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English Court of Appeal requires French defendants to comply with disclosure orders despite the French "blocking statute"

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The existence in several countries of "blocking statutes", which prohibit the provision of economic information to foreign authorities or courts (or require prior authorization to be obtained before doing so), present a challenge to those managing international litigation and multijurisdictional inquiries. Issues relating to blocking statutes have emerged in an increasing number of international proceedings involving investigative measures, especially in cartels and white collar cases and in actions relating to private damages. A recent Court of Appeal judgment has provided valuable insight to companies that are potentially exposed to such proceedings. The Court imposed that the defendants, most of which were French companies, comply with the order to provide documents, stating that the "French blocking statute" could not be invoked in defense. However an application to the Supreme Court of England & Wales for permission to appeal this decision is pending, and therefore this may not be the end of the story.

L'existence, dans plusieurs pays, de «lois de blocage» interdisant la communication d'informations économiques ou commerciales à des autorités ou des juridictions étrangères, représente un enjeu pour toutes les entreprises confrontées à des litiges internationaux ou à des enquêtes ouvertes dans plusieurs juridictions. Les problématiques soulevées par les lois de blocage apparaissent dans un nombre croissant de procédures internationales, particulièrement en matière d'antitrust, de droit pénal des affaires ou dans des demandes en dommages et intérêts. Un arrêt récent de Cour d'Appel au Royaume Uni apporte un éclairage intéressant sur les obligations qui s'imposent aux entreprises exposées à de telles procédures. La cour a écarté l'application de la loi de blocage française et décidé que les défendeurs, qui étaient essentiellement des entreprises hexagonales, devaient se conformer aux injonctions de produire des documents. Cette décision a cependant fait l'objet d'un pourvoi.

On 22 October 2013, the Court of Appeal of England and Wales ('**CoA**') ruled that the possibility of prosecution under a French blocking statute (the '**Blocking Statute**') would not provide French defendants with a defence against an English court order to provide information or disclose documents. The CoA held that European Council Regulation 1206/2001 (the '**Regulation on Taking of Evidence**'), which governs the direct taking of evidence in other Member States, did not apply to the disclosure orders. According to the CoA, the trial judges were not precluded from making disclosure orders that would potentially require a party to breach a foreign law, nor did they err in the exercise of their discretion in doing so. A merely theoretical risk of prosecution in France was not enough to preclude an order for disclosure.

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Notably, this solution was in part adopted on the basis that complying with the Blocking Statute would lead to an infringement of the laws of the European Union ('**EU**'). The CoA considered that, among other things, compliance with the Blocking Statute would have jeopardized the primacy of European law; and by implication, the application of the Blocking Statute would potentially have resulted in France failing to meet its obligations under the Treaty on the Functioning of the European Union ('**TFEU**').

Significance

This decision means that French defendants can be subjected to English court orders for disclosure notwithstanding the existence of the Blocking Statute. The decision also limits the scope of the Regulation on Taking of Evidence, as the CoA held that the Regulation does not remove or restrict the ability of the English courts to use their own procedure for ordering disclosure of documents in proceedings before them. The CoA held that the Regulation on Taking of Evidence need only be used where the orders sought are for the taking or seizing of property in another Member State requiring the involvement of a judicial or public official of that Member State.

The Blocking Statute

The Blocking Statute prohibits the "requesting, seeking or disclosure" of any written, oral or other form of "documents or information of an economic, commercial, industrial, financial or technical nature", where such documents or information are intended to be used as evidence in foreign proceedings. The penalty for contravention is up to six months' imprisonment and/or a fine of up to €18,000 (or €90,000 for legal entities).

Introduced in 1968 and amended in 1980, the Blocking Statute is seen as a response to perceived "extravagant excesses of discovery processes" in America. There has been only one known case in France where a sanction has been imposed on the basis of the Blocking Statute, namely *Christopher X* in 2007 (a case involving dishonest conduct by a French lawyer who was not acting pursuant to an order of a foreign court). Yet, despite having only been applied in one case, it does not follow that the Blocking Statute has no practical relevance; indeed, it is being invoked by several companies that are subject to investigations, and is complied with by several non-French authorities (although other authorities and courts have already rejected the invocation of the Blocking Statute as a basis for refusing to comply with their orders).

First Instance Proceedings

At first instance the French defendant companies in two related matters (the '**French Companies**') (notably, not all of the defendant companies were French) claimed that the orders for disclosure would force them to violate the Blocking Statute and would therefore expose them to a risk of criminal prosecution in France. The French Companies also argued that they could only be required to respond to requests for information or disclosure orders under the procedure in the Regulation on Taking of Evidence.

The court ordered the French Companies to make the requested disclosure without going through the process set out in the Regulation on Taking of Evidence (which it described as potentially inapplicable, and associated with extra time and expense). The court also looked at the risk of prosecution under the Blocking Statute and took into consideration the fact that non-compliance with it is rarely punished in France.

Before the CoA

The defendants reiterated their earlier submissions, and added the following points:

- The Regulation on Taking of Evidence applies to the taking of information in the territory of another Member State where this would impact on the sovereignty of that Member State.[1] Under civil law, a disclosure order falls within the concept of the taking of evidence, and would impact French sovereignty as it would contravene the French Blocking Statute. The Blocking Statute is subject to French duties under international treaties and regulations, and so, as France is bound by the Regulation, the Regulation procedure covers how a party might access evidence in France without breaching the Blocking Statute.
- Any discretion vested in the English court was misused, as the first instance judges failed to properly assess and take into account the practical risk faced by the French companies.

The claimants/respondents to these matters likewise adhered to their earlier positions, and further added:

- The Blocking Statute was limited to protecting French nationals from procedural abuse by foreign tribunals and had no application to an order of an English court for disclosure of further information.
- If the Blocking Statute applied as the French companies argued, it would be inconsistent with France's obligations under the TFEU. Article 18 of the TFEU prohibits discriminatory laws that treat one's own nationals differently to those of other Member States as the Blocking Statute would do, and Article 4.3 of the TFEU requires Member States to assist each other in carrying out tasks which flow from EU law.

1 Case C-332/11 *ProRail BV v Xpedys NV* (CJEU, 12 February 2013).

- All matters of procedure must be governed by the law of the jurisdiction where the claim is being heard, in this case the laws of England and Wales. English law recognises that its court orders may expose parties to consequences under the law of foreign states but it does not give primacy to those foreign laws.

Conclusions of the CoA

The arguments came down to one substantive point: whether it had been mandatory for the trial judges to use the Regulation on Taking of Evidence to obtain the requested information or disclosure.

The CoA held that it was not necessary to use the Regulation on Taking of Evidence because:

1. the orders were for the provision of further information and for disclosure;
2. the orders were of a procedural nature and governed by the laws of England and Wales – so even if the orders did expose the French defendants to criminal sanction in France, this was no defence; and
3. English courts have discretion to make such orders depending on the circumstances before them and the judges at first instance did not err in the exercise of their discretion to make the orders, given
    a. the cumbersome and potentially fruitless alternative of proceeding with a court-to-court' request under the Regulation on Taking of Evidence,
    b. the fact that only one prosecution under the Blocking Statute has taken place since its making, and
    c. the principle that French law must give way to the supremacy of European law, which would make it highly unlikely that French prosecutors would bring any action against a French company for making disclosures in accordance with an English court order, as such an action could potentially be deemed to oppose TFEU principles of non-discrimination and the duty to cooperate, as well as EU controls over anti-competitive behaviour.

The CoA also held that the Regulation on Taking of Evidence is not needed where the court of a Member State is able to order disclosure from a party to proceedings before it, as the purpose of the Regulation is to improve and accelerate the procedures for taking evidence for use in civil and commercial proceedings in another Member State. The Regulation should not be used to limit ways by which to do that.

By narrowing the use of the Regulation on Taking of Evidence to situations where the orders sought are for the taking or seizing of property in another Member State and a judicial or public official of that Member State will need to be involved, the CoA has adopted a highly restrictive interpretation of the requirements of the Regulation on Taking of Evidence.

The impact of the judgment in other jurisdictions

The defendants have applied for permission to appeal this ruling to the Supreme Court. It is possible that, ultimately, there may be a preliminary question before the Court of Justice of the European Union ('**CJEU**') in respect of this issue. Were the CJEU to rule on this it would help to ensure a uniform application of the Regulation on Taking of Evidence and inform the approach to legislation similar to the Blocking Statute in other EU countries.

The CoA decision does not seem to be directly transferable to non-EU countries. Indeed, the fact that the dispute in question was confined to the territory of the EU seems to have played an important role in the CoA's decision due to the application of the TFEU. Significantly, EU law may not be invoked outside the EU to require requests for information to be made pursuant to procedures set out in international treaties or agreements.

For example, certain agreements have been signed and conventions entered into by France and Switzerland which facilitate the disclosure of documents between the two countries. One such agreement is the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 ('**ECMR**'), as supplemented by the Agreement of Bern of 1 May 2000. This agreement governs mutual assistance in criminal matters between France and Switzerland. Another is the Hague Convention of 18 March 1970 on the 'Taking of Evidence Abroad in Civil or Commercial Matters' ('**Hague Convention**'). This Convention, to which France and Switzerland, among many other countries, are Contracting States enables parties to a civil or commercial dispute before a court of a Contracting State to carry out investigative measures in the territory of another Contracting State. Both agreements simplify and accelerate the procedure for judicial cooperation between France and Switzerland.

Both the ECMR and the Hague Convention require that certain procedures are followed when seeking the disclosure of documents, information or evidence, as the case may be, and so long as these procedures are adhered to, the Blocking Statute does not preclude such disclosure.

Another example is the treaty of mutual assistance in criminal matters ('**MLAT**') between France and the United States ('**US**'), signed in December 1998, which governs the disclosure of documents and information and has been designed to enable the gathering and sharing of information in an effort to enforce public or criminal laws. Notably, the US is also a Contracting State under the Hague Convention.

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Despite the existence of the MLAT and Hague Convention, Federal authorities in the US have sometimes avoided following the procedures set out therein by, for example, directly ordering foreign companies to produce the required documents or by sending requests for disclosure of documents to US branches of foreign companies.

Similarly, US civil and criminal courts have, in a number of cases, refused to acknowledge that the Blocking Statute could potentially jeopardize measures of discovery[2]. One of the primary reasons for avoiding this law is the fact that non-compliance is rarely punished in France.

Given that both Switzerland and the US are not members of the EU, the TFEU notably would not apply in cases where, for instance, Swiss or US courts were to hand down similar disclosure orders to those of the English courts. As such, Swiss and US (or any other non-EU country's) courts would have to follow procedures set out in the relevant agreements or conventions with France in requesting disclosure of information from French courts or from within French territory so as to comply with, or prevent the application of, the Blocking Statute. However, such courts could raise arguments similar to those discussed by the CoA; namely, that violation of the Blocking Statute has rarely been sanctioned in France.

2 Société Nationale Industrielle Aérospatiale c. US District Court, 482 U.S 522, 15 juin 1987 ; Bodner v. Banque Paribas, 202 FRD 370 (EDNY 2000) et Strauss v. Crédit Lyonnais SA, 242 FRD 1999 (EDNY 2007).

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