

The legal framework governing trade secrets in Belgium has changed significantly with the adoption of EU Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (“Trade Secrets Directive”).

The Trade Secrets Directive was transposed into Belgian law by the Act of 30 July 2018 relating to the protection of trade secrets (“Trade Secrets Act”). The Trade secrets Act entered into force on 24 August 2018, which means that it has been in force for more than five years and this is now a good time for an interim evaluation.

## THE DEFINITION OF TRADE SECRETS

Prior to the transposition of the Trade Secrets Directive in 2018, Belgian law did not have a specific definition of “trade secrets”. Trade secrets are now defined rather broadly and consist in the first place of *information*, which may include, among others, know-how, the secrets of the factory, business processes, commercial information, market studies, customer lists, business plans, knowledge from previous projects, price lists and technological information. The Trade Secrets Act does not provide for any limitation as to the nature or appearance of the protected information, nor does it require protected information to be fixed on a medium (paper or digital).

In order to be protected as a trade secret the information must cumulatively meet the following three conditions:

1. ***The information is secret in the sense that the information must not be generally known and the information must not be generally accessible to anyone wishing to acquire it.***

The condition of secrecy must be examined on a case-by-case basis, taking into account all the concrete circumstances of the case, such as the specificities of the sector in question. Secrecy must further be assessed from the point of view of the professional circle concerned, and not from the point of view of a person external to it. In addition, the secret nature of confidential information must be assessed as a whole. This means that when the various components of information are individually generally known or easily accessible to persons within the circles that normally deal with the kind of information, but not in their combination (as a whole), then the information as a whole still remains secret. Finally, trivial information and the experience and skills gained by employees in the normal course of their employment are excluded from the definition of trade secrets.

# PROTECT YOUR TRADE SECRETS

## — GENERAL INTRODUCTION



## 2. *The information has commercial value because it is secret.*

This means that the breach of secrecy must prejudice the legitimate holder of the information, and the author or beneficiary of the breach of secrecy can derive a benefit from it. It is not required that the information as such has a commercial value. It is however necessary, but also sufficient, that the trade secret confers a competitive advantage on its holder, so that the latter has a commercial interest in keeping the information secret.

## 3. *The information must be subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*

“Reasonable steps” may take different forms, such as contractual provisions, physical or virtual security mechanisms, the registration of a trade secret with the Benelux Office for Intellectual Property using i-DEPOT®, etc. One might think of confidentiality clauses in commercial contracts or in employment contracts, installing camera surveillance, identity verification, controlling access to premises, using of a safe, deployment of guards or encryption of files or email messages. Whether sufficient reasonable measures have been taken to keep the information secret must be assessed on a case-by-case basis, taking into account the concrete circumstances of the case. This essential condition is often overlooked, and not taking sufficient reasonable measures will lead to a denial of trade secrets protection.

## THE BENEFICIARY OF PROTECTION OF TRADE SECRETS

The “trade secret holder” is defined in the Trade Secrets Act as “any natural or legal person lawfully controlling a trade secret”. This control may take the form of the ability to impose obligations on third parties relating to trade secrets (e.g. obligations of confidentiality and non-use of trade secrets or physical measures restricting access to information). It can be assumed that licensees too may benefit from the protection given to trade secrets.

## STAY TUNED

In part two of our Trade Secrets Series we will discuss the acts against which a trade secret holder may take action: the unlawful acquisition, use or disclosure of trade secrets.

**For any questions or assistance, please reach out to our  
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*This newsletter is not a legal advice or a legal opinion. You should seek advice from a legal counsel of your choice before acting upon any of the information in this newsletter.*



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