Global Investigations Review

The Practitioner's Guide to Global Investigations

Editors
Judith Seddon, Clifford Chance
Eleanor Davison, Fountain Court Chambers
Christopher J Morvillo, Clifford Chance
Michael Bowes QC, Outer Temple Chambers
Luke Tolaini, Clifford Chance

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David Samuels

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Copy-editor
Jonathan Allen

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It will be published annually as a single volume and is also available online, as an e-book and in PDF format.

The volume

This book is in two parts.

Part I takes the reader through the issues and risks faced at every stage in the lifecycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Part I is then complemented by Part II's granular look at the detail of various jurisdictions, highlighting among other things where they vary from the norm.

Online

The guide is available to subscribers at www.globalinvestigationsreview.com. As well as containing the most up-to-date versions of the chapters in Part I of the guide, the website allows visitors to quickly compare answers to questions in Part II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
copublishing@globalinvestigationsreview.com

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The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Part I of the guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Part I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Part II of the book, local experts from 12 national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation. We look forward to updating and expanding both parts of the book in future editions as the law and practice continues to evolve in this emerging field. *The Practitioner's Guide to Global Investigations* has been designed for external and in-house legal counsel; compliance officers and accounting practitioners who wish to benchmark their own practice against that of leaders in the fields; and prosecutors, regulators and advisers operating in this complex environment.

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Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini
November 2016
London and New York

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France

Stéphane de Navacelle, Sandrine dos Santos and Julie Zorrilla[1]

General context and principles

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

After an investigation into allegations of laundering of tax fraud, the first major guilty plea bargain in France was agreed to by the National Financial Prosecutor's office (PNF), investigating magistrates and a Swiss bank, which accepted to pay €2.8 million and admit guilt to end the investigation. In the previous month, two executives from the bank were found by the specialised financial investigating magistrates to have not committed an offence, which suggests there will be an increasing use of the plea bargain as a 'procedural tool' in major financial matters.

Following a complaint by French fiscal authorities, the recently created PNF initiated investigations into Google Ltd and McDonald's separately on grounds that they were abusing EU regulations and concealing actual French income to avoid paying taxes in France. Charges include tax fraud and money laundering as part of a conspiracy. In addition to several million euros in fines, companies face potential back payment of taxes of over €1.6 billon for Google Ltd and several million euros for McDonald's. In an unprecedented show of force, the PNF raided the offices of the companies within the same week in operations involving over 50 expert officers from the financial police squad. Given that plea bargaining is not possible for tax fraud under current rules of criminal procedure, investigations are likely to last several years before a trial date is set. These cases reflect both prosecutorial discretion and resources allocated to addressing tax related violations by both international corporations and wealthy individuals.

1 Stéphane de Navacelle, Sandrine dos Santos and Julie Zorrilla are members of Navacelle.

The specialised financial investigating magistrates at the Paris Tribunal have also shown their ability to work with other authorities in France (the Financial Market Authority (AMF), the banking regulator (ACPR), and the Consumer Competition and Fraud branch of the Finance ministry (DGCCRF)) and abroad (with raids, interviews and requests for co-operation from foreign authorities) in a case concerning the deregulation of financial markets in the EU and web-based service providers. The investigation purports to identify tens of thousands of French victims and to take down an industry now considered illegal. Charges include illegal financial solicitation, fraud, money laundering and conspiracy to carry out all the above.

The PNF currently has over 15 prosecutors and is handling over 20 matters involving international corruption.

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

Corporations can be held liable on both civil and criminal grounds. Corporate criminal liability is subject to 'offences committed on [companies'] account by their organs or representatives', namely for actions committed by persons who exercise direction, administration, management or control functions, or by persons who act on behalf of an identified delegation of power which meets specific criteria. Thus, corporate liability does not exclude individual liability.

On several occasions since 2006, the Criminal Division of the French Supreme Court has found corporations liable without identifying an organ or representative, relying instead on facts which reflect an endorsement by company management. The underlying facts of each case tend to show that this trend is one based on a *contra legem* fairness standard which could open a Pandora's Box for corporate liability.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

Enforcement authorities include judicial, independent administrative and administrative authorities. Mostly, jurisdiction between the authorities is subject-matter-based with numerous opportunities for co-operation – and competition – between authorities.

Each superior court has jurisdiction over offences committed within its territory or based on headquarters' location. Specialised interregional courts have jurisdiction over economic and financial matters of some importance or complexity and whose scope involves several jurisdictions. Some particular fields fall in the scope of specialised sections of the prosecution in Paris; for example, terrorism, war crimes and human rights, health and safety, and the environment. The PNF, mentioned above, was created in 2013 to deal with major complex financial, economic and tax prosecutions.

Alongside judicial authorities, the main independent administrative authorities with jurisdiction over corporations are the AMF (mainly with regard to market abuse, investor protection generally and functioning of the financial markets), the Competition Authority (sector inquiries, antitrust activities, merger control, publication of opinions and recommendations), the ACPR (regulates, investigates wrongdoing, and issues warnings and sanctions

French banks) and the Tax Authority within the Finance Ministry. Each administrative authority has its own enforcement policies.

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

There is no real minimal standard for a prosecutor to request inquiries to be carried out; prosecutorial discretion is considerable. If the matter is particularly complex, prosecutors may turn it over to an independent investigating magistrate to carry out a comprehensive investigation into the facts and give an opinion as to guilt. Investigating magistrates can also be required to investigate pursuant to a specific complaint filed by alleged victims including, under specific conditions, NGOs.

Procedures can arise from authorities' detection of suspicious activities within their material jurisdiction, if mandated by a foreign authority upon a report from a whistleblower or alert turned over by TRACFIN, the anti-money laundering branch of the finance ministry. Several categories of professionals – including banks – have an obligation to report suspicious activities to TRACFIN.

5 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 country?

Within the European Union, judicial co-operation has led jurisdictions to apply the *ne bis in idem* principle to defendants already prosecuted in another Member State. French criminal law upholds the double jeopardy defence except in cases of territorial jurisdiction, namely when there is a sufficient *nexus* to French territory.

The principle of double jeopardy is also enshrined in article 14.7 of the International Covenant on Civil and Political Rights of 19 December 1966, and article 50 of the Charter of Fundamental Rights of the European Union.

On 26 February 2016, in a decision regarding the Oil-for-Food Programme, the Paris Appeal Court refused to apply the double jeopardy provision of the Code of Criminal Procedure to a US DPA. Conversely, the Court gave a cross-border application to article 14.7 of the Covenant, on the grounds that a separate provision of the Code of Criminal Procedure did not distinguish between national and foreign jurisdiction in enforcing double jeopardy. This apparent contradiction is to be reviewed by the Supreme Court.

In a separate matter, a UK lawyer convicted in the US after a plea bargaining to 21 months jail successfully argued a double jeopardy defence based on article 6 of the European Convention on Human Rights (ECHR).

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

To a large extent, pressure to increase enforcement on international financial and corruption issues comes from the US, and co-operation with the US usually works well in those matters,

although there have recently been signs of tension. Co-operation with other EU countries is generally smooth.

Despite very limited enforcement, the main concern arises from the blocking statute that kicks in when a foreign authority is involved. The purpose of the statute is to prohibit compelled communication of virtually any information of commercial value without some involvement of French authorities. It carries both a fine and a prison term for violations. Appropriate contact with French authorities should be made to mitigate risks.

EU-wide data protection and privacy rules are enforced by the data protection authority (CNIL) and the right of privacy of individual employees and the management of personal information should be properly addressed. Although burdensome, both can be dealt with effectively by addressing the privacy issue as a firm policy and complying with data protection rules by obtaining appropriate authorisations from the CNIL or working with enforcement authorities.

Although this is a rapidly changing area, most legal practitioners lack a proper understanding of the purpose of internal investigations (and compliance programmes) and improperly address the usual issues relating to investigations, including the right to representation and attorney–client privilege (which does not apply to in-house counsel). Also, the judiciary is suspicious of private investigations.

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

See question 5. In a nutshell, foreign court decisions are usually given full weight by French jurisdictions.

8 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

White-collar crime enforcement authorities – except for some individuals within senior enforcement bodies including the PNF and the Paris Financial Prosecutor's office – tend to dismiss internal efforts to avoid violations of criminal law. This is likely to change rapidly, notably with the enactment and implementation of the Sapin II law (National Assembly, TA no. 830 of 8 November), which imposes an obligation on medium-sized and large corporations to implement compliance programmes.

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

The two main priorities of enforcement authorities are tax evasion – for individuals and corporations – and corruption. Since its inception in 2013, the PNF has aggressively moved to fight tax evasion, including in instances when the tax authorities themselves decided not to impose sanctions, by relying on money-laundering offences.

The PNF currently has over 100 open corruption cases, 21 of which involve international corruption. The 2016 Sapin II law creates a new anti-corruption agency (the French Anti-Corruption Agency) – headed by a senior former investigating magistrate – and includes provisions on requirements for companies to have anti-corruption compliance programmes and a French DPA equivalent: the judicial public interest agreement.

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

Although far from being imbedded in the legal culture, internal investigations are generally accepted by specialised financial investigating magistrates as a necessary evil. Extra caution should nonetheless be taken if a judicial investigation is likely as speaking to potential witnesses could be regarded as subornation and obstruction of justice – a crime in itself.

In a legal culture where negotiating a deal with a prosecutor or an investigating magistrate is uncommon, and as in-house counsel has no legal privilege, attorney–client privilege should be a main concern in internal investigations.

Before an internal investigation

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

Whistleblowers are an increasingly common source of disclosure of misconduct within corporations. The Sapin II law of 2016 provides a specific framework to protect whistleblowers and provide them with financial support.

As some specific professions – including financial institutions – are required to report to TRACFIN any suspicious activity, anti-money laundering reports have generated several high-profile cases.

The Sapin II compliance requirement will likely create a new compliance culture. The transitional phase will likely reap its share of new matters.

Extensive freedom of the press and protection from disclosure of journalists' sources have led mostly web-based media to reveal facts resulting in prosecution of key political figures in recent years.

NGOs that have existed for a sufficiently long period can initiate criminal procedures that are within the scope of their by-laws. Several landmark corruption investigations have been launched at the initiative of NGOs in recent years.

12 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 the company has if those limits are exceeded.

Dawn raids are a keystone of enforcement and evidence gathering in an overwhelming majority of cases by judicial and administrative authorities. During the raid itself, there is little that a corporation (or individual) can do if the raid is within legal hours and the scope of the request set by the investigating magistrate. Outside counsel should, however, be contacted immediately.

Corporations should ensure they identify everything that is being seized, request to be able to make copies and specifically identify material that is attorney–client privileged or otherwise protected by law. If privileged materials are taken, they should be put under seal. Also, any incident should be reported on the minutes of the dawn raid and the minutes should not be signed if there is a disagreement as to content. Subsequently, if the legal requirements of a dawn raid have been violated, nullity of procedural steps can be obtained.

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

Legal privilege attaches to any advice provided by outside counsel. There is no in-house counsel privilege. Attorney–client communications cannot be seized. Very often, privileged materials will be seized along with other material and a specific request must subsequently be filed to have the materials returned to the corporation.

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

An individual and (at least in theory) a company can refuse to answer based on the right against self-incrimination. An individual or company can refuse to answer a question on the basis that the information is privileged. A witness (against whom no charges can be made) can be compelled to testify.

15 What legal protections are in place for whistleblowers in your country?

The first legal protection for whistleblowers dates back to 2007 and has developed since to target specific areas including corruption and risks to public health or the environment. The 2016 Sapin II law provides for a general whistleblower protection.

16 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Data protection and privacy laws apply to all employees regardless of allegations of wrongdoing. Prior to gathering or reviewing employee materials, counsel should check company policy with respect to the use of company computers (and other storage materials) and, unless already specified that the use of company computers is strictly for professional purposes, obtain individual employee consent. In any event, folders marked 'personal' should be treated as such.

Officers and directors of companies who are subject to board decisions have to be fired using similar procedures. In some positions subject to authorisation by a regulatory authority, removal of the authorisation can lead to termination.

17 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

If the misconduct is confirmed, an employer has a large set of tools to sanction the employee, including releasing the employee from his or her duties until completion of the investigation. An employee can be sanctioned if refusing to participate in the internal investigation is considered by the labour courts as a sufficiently severe fault.

Commencing an internal investigation

18 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?

It should be considered good practice to prepare a document setting out the investigatory scope, especially when judicial review seems likely.

19 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?

There is no obligation to report back to authorities nor is there a leniency programme. The company should assess the scope of the facts and the likelihood of a leak as soon as possible without creating unnecessary internal awareness.

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

Other than obligations 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 law enforcement.

21 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

Board briefing by management is highly dependent on the materiality of the investigations, the overall operations of the company and on the seniority of the individuals involved.

22 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 raiding the company, having gathered sufficient information from third parties to ensure they are able to collect relevant information. If a company has any reason to believe a raid is likely, it should immediately anticipate by making sure copies of relevant documents can be made in a way which attaches privilege and consider providing separate representation to key employees.

Administrative authorities, for example, the AMF, ACPR, Competition Authority and the Ministry of Economy, can request communication of data and documents from corporations under review or directly from third parties.

23 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

It is unlikely that an enforcement authority would use a notice or subpoena to maintain or collect documents or data. There is little ground for challenging such a request if it is within

the scope of the authority's prerogatives. The company may argue against communicating data and documents that are covered by attorney–client privilege or medical secrecy.

Attorney–client privilege

24 May 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. For privilege to attach, the internal investigation should be carried out by outside counsel, namely French lawyers admitted to the Bar. Interviewed employees are bound by contractual obligation to confidentiality which cannot successfully put forward to refrain from answering an investigating magistrate or police investigator's questions.

Professional secrecy applies to conversations between lawyers whether or not there is a common interest between their clients. Providing separate counsel to individuals may be a good way to facilitate communications safely.

25 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?

The principle of the attorney–client privilege was set down in the Article 66-5 of the Law of 31 December 1971, modified by the Law of 7 April 1997 and by Article 226-13 of the French Criminal Code.

These provisions expressly set out that an attorney may not disclose information that contravenes professional secrecy. Article 226-13 of the French Criminal Code states that disclosure of secret information by a person entrusted with such a secret, either because of his or her position or profession, or because of a temporary function or mission, faces one year's imprisonment and a €15,000 fine.

The holder of the privilege is the attorney's client, either an individual or a company.

26 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

No privilege attaches to communications with in-house counsel.

27 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?

Waiver of the attorney–client privilege is not specifically considered as a co-operative step in France. At this stage, there is little to no reliance by enforcement authorities on internal investigations.

28 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.

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

Privilege can be maintained in France after a limited disclosure abroad. Co-operation between enforcement authorities would likely make the privilege moot.

30 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. However, it is possible, for the purpose of defending a client, to share some privileged information with other attorneys – whether the clients share a common interest or not – and retained experts, namely forensic accountants.

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

The scope of professional secrecy is very large and lawyers are expected to rely on experts. That being said, it usually is safer to have the information collected and processed within the law firm's offices.

Witness interviews

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

There are no clear rules when it comes to internal investigations and interviews with individuals who are not employees of the company should be regarded with great caution. If the underlying facts amount to an offence under French law, such an interview would likely be considered obstruction of justice. The proper alternative is to rely on outside counsel.

33 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes, it would be the company's privilege. Attorney reports are covered by attorney–client privilege as long as the attorney is providing legal advice.

34 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?

Interviews of third parties should be ruled out unless specific precautionary steps are taken. The Paris Bar council recently issued recommendations according to which attorneys should explain the purpose of the interview and its non-coercive nature to employees and inform them that their exchanges are not covered by professional secrecy (equivalent of *Upjohn*

warnings). Employees should also be informed that they can be assisted by an attorney, but only when it appears that they may be blamed for their actions at the end of the investigation.

35 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?

Assuming outside counsel carries out the interview, they should explain both whom the attorney–client relationship is with and how the privilege rule works. In-house counsel is usually present at the interview. Independent counsel should be provided to interviewees if there is any sense they might be involved in any wrongdoing. Documents are usually provided ahead of time when counsel for the employee is involved, through counsel for the company to avoid *de facto* waiver of privilege.

Reporting to the authorities

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

Except for specific crimes that are not yet choate and can be avoided, only civil servants have a general obligation to report crimes they become aware of in the context of their employment. There is no requirement to self-report.

37 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?

Except for antitrust issues, only in very limited circumstances does a corporation have an interest in reporting wrongdoing to enforcement authorities. It should first determine the scope of the wrongdoing and the responsibilities of those involved to assess potential corporate criminal liability. If the wrongdoing is carried out by a current or former employee, it should weigh the pros and cons of filing a criminal complaint against the perpetrators to deter others, show commitment to compliance and shield itself from prosecution by acquiring the status of victim.

Self-reporting outside France should be based on a decision tailored to that country's laws and enforcement policies. Should the corporation decide to self-report in a foreign jurisdiction, reporting the facts to French authorities should also be considered. Arguments to weigh up include potential interest of French authorities in the underlying matter, where the facts occurred, whether they are still ongoing and how closely national and foreign authorities work together.

In its over 300 ongoing matters, the PNF is working closely on trying to address cases at the preliminary inquiry phase of criminal investigations before an investigating magistrate is appointed, namely, the instruction phase, which limits the leeway for plea bargaining and considerably extends the length of procedures.

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

There is no specific procedure to self-report and no legal requirement to do so. Informal contacts should be made, through outside counsel, with the competent authority, at the appropriate hierarchical level, after a thorough cost/benefit analysis.

Responding to the authorities

39 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?

There is no common practice by enforcement authorities of providing advance notice to corporations that may become defendants in criminal procedures. Contact should be made with the police investigator, prosecutor or investigating magistrate depending on the status of the investigation. Challenges can be made against requests beyond the scope of the instruction from the judicial authority.

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

Yes. Ongoing authority investigations are subject to challenge before courts.

41 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 all the authorities involved separately as the questions which can be raised by different authorities could vary and bear in mind that authorities communicate with one another. When dealing with foreign authorities, blocking statute, privacy and data protection issues should also be addressed.

42 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. However, national authorities will only be concerned about the actual answer to the production request.

43 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?

There is extensive co-operation with foreign enforcement authorities both in the EU and abroad, through MLATs, agreements between regulators and enforcement authorities and EU co-operation agreements.

44 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 company should retain outside counsel to explain to the requesting French authority the other country's law and work with the French and foreign authorities for the production to be carried out appropriately, likely pursuant to co-operation agreements.

45 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

France has both blocking and data protection and privacy statutes. As discussed above, neither would have an impact on domestic enforcement but both should be properly addressed when responding to a foreign authority.

46 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, mostly when foreign authorities are involved, or when, in an ongoing investigation, there is a strategic interest to do so. Criminal files are accessible to all parties involved, including victims and other defendants. Although legally covered by secrecy rules for legal professionals, parties themselves are free to share information – not documents – from the file with third parties. Information from high-profile cases is regularly leaked to the press.

Global settlements

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

There is an extremely limited track record of guilty pleas in France and none for NPAs or DPAs. The Sapin II law provides for DPAs limited to instances of corruption and 'probity offences'. Companies should move swiftly to settle if possible as both procedures provide for, and will likely include, strong involvement of alleged victims who will pursue their own interests. If the case may involve foreign jurisdictions, companies should assess the consequences of admitting guilt in France.

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

Corporate liability does not shield individuals from liability. In an overwhelming majority of cases (as required by law) the courts have to identify the individual or organ acting on behalf of the company. The individuals involved will therefore likely have committed the offence themselves.

Penalties for individuals include fines, imprisonment, payment of civil compensation to victims within the same criminal procedure and prohibition from specific managerial

positions in addition to publication of the decision in the press. Except for imprisonment, penalties for companies include all of the above, as well as dissolution and debarment for certain specific offences.

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

Although laws provide for very high penalties, including those based on a percentage of overall revenues for companies, penalties will be based on net worth, income, personality and *mens rea*. Although not recognised as such by law, deterrence appears to be a growing component of the decision as to penalties.

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

NPAs and DPAs are not part of the legal culture. However, the recently enacted Sapin II law provides for a DPA procedure limited to corruption and 'probity offences': known as a judicial public interest agreement.

51 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

If a criminal conviction has been pronounced in the previous five years for a limited number of offences, for example, including corruption, fraud, breach of trust and breach of professional secrecy, a judge can also hand out a debarment from government contracts sanction. Access to public contracts can also be imposed on candidates who are not up to date with their social security or tax obligations.

Based on criteria discussed above, the company should determine the likeliness of involvement of French authorities when determining whether to settle in another country, particularly the territorial competence of French courts for double jeopardy reasons.

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

Multiple authorities often investigate the same facts at the same time. There is no particular procedure for global settlements as relationships vary from co-operation to competition and sometimes lead to a race to a decision. A prior sanction or decision on the same facts will be taken into account by the other authorities involved.

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

Parallel private actions are possible. In most instances, alleged victims will join the criminal procedure as civil parties and will, as such, be granted full access to the file and be able to submit requests for investigative steps to investigating magistrates. Also, alleged victims can start a criminal investigation by filing a specific complaint to that effect.

Private parties do not normally have access to administrative authorities' investigation files.

Publicity and reputational issues

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

Secrecy in the investigatory stage is required by law but applies neither to defendants, victims nor the press. In effect, especially if victims are involved in the procedure, it is very difficult to keep communication and information taken from the criminal file private.

55 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 very 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.

56 How is publicity managed when there are ongoing, related proceedings?

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

Duty to the market

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

Unless otherwise specifically requested by an agreement, there is no obligation to disclose settlements to the public. In anti-corruption matters, the Sapin II law makes disclosure compulsory. Any settlement in criminal matters will have to be approved by a judge in a public hearing. Administrative authorities communicate on sanctions and settlements on their websites.

Appendix 1

About the Authors

Stéphane de Navacelle
Navacelle

Stéphane de Navacelle, a lawyer in New York and Paris, is a regular participant at seminars and is consulted on issues relating to regulatory and criminal investigations in Europe, the United States and Africa. He is a fellow of the American Bar Foundation and co-chair of the ABA International Criminal Law Committee.

Stéphane de Navacelle
Navacelle

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Navacelle
60, rue Saint Lazare
75009 Paris
France
Tel: +33 1 48 78 76 78
Fax: +33 9 81 70 49 00
sdenavacelle@navacellelaw.com
sdossantos@navacellelaw.com
jzorrilla@navacellelaw.com
www.navacellelaw.com