

# Bird & Bird & Trade Secrets

## *Implementation of the Trade Secret Directive – Some comments from Belgium*

In the third of our series of articles written by members of our International Trade Secrets Group, and intended to highlight particular points to note relating to the protection of Trade Secrets in various different countries, we move to Belgium, where the Trade Secrets Directive ("TSD") was implemented by means of an Act of 30 July 2018 ("TSBA"), which entered into force on 24 August 2018. One and a half years later, we are able to report on a few judgments rendered under the auspices of this new legislation.

Noteworthy points are (i) a noticeable increase in the number of cases in which trade secrets related issues are being brought up; (ii) the range of information parties are seeking protection for under trade secrets legislation; (iii) an emphasis on the requirement of taking "reasonable steps" to protect; (iv) parties seeking means to gather evidence of trade secrets breach; and (v) a willingness by the courts to provide for protection of trade secrets when conducting court proceedings.

These points are discussed in further detail below:

### 1) Noticeable increase in the number of Trade Secrets cases

We have noted a higher number of (reported) trade secret cases during the last 1.5 years. While neither the protection of trade secrets nor many of the specific conditions or measures provided by the TSBA are new, this increase in litigation shows that trade secret holders have gained confidence through the impetus and solid legal framework provided for by the TSBA. That being said, trade secret holders have had mixed successes in their attempts to have an alleged trade secret recognised as such.

### 2) Information that is secret and has commercial value because of its secrecy

To benefit from legal protection as a trade secret, the information needs to be secret. However, *absolute* secrecy is not required. It suffices that the information, either in its entirety or in the precise composition and arrangement of its components, is not generally known by, or easily accessible to,

persons within the circles normally dealing with such types of information. It is additionally required that the information has *commercial value* because of such secrecy.

A recent (criminal) case in the Leuven Court dealing with the specific sub-set of "factory secrets" reminded the claimant of the importance of clearly defining the particular secret the claim is based on. A general plea showing that a company had developed technical know-how in the field of rechargeable battery systems did not suffice to show it held a secret, nor that this secret was at issue in the proceedings. As such, the established fact that a former employee transferred emails with attachments to his personal email address and started a competing activity later on, did not and could not suffice to show that these emails would also contain a recognised factory secret, or any breach thereof.

In another recent case before the Antwerp Court a trade secret holder claimed protection for client information and pricing data. The court rejected that plea. While the court recognised its sensitive nature, it was not convinced about its secrecy nor its commercial value. It was found that the information at issue would typically be mentioned on an invoice or on a bill of lading, and would therefore not be secret in the sense that competitors with some expertise in the sector could reconstruct it.

The same court did award trade secret protection to a body of information that could be used to rebuild a production line. These trade secrets were considered not generally known to the public and having commercial value by allowing optimisation of the concerned product lines.

### 3) Reasonable steps to protect the secrecy of such information

Taking "reasonable steps" to keep the information in question confidential is a paramount criterion for legally qualifying as a trade secret. In the aforementioned case in Leuven, the court found that "reasonable measures" were not taken in the given circumstances when the employment contracts with

key R&D personnel did not contain any confidentiality and non-compete obligations. It was not deemed sufficient to stress the importance of keeping certain information confidential only when terminating the employment.

In another case before the Antwerp Court, where the plaintiff had included confidentiality obligations in its supplier and employment agreements and had invested in data security on its servers, the court *did* grant trade secret protection.

#### 4) Gathering evidence of wrongdoing in relation to trade secrets

The burden of proof to show not only the existence of a trade secret, but also its misappropriation, misuse or unauthorised disclosure lies with the claimant. Such evidence may be hard to provide, for instance because it is available only within the premises of an alleged infringer. In Belgium, the powerful tool of an evidentiary seizure would in theory allow the gathering of such evidence. However, the Belgian legislator made very clear when drafting the TSBA that this procedure applies to IP rights, and does not cover trade secrets. Belgian law, however, does provide for alternative means of safeguarding evidence. *Ex parte* seizures or sequestration of evidence (article 584.4 Procedural Code), for instance, may provide for such means. It requires there are *prima facie* indications of a breach of the TSBA and an absolute necessity of gathering and/or safeguarding the evidence on an *ex parte* basis. Before and after the TSBA entered into effect, Belgian courts have granted such relief to avoid the risk that a defendant would dispose of the relevant evidence. However, courts have also overturned earlier orders or rejected petitions that lack precision, or that failed to show why the measure is absolutely necessary.

#### 5) The protection of trade secrets during court proceedings

The TSD included an explicit obligation to ensure that secrecy can be maintained in the course of conducting

legal proceedings, which was carried over, almost literally, in the TSBA. That being said, confidentiality clubs or *in camera* court hearings are no novelty in Belgian law, especially not in certain practices, like IP litigation. It therefore came as no surprise that the courts dealing with these issues were among the early adopters.

Importantly, these protective measures are now enshrined in the (general) procedural code. This means they are not only available in cases where trade secrets are being enforced, or even the primary subject-matter of the litigation, but may play a role in any court case.

As such, a defendant in a patent infringement claim before the Brussels Court recently managed to convince the court that a confidentiality regime had to be put in place to safeguard his interests in the litigation, as discussing his non-infringement defence might require disclosing confidential information. Elaborate debate between the parties lead to this useful precedent, setting out relevant factors for determining the number and profile of the members of a confidentiality club.

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