.

With respect to investigating judges, investigations are initiated either through the prosecutor or pursuant to a complaint filed by civil parties. Non-governmental organisations that have been in place for a certain number of years can also file a complaint if the facts of the complaint pertain to the objective of the organisation.

Investigating judges will be seized *in rem* and their investigative acts will be limited to the facts as presented by the public prosecutors. All investigative acts of the investigating judge can be challenged in court.

Investigations can also stem from administrative or regulatory authorities' detection of suspicious activities within their material jurisdiction (e.g., AMF, AFA, ACPR).

5 How can the lawfulness or scope of a notice or subpoena from an authority be challenged in your country?

Orders issued by investigating, administrative and judicial authorities must comply with specific formalities and be based on a legal provision.

Notice to attend or a subpoena (i.e., a written notice that requires a party to attend a court hearing or to produce a document to the authorities) can be challenged under French law if the orders are not provided for by law or do not contain the appropriate information to inform the recipients of their rights.

Moreover, the principle of secrecy (e.g., professional secrecy, bank secrecy, defence and security), for instance, is a ground to object to the issuance of an order for the communication of documents – even though the trend in recent case law has admitted the seizure of documents protected by the attorney–client privilege.

When a notice or a subpoena is issued by a foreign authority, it is possible to challenge whether it is lawful by opposing the French Blocking Statute (Law 68-678 of 26 July 1968). The French Blocking Statute prohibits any request for or submission of information or documents of an economic, commercial, industrial, financial or technical nature, whether in writing or orally, either affecting the essential economic interests of France or in view of the information or documents constituting evidence in foreign judicial or administrative proceedings outside the framework of international treaties or agreements.

6 Does your country make use of co-operative agreements giving immunity or leniency to individuals who assist or co-operate with authorities?

There are no formalised co-operative agreements signed with corporations that grant immunity or leniency for individuals who assist or co-operate with authorities.

Nevertheless, the co-operation of individuals with authorities could lead to more lenient sentences. Plea bargaining for individuals is only permitted should they admit guilt (a CRPC); in return, they will receive half the applicable prison sentence. Moreover, for offences relating to private and public corruption, a prison sentence can be halved should an involved individual co-operate with the administrative or judicial authorities and contribute to putting an end to the offence or identifying the offenders or accomplices.

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

For several years, in the field of financial crime, the main priority for French enforcement authorities has been the fight against corruption.

This priority was reaffirmed by the Criminal Policy Circular issued by the Minister for Justice on 2 June 2020, which focuses on the fight against international corruption and was adopted in the wider context of the Organisation for Economic Co-operation and Development's assessment of the anti-corruption arsenal in France. This is also evident

in the interest shown in a report by two Members of Parliament on an evaluation of the Sapin II Law (the Gauvain/Marleix Report) and the subsequent bill to improve it.

8 To what extent do law enforcement authorities in your jurisdiction place importance on a corporation having an effective compliance programme? What guidance exists (in the form of official guidance, speeches or case law) on what makes an effective compliance programme?

Within the context of a trial for probity offences, corporations meeting the requirements of the Sapin II Law, under Article 17, can request the public prosecutor to offer a CJIP and to impose a lower financial sanction. Nevertheless, this remains at the public prosecutor's discretion.

The public prosecutor considers the ability and willingness of the executive management, once it is aware of the offences that have been committed within the corporation, to implement the necessary corrective measures to enhance the compliance programme. Implementing an effective corporate compliance programme may be a condition of a CJIP and the law enforcement authorities can order the AFA to monitor the compliance programme of a corporation for up to three years.

In practice, should a company enhance its compliance programme in accordance with best practice before a CJIP is signed, the public prosecutor may rule on completion of the structure of the programme, and the AFA will only have to monitor its implementation.

The first official guidance on the content of an effective compliance programme was provided by the eight pillars of the Sapin II Law, namely code of conduct, whistleblower channel, risk mapping, due diligence on customers, suppliers and third-party agents, internal and external accounting controls, training for high-risk employees, disciplinary sanctions, and monitoring and evaluation of measures. Moreover, the AFA has issued several sets of guidelines – including Practical Guide on the Corporate Anti-Corruption Compliance Function and Practical Guide on Implementation of the Compliance Programme Sanction – and practical Q&As for private and public sector entities.

Although AFA recommendations are not legally binding, compliance with them is taken into consideration in the event of subsequent control measures.

CYBER-RELATED ISSUES

9 Does your country regulate cybersecurity? Describe the approach of local law enforcement authorities in your country to cybersecurity-related failings.

A comprehensive framework addresses cybersecurity at different national levels.

The National Cybersecurity Agency (ANSSI), established in 2009, is the national authority in charge of cyber-defence and information security. Its purpose is to oversee the activities of government departments, public services, strategic businesses and operators, with the aim of providing a proactive response to cybersecurity matters. It also issues authorisations for exports and imports of goods containing encryption. Alongside ANSSI, other specialist bodies address cybersecurity: the police force (Central Cybercrime

Prevention Office) is responsible for fighting crimes linked to information and communication technologies, the National Gendarmerie office is responsible for fighting digital crimes and the Paris Prefecture brigade is responsible for the investigation of information technology fraud.

Should an undertaking's cybersecurity measures fall short of ensuring data protection, for instance, administrative fines can be incurred.

10 Does your country regulate cybercrime? What is the approach of law enforcement authorities in your country to cybercrime?

The implementation of cybercrime regulations is coordinated by the Interior Ministry in collaboration with ANSSI and dedicated police services. The legal framework for tackling cybercrime has grown in recent years, drawing from the Budapest Convention on Cybercrime of 23 November 2001, which harmonises national laws across Europe, improves investigative techniques and increases co-operation between European states.

Several pieces of French legislation include sanctions for offences constituting cybercrime. The Criminal Code sanctions hacking and denial-of-service attacks and the Code of Intellectual Property sanctions phishing and possession or use of hardware to commit cybercrime – offenders face imprisonment and fines up to €375,000.

French law provides for extraterritorial application of its provisions in that a cybercrime is considered to have been committed in France if the offence is committed through an e-communication network to the detriment of a person in France or a company with its registered office in France.

CROSS-BORDER ISSUES AND FOREIGN AUTHORITIES

11 Does local criminal law have general extraterritorial effect? To the extent that extraterritorial effect is limited to specific offences, give details.

Criminal law can have extraterritorial effect should a crime or misdemeanour be committed abroad by a French national. For misdemeanours (*délits*) committed abroad, extraterritoriality will apply, provided that the conduct is sanctionable under the legislation of the country in which it was committed (double incrimination). In respect of corruption, whether in a public or private context, the Sapin II Law removes the double incrimination requirement and extends the extraterritoriality effect to French residents or those individuals and corporations who conduct their economic activity on French soil.

Criminal law can also have extraterritorial effect should a crime or misdemeanour that is sanctioned by imprisonment be committed abroad against a French national.

The public prosecutor can only initiate proceedings against an offender once a formal complaint has been filed by a victim or by the concerned foreign authorities.

In specific circumstances, French criminal law can have extraterritorial effect should a crime or misdemeanour be committed abroad by a non-French national, in the event that his or her extradition or transfer to his or her country of origin is refused by the French authorities.

French criminal law can also have extraterritorial effect in other limited circumstances, such as when the fundamental interests of the nation, diplomatic or consular agents or premises are targeted and when crimes and misdemeanours pertaining to acts of terrorism are committed abroad by a French national or a resident on French soil.

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

The challenges of cross-border investigations mainly occur when the French authorities are not involved in the investigation and prosecution proceedings.

The United States has always encouraged a more hard-line enforcement of international financial and corruption issues globally, whereas the French authorities tend to co-operate with the United States without tackling the issues proactively and independently. The Sapin II Law marks the change in cross-border investigations, in which the French authorities are much more involved and trusted as international participants. The *Airbus* CJIP (judicial public interest agreement) is an illustration of this new status. The National Financial Prosecutor's Office coordinated the investigations with the United Kingdom's Serious Fraud Office and the United States Department of Justice and was the main point of contact for Airbus.

Even though the French authorities are currently more involved in cross-border investigations, some issues remain. One of the main challenges is to ensure that French corporations and individuals abide by the French Blocking Statute. This statute prohibits the communication of economic, commercial, industrial, financial or technical documents or information to foreign authorities or the use of any such information as evidence in legal proceedings abroad, subject to mechanisms afforded under international agreements or treaties, such as the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention) or a mutual legal assistance treaty.

To mitigate this challenge when the French authorities are not involved in a request for communication from foreign authorities, French corporations or individuals can seek advice from the French Anti-Corruption Agency or the Strategic Information and Economic Security Service of the Ministry for Economy and Finance.

13 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another? Is there anything analogous in your jurisdiction to the 'anti-piling on' policy as exists in the United States (the Policy on Coordination of Corporate Resolution Penalties) to prevent multiple authorities seeking to penalise companies for the same conduct?

The principle of double jeopardy enshrined in Article 14.7 of the International Covenant on Civil and Political Rights, Article 50 of the Charter of Fundamental Rights of the European Union and Article 4 of Protocol No. 7 to the European Convention on Human Rights has been ratified by France. The French state provides an exception in its ratification of Article 4 of Protocol No. 7, limiting the application of *ne bis in idem* to the field of

criminal law. Based on this principle, no individual who has been convicted or acquitted in France by definitive criminal judgment may be prosecuted again for the same offence.

French criminal case law considers, however, that *ne bis in idem* does not apply when a definitive foreign judgment has been rendered for an offence of which elements occurred in France. For instance, on 14 March 2018, in a decision regarding the Oil-for-Food Programme, the Court of Cassation (the highest criminal court in France) confirmed that Article 14.7 of the United Nations International Covenant on Civil and Political Rights applies only when both proceedings are initiated in a territory of the same state. Thus, the double jeopardy provision found in a US deferred prosecution agreement (DPA) does not apply.

Owing to the French exception in its interpretation of Article 4 of Protocol No. 7, it is possible in France for an individual or corporation to be sanctioned for the same offence by both judicial and administrative authorities. On 6 June 2019, however, in a case involving two sanctions for market offences – by the French Financial Markets Authority and the criminal court – France was convicted by the European Court of Human Rights (ECHR) for violation of the *ne bis in idem* principle (*Nodet v. France*, Case No. 47342/14). The ECHR called on France to ensure that each proceeding is duly considered and that the overall amount of all penalties is proportionate.

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

Global settlements are a recent development in France in multi-jurisdictional investigations. The *Société Générale* CJIP in 2018 and the *Airbus* CJIP in 2020, both signed alongside foreign DPAs, demonstrate an intent to reinforce co-operation between cross-border authorities. The main practical consideration with respect to global settlements is that they can occur in jurisdictions with an entirely different legal system.

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

In criminal matters, save for cases in which *ne bis in idem* applies, the French authorities are free to take a foreign court ruling into consideration to open an investigation. The French authorities conduct their own investigations independently.

In practice, however, the emerging trend is towards co-operation between French and foreign authorities.

ECONOMIC SANCTIONS ENFORCEMENT

16 Describe your country's sanctions programme and any recent sanctions imposed by your jurisdiction.

The implementation of economic sanctions in France is essentially part of UN sanctions policy and the EU Common Foreign and Security Policy. Restrictive measures, such as asset freezing, embargoes and commercial restrictions, are enforced by a European Council decision supported by EU Regulations and are directly binding on EU Member States. Unilateral measures can also be implemented by national decree or order, even though the

European Commission, in a recent non-binding opinion, has considered unilateral asset freeze measures to be incompatible with EU law.

The sanctions may target governments of foreign countries, non-government entities and individuals. France's Ministry of the Economy and Finance (Directorate-General of the Treasury) and Ministry for Europe and Foreign Affairs oversee the implementation of any sanction decided at European level.

17 What is your country's approach to sanctions enforcement? Has there been an increase in sanctions enforcement activity in recent years, for example?

There is no unique approach to sanctions enforcement.

In recent years, measures to fight terrorism financing have increased. For instance, the French Monetary and Financial Code entitles the Minister of Economy and Finance to order the freezing of assets belonging to individuals or legal entities who commit, or attempt to commit, terrorist acts, or who facilitate or participate in such acts. On 17 June 2019, the French Directorate-General of the Treasury published an updated version of the guidelines drafted with the Supervisory and Resolution Authority on the implementation of French economic sanctions.

18 Do the authorities responsible for sanctions compliance and enforcement in your country co-operate with their counterparts in other countries for the purposes of enforcement?

There is no general framework to criminalise the violation of economic sanctions, although a bill for this purpose was considered by the French Parliament in 2016. However, France enforces international and European restrictive measures.

19 Has your country enacted any blocking legislation in relation to the sanctions measures of third countries? Describe how such legislation operates.

As a member of the European Union, France is subject to the EU Blocking Regulation established on 22 November 1996 and updated on 6 June 2018 by the European Commission. This Regulation is directly enforceable in France. The measure forbids EU citizens from complying with third-country extraterritorial sanctions unless exceptionally authorised to do so by the European Commission, as set forth in Commission Implementing Regulation (EU) 2018/1101. A case concerning the interpretation of the EU Blocking Statute and its effects on US sanctions is currently pending before the Court of Justice of the European Union (C-124/20), and is apparently still ongoing.

20 To the extent that your country has enacted any sanctions blocking legislation, how is compliance enforced by local authorities in practice?

Although the EU Blocking Regulation sanctions EU companies that would comply with third-country sanctions, the measure has much more of a symbolic effect than an economic one.

It has been applied only in 1998 in the context of a complaint filed by the European Communities before the World Trade Organization. As regards the US sanctions on Iran, experts are sceptical about how far Europe will ultimately go to enforce such a rule. It could also prove difficult to enforce, in part because of the international banking system and the significance of the United States in international financial markets.

BEFORE AN INTERNAL INVESTIGATION

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

Allegations can come to light through various channels.

Article 8 of the Sapin II Law provides for a three-tiered reporting system, by which employees or business partners first must submit an alert to their direct supervisor, employer or designated representative. Second – if no appropriate action is taken or there is a likelihood of imminent danger – the alert must be submitted to the relevant judicial, administrative or professional authority. Third – if no appropriate action is taken or there is a likelihood of imminent danger – the alert must be made public. Appropriate procedures for collecting reports must be established by legal entities with more than 50 employees, state administrations, municipalities with more than 10,000 inhabitants, public inter-municipal co-operation establishments, departments and regions.

INFORMATION GATHERING

22 Does your country have a data protection regime?

France adopted a data protection regime in 1978 with the Law on Information Technology, Data Files and Civil Liberties.

In 2016, the European Parliament and the Council of the European Union adopted the General Data Protection Regulation (GDPR), which entered into force on 25 May 2018. The GDPR was incorporated in France's internal legislative framework by Law No. 2018-493, which was passed on 20 June 2018, amending the existing law, of which some provisions were contrary to the GDPR.

23 To the extent not dealt with above at question 9, how is the data protection regime enforced?

Law No. 2018-493 of 20 January 2018 and the GDPR grant new investigating and sanctioning powers to the National Commission on Computing and Liberty (CNIL).

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

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

Although there are several data protection issues relevant to internal investigations in France, these are not country-specific, as they result from European regulation (i.e., the GDPR).

The main issue is that lawyers leading internal investigations may find themselves as guarantors of data protection and must reconcile this duty of protection with the duty of professional secrecy. It is necessary to clearly identify the regulations applicable to the use or transfer of data, such as the rules protecting the transfer of data considered to be within the scope of the interests of France (i.e., the Blocking Statute and rules on corporate secrecy), the rules protecting the access, processing and transfer of personal data outside or within the European Union (e.g., transfers based on international conventions), the rules protecting the rights of individuals who are subject to internal investigations (e.g., information provided to individuals regarding their right to access, rectify or delete data) and the rules pertaining to the length of time for which data can be stored.

25 Does your country regulate or otherwise restrict the interception of employees' communications? What are its features and how is the regime enforced?

When employees use technological devices made available to them by their employer for professional purposes, those devices are presumed to be professional. Employers are therefore permitted to request to consult or access them. The courts, however, have curtailed this right of access based on the right to privacy. Professional emails, text messages or chat applications expressly labelled as private are thereby confidential and not accessible by the employer.

DAWN RAIDS AND SEARCH WARRANTS

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

Yes, search warrants and dawn raids are a key element of enforcement and evidence gathering by judicial and administrative authorities.

Strict legal provisions apply to search warrants and dawn raids. The latter must be authorised either by the public prosecutor for in flagrante delicto and preliminary investigations or the investigating judge for judicial investigations. In preliminary investigations, the consent of the individuals or corporations to be raided is needed. Should consent not be given, the dawn raid must be authorised by the Judge of Liberties and Custody. Moreover, dawn raids can be conducted only between 6am and 9pm, except in cases of organised crime and terrorism. Minutes of the dawn raid are drafted and signed by the entities or individuals involved in the raid.

Companies subject to dawn raids should ensure that these legal provisions are followed. Any incident should be recorded in the minutes of the dawn raid and the minutes should not be signed if there is any disagreement regarding the content.

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

Privilege only attaches to external lawyer material and not that of in-house counsel.

Privileged material is protected from investigating and judicial scrutiny, save for materials unrelated to defence rights or those establishing the participation of the lawyer in an offence.

Corporations or individuals must thereby indicate the material that is covered by the attorney–client privilege. In the case of seizure of privileged material, the corporations or individuals involved must seek permission to make copies and file a subsequent request to have the privileged material returned.

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

There are two separate regimes for witnesses and suspects.

During the investigation phase, police officers can summon as a witness any person who they deem fit for the purposes of the investigation. Should a witness refuse to comply, a police officer may notify the public prosecutor, who may compel the person by official notice. Witnesses who fail to appear or testify before the investigating judge or police officer without proper reason face a €3,750 fine. Before a court, witnesses are always compelled to attend the hearing and testify. The summons issued to a witness must also state that failure to appear, refusal to testify and perjury are punishable by law. Witnesses who refuse to appear without proper reason face a €10,000 fine.

Police officers can detain suspects for the amount of time necessary for the purposes of the investigation and under the limitations of the law and approval of a judge. A suspect can refuse to answer questions based on the right against self-incrimination.

Testimony can also be refused on account of public service (e.g., diplomatic, presidential or parliamentary immunity) or professional secrecy. Testimony revealing information of a secret nature by a person who is in possession of that information, owing to state, professional or temporary function or mission, is sanctioned by imprisonment or a €15,000 fine, save for limited exceptions.

WHISTLEBLOWING AND EMPLOYEE RIGHTS

29 Describe the whistleblowing framework in your country. What financial incentive schemes exist for whistleblowers? What legal protections are in place for whistleblowers?

Until the implementation of the European Whistleblowing Directive (for which the deadline in December 2021), which grants broader protection to whistleblowers

(e.g., access to free information and advice about the available procedures for protection against any legal action taken against them), the Sapin II Law provides relevant protective measures.

There are no financial incentives for whistleblowers in France. The idea of a financial incentive scheme was considered but the French Constitutional Council ruled against it.

With respect to legal protections, whistleblowers cannot be excluded from recruitment procedures or professional training, cannot be dismissed, or face direct or indirect discriminatory measures. The protection of whistleblowers' identity must also be guaranteed.

30 What rights does local employment law confer on employees whose conduct is within the scope of an investigation? Is there any distinction between officers and directors of the company for these purposes?

Internal investigations do not benefit from a dedicated legal framework. In September 2016, the Paris Bar adopted a *vade mecum* of ethical recommendations for investigating lawyers, which was amended in December 2019. On 12 June 2020, the National Council of Bars also published a guide for French lawyers conducting internal investigations. Other legal provisions apply to these internal investigations.

Employees whose conduct is within the scope of an investigation could benefit from several rights, but these are not expressly provided by law. Employees interviewed within an internal investigation should be informed that the external lawyer represents the company and not their personal interests and that they can be assisted by an independent lawyer, should their conduct amount to misconduct. The purpose of the interview and its non-coercive nature should also be indicated.

Furthermore, data protection and privacy laws apply to all employees regardless of allegations of wrongdoing, allowing employees to access and modify all personal data that has been collected and entitling them to invoke the right to privacy. This right to privacy may be circumvented, however, should emails, text messages or chat applications be located on professional devices, and they are not marked as private or in a private inbox.

There is no different treatment applicable to officers and directors of companies within internal investigations.

31 Do employees' rights under local employment law differ if a person is deemed to have engaged in misconduct? Are there disciplinary or other steps that a company must take when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation?

Presumption of innocence applies to all employees, including those who are deemed to have engaged in misconduct. These employees thereby benefit from the same rights as other employees (e.g., notice for interview and notification of rights). Employees suspected of misconduct must be advised of their right to a lawyer.

If misconduct is confirmed, an employer has several options for sanctioning employees, including dismissing them or putting them on furlough during the investigation.

32 Can an employee be dismissed for refusing to participate in an internal investigation?

The labour courts appear to consider the refusal to participate in an internal investigation as a sufficiently severe fault to warrant sanction under specific circumstances.

COMMENCING AN INTERNAL INVESTIGATION

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

When judicial review by a labour court is likely to happen (e.g., if an employee who has been sanctioned for misconduct challenges the findings of an internal investigation), it is considered best practice to prepare a document setting out the terms of reference or investigatory scope before commencing an internal investigation.

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

French law does not provide a clear set of rules with respect to the steps a company should take internally when it becomes aware of an issue with legal implications. The company should assess the scope of the facts and the probability of incurring liability, to determine the interest in co-operating with the authorities and to set out a defence strategy.

There is no obligation to report back to authorities, but this is encouraged within the framework of a CJIP (judicial public interest agreement). The joint guidelines issued by the French Anti-Corruption Agency (AFA) and the National Financial Prosecutor's Office (PNF) (the AFA-PNF Guidelines) on the implementation of CJIPs expressly provide, however, that voluntary self-disclosure by a company will be taken into account favourably, both for the opportunity to settle a CJIP and as a mitigating factor.

The main legal requirement is for individuals or corporations not to destroy or amend evidence.

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

It is very likely that the enforcement authority would collect documents or data directly by carrying out a raid within the company, having gathered sufficient information from third parties to ensure that it is possible to collect relevant information. If a company has any reason to believe a raid is likely, it should immediately ensure that any documents that may be seized indicate privilege, where relevant.

Administrative authorities (e.g., AFA, the French Financial Markets Authority, the Supervisory and Resolution Authority and the Competition Authority) can request

communication of data and documents from companies under review or directly from third parties. If these requests are legally permitted, corporations must comply.

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

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

Self-disclosure is an option available to obtain credit for co-operation.

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

Influenced by the Anglo-Saxon legal culture, internal investigations have been progressively accepted by specialist financial investigating judges and prosecutors.

Although negotiating a deal with a prosecutor or an investigating magistrate is still rather uncommon, the number of CJIPs has increased in recent years, and internal investigations are an effective tool in multi-jurisdictional matters and cross-border negotiated justice. French authorities are relying more and more on internal investigations, which are considered a key component of a criminal file.

Pursuant to the AFA-PNF Guidelines, should a company be interested in concluding a CJIP, it is encouraged by the prosecution authorities to demonstrate its co-operation by disclosing the findings of any previous or current internal investigation.

ATTORNEY–CLIENT PRIVILEGE

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

There is no attorney–client privilege for communications with in-house counsel in France. To benefit from privilege, investigations should be carried out by external lawyers. Lawyers cannot be freed from the duty of professional secrecy under any circumstances, even by their clients.

Professional secrecy applies between lawyers and their clients but not with the employees of their clients. Lawyers must therefore notify those employees that anything they say can be disclosed to the authorities by their employer. Confidentiality applies to communications between lawyers and providing separate counsel to individuals is recommended to facilitate safe communications.

The joint guidelines issued by the French Anti-Corruption Agency (AFA) and the National Financial Prosecutor's Office (PNF) (the AFA-PNF Guidelines) differ slightly from the Paris Bar's *vade mecum* for investigating lawyers, published in 2019. Whereas the AFA-PNF Guidelines state that not all the evidence included in an internal investigation report is necessarily covered by lawyers' professional confidentiality, the *vade mecum*

provides that all documents drawn up by lawyers in the course of their work are covered by professional secrecy.

In any case, the client is at liberty to disclose documents.

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

There is no specific attorney–client privilege relating to corporations.

The particularity within this context is to determine who the counterpart of the lawyer is within a corporation, which will usually be the general manager or general counsel.

There are no differences when the client is an individual.

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

There is no privilege attached to communications with in-house counsel. Privilege only attaches to external lawyers.

The Gauvain Report on the Protection of French Companies Against Extraterritorial Laws and Measures published on 26 June 2019 recommends introducing privilege applicable to legal advice given by in-house counsel.

41 Does the attorney–client privilege apply equally to advice sought from foreign lawyers in relation to investigations in your country?

There is no general provision regarding the attorney–client privilege as regards foreign lawyers in relation to investigations.

The Paris Bar Council has stressed that email exchanges between a client and a foreign lawyer can be covered by the attorney–client privilege. In addition, foreign lawyers can be temporarily and occasionally authorised to practise consulting and counselling activities in France. In that case, they are bound by both their home country's professional rules and the ethics rules applicable to French lawyers, which include the attorney–client privilege.

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

The attorney–client privilege cannot be waived by lawyers under any circumstances, even when permitted by the client, save for the personal defence of lawyers in a case opposing their client or specific cases provided by law.

The client is not bound by the attorney–client privilege.

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

This concept does not exist in France.

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

As the attorney–client privilege is general, absolute and unlimited in time under French law, it must be maintained, even after a limited disclosure abroad.

Co-operation between enforcement authorities is likely, however, to make the privilege moot.

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

Common interest privileges do not exist per se in French law. It is possible, however, for the purposes of defending a client, to share privileged information with other attorneys without waiving privilege – whether the clients share a common interest or not (*foi du palais*).

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

Professional secrecy can be extended to experts on whom lawyers rely for the purposes of their work.

It is usually safer to have the information collected and processed within the law firm's offices.

WITNESS INTERVIEWS

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

There are no legal provisions regarding internal investigations, including the interviewing of witnesses.

Interviews with individuals who are not current or former employees of the company are not prohibited by the Paris Bar *vade mecum*, but recourse to external counsel is advised.

48 Can a company claim the attorney–client privilege over internal witness interviews or attorney reports?

Professional secrecy applies between lawyers and their clients. A company can thus claim the attorney–client privilege over internal witness interviews or attorney reports. Nevertheless, the joint guidelines issued by the French Anti-Corruption Agency and the National Financial Prosecutor's Office differ slightly from the Paris Bar *vade mecum* for investigating lawyers regarding the documents covered by the attorney–client privilege.

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

There are no legal provisions regarding internal investigations, including the interviewing of witnesses.

The Paris Bar *vade mecum* makes no distinction between interviews carried out with employees and third parties.

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

Lawyers conducting interviews must explain to whom the attorney–client relationship applies (i.e., that they are acting in the interests of the corporation, not the employees) and that independent representation is possible. Lawyers must also indicate the purpose of the interview and its non-coercive nature.

Documents can be provided ahead of time. This practice usually occurs when an employee has separate representation. Documents are communicated from the lawyer of the company to the lawyer of the employee, as correspondence between attorneys is covered by default by privilege.

REPORTING TO THE AUTHORITIES

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

Except for specific crimes that are inchoate and can be avoided, only civil servants have a general obligation to report crimes of which they become aware in the context of their employment.

There is no legal requirement to self-report.

The guidelines on CJIPs (judicial public interest agreements) clearly state, however, that voluntary self-reporting of offences to prosecutors, if made in a timely manner – both as regards the choice of the CJIP procedure and as a factor reducing the amount of the public interest fine – will be considered favourably.

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

Self-reporting is not very common in France.

A corporation will be advised to self-report (provided misconduct is established without doubt, proper corrective measures have been taken and the corporate compliance programme has been reinforced) to be eligible for credit for co-operation with the judicial authorities notified of the misconduct. The involvement of foreign authorities can also

have a bearing on a decision to self-report, as well as the multi-jurisdictional aspect of investigations, should the multiple authorities involved be likely to collaborate.

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

There is no specific procedure for self-reporting and no legal requirement to do so.

Informal contacts should be made, through external counsel, with the competent authority, after a thorough analysis of the advantages and disadvantages. Although there is no statutory requirement to evaluate self-reporting and co-operation in a CJIP, the joint guidelines issued by the French Anti-Corruption Agency and the National Financial Prosecutor's Office indicate that self-reporting within a reasonable period shall be considered favourably, as a factor for encouraging the offer of a CJIP or reducing the fine.

RESPONDING TO THE AUTHORITIES

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

Corporations must respond in writing to notices or subpoenas from a law enforcement authority in compliance with the methods and time limits provided by law.

It is possible to enter into dialogue with the investigating authorities, whether the investigating judge or the public prosecutor, but these communications often remain unofficial and may not amount to anything. Alongside ad hoc communications, investigative acts beyond the scope of the mandate of the judicial authority can be challenged in court.

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

Yes, ongoing authority investigations can be challenged before the courts.

Ongoing investigations led by a public prosecutor are not subject to challenge before the courts, except for a limited number of investigative acts that breach legal requirements. Challenges are only possible once the investigation is closed by requesting the nullity of the investigative acts.

However, investigative acts in ongoing investigations led by an investigating magistrate can be challenged before the courts.

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

The company should answer to all the authorities involved separately, as the questions that can be raised by different authorities vary.

It should nevertheless be borne in mind that authorities communicate with one another.

When dealing with foreign authorities, the EU Blocking Statute, specific secrecy provisions, and privacy and data protection issues should also be addressed.

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

The collection of material abroad will have to be carried out in compliance with the applicable foreign law.

The difficulty may be that the applicable foreign law does not allow the seizure and production of material. If a corporation finds it impossible to provide requested material, it must explain the situation to the French authorities.

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

Co-operation with foreign enforcement authorities is increasing, both within the European Union and beyond, namely through mutual legal assistance treaties, agreements between regulators and enforcement authorities, and EU co-operation agreements.

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

Except where the law provides otherwise, inquiry (i.e., under an investigating magistrate) and investigation (i.e., under a public prosecutor) proceedings are confidential. Third parties are not bound by this confidentiality.

Any person contributing to an investigation is bound by this confidentiality, namely the judges in charge of the investigation, the public prosecutor, the law clerks, the bailiffs, the police investigators, the personality investigators and any interpreters or experts.

Lawyers are not bound by this confidentiality but are bound by professional secrecy. The disclosure of confidential information by breaching confidentiality or professional secrecy can be sanctioned by imprisonment for one year and a €15,000 fine.

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

The corporation should retain external counsel to obtain a legal opinion on the law of the country in which the documents sought are located. Co-operation with the French and foreign authorities – and perhaps with the diplomatic authorities of both countries

pursuant to formal co-operation agreements – may be necessary for the production to be carried out appropriately.

61 Does your country have secrecy or blocking statutes? What related issues arise from compliance with a notice or subpoena?

Yes, France has both a country-specific blocking statute and privacy statutes.

The French Blocking Statute prohibits the communication of economic, commercial, industrial, financial or technical documents or information to foreign authorities or their use as evidence in judicial or administrative proceedings abroad, subject to mechanisms afforded under international agreements or treaties, such as the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention) or a mutual legal assistance treaty. Data protection legislation, in that it can prohibit the transfer of data outside Europe, could also constitute a type of blocking statute.

Several secrecy laws exist, depending on the interests at play (e.g., banking, security and defence, medical, journalism source or corporate secrecy). To ensure the preservation of these secrecy provisions, communications should be properly addressed when responding to a foreign authority.

Bank secrecy, for instance, should be addressed when a notice or subpoena concerns a financial institution. These institutions owe a legal duty to their customers not to disclose information about their affairs to third parties. Any banking institution that discloses information about customers faces criminal sanction pursuant to the Monetary and Financial Code and the Criminal Code.

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

Voluntary production is limited to very specific circumstances, namely when foreign authorities are involved or there is a strategic interest in doing so in an ongoing investigation.

All material produced is included in the criminal file and is accessible, under limited circumstances, to defendants (indicted and assisted witnesses) and civil parties. Although legal professionals are bound by professional secrecy, they are not bound by the confidentiality of the inquiry. They are free to share information – not documents – from the file with their clients, who can then share the information with third parties.

PROSECUTION AND PENALTIES

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

Corporations sanctioned for misconduct can face fines, payment of civil compensation to victims, disgorgement of profits resulting from the offence, dissolution, publication of the sanction in the press and debarment from bidding for tender for certain specific offences.

Individuals sanctioned for misconduct can face fines, imprisonment, payment of civil compensation to victims or a ban on undertaking specific managerial positions. Directors, officers or employees also face sanctions by their company, including dismissal.

Hearings are rarely closed. Therefore, corporations and individuals face the risk of having their identity disclosed in the press.

64 Where there is a risk of a corporate's suspension, debarment or other restrictions on continuing business in your country, what options or restrictions apply to a corporate wanting to settle in another country?

The EU Directive on public procurement has been transposed into French law, prohibiting companies found guilty of specific offences (e.g., corruption, fraud, money laundering, terrorism or embezzlement and misappropriation of property) from bidding in public procurements throughout the European Union for five years – unless the sentencing decision specifically provides for a more limited period.

French law provides that corporations cannot bid for public procurements if they have previously been sanctioned definitively by a court of law for certain offences, namely corruption, extortion or probity offences.

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

The principle of personalisation of a sanction applies in France to corporations and individuals.

Regarding the CJIP (judicial public interest agreement) public interest fine, the joint guidelines issued by the French Anti-Corruption Agency (AFA) and the National Financial Prosecutor's Office (PNF) (the AFA-PNF Guidelines) specify that the fine should reflect the illegal profits derived by the corporation from the offence but can also have a punitive dimension. With respect to the punitive aspect, the AFA-PNF Guidelines consider the corruption of a public official, the fact that the legal entity falls within the scope of the compliance obligation of the Sapin II Law, the existence of possible convictions or sanctions for similar offences, any attempt to conceal the offence, and the repeated or even systemic nature of corruption. Gains in market share or increased visibility may also be considered when determining the amount of the fine.

RESOLUTION AND SETTLEMENTS SHORT OF TRIAL

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

The French legal system does not offer non-prosecution agreements.

The CJIP (judicial public interest agreement) is available, allowing corporations accused of corruption, probity offences, tax fraud or environmental crime to settle allegations. This will imply a financial fine, without constituting an admission of guilt – thereby allowing corporations to continue bidding for public procurements – except in cases following an inquiry.

67 Does your jurisdiction provide for reporting restrictions or anonymity for corporates that have entered into non-prosecution agreements or deferred prosecution agreements until the conclusion of criminal proceedings in relation to connected individuals to ensure fairness in those proceedings?

There is no correlation in French law between a settlement with a corporation and criminal proceedings regarding individuals. There are therefore no reporting restrictions or anonymity for corporates beyond the confidentiality of criminal settlement negotiations.

The joint guidelines issued by the French Anti-Corruption Agency (AFA) and the National Financial Prosecutor's Office provide that the aim of internal investigations conducted by a prosecuted company, and communicated to the prosecutor, is also to determine individual liabilities.

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

If a case is likely to involve foreign jurisdictions, companies should assess the consequences of admitting guilt in France, namely regarding the principle of *ne bis in idem*.

Corporations should also be mindful that signing a French plea bargain – as compared with signing a CJIP – amounts to an admission of guilt, thus preventing them from bidding for public tenders.

69 To what extent do law enforcement authorities in your country use external corporate compliance monitors as an enforcement tool?

Law enforcement authorities cannot use external corporate compliance monitors as an enforcement tool, as the AFA constitutes the official compliance monitor, with a monopoly on the supervision of the compliance programmes of legal entities that have signed a CJIP, in accordance with the Sapin II Law.

In specific cases, the legal entities have recourse to experts (e.g., law, accounting or audit firms) to process the AFA requests.

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

Should alleged victims demonstrate legal standing, they will be allowed to join the criminal procedure as civil parties and, as such, will be granted access to the criminal file and be able to submit requests for investigative acts.

Moreover, alleged victims can initiate a criminal investigation by filing an official complaint to that effect.

Private parties do not normally have access to the investigation files held by administrative authorities.

PUBLICITY AND REPUTATIONAL ISSUES

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

Investigations led by a prosecutor or investigating judge are confidential.

As defendants and victims have access to the criminal file but are not bound by secrecy, it is sometimes very difficult to keep communications and information confidential. To prevent leaks of fragmented or inaccurate information or to avoid disrupting public order, the public prosecutor may, either *ex officio* or at the request of the investigating court or the parties, communicate on objective elements of the proceedings, without making an assessment on the charges.

Members of the press can be present and cover the hearing – albeit microphones and cameras are not allowed in the courtroom. Defendants and victims are free to make statements within the limits of the freedom of expression.

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

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

73 How is publicity managed when there are ongoing related proceedings?

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

DUTY TO THE MARKET

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

There are no circumstances in which a judicial settlement could be agreed privately. CJIPs (judicial public interest agreements) and plea bargains offered by public prosecutors are officially approved by judges by way of a public hearing. Moreover, CJIPs are published on the French Anti-Corruption Agency's website.

There is no obligation to disclose settlements with administrative authorities to the public.

ENVIRONMENTAL, SOCIAL AND CORPORATE GOVERNANCE (ESG)

75 Does your country regulate ESG matters?

Partially. The French Duty of Vigilance Law (enacted in 2017) requires major companies (with 5,000 employees in France or 10,000 employees worldwide) to establish, publish and implement a vigilance plan with the aim of identifying and preventing serious violations of human rights and fundamental freedom resulting from the company's activities,

from activities of its subsidiaries, its subcontractors and its suppliers, or from entities with whom the company has an established commercial relationship.

There are five mandatory actions that companies must implement as part of their vigilance plan:

- a risk-mapping that identifies, analyses and ranks risks of serious violations of human rights and fundamental freedom;
- evaluation procedures that regularly assess, in accordance with the risk-mapping, subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;
- appropriate actions to mitigate risks or prevent serious violations;
- an alert mechanism that collects potential or actual risks. This alert mechanism must be implemented in collaboration with trade unions organisations represented within the company concerned; and
- a monitoring scheme assessing the effectiveness of the measures put in place by the company.

76 Do you expect to see any key regulatory or legislative changes emerge in the next year or so designed to address ESG matters?

There could be developments at a European level given that, on 10 March 2021, Members of the European Parliament (MEPs) have adopted, in plenary session, the legislative initiative report with recommendations for a directive on corporate human rights due diligence.

Under the MEPs' proposal, companies would be required to identify, assess, prevent, cease, mitigate and monitor potential or actual adverse impacts on human rights, the environment and good governance in their activities and value chain.

77 Has there been an increase in ESG-related litigation, investigations or enforcement activity in recent years in your country?

So far, a few cases have been brought before courts using the Duty of Vigilance Law. In that regard, owing to the lack of a public body acting as regulator, the enforcement is conducted by a few proactive non-governmental organisations (NGOs). One notable case pertains to Total, which was sued by NGOs for its lack of a vigilance plan, which the company is required to establish under the Duty of Vigilance Law.

However, uncertainties as to the content of the Law and procedural issues of jurisdiction means that it still remains difficult to ascertain what the impact of the Law will be on companies.

ANTICIPATED DEVELOPMENTS

78 Do you expect to see any key regulatory or legislative changes emerge in the next year or so designed to address corporate misconduct?

France is proactive – various publications indicate regulatory and legislative amendments for the coming years.

An evaluation of the Sapin II Law's effectiveness by a commission led by two Members of Parliament, which led to a bill being introduced in Parliament in November 2021,

confirms France's intent to efficiently reduce corruption and the paramount importance internationally of the National Financial Prosecutor's Office. The *Airbus* CJIP (judicial public interest agreement) in a corruption case opens the way to negotiated justice – encouraging self-reporting and full co-operation, including with foreign authorities.

The aim of the Gauvain Report on the Protection of French Companies Against Extraterritorial Laws and Measures is to restore French and European sovereignty and protect companies from extraterritorial control. It provides recommendations to reinforce the French legal framework applicable to foreign procedures targeting French companies, including strengthening the French Blocking Statute, introducing legal privilege for in-house counsels and protecting data from the US Cloud Act by the threat of fines similar to those applicable to violations of the General Data Protection Regulation.

Finally, as of 2021, CJIPs can be implemented for environmental crimes.

Appendix 1

About the Authors of Volume II

Stéphane de Navacelle
Navacelle

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

With extensive experience in French and US white-collar crime, he has participated in landmark cases involving FCPA and embargo restrictions (OFAC), market abuse and insider trading, fraud (Forex), benchmark manipulation (LIBOR/Euribor), investigations by development banks and criminal and internal investigations in Europe, the Americas and Africa. He is a member of the French Independent Committee on sexual abuse within the Church.

Stéphane was appointed independent compliance monitor – pursuant to a World Bank negotiated resolution agreement – by European infrastructure groups with global operations. He is member of the Paris Bar Council and an ethics investigator.

Julie Zorrilla
Navacelle

Julie Zorrilla has worked for more than eight years on complex cross-border financial and criminal matters, including asset recovery, embargo and index manipulation (LIBOR and SSA), involving top executives of global foreign and French financial institutions.

Julie handles large-scale corruption and compliance matters advising on both legal and crisis management for corporations with global operations. She is involved in assisting Stéphane de Navacelle in connection with his appointment as expert pursuant to a World Bank negotiated resolution agreement.

She also participates in determining the strategy for and the implementation of internal investigations.

Julie became counsel at Navacelle in 2019 and partner in 2020. Prior to joining Navacelle in 2012, she worked in the Legal Affairs Department of the Ministry of the

Economy and Finance in 2012 and as a trainee auditor at the Paris Court of Appeal in 2011. Julie graduated from Paris X University and from the Institute of Criminal Sciences at University Paris II Panthéon-Assas (2010).

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ISBN 978-1-83862-272-5