Policing Your Own *Jardin* – France Signals Eagerness to Take Control of Its White Collar Enforcement

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In light of well-publicized U.S. enforcement actions against French companies (Alstom, Total, Technip, Alcatel, BNP), the French government asked MP Raphaël Gauvain to consider measures to protect French companies faced with foreign extraterritorial judicial and administrative procedures. His long-awaited report was published on June 26, 2019. Entitled "*Restoring French and European Sovereignty and protecting our companies from extraterritorial laws and measures*," this 100-page document points out the lack of effective legal tools available to French companies faced with extraterritorial proceedings. Drawing on this, the report makes several recommendations.

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Giving Teeth to the French Blocking Statute. The 1968 law often referred to as the "Blocking Statute" prohibits French citizens and residents of France from disclosing information that would harm the sovereignty, security or essential economic interests of France or contravene public policy; and from requesting, searching or disclosing commercial information for use in foreign judicial or administrative proceedings, unless this is accomplished under an existing treaty (such as the 1970 Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or the U.S.-France Mutual Legal Assistance Treaty). Its moniker notwithstanding, the purpose of the provision is in fact not so much to "block" transmission of data but rather to insure that transmission of information goes through formal channels. A breach of such prohibitions is punishable by up to six months' imprisonment and/or a EUR 18,000 fine (EUR 90,000 for legal entities).

This Blocking Statute was explicitly adopted in reaction to the practices of U.S. lawyers coming to France to conduct pretrial discovery for use in U.S. proceedings. It has however almost never been enforced. As it stands, the only decision is a 2007 French Cassation Court ruling imposing a EUR 10,000 criminal fine against a French lawyer. Because of this lack of enforcement history, U.S. and UK courts tend not to see the Blocking Statute as a valid reason not to comply with domestic subpoenas, production orders, or discovery or disclosure requirements without recourse to burdensome MLA channels. As a result, the Blocking Statute creates a host of difficulties for French companies, requiring them to balance the immediate risk of noncompliance with their U.S. or UK obligations with the often theoretical risk of violating the Blocking Statute.

Perhaps unsurprisingly, French companies tend to take their chances and comply with the U.S. or UK requirements.

As a consequence, French authorities have a sense they are losing their grip on the flow of potentially sensitive information transmitted by French corporate champions. The Gauvain report thus recommends strengthening the Blocking Statute, notably by increasing the penalties for violations to a maximum of EUR 2 million (EUR 10 million for legal entities) and two years' imprisonment. The report further proposes to strengthen the already-existing but unenforceable obligation to report requests for documents by foreign authorities or opposing parties by designating an already-existing government body (the Economic Strategic Information and Security Department, or "SISSE", of the Ministry of Economy and Finance) to receive such reports. In addition, the report suggests introducing a criminal offence punishable by up to six months' imprisonment and/or a EUR 50,000 fine (EUR 250,000 for legal entities) for failing to report a request to the SISSE.

If these proposals are ever implemented, it would remain to be seen whether foreign courts would give more consideration to the Blocking Statute "excuse." In that respect, the level and seriousness of French enforcement action would also certainly be a key factor.

Introducing In-House Privilege. According to the report, France is the only G7 country not recognizing in-house counsel advice as being privileged. The report argues that this places French companies at a disadvantage compared to their main competitors in the context of, in particular, U.S. enforcement action. The current workaround is for French companies to hire U.S. or UK in-house lawyers or to outsource their legal departments in other jurisdictions.

The Gauvain report thus recommends protecting all internal communications of in-house counsel amounting to legal advice, "*including legal consultations concerning the preparation or conduct of the company's defense in legal proceedings*." In-house counsel would be enrolled at the Bar on an ad hoc list and thus be subject to specific ethical obligations, although they would not enjoy rights of audience before courts. As is already the case for external counsel, legal advice provided with the intent to commit or enable an offence would not be protected.

The report argues that in-house privilege would likely be respected by U.S. authorities as it mirrors the protection available under U.S. law and because French in-house counsel would be members of the Bar.

Protecting Companies' Data against the Cloud Act. According to the report, the Cloud Act would be a threat for the nonpersonal data of French companies. The report

explains that the Cloud Act allows U.S. enforcement authorities to compel U.S.-based data hosting companies, via warrant or subpoena, to provide data stored on their servers anywhere in the world. It goes on to say that France is ill-equipped to protect data of legal entities since the GDPR only applies to personal data and because the Blocking Statute does not cover the transfer of such data in all circumstances and, in any case, with too little deterrence for hosting companies.

The report therefore recommends the enactment of a new law that would forbid hosting companies from transmitting data from French companies other than pursuant to international agreements or treaties. Infringements would result in administrative fines mirroring those for violating the GDPR—up to four percent of annual global revenue or EUR 20 million, whichever is higher.

Upgrading the French-Style DPA. The report also recommends expanding the use of the French-style deferred prosecution agreement mechanism (known as "CJIP"), which the report characterizes as an effective tool to resolve cases of financial misconduct and help French authorities deal with French companies also targeted by foreign authorities.

The CJIP is available to resolve investigations into a limited number of offences, principally corruption, influence peddling, tax fraud and the laundering of the proceeds of tax fraud. The report recommends extending the scope of the CJIP to misuse of corporate assets and money laundering. The report also recommends that the legislature consider the possibility of regulating internal investigations including by setting out the conditions for appointing an internal investigator; the duties of this investigator and of the company during an investigation; the powers of prosecutors supervising internal investigations; the status of documents and information collected during an investigation; and the situation of individual defendants.

Other Recommendations. The Gauvain report includes many other recommendations such as: clarifying what French "essential economical interest" means in order to better identify what information should be covered by the French Blocking Statute; turning to the International Court of Justice and the OECD to clarify international law on the issue of the extraterritoriality, particularly in relation to unilateral sanction regimes; upgrading the EU Blocking Regulation to make it as protective as the proposed reforms of the French Blocking Statute; and loosening France's corporate criminal liability regime to facilitate prosecution of legal entities.

The Gauvain report reflects a lingering feeling in France and a number of other EU countries that action should be taken to counteract a perceived propensity of U.S. authorities to use their laws to target non-U.S. companies. The express objective of the proposed reforms is for French authorities to take control over supervision and enforcement of the conduct of French and other companies active in France as robustly

as U.S. authorities. The EUR 3.7 billion fine imposed against UBS AG by the Paris criminal court in February 2019 is an example of this trend.

The report calls for a parliamentary committee to use its proposals as a basis for reforming the law. In a speech on June 28, 2019, French Prime Minister Edouard Philippe said the protection of in-house counsel's internal legal advice would be an effective tool to protect French companies, adding that he is ready to work on this specific issue.

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With a team of white-collar lawyers based in Paris, we are well positioned to assist clients on these and other issues. Please do not hesitate to contact us with any questions.

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