

The Adoption of the French Law on the Protection of Trade Secrets

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The French legislature was required to transpose the 9 June 2018 Directive (EU) 2016/493 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. This has now been done: the Law on the Protection of Trade Secrets was definitively adopted by the National Assembly (*Assemblée Nationale*) and then the Senate (*Sénat*) on 14 and 21 June 2018 and validated by the Constitutional Council (*Conseil constitutionnel*) on 26 July 2008.

The law introduces a harmonised definition of trade secrets and a set of protective rules of a civil nature into the French Commercial Code (the “Commercial Code”), with several exceptions (Articles L. 151 – 1 to L. 154 – 1 of the Commercial Code).

A harmonized definition of trade secrets

Information protected under trade secrets is defined by the new Article L. 151 – 1 of the French Commercial Code as information that is “*not generally known or easily accessible to those familiar with this type of information because of their sector of activity*”; “*of commercial value, actual or potential, because of its secret nature*”; and subject to “*reasonable protection measures by its legitimate holder, given the circumstances, to maintain its secret nature*”.

A minimal transposition of the Trade Secrets Directive

The French legislature did not wish to criminalise any breach of trade secrets. It is true that criminal legal constraints with respect to the constituent elements of an offence barely lent themselves to the variety of situations covered by the text. Common law qualifications—*theft, fraud or breach of trust*—may be used in the most serious cases.

Determination of the lawful or unlawful character of the acquisition, use and disclosure of trade secrets

The law gives a definition of a breach of trade secrets by distinguishing the lawful and unlawful acquisitions of the secrets (Article L. 151–3 seq of the French Commercial Code).

Civil protection of trade secrets: the judge's office strengthened

The new text is organised around a principle of civil liability. It will be up to the civil judge to clarify the definition of protected information. Then, the judge will still have to assess whether the information “*is of commercial value, actual or potential*”, whether it has been the subject of “*reasonable protective measures*” and whether it has been obtained, used or disclosed unlawfully.

The judge may then implement “*any proportionate measure likely to prevent or put an end to such an infringement*” (Article L. 152 – 3 of the French Commercial Code) to punish the perpetrator of the infringement and to compensate the damage suffered by the company. It may in particular prohibit the continued use of protected information, the placing of products on the market that result from an infringement of trade secrets, and order the recall or destruction of disputed products. He or she shall also have the power to order, as a precautionary measure, the payment of compensation to the injured party where such payment appears more reasonable than the prohibition measures mentioned above. The payment of this compensation may be imposed on the perpetrator of the breach of secrecy even if he or she did not know that the secret information had been obtained unlawfully by another person.

In addition to urgent measures, the judge shall determine in due time the amount of damages due to the injured party, taking into consideration the negative economic consequences of the infringement, the moral prejudice caused and the profits made by the author. The legislator has also provided for more severe penalties to be imposed on SLAPPs (*strategic lawsuits against public participation, i.e. “procédures bâillons”*) providing that a civil fine of up to 20 percent of the amount of the claim for damages may be imposed on any party who has invoked the right of trade secrets in a dilatory or abusive manner (Article L. 152–6 of the French Commercial code). In the absence of such a request, the civil fine may not exceed 60,000 euros.

Without prejudice to the exercise of the rights of defence, the judge may decide that the proceedings and the delivery of the decision shall take place *in camera*, restrict the communication of documents, and adapt the reasons for his decision and its publication “*to the needs of business law protection*”.

Exceptions: unenforceability of trade secrets (Article L. 151–7 of the Commercial Code)

The protection of trade secrets is not an absolute right and the law has listed several exceptions to it.

Indeed, preserving “trade secrets is not enforceable where the obtaining, use or disclosure of the secret is required or authorized by European Union law, international treaties or agreements in force or national law, in particular in the exercise of the powers of investigation, control, authorization or sanction of judicial or administrative authorities”. The same applies where the obtaining, use or disclosure of the secret has taken place “to exercise the right to freedom of expression and communication”; “to reveal, for the purpose of protecting the public interest and in good faith, unlawful activity, misconduct or reprehensible conduct, including in the exercise of the right of alert (Sapin II Law)”; “for the protection of a legitimate interest recognized by European Union or national law”. Finally, the obtaining or disclosure of a secret “in the exercise of the right to information and consultation of employees or their representatives” or in the “legitimate exercise” by the latter of their functions is also a source of unenforceability, stating that “information thus obtained or disclosed remains protected under trade secrets with respect to persons other than employees and representatives having knowledge thereof”.

The text of the law, by formalising rules protecting trade secrets, promises significant protection for innovative companies that, too often, were hitherto without effective means of action. The latter will necessarily have to organise themselves accordingly by introducing an *ad hoc* security policy so that their business secrets are effectively protected. Hence, companies will have to define, identify and

prioritizes the information they consider to be a trade secret, while providing for internal controls to ensure the protection of the information (appointment of managers, implementation of internal control procedures, limitation of the number of people who have access to information, organisation of training for the employees in order to raise awareness to the concept of trade secrets, and implementation of non-disclosure agreements with employees and business partners, etc.).

The Law on the Protection of Trade Secrets was published in the French *Journal Officiel (JO)* on 31 July 2018 and a decree in the Council of State (*Conseil d'Etat*) will subsequently specify the conditions of application of the text.

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