

White Collar Defense and Investigations



If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Ryan D. Junck

Partner / London
44.20.7519.7006
ryan.junck@skadden.com

Margot Sève

European Counsel / Paris
33.1.55.27.11.51
margot.seve@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

French Blocking Statute: SISSE, PNF, DOJ and French Ministry of Justice Representatives Draw Early Lessons From the 2022 Reform

Please see [the French version of this client alert](#) for the authoritative summaries of the speakers' remarks. What follows is an English translation of those summaries.

Representatives from the French and U.S. governments, judiciary and private sector discussed early lessons from the 2022 reform of the so-called French “blocking statute” at a Skadden roundtable in Paris on 27 November 2023.

The FBS prohibits, on one hand, the communication to foreign authorities of sensitive information that could harm the interests of the French state (Article 1) and, on the other, the production or collection of information with a view to gather evidence in the context of foreign proceedings (civil or criminal) outside applicable international channels (Article 1 bis).

In 2022, the legal framework of the FBS was strengthened to clarify the reporting process to French authorities that French companies must follow when facing issues of information transfer to foreign authorities. The reform confirmed France’s intention to ensure that French companies and foreign authorities comply with the FBS. Eighteen months after the reform, the panelists — key actors in the framework in several respects — gathered to assess its impact on FBS compliance and enforcement.

The speakers included:

- **Jean-François Bohnert** / Head of the Parquet National Financier (PNF)
- **Joffrey Célestin-Urbain** / Head of the Strategic Information and Economic Security Service (SISSE) / French Ministry of Economy, Finances, and Industrial and Digital Sovereignty
- **Cécile Di Meglio** / Head of Litigation and Investigations / Société Générale
- **Puneet Kakkar** / Justice Attaché to France and Monaco / U.S. Department of Justice (DOJ)
- **Etienne Perrin** / Head of the Office of Economic, Financial and Social Law, Environment and Public Health / Criminal Division (DACG) of the French Ministry of Justice

French Blocking Statute: SISSE, PNF, DOJ and French Ministry of Justice Representatives Draw Early Lessons From the 2022 Reform

- **Ryan Junck** / Head of Skadden's European Litigation/Controversy Practices / Skadden, London
- **Margot Sève** / European Counsel, White Collar Defense and Investigations / Skadden, Paris

The speakers addressed:

- Compliance with the FBS by French companies and foreign authorities since the 2022 reform.
- The FBS' criminal framework.
- The reform's impact on companies and U.S./France cooperation.
- The role of the PNF in the FBS' enforcement.

Below you will find:

- A summary of the speakers' comments, in the order they were delivered. As stated above, please see [the French version of this client alert](#) for the authoritative summaries of the speakers' remarks. What follows is an English translation of those summaries.
- An infographic on the FBS' applicability, provided by the SISSE.
- A link to the full transcript of the speakers' comments (in French).

Background

On 18 February and 7 March 2022, the French government reformed the FBS framework to clarify the procedure that French companies must comply with when facing issues of information transfer to foreign authorities. French companies are required to report foreign information requests to a single point of contact: the French Strategic Information and Economic Security Service (SISSE). The SISSE serves as liaison between the company and the various ministries involved and can produce an opinion about the applicability of the FBS to the requested information that companies can share with foreign authorities. The reform did not modify the FBS' text or penalties.

Compliance With the FBS by French Companies and Foreign Authorities Since the Reform

Joffrey Célestin-Urbain, chief of the SISSE, reported that the initial outcomes of the FBS reform have surpassed expectations. The SISSE has observed a significant increase in the number of company referrals since the reform (with a fivefold rise compared to the previous period). Looking ahead, the SISSE believes there is still a large pool of transactions likely to pass through the FBS channels. The SISSE also noted that the cases received are diverse in nature (civil proceedings: 42%; criminal: 30%; administrative: 28%) and geographical origin (North America: 52%; EU/UK:

30%; Asia: 7%). The SISSE attributes this success to the system's reputation, the trust it has instilled among companies, the fear of sanctions in the event of non-notification and the efficiency of the French administration. On this last point, the SISSE noted that the average time for delivering an opinion from the ministerial college was 17 days on average (nearly a month for Article 1 and five days for Article 1 bis).

The SISSE also observed that, in 95% of cases, the FBS was complied with by companies that received an opinion from the department, as well as by foreign parties with whom these opinions were shared. The SISSE cited three American and English decisions as representative of this 95% of cases. It therefore believes that compliance with the FBS does not undermine French companies' cooperative relationships with foreign countries.

Recognizing that the sensitivity of judges on these issues remains variable around the world, the SISSE invited foreign authorities to look not at the number or amount of criminal sanctions, but at the FBS framework's evolving track record. Regarding criminal enforcement, the SISSE emphasized that, when a violation of the FBS is found, the SISSE systematically reports it to prosecutors, and that a lack of publicized cases should not be misconstrued as an absence of such cases altogether.

The SISSE continues to refine its doctrine on various FBS-related subjects, such as the applicability of the FBS, as summarized in the infographic at the conclusion of this alert.

The Criminal Framework of the FBS

Etienne Perrin, head of the Office of Economic, Financial and Social Law, Environment and Public Health of the Criminal Division (DACG) of the French Ministry of Justice, provided an overview of the ministry's role in the FBS, as well as the statute's criminal framework.

On the first issue, the DACG explained that the ministry plays a role in the inter-administrative exchanges mentioned by the SISSE. The DACG is also engaged in criminal proceedings when assisting courts in reviewing requests for international criminal assistance.

In its overview of the FBS' criminal framework, the DACG emphasized that the statute is a criminal law that is part of the broader category of offences relating to the nation's fundamental interests. According to the DACG, the constituent elements of an FBS violation are assessed broadly, both with regard to the offender and the requesting party, and with regard to the nature and form of transmission of the information covered by the law. The DACG recalled that the moral element in criminal matters is awareness of violating the law, which is a highly general concept that creates a wide range of possible applications of the FBS.

French Blocking Statute: SISSE, PNF, DOJ and French Ministry of Justice Representatives Draw Early Lessons From the 2022 Reform

The DACG explained that territorial jurisdiction for an FBS matter is determined in particular by the location where the offence occurred, such that any French prosecutor with nationwide jurisdiction can handle an FBS violation. The DACG noted that where the violation of the FBS relates to more serious and complex offences, cases may be handled by specialized prosecutors, such as the PNF.

Regarding the circumstances of disclosing the offence, the DACG observed that no prior complaint is required. Proceedings may be initiated by the public prosecutor through various means. For example, a prosecutor may open an investigation upon discovering an FBS violation when receiving a request for international assistance.

The DACG concluded its presentation by noting that convictions for FBS violations appear on the criminal record of the individual or legal entity that committed the offence, rendering the entity ineligible to participate in certain public procurements contracts. Lastly, the DACG stated that discussions are underway regarding the penalty amounts for violations, given the interests at stake.

Impact of the Reform From the Company Perspective

Cécile Di Meglio, head of litigation and investigations at Société Générale, highlighted the reform's positive impacts. First, the reform reminds foreign authorities of the French government's commitment to ensuring compliance with the FBS. On Article 1, Ms. Di Meglio commended how the reform allows companies to assess the sensitivity of data to the French state, with the options of seeking help from the SISSE and referring to guidance published by the French Association of Private Enterprises (AFEP) and the Movement of the Enterprises of France (MEDEF) if needed. Ms. Di Meglio explained that Société Générale has identified bank documents that fall under Article 1, as they hold strategic importance, and systematically refuses to communicate them to foreign regulators outside the channels of mutual assistance.

On Article 1 bis, and more generally, Ms. Di Meglio expressed her appreciation for the responsiveness of the SISSE, which has delivered opinions within shorter timeframes than announced when the reform was introduced. The SISSE's opinion often helps the bank convince foreign authorities to pursue their requests through mutual assistance channels. Ms. Di Meglio stressed that the SISSE's ability to contact foreign authorities directly is also a step in the right direction.

According to Ms. Di Meglio, the use of the FBS is no longer, or is less frequently, perceived by foreign authorities as an obstruction or sign of non-cooperation. She also noted that, in cases that can be prosecuted both in France and in a foreign country, the increased use of international assistance in criminal matters by foreign authorities is likely to push French companies to engage in a dialogue with French prosecutors at an earlier stage than before.

Ms. Di Meglio also identified areas of the FBS framework that would benefit from improvement or clarification. First, there remains a lack of case law and conviction records about FBS violations. Second, uncertainties linger about the FBS' territorial scope. Lastly, there are still areas of the law where no international treaties exist; in these situations, French companies continue facing conflicts of laws. Ms. Di Meglio emphasized that French companies should not have to face criminal risks because no means exist to defend themselves abroad while simultaneously complying with the FBS.

The Impact of the Reform on US/France Cooperation

According to **Puneet Kakkar**, justice attaché to France and Monaco, the U.S./French cooperation generally functions effectively. The 350 mutual assistance cases that Mr. Kakkar currently oversees demonstrate a mutual commitment to cooperation between the two countries, which share common objectives. Mr. Kakkar cited three cases that exemplify decisive Franco-American cooperation.

Despite the positive cooperation, Mr. Kakkar noted that authorities may sometimes come up against national sovereign laws that slow down their investigations. In the United States, the requirement, for example, to demonstrate a "probable cause" in order to obtain evidence, which has no equivalent in France, may hinder French international investigations. U.S. magistrates, however, account for this legal difference and collaborate with their counterparts to allow French investigations to move forward.

Conversely, in France, the FBS can also impact international cases in two respects. First, the various steps for compliance, particularly concerning data filtering, can slow down procedures. Yet, some international cases, such as ransomware or terrorist threat cases, require a rapid response from each country. Second, a delayed execution can impact the cases in which French companies wish to cooperate with a U.S. investigation by disclosing relevant information to the DOJ. In September 2022, the DOJ specified that disclosures must meet specific criteria to be satisfactory, including by providing fresh information. If the information takes too long to reach the U.S. authorities, they can obtain it by other means, impacting the cooperation of French companies. Mr. Kakkar noted, however, that a sustained dialogue between all stakeholders can resolve these difficulties, concluding with an invitation to engage in such dialogue.

The PNF's Role in the Enforcement of the FBS

Jean-François Bohnert, head of the Parquet National Financier, explained the PNF's role in enforcement of the FBS. First, the PNF plays a "passive" role when it receives requests for international criminal assistance. In this capacity, the PNF (and the investigative services to which such requests are delegated) verifies the requests' compliance with the FBS by working, where appropriate, with the

French Blocking Statute: SISSE, PNF, DOJ and French Ministry of Justice Representatives Draw Early Lessons From the 2022 Reform

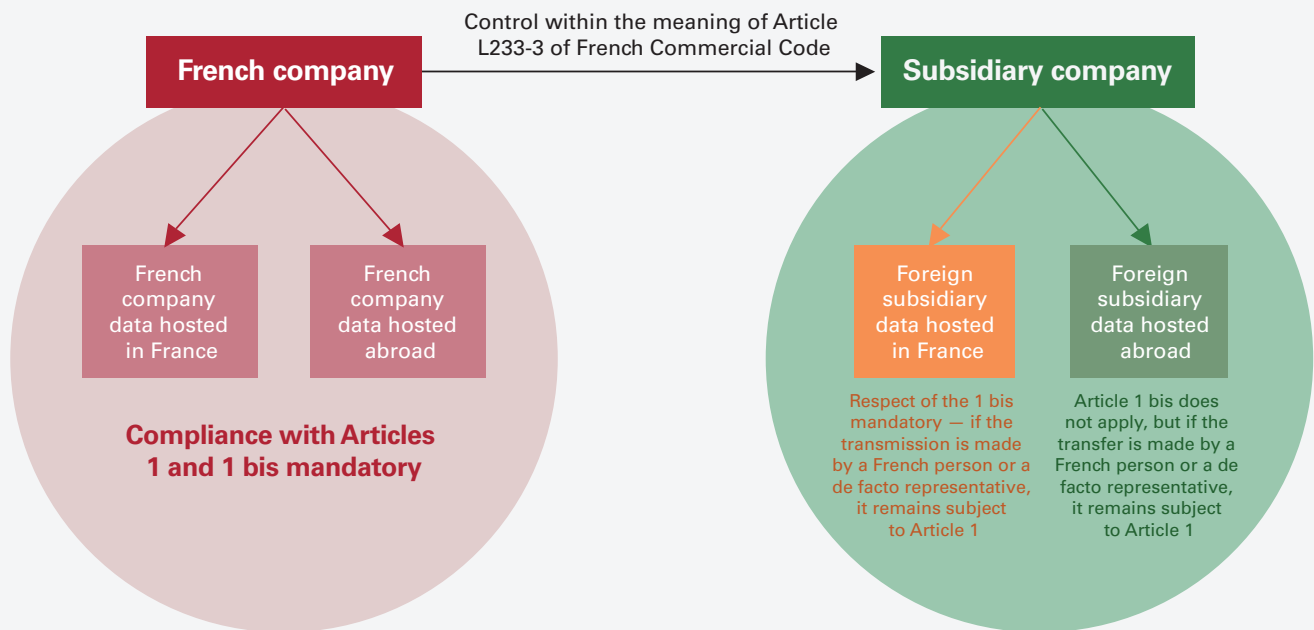
DACG. The PNF noted that, in the past 10 years, it has processed about 285 requests for international criminal assistance from foreign authorities. The PNF found FBS issues in several cases, which it referred to the central authority.

Second, the PNF could play a more active FBS enforcement role if its jurisdiction were extended to cover such offences, in addition to its current authority over corruption, tax evasion, market abuse

and anti-competitive offences. Currently, as noted by the DACG, the PNF can only pursue FBS breaches if they are prosecuted in connection with offences falling within its existing jurisdiction. However, if the Ministry of Justice proposed it and Parliament approved, the PNF could eventually obtain concurrent or exclusive jurisdiction to independently prosecute FBS violations.

Read [the full transcript of the speakers' comments](#) (in French).

Compliance With the 1968 Law



Source: Strategic Information and Economic Security Service of the French Ministry of Economy, Finances, and Industrial and Digital Sovereignty.


MINISTÈRE
DE L'ÉCONOMIE,
DES FINANCES
ET DE LA SOUVERAINETÉ
INDUSTRIELLE ET NUMÉRIQUE
*Liberté
Égalité
Fraternité*