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NEWSLETTER COMMERCIAL LAW

TRADE SECRETS: A REVITALISED PROTECTION TO ENHANCE INNOVATION AND COMPETITION

On January 19, 2018, the Belgian council of ministers approved the draft bill on the protection of trade secrets against their unlawful acquisition, use and disclosure. This draft bill, that needs to be transposed and adopted into national law by June 9, 2018, enables companies to protect their trade secrets that had no protection under IP law before.

Companies invest substantial amounts in developing or acquiring and applying know-how and information. This investment in virtual capital is a key contributor to the competitiveness and innovation-related performance of companies in their respective markets.

Companies have recourse to different tools to claim ownership of the results of their innovation-related activities. The use of intellectual property rights, such as patents, design rights or copyright, is quite commonly known. The results of innovation can, however, also be protected by limiting access to, and exploitation of, knowledge that is valuable to the company and that is not widely known. Such valuable know-how and business information, that is undisclosed and intended to remain confidential, is referred to as a trade secret: trade secrets can consist of technological knowledge, but also of commercial data such as

information on customers and suppliers, business plans, and market research and strategies.

Trade secrets have, however, to date not been awarded solid legal protection. This has now changed with the adoption of Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure (minimum harmonization).

The draft bill on trade secrets, which has recently been adopted by the council of ministers but has not been adopted by parliament yet, defines a trade secret as (i) secret information, (ii) that has actual or potential commercial value and (iii) where reasonable steps have been taken to keep the knowledge secret. As to the commercial value, trade secrets should be considered to have a commercial value when the unlawful disclosure undermines the scientific and technical potential, business or financial interests, strategic positions or the ability to compete. Consequently, trivial information is excluded, as are the experience and skills gained by employees in the normal course of their employment and information which is generally known to the public.

The essential and innovative aspect of the Directive (and the draft bill) is the revitalised protection of knowledge that was not protected under existing IP law. Under the draft bill, the following protective measures will be adopted:

- the cessation of the use or disclosure of the trade secret,
- the prohibition to market infringing goods,
- the seizure and/or destruction of infringing goods,



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- awarding damages appropriate to the actual prejudice suffered (based on objective criterion)

Further important to note is that confidentiality of the trade secret in the course of legal proceedings, and thereafter, will be preserved upon motivated request of one of the litigating parties (e.g. by restricting access to documents, hearings and to the non-confidential version of a judicial decision). Since the prospect of losing the confidentiality of a trade secret in the course of legal proceedings often deters legitimate trade secret holders from instituting legal proceedings to defend their trade secrets and thus jeopardising the effectiveness of the measures, this institutional safeguard is of the utmost importance.

To conclude, best practices for companies interested in seeking to protect their indispensable and valuable knowledge include measures such as (i) making an inventory of commercially valuable trade secrets, (ii) valorising the trade secret, (iii) taking reasonable steps to keep this knowledge secret and (iv) taking immediate (legal) action when a breach of a trade secret has been discovered.

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TRADE SECRETS ARE ONE OF THE MOST COMMONLY USED FORMS OF PROTECTION OF INTELLECTUAL CREATION AND INNOVATIVE KNOW-HOW BY BUSINESSES, YET AT THE SAME TIME THEY WERE VERY POORLY PROTECTED