JONES DAY | One Firm Worldwide℠

WHITE PAPER

June 2019

French Blocking Statute: A Renewed Interest?

Recent laws—such as the 2016 Sapin 2 Law and the new EU General Data Protection Regulation—provide for rules that are intended to ensure compliance with the French Blocking Statute, which prohibits any French party from requesting or disclosing commercial information, absent a French court order. Many individuals believe that these provisions are likely to lead to increased enforcement of the Blocking Statute.

French Parliament Member Raphaël Gauavin, in a recent unreleased Report to the French Prime Minister, insisted on the strict enforcement of the French Blocking Statute, with increased penalties. If they have not already done so, companies should be considering what risks these new legal provisions create when they are ordered to produce documents in proceedings outside of France.

TABLE OF CONTENTS

A DILEMMA FOR FRENCH COMPANIES 1

RARE ENFORCEMENT BY FRENCH COURTS 1

APPLICATION IN U.S. COURTS 1

RECENT LAWS AND REGULATIONS 2

THREE KEY TAKEAWAYS 3

LAWYER CONTACTS 3

ENDNOTES 3

Originally enacted in 1968 in response to U.S. antitrust investigations into French shipping companies, the French Blocking Statute was tailored to protect French citizens and corporations from the alleged excesses of U.S. discovery processes.

The Statute prohibits any French party from requesting or disclosing commercial information, whether originating from France or elsewhere in litigation outside of France, absent a French court order.[1]

The reach of the statute has been interpreted broadly, and the information requested or disclosed does not have to involve the sovereignty, security, or essential economic interests of France to be covered by the statute. Moreover, the Statute applies to any evidence located in France, whether in the hands of a natural or legal person, French or foreign.

Any infringement of the Blocking Statute constitutes a criminal offense, the potential sanctions being imprisonment of up to six months and/or a fine of up to €18,000 for an individual and €90,000 for a company.

For a more complete description of the Statute, see our Jones Day *Commentary* "French Blocking Statute: A Death Foretold" (February 2014).

A DILEMMA FOR FRENCH COMPANIES

The Statute often requires French companies that are involved in litigation outside of France to choose between either complying with the foreign discovery process and possibly exposing themselves to prosecution in France or complying with the provisions of the Blocking Statute and jeopardizing their position in litigation pending in a foreign jurisdiction.

U.S. courts have ruled in several landmark decisions that the Federal Rules of Civil Procedure prevail over the French Blocking Statute and, hence, over the Hague Convention.[2] This creates a dilemma in U.S. criminal and regulatory proceedings when U.S. authorities proceed by serving subpoenas on French companies with a U.S. presence for documents located in France, rather than proceeding under the U.S.–French Mutual Legal Assistance Treaty to obtain those documents. In such proceedings, U.S. authorities may view a company's compliance with the French Blocking Statute as noncooperative, and U.S. courts may view such behavior as contemptuous.

Therefore, even though the Blocking Statute may in fact be depriving companies of their right to defend themselves efficiently before foreign courts, the Statute's initial goal was to protect French economic interests.

RARE ENFORCEMENT BY FRENCH COURTS

French authorities have prosecuted offenders under these provisions from time to time.

On December 12, 2007, the French Supreme Court rendered a landmark decision, known as the Christopher X / MAAF case.[3] The court held that a French-qualified lawyer had committed a criminal offense by seeking to obtain information—without complying with the requirements of the Hague Convention—from a French company to serve as evidence in court proceedings pending in the United States.

However, on January 30, 2008, the French Supreme Court[4] reversed its position, upholding dismissal of a criminal complaint based on alleged breach of the Blocking Statute. The Court ruled that the information disclosed in the course of a U.S. court proceeding was related to private matters. It stated that despite the confidentiality of the information, the data did not fall within the scope of the Statute, because this was not sensitive economic information.

More recently, the Blocking Statute has been invoked before French civil courts to challenge the transmission of documents. In a notable decision, the Court of Appeal of Nancy[5] refused, pursuant to the Statute, to order the disclosure of documents intended to be produced in a *pre-trial discovery* proceeding in the United States.[6]

APPLICATION IN U.S. COURTS

Litigants and third parties have invoked the French Blocking Statute in U.S. court proceedings with little success. In the seminal case *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*,[7] plaintiffs sued two French companies in U.S.

federal court. The defendants opposed discovery of information located in France, arguing that compliance would violate the French Blocking Statute. The U.S. Supreme Court declined to defer to French law, writing that "[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[8] But the Court did not wholly disregard French interests, stating that "American courts should … take care to demonstrate due respect for any special problem confronted by [a] foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."[9]

Thus, before ordering discovery or enforcing a subpoena that would violate a foreign blocking statute, U.S. courts must engage in a comity analysis that considers the particular facts of a case and the sovereign interests at issue.[10] Courts have considered different factors when conducting this comity analysis, including:

- The importance to the investigation or litigation of the documents or other information requested;
- The degree of specificity of the request;
- Whether the information originated in the United States;
- The availability of alternative means of securing the information;
- The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located;
- Hardship of the party facing conflicting legal obligations; and
- Whether that party has demonstrated good faith in addressing its discovery obligations.[11]

The existence of a blocking statute is "relevant to the court's particularized comity analysis only to the extent that its terms *and its enforcement* identify the nature of the sovereign interests in nondisclosure of specific kinds of material."[12]

The French Blocking Statute has not carried much weight in U.S. courts' comity analysis. Courts regard the Statute as a law that was purposefully drafted "riddled with loopholes that make it substantially unenforceable."[13] A U.S. court has observed that "[i]n practice … it appears that when a foreign court orders production of French documents even though the producing party has raised the 'excuse' of the French blocking statute, the French authorities do not, in fact, prosecute or otherwise punish the producing party."[14] As a result, U.S. courts have repeatedly held that U.S. interests in obtaining information and documents located in France outweigh any French interest embodied by the current Blocking Statute.[15] That said, even when a U.S. court compels discovery notwithstanding the Blocking Statute, U.S. courts have been receptive to arguments that certain types of documents should be produced in pseudonymized or redacted form.[16]

RECENT LAWS AND REGULATIONS

The 2016 Sapin 2 Law,[17] which addresses transparency, anticorruption, and economic modernization in France, established a French Anti-Corruption Agency ("Agency") to control the implementation of compliance programs within companies, including compliance with the provisions of the Blocking Statute.

Article 3.5 of the Sapin 2 law provides that the new Anti-Corruption Agency:

> [S]hall ensure, at the request of the Prime Minister, the compliance with [the Blocking Statute] in the context of the implementation of decisions taken by foreign authorities and which impose on companies whose registered office are located on French territory an obligation to undertake a procedure in order to bring into conformity its internal procedures for preventing and detecting corruption.

The Agency's mission will therefore include ensuring compliance with the Blocking Statute, notably in the context of the execution of deferred prosecution agreements signed by French companies. Indeed, in the light of the above, the Agency will intervene only at the stage of implementation of decisions of foreign authorities and not at the prior stage of investigation or *discovery* procedures.

Also, decree No. 2016-66 of January 29, 2016, established a "Strategic Information and Economic Security Service" (*Service de l'information stratégique et de la sécurité économique*), whose mission is to "ensure the application of the provisions of the above-mentioned law of July 26, 1968 by the persons subject to it, with the exception of those powers conferred by the law in this field to another authority (…)."

No doubt, these provisions are likely to strengthen the enforcement of the Blocking Statute and perhaps force U.S. courts to revisit their rationale for refusing to apply the French Blocking Statute.

Finally, by a law dated July 30, 2018,[18] France implemented the EU Directive on Trade Secrets.[19] While this law has no direct impact on the Blocking Statute, its provisions are intended to sanction the unlawful use and disclosure of trade secrets, including in litigation proceedings in France. This is an additional provision that lawyers will be able to use to oppose the transmission of sensitive documents.

THREE KEY TAKEAWAYS

Recent French laws provide for rules that are intended to ensure compliance with the French Blocking Statute.

The coming Gauvain Report will very likely recommend the strict application of the French Blocking Statute and increase the current penalties to prevent any breach of the Statute.

Increased enforcement of the French Blocking Statute may cause U.S. courts to give increased weight to the Statute when conducting comity analysis.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Ozan Akyurek
Paris
+33.1.56.59.39.39
oakyurek@jonesday.com

Sophie Hagège
Paris
+33.1.56.59.39.39
shagege@jonesday.com

Kelly A. Carrero
New York
+1.212.326.8391
kacarrero@jonesday.com

Jayant W. Tambe
New York
+1.212.326.3604
jtambe@jonesday.com

Bénédicte Graulle
Paris
+33.1.56.59.46.75
bgraulle@jonesday.com

Elie Kleiman
Paris
+33.1.56.59.39.39
ekleiman@jonesday.com

Françoise S. Labrousse
Paris
+33.1.56.59.39.48
flabrousse@jonesday.com

Alban Caillemer du Ferrage
Paris
+33.1.56.59.38.18
acf@jonesday.com

Philippe Goutay
Paris
+33.1.56.59.39.39
pgoutay@jonesday.com

Wesley R. Johnson Jr.
New York / Paris
+1.212.326.3907 / +33.1.56.59.39.42
wrjohnsonjr@jonesday.com

James P. Loonam
New York
+1.212.326.3808
jloonam@jonesday.com

Frédéric Gros
Paris
+33.1.56.59.38.32
fgros@jonesday.com

ENDNOTES

1 Article 1 bis of the Statute provides: "Subject to Treaties or International Agreements and to currently applicable laws and regulations, it is prohibited for any person to request, seek or disclose, in writing, orally, or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature directed toward establishing evidence in view of foreign judicial or administrative proceedings or in relation thereto."

2 See our Jones Day *Commentary*, "French Blocking Statute: A Death Foretold," Feb. 2014.

3 French Supreme Court, Criminal Section, December 12, 2007, n° 07-83.228.

4 French Supreme Court, Criminal Section, January 30, 2008, n° 06-84.098.

5 Court of Appeal of Nancy, June 4, 2014, n° 14/01547.

6 In this case, a U.S. company, which sold its French subsidiary to a Scandinavian company based in France, was sued by a former customer before U.S. courts. The U.S. company requested, before a French judge, that its former French subsidiary provide it with a significant number of documents (accounts, trade secrets, etc.). After the trial judge ordered the production of the requested documents, the Court of Appeal quashed this decision and refused, on the basis of the Statute, to order the disclosure of the documents.

7 482 U.S. 522 (1987).

8 *Aerospatiale*, 482 U.S. at 544 n.29 (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

9 *Id.* at 546.

10 *Id*. at 544.

11 The first five factors are taken from Section 442 of the Restatement (Third) of Foreign Relations Law of the United States.

12 *Aerospatiale*, 482 U.S. at 544 n.29 (emphasis added).

13 *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 403 (S.D.N.Y. 2014), reconsideration granted on other grounds, 132 F. Supp. 3d 518 (S.D.N.Y. 2015).

14 *Id*. *See also Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (court declined to apply the French Blocking Statute, explaining that: "the legislative history of the statute gives strong indications that it was never expected to nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts"); *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) ("the French Blocking Statute does not subject defendants to a realistic risk of prosecution").

15 *See, e.g.*, *Bodner*, 202 F.R.D. at 375 (declining to defer to blocking statute); *Adidas Ltd. v. SS Seatrain Bennington*, 1984 WL 423 (S.D.N.Y. 1984) (court declined to apply the French Blocking Statute in light of interests it was intended to serve); *Valois of America v. Risdon Corp*. 183 F.R.D. 344 (D. Conn. 1997) (declining to apply French Blocking Statute); *but see In re Activision Blizzard, Inc*., 86 A.3d 531 (Del. Ch. Feb. 21, 2014) (ordering discovery to proceed under both the Delaware procedural rules and the letters of request procedure provided by The Hague Evidence Convention).

16 *See, e.g.*, *In re Commodity Exchange, Inc. Gold Futures and Options Trading Litig.*, 14-MD-2548 at ** 4-5, 16 (S.D.N.Y. May 6, 2019).

17 Law No. 2016-1691 of Dec. 9, 2016.

18 Law n° 2018-670.

19 Directive 2016/943.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2019 Jones Day. All rights reserved. Printed in the U.S.A.