

QUESTIONS FOR NATIONAL REPORTERS OF LIDC STOCKHOLM 2015

QUESTION B

The Protection of Trade Secrets and Know-How

Are countries providing enough or too much protection?

BELGIAN REPORT

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TABLE OF CONTENT

1. DEFINITION(S)	4
1.1. International level	4
1.2. European level	5
1.3. Belgian level	6
1.4. Common features	7
2. LEGAL FRAMEWORK	7
2.1. Criminal law	8
2.2. Labour law	9
2.3. Tort law	10
2.4. Unfair competition	10
2.5. Contract law	10
2.6. Constitutional and fundamental rights	11
2.7. Other rules	11
2.8. Trade secrets as intellectual property rights?	11
3. ENFORCEMENT	12
3.1. Elements to prove to initiate legal action in case of trade secret misappropriation	12
3.2. Burden of proof	13
3.3. Legal measures to secure evidence of trade secret misappropriation	13
3.3.1. Production orders within the course of pending proceedings.....	14
3.3.2. <i>Ex parte</i> measures to secure evidence	14
3.3.3. Judicial sequestration.....	15
3.3.4. Measures specific to criminal proceedings.....	15
3.3.5. Other measures	15
3.3.6. Exclusion of IP devices	15
3.4. Available proceedings	16
3.4.1. Criminal proceedings.....	16
3.4.2. Civil proceedings	16
4. PROTECTION OF TRADE SECRETS IN THE COURSE OF PROCEEDINGS	17
4.1. (Restricted) access to the hearing	18
4.2. (Restricted) access to evidence	18
4.2.1. Balance of interests between the right to protection of trade secrets and the right to a fair trial .	18
4.2.2. Suppression of confidential information from evidence	21
4.2.3. Disclosure of confidential information to a limited group of person and/or under specific conditions.....	22
4.2.4. Legitimate reason to refuse to submit certain documents to the court	23
4.3. Publicity of judgement and possibility to limit disclosure of confidential information	24
4.4. Do safeguard procedural measures apply automatically?	24
4.5. Use of information gained during the proceedings after termination thereof	25
5. REMEDIES AVAILABLE IN CASE OF TRADE SECRET MISAPPROPRIATION	25
5.1. Injunctions / Cease and desist orders	25
5.2. Accessory/accompanying measures	26
5.3. Damages	26
5.3.1. Absence of specific provision.....	26
5.3.2. Quantification of damages	27

5.3.3.	Possible damages for moral prejudice	28
5.4.	Reimbursement of attorney’s fees.....	28
5.5.	Possibility to obtain remedies against third parties	28
6.	PROTECTION OF KNOW-HOW IN CONFIDENTIALITY OR NON-DISCLOSURE AGREEMENTS.....	29
7.	MISUSE OF TRADE SECRET PROTECTION.....	29
8.	CONCLUSION AS TO THE POSSIBLE INADEQUATIES OF THE PROTECTION OF TRADE SECRETS IN BELGIUM	31

The purpose of the present report is to give a brief, yet complete, overview of the protection of trade secrets and know-how in Belgium at the moment.

Before examining the existing system of protection as such, we will first define the notion of “trade secrets”, as one must first understand what does this notion really correspond to in order to see and to understand, how it is and/or can be effectively protected under Belgian law (Section 1).

After having defined the notion of “trade secrets”, we will examine the legal framework currently in place in Belgium within which trade secrets are and/or can be protected (Section 2).

In a third time, we will then examine how a trade secret owner can enforce his right in case of misappropriation, and more particularly, what elements have to be established in order to launch a judicial action, what legal measures are at the trade secret owner’s disposal to secure evidence of the alleged misappropriation and, finally, what proceedings are available (Section 3).

As we will see, considering the risk of further disclosure of trade secrets within judicial proceedings, many trade secret owners are rather reluctant to launch a judicial action to defend their rights. We will therefore thoroughly examine the measures available up to date to ensure the protection of trade secrets within the course of proceedings (Section 4).

Once the misappropriation of trade secrets has been established, we will briefly examine what remedies are available to the trade secret owner (Section 5).

In Section 6, we will look at the contractual protection likely to be conferred to trade secrets or, more largely, to confidential information in addition to and/or in the absence of specific legal protection.

Finally, we will briefly examine the question of the possible misuse of trade secrets (Section 7).

1. DEFINITION(S)

As we will further see in the next section, there is not a single piece of legislation on the protection of trade secrets as such in Belgium, but there are several provisions of Belgian law which can be used against the misappropriation of trade secrets.¹

These provisions do not provide for a uniform definition of trade secrets under Belgian law.²

In the absence of a uniform definition, guidance can nevertheless be sought at the international, European and national levels to determine the common features of the general concept of “trade secrets”.³

1.1. International level

International law does not provide for a definition of trade secret as such. Yet, Article 39(2) of the TRIPS agreement (hereafter “TRIPS”) provides that “undisclosed information” should be protected against being

¹ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 2, “Member States’ responses to initial trade secrets questionnaire”, Belgium, p. 9.

² D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 370.

³ M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 13.

disclosed to, acquired by, or used by others without their owner's consent in a manner contrary to honest commercial practices, "so long as such information:

- a) is 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;
- b) has commercial value because it is secret; and
- c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret".

1.2. European level

European law does not provide for a uniform definition of trade secrets. However, several European legislative acts contain specific definitions of trade secret and/or know-how, notion which is often considered, if not as a synonym, at least as a subset of the notion of trade secret. Yet, the scope of these definitions is limited to the specific sector covered by the considered regulations:

- According to Article 1(i) of Commission Regulation No 316/2014,⁴ know-how means a package of practical information resulting from experience and testing, which is:
 - (i) secret, that is to say, not generally known or easily accessible,
 - (ii) substantial, that is to say, significant and useful for the production of contract products, and
 - (iii) identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.⁵
- In its notice 2005/C 325/07,⁶ the Commission provides for a definition of trade secret in a specific context (access to the Commission's files), but which is not without interest considering that the approach is casebased, so that the considered definition can easily be transposed to other situations.⁷ Section 3.2 of the Commission notice distinguishes between two categories of information, namely "business secrets" and "other confidential information":
 - (i) "Business secrets" are defined, with reference to the decision "Postbank" of the Court of First instance of the European Union (hereafter "CFI") of 18 September 1996,⁸ as "information about an undertaking's business activity, [the disclosure of which] could result in a serious harm to the same undertaking". According to the Commission, examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.

⁴ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28 March 2014, pp. 17-23.

⁵ For similar definition of "know-how", see: Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23 April 4 2010, pp. 1-7; Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304, 5 December 2000, pp. 7-12; Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1 August 2002, pp. 30-41.

⁶ Commission Notice 2005/C 325/07 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

⁷ M. Buydens, "La protection des secrets d'affaires et la procédure de saisie en matière de contrefaçon", Cah. Jur., 2011, p. 14.

⁸ CFI, case T-353/94, *Postbank v Commission*, ECR 1996 II-921, pt 87.

- (ii) “Other confidential information” includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking.

In a decision of 12 October 2007, the CFI took over this definition and added that the interests liable to be harmed by disclosure must be worthy of protection:

“As regards, generally, the nature of business secrets or other information covered by the obligation of professional secrecy, it is necessary, first of all, that such business secrets or confidential information be known only to a limited number of persons. Next, it must be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties (*Postbank v Commission*, paragraph 63 above, paragraph 87, and see also Commission Notice 2005/C 325/07 on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC] (OJ 2005 C 325, p. 7), paragraphs 3.2.1 and 3.2.2). Finally, the interests liable to be harmed by disclosure must be worthy of protection. The assessment as to the confidentiality of a piece of information requires, in this regard, the individual legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible (*Bank Austria Creditanstalt v Commission*, paragraph 46 above, paragraph 71).⁹”

1.3. Belgian level

Not only is there no uniform definition of trade secrets under Belgian law, but moreover there does not seem to be a unique expression of “trade secrets” as such. Indeed, depending on the field of law we look at, the protected confidential information is qualified as a “manufacturing secret” (“*secret de fabrique*” / “*secret de fabrication*”), a “business secret” (“*secret d’affaires*”) or simply identified as “confidential information”:¹⁰

- Article 309 of the Belgian Criminal Code (hereafter “Cr.C.”) prohibits the disclosure of “*manufacturing secrets*” by individuals working or having worked in a factory;
- Article 17, 3° of the Belgian Act of 3 July 1978 on Employment Contracts¹¹ (hereafter “AEC”) provides that an employee may not disclose, either during his employment or after the termination thereof, “*manufacturing secrets, business secrets or secrets in respect to any personal or confidential matters which he may have obtained in the framework of his professional activity*”. This broad definition covers technical information, commercial data such as clients and prices, as well as information pertaining to the organization of the business.
- A broader definition of “trade secrets” is applied in cases where the courts are seized to rule on whether the misappropriation and use of confidential information of a competitor constitutes an unfair trade practice in the sense of Article VI.104 of the Belgian Code of Economic Law¹² (hereafter “CEL”). This case law at least implicitly seems to apply the definition provided in Article 39(2) TRIPS¹³ which, even if it does not enjoy direct effect in Belgium, does however not preclude an interpretation of national law

⁹ CFI, case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, ECR 2007 II-4225, pt 65.

¹⁰ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 3, “Member States’ responses to second trade secrets questionnaire”, Belgium, pp. 5-6.

¹¹ Belgian OJ, 22 August 1978.

¹² Book VI CEL cancelled and replaced the Belgian Law of 6 April 2010 on market practices and consumers protection (see Law of 21 December 2013, Belgian OJ, 30 December 2013).

¹³ See Section 1.1 above.

in accordance thereof.¹⁴ Examples of protected information include detailed customer lists, data in respect to the date that maintenance and repairs were conducted for particular clients, the spare parts delivered to a particular client¹⁵ and confidential e-mail correspondence¹⁶.

1.4. Common features

In view of the above, for the purpose of this study, the concept of “trade secret” (in the broad sense of the word) can be defined as:

- (i) technical, commercial or organizational information related to the business;
- (ii) that is “secret”; that is to say that is not generally known or easily accessible (even if shared by several person);
- (iii) which has economic value, i.e. it confers a competitive advantage to the owner;
- (iv) which if disclosed to a competitor would be such to cause significant damage to the owner;
- (v) last, but not least, it is commonly agreed that secrecy must be achieved and/or maintained due to the owner’s reasonable efforts.¹⁷

2. LEGAL FRAMEWORK

As already underlined in Section 1, Belgian law does not provide for a comprehensive set of rules governing the protection of trade secrets as such.¹⁸

In 2007, the Belgian legislator stated in the *Travaux Préparatoires* of the Acts implementing the Directive 2004/48/EC on the enforcement of intellectual property rights¹⁹ (hereafter “the Enforcement Directive”) that the protection of confidential information is an issue requiring urgent attention which should be included in a separate act.²⁰ Whilst this was a promising statement, no initiatives seem to have been taken since then.²¹

To this day, trade secret owners can rely on the following provisions of Belgian law, used alone or in combination with one and another.²²

¹⁴ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 369; M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 13.

¹⁵ Ghent Court of appeal, 18 February 2004, D.C.C.R., 2005, p. 67.

¹⁶ Ghent Court of appeal, 30 March 2009, D.A.O.R., 2009, p. 180.

¹⁷ M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 14.

¹⁸ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, “Intellectual Property and Commercial Law – Country Report”, Belgium, p. 6; D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 370.

¹⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 3 April 2004, pp. 45-86.

²⁰ Preparatory works of the Acts on civil and procedural law aspects of the protection of intellectual property rights, DOC 51 2943/001 and 2944/001, Exposé des motifs.

²¹ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 370; M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 14.

²² Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 2, “Member States’ responses to initial trade secrets questionnaire”, Belgium, pp. 9-11.

2.1. Criminal law

Trade secret violation constitutes a criminal offence under Article 309 Cr.C.:

“Whoever communicates in a deceitful or malicious way, manufacturing secrets of the factory where he is working or has worked, shall be punished with imprisonment from three months up to three years and a fine from EUR 50 to EUR 2,000”.

The protection offered by this provision is rather limited. Its scope is indeed strictly delimited by the 5 following conditions:

- The protected information must be a “manufacturing secret” “of the factory”:
 - (i) This notion is narrower than the general notion of trade secrets. To this day, there is no uniform legal definition thereof. We must therefore turn to the case law, where the Belgian Supreme Court ruled that a “manufacturing secret” comprises “technical data which, in contributing to the realisation of operations put in place in a factory to obtain a certain product, are liable to provide to the manufacturer technical advantages and which ensure a competitive superiority over his competitors so that the manufacturer obtains an economical benefit by not disclosing the information to his competitors”.²³ In its decision of 26 June 1975, the Court of cassation also ruled that, absent a legal definition of “manufacturing secret”, it is up to the court ruling on the merits of the case to decide whether, in a given case, a manufacturing process qualifies as a “manufacturing secret”.²⁴ Recent case law still applies the definition set out in the judgment of 27 September 1943.²⁵
 - (ii) By specifying that the protected secret must be “of the factory”, Article 309 does not only aim at protecting secrets which the employee has acquired knowledge of consequently to his functions within the company – as it is the case in labour law (see Section 2.2 below) – but all the manufacturing secrets of the company he has worked in, whatever the reasons he has acquired knowledge thereof.
- Only the effective disclosure (“communication”) of the secret is incriminated. The simple risk of dissemination or disclosure of trade secrets as such is not sufficient to give rise to criminal liability.²⁶ Furthermore, the use of the secret merely for its own account, without the secret being divulged, is not penalized.²⁷
- Communication of the secret must be made to a “third party”.²⁸ Yet, only the author of the illegal communication will be punished under Article 309 whereas the third party which has benefited from the disclosure can freely use the manufacturing secret unless it is proven that he has been an accomplice of the considered disclosure (see Sections 2.5 and 6 below).

²³ Supreme Court, 27 September 1943, Pas., I, p. 1043.

²⁴ Supreme Court, 26 June 1975, Pas., I, p. 1043.

²⁵ Liège Court of appeal, 2 September 2004, J.L.M.B., p. 508; Antwerp Court of appeal, 31 March 2009, I.C.I.P., 2009, p. 133; Brussels Court of appeal, 31 March 2009, I.C.I.P., 2009, p. 137.

²⁶ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 3, “Criminal Law - Country Report”, Belgium, p. 9.

²⁷ B. Tilleman, “L’obligation au secret et à la discretion des administrateurs de sociétés”, J.T., 1993, p. 549 ; Van Mensel, “De bescherming van fabrieksgeheimen of technische know-how naar Belgisch recht”, R.W., 1981-1982, col. 2001 sq.; M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 15.

²⁸ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 3, “Criminal Law - Country Report”, Belgium, p. 11.

- This provision is not limited to employment agreements as such. It applies against any person who works or has worked for the company under a contract, regardless of his legal status.
- To establish trade secret violation as a criminal offence, the illegitimate disclosure must have taken place and the offender must have acted purposely, knowingly or recklessly (“in a deceitful or malicious way”), to prejudice the company and/or to gain illicit advantage for oneself or for a third party.²⁹ Disclosure out of mere indiscretion, carelessness or ignorance will not suffice.

Besides what precedes, a person invoking a violation of Article 309 Cr.C. must have taken all necessary measures with a view of protecting the manufacturing secrets vis-à-vis third parties.³⁰

2.2. Labour law

Pursuant to Article 17, 3° AEC, an employee must “refrain, during the term of the employment contract as well as after its termination:

- a) from divulging the manufacturing secrets, trade secrets, as well as secrets in respect to personal or confidential matters, which he may have obtained in the framework of its professional activity;
- b) from performing or collaborating to any act of unfair competition”.

The scope of this provision is quite broad:

- The legal obligation of confidentiality covers:
 - (i) “manufacturing secrets” (see Section 2.1 above);
 - (ii) “trade/business secrets”: any commercial and/or financial information which belong to the undertaking and which secrecy / non-disclosure brings it an advantage over his competitors;
 - (iii) “secrets in respect to personal or confidential matters”: any information relating to people and/or matters linked to the undertaking. In other words, any confidential information which comes to the knowledge of the worker during the course of his employment.³¹
- The (ex-)worker must refrain from “divulging” the secret: this notion must be interpreted broadly. The mere use of confidential information can be considered as a divulgement in the sense of Article 17, 3°, a) AEC. Moreover, the mere use of confidential information is considered as an act of unfair competition pursuant to Article 17, 3°, b).³²

Employees are therefore under a legal duty of confidentiality / confidence even if this is not expressly set out in their employment agreement.

The employer is entitled to add a confidentiality clause in the employment agreement, in which he can describe more in detail what is meant by trade or manufacturing secrets, as well as the information that is covered by the confidentiality duty.³³ However, this does not entitle the employer to broaden the scope of the legal obligation.³⁴ It is therefore not possible to prevent an employee from using in the future the knowledge / technics he has

²⁹ See for example Antwerp Court of appeal, 31 March 2009, I.C.I.P., p. 133.

³⁰ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 3, “Criminal Law - Country Report”, Belgium, pp. 9-11.

³¹ Brussels Court of appeal, 10 September 2013, 2011/AR/3155, pp. 17-18, unpublished.

³² Brussels Court of appeal, 10 September 2013, 2011/AR/3155, p. 18, unpublished.

³³ Brussels Court of appeal, 10 September 2013, 2011/AR/3155, p. 19, unpublished.

³⁴ In this sense, see Article 6 AEC: “Any stipulation contrary to the provisions of this Act and of its implementing decrees is void insofar as it seeks to restrict workers' rights or to worsen their obligations”.

acquired in the course of his employment, providing of course that said use does not imply disclosure of a trade secret.³⁵ Moreover, a confidentiality clause may not result in a mere non-compete obligation, since the validity and enforceability of the latter clause is subject to specific conditions set out in the legal provision (must be limited in time, geographically, etc.).

In principle, there is no time limitation to the confidentiality duty of the employee: it lasts as long as the secret remains. However, if the employer decides to add a confidentiality clause to the employee's employment agreement, he could contractually provide for a specific period of time during which the employee would at least be bound by the confidentiality duty.

2.3. Tort law

The general law of tort, encompassed in Article 1382 of the Belgian Civil Code (hereafter "CC") can also be invoked to compensate trade secret misuse:

"Any act of a person which causes a prejudice to someone else, obliges the one who committed the fault to repair such prejudice".

According to this provision, a person who does not behave as a normal, cautious and forward-looking person placed in the same circumstances (this includes the mere negligence) and who, by such tortious behaviour, causes a prejudice, is obliged to repair such prejudice.

The misappropriation and use of trade secrets belonging to a third party can constitute "tortious behaviour" in the meaning of Article 1382 CC.

2.4. Unfair competition

Where the misappropriation and use by an undertaking of trade secrets belonging to another undertaking causes or threatens to cause prejudice to this undertaking, the latter can rely on Article VI.104 CEL, which provides for a general prohibition of unfair trade practices among economic actors (undertakings):

"Any act contrary to the fair market practices whereby an undertaking causes or threatens to cause prejudice to the professional interests of one or more other undertakings is prohibited".

This rule can be seen as a specific application in the field of business of the general principles of tort (see Section 2.3 above).

2.5. Contract law

Articles 1134 and 1135 CC respectively provide that:

- "Legally concluded agreements take the place of law for those who made them. They can be revoked only by mutual consent or for causes authorized by law. They must be performed in good faith".

- "Conventions oblige the parties not only to what is expressed in it but also to all the consequences which equity, usage or law confer to the obligation according to its nature".³⁶

³⁵ Ghent Court of appeal, 19 February 2007, Ann. Prat. Comm., 2007, p. 425.

³⁶ This provision echoes the duty of loyalty referred to in Article 17, 3°, b) AEC.

A contract may provide protection to the trade secret owner. However, third parties to whom the information is divulged in breach of said contractual provisions will only be liable in case they were aware, or should have been aware, of the contractual obligations of the party having disclosed the information (see Section 6).³⁷

2.6. Constitutional and fundamental rights

It is unanimously accepted that an undertaking can protect its trade secrets on the basis of the European and constitutional provisions protecting privacy. Articles 8 of the European Convention on the protection of Human Rights (hereafter “ECHR”) and Article 22 of the Belgian Constitution can therefore be invoked.³⁸

Moreover, the European Court of Justice (hereafter “ECJ”) has acknowledged protection of trade secret as a general principal of law.³⁹

2.7. Other rules

Various other rules address, in more or less details, the issue of protecting trade secrets (expressly or, more generally, through the protection of “confidential information”), such as:

- professional secrecy applicable to some regulated professions;⁴⁰
- financial regulation regarding inside trading;
- criminal provisions concerning IT theft, breach of confidence,⁴¹ bribery,⁴² etc.;⁴³
- competition law;⁴⁴
- public procurement law;⁴⁵
- pre-contractual information exchanged in the context of trade partnership agreements;⁴⁶ etc.

The abovementioned rules are not addressed in the present study.

2.8. Trade secrets as intellectual property rights?

In Belgium, as in most of the Member States, trade secrets are not considered to be intellectual property right and are therefore not protected as such.⁴⁷ Consequently, the Enforcement Directive is not applicable to trade secrets in Belgium.⁴⁸

³⁷ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 374.

³⁸ See Constitutional Court, 19 September 2007, R.A.B.G., 2008, p. 382; which refers to CEDH, 16 December 1992, *Niemietz c. Germany*, pt 29 and CEDH, 16 April 2002, *Soci t  Colas Est e.a. c. France*, pt 41; see on this decision M. Buydens, “La protection des secrets d’affaires et la proc dure en saisie-contrefa on”, Cah. Jur., 2011, pp. 13 sq.

³⁹ ECJ, case C-53/85, *Akzo Chemie et Akzo Chemie UK / Commission*, ECR 1986 I-1965, pt 28; ECJ, case C-36/92, *SEP / Commission*, ECR 1994 I-1911, pt 37.

⁴⁰ See for example Article 458 Cr.C. concerning the professional privilege for medical doctors, health officers, etc.

⁴¹ Article 491 Cr.C.

⁴² Article 504bis Cr.C.

⁴³ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 8, “Country Specific Questionnaires – Criminal Law”, Belgium, pp.10-17.

⁴⁴ Book IV CEL (“protection of competition”); see more in particular Articles IV.4, IV.42, IV.58, IV.60 and IV.64.

⁴⁵ See Article 11 of the Belgian Act of 15 June 2006 on public procurement and on certain contracts for works, supplies and services, Belgian OJ, 15 February 2007.

⁴⁶ Article X.31 CEL.

⁴⁷ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 2, “Member States’ responses to initial trade secrets questionnaire”, Belgium, p. 12.

⁴⁸ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, “Intellectual Property and Commercial Law – Country Report”, Belgium, p. 7.

In addition, some courts even consider that trade secrets should enjoy less legal protection than intellectual property rights as they are not intellectual property rights and are therefore not limited in time. In this sense, the Liège Court of appeal stressed that manufacturing secrets could only enjoy limited protection. Indeed, while one can prevent parties from disclosing such secret, it cannot be used to prevent parties from using a similar manufacturing process, when the secret has not been breached. This would otherwise allow the owner of the manufacturing secret to enjoy a similar, or even stronger, protection than a patent owner (see Section 5.1).⁴⁹

3. ENFORCEMENT

3.1. Elements to prove to initiate legal action in case of trade secret misappropriation

In order to be able to judicially enforce his rights, and to possibly obtain compensation of the infringement thereof, a trade secret owner must prove that:

- (i) He is the owner of a trade secret: As seen in Section 1.4 above, “trade secrets” can be defined as business, organizational or technical information, which is liable to provide its owner certain advantages and which ensure a competitive superiority over its competitors, so that its owner obtains an economical benefit by not disclosing the information to his competitors. As a trade secret is valuable only if it remains secret, the owner of the confidential information should also prove that he suffers a prejudice from its disclosure.
- (ii) The confidential information which has allegedly been infringed is duly protected: As outlined in Section 2, trade secrets can be protected under different provisions of law (alone or combined with one and another). Therefore, depending on the legal provision invoked, the trade secret owner will have to establish that the considered confidential information can qualify as a “manufacturing secret” and/or “business secret”, “trade secrets”, etc.
- (iii) The information has been disclosed in breach of this protection: The elements to be proved depend on the protection ground invoked:⁵⁰
 - The criminal offence under Article 309 Cr.C. requires the evidence that:
 - (i) the defendant is a (former) “employee” of the company;⁵¹
 - (ii) he disclosed a “manufacturing secret” to a third party;
 - (iii) the defendant acted with fraudulent intent;
 - (iv) the trade secret owner can establish that he had adopted reasonable steps to keep it secret.
 - Article 17, 3°, a) AEC implies that the following elements are established:⁵²
 - (i) the defendant is a (former) employee;
 - (ii) who has disclosed manufacturing secrets, business secrets and/or any other confidential information of he acquired within the course of his work,
 - (iii) to persons who had no knowledge of the secret.

⁴⁹ Liège Court of appeal, 12 June 2008, I.R.D.I., 2008, p. 339.

⁵⁰ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 2, “Member States’ responses to initial trade secrets questionnaire”, Belgium, pp. 12-13; Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, “Intellectual Property and Commercial Law – Country Report”, Belgium, pp. 7-8.

⁵¹ In the broad sense of the word; see Section 2.1 above.

⁵² For an example of the elements which the trade secret owner must establish in order to get relief and, where possible, compensation, see Brussels Court of appeal, 10 September 2013, 2011/AR/3155, pp.21 sq., unpublished.

- Under Article 1382 CC, the plaintiff has to prove that the three following conditions are met:
 - (i) the defendant has committed a civil “fault” (“tortious behaviour”);
 - (ii) which has caused a prejudice to the plaintiff;
 - (iii) there is a causal link between the tortious behaviour and the prejudice.

- Pursuant to Article VI.104 CEL, in order to start proceedings against an undertaking for unfair practices resulting from the misappropriation, unauthorized use or disclosure of trade secrets, the plaintiff has to prove that:
 - (i) The defendant and the plaintiff are both “undertakings” in the meaning of Article I.1, 1° CEL (“individual or company durably involved in an economic activity”);
 - (ii) the defendant committed an act contrary to fair market practices. The misappropriation, disclosure or use of trade secrets of another undertaking is considered by case law and legal doctrine as an act contrary to such practices;
 - (iii) This misuse or disclosure causes or threatens to cause prejudice to the professional interests of the plaintiff.⁵³

3.2. Burden of proof

The burden of proof in a trade secret violation case is governed by the general Belgian civil law principles.

According to Article 1315 CC⁵⁴ and Article 870 of the Belgian Judicial Code (hereafter “JC”)⁵⁵, each party must prove what he/she alleges.

In principle, the claimant would first have to demonstrate what rights he has and that the alleged trade secret can be considered in fact as a trade secret (see Section 3.1 above). As a means of defence, the defendant would have to prove that he legitimately gained access to the trade secret.

Regarding the proof of the confidential nature of the litigious trade secret, the claimant must demonstrate that the trade secret cannot easily be accessed materially, intellectually and legally speaking. Here again, as a means of defence, the defendant would have to prove that he gained access to the trade secret through a legitimate way.

Eventually, when seeking damages, the claimant has to prove the prejudice suffered. Indeed, the sole fact that a trade secret and/or a confidentiality clause might have been breached is not sufficient as such to establish that the trade secret owner has effectively suffered a prejudice justifying compensation.⁵⁶

3.3. Legal measures to secure evidence of trade secret misappropriation

Because of the ease with which information can be copied (for instance, by using electronic means), a general problem facing plaintiffs in trade secret actions is proving that their trade secrets have been misappropriated and identifying the nature and scale of misuse. If the victim cannot prove the “theft”, he cannot institute legal proceedings.

⁵³ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKET/2010/20/D, Appendix 3, “Member States’ responses to second trade secrets questionnaire”, Belgium, p. 1.

⁵⁴ “Whoever claims the performance of an obligation must prove it.

Reciprocally, one who claims to be released, must justify the payment or the fact which terminated its obligation”.

⁵⁵ “Each party has the burden of proving the facts it alleges”.

⁵⁶ Brussels Court of appeal, 10 September 2013, 2011/AR/3155, p. 23, unpublished.

Belgian law provides for procedural devices that the trade secret owner can use in order to secure evidence of the alleged infringement of his rights:

3.3.1. Production orders within the course of pending proceedings

Under civil procedure law, the court can order that a specific document containing evidence of a relevant fact be submitted by a party to the proceedings (Article 871 JC).⁵⁷ Such an order may even be addressed to a third party to the pending proceedings (Article 877 JC).⁵⁸ For such an order to be allowed, there must be serious, precise and concordant presumptions that the party in question has such document in his/her possession. If, the party which has been ordered to produce a document refrains to do so without a due justification, he may be condemned to damages. Such production order is close to a common law “discovery”, though its scope is narrower.

3.3.2. Ex parte measures to secure evidence

The Judicial Code also includes a general provision allowing the Presiding judges of civil, commercial and labour courts to take various kinds of (provisional) orders on the basis of *ex parte* proceedings (Article 584, 3rd indent JC). Such orders may be requested with the view to obtaining and securing evidence of facts, including, arguably, the violation of trade secrets, the unlawful divulcation (or use) of confidential information, and yet other acts of unfair competition.

The threshold to obtain such orders in *ex parte* proceedings is, however, rather high: in addition to the requirement for normal summary proceedings, namely urgency, the petitioner must demonstrate the existence of an “*absolute necessity*” not to make use of *inter partes* (summary) proceedings. Besides cases of “extreme urgency” (i.e. where any delay would cause irreparable harm to the right holder), such absolute necessity exists, according to leading legal scholars, when there is a demonstrable risk of evidence being destroyed, and a surprise effect is hence necessary.⁵⁹

In addition to the abovementioned conditions, the *ex parte* measures aiming at securing evidence likely to be obtained in application of Article 584, 3rd indent JC must meet the requirements set out in Article 877 JC. In other words, the considered *ex parte* measures will only be granted if the trade secret owner has established that “there are precise, serious and strong presumptions” that another party has in its possession a *specific* document containing the proof of a fact relevant for the solution of the case. If the trade secret owner fails to do so, the requested *ex parte* measure should be denied as “fishing expedition” are not allowed under Belgian civil procedural law, outside the specific procedure of “seizure in matter of counterfeit” which is not available to trade secret owners (see Section 3.3.6).

In this sense, in an unpublished judgment of 17 December 2008,⁶⁰ the Brussels Court of appeal cancelled an *ex parte* order (granted by the judge in first instance pursuant to Article 584, 3rd indent JC) which had allowed the collecting of computer data, by a bailiff and an expert, from the computers of a company suspected of unfair competition and its directors. According to the court of appeal, the actual purpose of the petitioner was to search or identify undetermined elements of evidence, which was not allowed under Belgian civil procedural law. Likewise, in a judgment of 8 March 2011,⁶¹ the Liège Court of appeal confirmed the cancellation of an *ex parte* judicial order which had allowed the collecting of evidence by an expert concerning the sales of biscuits the packaging whereof was allegedly in breach of fair market practices. The court held that there was no “absolute necessity” for such an order to be granted, within the meaning of Article 584, 3rd indent JC. Moreover, the court

⁵⁷ “The judge may order any party to the procedure to produce the evidence available to it”.

⁵⁸ “If there are precise, serious and strong presumptions that a party to the procedure or a third party has in its possession a document containing the proof of a relevant fact, the judge can order the production thereof”.

⁵⁹ H. Boularbah, *Requête unilatérale et inversion du contentieux*, Bruxelles, Larcier, 2010, pp. 486 and following.

⁶⁰ Brussels Court of appeal, 17 December 2008, *One Solution/HP*, 2008/AR/90, unpublished.

⁶¹ Liège Court of appeal, 8 March 2011, *Lotus Bakeries/Brichard*, 2010/RF/135, unpublished.

underlined that the request for such order, on the basis of the latter provision, constituted an attempt to circumvent the requirements under Article 1369*bis* JC (see Section 3.3.6 below).⁶²

3.3.3. Judicial sequestration

Belgian law provides for a general device called “judicial sequestration” (Articles 1955 and following CC), whereby any kind of object can be confiscated and put into the hands of a third party (trustee). According to case law, the conditions for sequestration to be granted are that two or more persons invoke conflicting rights in a same object.⁶³

Judicial sequestration may be requested in *ex parte* proceedings, under Article 584, 3rd indent JC, subject to the condition of absolute necessity and might arguably be used in the context of violation of trade secrets, where documents or other confidential items have been diverted. There is however no settled case law in this respect.

3.3.4. Measures specific to criminal proceedings

Whenever a criminal offence (including the violation of trade secrets) is suspected to have been committed, the police, and in some cases other public agents, may, under the supervision of an investigating magistrate, take, on a pre-action stage, any measures necessary to secure evidence of the crime and prevent its continuation (seizures, seals, witness hearings, etc.).

As seen in Section 3.3.6 below, a trade secret owner cannot secure evidence via an *ex parte* search order, as available under Article 1369*bis* JC for IP right holder. Yet, in criminal proceedings, the examining magistrate has the widest investigative powers which implies that he can order all necessary measures, including ordering a search of the premises and computer systems for misappropriated data and requiring the defendant to provide information as to the whereabouts of the documents and files containing such data.⁶⁴

3.3.5. Other measures

The infringement may be proved by any legal means, including confessions, testimonials,⁶⁵ expert evidence, presumptions, etc., provided that these have been legally acquired.

3.3.6. Exclusion of IP devices

Since trade secrets are not considered as intellectual property rights (see Section 2.8 above), the specific procedural devices put in place, mostly in implementation of the Enforcement Directive, to allow the IP right holder to gather evidence of the existence and the scope of the infringement to his rights are not available to trade secret owner. In this respect, it can be referred to the following procedural devices.⁶⁶

⁶² O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

⁶³ Supreme Court, 16 April 1984, Arr. Cass., 1983-84, p. 1097; Bull., 1984, p. 1036; Pas., 1984, I, p. 1036; R.W., 1984-85, p. 1986; Supreme Court, 28 April 1994, A.J.T., 1994-95, p. 267, note P. Hofstrossler, Arr. Cass., 1994, p. 427; Bull. 1994, p. 418; J.L.M.B., 1995, p. 5, P.&B., 1994, p. 158; Pas., 1994, I, p. 418; R. Cass., 1994, p. 324, note K. Broeckx; R.W., 1994-95, p. 812.

⁶⁴ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 3, “Criminal Law - Country Report”, Belgium, p. 12.

⁶⁵ Comm. Ghent (Pres.), 5 January 2015, C/14/00029, unpublished.

⁶⁶ O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

- Article XI.334 (3) CEL, implementing Article 8 of the Enforcement Directive which entitles the judge, when finding infringement of a IP right on a commercial scale, to order the infringer (or the user or holder of the infringing goods or services) to provide the claimant with all information and data in his/her possession about the origin and the distribution networks of the infringing goods or services. Such measure will be granted only if it is “justified and proportionate”.
- Article 1369bis/1 sq. JC provides for a specific *ex parte* order called “seizure in matter of counterfeit”. Such an order aims both at obtaining and securing evidence of a suspected infringement (description of facts and taking of samples, pictures and copies of documents on premises of the alleged infringer – “descriptive measures”) and, under stricter conditions, at preventing counterfeit goods from entering into circulation, and production means to be further used (“effective seizure measures”).

To this day, this *ex parte* order is not available to the trade secret owners.⁶⁷ It is worth noting that in its current version, the Proposal for a Directive on Trade Secrets does not include any provision regarding the collecting and safeguarding of evidence.

3.4. Available proceedings

Under Belgian law, action against the misappropriation of trade secrets can be categorized in criminal and civil proceedings.

3.4.1. Criminal proceedings

As seen in Section 2.1, criminal action pursuant to Article 309 Cr.C. is reserved for fraudulent disclosure of “manufacturing secrets” by individuals working or having worked in a factory.

The public prosecutor may prosecute the offender *ex officio*. The trade secret owner may also introduce a claim by filing a report of the offence. Upon receiving the report, criminal investigations can be initiated, but the initiative is left to the public prosecutor. After the investigation, it will again be the public prosecutor who will decide whether the case will be referred to the criminal court or not.⁶⁸

In case the proceedings are initiated, the trade secret owner can decide to become a civil party, which means, among other things, that he will be informed of the investigation, that he can suggest some investigation measures, and that, if the offender is convicted, he may claim damages within the framework of the ongoing criminal proceedings.

3.4.2. Civil proceedings

Civil enforcement can take several forms:⁶⁹

⁶⁷ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 2, “Member States’ responses to initial trade secrets questionnaire”, p. 15; Ghent Court of appeal, 1 December 2008, I.R.D.I., 2009, p. 58; Comm. Antwerp (Pres.), 28 April 2015, C/14/00079, pp. 15-16, unpublished; *contra*: the author Carl De Meyer who considers that the procedure of “descriptive seizure” should also be available for know-how for Belgian law to be compliant with the TRIPs agreement (“Beschrijvend beslag en knowhow”, in Liber Amicorum Ludovic De Gryse, Larcier, Bruxelles, 2010, pp. 117-129).

⁶⁸ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 3, “Criminal Law - Country Report”, Belgium, p. 12.

⁶⁹ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 2, “Member States’ responses to initial trade secrets questionnaire”, pp. 13-14; Appendix 3, “Member States’ responses to second trade secrets questionnaire”, pp. 1-2.

- *Summary / preliminary injunctions*

Preliminary injunctions may include courts orders to (temporarily) stop using or disclosing the trade secret, precautionary measures, appointment of an expert, hearing of witnesses,⁷⁰ etc.

Preliminary relief can be sought in summary proceedings (Article 584 JC) or in the framework of regular action on the merits (Article 19, indent 3 JC *juncto* Article 584 JC), if the claimant can establish that:

- the matter is urgent and the said urgency is not due to his own negligence;
- his rights are *prima facie* valid;
- the relief sought is a preliminary measure which does not affect the merits of the case.

In cases where extreme urgency is established (rather exceptional), an *ex parte* motion can lead to relief in summary proceedings.

- *Cease-and-desist action*

Cease-and-desist actions consist in a court's decision on the merits handed down by the President of the Commercial Court under an expedite procedure to prevent a defendant from committing further infringements.

The cease-and-desist action brought under the Unfair Competition Law (book VI of the CEL) is only available if (i) the claim is not based on a breach of contract by the defendant or (ii) the claimant can establish that the defendant's actions are illegitimate for reasons other than the breach of contract.⁷¹

Cease-and-desist orders may be accompanied by accessory measures that can contribute to the cessation of the infringement (e.g., publication of the court's decision), which will generally be ordered under penalty of a fine in case of non-compliance.

Within the framework of such an expedited cease-and-desist procedure, no damages can be allocated to the trade secret owner, even if the violation of his secret has been established.⁷²

- *Action on the merits*

In a "regular" action on the merits, the plaintiff can seek both an injunction *and* damages. However, it is already worth noting that Belgian courts are quite reluctant to grant orders prohibiting the use of misappropriated trade secrets (see Section 5.1 below).

4. PROTECTION OF TRADE SECRETS IN THE COURSE OF PROCEEDINGS

Although laws are in place to protect trade secrets, trade secret owners face serious problems in enforcing their rights or in safeguarding their trade secrets in the course of court proceedings, whether of civil or criminal nature.⁷³ National procedural rules are not always adapted for the preservation of the secrecy of information during or after litigation: Court hearings (and decisions) are public; in order to get relief, the owner must usually describe his trade secret in open court and/or might be forced by the Court to do so; when issuing an injunction

⁷⁰ Comm. Ghent (Pres.), 5 January 2015, C/14/00029, unpublished.

⁷¹ Ghent Court of appeal, 9 February 2009, www.cass.be (not a trade secret case).

⁷² Antwerp Court of appeal, 27 September 2007, Ann. Prat. Comm., 2008, p. 527.

⁷³ "Report on Trade Secrets for the European Commission", pp. 11-12 (overview of the Belgian legal framework), published at http://ec.europa.eu/internal_market/iprenforcement/docs/trade/201201-study_en.pdf.

based on a trade secret, the court must in principle describe the considered trade secret in its judgment; etc. So many possibilities leading to dissemination of the trade secret.⁷⁴

To this day, in the absence of a legal specific framework,⁷⁵ protection of trade secrets in the course of proceedings is mainly, if not only, to be obtained on a case by case basis.

4.1. (Restricted) access to the hearing

According to Article 148 of the Belgian Constitution, civil proceedings are public.⁷⁶ This principle is also to be found in Article 6.1 ECHR.

As hearings are public, any third party can attend the hearing and hear the arguments and explanations brought by the parties, including the trade secrets.

Yet, Article 148 itself slightly tempers this principle by allowing the Courts to order that the hearing will not be public if the “*public access can endanger morals or public order*” or in case the right to privacy pursuant to Article 6 ECHR is at stake. If it is thus not excluded that trade secrets as such might justify a “closed trial”, we have to this day little knowledge of such decision, both in civil and in criminal proceedings.⁷⁷

In civil proceedings, it is commonly accepted that should a “closed trial” be ordered to ensure trade secrets protection, all parties should have consented thereto. Eventually, it is interesting to note that in some rare occasions, the 18th chamber of the Brussels Court of Appeal has held hearings in the absence of one of the party's counsel, but again with both parties' agreement.⁷⁸

4.2. (Restricted) access to evidence

4.2.1. Balance of interests between the right to protection of trade secrets and the right to a fair trial

Pursuant to Article 870 JC and Article 1315 CC, each party has to prove its claims and file the documents evidencing its claims. This principle has to be read in the light of the principle set forth in Article 736 JC which stipulates that a party that intends to use an exhibit is obliged to communicate it to the other side, echoing the general principle of the right to an “adversarial/*inter partes* trial”.⁷⁹

⁷⁴ "Report on Trade Secrets for the European Commission", pp. 11-12 (overview of the Belgian legal framework), published at http://ec.europa.eu/internal_market/iprenforcement/docs/trade/201201-study_en.pdf.

⁷⁵ Despite Article 42 TRIPS which stipulates that “The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements” – yet, this Article is not directly applicable.

⁷⁶ Supreme Court, 9 November 2012, www.cass.be: “When determining one's rights and duties, everybody is entitled, pursuant to Article 6.1 ECHR, to benefit from the different guarantees provided for in that provision, including the right to a public handling of one's case. This principle of publicity of the trial and the judgment can only be deviated from in case the party involved waives that right freely and unequivocally, and in conformity with national right” (free translation).

⁷⁷ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 3, “Member States' responses to second trade secrets questionnaire”, p. 3.

⁷⁸ Brussels Appeal Court, 30 June 2010, J.L.M.B., 2011, p. 1185; B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1074; O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

⁷⁹ Right for each party to be heard and to have access and to reply to all the documents submitted to the Court by the other party: ECHR, 18 February 1997, *Nideröst-Huber/ Switzerland*, Publ. Eur. Court. H.R. 1997, I, p. 101; B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1064; E. Brewaeys, “Zakengeheim verdraagt geen tegenspraak”, Juristenkrant, 2013, p. 7; Supreme Court 14 January 2005, Arr. Cass., 2005, n°24.

These principles imply that the plaintiff who alleges that a trade secret has been misappropriated has to prove (i) that it owns a trade secret, (ii) what this secret is and (iii) that it has indeed been misappropriated by the defendant. If he fails to do so:

- The court can dismiss the claim for lack of evidence,⁸⁰
- The court can also force the plaintiff to file relevant evidence. Article 871 JC stipulates that “the court can order any litigating party to file the elements of proof in its possession”. In particular, Article 877 JC provides that the court can order the filing of a relevant document: “if there are precise, serious and strong presumptions that a party has in its possession a document⁸¹ containing the proof of a relevant fact”.⁸²

On the basis of the procedural principles abovementioned, it clearly appears that publicity of evidence is the rule. Yet, one can easily see how this rule is potentially contradictory, even harmful, to the protection of trade secrets: For example, the plaintiff who alleges that his trade secret has been misappropriated will have, pursuant to Article 870 JC, to describe his trade secret in his trial briefs and court’s file, which contradict the very nature of the trade secret. In the course of the proceedings, the plaintiff might even be forced to file a document that is considered relevant by the Court and which might contain certain of his trade secrets (Art.877).

As such, two fundamental principles collide: on the one hand, the party's right to protect its privacy, including trade secrets⁸³ (Art.8 ECHR) and, on the other hand, the right to a fair trial set forth in Article 6 ECHR (and Art.14.1 ICCPR), which encompasses the procedural principles abovementioned (the parties' obligation to participate diligently and loyally in the proceedings, the right to get access to evidence and the right to an adversarial/*inter partes* trial⁸⁴). The solution usually suggested when two fundamental rights collide, is that the Court would make a balance of the interests at stake.⁸⁵ This also seems to be the case with respect to the fundamental rights at issue.⁸⁶

In this sense, in a decision of 2 November 2012, the Belgian Supreme Court has expressly acknowledged that the right to privacy, including the right to protection of trade secrets, can in some cases justify a limitation to the right to adversarial/*inter partes* trial, and that the trial judge will have to appreciate the need for such a limitation after having properly balanced the interests at stake.⁸⁷

⁸⁰ Supreme Court, 10 December 1976, Pas., I, p. 410.

⁸¹ The word “document” encompasses written documents but also drawings, pictures, etc.

⁸² This provision echoes Article 43 TRIPS.

⁸³ This right to privacy also applies to professional relationships and legal entities: ECHR, 16 December 1992, *Niemietz/ Germany*, Publ. Eur. Court. H.R. 1993, Series A, p. 251-B; ECHR, 16 April 2002, *Société Colas Est et autres / France*, Publ. Eur. Court. H.R. 2002, III, p.131; ECJ, case C-450/06, *Varec / Belgische Staat*, ECR 2008 I-581; Constitutional Court, 19 September 2007, case 118/2007, Belgian OJ, 31 October 2007; R.A.B.G., 2008, p. 382; Brussels Court of appeal, 9 December 2005, R.G. 2004/AR/174, www.juridat.be.

⁸⁴ B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, pp. 1063-1066.

⁸⁵ ECJ, case C-438/04, *Mobistar / BIPT*, ECR 2006 I-6675; ECJ, C-450/06, *Varec / Belgische Staat*, ECR 2008 I-581.

⁸⁶ Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 3, “Member States' responses to second trade secrets questionnaire”, p. 4; O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet; D. Mougenot, “Le secret des affaires et ses implications en droit judiciaire”, I.R.D.I., 2009, p. 114; B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1065; B. Allermeersch, “Zakengeheim in burgerlijk proces en bewijs”, in B. Allermeersch et al., *Zakengeheim, Brugge, die Keure*, 2012, p. 15; Brussels Court of appeal, 29 September 2006, *Jaarboek Handelspraktijken & Mededinging*, 2006, p. 870; B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, pp.1063-1064; Liège Court of appeal, 25 June 1998, *Jaarboek Handelspraktijken & Mededinging*, 1998, p. 246; Brussel Court of appeal, 7 November 2013, T.B.H., 2014, p. 808; Supreme Court, 20 February 1975, Pas., 1975, I, p.633.

⁸⁷ Supreme Court, 2 November 2012, J.T., 2013, p. 176, note E. De Lophem; T.B.O., 2013, p. 84, note T. Toremans and F. Dupon; Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1066.

Considering that, to this day, there is no legal provision on the basis of which the judge may perform this balance of interests, guidance in that respect is to be found in the case law.

First of all, the judge should always keep in mind the general rule pursuant which fundamental rights can only be deviated from in case it is absolutely necessary and if no less invasive alternative measure is available.⁸⁸ If, at first, the right to a fair *inter partes* trial was almost absolute, the ECJ, followed by the Belgian national Courts, has acknowledged that a limitation could be brought to the adversarial/*inter partes* character of the trial, and to the underlying principle that each party must be given access to all the evidence filed by the other(s), in so long as the evidence which was not submitted to the “contradiction” was not essential for the judge’s final decision⁸⁹ and/or if the prejudice caused by the disclosure of a document containing a trade secret appears disproportionate to the little importance of the considered document for the solution of the case:⁹⁰

- In a decision of 14 January 2000, the Liège Court of appeal refused to order forced disclosure of some confidential documents, considering that the prejudice caused by the requested disclosure was disproportionate compared to the limited relevance of the considered document for the solution of the case;⁹¹
- In a judgment of 29 September 2006, the Brussels Court of appeal found that the principle of loyal participation in the proceedings does not oblige a party to disclose allegedly relevant confidential evidence, if the requesting party itself had not produced any direct evidence to support its case.⁹² This case law was confirmed later by that same court in a similar case, stating that an expert appointment or an order for production of documents cannot serve to compensate for a total lack of evidence by the plaintiff.⁹³ The same conclusion was reached in a case where the plaintiff’s allegations were in fact contradicted by other evidence.⁹⁴

The judge is not bound by the trade secrets qualification given by a party to some document. The judge should always be given the possibility to verify the confidential nature of the document invoked by a party and the relevance of said document for the solution of the ongoing proceedings in view of performing the balance of interests between the need to preserve (as much as possible) the confidential character of the alleged trade secrets and the need to ensure that all relevant information are communicated to each party.⁹⁵ In this respect, a judge could request an external expert to examine the alleged confidential documents in order to see if they can indeed, in whole or in part, qualify as trade secrets, if they are relevant for the solution of the case and, if yes, how they could be produced while preserving the confidential character thereof as much as possible.⁹⁶

In this respect, some decisions provide practical guidance as to what aspects should be taken into account by the judge when performing the balance of interests. In this sense, for example, the Antwerp Commercial Court attempted to provide for some guidance when making an indicative list of elements that can be taken into account when performing the aforementioned balancing exercise, i.e. (i) whether parties are in a competitive relationship towards each other, (ii) what value the confidential information has for the other side, (iii) what the

⁸⁸ ECJ, case C-360/09, *Pfeiderer AF / Bundeskartellamt*, ECR 2011 I-5161; B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1065.

⁸⁹ ECJ, case C-450/06, *Varec / Belgische Staat*, ECR 2008 I-581.

⁹⁰ CFI, case T-271/03, *Deutsch telekom*, ECR 2008 II-477; Liège Appeal Court, 14 January 2000, J.L.M.B. 2001, p. 1289; M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 16.

⁹¹ Liège Court of appeal, 14 January 2000, J.L.M.B., 2001, p. 1289.

⁹² Brussels Court of appeal, 29 September 2006, *Jaarboek Handelspraktijken & Mededinging*, 2006, p. 870; B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, pp. 1063-1064; see also Liège Court of appeal, 25 June 1998, *Jaarboek Handelspraktijken & Mededinging*, 1998, p. 246.

⁹³ Brussel Court of appeal, 7 November 2013, T.B.H., 2014, p. 808.

⁹⁴ Supreme Court, 20 February 1975, Pas., 1975, I, p. 633.

⁹⁵ B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1069.

⁹⁶ D. Mougnot, “Le secret d’affaires et ses implications en droit judiciaire”, P&B, 2009, p. 116.

information the other side has already in its possession, (iv) whether the other side could get hold of the information via alternative ways, (v) whether there is a risk that the information will be used for other purposes.⁹⁷

One has however to keep in mind that to this day, the issue is casebased so that the criteria that the judge will or not take into consideration might vary from one case to the other.

Eventually, if the Court may, considering the case at hand, restrict the adversarial/*inter partes* character of the proceedings, it should however also always ensure that the other party has sufficient access to the relevant information and, in this respect, determine the precise modalities for disclosing the evidence to the other party.⁹⁸ In other words, even if the right to protection of trade secrets is deemed to prevail in a specific case, the Court will have to put in place certain measures that compensate for the limitation of other fundamental rights and that, ultimately, guarantee the fairness of the proceedings.⁹⁹ In this respect, when possible, parties should be able to consult a non-confidential version of the exhibits.¹⁰⁰

4.2.2. Suppression of confidential information from evidence

Pursuant to Article 879 JC, the court issuing an order on the basis of Article 877 JC can grant measures for protecting the trade secrets. In this sense, parties can agree to and/or the judge may order to provide for a non-confidential version of a document by blanking out the alleged trade secrets¹⁰¹, provided however that this does not make the document impossible to understand or worthless:¹⁰²

- In a case before the Hasselt Commercial Court, the judge allowed one of the parties to “blackline” the purchasing price of certain of its products to safeguard the confidential nature of that information towards the other side;¹⁰³
- In this sense also, the Brussels commercial Court allowed the production of a non-confidential (redacted) version of a cinema exploitation agreement signed by one of the parties, in order to protect that contracting party's interests in safeguarding certain confidential data described in the agreement. However, the Court expressly stated that the party which invoked its trade secrets had to justify each redaction it made to the contract.¹⁰⁴ At a later stage, the Court checked if the information blanked out was indeed confidential and was not essential to the solution of the case, and it turned out that the party which invoked the secrecy did not respect the modalities set forth by the Court, as it also blanked out information which was relevant for the solution of the case.¹⁰⁵

⁹⁷ Comm. Antwerp, 20 December 20012, unpublished, cited in B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1065.

⁹⁸ Supreme Court, 2 November 2012, J.T., 2013, p. 176; O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

⁹⁹ B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1065; Brussels Appeal Court, 30 June 2010, J.L.M.B., 2011, p. 1185 (with reference to ECHR, 20 February 1996, *Doorson/Nederland*).

¹⁰⁰ Constitutional Court, 19 September 2007, case 118/2007, Belgian OJ 31 October 2007; R.A.B.G., 2008, p. 382.

¹⁰¹ Comm. Antwerp, 19 February 1987, Ann. Prat. Comm., 1987, p. 225; Comm. Ghent, 8 January 1993, Ann. Prat. Comm., 1993, p. 60; Brussels Appeal Court, 30 June 2010, J.L.M.B., 2011, p. 1185; Comm. Hasselt, 11 October 1996, *Jaarboek Handelspraktijken & Mededinging*, 1996, p. 293.

¹⁰² O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

¹⁰³ Comm. Hasselt, 18 April 2001, *Jaarboek Handelspraktijken & Mededinging*, 2001, p. 284; Brussels Court of appeal, 30 June 2010, J.L.M.B., 2011, p. 1185.

¹⁰⁴ Comm. Brussels, 14 May 2009, A/08/05692, unpublished, cited in B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1071.

¹⁰⁵ Comm. Brussels, 3 December 2009, unpublished, cited in B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1072.

- Besides what precedes, it is also accepted that in place of completely suppressing the confidential information, one could replace it by corresponding non confidential information: for example, one could replace a specific number by a range of numbers.¹⁰⁶

Redaction of confidential data has the benefit of being relatively cheap and effective, but is also possibly subject to abuse.

For that reason, some legal scholars suggest for the Court to take a more active approach to the matter and, in this respect, suggest that a complete bundle of exhibits would be produced to the Court upfront, albeit in confidential manner, for the judge to form its opinion as to the relevance of the exhibit for the solution of the case and the existence of trade secrets (and the need/possibility to protect them without unduly endangering the principle of adversarial/*inter partes* trial).¹⁰⁷

Others scholars suggest that evidence would be produced to an intermediary (independent expert, special lawyer, bailiff, etc.) who would take care of sorting out the confidential from the non-confidential information.¹⁰⁸ Such a possibility appears especially appropriate in technically advanced fields where the judge could be out of his depth.¹⁰⁹ For instance in a matter involving two beer breweries, where one saw no issue in disclosing information to a court-appointed expert instructed to describe the cost structure of price calculation of one of the parties, but objected to the inclusion in the expert report of evidence that was not immediately useful for reaching a judgment on whether that party was unable to live up to its contractual obligations (deliver the quantities that were ordered).¹¹⁰

4.2.3. Disclosure of confidential information to a limited group of person and/or under specific conditions

Sometimes, besides, or in place of, the communication of a non-confidential version of a specific document, the parties can further agree (or be ordered by the judge) to communicate the whole document – thus including the alleged trade secrets – to an “authorized person”:

- In some cases, parties have come to a mutual agreement on the person to whom confidential information may or not be disclosed, as well as on the specific use that the receiving party may make of the information communicated.¹¹¹
 - (i) In a case before the Hasselt Commercial Court, parties agreed that a defendant would only communicate to the plaintiff purchasing orders that did not show the identity of the buyer, while it would produce the original copies of the purchasing order to the judge at the hearing.¹¹²
 - (ii) In a case before the Antwerp Court of appeal, the expert drafted two versions of his descriptive-seizure report.¹¹³ Only the courts, the claimant’s counsels and its company lawyers got access to a confidential version of the descriptive-seizure report, whereas a non-confidential version of the report could be shared with a wider group. In subsequent proceedings on the merits, parties always

¹⁰⁶ B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1072.

¹⁰⁷ Supreme Court, 19 December 1994, R.W., 1994-95, note S. Van Overbeke.

¹⁰⁸ B. Allermeersch and W. Vandenbussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1073; see or example Liège Court of appeal, 22 May 2001, R.R.D., 2001, p. 468.

¹⁰⁹ O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

¹¹⁰ Comm. Tongeren (Pres.), 13 February 2007, R.D.J.P. 2009, p.110, note D. Mougenot, confirmed by Antwerp Court of appeal, 20 November 2007, R.D.J.P., 2009, p. 109, note D. Mougenot.

¹¹¹ Brussels Court of appeal, 20 June 2008, I.C.I.P., 2008, p. 566.

¹¹² Comm. Hasselt, 11 October 1996, Jaarboek Handelspraktijken & Mededinging, 1996, p. 293.

¹¹³ Antwerp Court of appeal, 6 February 2008, I.R.D.I., 2008, p. 173 (this judgment was annulled by the Supreme Court on grounds unrelated to the restrictions of use).

filed one confidential version of their written pleadings (referencing the confidential content of the expert report and annexes) and one non-confidential version (in which certain parts of the written pleadings were redacted).

- In some other cases, parties have agreed on the preliminary signing of a confidentiality agreement before allowing the presence of the opposing party, its employees and/or its counsel at an *inter partes* expert mission in one of the other party's premises.¹¹⁴
- In a judgment of 29 June 2009, besides the signing of a confidentiality agreement, the Brussels Court of appeal provided for specific safety measures by making the consultation of the confidential information subject to certain rules and limits: The confidential information was stored in a secured data room, visitation hours were well-determined, no copies or notes could be made, and visitation right was limited to the party's representatives or legal counsel. All of this was organized within the framework of a court-ordered *inter partes* expert mission.¹¹⁵
- Eventually, authorization of certain individual is sometimes made subject to certain prerequisites, such as the existence of specific confidentiality obligation. In this sense, parties have sometimes agreed to give access to confidential data to a company auditor, since he was bound by an obligation of professional secrecy.¹¹⁶

4.2.4. Legitimate reason to refuse to submit certain documents to the court

Pursuant to Article 882 JC, a party which has been requested by the judge to submit a specific document might refuse to do so if it can prove that it has a “*legitimate reason*” to. The question is whether a trade secret can be considered as a “legitimate reason” in the sense of Article 882?

According to some scholars, this question should be answered negatively.¹¹⁷ On the contrary, others consider that a trade secret might serve as a “legitimate reason”. In this respect, they consider that the legitimate reason can be derived from the severe consequences that would be brought up when disclosing the document comprising the trade secrets to the defendant. Again, a balance has to be made by the Court between these legitimate interests and the plaintiff's legitimate interest.¹¹⁸

In any event, the Court always has the last word and can decide that taking into account the parties' obligation to collaborate to the proof and the right of defence of the plaintiff, the documents must nevertheless be filed, even if they contain trade secrets.¹¹⁹ Such a decision cannot be appealed.¹²⁰

¹¹⁴ Antwerp Court of appeal, 24 May 2006, 2005/RK/276, unpublished; Antwerp Court of appeal, 5 September 2007 2007/RK/32, unpublished.

¹¹⁵ Brussels Court of appeal, 29 June 2009, R.W. 2012-13, p. 388; B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1067

¹¹⁶ Antwerp Court of appeal, 20 November 2007, P&B, 2009, p. 110, note D. Mougenot; Ghent Court of appeal, 11 April 2011, R.W., 2012-13, p. 468; B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, pp. 1068;-1069.

¹¹⁷ D. Mougenot, “Le charme discret des ‘petites’ mesures d’instruction”, P&B, 2007, p. 245; Comm. Brussels, 14 May 2009, unpublished, cited in B. Allermeersch and W. Vandebussche, “Bewijs versus geheim in het aansprakelijkheidscontentieux”, T.B.H., 2013, p. 1071.

¹¹⁸ O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

¹¹⁹ Liège Court of appeal, 6 March 2000, J.L.M.B., 2000, p. 1728; A. Kohl, “Les mesures d’instruction”, in X., *Actualités et développements récents en droit judiciaire*, Brussels, Larcier, 2004, pp. 207 sq.

¹²⁰ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, “Intellectual Property and Commercial Law – Country Report”, Belgium, p. 9; Hogan Lovells International LLP, “Report on Trade Secrets for the European Commission”, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 3, “Member States' responses to second trade secrets questionnaire”, p. 4

4.3. Publicity of judgement and possibility to limit disclosure of confidential information

Pursuant to Article 149 of the Belgian Constitution, “every judgment must be pronounced in public hearing”. There is no exception to this principle which is prescribed not only by Article 149 of the Belgian Constitution, but also by Article 6.1 ECHR and 14.1 ICCPR. Therefore, if a trade secret is mentioned in a judgment, there is no way to prevent its disclosure.¹²¹

In order to prevent the disclosure of a trade secret in a judgment, one must therefore take action before the judge has made up his mind and has drafted his judgment. In this sense, a party to a dispute can file a request asking the court to treat certain information it has submitted as confidential, for example by suppressing the considered information from the judgment. In its judgment dated 20 June 2008, the Brussels Appeal Court granted such a request and expressly blanked out the stereotypes of GSK which were considered confidential.¹²²

It has to be noted that to this day, the above judgment remains rather exceptional.

4.4. Do safeguard procedural measures apply automatically?

In Belgium, there are only few legal provisions that expressly provide for an automatic safeguard of confidential information.

In civil proceedings, we can refer to the safeguards set forth in Articles 1369bis/1, § 3, 1369bis/4, § 1, 1369bis/6 and 1369bis/7 JC:

- Article 1369bis/6 expressly provides that the court-appointed expert should take due care not to prejudice the alleged infringer’s legitimate interests, “*in particular as far as the protection of confidential information is concerned*”.¹²³ In practice, the expert should therefore not include in his report confidential information which are not strictly necessary to his mission;¹²⁴
- Article 1369bis/7, §2 JC explicitly states that the ensuing expert report and all of its annexes are deemed to be confidential and that they can only be used within the framework of a judicial procedure;¹²⁵
- Pursuant to Article 1369bis/4, the court order can authorize or deny the presence of the applicant or its counsel during the seizure.

Thus, in this specific discovery procedure, the law expressly provides for protection of trade secrets. Consequently, the confidential nature of some information of the seized party cannot prevent the granted discovery measures from taking place because the discovery is precisely supposed to reveal what would otherwise be kept confidential.¹²⁶

¹²¹ A. Verheyden and W. Derijcke, “Secrets d’affaires et principe du contradictoire”, in V. Cassiers and S. Gilson (coord.), *L’entreprise et le secret*, Brussels, Larcier, 2014, pp. 241-242.

¹²² Brussels Court of appeal, 20 June 2008, I.C.I.P., 2008, p. 566.

¹²³ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 375.

¹²⁴ Brussels Court of appeal, 4 December 2009, I.C.I.P., 2009, p. 513.

¹²⁵ Brussels Court of appeal, 18 December 1998, I.R.D.I., 1999, p. 65; G. Glas, “La saisie-description en matière de brevets en Belgique”, in *Jura Vigilantibus* Antoine Braune, Bruxelles, Larcier, 1994, p. 193.

¹²⁶ Preparatory works of the Acts on civil and procedural law aspects of the protection of intellectual property rights, DOC 51 2943/001 and 2944/001, Exposé des motifs, p. 67; F. de Vischer, “La preuve des atteintes – Réforme de la saisie-description”, in F. Brison (ed.), *Sanctions et procédures en droits intellectuels*, Bruxelles, Larcier, 2008, p. 166; B. Vandermeulen, “Les mesures de confidentialité entourant les rapports de saisie-description”, I.R.D.I., 2009, p. 361 ; Brussels Court of appeal, 24 March 2010, I.R.D.I., 2010, p. 157.

There is ample case law on the role of the court-appointed expert in this delicate exercise of collecting evidence of intellectual property right infringement but at the same time safeguarding the seized party's interests, including the secrecy of its confidential information.¹²⁷

When opposing the discovery in court in specific “*terce opposition*” proceedings, the alleged infringer can further request variety of measures to safeguard his legitimate interests.

Apart from what precedes, the trade secret holder should expressly invoke the protection of its trade secrets in the course of court proceedings and request the Court to treat certain information as confidential.

4.5. Use of information gained during the proceedings after termination thereof

There is no such general rule under Belgian law. At most there is a general duty of care and/or of loyalty, which is not more stringent than the general rule of tort – would a reasonable person put in the same circumstances have acted differently?¹²⁸

There are, however, certain specific provisions that limit a party's freedom to use information gained during the proceedings. For instance in descriptive seizure proceedings, parties are restricted in the use that they could possibly make of the evidence (confidential know-how possibly) obtained within the framework of the seizure. Pursuant to Article 1369*bis*/7, §2 JC, “the expert report, as well as all the annexes thereof, samples or information collected within the framework of the descriptive measures are confidential and can only be disclosed or used by the plaintiff or its right-holders within the framework of a procedure, in Belgium or abroad, on the merits or in summary proceedings” If no such action is introduced within the time frame referred to in Article 1369*bis*/9 JC, the claimant is no longer entitled to use the information gathered by the expert.

Echoing Article 1369*bis*/7 JC, the Antwerp Court of appeal has ruled that information obtained by a competitor during discovery can only be used in the framework of the subsequent patent proceedings.¹²⁹

Eventually, the parties may also come to a mutual agreement on the subsequent use of the information obtained.¹³⁰

5. REMEDIES AVAILABLE IN CASE OF TRADE SECRET MISAPPROPRIATION

Part III of the TRIPS Agreement sets out provisions on enforcement of intellectual property rights and under Article 1, paragraph 2 of TRIPS, “intellectual property” does include protection of undisclosed information (“For the purposes of this Agreement, the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II”). According to TRIPS, injunctions (Article 44), damages (Article 45) and other remedies such as destruction of infringing goods (Article 46) should be available as a minimum.

5.1. Injunctions / Cease and desist orders

Given the particular nature of a trade secret, a restraining order prohibiting the use of the information may face serious problems:¹³¹

¹²⁷ Brussels Court of appeal, 4 December 2009, I.R.D.I., 2010, p. 146.

¹²⁸ O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

¹²⁹ Antwerp Court of appeal, 6 February 2008, I.R.D.I., 2008, p. 173.

¹³⁰ Brussels Court of Appeal, 20 June 2008, I.C.I.P., 2008, p. 566.

¹³¹ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, pp. 376-377; Hogan Lovells International LLP, “Report

The first problem is that the plaintiff must bring sufficient proof of its claim, which implies that he must file the documents establishing that its claim is well founded or might even be forced to do so by the judge (Articles 870 and 877 JC and Article 1315 CC). In trade secret matters, this usually implies that the plaintiff must describe his trade secret in his trial briefs and court's file, which contradicts the very nature of the trade secret (see Section 4.2 above).

The second problem arises from the fact that the judgment prohibiting a further use or disclosure of a trade secret, must describe the trade secret at stake (the decision prohibiting the use of "information X" would not be applicable and would contravene Article 11 JC). If the judgment describes the trade secret, this will disclose it again (see Section 4.3 above).

The third problem with cease and desist orders concerning trade secret results from the fact that the protection of trade secrets, contrary to that of IP rights, is not limited in time. The prohibition to use the trade secret could thus possibly last forever, which would grant the trade secret owner potentially broader protection than a traditional IP right. Case law has highlighted this problem and is therefore reluctant to issue orders prohibiting the use of misappropriated trade secrets.¹³²

5.2. Accessory/accompanying measures

As stated in Section 3.4.2, a cease-and-desist order may be accompanied by measures that can contribute to the cessation of the infringing acts. In this respect, Article XVII.4 CEL expressly provides for the possibility for the judge to order the publication of the judgment (or of a summary thereof) if such a publication is likely to contribute to the cessation of the infringement and/or of its effects. Such an order can be linked to the payment of penalties in the event of non-compliance.

According to some authors, within the framework of a cease-and-desist order, the judge could also order to the defendant to provide all information "on the origin and/or distribution channels" of the trade secret violation and/or of the products resulting from its infringement (and possibly incorporating such trade secret).¹³³ Yet, this is subject to controversy considering the fact that to this day, the legal provisions providing for such a possibility only relate to IP rights (Article XI.334, §3 CEL) and registered names/designations (Article VI.126, §2 CEL). It is therefore doubtful that these provisions could also be applicable in case of violation of trade secrets (see Section 3.3.6 above).

5.3. Damages

In case a trade secret violation is established, besides an injunction, the trade secret owner can in principle also seek damages. Yet, as outlined in Section 3.4.2, damages are not available in expedite proceedings on the merits.

5.3.1. Absence of specific provision

There are no specific rules under Belgian law that provide for damages for trade secret violation (contrary to provisions on intellectual property rights, such as Article XI.335 CEL). Consequently, remedies will have to be sought on the basis of the general principles of civil law according to which the injured party is entitled to full

on Trade Secrets for the European Commission", Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D, Appendix 3, "Member States' responses to second trade secrets questionnaire", p. 2.

¹³² Liège Court of appeal, 12 June 2008, I.R.D.I., 2008, p.339; M. Buydens, "La protection des secrets d'affaires et la procédure de saisie en matière de contrefaçon", Cah. Jur., 2011, p. 15.

¹³³ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, "Intellectual Property and Commercial Law – Country Report", Belgium, pp. 8-9.

compensation for the prejudice it suffered so as, virtually, to be put back in the state it would have been had its rights not been violated.

5.3.2. Quantification of damages

The prejudice must be evaluated *in concreto*, meaning that the party claiming damage compensation must prove the amount of damages it has incurred, including the defendant unjust enrichment resulting from its wrongdoing. Expert evidence may be helpful to support this claim.¹³⁴

In most cases, the value of such kind of damage will not be easy to determine. The court is thus allowed to apply an *ex aequo et bono* calculation of damages.¹³⁵

Damages are compensatory. In principle, punitive damages are therefore not recognized under Belgian civil law.

To avoid the difficulties in proving the value of the prejudice or damage suffered, parties to a contract may agree on a penalty clause, which determines the amount of damages due in case confidential information is illegitimately disclosed. Pursuant to Article 1231 CC, the judge is nevertheless entitled to temper the penalty agreed on in case the amount does not correspond to the amount of damages the parties could have reasonably foreseen at the time the agreement was concluded or obviously exceeds the actual value of the damage.¹³⁶

In practice, a claimant is entitled to seek damages to compensate the defendant's unjust enrichment resulting from the trade secret violation as well as loss of profits, provided that the claimant is able to prove the casual link between the trade secret violation and the alleged unjust enrichment/loss of profits. In most cases, this link will be quite difficult to prove, even though the evidence can be in any form, including suspicion alone or factual presumptions. For instance, the Brussels Court of appeal held that an employee had breached the confidentiality obligation under Article 17 AEC when he copied confidential information before leaving to join a competitor, but that the ex-employer had failed to show that the use or the disclosure of such information by the ex-employee could cause damage to its own interests.¹³⁷

One presumption, which is often considered by the court, is the “unrealistically fast and massive success” gained by the defendant that could not have been achieved without the use of the litigious trade secret, as it is unbelievably achieved so fast and massively.

Loss of profit is not easy to determine because the profit made by the defendant through the unlawful access/use of the trade secret might not be equal to the profit the claimant would have made. The claimant will have to identify the competitive advantage that its trade secret presents and then show for instance market shares gained by the defendant and to claimant's detriment because of the unlawful access/use of the trade secret. Concepts commonly used in the field of intellectual property rights such as the assessment of the loss of profit on the basis of the “counterfeiting mass” could also be helpful, as well as the royalty fee that the claimant used to request for the use of its trade secret as an indicator for an *ex aequo et bono* assessment.

¹³⁴ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, “Intellectual Property and Commercial Law – Country Report”, Belgium, p. 9; O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

¹³⁵ Preparatory works of the Acts on civil and procedural law aspects of the protection of intellectual property rights, DOC 51 2943/001 and 2944/001, Exposé des motifs, p. 67.

¹³⁶ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 378.

¹³⁷ Brussels Court of appeal, 10 September 2013, 2011/AR/3155, unpublished.

5.3.3. Possible damages for moral prejudice

General civil law principles governing damages for trade secret violation do not exclude moral prejudice *per se*, as the main rule is that the prejudice must be compensated in its entirety.

Generally speaking, moral prejudice is the damage that affects a (legal) person's reputation, integrity or honour. In the context of intellectual property rights, moral prejudice could be, for instance, the damage to an author's reputation, the banalisation of an artistic work, the popularization of a trademark or the violation of a patent holder's monopoly.

As regards trade secrets, since the trade secret has value only because it is kept secret to the public, the trade secret holder's moral prejudice could only be caused if its identity is disclosed with the trade secret; such disclosure could then have an impact on the image or reputation of the holder.¹³⁸

To our knowledge, there is no published case law on this subject.

In any event, should moral prejudice be held by the court, it would most likely be quantified on an *ex aequo et bono* basis.

5.4. **Reimbursement of attorney's fees**

The claimant is also entitled to seek reimbursement of lawyer's fees and costs, the sums of which are determined by law and are quite low (Article 1022 JC). The question concerning whether this provision is compatible with Article 14 of the Enforcement Directive has already been raised a few times. In a recent patent litigation, this question has finally been referred to the CJEU, whose answer could also have an impact on trade secret litigation.

5.5. **Possibility to obtain remedies against third parties**

In principle, the protection of trade secrets does not extend to third parties who are innocent recipients of trade secrets.¹³⁹

The independent inventor, the competing parties with their own research laboratories, or others who accidentally happen to receive the confidential information do not have any obligation towards the rightful owner of the trade secrets. They are therefore in principle not subject to any civil or penal liability if they use in good faith an invention that happens to be a trade secret of another company.¹⁴⁰

On the other hand, the new employer of a former employee (who has knowledge of trade secrets deriving from his former job) is in quite a delicate situation. He is not subjected to a duty of confidentiality himself, but by acquiring and using this information, he could be held liable.

According to Belgian law, third parties helping other parties to breach their contractual obligations can indeed be liable. The complicity of breach of contract requires (a) the existence of a (valid) contract; (b) that the third party

¹³⁸ O. Hottat, D. Kaesmacher, S. Lens, A. Mottet, D. Op de Beeck, P.Y. Thoumsin and B. Vanbrabant, AIPPI – Question 247 – Draft report on “Trade secrets: overlap with restraint of trade, aspects of enforcement”, not published yet.

¹³⁹ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, “AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law”, I.C.I.P., 2010, p. 374.

¹⁴⁰ Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets), Study on trade secrets and confidential business information in the internal market, April 2013, MARKT/2011/128/D, Appendix 1, “Intellectual Property and Commercial Law – Country Report”, Belgium, p. 10.

knew or ought to have known of the contract; (c) a breach of contract and (d) the third party has participated in or contributed to the breach of contract.¹⁴¹

6. PROTECTION OF KNOW-HOW IN CONFIDENTIALITY OR NON-DISCLOSURE AGREEMENTS

Companies in Belgium adopt various practical solutions to protect trade secrets and know-how, including, in particular, licensing,¹⁴² non-disclosure agreements, non-use agreements, etc.

The adoption of such practical solutions is not only justified to provide for protection where no specific provision exists, but can also serve as additional protection where specific provision already exists. In this respect, for instance, employers often include a confidentiality and/or a non-compete clause in the employment contract to precise the terms of Article 17, 3° AEC and further improve the protection of their trade secrets.¹⁴³

Prevailing enforcement with regards to non-disclosure and non-use agreements and/or to non-compete clause in Belgium is provided by contract law: Since the judgment of the Supreme Court of 7 December 1973, in case of concurrence between contractual and extra-contractual (i.e. tort or unfair competition) liability, a claim on the basis of the latter is only possible if the fault (in this case the misuse or misappropriation of trade secrets) does not amount to a breach of contract, but only to a breach of the duty of care, and to the extent the damage is different from the damage resulting from the poor performance of the contract.

As regards the enforcement of non-disclosure and non-use agreements and/or non-compete clauses, there is only little case law is available. One known precedent concerns the violation of a confidentiality agreement concluded between pharmaceutical companies GSK Biologicals and Sanofi Pasteur.¹⁴⁴ GSK sought the revocation of Sanofi's patent covering a multivalent vaccine composition for the prevention and treatment of infections caused by certain pathogenic agents. During the proceedings, Sanofi's counsel had requested information from GSK, thereby expressly confirming that the information requested would be treated as strictly confidential and that its client would only use it to evaluate the opportunity of introducing a counterclaim for infringement. According to the Court of Appeal, the said correspondence between the parties' counsels qualified as a confidentiality agreement. Further on in the procedure, Sanofi submitted an amended set of claims which seemed to be inspired by the information obtained from GSK. The Court of Appeal ruled that amending claims to escape revocation did not qualify as use "to evaluate the opportunity of an infringement claim" and that Sanofi's amendments were thus a breach of contract. On these grounds, the amended claims were rejected in the Belgian revocation proceedings.

7. MISUSE OF TRADE SECRET PROTECTION

The freedom to exercise one's right, including the right to protection of trade secrets, is never absolute since it necessarily takes place next to the freedom of others to exercise they own (maybe contradictory or concurrent)

¹⁴¹ D. Kaesmacher, P. Maeyaert, A. Mottet, G. Philipsen, L. Ryckeboer and K. Neefs, "AIPPI – Question 215 – Protection of trade secrets through IPR and unfair competition law", I.C.I.P., 2010, p. 378; Supreme Court, 24 November 1932, Pas., 1933, I, p. 19; Supreme Court, 21 April 1978, R.W., 1978-1979, p. 1961; For an application in an intellectual property case, see Liège Court of appeal, 27 May 2007, I.C.I.P., 2007, p. 635; Hogan Lovells International LLP, "Report on Trade Secrets for the European Commission", Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKET/2010/20/D, Appendix 3, "Member States' responses to second trade secrets questionnaire", pp. 4-5.

¹⁴² For your perfect information, licenses involving know-how are in principle subject to EU Regulation 316/2014 (see Section 1.2) which prevails over contractual arrangements.

¹⁴³ The enforceability of a non-compete clause in an employer-employee relationship is subject to the payment of an economic compensation, must be limited in time and geographically and must relate to similar activities (see. Article 65 AEC).

¹⁴⁴ Brussels Court of appeal, 20 June 2008, I.C.I.P., 2008, p. 566.

right. In this respect, it can be referred to the famous saying according to which “the freedom of one ends where the right of another begins”.

Therefore, even though subjective rights, sometimes qualified as “selfish rights”, are created in favour of their owner / holder – so that the latest can in principle exercise his rights in his own “selfish” interest –, their exercise can sometimes be limited if it appears to be abusive and/or contrary to the doctrine of good faith.¹⁴⁵

The Supreme Court defines the abuse of right as any use of a right which “obviously exceeds the limits of a normal exercise thereof by a normally cautious and diligent individual”.¹⁴⁶

To qualify the exercise of a right as abusive, one must prove one of the following elements:

- the predominant motive for exercising the right is to cause harm to another party; or
- no serious or legitimate motive exists for exercising the right in the considered way; or
- the exercise of the right is against moral rules, good faith, or elementary fairness; or
- the right is exercised for a purpose other than that for which it was granted.¹⁴⁷

Considering what precedes, the possibility of an abuse / misuse of a trade secret right is not excluded *per se*:

- possible misuse to circumvent legal obligations to disclose specific information;¹⁴⁸
- possible misuse to conceal information within the framework of (judicial) proceedings;
- possible misuse to gain access to a competitor’s confidential information (through right to access public records, right to attend public hearing, etc.);
- possible misuse to unfairly delaying or restricting a competitor’s access to the market;
- possible misuse to unfairly intimidating or harassing a competitor; etc.

If the abuse of right is established, the trade secret owner can be held liable under Article 1382 CC, and consequently see the exercise of his right limited and/or be condemned to pay damages if the abuse caused prejudice to a third party.

Where it is established that the trade secret owner has abusively started judicial proceedings against a third party, the latter could request his condemnation to damages for frivolous and vexation action. The right to initiative litigation to defend one’s right (to protection of trade secret for instance) can indeed constitute a “fault” pursuant to Article 1382 CC when the action is diverted from its initial purpose and is used to prejudice another party and/or negligently / carelessly.¹⁴⁹ Pursuant to Article 780*bis* JC, besides damages, the trade secret owner could also be condemned to a fine from EUR 15 up to EUR 2,500:

“The party which obviously uses the procedure for dilatory or abusive purposes can be condemned to a fine from EUR 15 up to EUR 2,500, without prejudice of the damages that could be claimed”.

¹⁴⁵ Supreme Court, 8 February 2001, R.G.D.C., 2004, p. 396.

¹⁴⁶ Supreme Court, 17 September 1971, Pas., 1972, I, p. 28; Supreme Court, 17 October 2008, Arr. Cass., 2008, p. 2281.

¹⁴⁷ G. De Leval, “Traité des saisies”, Fac. Dr. Liège, 1988, p. 13; P. Van Ommeleslaghe, “Abus de droit, fraude aux droits des tiers et fraude à la loi”, R.C.J.B., 1976, p. 303 sq. ; Supreme Court, 29 November 1962, Pas., 1963, I, p. 406.

¹⁴⁸ As expressly reminded on the European Commission’s website on Trade Secrets, companies cannot invoke their trade secrets with the sole purpose to hide information on matters of public interest, such as public health, the environment or the safety of consumers (http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets/index_en.htm).

¹⁴⁹ G. Van Dessel, “La vie du droit. Contre l’abus procédural”, J.T., 1997, pp. 680-682; Brussels Court of appeal, 24 September 1992, J.T., 1993, p. 361; Supreme Court, 31 October 2003, J.T., 2004, p. 135, note J.-F. van Drooghenbroeck; Supreme Court, 12 May 2005, R.A.B.G., 2005, p. 1683; L. Lamine, B. Schoenaerts and C. Vaes, *Het tergend en roekeloos geding*, Anvers, Intersentia, 2003, p. 4

Recital 12 of the Trade secrets Directive proposal¹⁵⁰ expressly acknowledges the risk for a trade secret owner to abuse his right to protection and, consequently, expressly underlines the need to adopt appropriate measures to prevent such abuse and/or, at the very least, to allow the authorities (administrative, judicial, etc.) to “bypass” and/or to limit the protection of trade secrets when it is established that such protection is invoked abusively:

“The smooth functioning of the internal market would be undermined if the measures and remedies provided for were used to pursue illegitimate intents incompatible with the objectives of this Directive. Therefore, it is important to empower their judicial authorities to adopt appropriate measures with regard to abusive behaviour by claimants who act abusively or in bad faith and submit manifestly unfounded applications with, for instance, the purpose of unfairly delaying or restricting the respondent’s access to the market or otherwise intimidating or harassing the respondent. It is also important that measures and remedies provided for should not restrict whistleblowing activity. Therefore the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest in so far as relevant misconduct or wrongdoing is revealed” (see Article 6.2 of the Directive proposal).

8. CONCLUSION AS TO THE POSSIBLE INADEQUATIES OF THE PROTECTION OF TRADE SECRETS IN BELGIUM

As seen above, protection of trade secrets is scattered over different provisions of law. There is not a uniform definition and terminology of “trade secrets”, “confidentiality” and “confidential information”, which may impact on the assessment of different situations and generate interpretative doubts. It would therefore be advisable to adopt a harmonised and uniform definition and terminology.

Another issue is related to the fact that trade secrets are not considered to be “intellectual property” and are, therefore, not limited in time, which makes it difficult to obtain a cease-and-desist order or search-order. In this respect the author M. Buydens suggests that the problem could be solved by limiting the cease-and-desist order to the time necessary to the amortization (or the obsolescence) of the considered trade secret (supposing that it can be defined).¹⁵¹

Finally, it would also be useful to provide rules / guidelines concerning the balance to be made between the rights of the trade secret owner and the rights of the defendant and adopt a clear set of rules on how to deal with confidential documents in regular court proceedings.

¹⁵⁰ Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 9870/14, General approach of the European Council adopted on 26 May 2014.

¹⁵¹ M. Buydens, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, Cah. Jur., 2011, p. 15.