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## The protection of trade secrecy is strengthened under French law

(by Bruno WEIL, LL.M., Partner)

With a new law enacted on July 30, 2018, French law includes a legislative provision on the protection of trade secrecy.

Before that date, trade secrecy was not defined and was protected throughout scattered provisions in various Codes. The protection of trade secrets stemmed from the general principles of civil liability in tort or contractual civil liability if there was a confidentiality clause.

This law implements into national law the European Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful misappropriation, use and disclosure. The primary objective is to provide a uniform level of protection for companies within the European Union, while only some of the Member States had specific legislation on the protection of trade secrets.

The goal of the law of 30 July 2018 is to define business secrecy and unlawful conduct and to facilitate legal proceedings to protect trade secrets.

A new chapter entitled "Protection of business secrets" ("De la protection des secrets des affaires") is created in the French Commercial Code.

Three guiding principles emerge from the new law.

➤ **Conditions for the protection of business secrecy:**

Not all information is covered by business secrecy. In order to be protected, the information must meet three cumulative conditions:

- First of all, the information must not be "*generally known or easily accessible to persons familiar with this type of information because of their sectors of activity*": the information must therefore be known by a limited number of people;
- Secondly, the information must have an "*actual or potential commercial value resulting from its secret nature*";
- Finally, the information must have been subject to "*reasonable protection*" against misappropriation.

If these three criteria are met, the information is protected by business secrecy.

Any access, use or disclosure without prior authorization is considered unlawful.

The new law specifies in particular that the obtaining of a business secret is unlawful when it is carried out without the consent of its legitimate holder and results:

- from an unauthorized access to any document, object, material, substance or digital file that contains the secret or from which it can be inferred, or unauthorized appropriation or copying of these elements;
- from any other conduct considered to be unfair and not compliant with good commercial practices, in the light of the specific circumstances of the case.

Moreover, the use or disclosure of a business secret is unlawful when it is carried out by a person who has obtained the secret under unlawful conditions or who acts in breach of an obligation not to disclose the secret or to limit its use.

In addition, it should be noted that the production, free distribution or placing on the market, as well as the import, export or storage for these purposes of any product, which results from an infringement of a business secrecy, is unlawful if the person carrying out these activities knew, or should have known in the light of the specific circumstances of the case, that the secret was being used unlawfully.

➤ **Exceptions to the protection of business secrecy:**

The secrecy of the information is not protected when:

- the author is exercising the right to freedom of expression and communication, including freedom of the press and freedom of information as protected by the Charter of Fundamental Rights of the European Union;
- the author is disclosing, for the purpose of protecting the general interest and in good faith, an illegal activity, misconduct or reprehensible behavior (whistleblowing);
- the disclosure aims at the protection of a legitimate interest recognized by European Union or national law.

Finally, the law also provides that business secrecy will not be enforceable against employees and their representatives when they have obtained protected information as part of their right to be informed or consulted.

➤ **Actions to prevent, stop or compensate for an infringement of business secrecy:**

Any infringement of business secrecy triggers the civil liability of its author. Actions relating to an infringement of business secrecy shall be time-barred after five years.

More specifically, the judge may prescribe any proportionate measure in order to prevent or stop the infringement, such as: prohibiting the implementation or continued use or disclosure of the secret, asking for the total or partial destruction of the protected data.

The infringer may request that these injunctions stop when the information concerned can no longer be classified as business secret for reasons that do not depend, directly or indirectly, on him.

In addition, in order to prevent an imminent infringement or to stop an unlawful infringement of a business secret, the judge can order, ex-parte or in summary proceedings, provisional and protective measures (art L 152-4).

Compensation measures may replace preventive measures if various conditions are met, namely:

- At the time of the use or disclosure of the business secret, the author did not know, nor could he have known in the light of the specific circumstances of the case, that the business secret had been obtained from another person who unlawfully used or disclosed it;

- The execution of the measures would cause disproportionate damage to the author;
- The payment of compensation to the injured party seems reasonably satisfactory.

Finally, the law sets out the criteria that the judge must take into account in order to assess the damages due in compensation for the damage actually suffered:

- The negative economic consequences of the infringement of business secrecy, including loss of profit and losses suffered by the injured party, including loss of opportunities;
- The emotional distress caused to the injured party;
- The profits made by the infringer, including the intellectual, material and promotional investment savings that the infringer has misappropriated.

Lastly, the new law provides for an obligation of secrecy for all parties to the proceedings. This obligation ends if the court rules out the violation of a business secrecy or if the information in question has in the meantime ceased to constitute a business secret or has become easily accessible.



**About the author:** Bruno Weil (LL.M., Partner) has been practicing as a lawyer of mid-sized or international corporations, which are present or active in France since more than twenty years. Bruno Weil is legal expert in IP, IT or NTCs. As such, he intervenes as advisor or counsel before courts for instances involving patent, trademark or copyright infringements, as well as any negotiation on license agreement or know-how transfer.

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