Newsletter Blocking Statute – 31 July 2019

1. Law No. 68-678 of 26 July 1968 on the disclosure of documents and information of an economic, commercial, industrial, financial or technical nature to foreign individuals or legal entities (inappropriately referred to as the "blocking statute") aims *inter alia* to protect French companies that may be required to produce such documents in connection with foreign administrative or judicial proceedings by punishing any person who attempts to obtain or who collects information and documents outside the channels provided for this purpose by the international treaties and conventions on mutual legal assistance[1]. It is therefore more a reorientation law than a blocking law because its purpose is to encourage requests for disclosure of documents by foreign judicial and administrative authorities to be directed to their French counterparts, who will determine what action should be taken.

Under Article 1 of this law, *"subject to international treaties and agreements, any individual who holds French nationality or habitually resides in France and any manager, representative, agent or employee of a legal entity that has its registered office or an establishment in France is prohibited from disclosing, in writing, orally or in any other form, in any location, to foreign public authorities, documents or information of an economic, commercial, industrial, financial or technical nature, the disclosure of which may affect the sovereignty, security or essential economic interests of France, or public order."*

Article 1 *bis* of the same law prohibits, subject to the same reservations, any person *"from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purpose of gathering evidence in or in connection with foreign judicial or administrative proceedings."* Non-compliance with these provisions is punishable by six months' imprisonment and a fine of €18,000 for individuals and €90,000 for legal entities.

2. Initially limited to maritime trade, the scope of this law was extended by a law of 16 July 1980 in the specific economic context of the Cold War. The French legislator's stated objective at the time was to protect French economic actors from the upsurge in requests for information from foreign authorities, that were deemed abusive, by providing French companies with a *"legal excuse for refusing to provide information and documents that may be requested of them"* outside the mutual assistance procedures recognised by France. It was also the liberties taken in certain procedures used to search for evidence, such as pre-trial discovery, that motivated the intervention of the French legislator.

3. However, both the effectiveness and the efficiency of this law have been criticised.

Firstly, its effectiveness since this law is often presented as having led to only one criminal conviction, that of a French lawyer in connection with MAAF's acquisition of a US company, Executive Life, which resulted in a dispute with the California Insurance Commissioner, which that lawyer represented. The lawyer was fined €10,000 for having sought and requested *"information*

[1] Which, under Article 55 of the French Constitution, have supra legal value.

(...) on the circumstances under which the MAAF Board of Directors had adopted its decisions on the takeover of Executive Life", which was information *"of an economic, financial or commercial nature"* for the purpose of *"gathering evidence in foreign proceedings"* (Cass. crim., 12 December 2007, No. 07-83.228).

Secondly, its efficiency because certain foreign courts have deemed that its lack of effectiveness precludes it from being asserted as grounds to justify a refusal to disclose documents. For example, the US courts have held, applying the principle of the balance of interests that the comity test criteria, in particular the hardship criteria, were not met, thereby exposing companies that refused to comply to the risk of a conviction for contempt of court (United States Supreme Court, 15 June 1987, No. 85-1695, 482 U.S. 522).

4. However, this observation must be qualified, if only because the French commercial courts have also had the opportunity to apply the law of 16 July 1980 to block foreign companies' requests for the production of documents (Nanterre District Court, summary proceedings, 22 December 1993, No. 93-4436; Paris Comm. Court, 20 July 2005, JurisData No. 2005-288978; Nancy Court of Appeal, 4 June 2014, No. 1335/4). In addition, the US courts have recently held that The Hague Convention prevailed over the rules governing US discovery proceedings [Activision Blizzard, Inc. Stockholder litigation, Cons. C.A. No. 8885-VLC (Del. Ch. Feb. 21, 2014); see also, a case where a US court, on the basis of the Hague Convention, dismissed an application to compel a French defendant to appear in the United States of America: Denman v. Terrien, 2002 WL 1824941 (Cal. App. 2nd D. 2002)].

5. Above all, the French parliament has reaffirmed the importance it attaches to compliance with the French "blocking statute" through Article 3(5) of Law No. 2016-1691 of 9 December 2016 on transparency, combating corruption and the modernisation of economic life, known as the "Sapin 2 Law", by conferring on the French Anti-Corruption Agency the task of ensuring compliance with the statute *"in the **context of the enforcement of decisions of foreign authorities** requiring a company whose registered office is located in France to **adopt a procedure to make its internal procedures for preventing and detecting corruption compliant**".*

6. More recently, the French authorities have reaffirmed that the Strategic Information and Economic Security Service ("SISSE") of the Ministry of Economy is in all other areas responsible for ensuring that persons subject to the French "blocking statute" apply it (Article 3 of Decree No. 2019-206 of 20 March 2019 on the governance of economic security policy).

7. Finally, the French Deputy Raphaël Gauvain has been tasked with studying ways to strengthen the provisions of the French "blocking statute". His report, entitled *"Restoring the sovereignty of France and Europe and protecting our companies from laws and measures with extraterritorial scope"*, was published on 26 June 2019.

The main recommendations of this report are the following: (i) the prison sentence for individuals would be increased from six months to **two years** and the fine from €18,000 to **€2 million**. The maximum fine for legal entities would be increased to **€10 million**; (ii) the obligation for French companies to report to the SISSE requests for information made in connection with foreign

proceedings would henceforth be subject to a six-month prison sentence and a fine of €50,000 in the event of non-compliance.

If the report's recommendations were followed by the French legislator – which would lead the SISSE to review whether or not the documents covered by the request of the requesting foreign authority should be disclosed – it would be likely to result in the SISSE applying Article 40 of the French Code of Criminal Procedure and, consequently, reporting potentially criminal acts brought to its attention to the Prosecutor of the Republic, with the risk of parallel criminal proceedings being initiated in France.

8. The Gauvain report also recommends the establishment of rules providing for the systematic intervention of the French authorities in the event of monitoring ordered by foreign authorities against French companies. The aim would be for said French authorities to contribute to defining the scope of the monitoring, to participate in the choice of the monitor and the various consulting firms involved in the investigations and to receive the monitor's reports, all under the threat of penalties.

9. The last key measure of this report apparently would be the creation of an administrative penalty, similar to that provided for in the General Data Protection Regulation ("GDPR"), in the event electronic communication services providers disclose digital information and data about French legal entities to foreign judicial or administrative authorities outside mutual assistance channels. As the discussions stand, this penalty, which is nothing more than a response to the US "Cloud Act" and mainly targets the GAFAs, could consist of a fine of up to €20 million or up to 4% of the offender's annual worldwide revenue.

10. In the event the "blocking statute" would be amended to reflect the recommendations of the aforementioned report, it is likely that the French authorities would be increasingly severe in the event of non-compliance with its provisions.

Moreover, it is not out of the question that all persons who have contributed to the disclosure of information, documents and elements outside the framework established by the law may be implicated, in France, as perpetrators or accomplices. In such cases, it would be difficult for them to attempt to avoid liability by asserting a legal order or the command of a legitimate authority, which are grounds for avoiding criminal liability under French law (Art. 122-4 of the French Criminal Code), because the case law holds that the order of a foreign law is not a defence if the offence prosecuted has been committed in France (Cass. crim., 27 June 1973, Bull. crim., No. 305).

Finally, strengthening the law in this way could encourage a large number of individuals, who until now have seen little point in complaining about violations of the law, to report disclosures made in breach of the law, particularly in the event of a conflict of interest with the company that employs them if it cooperates with foreign authorities in disregard of the foregoing.