

OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

FRANCE

1. Sources of Law

The EU Trade Secret Directive was implemented in France in 2018 through *loi n° 2018-670 du 30 juillet 2018* relative à la protection du secret des affaires, and by a decision of the *Conseil d'Etat (décret n°2018-1126 du 11 décembre 2018 relatif à la protection du secret des affaires)* on the procedural aspects. Specifically, a new Title “Title V Trade secret protection” was added under Book I of the *Code de commerce*, the French Commercial Code (FCC).

In addition, the French Labor Code contains provisions on criminal remedies in case of divulgation of manufacturing secrets by employee’s Industrial espionage. Accessing to automated data processing systems and other offenses are penalized by the French Criminal Code.¹

2. Definition of a trade secret

According to Article L. 151-1 FCC,² a trade secret is defined as information, which meets all the following requirements:

- It is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- It has commercial value, actual or potential, due to its secret nature; and
- It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

It is noted that this definition of a trade secret is closely aligned with the definition according to Article 2, par. 1 of the EU Trade Secret Directive.

3. Scope of trade secret protection

Article L151-2 FCC defines a legitimate holder of a trade secret as someone who has lawful control of it. According to Article L151-3 FCC, lawful means of acquisition of a trade secret are:

- an independent discovery or creation;
- the observation, study, dismantling or testing of a product or object that has been made available to the public or that is lawfully in the possession of the person acquiring the information, unless a contractual stipulation prohibits or limits the acquisition of the secret.

¹ This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Gougé, Emmanuel and Truchot-Bothner, Anne-Celine, *The Trade Secrets Directive — France* (July 15, 2019). *les Nouvelles - Journal of the Licensing Executives Society*, Volume LIV No. 3, September 2019, Available at SSRN: <https://ssrn.com/abstract=3420351>, François-Xavier Mirzai in *Trade Secrets throughout the World* (Jager *et al.*), 2023, Chapter 14 France.

² Article L. 151-1 Code de Commerce «*De l'information protégée est protégée au titre du secret des affaires toute information répondant aux critères suivants: 1 Elle n'est pas, en elle-même ou dans la configuration et l'assemblage exacts de ses éléments, généralement connue ou aisément accessible pour les personnes familières de ce type d'informations en raison de leur secteur d'activité; 2 Elle revêt une valeur commerciale, effective ou potentielle, du fait de son caractère secret; 3 Elle fait l'objet de la part de son détenteur légitime de mesures de protection raisonnables, compte tenu des circonstances, pour en conserver le caractère secret.*».

Prohibited acts are defined in Articles L. 151-4 to L. 151-6 FCC. The acquisition of a trade secret shall be unlawful if it is carried out without the consent of its lawful holder and if it results:

- from unauthorized access to any document, object, material, substance or digital file that contains the secret or from which it may be deduced, or from unauthorized appropriation or copying of such items; or
- from any other conduct considered, in the light of the circumstances, to be unfair and contrary to commercial practice.³

Article L. 151-5 FCC further clarifies unlawful use of trade secrets as follows:

“The use or disclosure of a trade secret shall be unlawful where it is made without the consent of its lawful holder by a person who has acquired the secret under the conditions referred to in Article L. 151-4 FCC or who is acting in breach of an obligation not to disclose the secret or to limit its use.

The production, offering or placing on the market, as well as the import, export or storage for these purposes of any product resulting significantly from an infringement of a trade secret shall also be considered as unlawful use, if the person carrying out these activities knew, or should have known in the circumstances, that the secret was being used unlawfully within the meaning of the first paragraph of this Article.”

In addition, Article L. 151-6.FCC states that acquisition, use or disclosure of a trade secret shall also be considered unlawful where, at the time of acquiring, using or disclosing the secret, a person knew, or should have known in the circumstances, that the secret had been acquired, directly or indirectly, from another person who was using or disclosing it unlawfully within the meaning of the first paragraph of Article L. 151-5.

4. Exceptions

According to Articles L.151-7, L 151-8 and L.151-9 FCC, trade secrets are not enforceable under certain circumstances.

Namely, the trade secret is not enforceable if its acquisition, use, or disclosure is required or authorized by European Union law, international treaties or agreements in force or national law, in particular in the exercise of powers of investigation, control, authorization or sanction by judicial or administrative authorities, Article L.151-7 French Commercial Code.

Further, Article L 151-8 FCC states that a trade secret shall not be enforceable when it was acquired, used or disclosed:

- to exercise the right to freedom of expression and communication, including respect for the freedom of the press, and to freedom of information as proclaimed in the Charter of Fundamental Rights of the European Union;
- to reveal, with the aim of protecting the general interest and in good faith, illegal activity, misconduct or reprehensible behavior, including when exercising the right to alert as defined in Article 6 of Law No. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life;

³ Article L. 151-4 FCC.

- for the protection of a legitimate interest recognized by European Union law or national law.

In addition, according to Article L. 151-9, par. 1-2 FCC, a trade secret shall not be enforceable if:

- it was acquired in the exercise of the right to information and consultation of the employees or their representatives;
- the disclosure of the trade secret by the employees to their representatives was made in the legitimate exercise of the representative's functions, provided that such disclosure was necessary for that exercise.

According to L. 151-9 par. 3 FCC, the information thus acquired or disclosed remains protected as a trade secret with respect to persons other than the employees or their representatives who have had knowledge of it.

5. Civil remedies

Article L. 152-1 through L. 152-7 FCC specify the civil remedies for trade secret holders. Measures to prevent and stop misappropriation of a trade secret are described in Article L. 152-3 FCC, which states that a court can without prejudice to the award of damages, order any proportionate measure likely to prevent or stop such a trade secret infringement.⁴ In particular, it may:

- prohibit the performance or continuation of acts of use or disclosure of a business secret;
- prohibit acts of production, offering, placing on the market or use of products resulting significantly from the infringement of the business secret or the import, export or storage of such products for these purposes;
- order the total or partial destruction of any document, object, material, substance or digital file containing the business secret concerned or from which it may be inferred or, as the case may be, order their total or partial handover to the applicant.

Further, the court may also order that the products resulting significantly from the infringement of the trade secret be recalled from commercial channels, permanently removed from such channels, modified in order to remove the infringement of the business secret, destroyed or, as the case may be, confiscated for the benefit of the injured party.⁵

The measures according to Article L. 152-3 I. and II. FCC may be limited in duration,⁶ and except in special circumstances and without prejudice to any damages that may be claimed, the measures mentioned in I to III shall be ordered at the expense of the infringer⁷. Under the circumstances laid-out in Article L. 152-5 FCC, upon request, the court may order the payment of compensation to the injured party in lieu of the measures mentioned in Article L. 152-3 I. through III. FCC, whereby this is without prejudice to the claim of damages according to Article L. 152-6 FCC.

⁴ It is to be noted that at the request of the infringer, when the information concerned can no longer be qualified as a trade secret within the meaning of Article L. 151-1 FCC, for reasons that do not depend, directly or indirectly, on the infringer, the claim as to prevention and cessation of the infringement may be terminated (Article L. 152-3, last par. FCC).

⁵ Article L. 152-3, II. FCC.

⁶ See with further details Article L. 152-3 III. FCC.

⁷ Article L. 152-3 IV. FCC.

Article L. 152-4 FCC provides for provisional measures. Article R. 152-1 I. FCC specifies that the court can order, in summary proceedings or on request, any proportionate provisional and protective measure likely to prevent an imminent misappropriation or stop a trade secret misappropriation. In addition to the measures provided in Article L.152-3 I. para 1 and 2 FCC, the court can also order the seizure or delivery of products into the hands of a third party, including imported products, so as to prevent them from entering or circulating on the market. In lieu of the measures mentioned in Article R.152-1 I. FCC, the court may authorize the continuation of the alleged unlawful use of a trade secret, subject to the defendant providing a guarantee intended to ensure compensation for the trade secret holder. Further, the court may decide that the implementation of provisional and protective measures is subject to a guarantee by the injured party (Article R.152-1 III. FCC). The injured party shall refer the matter to the court hearing the case on the merits within a period of twenty working days from the date of the order or thirty-one calendar days, whichever is longer. Otherwise, the measures taken pursuant to Article R. 152-1 FCC shall lapse (Article R. 152-1 V. FCC).

Damages may be claimed according to Article L.152-6 FCC. The court will take the following aspects into consideration separately:

- The negative economic consequences of the infringement of business secrecy, including the loss of profit and the loss suffered by the injured party, including the loss of opportunity;
- The non-material damage caused to the injured party;
- The profits made by the person who infringed the business secrecy, including the savings in intellectual, material, and promotional investments which he has made as a result of the infringement.

The court may, as an alternative and at the request of the injured party, award as damages a lump sum that takes into account, in particular, the fees that would have been due if the infringer had requested authorization to use the business secret in question. This sum shall not be exclusive of compensation for non-material damage caused to the injured party.

Article L. 152-8 FCC introduces a specific scheme for abusive action, notably to protect whistleblowers and the freedom of expression. Under this scheme, trade secret holders, who act in a dilatory or abusive manner may be ordered to pay a civil fine, whereby the amount of such fine may not exceed 20% of the amount of the claim for damages. It is stated that in the absence of a claim for damages, the amount of the civil fine may not exceed €60,000. Further, it is clarified that the civil fine may be pronounced without prejudice to the award of damages to the party who is the victim of the dilatory or abusive procedure. Further, Article 122-9 of the French Criminal Code also excludes certain actions by whistleblowers from criminal liability.

6. Criminal sanctions

The FCC does not contain specific provisions regarding criminal sanctions as to trade secret misappropriation. However, existing criminal law offence make it possible to penalize certain acts of conscious trade secret misappropriation (see Article 226-15 of the Criminal Code), and certain acts relating to computer systems (Article 323-1 of the Criminal Code).

7. Trade secret protection in judicial proceedings

While the rules of confidentiality according to the EU Trade Secret Directive apply only in the field of trade secret litigation, France implemented with Article L. 153-1 FCC a broader approach for all civil or commercial proceedings.

Where a trade secret is affected by reference to, or the disclosure/production of, a document, the judge may, of his/her own motion or at the request of a party or a third party, take the following measures, provided that the protection of the trade secret cannot be ensured otherwise and without prejudice to the exercise of the rights of the defense:

- Take cognizance of the document alone and, if he/she deems it necessary, order an expert opinion and seek the opinion, for each of the parties, of a person empowered to assist or represent him/her, in order to decide whether to apply protective measures provided for in Article L. 153-1 FCC;
- Decide to limit the communication or production of this document to certain of its elements, order its communication or production in summary form or restrict access to it, for each of the parties, to a maximum of one natural person and one person empowered to assist or represent him/her;
- Decide that the debates will take place and that the decision will be pronounced in chambers;
- Adapt the reasoning of its decision and the modalities of its publication to the needs of the protection of the trade secret.

According to Article L. 153.2 FCC, any persons having access to a document or to the content of a document considered by the judge as being covered or likely to be covered by a trade secret shall be bound by an obligation of confidentiality that prohibits the use or disclosure of the information contained therein. Namely, the legal framework of confidentiality clubs according to Article L. 153.2 FCC provide that:

- in the case of a legal person, the obligation of confidentiality applies to its legal or statutory representatives and to the persons who represent it before the court;
- the persons having access to the document, or its contents are not bound by this obligation either in their relations with each other or with regard to the legal or statutory representatives of the legal person party to the proceedings;
- persons authorized to assist or represent the parties are not bound by this obligation of confidentiality with respect to the parties, except in the case provided for in Article L. 153-1, par. 1 FCC;
- the obligation of confidentiality continues at the end of the proceedings. However, it shall cease if a court decides, in a decision that is not subject to appeal, that there is no trade secret or if the information in question has in the meantime ceased to constitute a business secret or has become easily accessible.

Regarding the publication of a court decision, Article L 152-7 FCC states that the competent court may grant a party any measure of publicity of the decision relating to the unlawful acquisition, use or disclosure of a trade secret, with the expense of the infringer.

Article L 152-7 FCC also names the examples of measures that can be taken, i.e., posting or publication of the decision, in full or in extracts in the newspapers or on the online public communication services. Trade secret protection under the conditions provided for in Article L. 153-1 FCC shall be ensured by the court when ordering any publication measure.

In addition, R. 153-1 FCC and seq provide details on how the judges shall apply the measures mentioned in Article L. 153-1 FCC.

8. Procedural provisions

Civil and commercial courts are generally the competent courts for trade secret misappropriation.

In general, burden of proof lies with the party claiming trade secret protection.

Regarding the statute of limitation, Article L152-2 FCC stipulates a time limitation of five years for all claims relating to trade secret misappropriation starting from day on which the legitimate holder of the trade secret knew, or should have known from the last event causing, the misappropriation.