

French Government Seeks to Regain Control Over Enforcement of French Blocking Statute

A new decree and a ministerial order strengthen cooperation between French ministries, reflecting the government's desire to monitor more closely certain foreign discovery requests.

Overview

Originally enacted in 1968 in response to US antitrust investigations into French shipping companies, and subsequently modified in 1980, the French Blocking Statute (FBS) was initially aimed at protecting French nationals (i.e., citizens and corporations) from the alleged excesses of US discovery procedures.

The FBS restricts or prohibits the communication of documents or information relating to “economic, commercial, industrial, financial or technical matters” outside France, except under certain conditions:

- Article 1 provides that “[s]ubject to treaties or international agreements”, it is prohibited:

*“for any individual of French nationality or who usually resides on French territory and for any officer, representative, agent or employee of an entity having a head office or establishment in France to communicate **to foreign public authorities**, in writing, orally or by any other means, anywhere, documents or information relating to economic, commercial, industrial, financial or technical matters, **the communication of which is capable of harming the sovereignty, security or essential economic interests of France or contravening public policy**, specified by the administrative authorities as necessary”*

- Article 1 bis provides that “[s]ubject to any treaties or international agreements and the laws and regulations in force”, it is prohibited:

*“for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters **leading to the establishment of proof in view of foreign administrative or judicial proceedings or as a part of such proceedings”***

Infringement of the FBS constitutes a criminal offense, subject to imprisonment of up to six months and/or a fine of up to €18,000 for an individual and €90,000 for a company.

In addition, Article 2 of the FBS requires that the persons and corporations that receive a foreign discovery request that trespasses the prohibition set forth in the FBS inform “without delay” the “competent minister”. Until recently, [Decree No. 81-550 of May 12, 1981](#) specified that the competent minister was the Minister of Foreign Affairs, but also provided the possibility to inform the Minister of Justice, the Minister of Economy, or any minister that supervises the activity of the company that received the foreign discovery request.

However, the lack of systematic and effective enforcement of the FBS since its enactment as well as the relatively low sanctions led foreign courts, in particular US courts, to believe that the risk of criminal conviction in France was largely theoretical, and as such, to give little deference to the FBS defense raised by French parties when facing a discovery request. This resulted in a rather uncomfortable position for French parties subject to a foreign discovery request, as they are usually caught between “a rock and a hard place” when deciding whether to comply (i) with the foreign discovery request, and thus face potential sanctions in France under the FBS, or (ii) with the terms of the FBS, and thus face the adverse consequences in the foreign proceedings.

Additionally, many criticised the fact that French corporations are left without effective assistance from the relevant French authorities when dealing with such dilemma.

Under these circumstances, over the past few years, French authorities have shown genuine willingness to revive enforcement of the FBS, and various parliamentary reports (such as the famous “Gauvain Report”¹) have called for reform and modernisation of the French legislation.

What Are the Changes Introduced by the Decree and the Ministerial Order?

Both the Decree No. 2022-207 published on 18 February 2022 (the [Decree](#)) and the Ministerial Order (*arrêté*) enacted on 7 March 2022 (the [Ministerial Order](#)) relate to Article 2 of the FBS.

The Decree provides that:

- The competent minister for the purposes of Article 2 of the FBS is now the **Minister of Economy**, through its service specifically in charge of the national economic security policy, i.e., the “*Service de l’information stratégique et de la sécurité économique (SISSE)*”
- The Minister of Economy shall in turn inform the Minister of Foreign Affairs, the Minister of Justice, and, as the case may be, the competent minister who supervises the activity of the persons and/or the corporations at stake involved in the foreign proceedings
- The persons:
 - “subject to the prohibition to communicate the documents and information covered by Article 1 and 1 bis of the FBS”
 - inform the SISSE of
 - any request for such communication “issued by a foreign public authority or by anyone acting on its behalf or in order to answer its request”

Concretely, under the changes:

- The SISSE should be informed “without delay” after the receipt of such a request
- This information should be completed “as soon as possible” by a documentation file — the content of which is provided in the Ministerial Order and includes a non-exhaustive list of items:
 - The registration number with the Registry of Companies of the company that holds the documents and information requested
 - The organisation chart that permits the identification of the natural or legal persons that control the company which holds the documents or information requested, as well as the legal persons controlled by such company within the meaning of Article L. 233-3 of the French commercial code
 - A brief description of the activities carried out by the company that holds the documents or information requested, including in France and in the country related to the requesting party
 - The main French and foreign competitors of the company that holds the documents and the information requested
 - The reasons explaining the request for information issued by the requesting party to the company that holds the documents or information requested
 - The correspondence between the requesting party and the company that holds the documents or information requested
 - The contact details of a designated person within the company who holds the documents or information requested
- The SISSE should acknowledge receipt of the file and proceeds with its analysis, in coordination with the Minister of Justice, the Minister of Foreign Affairs, and any other competent ministry or authority
- Within one month of the receipt of the complete documentation file, the SISSE should issue an **opinion on the applicability of Articles 1 and 1-bis of the FBS**

Both the Decree and the Ministerial Order will enter into force on 1 April 2022.

What Are the Practical Impacts?

Although the publication of the Decree indicates a clear message from the French government of its intent to regain control over the enforcement of the FBS, it remains to be seen how enforcement will function in practice.

At the very least, these recent developments tend to clarify the overall process by creating a clear and “single-window” point of contact — the SISSE.

By introducing the possibility to obtain more “official” guidance on the enforcement of the FBS, in particular through the issuance of an opinion that will be “stamped” by the French Ministry of Economy, recipients of a document request likely will be better armed in their defense before foreign courts and authorities, to require that such request be made in line with the FBS.

However, some lingering questions remain:

- Will the SISSE monitor the evolution of the foreign proceedings?
- What happens in case a corporation does not inform the SISSE of the receipt of a request received in violation of the FBS?
- Alternatively, what happens in case a corporation informs the SISSE of such a request, but ultimately decides not to comply with the opinion issued by the SISSE?
- Will the SISSE be competent to issue an opinion if the request received in violation of the FBS is not “issued by a foreign public authority or by anyone acting on its behalf or in order to answer its request”?
- Could the SISSE decide to refer the case to the French public prosecutor in case of breach of the FBS?

Conscious of the need for additional guidance, the French Business Federation (MEDEF), together with the SISSE and the French Association of Private Enterprises (AFEP), published a [practical guide](#) aimed at helping companies to identify and classify the “documents or information relating to economic, commercial, industrial, financial or technical matters” that might fall within the scope of Article 1 of the FBS, as they are potentially “sensitive”.

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Endnotes

¹ This report was submitted by the French member of Parliament Raphaël Gauvain to the French Prime Minister on 26 June 2019.