

Michaël De Vroey & Noah Verbaenen | November 2023

In the latest episode of our Trade Secrets Series we focused on the position of trade secrets in the employer-employee relationship. In this fifth episode we will discuss the measures aimed at maintaining the confidentiality of trade secrets during legal proceedings.

PROTECTION OF TRADE SECRETS DURING LEGAL PROCEEDINGS

The Trade Secrets Act introduced a new Article 871*bis* in the Judicial Code, which provides for the protection of trade secrets during legal proceedings. It is interesting to note that, while Article 9 of the Trade Secrets Directive only introduced a confidentiality obligation during legal proceedings *concerning* the unlawful acquisition, use and disclosure of trade secrets, the Belgian legislator chose to extend the scope of this confidentiality obligation to *all* legal proceedings in which a trade secret has been *used or mentioned*.

Pursuant to Article 871*bis* of the Judicial Code, the parties, their lawyers or other representatives, magistrates and court staff, witnesses, experts and any other persons who, through their participation in legal proceedings, or through their access to the documents forming part of those proceedings, have become aware of an (alleged) trade secret, which the court, upon a reasoned request of an interested party or on its own initiative, has determined as confidential, may not use or disclose that (alleged) trade secret.

The confidentiality obligation remains in force after the legal proceedings have ended. However, it ceases to exist when a final decision has established that the information concerned does not satisfy the conditions for protection as a trade secret, or when the information has become generally known or easily accessible to persons within the circles that usually deal with this type of information.

Additionally, upon a reasoned request from an interested party or on its own initiative, the court may take the following specific measures to preserve the confidentiality of an (alleged) trade secret that is used or mentioned during legal proceedings:

1. restrict access to any document containing (alleged) trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;
2. restrict access to hearings, when (alleged) trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons or categories of persons he designates expressly;

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3. make available a non-confidential version of any judicial decision to any person other than those comprised in the limited number of persons referred to above, in which the passages containing trade secrets have been removed or redacted.

The expressly designated persons or categories of persons will constitute a so-called “confidentiality club”. The confidentiality club must include at least one natural person from each party (typically the company’s in-house legal counsel) and the respective lawyers or other representatives of those parties to the legal proceedings (such as a technical advisor or a patent attorney). The number of persons may not be greater than necessary to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial. The possibility of creating a “confidentiality club” is a welcome and useful addition to the tools available to parties and courts to preserve the confidentiality of (alleged) trade secrets during court proceedings and to allow for a more open debate involving trade secrets.

When deciding on the specific measures, the court must assess their proportionality. In doing so, the court must in particular take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties and, where appropriate, for third parties, resulting from the granting or rejection of such measures. In practice, the courts will often impose additional restrictions that are tailored to the specifics of each case.

Anyone who fails to comply with the abovementioned confidentiality obligations in legal proceedings, may be sentenced to a fine of between EUR 500 and EUR 25,000. This fine is without prejudice to any damages that could be claimed.

STAY TUNED

In the sixth and final episode of our Trade Secrets Series we will elaborate on government regulations related to licensing and commercialisation of trade secrets (including guidelines on imported/exported technology and antitrust laws) and tax issues related to trade secrets (including deductibility and amortization of R&D costs and taxes on royalties).

If you want to know more about the protection of trade secrets in Belgium, please refer to our detailed contribution for Belgium in the next edition of the book “*Trade Secrets Throughout the World (TSTW) 2024-2025*” which will be published by early 2024.

**For any questions or assistance, please reach out to our
Intellectual Property Team | IP@simontbraun.eu – +32 (0)2 543 70 80**

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.



SIMONT BRAUN

Avenue Louise 250 / 10
1050 Brussels

+32 (0)2 543 70 80

www.simontbraun.eu

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