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In the latest episode of our Trade Secrets Series we discussed the measures aimed at maintaining the confidentiality of trade secrets during legal proceedings. In this sixth and final episode we elaborate on the criminal law protection of trade secrets and tax issues related to trade secrets.

CRIMINAL LAW PROTECTION OF TRADE SECRETS

Article 309 of the Belgian Criminal Code imposes imprisonment and fines on any person who maliciously or fraudulently passes on secrets of the factory owned by the company where he is or was employed to a third party. The notion of “secrets of the factory” has a narrower scope than that of “trade secrets”. In the absence of a definition in the law, the Belgian Cour de Cassation ruled that it is for the court hearing the case to assess whether the manufacturing process constitutes a secret of the factory in the normal and usual sense of those terms. The Cour de Cassation did not reverse the Court of Appeal judgement that defined “*secrets of the factory*” as “*a technical fact which, contributing to the performance of the operations carried out in a factory to obtain a given product, is of such a nature as to give the manufacturer technical advantages and to ensure him a superiority over his competitors of such a nature that it is to his economic advantage not to be known by his competitors*”.

It may be regretted that the Belgian legislator did not use the transposition of the Trade Secrets Directive to bring Article 309 Criminal Code in line with the new notion of “trade secrets”. This could have improved legal certainty and uniformity. It can now be questioned whether the case law of the Cour de Cassation remains applicable, or on the contrary, we should take the view that, from now on, the definition in the Trade Secrets Directive will also apply in criminal matters.

In some cases, it may also be useful to invoke other provisions of the Criminal Code with regard to the prohibition against divulging professional secrets (Article 458 Criminal Code), theft of documents (Article 461 Criminal Code), as well as the protection of domicile against non-authorized entry (Article 439 Criminal Code). Criminal sanctions may also be imposed in cases where an act of unfair competition is committed in bad faith (Article XV.83 CEL) or in violation of a court injunction (Article XV.85 CEL).

Scope of protection

The scope of protection under Article 309 Criminal Code is in various aspects rather limited and subject to a number of conditions. First, Article 309 only protects secrets of the factory relating to production methods, processes, or the products themselves.

PROTECT YOUR TRADE SECRETS

— CRIMINAL LAW PROTECTION AND TAX ISSUES



Second, the protection granted under Article 309 can only be invoked against employees or former employees and not against competitors and other third parties unless they are co-conspirators with respect to the original misappropriation committed by the employee. The non-disclosure obligation contained in Article 309 Criminal Code applies to blue-collar workers, managers, and directors employed by a company.

Disclosure as such to a non-authorized third party is punishable under Article 309 even if the information was communicated after termination of the employment contract. The employee or former employee is punishable under Article 309 if technical know-how has been disclosed to a third party, irrespective of whether that third party is a competitor of the employer. This means that the appropriation of secrets of the factory by an employee who, having left his former employer, sets up his own business and uses a secret of the factory confided to him by his previous employer, is not punishable under Article 309 Criminal Code. The employer will have to rely on civil law and unfair competition rules for his remedies in such a case.

The unauthorized disclosure of a secret of the factory by an employee or former employee is sufficient to violate Article 309 irrespective of whether the third party uses the manufacturing secret. The way in which manufacturing secrets are communicated to third parties is also irrelevant (orally, written, handing over of documents, etc.).

As mentioned, Article 309 Criminal Code is only applicable to employees, and not, for example, to competitors or other third parties who wrongfully appropriate the secrets of other companies. Such third parties could, however, be punished as co-conspirators or as accomplices if, by any act, they participated in the violation of Article 309 in such a way that without said help the offence could not have been committed, or if they directly instigated the commission of it.

A third party using a secret of the factory could not be held responsible under Article 309 as an accomplice if the disclosure of manufacturing secrets has taken place without its active involvement in the original misappropriation and illegal disclosure. The criminal protection of secrets of the factory only covers the misappropriation and disclosure of said secrets by employees, and not the use of the secret technical know-how by a third party.

It should also be stressed that communication to a third party is only punishable if the employee has acted maliciously or fraudulently. Maliciously means with the conscious view to cause damage. Fraudulently means with a profit-seeking motive. While such *dolus specialis* does not require awareness of the prohibited nature of the act, an employee will not be punishable under Article 309 if he simply acted through negligence.

In practice, an employer rarely invoke protection under Article 309 Criminal Code because of the difficult burden of proof and because such criminal protection does not usually provide an effective means to prevent the use of the secrets of the factory by a competitor.

Damages for certain wrongful acts (such as “passing off”) can be sought under the law on unfair competition and/or the general rules of civil liability, and (current or former) employees can be held liable for damages by virtue of the Act on Employment Contracts.



Sanctions and prosecution

Criminal sanctions for breach of Article 309 Criminal Code are included in the Code itself. Under Article 309, any covered person who maliciously or fraudulently discloses secrets of the factory to third parties will be sentenced to imprisonment of three months to three years and to a fine of fifty euros to two thousand euros.

The employer (or former employer) may file a complaint with the public prosecutor (*Procureur du Roi, Procureur des Konings*) who will gather information and determine whether legal action should be brought. However, the employer may also file charges with the investigating judge (*judge d'instruction, onderzoeksrechter*) in order to initiate the procedure, notwithstanding the opinion of the public prosecutor. It is also possible to send a writ of summons, but this is not an efficient means of summoning witnesses and is thus rarely used.

TAXATION AND TRADE SECRETS

Withholding and other taxes on royalties paid to a licensor

As a general rule, royalties received by a Belgian company are subject to corporate income tax on their net amount, i.e., gross amount less expenses, including any foreign turnover, withholding and income taxes (to the extent that these have been levied correctly according to the relevant double tax treaty).

There is a lump-sum foreign tax credit available for royalty income which is equal to 15/85 of the net amount received, i.e., less foreign tax, but before deduction of any Belgian withholding tax which is due in certain cases. The income received is grossed up. This credit is only granted if the income has been subject to foreign income tax, but regardless of the actual amount of the foreign tax withheld or assessed. As from assessment year 2025, the actually paid foreign withholding tax will be taken into account to determine the lump sum portion of foreign tax.

A withholding tax of 30% is levied in Belgium on royalties paid by a Belgian company. The withholding tax can be exempted or reduced pursuant to domestic law or the relevant double tax treaty. The withholding tax on royalties paid to a non-resident is a final tax in Belgium, provided that the non-resident recipient does not receive this income through a permanent establishment in Belgium, in which case he is subject to non-resident income tax on the net amount of the royalty income.

According to the Belgian VAT Code, the transfer and licensing of intellectual or industrial property rights constitute services that are subject to VAT. The normal Belgian VAT rules apply to these services. To the extent that these services are located in Belgium, Belgian VAT will be due on the royalties at the standard rate of 21%. If the intellectual property right is transferred or licensed to a recipient established outside the European Union, the service is located in the country where the recipient of the service is established.



Deductibility, amortization of R&D costs and special tax regimes

In computing corporate income tax, business expenses, including royalties, are deductible. However, anti-avoidance provisions can limit the deduction if the payments are not in line with the arm's-length principle or if the payments are made to foreign companies that are not subject to income tax or that are located in a country where the tax rules for this specific income are substantially more advantageous than in Belgium.

Investments in research and development can be amortized over a period of at least three years.

It should also be noted that a special investment deduction is available for costs of research and development, licenses and know-how. For assessment year 2024, the ordinary rate of the one-off investment deduction is equal to 8%. To the extent that the costs relate to environment-friendly investments, the investment deduction for such investments is equal to 20.5% of the investment cost.

Expenses related to know-how or trade secrets are generally not eligible for the Belgian innovation income deduction regime.

This concludes our Trade Secrets Series. 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

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