

Better protection of “trade secrets”

a) “Trade secrets”

For many companies, their know-how, customer lists and other intangible assets represent (especially) protection-worthy investments. This protection can take the form of ‘hard’ (intellectual) property rights. However, not all investments qualify for this. Moreover, there are times when one intentionally opts not to e.g. file a patent application, given the costs and/or attendant conditions (publicity, in particular). In such cases, it all becomes a matter of maintaining secrecy.

There are (all too) many methods that can be applied for this purpose, with confidentiality clauses being the main one. The Employment Contract Act obliges (former) employees to preserve secrecy. Third-party complicity in a breach thereof is a violation of fair market practices (art. VI.104 of the Code on Economic Law (CEL)). Article 309 of the Criminal Code sanctions the communication of ‘manufacturing secrets’. Other attempts to appropriate secrets can be qualified as theft (e.g. of customer lists), breach of confidence, cybercrime, etc. Physical or virtual keys on the door serve the same purpose.

A general legal framework was (finally) adopted in Belgium with the Act of 30 July 2018. The Act is the transposition of European Directive 2016/943, which strives to achieve a uniform minimum protection of know-how and business information in all Member States. Most of the new provisions were inserted into book XI, Title 8/I of the CEL, which is now entitled ‘intellectual property and trade secrets’.

The new law introduces a definition of the notion of ‘trade secret’. In line with the Directive, a trade secret is described as all information that i) is secret (not generally known or readily accessible); ii) has commercial value because it is secret; and iii) has been subject to reasonable steps to keep it secret (e.g. NDA, access restrictions, etc.). Examples would include production processes, market strategies, technical data and so on.

b)(Un)lawful character of the acquisition or disclosure

The acquisition of a trade secret is lawful if it is the result of an independent discovery or creation, reverse engineering or any other practice in conformity with honest commercial practices. Contractual or other duties of confidentiality can of course restrict the disclosure or the use of lawfully acquired trade secrets.

However, trade secrets can also be unlawfully acquired. This is the case when the acquirer gains unauthorised access or otherwise acts in ways contrary to honest commercial practices. Most of the known arsenal falls under this denominator. It is also prohibited to use information of which one knows or ought to know that it was unlawfully acquired or made public (e.g. by means of breach of contract). Given that this is an issue of fact, the judge appears to (still) possess a significant degree of discretion. From this perspective as well, no revolution.

c) Sanctions in case of unlawful acquisition, use and disclosure

Firstly, in the event of unlawful acquisition, use or disclosure, the holder of a trade secret can request temporary and protective measures in a summary proceeding. Alternatively, the judge can attach a security to the further use. These provisional measures lapse if no claim on the merits is filed. In addition, the holder of the secret can ask the judge on the merits for damages and/or one or several measures, under penalty of a daily default fine, such as discontinuation of the further production of or trading in 'infringing' products and/or their destruction. The same measures can also form the object of a prohibitory injunction (as in a summary proceeding).

When determining the most appropriate measure(s), the judge must be guided by (amongst other things) the value of the trade secret, the extent to which the secret was protected, the public interest and the interests of the parties and third parties. If the judge limits the duration of the measures, he must make sure that this period is long enough to nullify any commercial or economic advantages that the infringer might have derived from the infringement. Where pecuniary compensation is ordered, it shall not exceed the amount of the royalties or fees that would have been due had authorisation been granted.

However, the judge cannot take measures or award damages if the acquisition or the disclosure took place as an exercise of the right to freedom of expression or in order to reveal wrongdoing, misconduct or illegal activity for the purpose of protecting the public interest. Not every pot has to (or may) remain covered.

d) Protection of trade secrets in legal proceedings

Finally, the new law also foresees provisions for the protection of trade secrets in and after legal proceedings. The judge will henceforth, on his own initiative or at the request of a party, be able to

designate documents that contain trade secrets (e.g. expert appraisals) as confidential, as a result of which the information may not be used or disclosed by those having access to it. This confidentiality will continue even after the proceeding has concluded. If the judge deems it desirable, he can also restrict the access to certain information.

The law entered into force on 24 August 2018.

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