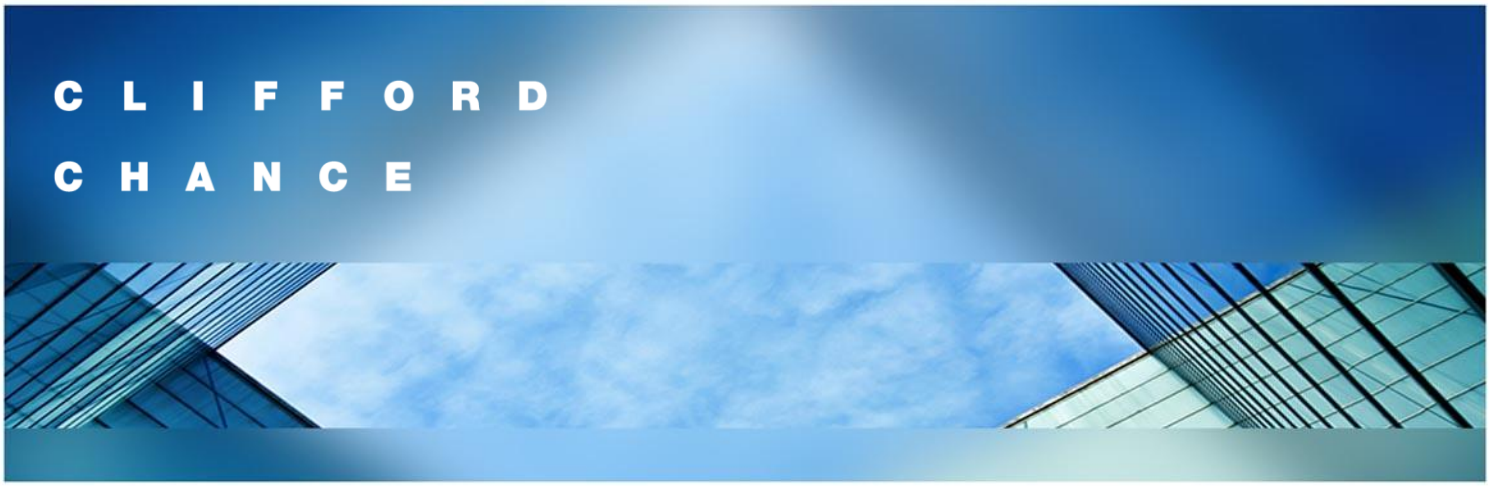

THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH? THE PRIVATE INVESTIGATIONS FRAMEWORK UNDER SCRUTINY

Introduction

While traditionally the term "private detective" conjures up images of Hercule Poirot and Sherlock Holmes, private investigations have long since left the realm of obscurity and have become quite commonplace for private actors confronted with allegations of misconduct of employees, suppliers or other contract partners. Recent legislative reform at the EU level, such as notably the adoption of the whistleblowing directive, as well as an increased focus on compliance with e.g. anti-money laundering, anti-bribery and sanctions legislation have required companies to pay more attention to the reporting and investigation of incidents. A trend which is likely to continue in the years to come.

Against this backdrop, a law of 18 May 2024 which will enter in force on 16 December 2024 overhauls the old regime for private investigations to account for modern and technological methods of research, as well as to ensure compliance with the legal requirements on data privacy and to protect the rights of the individuals concerned. One of the main objectives of the reform is also to bring the legal framework for private investigations closer to the one applicable to public investigations.

This briefing lays out the main features of the new regime and the fundamental impact they will have for in-house investigation services.

Key points:

- New law completely revisits the legal framework for private investigations.
- In-house investigation services are within the scope.
- Prior authorisation is required, subject to a grandfathering period of six months for existing players.
- Compliance with data protection requirements is a major focus, and so is the protection of the rights of the person subject to investigation.
- Detailed procedural steps and conditions are provided, including in relation to the methods used.
- Judicial control and administrative sanctions apply in case of breach.

Clear scope, covering both external and internal investigations

The law regulates all "private research activities", which are defined as activities (i) carried out by a natural person, (ii) on behalf of a principal, (iii) consisting of collecting data obtained through the processing of information relating to natural or legal persons or concerning the precise circumstances of acts committed by these persons, and (iv) with the aim to provide the data obtained to the principal in order to preserve his or her interests in the context of an actual or potential conflict or to search for missing persons or for lost or stolen property.

As a result, while such services were previously unregulated, internal private research services which are organised within a company for its own needs in a structural manner are henceforth within the scope of the law.

The activities carried out by certain professionals such as notaries, lawyers, bailiffs, journalists and statutory auditors, are, however, excluded from the scope although the exception is limited to their professional activities. A -number of other specific research/data gathering activities listed in the law are also exempt (e.g. cyber security incident management, incident investigations by HR-services, or compliance with AML/whistleblowing rules).

Prior authorisation by the Ministry

The law requires in-scope entities to obtain a prior authorisation from the Ministry of the Interior. The authorisation, which is valid for five years, is delivered if they meet the conditions set out in the law (relating to the absence of criminal record, compliance with social and tax laws and GDPR etc.) and continue to do so throughout the authorisation period.

Strict conditions and incompatibilities

The individuals performing the private research services, including those who effectively manage the in-scope entities or sit on their board of directors or exercise control over them, are subject to strict conditions related to their training, their profile (as determined after a profiling exercise performed by the Ministry), their background and their criminal record. They must also observe a long list of incompatibilities with other activities and demonstrate compliance with the security conditions set by the law. If they do, they will receive a special identification card from the Ministry, which is valid for five years and without which they cannot carry out their research activities. HR personnel investigating internal incidents are exempted from the requirement to obtain this special ID card.

GDPR

The law expressly states that the global data protection regulation (GDPR) and its Belgian implementing law are applicable to all private research activities and that those handling data during the research (including the principal receiving the data) are considered to act as data controllers within the meaning of the GDPR. Collecting information on certain topics is moreover forbidden (sensitive personal data of course, but also ongoing court proceedings, journalists' sources of information and classified information) or requires the consent of the person that is the subject of the investigation, including for instance on the financial or professional situation of a natural or legal person before contracting with it.

Detailed process and conditions

The law stipulates detailed procedures to be observed whenever an investigation is carried out, including regarding (i) the written mission statement that must be established before the start of the investigation, (ii) the methods and means of research that may or may not be (e.g. interviews, observation, tracking methods, etc.) and (iii) the investigation file that has to be drawn up by the investigator.

It should be noted that, if the investigation relates to an employee of the principal, the authorisation to carry out the investigation and the modalities of the investigation process must be explicitly and transparently provided for in writing, for instance in a specific policy included in the internal work regulations of the company. Such policy must be adopted within two years.

Controls and sanctions

Lastly, the law provides for control and sanction mechanisms (enforced by the Data Protection Authority, police services and specially designated public servants) to ensure compliance with its provisions. In case of breach, the sanctioning official may decide to issue a warning, propose an amicable settlement or impose an administrative fine between EUR 100 and EUR 25.000 (base amount). The fines can be challenged before the Tribunal of first instance of Brussels, without further appeal.

If the findings of a private investigation are submitted in court, the judge must verify whether they have been obtained in accordance with the law and decide on the

evidential value to be given to them. Any evidence obtained in violation of provisions of the law which are subject to a sanction of nullity must, however, be excluded by the judge.

Given that the reform amounts to a complete overhaul of the existing rules and considering that in-house investigation services will from now on be caught by the rules, companies that conduct internal investigations should prepare themselves to be compliant with the new regime.

As mentioned, the law will be applicable as from 16 December 2024. If you are currently legitimately carrying out the in-scope activities, you may nevertheless continue to do so without prior authorisation from the Ministry, but you must request it within six months. You also have two years to adopt a written private investigation policy.

In case of questions on the law or its impact on your business, reach out to our specialists: **Dorothée Vermeiren**, **Nathan Tulkens**, **Ysaline le Paige**.

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