

LEGAL INSIGHT

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ARTICLE 145 OF THE FRENCH CODE OF CIVIL PROCEDURE



Pre-Trial Evidence in France: Mastering Article 145 CPC

1. The French system: Absence of disclosure

English civil procedure is founded on a strong principle of evidentiary transparency, embodied in the mechanism of “disclosure.” This mechanism requires each party to disclose all documents relevant to the resolution of the dispute, irrespective of whether they are favorable or unfavorable to its own case.

Failure to comply with disclosure obligations may result in significant sanctions, including adverse inferences, exclusion of evidence, cost penalties, or, in serious cases, findings of contempt of court.

Overall, the English system relies on systematic evidentiary cooperation between parties, ensuring a high level of transparency but also imposing substantial procedural burdens.

This model has no direct equivalent in French law.

2. Strategic importance of Article 145 of the French Code of Civil Procedure

Unlike English law, French civil procedure does not provide for any general disclosure mechanism or duty of spontaneous evidence-sharing between parties.

Instead, it is governed by the principle that each party bears the burden of proving the facts upon which its claims are based. There is no obligation to disclose adverse documents, nor any general duty of cooperation in the production of evidence. This fundamental difference creates significant evidentiary constraints, particularly where key evidence is held exclusively by the opposing party.

Article 145 of the French Code of Civil Procedure addresses this structural limitation.

It constitutes one of the most distinctive and strategically important tools of French evidentiary law, allowing parties to obtain investigative measures prior to initiating proceedings on the merits. Its development reflects a broader evolution of procedural law aimed at ensuring effective access to justice, particularly in situations where evidence is at risk of disappearing or is inaccessible without judicial intervention (especially within commercial wrongdoing, unfair competition or fraudulent concealment cases).

Article 145 emerged as a corrective mechanism to mitigate these limitations by enabling litigants to secure or establish evidence before commencing substantive proceedings. Article 145 also reflects a balance in French procedure between the right to evidence, linked to a fair trial, and the protection of privacy, confidentiality, and trade secrets, making it a central instrument in the administration of justice.

3. Legal framework of Article 145

Article 145 provides that where there is a legitimate reason to preserve or establish, before any proceedings, evidence of facts upon which the resolution of a dispute may depend, the court may order any legally admissible investigative measures at the request of an interested party.

Article 145 can be requested *ex parte* (“requête”), allowing authorization without notice when evidence risks being concealed, altered, or destroyed. The element of surprise is often crucial to the measure’s effectiveness.

The measures sought may only be ordered if the following three cumulative conditions are met:

- The first and most critical condition for the application of Article 145 is the **existence of a “legitimate reason”** (“motif légitime”). This requires the applicant to demonstrate the plausible existence of a future dispute, supported by sufficiently precise and objective elements. Courts exercise strict control over this requirement, ensuring that the mechanism is not used to compensate for a complete lack of evidence or to conduct speculative investigations;

- The second condition relates to a **derogation from the adversarial principle**: the applicant must demonstrate, in concrete terms, that if the measure were ordered on an inter partes basis, it would be deprived of its effectiveness or would have a significantly reduced effect. This is the case, in particular, where it is established that the respondent has attempted to conceal certain elements (notably where a nominee arrangement has been used). The mere fact that the evidence sought is stored in digital form no longer appears to be sufficient in light of the most recent decisions of the Cour de cassation.
- The last requirement concerns the nature of the measures sought. Only **legally admissible measures** may be ordered, and they must be both relevant and proportionate to the objective pursued. Judges conduct a careful assessment to ensure that the requested measures are necessary for the preservation or establishment of evidence and do not unduly infringe upon the rights of the opposing party.

Particular attention is paid to fundamental protections such as privacy, professional secrecy, and trade secrets, which have become increasingly important in modern litigation. When filing an Article 145 request, the applicant must specify the evidence sought and its purpose. In cases involving electronic searches, a list of keywords must be provided to guide the investigation, ensuring the search is targeted, proportionate, and respects privacy and sensitive business data.

4. Implementation of the investigative measure

Once the judge signs the Article 145 order, several actors are involved in its implementation. The judge defines the scope and limits of the measure, while **a bailiff carries out on-site operations**, collects documents or electronic data, and records findings. In practice, he is almost **systematically assisted by an IT expert** in order to carry out the measure across all electronic data storage systems (computers, smartphones, cloud storage systems, etc.).

Measures can include inspections, document seizure or copying, electronic data extraction, and expert investigations. They may be intrusive, involving business premises, private home or sensitive information, and must comply strictly with the court order. Any irregularity can result in annulment of the measure or exclusion of the evidence obtained.

5. Procedural safeguards

Even where the measure has been ordered ex parte, the opposite party retains the right to challenge the decision after its execution, either through an application to set aside the order (“rétractation”) or by contesting the admissibility of the evidence obtained. This ensures that the mechanism remains consistent with the principles of due process and adversarial proceedings.



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