Corporate Internal Investigations

Overview of 13 jurisdictions

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Individual's insurance

6. Most insurance policies will not pay for employees to seek separate legal advice. 171
7. As for directors, sometimes they have D&O (directors and officers) insurance which will indemnify them in respect of any legal costs expended, but these are recoverable from the director if he/she is found guilty of the offence concerned. 172

III. Internal disclosure obligations on a company

1. Once an issue has come to light that requires an investigation to be commenced, a company in England and Wales may have to report the existence of the investigation and/or the outcome to other internal stakeholders: 173

Auditors

2. Company directors have an obligation to disclose all 'relevant audit information' to external auditors and failure to do so may result in a breach of section 501 of the Companies Act 2006. There is no provision in the Act as to when information must be disclosed. Therefore, the investigation can be completed before a decision is made as to whether any 'relevant audit information' needs to be disclosed. If the company's auditors are preparing their report at the same time as the investigation, a decision must be made as to whether the directors have any relevant audit information they must disclose immediately. 174

Banking covenants

3. Loan agreements to which the company is a party should be reviewed to see whether any facts established by the investigation (or that may be established) are likely to trigger an obligation pursuant to an Information Covenant or an Event of Default. The consequences of disclosure or non-disclosure to the lender should be considered and a decision made taking into account the company's obligations and best interests. For example, if disclosure of certain facts discovered in an investigation would lead to questions in the market about the company's solvency, the consequences of non-disclosure may be preferable. 175

§ 5. France

Charlot/Dallais/Desoutter/De Guillebon/Lebeau-Marianna

A. Initiation of internal investigations

I. When and to what extent should internal investigations be initiated?

1 Internal investigations serve to reveal a company's weaknesses, with the purpose of then rectifying such weaknesses and attempting to avoid any further damage to the company. In detail:

- If employee or management misconduct becomes public, confidence in the company will ultimately decline and its reputation as a whole, as well as that of any of its individual brands will suffer. Internal investigations are aimed at restoring the public, customers and business partners' faith and confidence in the company.
- The company must make it clear not only to third parties, but also to its employees, that it will not tolerate any type of misconduct. By conducting internal investigations, companies are able to implement a "zero tolerance" stance and ensure that misconduct and violations will be exposed and appropriate sanctions imposed.
- The purpose of internal investigations is to reveal a company's weaknesses and to remove them once and for all. In order to prevent employees from violating any laws, an efficient control system should be set in place.

Under French law, misconduct by management and/or an employee can have several serious consequences for both the company and its management. 2

Under French Criminal Law, legal entities are considered criminally liable for the offences committed on their behalf by their representatives.[1] The maximum fine applicable to legal entities is five times the amount of the standard fine set forth in the French Criminal Code. The amount of the standard fine depends on the exact nature of the offence. For instance, in the event a company is found liable of corruption, a maximum fine of 750.000 EUR could be imposed. The company may also be subject to a number of other measures, such as liquidation/winding up, disqualification from taking part in public procurement bids, prohibition to use bank checks, court supervision and publication of the court judgment.

A company may also be found liable in tort (i. e. "*civilement responsable*") for offences committed by its employees. In this case, the employer is generally ordered to pay damages to the victim, however it may even be ordered to pay the applicable fine instead of the convicted employee under the theory that the employee acted during his employment and using the means placed at his/her disposal by the company, the employer is thus liable in tort. The employer is deemed to have breached the obligation of proper supervision of the employee.

If the company has already conducted internal investigations to correct weaknesses, the findings of such investigations may be decisive for the discretionary decision of the Public Authorities as to whether and to what extent it will take measures or initiate an official investigation.

If management is involved in misconduct, its members may be directly subject to criminal sanctions. Company management is personally liable for its own misconduct. Executives may also be found liable for offences committed by company employees – in particular when occupational health and safety rules have been disobeyed within the company. From a more general perspective, based on their supervision obligations, members of management may be liable for the offences committed by employees. Company management must therefore address all indications of possible offences and take all the necessary measures to restore compliance.

Management is responsible for initiating and defining how and to what extent internal investigations are to take place. It is important however, that when management is contemplating an internal investigation, it carefully considers all possible negative factors and or consequences which could result from such an investigation and whether it would ultimately be worthwhile. If an internal investigation is not thorough, it may give the impression that nothing is out of order. As a result, misconduct left uncovered may be reinforced or even continued. Furthermore, if an investigation reveals negative results at a later stage, it may be assumed that management was trying to cover up a transgression and as a result, backfire. Internal investigations may be carried out with respect to individuals as well as individual departments. Additionally, if there is a suspicion of widespread misconduct throughout the company – or even that criminal structures are in place – a more comprehensive internal investigation beyond the scope of individual departments or divisions is recommended. 3

[1] Art. L. 121–2 of the French Criminal Code.

II. Should an internal investigation be of an open or covert nature?

4 If suspicions arise that employees are misappropriating funds and/or giving or taking bribes, a covert internal investigation should be initiated. A covert internal investigation is necessary in order to effectively identify the offenders and possible accomplices, without risking the destruction of evidence. Data protection laws can be a special challenge when it comes to conducting covert investigations, as certain measures within the scope of an investigation are only admissible if the employee concerned is given prior notice.

5 In some cases, however, it can be important for a company to openly communicate that an internal investigation is to take place; in particular by informing employees. An open investigation would for example be necessary when rumors circulate that an internal investigation is being conducted or that the Authorities have begun initial enquiries. A company must always assess whether the advantages of conducting an open investigation outweigh the risk of certain individuals concealing or even destroying evidence.

6 Depending on the information available, investigations may firstly be carried out covertly, then partially and finally completely open.

III. Is it advisable to involve external investigators?

7 The involvement of external investigators basically depends on the company involved, the specific circumstances and the suspected breaches of the law.

8 One advantage in favor of using internal investigators, such as a legal department or an auditing department, as opposed to external investigators, is the cost. Internal personnel are more familiar with the internal operations and activity of the company than external investigators. There are, however, strong arguments in favor of external investigators, such as attorneys and auditors. External personnel often specialize in conducting such investigations and therefore have the necessary expertise and know how to construct a comprehensive solution to ongoing breaches. Very few companies have internal investigators who are equally qualified.

9 Additionally and more importantly, external investigators enjoy special privileges. For example, they have the right to refuse to give evidence (professional secrecy of attorney for example). With limited exceptions, client-related records may not be seized. Furthermore, external investigators are – as a general rule – viewed as more credible than internal investigators. The use of external investigators makes it easier to convince the Authorities that management is genuinely determined to resolve the current situation. With this in mind, company management should preferably select external investigators from firms who have not dealt extensively with the company in the past.

IV. Are foreign attorneys allowed to conduct internal investigations in France?

10 Foreign attorneys may conduct internal investigations in France, provided they do not disclose to third parties any collected information and/or documents "*of an*

economic, commercial, industrial, financial or technical nature" which may then constitute evidence in the framework of foreign judicial or administrative proceedings. According to Art. 1bis of the French "Blocking Statute" (i. e. Act dated 26 July 1968, as amended by the Act dated 16 July 1980), "*Subject to treaties or international agreements and the law and regulations in force, any person is prohibited from requesting, seeking or disclosing, in writing, verbally or by any other means, any documents or information of an economic, commercial, industrial, financial or technical nature tending to constitute evidence in view of foreign judicial or administrative proceedings or in the framework of such proceedings*". Therefore, except in investigations based on specific proceedings authorized by international treaties, the possibility for foreign attorneys to take part in internal investigations in France is limited. Their investigations must be conducted in accordance with the limitations of the Blocking Statute, breach of which is criminally punishable. As an illustration, a French attorney acting as correspondent attorney for a US colleague was recently ordered by the French Supreme Court to pay a fine for having requested information from a French company within the framework of judicial proceedings that were ongoing in the United States.[2]

However, apart from the exception established by the Blocking Statute, foreign attorneys may conduct internal investigations within French companies. **11**

V. When should National Authorities be called in?

The earlier the better. Early involvement of National Authorities shows that the company is serious and sincere about remedying misconduct and finding a solution. Involving Public Authorities early can serve as a confidence building tool. This will particularly be the case where the accusations against the company or its employees are of a serious nature and the matter attracts significant public attention. A company should however only call in the Authorities when an internal investigation has already produced specific results. The premature involvement of Public Authorities e.g., when only vague suspicions exist, can be counterproductive and may lead the Authorities to initiate their own criminal investigations. **12**

Official investigations additionally attract great public interest and the company will inevitably have media exposure. There is also a strong possibility that evidence will be destroyed once it is known that Public Authorities are involved. **13**

Additionally, if criminal investigations are opened, the company will no longer have access to the investigation results until it becomes a party to the proceedings; either when charged of an offence or as the victim thereof. As soon as National Authorities are involved, it becomes more difficult to correct bad or even illegal practices within the company. **14**

[2] French Supreme Court (Criminal section), December 12, 2007.

B. Admissibility and implementation of individual measures within the scope of internal investigations

I. What measures are admissible within the scope of internal investigations?

15 In order to investigate French employees, employers must comply with strict labor law, criminal law and data privacy regulations.

1. Employee interviews

16 Employee interviews constitute the key instrument and the starting point of internal investigations.

17 Employee interviews within the scope of internal investigations are permissible in the workplace during working hours and the employee cannot refuse to respond if the employer's request concerns his/her personal work space.

18 The employee can only be interviewed alone if the company knows that no disciplinary sanction will be taken (otherwise the employee may be assisted by an employee representative and the employer must comply with the disciplinary process pursuant to the applicable Internal Regulations).

2. Email and (electronic or physical) file screening

19 Email and file screening, e.g. electronic monitoring of employees' professional emails and files may be carried out to ensure that employees collectively comply with French law and with company policies. Access to an employee's professional emails and (electronic or hard copy) files during an investigation may be performed for evidentiary purposes. Such access is however strictly regulated under French law and monitoring an employee's individual activity or accessing professional emails (i. e., those not marked as private or personal) must be justified by legitimate business reasons.

20 All personal emails are protected in the same manner as private correspondence.

21 French labor and criminal law as well as data privacy regulations and applicable case law strictly protect a person's right to privacy.[3] Secrecy of correspondence is protected *erga omnes* and may be enforced in all situations.

22 In order to investigate an employee's emails and files, two key distinctions must be made:

- distinguish between **personal** and **professional** (or business related) documents and files;
- distinguish between **files** (whether electronic or physical) and **emails.**

23 Failure to observe the above rules may result in:

1. significant fines for breach of the secrecy of correspondence, which is sanctioned by up to one year imprisonment and by a fine of up to 45.000 EUR (a fine of up to 225.000 EUR for a company); and/or

[3] Art. 8 of the European Convention of Human Rights, Art. 9 of the French Civil Code and Art. L. 1121–1 of the French Labor Code.