

# Bird & Bird & Trade secrets in the workplace

New legislative developments and challenges

Anton Aerts, Associate

International HR Services

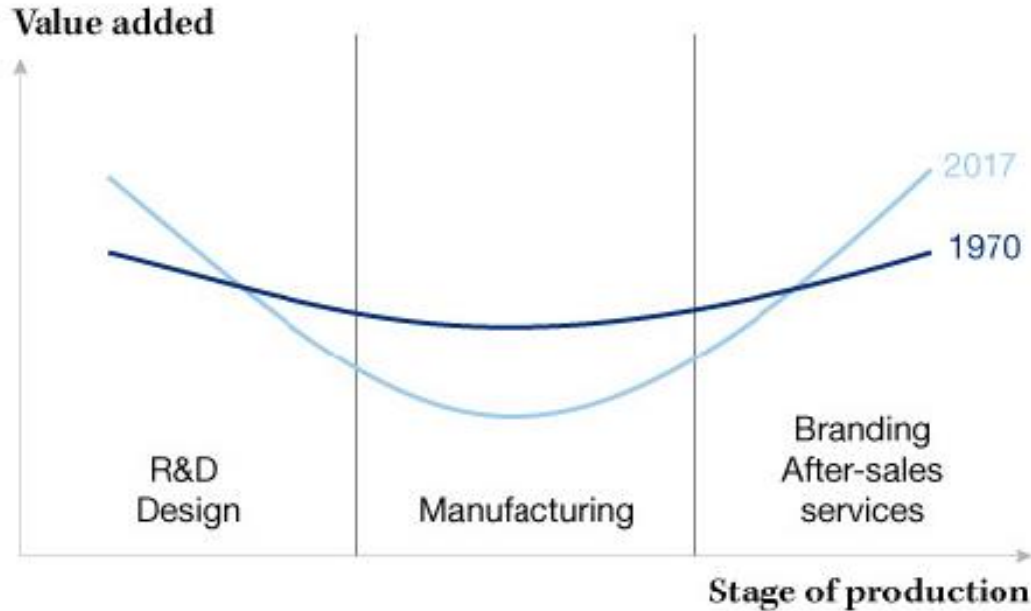
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- 2 The new Belgian Act on the Protection of Trade Secrets
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# Trade secrets in the digital century

## *World Intellectual Property Report 2017*

### Production in the 21<sup>st</sup> century – a growing smile



Report: *Intangible Capital in Global Value Chains*

# Trade secrets in the digital century

*Yes, these valuable assets were never more vulnerable*



Huge increase in intangible assets



Over 80% corporate value held in such assets



Very easy to share  
(intentionally or not)

# Trade secrets in the digital century

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Employees: the most important threat to your trade secrets!





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# The new Belgian Act on the Protection of Trade secrets

## *Implementation of the EU Directive 2016/943*

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**Uniform legal framework**  
(not an IP right)

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**New acts of infringement,  
infringers, relief**  
With a catalogue of exceptions

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**A common definition**

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**Secrecy in court cases**  
(litigation)

# The new Belgian Act on the Protection of Trade secrets

## *What is a (protected) trade secret ?*

### **Art. 2 Directive**

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- 1 It must be a secret – surprise, surprise!

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- 2 It must have a commercial value, because it is a secret.

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- 3 It must be subject to reasonable steps of prevention.



# The new Belgian Act on the Protection of Trade secrets

*What is a (protected) trade secret ?*

**Technical know-how and business information**



Business plans

## Customer lists

Customers who bought this product

Copy Print Excel CSV PDF Reset column order Show 10 orders

Date	Order	Billing First name	Billing Last name	Billing E-mail
2017-05-14	<a href="#">2712</a>	John	Doe	<a href="mailto:john@johndoe.com">john@johndoe.com</a>
2017-05-06	<a href="#">2645</a>	Jane	Doe	<a href="mailto:jane@janedoe.com">jane@janedoe.com</a>
2017-05-06	<a href="#">2645</a>	James	Doe	<a href="mailto:james@jamesdoe.com">james@jamesdoe.com</a>
2017-07-21	<a href="#">2919</a>	Jeremy	Doe	<a href="mailto:jeremy@jeremydoe.com">jeremy@jeremydoe.com</a>
2017-07-21	<a href="#">2919</a>	Janis	Doe	<a href="mailto:janis@janisdoe.com">janis@janisdoe.com</a>
2017-06-22	<a href="#">2905</a>	Jolene	Doe	<a href="mailto:janis@janisdoe.com">janis@janisdoe.com</a>
2017-05-14	<a href="#">2710</a>	Jasper	Doe	<a href="mailto:jasper@jasperdoe.com">jasper@jasperdoe.com</a>
2017-05-13	<a href="#">2709</a>	Jackie	Doe	<a href="mailto:jackie@jackiedoe.com">jackie@jackiedoe.com</a>



Recipes

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# Implications for Belgian labour law

## *Definition*

### **New article 17, 3° of the Act on Employment Contracts**

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*"as well during the employment agreement as after its termination, the employee has to refrain from*

- a) illegally obtaining, using or making public a trade secret in the meaning of article I,17/1 of the Economic Code"*

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**Refers to the definition of the Directive**

# Implications for Belgian labour law

## *Employee mobility*

***The provisions of the Act on Trade Secrets may not be construed as a means to limit employee mobility***

Honestly acquired  
skills



***"You cannot  
empty my  
brain!"***

# Implications for Belgian labour law

## *Exceptions*

**A trade secret can be nevertheless disclosed in the following cases:**

1

For exercising the right to freedom of expression and information

2

For revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest (includes whistleblowing)

3

Disclosed by workers to their (union) representatives

4

For the purpose of protecting a legitimate interest

# Implications for Belgian labour law

## *Exceptions*

A trade secret can be nevertheless protected in the following cases:

1

For exercising the right of freedom of expression and information

Many broad exceptions risk undermining protection

For revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest (includes whistleblowing)

3

Disclosed by workers to their representatives

For the purpose of protecting a legitimate interest



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# Tips & tricks

## *Prevention (when hiring & during employment agreement)*

### **Include a confidentiality clause in the employment contract**

The Act on Trade Secrets explicitly determines that the use of a trade secret shall be considered unlawful when:

- in breach of a confidentiality agreement;
- in breach of a contractual duty.

### **Provide in sufficient IT measures to protect trade secrets**

may include monitoring of the electronic communication of the employee (mind privacy and data protection laws)



# Tips & tricks

*Prevention (when hiring & during employment agreement)*

Check the employee's electronic communications or at least keep a back-up

Never give the employee favourable termination terms before ensuring that s/he cannot harm the company

Warning letter to the employee and/or employee's new employer

Exit interviews



"When I press this button, activating the trap door, this will conclude the exit interview."

# Thank you & Bird & Bird

## **Anton Aerts**

**Associate**

Tel: +32 2 282 60 83

anton.aerts@twobirds.com



## **Pieter De Koster**

**Partner**

Tel: +32 2 282 60 81

pieter.dekoster@twobirds.com



## twobirds.com

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