



# Trade secret laws in the Netherlands

## General

**1. Has the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (“Trade Secrets Directive”) been implemented?**

Yes.

On 23 October 2018, the Act of October 17, 2018, laying down rules for implementing Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the Protection of Undisclosed Know-how and Business Information (Trade Secrets) Against their Unlawful Acquisition, Use and Disclosure (Trade Secrets Act) (hereinafter: TSA) has entered into force.

The TSA implements the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (“Trade Secrets Directive”) (hereinafter: the Directive).

**2. Are there any other applicable sources of law related to trade secrets?**

- Article 22a(3) and Title 15A (Articles 1019ia - 1019ie) of the Dutch Code of Civil Procedure
- Article 3:310d Dutch Civil Code
- Act on the House for Whistleblowers “Wet Huis voor klokkenluiders”

Please Note: The Directive (EU) of 23 October 2019 on the protection of persons who report breaches of EU law has not yet been implemented in Dutch legislation. No draft bill has even been published.

**3. How are trade secrets defined?**

The definition of trade secrets is defined in Article 1 of the TSA (which implements Article 2 (1) of the Directive).

The Dutch Act on the protection of trade secrets describes a trade secret as information, which meets all of the following requirements:

- a. the information is secret;

- b. the information has commercial value because it is secret; and
- c. the person lawfully in control of the information has taken reasonable steps to keep it secret.

#### **4. Do specific measures or protections need to be put in place for information to benefit from protection as a trade secret?**

Article 1 sub c of the TSA (which implements Article 2 (1) sub c of the Directive), as stated above, provides that a trade secret: “has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret”. As a result, reasonable steps should be made in order to identify and protect trade secrets. The Directive and the TSA do not specify what such measures should mean.

The Dutch Explanatory Memorandum accompanying the TSA mentions a number of technical and contractual measures to this effect: the inclusion of Non-Disclosure Agreements in trade contracts, the inclusion of Non-Disclosure Agreements in employment contracts and employment regulations, the explicit implementation or registration of trade secrets within companies (i.e. an organisational security measure, such as a provision that only key figures in a company have access to certain secrets or conducting an I-deposit with the Benelux Office of Intellectual Property) and the monitoring of the business premises or installation in question. Other possibilities include providing for specific digital protection measures such as encryption, to prevent computer files or e-mails from being breached. 1

## **Dealings in and ownership of Trade Secrets**

### **1. Are trade secrets transferable and/or licensable?**

The status of trade secrets under property law is not yet fully realised under Dutch law. The prevailing opinion in Dutch literature is that trade secrets are not separately transferable (although they may in fact be transferred together with the transfer of a company), but trade secrets can be licensed. 2

### **2. Are there specific consequences arising from transfer or licensing of trade secrets by a party other than the trade secrets owner?**

A trade secret licensee appears to have the same rights as a trade secret holder.

As suggested in the previous question, transfer of a trade secret is probably not possible under Dutch law. If a company wants to ensure that its trade secret is or will continue to be protected, the company will have to include clauses in the licence agreement to retain the secrecy of the trade secrets. Such clauses could include a nondisclosure clause in the agreement or an obligation for the licensee to take reasonable steps to protect trade secrets.

### **3. Is co-ownership of trade secrets permitted?**

Co-ownership of trade secrets is likely permitted under Dutch law.

The TSA and the Directive leave it to member states to make arrangements regarding ownership and co-ownership of trade secrets.

However, in the Netherlands a trade secret qualifies as a property right, which can be held in joint ownership. 3

## **Enforcement of Trade Secrets**

### **1. What actions constitute infringement of trade secrets?**

Article 2 of the TSA (which implements Article 4 of the Directive) states what actions constitute

infringement of trade secrets:

1. The acquisition of a trade secret is unlawful, by:
  - a. unauthorised access to a trade secret or information or objects from which the trade secret can be deduced;
  - b. any other conduct, which under the circumstances is considered contrary to honest commercial practices, such as breach of contract.
2. The use or disclosure of a trade secret is unlawful, when:
  - a. the trade secret is acquired unlawfully;
  - b. a confidentiality agreement is breached;
  - c. a contractual or any other duty to limit the use of the trade secret is breached.
3. The acquisition, use or disclosure of a trade secret is also considered unlawful whenever someone knew or ought to have known that the trade secret had been obtained from someone who was using or disclosing the trade secret unlawfully.
4. The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, is also considered unlawful use of a trade secret when someone knew or ought to have known that the trade secret was used unlawfully.

The Explanatory Memorandum to the TSA states that due to the broad criterion of "significant benefit" in the Directive, the use of unlawfully obtained trade secrets for a part of the production can contaminate all goods and qualify them as infringing goods. As a result, the unlawful use of trade secrets by suppliers of semi-finished products may also mean that the products in which these semi-finished products are processed should qualify as infringing goods. 4

## **2. Are there any measures allowing the trade secrets' owner to gather and/or preserve evidence of infringement of trade secrets?**

The trade secrets' owner can request a prejudgment seizure of evidence of infringement of trade secrets.

Article 5 (2) of the TSA (which implements Article 10 (1) sub c of the Directive) further states that the trade secrets' owner can request prejudgment seizure of the suspected infringing goods.

Regarding the seizure, the standard provisions of Article 730 and the Dutch Code of Civil Procedure concerning prejudgment seizure apply.

If the court imposes the provisional measure, the provisions of Articles 491 and regulations concerning the surrender of movable property applies.

## **3. What specific interim and final measures and remedies are available in the event of infringement of trade secrets?**

The interim measures and remedies that are available in the event of infringement of trade secrets are listed in Article 5 of the TSA (which implements Article 10 of the Directive).

The interim measures are:

- a. cease and desist of the use or disclosure of the trade secret;
- b. prohibition to:
  1. produce,
  2. offer,
  3. place on the market or use,
  4. import,

5. export,
6. storage,
7. infringing goods;

c. seizure of infringing goods.

The final measures and remedies, which are available in the event of infringement of trade secrets are listed in Article 6 of the TSA (that implements Article 12 of the Directive).

The final measures are the same as interim measures a and b listed above. In addition, the following measures can be imposed:

- a. recall of the infringing goods;
- b. depriving the infringing goods of their infringing quality;
- c. destruction of the infringing goods or withdrawal from the market, provided that the withdrawal does not undermine the protection of the trade secret in question;
- d. the destruction of all or part of any document, object, substance, material or electronic file containing the trade secret.

#### **4. Is there a specific period after obtaining interim measures by which the applicant must bring proceedings for a substantive decision on the merits of the claim?**

The TSA does not provide a specific period after obtaining interim measures by which the applicant must bring proceedings for a substantive decision.

However, Article 1019i jo 1019ic(3) of the Dutch Code of Civil Procedure provides a period of one month after obtaining interim measures by which the applicant must bring main proceedings or another period provided by the court.

#### **5. Are there circumstances in which damages or other financial compensation may be available in place of an injunction and other measures?**

Article 7 (4) of the TSA (which implements Article 13 of the Directive) stipulates that at the request of the person liable to be subject to the measures provided for in Article 6 (1), a judge may order that financial compensation has to be paid if all the following conditions are met:

- a. the person concerned at the time of use or disclosure neither knew nor ought to know that the trade secret was obtained and disclosed unlawfully;
- b. the execution of the measures in question would cause that person disproportionate harm; and
- c. the compensation to the injured party is reasonable and fair.

On the basis of Article 8 (1) of the TSA (which implements Article 14 (1) of the Directive), a judge may, upon the request of the injured party, order an infringer to pay the trade secret holder damages suffered as a result of the unlawful acquisition, use or disclosure of the trade secret.

#### **6. Are any interim or final measures and remedies available through *ex parte* hearings?**

Ex parte hearings regarding trade secrets are not possible. The TSA does not contain any provisions on ex parte orders.

#### **7. How is financial compensation to the trade secrets holder calculated?**

The financial compensation of Article 7 (4) TSA will not exceed the amount of royalties or fees which would have been due if that person had requested permission to use the trade secret in question (Art. 7 (5) TSA).

The financial compensation of Article 8 TSA must be appropriate and repair the damage actually suffered. When calculating compensation, a judge will take into account all appropriate factors, such as the negative economic consequences, including loss of profit, suffered by the injured party, the unlawful profit enjoyed by the infringer and, where appropriate, factors other than economic factors, such as the moral damage suffered by the trade secret holder through unlawfully obtaining, using or disclosing the trade secret. 5

In appropriate cases, the judge has the discretionary power to determine the financial compensation as a lump sum (Article 8 (2) TSA). The amount is determined on the amount of royalties or fees that would have been due if the infringer had requested permission to use the trade secret. 6

### **8. What is the limitation period for claims relating to misappropriation of trade secrets?**

The limitation period is five years after the breach is uncovered or 20 years after the day on which the breach began (Article 3:310d Dutch Civil Code).

### **9. When does the limitation period begin to run?**

Limitation period of five years: The day on which the holder learned about the trade secret breach.

Limitation period of 20 years: The day on which the breach began.

### **10. Are there any circumstances that interrupt or suspend the limitation period?**

The limitation period is interrupted by the institution of a legal action or by any other act of judicial recourse instituted by a person entitled to do so (Article 3:316 Dutch Civil Code).

Prescription of a right of action is interrupted by a written warning or by a written communication in which the obligee unequivocally reserves the right to performance (Article 3:317 Dutch Civil Code).

Acknowledgment of a right of action interrupts the prescription of the right of action against the person who acknowledges this right (Article 3:318 Dutch Civil Code).

### **11. Are mechanisms available to preserve confidentiality of trade secrets in the course of legal proceedings?**

The Dutch Code of Civil Procedure provides that in trade secret infringement proceedings a “confidentiality club” can be introduced. Courts can determine that access to alleged trade secrets introduced in the proceedings is only granted to at least one person of the opposing party and that party’s lawyer under confidentiality restrictions (Article 1019ib Dutch Code of Civil Procedure).

The judge can, to preserve the confidentiality of a trade secret, take the following measures:

- a. restrict access to documents in whole or in part to a limited number of persons;
- b. restrict access to meetings at which business secrets may be disclosed, and to the minutes of such meetings or to the audio or visual recording and transcription in writing in whole or in part to a limited number of persons;
- c. prepare a non-confidential version of the judgment and make this available to persons in which the parts containing business secrets have been deleted or edited.

In deciding on the measures, the court must consider the legitimate interests of the parties and third parties and any damages that may be caused to one of the parties and third parties as a result of ordering or rejecting the measures.

Please note:

Article 22a (3) Dutch Code of Civil Procedure gives courts the power to order that certain documents

are only accessed by a lawyer or another authorised representative, if the protection of a trade secret would otherwise be disproportionately affected. This provision also applies outside the context of trade secret infringement proceedings and is referred to as an “external eyes only confidentiality club”.

## **12. Are there any particular legitimate interests which may be invoked as an exception to the measures, procedures and remedies for trade secrets protection?**

In the Dutch Explanatory Memorandum accompanying the TSA, it is stated that Article 5 of the Directive provides a number of exceptions with regard to the application of measures, procedures and remedies provided for in the Directive. Journalists and whistleblowers may, under certain conditions, disclose business secrets. These exceptions are an important contribution to the balance between the protection of trade secrets and the right of freedom of expression that the Directive aims to achieve. 7

Article 5 Directive: Member states will ensure that a request for application of the measures, procedures and remedies provided for in this Directive is rejected where the alleged acquisition, use or disclosure of business secrets took place in any of the following cases:

- a. the exercise of the right to freedom of expression and information as enshrined in the Charter, including respect for freedom and pluralism of the media;
- b. the disclosure of misconduct, error or illegal activity, provided that the defendant acted in the public interest;
- c. the disclosure of business secrets by employees to their representatives in the legitimate exercise of their representative functions in accordance with EU or national law, provided that such disclosure was necessary for such an exercise;
- d. with a view to protecting a legitimate interest recognised in EU or national law.

## **13. Are any measures available where proceedings concerning trade secrets are manifestly unfounded and / or found to have been initiated abusively or in bad faith?**

Article 1019id Dutch Code of Civil Procedure (which implements Article 11 (5) of the Directive) provides for someone who has been wrongly affected by a provisional measure, with an opportunity to bring a claim for damages against the claimant. Damages can also be claimed if the interim measure loses its effect as a result of any action or omission on the part of the claimant or if it is established that there has been no breach of a trade secret or the threat thereof. The judge can order the claimant to make appropriate compensation for any damage caused by the measure.

## **14. Are separate legal proceedings required for such measures?**

In the Explanatory Memorandum accompanying the TSA, it is stated that Chapter III of the Directive sets out the civil law measures to be taken in the event of unlawful conduct with regard to a trade secret and the procedures to be followed in the event of such conduct. Section 1 contains general principles applicable to it, particularly fairness, proportionality and effectiveness (Article 6), and safeguards to prevent abuse of process (Article 7). As these fundamental views are already part of the national and international legal order (e.g. Article 20 CR), implementation is not necessary. 8

The Explanatory Memorandum states also that according to Article 7 of the Directive, member states may provide for the measures referred to in the first subparagraph to be the subject of separate judicial proceedings. As these fundamental views are already part of the national or international legal order (e.g. Article 20 CR), implementation is not necessary. 9

## **Employee / employer liability**

### **1. In addition to any statutory protection of trade secrets, what protections can employers put in place to avoid misuse of trade secrets by its workforce?**

In addition to technical and organisational precautions, employers can and should put in place contractual obligations on employees to protect trade secrets and confidential information during and after termination of employment. These can be part of the employment agreement, drafted as a separate confidentiality agreement as an addendum to the employment agreement or form part of the settlement agreement. In any case, confidentiality clauses must meet the general requirements of Dutch law. It is recommended that these clauses include a broad definition of confidential information, categories of confidential information, and state the circumstances where the contractual obligation is considered breached (e.g. sending/sharing information to third parties, sending information to the private e-mail address of employees) in order to enforce this clause. It is also advisable to agree on a contractual penalty that is subject to any breaches of the confidentiality clause as damages are often difficult to substantiate in case of violation of the confidentiality clause. Note that contractual penalty clauses are subject to different statutory requirements under Dutch law, such as the prohibition to claim both penalties and damages in the contractual penalty clause. If both penalties and damages are claimed, the penalty clause is invalid. Therefore, it is vital to carefully review the applicable penalty clause and assess whether it can be enforced under Dutch law.

### **2. Are there implied rights of protection for employers regarding misuse of trade secrets by its workforce?**

Yes. This results from the general statutory obligation of good employment practices (in Dutch: goed werknemerschap) under article 7:611 of the Dutch Civil Code. This statutory obligation also implies that employees may not disclose or otherwise use any confidential information or trade secrets for external purposes. In addition, the Trade Secret Act (in Dutch: Wet bescherming bedrijfsgeheimen) also provides protection to employers regarding misuse of trade secrets by its workforce.

### **3. What other means can employers use to protect misuse of trade secrets by the workforce, particularly when staff leave?**

In addition to any post-contractual confidentiality obligations and contractual penalty clauses, an employer should consider the following:

- Issuing explicit instructions about the obligation to keep trade secrets confidential;
- Having technical measures in place to prevent unwanted access to confidential information or trade secrets;
- Using protective provisions to prohibit the private use of e-mails and internet;
- Prohibition of the storing of data on private end devices or sending company data to private email inboxes;
- Instruction on compliance with IT security requirements and the use of company communication tools;
- Implementing rules of conduct, particularly in sensitive areas (e.g. no photography/filming) or on entering certain areas;
- In addition, regular trainings should raise awareness in the workforce about the importance of protecting trade secrets and confidential information;
- In the settlement agreement, the confidentiality clause (and the associated penalty clause) should remain in force after the termination date. Parties can also agree upon the applicability of the confidentiality clause in the settlement agreement if this has not yet been agreed upon.

### **4. Are there any protections for “whistleblowers” or similar rights for employees in relation to infringement of trade secrets?**

Potentially, but it will depend on the circumstances – see our Expert Guide to Whistleblower Protection and Reporting Channels for more information.

## **5. Can an employer be liable for their employee's infringement of a third party's trade secrets?**

Yes, an employer can be liable under the Trade Secrets Act (in Dutch: Wet bescherming bedrijfsgeheimen) for obtaining, using or disclosing trade secrets if the employer knows or should have known that its employees obtained the trade secret through unauthorised means.

Furthermore, in the Netherlands, the employer has a vicarious liability regarding employees. Article 6:170 Dutch Civil Code contains a strict liability of employers regarding subordinates. The basic principle is that the employer is liable for damage caused by subordinates, regardless of whether the employer made a mistake. However, if an employee is exculpated for infringing a third-party trade secret based on the grounds cited above, this exculpation will apply to the employer who is also not liable.

## **Commercial contracts aspects**

### **1. What kind of protection/provisions are to be included in supply or similar contracts with respect to trade secrets?**

**Consequences of breaches** – One of the key principles of contract law is the freedom of contract. Parties, especially professional parties to a commercial relationship, can define the boundaries of their legal relationship. Following on from this observation, parties are in principle free to define the consequences of breaches of confidentiality obligations.

Narrowing the focus to trade secrets: most often the object of a trade secret is an intangible good and the law generally sets out open and somewhat vague norms aimed at defining and protecting trade secrets. Therefore, it is paramount to define what is to be considered a trade secret and even more importantly what rights a party has when it believes that there may be misappropriation and/or unlawful usage. Parties may then determine the liability for such a breach. In this situation, the important aspect to consider is whether a penalty clause should be included for a breach. This may be advisable since practice shows that proving the extent of damages is a difficult task.

**Linking agreements with NDAs** – Commercial practice reveals that parties often prefer to arrange detailed agreements on the exchange of trade secrets in a separate NDA. This creates two legal bodies that form the basis on which parties are able to operate (i.e. the NDA with confidentiality commitments and a 'main agreement' setting out the particular rights and obligations regarding the cooperation of the parties).

A relevant question one may ask is whether a party can use the NDA in this 'main agreement', and whether this 'main agreement' can be affected when there is a possible breach of the NDA. For this, the agreements must be 'related' to each other. Under Dutch law, this is possible when parties have made it clear that they consider those agreements to be interconnected with each other. Careful drafting will make such intentions clear and could mean that the parties may have a trump card up their sleeve.

### **2. What are typical pitfalls in contracts regarding protecting trade secrets?**

**No alignment with the law** – More often than not parties are not aware of the existence of legislation, which may help them with the protection of their trade secrets. The law is a tool, but it is left to the parties to make use of this tool. This is also the case with trade secrets since the legal framework offers open and somewhat vague provisions.

Parties can describe more extensively what they consider to be a trade secret and can also stipulate that they regard something to have commercial value, which may – in practice – have limited commercial value. Subject to the applicable law, parties can have further possibilities to enforce a provision defining what they consider to be trade secrets. This opens the door to the advantages the law on trade secrets has to offer.

**No contingency plan** – What can be overlooked is agreeing on a contingency plan. Parties generally do look at the protection of confidential data and the consequences of a breach but forget to stipulate what parties should do when harm is already done. The main goal of the parties is to maintain the secrecy of a trade secret. When a trade secret is revealed, however, the parties should have a contingency plan in place to limit the negative consequences as much as possible.

### **3. Are there any important aspects for cross-border protection of trade secrets?**

One of the first questions a party must ask is whether the chosen law offers sufficient protection of trade secrets, both from a substantive and procedural law perspective. The Directive (EU) 2016/943 harmonises the playing field within Europe to an extent and offers protection. The foregoing may not be true in other jurisdictions. It is therefore important to address this aspect by choosing the law of a state, which offers adequate protection for trade secrets but also procedural means to mitigate the consequences of a possible leakage and/or unlawful use of trade secrets.

Secondly, it is important to have a clear provision on the term of the NDA. If parties wish to have an NDA, which is not limited as to its term, it is advisable to explicitly agree on this. Another important aspect to address is the possibility of termination of an NDA. As Dutch law endorses the freedom of contract, parties are in principle free to arrange contracts as they wish. The significant question here is whether it is desirable to include a possibility to terminate the NDA. What would be the consequences of this? These are all aspects, which parties can include in their NDA.

### **4. Is it possible to include a penalty clause and, if so, is it advantageous?**

Dutch law (and most civil law countries) allows to include and enforce a penalty for a breach of contract. The possibility of including such a clause may be different in different jurisdictions. Common law, for example, is known for having a more restrictive interpretation of penalty clauses. Hence, the possibility of agreeing on imposing a penalty on the other party is often considered to be more limited.

Article 6:91 of the Dutch Civil Code defines the penalty clause as "any clause providing that the debtor is liable to pay a sum of money or to perform another kind of service if he fails to perform his obligation, irrespective of whether this is to compensate for damage or merely to induce him to perform."

Under peculiar circumstances, claiming payment of a stipulated penalty may be unacceptable according to the standards of reasonableness and fairness. This is considered to be a high threshold, which is not accepted that easily. The option that remains – and which is more often used – is to request the judge to mitigate the stipulated fine. The court, however, must exercise this option with restraint: mitigation should only be permitted 'if equity clearly requires it'.

It is advisable to include such a clause since it is difficult proving damages as a result of misappropriation and/or unlawful use of trade secrets. Thus, the advantage is that the extent of damage does not need to be proved. Moreover, careful drafting could also imply that, if there is damage exceeding the stipulated fine, such damage can also be claimed.

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