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In the first episode of our Trade Secrets Series we gave an introduction to the legal framework governing trade secrets in Belgium. In this second episode we will explain in more detail the acts against which a trade secret holder can and cannot take action.

THE ACTS AGAINST WHICH NO ACTION CAN BE TAKEN: THE LAWFUL ACQUISITION, USE OR DISCLOSURE OF TRADE SECRETS

The trade secret holder cannot take action when the trade secret is acquired by:

1. *independent discovery or creation;*
2. *observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret; [This situation covers reverse engineering. Reverse engineering of a lawfully acquired product should be considered as a lawful means of acquiring information, except when otherwise contractually agreed.]*
3. *exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices; and/or*
4. *any other practice which, under the circumstances, is in conformity with honest commercial practices.*

The acquisition, use or disclosure of a trade secret is also considered lawful when it is required or allowed by EU or Belgian law. This could include regulations on freedom of expression and freedom of the press, the law on the protection of sources, etc. Similarly, the protection of certain (fundamental) rights under national, EU and supranational law and the mobility of workers may prevail over the protection of trade secrets.

However, the fact that a trade secret is initially acquired lawfully does not prevent its use or disclosure from being unlawful. These acts may be prohibited by (national) law (e.g. constitute an unfair commercial practice) or contract.

THE ACTS AGAINST WHICH ACTION CAN BE TAKEN: THE UNLAWFUL ACQUISITION, USE OR DISCLOSURE OF TRADE SECRETS

Unlawful acquisition

The Trade Secrets Act mentions two cases where the acquisition of trade secrets without the consent of its holder is considered unlawful:

PROTECT YOUR TRADE SECRETS

INFRINGING AND EXEMPT ACTS AND EXCEPTIONS



1. unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
2. any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

Examples of conduct contrary to honest commercial practices might include theft, corruption, bribery and deception, breach of trust, breach of, or incitement to breach of, a confidentiality agreement or other obligation to maintain secrecy.

Unlawful use or disclosure

Subsequent acts may also be considered a breach of a trade secret. The use or disclosure of a trade secret is considered unlawful whenever carried out, without the consent of the trade secret holder, by a person:

1. *having acquired the trade secret unlawfully;*
2. *being in breach of a confidentiality agreement or any other duty not to disclose the trade secret; and/or*
3. *being in breach of a contractual or any other duty to limit the use of the trade secret.*

Unlawful acquisition, use or disclosure as a second-degree offence

The acquisition, use or disclosure of a trade secret is also considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or, under the circumstances, should have known that the trade secret had been acquired directly or indirectly from another person who was using or disclosing the trade secret unlawfully. This provision allows for the protection of trade secrets against acts by “third-party acquirers” or “second-degree offenders”. The ratio *legis* is that, if a person receives information that was originally acquired unlawfully, and that person is aware or should be aware of this, they may not use or disclose that information. Besides some exceptions, the general rule is that persons who receive information in the second degree should handle it with caution and circumspection.

A conceivable hypothesis is the case of an employee entering the service of a new employer who discloses his former employer’s trade secrets to his new employer. The new employer may also be liable as a second degree offender on the grounds that he knew, or at least ought to have known, that the employee was violating his former employer’s trade secrets.

For the application of this provision, the required “knowledge” must be there at the time of acquisition, use or disclosure. As a result, a party who acquires a trade secret in good faith and then uses it, no longer benefits from the presumption of good faith as soon as it is informed by the rightful holder of the unlawful origin of the trade secret. The subsequent use is then unlawful and action can still be taken against such use.

Infringing goods

The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, is considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully. “Infringing goods” are defined as “*goods, the design, characteristics, functioning, production process or marketing of*



which significantly benefits from trade secrets unlawfully acquired, used or disclosed’.

Whether the person who acts in relation to the infringing goods, knew or, given the circumstances, should have known that the trade secret was being used unlawfully must normally be assessed at the time when the acts began. As a result, a subsequent communication by the right holder about the “tainted” nature of the infringing goods will normally not remove the good faith of the receiving party.

Exceptions

The Trade Secrets Act provides exceptions on the unlawful character where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

1. *for exercising the right to freedom of expression and information as set out in the rules of inter- and supranational law and in the Constitution, including respect for the freedom and pluralism of the media; [This exception covers, among others, the protection of investigative journalism and journalistic sources.]*
2. *for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest; [This exception targets the protection of bona fide whistleblowers. The general public interest includes inter alia public safety, consumer protection, public health and environmental protection. It is not necessary that actual misconduct, wrongdoing or illegal activities are disclosed or that the disclosure actually contributes to the general public interest. It is sufficient that the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this provision.]*
3. *disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise; and/or*
4. *for the purpose of protecting a legitimate interest recognised by Union or national law.*

This last exception suggests a broad scope enabling the courts to strike a balance between the rights of trade secrets holder and the freedoms of the defendant.

STAY TUNED

In part three of our Trade Secrets Series we will analyse the measures, procedures and remedies that can be taken in the event of 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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