



TRIBUNAL DE COMMERCE  
DE PARIS

# Mechanisms to protect confidentiality

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## Key issues

- **The necessary balance between the principles of effectiveness and protection of confidential information specially business information before or during the trial**
  - Both of them are of major interest. The Damages Directive has stressed out the necessity to focus on indemnification of plaintiffs
  - French commercial courts needed time to find this balance (burden of proof)
- **The necessary balance between the right to evidence and the protection of confidentiality**
  - The french Supreme Court has clearly pointed out the necessity of a proportionate disclosure i.e. to ensure that the judges have taken into account at the same time the interest of the elements of proof and the preservation of the confidentiality. The Supreme Court aims to affirm a control of the motivation of the judgements of first instance and those of the Court of Appeal (Com., 8 juillet 2020, pourvoi n° 19-25.065)

## Business secrecy

- **Distinction has to be made between confidentiality and business information** as the second one is ruled by the law
- The confidentiality covers a wide range of information that do not directly benefit from the commercial rules of the French commercial code
- **Before a trial** , a company is entitled , according to strict conditions, to ask the president of a commercial court to allow ( art 145 of the civil procedure code) an *in futurum* measure. This consists in having access to information owned by a competitor in order to obtain complementary evidence. Protection of the business information is granted only if the defender asked for it during the month following the order of the court. If not, only the other protected secrets will be protected (bank secrecy, secrecy of correspondence, personal privacy, medical secrecy...)
- **During a trial**, each party has the right to ask the judge for the communication of proofs owned by the other party, if needed. Dedicated hearings are sometimes necessary.

## Business secrecy

- **The French judge has the tools** to ensure the preservation of business secrecy and a wide power to define the best way to achieve it
  - These tools have been built in accordance with EU competition law and the guidelines of the European Commission regarding the protection of business secrecy
  - Data room, confidentiality rings are the most frequent ones
  - **After several years of practice, the procedure is implemented as follows:**
    - The party asking for secrecy has to convince the judge that the legal conditions of secrecy are fulfilled (knowledge, commercial value, protection according to article L 151-1 French commercial code)
    - In this case, the parties can mutually propose a confidentiality ring to the judge with all agreed provisions : members allowed, location, access to the documents, copy, duration of the ring...).
    - If necessary, the judge set the conditions of the confidentiality ring
    - In any case, a judgment closes this part of the procedure

## Business secrecy

- **The economic experts** appointed either by the parties or by the tribunal have the right to be part of the ring and share the secret elements duly protected in order to make the contradiction effective
- Interest of substantive judgments are challenged with amicable settlement of disputes as regards the disclosure of business secrecy.
- The adversarial principle and the equality of arms lead to a disclosure that can cause serious prejudice to the parties
- **More than 90% of the disputes regarding article 101 and 102 TFEU are therefore amicably settled.**