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COMPLIANCE - CHALLENGES AND OPPORTUNITIES FOR THE LEGAL PROFESSION

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17 CHAPTER

INTERNAL "INVESTIGATIONS" CONDUCTED BY LAWYERS: WHY AND HOW?

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1. - The strategies adopted by companies to fight internal fraud or to remedy the conduct of their employees or directors that could engage their civil and, more importantly, criminal liability have in recent years been undergoing considerable change in France.

2. - It is possible to observe a certain shift towards the alignment of such strategies with those which have existed for a long time in Anglo-Saxon jurisdictions.

3. - French lawyers have for a long time been seen exclusively as litigators. They have also slowly but surely become advisers to companies. But do they today have to assume the guise of a genuine prosecutor in order to conduct "internal investigations", which term in itself gives rise to a certain confusion, intended or otherwise, with investigations conducted by the agencies of the state?

4. - In order to answer this question, which is important for the future of the profession and how the profession will be exercised, as well as in terms of corporate governance, it is necessary to avoid both adopting a reactionary or dogmatic position; and abandoning on the altar of a putative modernity what remains of the very essence of the legal profession and its preponderantly criminal focus.

5. - As they have always done, lawyers are required to defend the interests of their clients and to do so in a manner compliant with the applicable statutory rules and rules of professional conduct, in order to avoid mutating into private investigators, which moreover is an already extant profession subject to its own regulations.

6. - Defending the interests of companies necessarily results in lawyers seeking to anticipate the risks to which the relevant company is exposed; and, in so doing, they may be required to conduct an internal search for certain pieces of evidence.

7. - Such a search should be conducted in accordance with a certain number of principles, in light of the nature of the search. The use of the results of any such search may raise extremely challenging issues, should a search bring to light the commission of a criminal offence for which the company itself may be criminally answerable.

I. How Investigations Should Be Conducted

8. - Lawyers are amongst those professions which make a structural contribution to the protection of individual freedoms.

9. - There are in France lawyers responsible for the enactment of several laws and the existence of several jurisprudential precedents, making it possible to supervise to a certain degree the investigations conducted by police officers or investigating judges. All lawyers are aware of the long battle waged by the profession which today makes it possible for lawyers: to assist persons under official investigation during questioning by investigating judges to benefit from a minimum level of

adversarial process in the context of judicial investigations; to attend clients during policy custody; and to permit anyone under interrogation to exercise his right to remain silent.

10. - How then could we allow the non-compliance by these same lawyers with these rules in the context of internal investigations, on the sole ground that such internal investigations are being conducted not by police officers but by the lawyers themselves?

11. - Permitting such non-compliance would not only be proof of a certain inconsistency but, most importantly, could adversely affect the credibility of the arguments advanced by lawyers for changes to the guarantees of individual freedoms, which are in certain respects still necessary; for example, in terms of access to case files during a preliminary investigation.

12. - On the contrary, it is by respecting the principles which they defend when conducting investigations within companies that lawyers can ensure the consistency necessary for the exercise of their profession, whilst still usefully defending the interests of the companies that they advise.

13. - Three methods of search merit consideration.

A. Prescribed investigative methods

14. - It goes, of course, without saying that investigative measures unavailable to representatives of the forces of law and order are strictly out of bounds for lawyers. My optimism prevents me from listing such measures here. But can the methods available to the investigative branches of the forces of law and order be used by lawyers in the context of their own investigations?

15. - Let's take by way of a first example phone-tapping. Phone-tapping, when carried out by the forces of law and order, is regulated by the law. In this regard, and without going into the detail of the provisions applicable in certain areas, Article 100 of the French Code of Criminal Procedure stipulates that investigating judges can only authorise a phone-tap if the applicable penalty is two years' imprisonment or longer and if the investigation makes it and necessary. The law likewise regulates the duration and limits of phone-taps, although these raise significant difficulties in France, in particular where the phone-tapping tangentially involves lawyers.

16. - Phone-tapping is permitted subject to such reservations when carried out by the authorities, but it is punishable by one year's imprisonment and a fine of €45,000 (second paragraph of Article 226-15 of the French Criminal Code) when it is undertaken unlawfully, and in particular privately.

17. - It is therefore impossible to imagine a lawyer unlawfully tapping a phone or having a phone tapped in the context of an internal investigation.

18. - With regard to this investigative measure, of which we know the importance, the filing of a complaint with the authorities provides more investigative scope than an internal investigation, even if it is sometimes legitimate to consider the existence of unlawful phone-taps which, even if no open use is made thereof, serve as the basis for subsequent searches which are lawful.

19. - Lawyers should never consent to receiving evidence obtained in this manner and must remind their clients of the illegal nature thereof.

B. Permitted investigative methods

20. - Although lawyers are not permitted to use illegal investigative methods, they may have recourse to legal investigative methods. However, lawyers must comply with the rules which regulate certain searches and, furthermore, ensure that they are in compliance with their rules of professional conduct.

21. - Such investigations therefore consist of analyses of evidence which may be made available by the company, but also more specifically analyses of the contents of computers and in particular emails, and lastly interviews of persons who might be capable of providing useful information.

I. Consulting documents

22. - One might think that the mere consultation of documents made available by a company to its lawyer poses absolutely no difficulty. This is true most of the time. However, one difficulty must be highlighted; namely, the data storage conditions, especially if provided in an electronic format by the client. In fact, lawyers must in such a case ensure that the conditions in which they store such data offer a level of security and confidentiality identical to that provided by the client.

23. - This, of course, means protection of law firms against unauthorised physical or electronic intrusion. But a question also arises in terms of how the data is stored, in particular in the cloud. It is, in fact, incumbent upon lawyers to request that their IT service providers ensure as far as possible a sufficient level of security, making it possible to guarantee to their clients that data transfers in the context of the investigation carried out by the law firm do not vitiate the confidentiality of the documents provided.

24. - Similarly, and this is worthy of mention, the mere transfer of data to a law firm does not make such information confidential. Law firms, even though they do benefit from a certain level of protection in order to ensure lawyer-client privilege, do not constitute sanctuaries from the jurisdiction of either the civil or criminal courts.

II. Consulting employee emails

25. - As we know, emails constitute an incredible source of information on the activities of any person and therefore company employees. The question of how to reconcile the necessary protection of employees' private lives with the necessary protection of their employer's interests therefore arose very quickly.

26. - This question is especially important, as case law has established that employees may use their work email for private purposes.

27. - Case law (and in particular a decision of the French Court of Cassation dated 17 June 2009) have established the principle that in the absence of a major risk or occurrence of a specific event, an employer is only entitled to open emails that an employee has marked as personal on the hard drive of the computer provided to the employee in the employee's presence or if the employee has been duly notified.

28. - This rule is, of course, applicable to lawyers in the context of any internal investigations they conduct. Here again, it is incumbent upon lawyers conducting an investigation to strictly comply with the principles established by case law, especially as they must set out the evidence gathered in a report to the company, which report may in certain circumstances be made public and even produced in legal proceedings.

III. The conditions for conducting employee interviews

29. - Conducting interviews with employees of the company within which a lawyer is conducting an investigation has raised and still raises a certain number of issues.

30. - The first question which had to be answered was whether or not it falls within the remit of lawyers to conduct this type of investigation. The ethics committee of the Paris Bar issued an opinion in 2011 in which it stated that lawyers may conduct internal investigations, as such an investigation falls within the scope of the fifth paragraph of Article 6-2 of the National Internal Regulations (RIN) of the French National Bar Council, which provides that a lawyer "may be entrusted with the task of acting as an arbitrator or expert".

31. - In a report on lawyers conducting internal investigations dated 25 February 2016 and presented to the Paris Bar Council on 8 March 2016, the aforementioned 2011 analysis was confirmed and it was specified that "in accordance with such principles, a lawyer charged with an internal investigation must act with dignity, conscientiousness, probity and humanity. And also with fairness, tact, moderation and courtesy (Article 1.3 RIN). A breach of these fundamental principles shall constitute wrongful conduct subject to disciplinary action (Article 1.4 RIN)."

32. - Therefore, a lawyer may conduct an internal investigation and interviews, but only in compliance with the applicable principles of professional conduct.

33. - In the case of interviews, the question of the scope of lawyer-client privilege arises. In this regard, it is necessary to highlight the distinction drawn in the report of the Paris Bar Council between:

(i) the lawyer's task within the context of the fifth paragraph of Article 6.2 of the RIN, which refers inter alia to acting as an "expert"; and

(ii) the lawyer's task as referred to in the second paragraph of Article 6.2 of the RIN, which relates to the general task of providing advice and assistance.

34. - The aforementioned report states that if it is intended to disclose the report (for example, in the event of an internal investigation into harassment carried out jointly by the company and its employee representatives falling within the role of an "expert"), then any statements made during interviews are not covered by lawyer-client privilege.

35. - On the other hand, if the internal investigation falls within the general task of providing advice and assistance referred to in Article 6-1 and the second paragraph of Article 6-2 of the RIN, then lawyer-client privilege fully covers the relationship between the lawyer and the client; namely, the company having commissioned the report from lawyer.

36. - The report of the Paris Bar Council sets out the consequences of such principle as follows:

"Which does not amount to saying that the lawyer may not reproduce in his report the statements made by third parties who are not clients (such as the employees of the company which instructed the lawyer to provide a legal opinion after an internal investigation) or that the provision of the lawyer's report to the client poses the slightest problem.

However, in the context of such a task, the lawyer remains bound by lawyer-client privilege, both with regard to the client and with regard to third parties: in particular, the lawyer cannot, without breaching lawyer-client privilege, disclose to third parties the results of the investigation or any evidence (interviews or documents) collected during the investigation."

37. - The need to preserve confidentiality is therefore confirmed quite clearly in this report.

38. - But the question of how interviews are to be conducted also arises. Indeed, must a lawyer interviewing a third party do so in the presence of such party's lawyer or must the lawyer have informed the third party that he has such a right?

39. - The Paris Bar Council did not give an opinion in this regard in the aforementioned report but did raise the possibly different situation of a person interviewed as a mere "witness", as opposed to a person who might have participated in the commission of the wrongful acts.

40. - It was in the context of a recommendation dated 13 September 2016 entitled "Vademecum on lawyers instructed to conduct an internal investigation" that

the Bar Council set out its view hereon; in particular, in section 2, drawing a distinction between the lawyer acting in the context of the second or the fifth paragraph of Article 6.2 of the RIN.

41. - The Council sets out the manner in which an interview should be conducted in the context of an investigation falling with the lawyer's task of providing advice and assistance (the second paragraph of Article 6.2 of the RIN):

"In each occurrence, the lawyer shall inform the persons to be interviewed during the internal investigation that he is not their lawyer but is acting on behalf of the client who instructed him to conduct the investigation;

The lawyer shall explain to the persons to be interviewed and any other persons contacted for the purposes of the internal investigation that the lawyer-client privilege by which he is bound with regard to his client is not applicable to them, with the result that their statements and any other information collected during the investigation can be used by his client, as well as any report produced by the lawyer for the client, as the case may be;

The lawyer shall inform the persons to be interviewed that they may be assisted or advised by a lawyer during their appearance, before or during interview and that they may be accused of certain conduct at the end of the internal investigation;

Where a deposition is transcribed verbatim, the lawyer shall grant to the person interviewed the option of checking his statements and signing them, should he agree to do so. The lawyer shall not provide the interviewee with a copy thereof if the preservation of the confidentiality of the investigation requires that he not do so, in accordance with French or foreign confidentiality rules."

42. - The applicable rules are different in the case of an internal investigation conducted in the context of an expert report procedure implemented in the context of the fifth paragraph of Article 6.2 of the RIN, as, in addition to the fact that the habitual lawyer of the company cannot in principle perform the task if he is the habitual adviser of the company, with regard to how the interview is conduct it is stipulated:

"where a deposition is transcribed verbatim, the lawyer shall grant to the person interviewed the option of checking his statements and signing them, should he agree to do so, and the lawyer shall provide the interviewee with a copy thereof should he so request, barring special circumstances."

43. - These recommendations by the Paris Bar Council have the merit of laying down a modus operandi which respects the rights of persons who are questioned.

44. - The courts have yet to consider this challenging question and it will perhaps be necessary for legislators to intervene with regard to this admittedly technical but nonetheless significant issue.

II. What do to After the Investigation?

45. - Two scenarios present themselves regarding the use of the results of these investigations, which do not necessarily result in a written report by the lawyer.

46. - The situation is very different depending on whether the investigation involves facts of which the company is solely a victim or facts for which the company may be criminally liable.

A. The company as victim

47. - As pointed out above, the report produced by the lawyer may be used by the client in the context of proceedings which the client itself may decide to instigate.

48. - When doing so, the manner in which the investigation is used does not really pose any problems of a legal nature. As in any dispute, it is rather at the level of advisability that questions must be asked. Indeed does the company have an interest in making the identified problem public?

49. - Let's take the example of a company active in a strategic sector from which a document is stolen by an employee. It is not certain that any interest of the company will be served by allowing its clients to be apprised indirectly of the potential breach of its internal security system for protecting the documents and secrets entrusted to it. But, conversely, demonstrating that such acts do not go unpunished and were discovered thanks to the internal systems in place may have a beneficial effect both internally and externally.

50. - It is accordingly important not to neglect reputational considerations and thus communication in the context of investigations. As far as this question is concerned, it will be for the company and its advisers to reach a decision based on the individual circumstances of each case. Here it is also necessary to take human nature into account and to assess the consequences for the employee of a public sanction resulting from a mere internal investigation, no matter how serious the facts are.

51. - Lastly, the conduct of an internal investigation where the company is a victim necessarily has employment law ramifications, which means that human resources should be involved in the process so as not to deprive the company of any remedy in this area, by ensuring in particular compliance with the applicable periods for taking disciplinary action.

B. Potentially guilty companies

52. - It is in this scenario that the strategy to be implemented following an investigation is particularly challenging for a company. In short, should a company elect to

bring the relevant facts to the knowledge of the prosecuting authorities in order to attempt to reach a negotiated solution?

53. - In this regard the recent Sapin 2 Law tempts or encourages companies, opinion is divided on this point, to notify any criminal activities to the public prosecutor. In fact, Article 22 of the Sapin 2 Law introduced the concept of the public interest judicial agreement, which makes it possible to reach an agreement with the public prosecutor precluding prosecution of commitments made by the company. This agreement does not, however, cover natural persons and therefore the directors of the company.

54. - The benefit of such an agreement is that, once it is entered into, the order validating the agreement handed down by the judge contains no finding of guilt and neither constitutes nor produces the effects of a conviction.

55. - For all that, by placing itself within such a framework, the company exposes all its employees and directors to criminal prosecution, makes public information which could give rise to civil actions, discloses such information to foreign authorities and, lastly, must contend with reputational effects and even consequences in terms of stock exchange regulations if the company is listed. It goes without saying that a decision to inform the public prosecutor of the results of an internal investigation must be carefully weighed.

56. - This is most likely why the Sapin 2 Law, probably concerned with “stimulating such consideration”, includes in the internal compliance provisions a section 8 requiring that the company implement a “programme for auditing and assessing internally the measures taken”.

57. - Does the Law hereby impose an obligation to disclose in the context of such audit all the internal investigations completed? If so, is it necessary to complete investigations? Some would say that this question is provocative or even immoral, in the case of those with the most extreme views, but it should be expressed clearly, at the risk of degenerating into a real “bafflegab”, which has no place in a discussion of this issue.

III. Conclusion

58. - Lawyers have admittedly always had the role of defending their clients, but have that of encouraging them to put an end to practices that might be found to be illegal.

59. - Such a role is not based on any moral concept of the profession, as morality is wrongly confused with the law, but on the concern of lawyers to advise their clients in such a way that they are not exposed to the risk of prosecution and to procure that they comply with the law.

60. - Internal investigations are, as we have seen, an extension of this task in an

environment which has been made more complex by the transparency called for by public opinion, which transparency might prove excessive if pushed to extremes, and the globalisation of both international trade and the law, which has turned the law into a tool of economic competition between great powers.

61. - Let us make good use of internal investigations but ensure that they do not transform lawyers into sub-prosecutors.