



## UNVEILING THE NEW BELGIAN LAW ON THE PROTECTION OF TRADE SECRETS

SEPTEMBER 2018

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At last, after roughly two years, the EU Directive 2016/943 (hereinafter: The Directive) of 8 July 2016 has finally been transposed by the long-awaited Belgian Law of 30 July 2018 on the Protection of Trade Secrets (hereinafter: The Law) that entered into force on 24 August 2018.

The Law brings clarity, among other things, by giving a legal definition of “trade secrets” and provides useful mechanisms that allow more effective enforcement of the right to the protection of trade secrets.

Considering that The Law is in large part a copy/paste-exercise from The Directive, we first recollect the main objectives and principles of The Directive.

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### **Main objective**

It is clear from the recitals and the preparatory documents that The Directive has as its primary objective to establish effective and comparable legal means for protecting trade secrets across the Union in order to facilitate cross-border activities within the internal market.

Globalisation, digit(al)isation, the internet, the lack of common definitions and legal concepts are reoccurring phenomena that create the need for most of the regulatory actions at the European level. These were specifically problematic in the area of trade secrets considering the high economic value attached to trade secrets, the ease of copying and transferring huge amounts of data, as well as the multinational aspects and strategic considerations that go with a possible leak of trade secrets.

### **Principles**

To achieve the objective mentioned above, The Directive does not only contain articles on substantive law, but also several articles dealing with the procedural side of the coin.

The Directive starts with a homogenous definition of “trade secrets” in order to have a common legal understanding of the concept across the internal market.

Further, it outlines the circumstances in which legal protection of trade secrets is justified. Bearing in mind lawful means of acquisition, use or disclosure of a trade secret, The Directive strikes a careful balance between the interests of the various stakeholders, amongst which, the companies concerned, journalists, whistleblowers and employees. It aims at providing sufficient protection to the right holders, while at the same time not aiming at stifling competition nor innovation, nor restrict the fundamental freedom of others.

Finally, it contains articles aimed at facilitating, but also encouraging those harmed by a breach to seek and find legal redress. The Directive prescribes that Member States put in place procedures that are not overly burdensome, whilst at the same time providing the persons seeking redress with adequate legal means to address specific issues relating to their trade secrets. The preservation of confidentiality of trade secrets is essential during these procedures.

### **Key features of The Law**

The Law does not deviate noticeably from The Directive and copies the wording of The Directive almost literally in many aspects. There are, however, several articles from The Directive that did not make it into The Law, merely because the legal concepts or mechanisms already existed under Belgium Law, such as the legal remedies against abusive exercise of a right.

Just like The Directive, it is worth mentioning that The Law brings clarity to the domain of trade secrets by, for the first time, providing a written legal definition of this concept. It has done so by enumerating the different requirements that need to be fulfilled in order for information to be protected as “trade secrets”. It is interesting to note that these requirements are substantially in line with those already known from the TRIPS Agreement. The new definition reads as follows:

*“The information needs to be*

- *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;*
- *it needs to have commercial value because it is secret;*
- *and finally it needs to be subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;”* (art. 2, 1° The Law, own emphasis).

In light of this new definition, and especially the last requirement, it is recommended that companies re-examine and document their current measures undertaken to keep their valuable information secret to ensure that they can continue enjoying protection under the new legal regime, in addition to documenting the valuable information itself.

A most welcomed novelty in Belgian procedural law is the new confidentiality obligations and mechanisms aimed at protecting trade secrets, not only during but also after the procedure involving these trade secrets. This should provide those harmed effective legal protection and facilitate the enforcement of their rights. In this regard, The Law gives the possibility to the judge to impose a fine on anyone in breach of their confidentiality obligations, ranging from € 500 to € 25.000.

It is worth noting that The Law provides for legal remedies similar to those that already exist for intellectual property rights such as, but not limited to, cessation of unlawful use or disclosure, recall, destruction of infringing goods and damages. This enhances the strength and effectiveness of the right to the protection of trade secrets. However, despite being debated during the parliamentary discussions, the descriptive seizure procedure will not be available to the holders of a trade secret.

Lastly, in light of enhanced specialisation, The Law centralises most litigation concerning trade secrets to the commercial courts regardless of the parties’ capacity, although there are several exceptions in favour of labour courts in cases involving employees. One should keep in mind that the statute of limitation has been set to five years from the discovery of the unlawful breach and the identity of the alleged infringer, similar to the regime of non-contractual liability.

### **Conclusion**

Remains to be seen the impact in practice, but in theory, The Law should be able to provide sufficient means to combat the phenomena of industrial espionage and employees copying substantive amounts of (confidential) documents, in particular before they leave. The enhanced legal remedies put the holders of a trade secret almost on par with

the holders of an intellectual property right, which should enable them to take action more efficiently against a possible leak of their trade secrets.

In conclusion, the change is most welcomed, in particular considering that the most valuable information sometimes is information that precedes intellectual property rights, and is thus not protected by the latter.

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Philippe Campolini and Christopher Dumont

For more information or any question, please contact the authors:

[philippe.campolini@simontbraun.eu](mailto:philippe.campolini@simontbraun.eu) - +32 2 533 17 52

[christopher.dumont@simontbraun.eu](mailto:christopher.dumont@simontbraun.eu) - +32 2 533 17 58