



New French Decree Strengthens Protection of Confidential Documents

IN SHORT

The Background: French Decree No. 2018-1126, which is intended to enhance the protection of documents containing confidential information, became effective following publication in the Official Journal.

The Result: The Decree introduces Articles R. 153-1 to R. 153-9 into the Commercial Code, codifying procedures related to requests for document discovery in certain courts.

Looking Ahead: These developments constitute a significant step forward in the protection of trade secrets in France.

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Based on Article 145 of the French Code of Civil Procedure, a judge may order discovery prior to a trial, on request, or in summary judgment if there is a legitimate reason to believe that the withholding or establishing of certain facts could affect the outcome of a dispute.

Since a request for evidence could undermine the confidentiality of critical information, some courts chose to limit access to the seized documents. Applicants were then required to initiate an interlocutory procedure in order to obtain, after an adversarial examination, the requested documents. As a result, the withdrawal and subsequent request for access to the sequestered documents became the subject of two separate proceedings—a judge was required to rule on the first before the second could be examined.

The disclosure process was characterized by numerous uncertainties, in particular related to the methods of classification (certain courts passed on this responsibility to outside experts) and to the participation of applicants (and sometimes even their counsel) during the classification, which case law generally appears to have denied.

Decree No. 2018-1126 of December 11, 2018, which introduced Articles R. 153-1 to R. 153-9 into the Commercial Code, brings structure to the existing process of discovery requests, establishing clearly stated guidelines where none previously had existed.



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The Decree's Provisions

The Decree grants a judge the authority to order *ex officio* the sequestration of seized documents in order to ensure the confidentiality of trade secrets, although this is provisional. The sequestration measure may be waived and the documents provided to the applicant if the judge does not receive an application for amendment or withdrawal of his order within one month of its being served (R. 153-1). A single judge will rule on the request for withdrawal and disclosure of documents.

The Decree also clarifies the procedure applicable to requests for disclosure of documents, which removes certain uncertainties surrounding the practicalities of classification:

- Under penalty of inadmissibility, the party or third party to the proceedings invoking the protection of trade secret must submit to the judge, within a time limit fixed by the latter, the following: (i) the full confidential version of the document; (ii) a nonconfidential version or summary; and (iii) a memorandum specifying, for each piece of information or portion of the piece in question, the reasons why it qualifies as a trade secret (R. 153-3);
- The judge rules, without a hearing, on the disclosure of the documents to the applicant (R. 153-4); and
- The judge, based on how critical the documents are to the resolution of the dispute, has the authority to: (i) refuse their communication (R. 153-5); (ii) order communication of the full versions even if they are likely to violate trade secret protection, while restricting access to certain persons (R. 153-6); or (iii) order their communication in a nonconfidential version or in the form of a summary (R. 153-7).

Trade secrets are also preserved at the remedies stage. Thus, the decision ordering disclosure of documents cannot be executed provisionally, and an appeal period of 15 days will temporarily suspend communication of the documents (R. 153-8).

FOUR KEY TAKEAWAYS

1. A party wishing to revoke or modify an order for the disclosure of confidential documents will have to make the request within one month of the order's issuance; failure to do so will result in the documents being automatically transmitted to the applicant.
2. The requested party must devote a substantial amount of effort in order to avoid the disclosure of confidential documents (preparing a nonconfidential version or summary, as well as a memorandum justifying the rationale for conferring upon the document the nature of a trade secret).



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