

# French bar adopts internal investigations guidelines

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Paris, France (Credit: shutterstock.com/S.Borisov)

France's National Bar Council (CNB) has published comprehensive internal investigations advice focusing on how to protect attorney-client privilege, conduct interviews and adhere to the French Blocking Statute.

The CNB approved the guidelines, aimed at French and international lawyers carrying out investigations in France, on 12 June, and made a finalised

copy available to the public on 2 July.

The guidance took roughly two-and-a-half years to put together and was produced by a working group consisting of 27 lawyers specialising in various fields that deal with internal investigations, such as white-collar crime, competition and labour law. The group effort was coordinated by partner Stéphane Bonifassi and associate Victoire Chatelin at Bonifassi Avocats in Paris.

Bonifassi said that France's recent adoption of US-style anti-corruption trends and enforcement, such as the introduction of deferred prosecution agreements (DPAs), prompted the group to draw up the guidance.

France's sweeping anti-corruption law, known as Sapin II, came online in 2017 and brought in a raft of new enforcement tools to the country, including judicial public interest agreements, France's version of DPAs, and the French Anti-corruption Agency (AFA).

“It was time to have some guidelines about all this,” Bonifassi said. He added that one of the lawyers in the group had admitted to often losing sleep over whether they handled internal investigations correctly.

Sophie Scemla at Gide Loyrette Nouel in Paris, a member of the working group, said the guidance represents the modernisation to France’s anti-corruption system and its alignment with that of the US. “It shows the trend of French anti-corruption,” she said. “Internal investigations weren’t really part of the practice before ... but it’s a new development and now an integral part of the practice”.

Lawyers said that the recommendations contained in the guidance offer a detailed and codified approach on how to carry out internal investigations, building on guidelines previously issued by the AFA and the National Financial Prosecutor’s Office (PNF).

The guidance outlines in clear terms what lawyers need to do to ensure that potentially privileged documents, such as internal investigations reports, are protected, but does not go so far as to define the scope of privilege.

“There are some discussions in French courts as to the scope of privilege,” said Alexander Blumrosen at Polaris Law in Paris, another member of the working group. “We did not want to take a particular position when there are ongoing disputes, but we refer to different case law in the footnotes.”

The guidance advises drafting a mission statement before launching an investigation and defining the scope of documents that lawyers will review over the course of the probe, and adds that any privileged material must be clearly labelled as such, especially in case of an onsite search by authorities.

“As a matter of principle, the seizure of any document or exchange protected by privilege should be opposed, whatever its content and regardless of the authority making the seizure,” the guidance says.

Bonifassi said it was very important for the working group to make clear where it stood on protecting legal privilege. “The approach was a little relaxed in the French bar before,” he said. “It is crucial to carefully think about it and carefully manage the conduit of communication to make sure you protect privilege”.

Bonifassi added that French authorities should take note of the section on privilege.

“We’re sending a message to the prosecution that we believe and trust them to respect our professional secrecy,” he said. “We want to make clear to prosecutors that we believe internal investigation reports are confidential and they can’t be seized for criminal investigation”.

The guidance addresses how lawyers should help companies to comply with the French blocking statute and the EU's General Data Protection Regulation (GDPR).

The Blocking Statute prohibits individuals and companies from disclosing economic, technical and commercial information, including the results of an internal investigation, to foreign authorities, unless they gain approval from French authorities. The GDPR applies to data on individuals.

To help lawyers and their clients comply with the blocking statute, the guidance tells lawyers to enter a dialogue with any foreign authority likely to initiate proceedings against the company at the outset of the investigation to explain the need to comply with the Blocking Statute and negotiate a reduction to the scope of any request for information it might make.

The guidance suggests hiring specialists to handle information requests from foreign authorities.

“To avoid any unnecessary transfer of data outside of French territory, it is preferable to choose a forensics service provider that can host all the data in France and allow a review of the information and documents in response to the request of foreign authorities,” the guidance says.

To avoid GDPR violations during internal investigations, the guidance recommends that lawyers help companies to set up a data protection impact assessment and make sure that they notify relevant individuals that their data could be used for litigation purposes and that the lawyers may also be a party to their data.

Blumrosen said that the guidance illustrates how France's anti-corruption efforts have developed in the last 20 years, pointing to the births of the AFA and PNF.

The AFA released its anti-corruption plan in January, in which it said it wanted to enhance France's global reputation for being tough on corruption by strengthening its technical and operational cooperation with other countries.

The country's Ministry of Justice has also recently published its own guidelines encouraging companies to self-report financial misconduct.

Meanwhile, lawyers recently commended the way French authorities led their counterparts in the UK and the US in the €3.6 billion bribery settlement with Airbus in January.

“We looked at what the French investigation institutions of today are, what powers they have and what risks companies have, and we drill down into how

to deal with an investigation,” Blumrosen said. “This is very timely and topical work because a lot has changed”.