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Q247

Trade secrets: Overlap with restraint of trade, aspects of enforcement

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I. Current law and practice

Aspect (i) - Overlap with restraint of trade

1)	Is trade secret protection viewed as a form of restraint of trade and, if so, under what circumstances and under which legal regimes (e.g. competition law)?
	<p>yes</p> <p>Please comment.:</p> <p>Under Belgian law, the rule is freedom of trade and industry (Article II.2-3 of the Code of Economic Law - "CEL"); therefore trade secret protection (like intellectual property rights) constitutes an exception to this general rule and can be viewed as a form of restraint of trade.</p> <p>The free movement of goods is moreover a fundamental principle both under EU law (Article 28 seq. of the Treaty on the functioning of the European Union - TFUE) and under Belgian law. However the question whether goods manufactured, or sold, in breach of trade secrets may be seized and discarded from the channels of commerce, even after they have been purchased by a third party acting in good faith (i.e. not aware of their infringing nature), has not raised much debate among legal scholars in Belgium^[1], nor been decided by the Belgian Supreme court ("Court of cassation").</p>

On another note, it is acknowledged that the detention of trade secrets can sometimes lead to a dominant position on a specific market and that such dominant position may, in exceptional circumstances, be used abusively, e.g. to restrict competition on another, separate, market^[2]. The Belgian Competition Council found, in a similar situation, that Portima, a Belgian software company, abused its dominant position by refusing to disclose (confidential) network information and was therefore harming the reliability of other software developers' operating systems. Consequently, on the basis of Article 62 of the Protection of Economic Competition Act of 15 September 2006 (currently Article VI.64 CEL), the Competition Council adopted interim measures to oblige Portima to disclose this information^[3].

There is no uniformed or harmonized protection scheme at EU level, and 28 national systems coexist at the moment. Hence why the Commission has proposed a Directive to help companies in case of misappropriation (the "Proposal for a Directive on Trade Secrets")^[4]. This patchy situation can be viewed as a restraint of trade between EU Member States.

In addition, in sectorial legislation such as for chemicals (the so-called REACH), pesticides, biocides there are provisions which state which information ought to be considered as confidential or not, and those for which confidentiality can be requested to the authority. One may conclude that for this sectorial legislation within the EU trade is submitted to similar rule.

In view of the above, we conclude that the protection of trade secrets may be viewed as a form of restraint of trade, and in some circumstances therefore be restricted, on the basis of various conflicting principles (trade law, competition law, regulatory / administrative law).

Footnotes

1. [^] *Such discussions have however been triggered by the recent Proposal for a Directive of the European and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Com (2013) 813 final). The WTO (World Trade Organization) TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement signed in 1994 expressly mentions in its first page that it was drafted to "reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade...". The TRIPs Agreement includes a Section 7 "Protection of Undisclosed Information" with a unique Article 39, which defined in broad terms rules applicable to trade secrets. The other Articles on basic principles, enforcement and procedure apply as well to trade secrets. Signatory countries including Belgium must implement this Agreement.*
2. [^] *General Court of the European Union, T-167/08, Microsoft v. Commission, EU:T:2012:323.*
3. [^] *Decision no. 2007-V/M-07 of 14 February 2007 - Case MEDE-V/M-03/0060: NV Computer Resource Management - DEV -- NV Computer Resource Management - TEC / CVBA Portima.*
4. [^] *Proposal for a Directive of the European and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Com (2013) 813 final; see also A. STROWEL, "Les secrets d'affaires en droit européen anno 2013: projet de directive et jurisprudence de la Cour de justice de l'Union européenne", in V. CASSIERS and S. GILSON, L'entreprise et le secret, Brussels, Larcier, 2014.*

a) If so, under what circumstances and under which legal regimes (e.g. competition law)?

2) How does your law distinguish between general skills or knowledge acquired during the course of employment, confidential information, and trade secrets? What protection is extended to each?

a. Definitions

Various rules of Belgian law protect certain types of trade secrets, either through specific mechanisms or through general principles of law.

These provisions do not provide for a uniform definition of “trade secrets” under Belgian law.

As exposed in the Belgian report under Q 215^[1], guidance can nevertheless be sought in TRIPS, Commission Regulation No 316/2014^[2], Commission notice 2005/C 325/07^[3] and in European and national case law.

- As set out in the working guidelines, Article 39(2) of the TRIPS Agreement relates to information that (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
- According to Article 1(i) of Regulation Commission Regulation No 316/2014 (the so-called “Technology Transfer Block Exemption”) know-how means a package of practical information, resulting from experience and testing, which is secret, substantial and identified^[4].
- In section 3.2 of Commission notice 2005/C 325/07, business secrets are defined, with reference to case T-353/94 Postbank^[5], as information about an undertakings’ business activity, the disclosure of which could result in a serious harm to the same undertaking. The examples given in the notice are technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and sales strategy. In case T-474/04 Pergan, the General Court took over this definition and added that the interests liable to be harmed by disclosure must be worthy of protection^[6].
- On the national level, Article 17, 3° of the Act of 3 July 1978 on Employment Agreements (the “Employment Agreements Act”) provides that an employee may not disclose, either during his employment or after the termination thereof, “*manufacturing secrets, business secrets or secrets in respect to any personal or confidential matters which he may obtain in the framework of his professional activity*”. This broad definition covers technical information, commercial data such as clients and prices, as well as information pertaining to the organization of the business.

Disclosure of manufacturing secrets by individuals working or having worked in a factory is also prohibited by Article 309 of the Criminal code.

In respect to manufacturing secrets, the Court of cassation has ruled in a judgment of 27 September 1943^[7] that these comprise “*technical data which, in contributing to the realisation of operations put in place in a factory to obtain a certain product, are liable to provide to the manufacturer technical advantages and which ensure a competitive superiority over his competitors so that the manufacturer obtains an economical benefit by not disclosing the information to his competitors*”. In its judgment of 26 June 1975^[8], the Court of cassation has also ruled that, in the absence of a legal definition, it is up to the judge ruling on the merits of the case to decide whether a manufacturing process qualifies, in the normal sense of the word, as a manufacturing secret. Recent case law still applies the definition set out in the judgment of 23 September 1943^[9].

A broader definition of “trade secrets” is applied in cases where the courts are seized to rule on whether the misappropriation and use of confidential information of a competitor constitutes an unfair trade practice in the sense of Article VI.104 CEL. This case law at least implicitly seems to apply the definition provided in Article 39(1) TRIPS. Examples of protected information include detailed customer lists, data in respect to the date that maintenance and repairs were conducted for particular clients, the spare parts delivered to a particular client^[10] and confidential e-mail correspondence^[11].

In view of the above, for the purpose of the present study, the concept of “trade secret” can be defined as:

- i. technical, business or organizational information,
- ii. which is liable to provide its owner certain advantages and which ensure a competitive superiority over its competitors,
- iii. so that its owner obtains an economical benefit by not disclosing the information to his competitors.

a. **Protection**

Various, partially overlapping regimes apply to the protection of the different categories of “trade secrets”.

• **Specific rules regarding the work environment**

Article 17, 3° of the Employment Agreements Act prevents current and former employees from disclosing trade secrets which they obtained in the framework of their professional activity.

Pursuant to Article 309 of the Belgian Criminal Code, individuals working or having worked in a factory are prohibited to disclose "*the secrets of the manufacture in which they work or have been working*" to third parties, in a deceitful or malicious way. This provision is not limited to employment agreements as such.

With respect to manufacturing secrets, the Liège court of appeal stressed that they only enjoy limited protection. Indeed, while one can prevent parties from disclosing such secret, it cannot be used to prevent parties from using a similar manufacturing process, when the secret has not been breached. This would otherwise allow the owner of the manufacturing secret to enjoy a similar, or even stronger, protection than a patent owner¹²¹.

• General prohibition of unfair market practices

Where the misappropriation of confidential information and the use thereof threatens to cause prejudice to an undertaking, the latter can rely on Article VI.104 CEL, which provides for a general prohibition of unfair market practices. This rule is also a specific application in the field of business law of the general principles of tort (Article 1382 of the Civil code) providing that the author of a faulty behaviour should compensate for the damage resulting therefrom.

• Procedural rules

Various rules and practices can be considered to enable a (more or less restricted) disclosure of trade secrets during (court) proceedings. These rules and practices are further described below (see question 6).

• Other rules

Various other rules address the issue of protecting trade secrets, such as the professional secrecy applicable to some regulated professions; the financial regulation regarding inside trading, or criminal provisions concerning IT theft or breach of trust. These are not addressed in this contribution.

Footnotes

1. [^](#) D. KAESMACHER, P. MAEYAERT, A. MOTTET, G. PHILIPSEN, L. RYCKEBOER and K. NEEFS, "AIPPI – Question 2015 Protection of trade secrets through IPR and unfair competition law", I.C.I.P., 2010/3, 369.
2. [^](#) Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer

agreements, OJ L 93, 28.3.2014, p. 17-23.

3. [^ Commission Notice 2005/C 325/07 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation \(EC\) Nr. 139/2004. This notice describes, amongst others, how undertakings.](#)
4. [^ Whereby "secret" means not generally known or easily accessible; "substantial" means significant and useful for the production of contract products; and "identified" means that the information is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.](#)
5. [^ General Court, 18 September 1996, Postbank v Commission, T-353/94, \[ECR 1996\], p. II-00921, §87.](#)
6. [^ General Court, 12 October 2007, Pergan Hilfsstoffe für industrielle Prozesse v Commission, T-474/04, EU:T:2007:306, para. 65.](#)
7. [^ Court of cassation, 27 September 1943, Pas., I, 1043.](#)
8. [^ Court of cassation, 26 June 1975, Pas., I, 1043.](#)
9. [^ Liège court of appeal, 2 September 2004, J.L.M.B., p.508; Antwerp court of appeal, 31 March 2009, I.C.I.P., 2009/1, 133; Brussels Court of appeal, 31 March 2009, I.C.I.P., 2009, p.137.](#)
Interestingly, the Brussels court of appeal expressly dismissed the defense that the technique in dispute did not qualify as a trade secret because it was known from scientific literature, on the grounds that putting the said technique to practice successfully required extensive and complex experiments.
10. [^ Ghent court of appeal, 18 February 2004, D.C.C.R., 2005, p. 67.](#)
11. [^ Ghent court of appeal, 30 March 2009, D.A.O.R., 2009, p. 180.](#)
12. [^ Liège court of appeal, 12 June 2008, I.R.D.I., 2008/4, p. 339.](#)

3) Are employees under a duty of confidence whether or not such a duty is set out in their contract of employment?

yes

If yes please answer the following sub-questions::

a) are express confidentiality clauses to protect classes of information broader than would anyway be protected by the employee's duty of confidence permitted; and

Yes, employees are under a legal duty of confidentiality/confidence even if this is not expressly set out in their employment agreement (see Article 17, 3°, a) of Employment Agreements Act).

The legal obligation of confidentiality already covers trade and manufacturing secrets as well as confidential and private information. The scope of this provision is therefore quite broad.

The employer is entitled to add a confidentiality clause in the employment agreement, in which he can describe more in detail what is meant by trade or manufacturing secrets, as well as the information that is covered by the confidentiality duty.

However, this does not entitle the employer to broaden the scope of the legal obligation. It is therefore not possible to prevent an employee from using in the future certain knowledge/technics he has acquired in the course of his employment. Case law is very strict in its interpretation and considers, in particular, that a confidentiality clause may not result in a mere non-compete obligation, since the validity and enforceability of the latter clause is subject to specific conditions^[1].

Footnotes

1. [^](#) *Brussels labour court, 27 April 2011, Chr. D. S. 2012/1, p.36 ; Liège labour court, 2 September 2010, JTT 2011, p.109.*

b) how long after the end of employment does an ex-employee's duty of confidence in relation to trade secrets last in the absence of any express confidentiality clause?

As a secret normally remains a secret, there is no time limitation to the confidentiality duty of the employee: as long as the trade/manufacturing secret is secret the duty will last. However, if the employer decides to add a confidentiality clause to the employee's employment agreement, he could contractually provide for a specific period of time during which the employee is bound by the confidentiality duty.

4) If not constrained by an enforceable non-compete agreement, may workers use knowledge acquired in the course of earlier employment in their new employment?

yes

If yes, is there any distinction between the types of knowledge they can use?:

Workers may use the knowledge acquired in the course of an earlier employment in their new employment, provided that the use of this knowledge does not have as a consequence that trade/manufacturing secrets or confidential information are disclosed.

5) Are certain employees subject to a higher obligation of confidentiality / non-use?

yes

If so, which employees, and what is the rationale for any distinction between employees?:

The principle is that every employee is bound by the same duty of confidentiality. The law does not make any distinction with regard to the employee's function or the degree of confidentiality. The same confidentiality obligation rests on every employee. However, some employees will be in contact with more sensitive information, and will therefore have to be more cautious about what they say or disclose.

There is a specific exception for employee representatives in the works council^[1]. They are bound by a special discretion and confidence obligation regarding certain specific financial and economic information on the company.

Also, for certain professions, such as auditor, specific obligations apply.

Footnotes

1. [^](#) *See articles 32 and 33 of the Royal Decree of 27 November 1973 on economic and financial information to works councils.*

Aspect (ii) - Ensuring confidentiality during Court proceedings

6) What measures or provisions are available to preserve the secrecy of trade secrets during Court proceedings?

It has been observed that trade secret holders can face some problems in enforcing or safeguarding their trade secrets in the course of court proceedings^[1]. Belgian court systems are not always accustomed to adequately preserve the secrecy of confidential information during and/or after litigation. Indeed, in order to get relief in court, a trade secret holder risks having to disclose his secret in a public hearing. In addition, there is a risk that the formulation of related injunctions by the court will imply disclosing the secret. Both would cause unwanted dissemination of the trade secret.

In 2007 the Belgian legislator stated in the *Travaux Préparatoires* of the Acts implementing the Directive 2004/48/EC^[2] that the protection of confidential information required urgent attention^[3]. Whilst this was a promising statement, no legal initiatives seem to have broken the surface so far. In the meanwhile, courts and legal scholars are thinking about alternative ways to facilitate the use of secret evidence in court, including expert appointments, *in camera* view, limited disclosure or redactions of the secret evidence.

Footnotes

1. [^] "Report on Trade Secrets for the European Commission", 11-12 (overview of the Belgian legal framework), published at http://ec.europa.eu/internal_market/ipenforcement/docs/trade/201201-study_en.pdf[http://ec.europa.eu/internal_market/ipenforcement/docs/trade/201201-study_en.pdf].
2. [^] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30 April 2004.
3. [^] Preparatory works of the Acts on civil and procedural law aspects of the protection of intellectual property rights, DOC 51 2943/001 and 2944/001, Exposé des motifs, www.lachambre.be: "It should be stressed that it is urgent that the issue of the protection of confidential information is addressed. This is not only a requirement imposed by Directive 2004/48/EC, but it is also necessary to improve legal certainty, having regard to the fundamental principle of adversarial / inter partes debate" (free translation).

For example, do trade secret proprietors have access to the following mechanisms to preserve the secrecy of a trade secret during proceedings (subject to the Court's discretion to allow/disallow such access):

a) restricted access to the hearing and / or evidence;

- Restricted access to the hearing

Pursuant to Article 148 of the Belgian Constitution (and Article 6.1 of the European Convention on the protection of Human Rights - "ECHR"), civil proceedings are public.^[4] Yet, Article 148 itself slightly tempers this principle by allowing the courts to order that the hearing will not be public if the "*public access can endanger morals or public order*" or in case the parties' right to privacy pursuant to article 6 ECHR is at stake. A court will have to explicitly motivate any such limitation to the public nature of the hearing.

While it is not excluded that the protection of trade secrets as such might justify a trial behind closed doors, to our knowledge these cases have been very rare. And when such "closed trial" is ordered to ensure confidentiality of trade secrets, the parties usually had consented thereto. In a very exceptional case, the 18th chamber of the Brussels court of appeal appears to have ordered a hearing *in camera*, with only one the parties (and counsels) present, in order to determine if that

party's alleged trade secrets deserved protection in the course of the proceedings.^[2]

- Restricted access to the evidence

Pursuant to Article 870 of the Belgian Judicial Code and Article 1315 of the Belgian Civil Code, each party has to prove its claim and to submit the documents in support thereof to the court, and has to do so diligently and loyally (Article 871 of the Judicial Code). Further, pursuant to Article 736 of the Judicial Code, a party that intends to use an exhibit in court is obliged to communicate it to the other party. These procedural fundamentals echo the basic right to an "adversarial / *inter partes* trial" (i.e. the right for a party to be heard and to have access to all the documents that are submitted in court by the opposing party)^[3].

In this respect, attention should also go to Article 877 of the Judicial Code, pursuant to which "if there are precise, serious and strong presumptions that a party has in its possession a document containing the proof of a relevant fact", the judge – at the request of a party or *ex officio* – can force a party to disclose the considered document^[4]. This provision also relates to the principle that parties should cooperate loyally in search for the legal truth^[5].

On the basis of the above-mentioned procedural principles, disclosure of evidence is the rule. Yet, (too) strictly applied, this rule could possibly harm the parties' interests, in particular when trade secrets are at stake.

As such, two fundamental principles collide: on the one hand, the party's right to protect its privacy, including its trade secrets^[6] (Article 8 ECHR) and, on the other hand, the right to a fair trial (Article 6 ECHR and Article 14.1 ICCPR), encompassing the aforementioned procedural principles (the parties' obligation to participate diligently and loyally in the proceedings, the right to get access to evidence and the right to an *inter partes* trial^[7]). Following the solution usually suggested when two fundamental rights collide, the judge will have to make a balance of the interests at stake^[8].

In this sense, in a decision of 2 November 2012, the Court of cassation acknowledged that the right to privacy, including the right to protection of trade secrets, can in some cases justify that the right to *inter partes* trial is subject to certain limits^[9]. The Court found that it is up to the trial judge to appreciate the need for such a limitation after having properly balanced the interests at stake^[10].

Since there is no legal provision on the basis of which the judge should perform this balance of interests, guidance in that respect is to be found in case law. Upon performing the balance of interests, the judge should verify the confidential nature of the document and the relevance of said document for the solution of the proceedings.^[11] In this respect, some decisions have even provided practical guidance as to what aspects should be taken into account by the judge^[12]. To this day, the issue is however very case-based so that the precise criteria might vary from one case to the other.

It is commonly accepted that the court can only restrict the fundamental right to a fair trial, including the right to *inter partes* trial, in case it is absolutely necessary and if no alternative, less

invasive measure is available^[14]. If such a restriction is deemed to be necessary, the court should always make sure that the other party is provided with sufficient access to the relevant information and, in this respect, determine the precise modalities for disclosing the evidence to the other party^[15]. In other words, even if, in a particular case, the right to protection of one's trade secrets is deemed to prevail, the court will have to put in place certain measures that compensate for the limitation of the other fundamental rights and, ultimately, provide sufficient guarantees to the fairness of the proceedings^[16]. When possible, parties should be able to consult a non-confidential version of the evidence^[17].

Belgian courts deciding on the merits have been asked to perform this delicate balance of interests on numerous occasions, and in practice have come up with different solutions in an attempt to adequately safeguard the interests of all parties involved.

- Courts have repeatedly found that if the prejudice caused by a disclosure of a document containing a trade secret is disproportionate compared to the limited relevance of the document for the solution of the case, one must refuse the request for forced disclosure of the document altogether^[18].
- In a judgment dated 29 September 2006, the Brussels court of appeal found that the principle of loyal participation in the proceedings does not oblige a party to disclose allegedly relevant confidential evidence, if the requesting party itself had not produced any direct evidence to support its case^[19]. This case law was confirmed later by that same court in a similar case, stating that an expert appointment or an order for production of documents cannot serve to compensate for a total lack of evidence by the plaintiff^[20]. The same conclusion was reached in a case where the plaintiff's allegations were in fact contradicted by other evidence^[21].
- The court could also decide that the parties' obligation to collaborate to the collection of evidence and the right of defence of the one of the parties prevail and that certain documents must be disclosed in court, even if they contain trade secrets^[22]. Such a decision cannot be appealed.^[23] In that respect, Article 879 of the Judicial Code allows the court to modulate the disclosure in court, by imposing measures to protect the trade secret.

In a judgment dated 29 June 2009, the Brussels court of appeal did grant access to confidential documents held by a party. However, the court provided for safety measures by making consultation of the confidential evidence subject to specific rules and limits: the confidential information was stored in a secured data room, visitation hours were well-determined, no copies or notes could be made, and visitation right was limited to the party's representatives or legal counsel, all within the framework of a court-ordered *inter partes* expert mission^[24].

It is also quite commonly accepted to make a non-confidential version of a document, by redacting ("black line") and/or suppressing certain confidential content^[25]. In a case before the Hasselt commercial court, the judge allowed one of the parties to 'black line' the purchasing prices of certain of its products to safeguard the confidential nature of that information towards the other side^[26]. Similarly, the Brussels commercial court allowed the production of a redacted version of a

cinema exploitation agreement signed by one of the parties, in order to safeguard certain confidential information described in the agreement. However, the court required that party to justify each redaction. When, at a later stage, the court checked if the information blanked out was indeed confidential and was not essential to the solution of the case, it turned out that the party which invoked the secrecy did not respect the modalities set forth by the court, as it also blanked out information which was relevant for the solution of the case^[27].

Rather than completely suppressing or black lining confidential information, one could also replace it by corresponding non confidential information: for example, one could replace a specific number/amount by a more generic range^[28].

Footnotes

1. [^] [Court of cassation](http://www.cass.be), 9 November 2012, www.cass.be : “When determining one’s rights and duties, everybody is entitled, pursuant to article 6.1 ECHR, to benefit from the different guarantees provided for in that provision, including the right to a public handling of one’s case. This principle of publicity of trial and judgment can only be deviated from in case the party involved waives that right freely and unequivocally, and in conformity with national right” (free translation).
2. [^] [Brussels court of appeal](#), 30 June 2010, J.L.M.B., 2011, p.1185, cited in B. ALLERMEERSCH and W. VANDENBUSSCHE, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p.1074.
3. [^] According to the ECHR, this implies a right for the parties to the proceedings to take note of and reply to any exhibit or remark submitted to the judge in order to influence his decision: ECHR 18 February 1997 (Nideröst-Huber / Switzerland), Publ. Eur. Court. H.R. 1997, I, p.101; B. ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, p.1064; E. BREWAEYS, “Zakengeheim verdraagt geen tegenspraak”, *Juristenkrant*, 2013, p.7; Court of cassation 14 January 2005, Arr. Cass., 2005, n°24.
4. [^] The term “document” encompasses written documents but also drawings, pictures, etc.
5. [^] Report Van Reepinghen, *Travaux Préparatoires Senate*, 1963-64, 2012, nr.60.
6. [^] This right to privacy also applies to professional relationships and legal entities: ECHR 16 December 1992 (Niemiets/ Germany), Publ. Eur. Court. H.R. 1993, Series A, p.251-B; ECHR 16 April 2002 (Société Colas Est et autres / France), Publ. Eur. Court. H.R. 2002, III, p.131; ECJ, 14 February 2008, C-450/06 (Varec / Belgische Staat), *Jur.* 2008, I, p.581; Belgian Constitutional Court, 19 September 2007, case 118/2007, B.S. 31 October 2007, R.A.B.G., 2008, p.382; Brussels court of Appeal 9 December 2005, GR 2004/AR/174, www.juridat.be ; Brussels court of appeal, 10 June 2010, JLMB 2011, p. 1181.
7. [^] B. ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, pp.1063-1066.
8. [^] ECJ 13 July 2006, C-438/04 (Mobistar / BIPT), *Jur.* 2006, I, p.6675; ECJ, 14 February 2008, C-450/06 (Varec / Belgische Staat), *Jur.* 2008, I, p.581.
9. [^] B. ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, p.1065; B. ALLERMEERSCH, “Zakengeheim in burgerlijk proces en bewijs”, in B. ALLEMEERSCH et al., *Zakengeheim, Brugge, die Keure*, 2012, p.15.
10. [^] Court of cassation, 2 November 2012, J.T. 2013, p.176, note E. DE LOPHEM; T.B.O., 2013, p.84, note T. TOREMANS and F. DUPON; ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, p.1066.
11. [^] Court of cassation, 2 November 2012, J.T. 2013, p.176, note E. DE LOPHEM; T.B.O., 2013, p.84, note T. TOREMANS and F. DUPON; ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, p.1066.
12. [^] B. ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, p.1069.
13. [^] In its decision of 20 December 20012, the Antwerp commercial court provided an indicative

list of elements that can be taken into account when performing the aforementioned balancing exercise, i.e. (i) whether parties are in a competitive relationship towards each other, (ii) what value the confidential information has for the other side, (iii) what information the other side has already in its possession, (iv) whether the other side could get hold of the information via alternative ways, (v) whether there is a risk that the information will be used for other purposes (C/12/00129, unpublished, cited in B. ALLERMEERSCH and W. VANDENBUSSCHE, op.cit., p.1065).

14. [ECJ](#), 14 June 2011, C-360/09 (Pfeiderer AF / Bundeskartellamt), Jur., 2011, I, p.5161; B. ALLERMEERSCH and W. VANDENBUSSCHE, op.cit., p.1065.
15. [Court of cassation](#), 2 November 2012, op.cit..
16. [B. ALLERMEERSCH and W. VANDENBUSSCHE](#), op.cit., p.1065; Brussels court of appeal, 30 June 2010, op.cit. (with reference to ECHR, 20 February 1996, Doorson/Nederland); Brussels court of appeal, 29 June 2009, R.W. 2012-13, 389 (translated): "In case certain exhibits merit protection during the execution of the expert mission because of their confidential nature, one should determine how such protection can be organised in a manner that allows to optimally safeguard the adversarial/inter partes character of the proceedings".
17. [Belgian Constitutional Court](#), 19 September 2007, case 118/2007, B.S. 31 October 2007, R.A.B.G., 2008, p.382.
18. [Liege court of appeal](#), 14 January 2000, J.L.M.B., 2001, p.1289.
19. [Brussels court of appeal](#), 29 September 2006, *Jaarboek Handelspraktijken & Mededinging*, 2006, p.870; B. ALLERMEERSCH and W. VANDENBUSSCHE, op.cit., pp.1063-1064; see also Liège court of appeal, 25 June 1998, *Jaarboek Handelspraktijken & Mededinging*, 1998, p.246.
20. [Brussel court of appeal](#), 7 November 2013, T.B.H., 2014, p.808.
21. [Court of cassation](#), 20 February 1975, Pas., 1975, I, p.633.
22. [Liège court of appeal](#), 6 March 2000, J.L.M.B., 2000, p.1728; A. KOHL, "Les mesures d'instruction", in X., *Actualités et développements récents en droit judiciaire*, Brussels, Larcier, 2004, pp.207 et seq.
23. [Pursuant to Article 882 of the Belgian Judicial Code](#), a party that is ordered by the judge to submit a certain document might refuse to do so if it can prove that it has a "legitimate reason". To this day, it is debated whether a trade secret can be considered as a "legitimate reason" in the sense of Article 882.
24. [Brussels court of appeal](#), 29 June 2009, R.W. 2012-13, p.388; B. ALLERMEERSCH and W. VANDENBUSSCHE, op.cit., p.1067; this case is specific because it was the plaintiff himself who invoked the right of protection of his trade secrets. The judgment was confirmed by in Court of cassation, 2 November 2012, op.cit. The Court found that, even though the plaintiff had the burden to prove its claims as to the alleged prejudice and damage, it should not prevent him from obtaining a protection of its trade secrets.
25. [Brussels court of appeal](#), 30 June 2010, op.cit.; Hasselt commercial court, 11 October 1996, *Jaarboek Handelspraktijken & Mededinging*, 1996, p.293.
26. [Hasselt commercial court](#), 18 April 2001, *Jaarboek Handelspraktijken & Mededinging*, 2001, p.284; Brussels Court of appeal, 30 June 2010, op.cit.
27. [Brussels commercial court](#), 14 May 2009, A/08/05692, unpublished and Brussels commercial Court, 3 December 2009, unpublished, cited in B. ALLERMEERSCH and W. VANDENBUSSCHE, op.cit., p.1072.
28. [B. ALLERMEERSCH and W. VANDENBUSSCHE](#), op.cit., p.1072.

b) disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;

Disclosure of evidence to legal representatives only is as such not common in Belgian civil proceedings. As set out earlier, in principle all evidence which is filed with the court must simultaneously be communicated to the opposing party (through its counsel if it has one).

Parties may come to a mutual agreement on the disclosure of evidence, e.g. by identifying the persons to whom confidential information may or may not be disclosed, as well as the specific use that the receiving party may make of the information that is communicated in the course of the proceedings. In this respect, reference can be made to the decision of the Brussels court of appeal of 20 June 2008^[1] and to the decision of the Antwerp court of appeal of 6 February 2008^[2], where the receiving parties undertook to only share the confidential information to predetermined persons and to use it for certain purposes only. Noteworthy is that in both of these cases, restrictions were put in place as a result of the receiving party's own initiative.

Footnotes

1. [^](#) *Brussels court of appeal, 20 June 2008, I.C.I.P., 2008, p.566.*

2. [^](#) *Antwerp court of appeal, 6 February 2008, I.R.D.I., 2008, p.173. This judgment was annulled by the Court of cassation on grounds unrelated to the restrictions of use.*

c) non-confidential versions of documents being provided to all except authorised individuals;

The practice of allowing simultaneous filing of confidential and non-confidential files is occasionally applied. It is inspired by the regulatory and administrative proceedings^[1] and has gradually gained importance in Belgian civil proceedings.

Parties may agree and/or the judge may allow that a non-confidential (redacted or otherwise) version of a document allegedly containing trade secrets is communicated to the other party, while the integral document – including the alleged trade secrets – would only be disclosed to the court and/or an “authorized person”.

In the aforementioned Antwerp court of appeal case^[2], for instance, the expert drafted two versions of his “counterfeit/descriptive seizure” report. And it was explicitly stated that only the courts, the claimant's counsels and its company lawyers got access to a confidential version of the descriptive seizure report, whereas a non-confidential version of the report could be shared with a wider group. In subsequent proceedings on the merits, the parties always filed one confidential version of their written pleadings (referencing the confidential content of the expert report and annexes) and one non-confidential version (in which certain parts of the written pleadings were redacted).

In a case before the Hasselt commercial court, parties agreed that a defendant would only communicate to the plaintiff purchasing orders that concealed the identity of the defendant's customers, while it did produce the original copies of the purchasing order to the judge at the hearing^[3].

The prerequisites for getting the “authorization” that is required to acquire access to the full, unredacted version of the evidence tend to differ depending on the circumstances of the case and on the parties' positions.

Access to the evidence can result from specific confidentiality obligations, for instance inherent to

that person's profession. In this sense, certain parties have agreed that a company auditor could get access to confidential evidence and information, considering he was bound by an obligation of professional secrecy^[4].

In other cases, access to the evidence was subject to the actual signing of a confidentiality agreement. In a case before the Antwerp court of appeal, one party would not allow the presence of its opposing party, its employees and/or its counsel at an *inter partes* expert mission at its premises absent a preliminary signing of a confidentiality agreement^[5]. In another case, signing of a confidentiality agreement was required to get access to a data room where the confidential information was made available^[6].

Redaction of confidential data has the benefit of being relatively cheap and effective, but is also possibly subject to abuse.

For that reason, some legal scholars have suggested that the courts could take a more active approach to the matter and, in this respect, that a complete bundle of exhibits would be produced to the court, in confidential manner, for the judge to form its opinion as to the relevance of the exhibit for the solution of the case and the existence of trade secrets^[7].

Other legal scholars have suggested that all evidence should be produced to an intermediary (independent expert, special lawyer, bailiff, etc.), who could then be charged with the mission to sort out confidential from non-confidential data^[8]. Such a mission is said to be especially appropriate in technically advanced fields^[9], where there is a risk that the judge could be out of his depth. In other circumstances, such regime is much more controversial.^[10] In any event, the ultimate control needs to be executed by the court.^[11]

Footnotes

1. [^] G. DE BUYZE and L. SCHELLEKENS, "Stand van zaken en recente ontwikkelingen op het vlak van het eerlijk proces" in P. VAN ORSHOVEN (ed.), *Themis Gerechtelijk Recht, Brugge, Die Keure, 2010, p.24.*
2. [^] Antwerp court of appeal, 6 February 2008, *op.cit.* p.173.
3. [^] Hasselt commercial court, 11 October 1996, *op.cit.*
4. [^] Antwerp court of appeal, 20 November 2007, P&B, 2009, p.110, note D. MOUGENOT; Ghent court of appeal, 11 April 2011, R.W., 2012-13, p.468; B. ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, pp.1068;-1069; Pres. Tongeren commercial court, 13 February 2007, R.D.J.P. 2009, p.110, note D. MOUGENOT, confirmed on appeal by Antwerp Court of Appeal, 20 November 2007, R.D.J.P., 2009, p.109, note D. MOUGENOT.
5. [^] Antwerp court of appeal, 24 May 2006, 2005/RK/276, unpublished; Antwerp court of appeal, 5 September 2007 2007/RK/32, unpublished.
6. [^] Brussels court of appeal, 29 June 2009, R.W., 2012-13, p.388.
7. [^] J-P BUYLE, « La production forcée de documents au regard du secret et de la confidentialité », T.B.H. 2013, 1078; Court of cassation, 19 December 1994, R.W., 1994-95, note S. VAN OVERBEKE. Some argue that doing so creates an asymmetry in the information communicated to the judge on the one hand and to the parties on the other hand, which is contrary to the principle of *inter partes* trial according to which each party should have access to all the documents which have been submitted to the judge and on the basis of which the latter might

take its decision (D. MOUGENOT, "Le secret d'affaires et ses implications en droit judiciaire", P&B, 2009, p.116).

8. ¹ B. ALLERMEERSCH and W. VANDENBUSSCHE, *op.cit.*, p.1073.
9. ² This is the case for instance in "counterfeit seizures" ("saisie-contrefaçon"). Article 1369bis/6 of the Belgian Judicial Code provides that the court-appointed expert should take due care not to prejudice the alleged infringer's legitimate interests, "in particular as far as the protection of confidential information is concerned".
10. ³ Brussels court of appeal, 10 June 2010, JLMB 2011, p. 1181.
11. ⁴ Constitutional Court, 19 September 2007, case 118/2007, B.S. 31 October 2007, R.A.B.G., 2008, p.382.

d) only non-confidential parts of any judgment / decision publicly available?

Pursuant to Article 149 of the Belgian Constitution, "every judgment must be pronounced in public hearing". There is no exception to this principle which is prescribed not only by Article 149 of the Belgian Constitution, but also by Article 6.1 ECHR and 14.1 ICCPR. Therefore, if a trade secret is mentioned in a judgment, there is no way to prevent its disclosure^[1].

In order to prevent the disclosure of a trade secret in a judgment, one must therefore take action before the judge has made up his mind and has drafted his judgment. To that end, a party to a dispute can file a request asking the court to treat certain information it has submitted as confidential, in particular by not mentioning the considered information in the judgment. In its judgment dated 20 June 2008, the Brussels court of appeal granted such a request and expressly omitted some information which was considered confidential^[2].

It has to be noted that to this day, such explicit omissions in judgments remain rather exceptional.^[3] For this reason also, parties in litigation about trade secrets may prefer the avenue of arbitration.

Footnotes

1. ¹ A. VERHEYDEN and W. DERIJCKE, "Secrets d'affaires et principe du contradictoire", in V. CASSIERS and S GILSON (coord.), *L'entreprise et le secret*, Brussels, Larcier, 2014, pp.241-242.
2. ² Brussels court of appeal, 20 June 2008, *op.cit.*
3. ³ Specifically for matters of competition law, Articles IV. 65 and IV.66 CEL provides for an explicit legal basis imposing on the (President of the) Competition Law Council an obligation to safeguard the parties' business secrets and other confidential information when rendering its decision.

7) If such (or similar) measures are available, do they apply by default, or must the trade secret holder submit sufficient evidence to convince the Court that the information merits protection?

In Belgium, there are a few legal provisions that are meant to safeguard confidential information^[1]. However, their scope of application is rather limited (e.g. Article XI.60, § 1 CEL on the reversal of burden of proof relating to the infringement of a patented method resulting in a new product).

A lot of attention has gone to mechanisms protecting "confidential information" upon revising the rules regarding descriptive seizure in civil proceedings, (especially Articles 1369bis/1, § 3, 1369bis/4, § 1, 1369bis/6 and 1369bis/7 of the Judicial Code). It is stated explicitly that the court-appointed expert

should take due care not to prejudice the alleged infringer's legitimate interests, "*in particular as far as the protection of confidential information is concerned*", when performing the evidentiary seizure mission. Article 1369bis/7, §2 of the Judicial Code expressly provides that the ensuing expert report and all of its annexes are deemed to be confidential. The court order granting the seizure will set out the conditions in view of protecting the seized party's interest in protecting confidential data. It can also modulate or deny the presence of the applicant or its counsel during the seizure. Thus, in this specific discovery procedure (described below under question 15), the law expressly provides for protection of trade secrets. There is ample case law on the role of the court-appointed expert in this delicate exercise of collecting evidence of intellectual property right infringement but at the same time safeguarding the seized party's interests, including the secrecy of its confidential information^[2]. When opposing the discovery in court in specific "*tierce opposition*" proceedings, the alleged infringer can further request variety of measures to safeguard his legitimate interests. Consequently, the confidential nature of some information of the seized party cannot prevent the granted discovery measures from taking place because the discovery is precisely supposed to reveal what would otherwise be kept confidential.^[3]

It is not excluded that the court would make sure *ex officio* to provide for some protective measures, but in practice trade secret holders can of course expressly request for protection of their rights in the course of the proceedings by suggesting those measures that are most appropriate and proportionate for the case at hand.

Footnotes

1. [^] See footnote 61 above.
2. [^] E.g. Brussels court of appeal, 4 December 2009, I.R.D.I. 2010, p.146.
3. [^] Cf. D. KAESMACHER, P. MAEYAERT, A. MOTTET, G. PHILIPSEN, L. RYCKEBOER and K. NEEFS, "*Protection of trade secrets through IPR and unfair competition law*", I.C.I.P., 2010/3, 369; *Preparatory works of the Acts on civil and procedural law aspects of the protection of intellectual property rights*, DOC 51 2943/001 and 2944/001, *Exposé des motifs*, www.lachambre.be, p.67..

8) Whether or not such measures are available, does the Court restrict the defendant's or claimant's use - after the proceedings have terminated - of the information they gain during the proceedings?

There is no such general rule under Belgian law. At most there is a general duty of care and/or of loyalty, which is not more stringent than the general rule of tort - would a reasonable person put in the same circumstances have acted differently?

There are, however, certain specific provisions that expressly limit a party's freedom to use information gained during the proceedings. For instance in descriptive seizure proceedings, parties are restricted in the use that they can make of the evidence (confidential know-how possibly) obtained within the framework of the seizure. Pursuant to article 1369 bis/7, §2 of the Judicial Code, "*the expert report, as well as all the annexes thereof, samples or information collected within the framework of the descriptive measures are confidential and can only be disclosed or used by the plaintiff or its right-holders within the framework of a procedure, in Belgium or abroad, on the merits or in summary proceedings*". If no such action is introduced within the time frame referred to in Article 1369bis/9 of the Judicial Code, the claimant is no longer entitled to use the information gathered by the expert.

Echoing Article 1369bis/7 of the Judicial Code, the Antwerp Court of appeal has ruled that information

obtained by a competitor during discovery can only be used in the framework of the subsequent patent proceedings^[1].

Eventually, the parties may also come to a mutual agreement on the use of certain information that is obtained in the course of the proceedings.^[2]

Footnotes

1. [Antwerp court of appeal, 6 February 2008, op.cit. p.173.](#)
2. [Brussels court of appeal, 20 June 2008, I.C.I.P. 2008, p.566](#)

Aspect (iii) - Valuation of loss

9) Are damages available as a remedy for trade secret violation?

yes

If so please answer the following sub-questions::

a) how (if at all) is that value diluted by publication?

In cases where trade secret violation is actionable under Belgian law (see question 10 above), damages are available as a remedy for such trade secret violation.

However, there are no specific rules under Belgian law that provide for damages for trade secret violation (contrary to statutory provisions on intellectual property rights, such as Article XI.335 CEL). Belgian laws implementing the European Directive on the enforcement of intellectual rights do not apply to trade secrets, as trade secrets are not regarded as an intellectual property right "*sensu stricto*" in Belgium.

Remedies for trade secret violation are therefore based on general principles of torts law as provided Article 1382 of the Civil Code.

According to these principles, the trade secret holder must show that:

1. the trade secret has been violated;
2. this violation harms the holder's interests;

a causal link exists between the unlawful act and the prejudice.

We understand this question to cover the issue of the value of damages if the infringer has disclosed, published, or made accessible the trade secret to third parties.

The answer might differ from case to case, because Belgian case law and legal scholars seem to be divided on the question of the legal consequences of a breach of secrecy regarding trade secrets.

One part of the case law and legal literature considers that as soon as a trade secret is not secret anymore, it loses its protection, so the trade secret holder will not be able to seek a court order forbidding the use of its trade secret by the infringer or third parties. According to this part of the legal scholars and case-law, since the trade secret holder enjoys only a factual monopoly, a cease and desist order cannot cover a trade secret use whose secrecy is revealed at the risk of creating a monopoly outside the legal framework. The trade secret holder is not entitled to benefit from the same rights as the holders of intellectual rights who made concessions by, for instance, disclosing their invention. The disclosure of a trade secret is irrevocable, and the unlawful disclosure of the trade secret can only be compensated by damages.

According to the other part of the case law and legal literature, the fact that the trade secret holder does not enjoy a legal monopoly on its trade secret (contrary to that of an intellectual property rights holder) cannot impact the kinds of remedies available. It is considered a general rule under Belgian law that the remedy which must be favoured by the courts is the remedy in kind. This means that as long as it is still possible and does not constitute an abuse of process, the judge must or may order any injunction to put the trade secret holder back in the situation it would have been had the infringement not occurred. The injunction would therefore mitigate the consequences or even prevent the irrevocable character of the consequences of the breach of secrecy, and would thus have a direct impact on the value of damages that the trade secret holder could seek.

In summary, a court following the first line of reasoning will award damages as sole remedy for the violation, while a court following the second line of reasoning would issue an injunction as principal remedy and damages as a complementary or subsidiary means of compensation for the violation.

b) how are those damages quantified? Specifically, is allowance made for loss of profits; unjust enrichment; and /or what the trade secret holder would or might have charged as a reasonable royalty fee or licence?

As a general principle, damages must compensate entirely (but not more) the harm or loss that has been caused by the trade secret violation; in other words, the trade secret holder must be put back in the state where it would have been had its rights not been violated.

Furthermore according to general civil law principles, the prejudice must be evaluated *in concreto*, meaning that the applicant must prove the value of the damage claim. However, in most cases, the value of such kind of damage will not be easy to determine. The judge is thus allowed to apply an *ex aequo et bono* calculation of damages. A legal expertise could also be appointed and ordered to assess (in further details) the value of the damage. For instance, in a case before the Commercial Court of Brussels, the court appointed an accountant expert to provide a technical opinion in order to assess the scope of the damage (and its value) caused by the unlawful use of a company's confidential information by one of its competitors.^[4] Such an expert investigation can easily last one or two year(s).

One should also note that punitive damages are not recognized under Belgian civil law. However, as far as intellectual property rights are concerned, there is an ongoing juridical discussion on whether

or not damages should assume a prohibitive effect, which includes the fact that the holder of the litigious intellectual right might not have granted a license to the infringer.^[2] This discussion could be transposed to a certain extent into the field of trade secrets.

To avoid the difficulties in proving the value of the prejudice or damage suffered, parties to a contract may include a clause in their agreement that indicates the lump sum that would be owed if the confidentiality obligation is breached. According to Article 1231 of the Belgian Civil Code, the judge is nevertheless entitled to reassess the sum agreed between the parties should the sum fixed by the parties to compensate any prejudice caused by a breach of the confidentiality obligation obviously exceed the actual value of the damage.

Published case-law in which damages are granted for trade secret violation is rare. Most often, in accordance with the second line of reasoning abovementioned, actions for trade secret violation are based on unfair competition provisions, and the injured party would seek to obtain a cease and desist order, in the framework of which proceedings it is not entitled to request damages.

In a judgment of May 05, 2014, the Gent Court of appeal awarded damages to compensate for the access that the claimant made to the other party's confidential trade information.^[3] In the framework of a descriptive seizure, which was considered abusive by the judge afterwards, the defendant sought EUR 50,000 in damages for the prejudice it suffered which was caused by the abusive descriptive seizure. The prejudice included among others harm to its reputation and trade name and access to confidential trade information. The judge considered that the defendant's prejudice, including the access to confidential trade information, was unquestionable although the defendant could not specify it in details. The judge awarded on an *ex aequo et bono* basis a sum of EUR 10,000 to compensate entirely the prejudice caused by the abusive descriptive seizure.

On the contrary, the Brussels commercial court (November 03, 2010) in another case held that the request of the company GSK to obtain damages as a remedy for the unlawful access to its confidential information by the company Novartis in the framework of a descriptive seizure was not grounded.^[4] According to the court, GSK failed to show that Novartis had misused this information and/or that the latter would have used it for other purposes than only showing the alleged counterfeiting acts. The Brussels Court of appeal nevertheless prohibited Novartis to use that confidential information.

In practice, a claimant is entitled to seek damages to compensate the defendant's unjust enrichment resulting from the trade secret violation as well as loss of profits, provided that the claimant is able to prove the casual link between the trade secret violation and the alleged unjust enrichment/loss of profits. In most cases, this link will be quite difficult to prove, even though the evidence can be in any form, including suspicion alone or factual presumptions. For instance, the Brussels Court of appeal held that an employee had breached the confidentiality obligation under Article 17 of the Employment Agreements Act when he copied confidential information before leaving to join a competitor, but that the ex-employer had failed to show that the use or the disclosure of such information by the ex-employee could cause damage to its own interests.^[5]

One presumption, which is often considered by the court, is the “unrealistically fast and massive success” gained by the defendant that could not have been achieved without the use of the litigious trade secret, as it is unbelievably achieved so fast and massively.

Loss of profit is not easy to determine because the profit made by the defendant through the unlawful access/use of the trade secret might not be equal to the profit the claimant would have made. The claimant will have to identify the competitive advantage that its trade secret presents and then show for instance market shares gained by the defendant and to claimant’s detriment because of the unlawful access/use of the trade secret. Concepts commonly used in the field of intellectual property rights such as the assessment of the loss of profit on the basis of the “counterfeiting mass” could also be helpful, as well as the royalty fee that the claimant used to request for the use of its trade secret as an indicator for an *ex aequo et bono* assessment.

The claimant is also entitled to seek reimbursement of lawyer’s fees and costs, the sums of which are determined by law and are quite low (Article 1022 of the Judicial Code). The question concerning whether this provision is compatible with Article 14 of the Enforcement Directive has already been raised a few times. In a recent patent litigation, this question has finally been referred to the CJEU, whose answer could also have an impact on trade secret litigation.^[6]

Footnotes

1. [^ Brussels commercial court, 16 February 2012, RG. 6202/10, not published.](#)
2. [^ A. BERENBOOM, 26 March 2009, « Contrefaçon sur l’internet – Réparation du dommage », \[http://www.droitbelge.be/news_detail.asp?id=533\]\(http://www.droitbelge.be/news_detail.asp?id=533\)\[\[http://www.droitbelge.be/news_detail.asp?id=533\]\(http://www.droitbelge.be/news_detail.asp?id=533\)\]](#) .
3. [^ Ghent court of appeal, 5 May 2014, 2012/AR/1005, not published.](#)
4. [^ Brussels commercial court, 3 November 2010, I.R.D.I. 2010, p.474.](#)
5. [^ Brussels court of appeal, 10 September 2013, 2011/AR/3155, not published.](#)
6. [^ Antwerp court of appeal, 23 January 2015, IEFbe 1178, \[www.IE-Forum.be\]\(http://www.IE-Forum.be\)\[<http://www.IE-Forum.be>\]](#) .

c) can damages be awarded for moral prejudice suffered by the trade secret holder? If so, how is moral prejudice defined, and how are such damages quantified?

yes

Please comment:

General civil law principles governing damages for trade secret violation do not exclude moral prejudice *per se*, as the main rule is that the prejudice must be compensated in its entirety.

Generally speaking, moral prejudice is the damage that affects a (legal) person’s reputation, integrity or honour. In the context of intellectual property rights, moral prejudice could be, for instance, the damage to an author’s reputation, the banalisation of an artistic work, the popularization of a trademark or the violation of a patent holder’s monopoly.

As regards trade secrets, since the trade secret has value only because it is kept secret to the public, the trade secret holder’s moral prejudice could only be caused if its identity is disclosed with

the trade secret; such disclosure could then have an impact on the image or reputation of the holder.

Belgian case law and legal literature have not yet covered this subject exhaustively. The Ghent court of appeal nevertheless awarded damages, in the framework of a descriptive seizure, which was subsequently considered abusive by the court, to compensate for the access that the claimant made to the defendant's confidential trade information as well as the harm to the defendant's reputation and trade name⁴¹. Although the defendant could not specify its damage in detail, the judge awarded a sum of EUR 10,000 on an *ex aequo et bono* basis to compensate for the prejudice caused by the abusive descriptive seizure. In our view, this can be considered as quite similar to a compensation for moral prejudice.

In any event, moral prejudice would most often be quantified on an *ex aequo et bono* basis as applied in the here above mentioned case law.

Footnotes

1. ⁴¹ *Ghent court of appeal, 5 May 2014, 2012/AR/1005, not published.*

d) If so, how is moral prejudice defined and how are such damages quantified?

Aspect (iv) - Proving infringement

10) What elements must be proved to establish violation of a trade secret?

One should prove that (i) it is the owner of a trade secrets, (ii) that this information is duly protected that (iii) the information has been disclosed in breach of this protection.

i. In our answer to question 2, we gave a broad definition of "trade secrets" as business, organizational or technical information, which is liable to provide its owner certain advantages and which ensure a competitive superiority over its competitors, so that its owner obtains an economical benefit by not disclosing the information to his competitors.

As trade secrets are valuable only if they remain secret, the owner of the information should also prove that he suffers a prejudice from its disclosure. This prejudice should be proved pursuant to the principles outlined under question 9.

i. trade secrets can be protected at different levels, as outlined under question 2. They include rules applicable to employment agreements, general contract law, as well as the general prohibition of unfair competition.

i. The breach of protection should be defined depending on the protection ground, as stressed in question 11 below.

11) What additional elements must be proved (if any) for a trade secret violation in comparison to a breach of confidence, to the extent those are different types of violations?

Although the violations of trade secrets are similar in their nature, the elements to be proved depend on the protection ground. Under employment law, one has to prove the existence and validity of an employment agreement. Under criminal law, one has to prove the bad faith of the disclosing party (the “moral element” of the offence).

12) Can constructive knowledge of a trade secret by an ex-employee or a new employer be imputed, e.g. if the subject-matter of that ex-employee's work was closely linked to the trade secret?

yes

If so, in what circumstances? :

Employment law and criminal law prevent ex-employees from disclosing trade secrets. In addition, third parties can be held liable for complicity to a breach of contract. This requires (i) the existence of a valid contract, (ii) a breach of contract by one of the parties, (iii) the third party knew or ought to have known of the contract and (iv) the third party has participated in, or contributed to, the breach of contract of one of the parties^[1].

Footnotes

1. [^] *Court of cassation, 24 November 1932, Pas., 1933, I, p. 19 and Court of cassation, 21 April 1978, R.W., 1978-79, p. 1961. See for a concrete example in the field of trade secrets Liège court of appeal, 2 September 2004, J.L.M.B. 2006/12, p. 508.*

13) Does your jurisdiction provide for discovery?

yes

If yes, does it provide for discovery at the pre-action stage; and / or against third parties?:

Despite the commonly received idea that “discovery” is foreign to civil law jurisdictions, Belgian law actually provides for procedural devices that come close to discovery in more than one respect.

a. General procedural device: production orders

First, as set out in question 6.a, under civil procedure law there is a general possibility for the judge to order that a specific document containing evidence of a relevant fact be submitted by a party to the proceedings pending before the court. Such order may even be addressed to a third party, i.e. someone who is not a party to the pending proceedings (Article 877 of the Judicial Code). For such an order to be allowed, there must be serious, precise and concordant presumptions that the party in question has such document in his/her possession. If, without a due justification, the orderee refrains from making available the document in question (or a copy thereof), he/she may be condemned to damages. Such

production order is close to a common law “discovery”, though its scope is probably narrower.

The above mentioned production order, as well as other orders and measures concerning evidence (e.g. an expertise or the hearing of a witness), may be requested (i) as an *interim* measure in proceedings on the merits (Article 19, 3rd indent, of the Judicial Code), (ii) in summary proceedings (which are in principle, but not always, subject to a condition of urgency) (Article 584, 3rd indent, of the Judicial Code) or even *ex parte*, then under stricter conditions (see below, under question 15). In the latter case, the production order is close to a discovery at a pre-action stage, except for its scope (see above).

Subject to possible controversies, production orders are a general device of civil procedure law, and hence available also in cases involving the infringement of trade secrets.

b. Specific IP device

Another, specific, provision, the scope whereof is limited to listed intellectual property rights – not including trade secrets (at least on the face of the text of said provision) –, entitles the judge, when finding infringement of a right of such nature on a commercial scale, to order the infringer (or the user or holder of the infringing goods or services) to provide the claimant with all information and data in his/her possession about the origin and the distribution networks of the infringing goods or services (Article XI.334 (3) of the Belgian Economic Code, implementing Article 8 of Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights). Such measure will be granted only if it is “justified and proportionate”.

It is, as such, not available at pre-action stage. However, the specific “descriptive seizure” described below leads to a comparable result, on the basis of *ex parte* proceedings.

14) Does the burden of proof switch to the defendant if the applicant is able to demonstrate, to a certain level of probability, that there has been a violation?

yes

If yes, what is this threshold?:

The burden of proof in a trade secret violation case is also governed by the general Belgian civil law principles. According to Article 1315 of the Civil Code and Article 870 of the Judicial Code, each party must prove what he/she alleges. The Court of cassation also adds that the evidence must be certain.

In principle, the claimant would first have to demonstrate what rights it has and that the alleged trade secret can be considered in fact as a trade secret. As a means of defence, the defendant would have to prove that it legitimately gained access to the trade secret.

Regarding the proof of the confidential nature of the litigious trade secret, the claimant must demonstrate that the trade secret cannot be accessed materially, intellectually and legally speaking. Here again, as a means of defence, the defendant would have to prove that it gained access to the trade secret through a legitimate way.

15) Does your law provide for any other methods for securing evidence, such as seizures or ex parte measures?

yes

If so, what requirements must be fulfilled in order for the measure to be ordered and what safeguards are in place to prevent abuse?:

a. Securing evidence - IP

In the field of intellectual property, Article 1369bis of the Judicial Code provides for a specific procedure called “seizure in matter of counterfeit” or (“*saisie en matière de contrefaçon*”/“*beslag inzake namaak*”). This procedure aims in the first place at describing in detail (suspected) acts of counterfeit, and thereby providing the right holder with a strong evidence of the infringement of his/her rights; it is then being referred to as “descriptive seizure” (“*saisie-description*”/“*beschrijvend beslag*”)^[1].

The requirements for such “descriptive seizure” to be allowed by the Court are, on the one hand, the existence of a *prima facie* valid intellectual property right and, on the other hand, indications of an infringement, or an imminent infringement, of such right (Article 1369bis/1, §3 Jud. Code).

While the list of (IP) rights mentioned under Article 1369bis of the Judicial Code does not include trade secrets, or confidential information, it has been submitted by an author that the procedure of “descriptive seizure” should also be available for knowhow for Belgian law to be compliant with the TRIPs agreement^[2]. This thesis has however been rejected by a court^[3], and it is worth noting that the Proposal for a Directive on Trade Secrets does not include, at least at this stage, any provision regarding the collecting and safeguarding of evidence.

b. Securing evidence - General civil procedure

As mentioned above (question 13), the Judicial Code also includes a general provision allowing the Presiding judges of civil, commercial and labour courts to take various kinds of (provisional) orders on the basis of *ex parte* proceedings (Article 584, 3rd indent, of the Judicial Code). Such orders may be requested with the view to obtaining and securing evidence of facts, including, arguably, the violation of trade secrets, the unlawful divulcation (or use) of confidential information, and yet other acts of unfair competition.

The threshold to obtain such orders in *ex parte* proceedings is, however, rather high: in addition to the requirement for normal summary proceedings, namely urgency, the petitioner must demonstrate the

existence of an “*absolute necessity*” not to make use of *inter partes* (summary) proceedings. Besides cases of “*extreme urgency*” (i.e. where any delay would cause irreparable harm to the right holder), such absolute necessity exists, according to leading legal scholars, when there is a demonstrable risk of evidence being destroyed, and a surprise effect is hence necessary^[4].

However, in an unpublished judgment of 17 December 2008^[5], the Brussels court of appeal cancelled an *ex parte* order (granted by the judge in first instance pursuant to Article 584, 3rd indent, of the Judicial Code) which had allowed the collecting of computer data (including emails), by a bailiff and an expert, from the computers of a company suspected of unfair competition and its directors. According to the court of appeal, the actual purpose of the petitioner was to search or identify undetermined elements of evidence. The judge held that such “*fishing expedition*” was not allowed under Belgian civil procedural law, outside the specific procedure of “*descriptive seizure*”, analysed above. Likewise, in a judgment of 8 March 2011^[6], the Liège court of appeal confirmed the cancellation of an *ex parte* judicial order which had allowed the collecting of evidence by an expert concerning the sales of biscuits the packaging whereof was allegedly in breach of fair market practices (trade dress case). The court held that there was no “*absolute necessity*” for such an order to be granted, within the meaning of Article 584, 3rd indent, of the Judicial Code. The court underlined that the request for such order, on the basis of the latter provision, constituted an attempt to circumvent the requirements under Article 1369bis of the Judicial Code (the “*descriptive seizure*” procedure analysed above).

c. Seizures

Under Belgian law, the term “*seizure*” generally refers to the proceedings aiming at the freezing, and as the case may be the adjudicating, of the goods of an insolvent person for the benefit of his/her creditors. These kinds of proceedings, we understand, are foreign to the subject matter of this questionnaire.

In the field of intellectual property, though, a specific procedure of seizing is organized by the Judicial Code in order to protect the interests of right holders in case of counterfeit. Indeed, the above mentioned “*seizure in matter of counterfeit*”, in addition to measures that aim at securing evidence of an infringement (the so-called “*descriptive seizure*”: see above, under a), may include a real, physical, seizure, of the infringing goods, and, in appropriate cases, of the materials and implements used in the production and/or distribution of these goods (Article 1369bis/1, §5 of the Judicial Code)^[7].

Subject to the above mentioned controversy (concerning the requirements of the TRIPs Agreement), the specific procedure of “*seizure in matters of counterfeit*” is available only for the specified IP rights listed under Article 1369bis of the Judicial Code, and hence not in case of violation of trade secrets, or of a duty of confidence.

Belgian law, on the other hand, provides for a general device called “*judicial sequestration*” (Articles 1955 and following of the Belgian Civil Code), whereby any kind of object can be confiscated and put into the hands of a third party (trustee). According to case law, the conditions for sequestration to be granted are (i) that two or more persons invoke conflicting rights in a same object^[8].

Judicial sequestration may be requested in *ex parte* proceedings, under Article 584, 3rd indent, of the Judicial Code, subject to the condition of absolute necessity and might arguably be used in the context of violation of trade secrets, where documents or other confidential items have been diverted. There is however no settled case law in this respect.

d. Criminal proceedings

Whenever a criminal offence (including the violation of trade secrets, or computer crimes) is suspected to have been committed, the police, and in some cases other public agents, may, under the supervision of an investigating magistrate (“juge d’instruction” / “onderzoeksrechter”), take, on a pre-action stage, any measures necessary to secure evidence of the crime and prevent its continuation (seizures, seals, witness hearings, etc.).

Footnotes

1. [^] *At the request of the right holder (or possibly other persons authorized to proceed), the court will grant permission to an expert (e.g. a patent attorney) to enter, together with a bailiff and if need be the police and/or a locksmith, into premises where infringing goods are suspected to be manufactured, stocked or offered for sale. The order authorizing such “descriptive seizure” is, as a matter of principle, taken on the basis of ex parte proceedings, i.e. without the alleged infringer being heard; only a third-party opposition is available to the latter, after the order being served on him and the seizure having taken place. During the “seizure”, samples and pictures are generally taken by the expert, together with documents relating to the manufacture, sourcing and/or distribution of the infringing goods (e.g. invoices, accounting books...). Following the “seizure”, the expert will draft a report describing the scope of the counterfeit (if any), as well as the origin and destination of the infringing goods. To that effect, additional questions may be put to the alleged counterfeiter. On the other hand, the expert must take adequate measures to protect the legitimate interests of the visited party (and, in particular, to prevent the undue divulcation of confidential information).*
2. [^] C. DE MEYER, “Beschrijvend beslag en knowhow”, in X., *Liber Amicorum Ludovic De Gryse*, Brussels, Larcier, 2010, pp. 117-129.
3. [^] Ghent court of appeal, 1 December 2008, I.R.D.I. 2009, pp. 58-63.
4. [^] H. BOULARBAH, *Requêtes unilatérales et inversion du contentieux*, Brussels, Larcier, 2010, p. 486 et seq.
5. [^] Brussels court of appeal, 17 December 2008, *One Solution/HP*, docket No 2008/AR/90, unpublished.
6. [^] Liège court of appeal, 8 March 2011, *Lotus Bakeries/Brichard*, docket No 2010/RF/135, unpublished.
7. [^] *The requirements to be fulfilled for the court to grant such real seizure are (i) a prima facie valid intellectual property right, (ii) indications of infringement “which cannot reasonably be contested” and (iii) a favourable balance of interests. While the procedure is in principle ex parte, the court may request the opposing party to be heard before it grants the order; in such case, the applicant may however avoid the hearing by requesting a mere description, instead of the real seizure.*

8. [△] *Court of cassation, 16 April 1984, Arr. Cass., 1983-84, p. 1097, Bull., 1984, p. 1036; Pas., 1984, I, p. 1036, R.W., 1984-85, p. 1986), that the contestation at issue is serious and that the sequestration is in the interest of both parties (Court of cassation, 28 April 1994, available at <http://www.cass.be>[<http://www.cass.be/>], A.J.T., 1994-95, p. 267, note P. HOFSTROSSLER, Arr. Cass. 1994, p. 427, Bull. 1994, p. 418, J.L.M.B., 1995, p. 5, P.&B., 1994, p.158, Pas., 1994, I, p. 418, R. Cass., 1994, p. 324, note K. BROECKX ; R.W., 1994-95, p. 812.*

16) Where seizure is available, for what purposes can it be used? To secure evidence, to prevent items entering into circulation or for other reasons?

As mentioned above, the specific procedure of “seizure in matter of counterfeit” (available under Article 1369bis of the Judicial Code) may aim both at obtaining and securing evidence of a suspected infringement (description of facts and taking of samples, pictures and copies of documents; see point 15, a), above) and, under stricter conditions, at preventing counterfeit goods from entering into circulation, and production means to be further used (seizure: Article 1369bis/1, §5; 15, c), above).

Tools available under general civil and civil procedure law may, arguably, likewise be used to secure evidence (production order, bailiff observation and report, expertise and judicial sequestration of documents), or to prevent goods from entering into the channels of commerce (judicial sequestration of goods, cease and desist order/injunction under Article 584 of the Judicial Code). Due to various controversies, it may, however, appear more difficult to obtain such measures in case of violation of trade secrets than it would be, on the basis of the special provision of Article 1369bis of the Judicial Code, when IP rights are concerned.

In criminal proceedings, both kinds of measures are (also) available, without possible doubt.

II. Policy considerations and proposals for improvements of the current law

Aspect (i) - Overlaps with restraint of trade

17) Should limits be placed on the protection of trade secrets to avoid unlawful restraints on trade?

yes

If so, what limits? :

Yes. Inspiration can be found in this respect in the Belgian legal system where the judge enjoys a large margin of appreciation and is deemed to take into account the principle of proportionality when sanctioning acts of unfair competition, including the violation of trade secrets.

As mentioned in Question 1, in case of abuse of a dominant position, the judge could order the disclosure of trade secrets on the basis of competition law. Considerations of general interest such as fundamental rights, public health and the protection of the environment are also to be considered as legitimate limits to the protection of trade secrets.

Generally speaking, proportionality between the seriousness and/or the scope of the trade secret violation and (the consequences of) its sanction, should be taken into account. Also, the group believes

that the role and relative weight of the trade secret in the product/process under scrutiny should be taken into account when determining what (injunctive) relief is justified. The judge should weigh the legitimate interests of the parties but also the legitimate interests of third parties (in particular those who have purchased in good faith the goods manufactured on the basis of the violated trade secret).

18) Should different obligations of confidence / non-use apply to different employees? Why/why not?

As the confidence obligation is already large, we believe statutory law should not make a further difference between employees. However, depending of the employee's involvement in the company business, some employees will be in contact with more sensitive information, and will therefore have to be more cautious about what they say or disclose.

In this respect, we refer to the current Belgian system exposed under questions 3.a and 5 above.

Aspect (ii) - Ensuring confidentiality during Court proceedings

19) Should a defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade secret during the course of the litigation, be required to not use the trade secret after the proceedings? Why/why not?

Considering (i) the principle of freedom of competition and (ii) the fact that trade secrets are not a right under Belgian Law, the group does not see a justification for restricting a successful defendant's freedom of operation after such proceedings by way of principle.

It should however be stressed that the procedural rules should provide means to avoid the disclosure of trade secrets in the course of proceedings. In that respect, under certain circumstances courts could deem it necessary to subject the defendant to certain obligations of confidentiality and/or non-use or to impose alternative measures to safeguard the confidential nature of the trade secret from the defendant. The Proposal for a Directive on Trade Secrets should provide guidance in this respect.

If the procedural rules have provided means to avoid the disclosure of trade secrets in the course of proceedings, and the defendant has legally become aware of the trade secret in the course of the proceedings without breaching such procedural rules, this should in principle not impose on him any additional obligations of confidentiality / non-use. Otherwise disclosing trade secrets in proceedings could be used to limit the freedom of operation by a competitor.

The reasons for the dismissal of the action, as well as the situation (know-how) of the successful defendant prior to the action, should also be taken into consideration as the case may be, but the latter's situation should, as a rule, not be more disadvantageous than it used to be before the proceedings and the additional know-how gained during the proceedings should as a rule not be considered to have been acquired illegally.

20) Should such obligations of confidentiality attach to information that the defendant developed independently prior to the trade secret proceedings, or develops independently after the trade secret proceedings? Why/why not?

Such obligation doesn't attach to these independent developments, provided that it is proven that it was developed independently. And unless the defendant expressly agreed not to use such independent development.

Aspect (iii) - Valuation of loss

21) Should damages as a remedy be available by default, or only where injunctive relief is (a) not possible, (b) adequate, or (c) not necessary? If by default, why?

no

If not please comment.:

The principle should be that the prejudice caused by the violation of the trade secret has to be repaired in its entirety in the most appropriate way. Therefore, as long as it is still possible and useful, an injunctive relief should be ordered in order to stop the disclosure and/or the use of the trade secret and thus mitigate the prejudice of the trade secret holder. Furthermore a distinction has to be made between the prejudice already caused to the trade secret holder by the unlawful acquisition, disclosure and/or use of its trade secret and the prejudice which could still occur in the future. The past prejudice can only be repaired by the payment of damages.

Aspect (iv) - Proving infringement

22) Should constructive knowledge of a trade secret by an ex-employee be imputed to their new employer?

yes

If yes, in what circumstances? :

Yes, under strict conditions, as provided in the current Belgian regime exposed under question 12 above. The new employer's knowledge should in particular be based on a set of serious, precise and convergent factual elements.

23) Availability of pre-action evidence orders and seizure orders.

a) Should pre-action evidence preservation orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place *ex parte*?:

Yes, pre-action evidence preservation orders and seizure orders should be available. Evidence preservation orders should take place *ex parte* as a matter of principle, subject to the prior authorization of a judge, and the possibility for the later to decide that only a third independent party (e.g. an expert) will have (full) access to the collected data. As far as seizure orders are concerned they should be allowed *ex parte* also if the judge decides that this is appropriate after balancing the interests of the applicant and the would-be seized party. If the seizure is liable to cause an excessive prejudice to the latter, and the existence, or the extent, of the infringement remains uncertain, a prior hearing should take place. In order to avoid such hearing the claimant should have the option to, temporarily, limit his request to a mere description (and analysis) of the infringing acts/products.

b) Should pre-action evidence seizure orders be available?

yes

If so, should the hearings to decide whether or not to grant them be able to take place *ex parte*?:

See 23) a)

24) What if the claimant learns of new trade secrets (of the defendant) during the course of a seizure?

The claimant should not be allowed to use, or divulge, trade secrets learnt in such circumstances, until they fall in the public domain. This prohibition should apply in particular if the claim is dismissed.

III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

Yes.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

Aspect (i) - Overlaps with restraint of trade

26) Please propose principles for the circumstances in which trade secret enforcement actions should fail, because such actions would be de facto restraints of trade.

The central criterion should be the good or bad faith of the user of the trade secret or the owner of the goods manufactured on the basis of the trade secret.

27) What relief should courts give when a trade secret violation has occurred or is about to occur, but an enforcement action is barred as a restraint of trade?

The violating party should be liable to pay damages to the owner of the trade secret.

28) Should employees subject to a stricter obligation of confidentiality be released from that duty in certain circumstances? If so, in what circumstances?

N/A.

Aspect (ii) - Ensuring confidentiality during Court proceedings

29) What protection for trade secrets should be available during Court proceedings, and what conditions should be satisfied for that protection to be given?

Full disclosure should only be reserved to the court or - in technically advanced cases - to a third party expert appointed by the court, and limited disclosure should be made to the other party:

- provided that the disclosing party is able to demonstrate that the trade secret is eligible for protection in the case at hand (secret, substantial, valuable, etc.),
- and subject to certain safety measures (e.g. limited verification by the parties' lawyers or individually

designated representatives of the other party, under an injunction not to disclose to the other party).

The courts should be (made) aware of the risk of disclosing trade secrets when issuing judgment (e.g. not explicitly include trade secrets).

30) If an enforcement action fails (e.g. because the defendant had independently developed the secret information and did not misappropriate it), what type(s) of confidentiality or non-use obligation, if any, should continue or cease to apply?

No such obligation should apply, unless agreed during the proceedings.

Aspect (iii) - Valuation of loss

31) Please propose the principles for quantifying damages for trade secret violations.

The principles applicable to IP rights violation should equally apply to trade secret violation. This means the taking into consideration of all the relevant factors, including the unfair profits obtained by the infringer, the loss of profits incurred by the trade secret holder, the possibility of calculating the damages on the basis of royalties which would have been due had the infringer requested authorisation to use the trade secret in question, as well as any moral prejudice caused to the trade secret holder.

32) Should courts award moral damages?

yes

If so, how should they be quantified?:

The moral damage should not be excluded as a matter of principle, as the reputation of a company or the confidence herein can be damaged due to a trade secret violation. The moral damages should however always be demonstrated.

Aspect (iv) - Proving infringement

33) What measures to secure or preserve evidence should be available?

The group strongly suggests that all measures available to secure or preserve evidence of infringement of intellectual property rights¹¹ be available, under national laws, to the holders of trade secrets who present reasonably available evidence to support their claims that such trade secrets have been illegally acquired, divulged or used. The same safeguards, in particular those directed to the protection of confidential information of the alleged infringer, or visited third party, should also apply. Those provisions should be compliant with the general requirements under Article 50 of the TRIPs Agreement, which does not make any distinction between undisclosed information, protected under Article 39, and other IP rights.

Footnotes

1. ¹¹ As far as Belgian law is concerned, cf. the specific procedure of "Saisie en matière de contrefaçon" / "Beslag inzake namaak" described above, in our answer to questions 15 and 16. At the EU level, the Directive on Trade Secrets should, in our view, be supplemented by provisions similar to those found

under Articles 6 and 7 of Directive 2004/48.

34) What restrictions should apply to the use of seized evidence by the claimant?

Practical measures, including restricted access and/or non-disclosure obligation, should be taken to avoid such evidence to be used for other purposes than substantiating the pending, or contemplated legal claim.

Summary

Please comment on any additional issues concerning trade secrets you consider relevant to this Working Question.