

2022 - STUDY QUESTION

PROTECTION OF TRADE SECRETS DURING CIVIL PROCEEDINGS

National Group: Belgium

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I. CURRENT LAW AND PRACTICE

Please answer the below questions with regard to your Group's current law and practice.

Note: unless expressly indicated otherwise, for purposes throughout these Study Guidelines, "proceeding" may be any civil court proceeding or action (including, e.g., cases on the merits, preliminary injunction proceedings, discovery applications/motions, evidence gathering/preservation procedures, including seizures, et al.).

1. Does your Group's current law provide for the protection of trade secrets for or during any of the following stages of civil proceedings? Please tick all that apply. Please explain.

- complaint/pleading/writ of summons initiating a proceeding
- any other pleadings or submissions filed in the context of a proceeding
- production of documents during discovery phase or court-ordered production of evidence
- evidence seizure
- prepared-for-litigation technical description/declaration or any other exhibits
- oral hearing
- hearing transcripts
- witness statements made out of court and on the record for use in litigation (e.g., deposition)
- court decision
- potential for future misuse of trade secret information gained from claimant or defendant during the proceeding
- other, namely

1.1. Applicable provisions

Under Belgian law, the protection of trade secrets during civil proceedings is mainly organized in accordance with Article 871bis of the Belgian Judicial Code (hereafter, "JC"), which provides that:

"§1. The parties, their lawyers or other representatives, judges and court staff, witnesses, experts and any other person who, as a result of their participation in judicial proceedings or their access to documents forming part of such judicial proceedings, have become aware of a trade secret or an alleged trade secret within the meaning of Article I.17/1, 1°, of the

Code of Economic Law, which the judge has, in response to a duly reasoned request from an interested party or ex officio, qualified as confidential, are not allowed to use or disclose this trade secret or alleged trade secret.

However, it shall cease to exist in each of the following circumstances:

- 1° when it is established, in a decision that has become res judicata, that the alleged trade secret does not meet the conditions set out in Article 1.17/1, 1°, of the Code of Economic Law; or*
- 2° when the information in question has become, in the course of time, generally known to persons belonging to the circles that normally deal with this type of information, or has become easily accessible to such persons.*

§2. *The judge may furthermore, at the duly reasoned request of an interested party or ex officio, take the following specific measures to protect the confidentiality of any trade secret or alleged trade secret used or mentioned in the course of judicial proceedings:*

- 1° restrict access to all or part of documents containing trade secrets or alleged trade secrets produced by the parties or by third parties, to such persons or categories of persons as they may expressly designate;*
- 2° restrict access to hearings, as well as to records or transcripts thereof, where trade secrets or alleged trade secrets are likely to be disclosed, to persons or categories of persons that they may expressly designate;*
- 3° make available to any person other than the persons or categories of persons referred to in 1° and 2°, a non-confidential version of any judicial decision in which passages containing trade secrets have been deleted or struck out.*

The number of persons expressly designated or belonging to the categories of persons expressly designated referred to in the 1st paragraph, 1° and 2°, may not be greater than is necessary to ensure that the parties to the judicial proceedings have the right to an effective remedy and to access an impartial court, and it shall include, at least, one natural person for each party and each party's lawyer or other representatives of those parties to the judicial proceedings.

§3. *When deciding on the measures referred to in paragraph 2, the judge shall assess their proportionality. For this purpose, the judge shall consider the need to ensure the right to an effective remedy and access to an impartial court, the legitimate interests of the parties and, where appropriate, of third parties, as well as any damage that the granting or refusal of such measures might cause to any of the parties and, where appropriate, to third parties.*

§4. *The person who fails to comply with the obligation under paragraph 1 or the measure taken under paragraph 2 may be ordered to pay a fine from 500 to 25.000 €, without prejudice to any damages which may be claimed.*

In such a case, the same decision shall be taken insofar as a claim for damages for failure to comply with the obligation laid down in paragraph 1 or the measure taken pursuant to paragraph 2 is upheld. If this is not the case, the parties shall be invited to explain themselves in accordance with Article 775.

The King shall designate the administrative body responsible for the recovery of the fine pursued by all legal means. Every five years, the King may adjust the minimum and maximum amounts of the fine to the cost of living.

§5. *Any processing of personal data under this Article shall be carried out in accordance with the regulations on the protection of individuals with regard to the processing of personal data”.*

This provision was introduced in Belgian law by the law of 30 July 2018 on the protection of trade secrets, which entered into force on 24 August 2018 (published in the Belgian Official Journal, “M.B.”, on 14 August 2018 - hereafter, “Law of 30 July 2018”). It constitutes the faithful transposition of Article 9 of Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (hereafter, “Directive 2016/943”).

Article 9 of Directive 2016/943 requires the Member States to provide for an obligation of confidentiality in proceedings relating to the unlawful acquisition, use and disclosure of trade secrets. In Belgium, the choice was made to extend the scope of Article 871bis JC to *any* judicial proceedings in which a trade secret is used or referred to, irrespective of whether the trade secret is the main subject-matter of the proceedings, whether it is invoked as a defense and/or whether it is invoked in an ancillary manner to support an argument of the claimant and/or the defendant (Doc. parl., Ch., 2017- 2018, doc. n° 54 3154/001, p. 30).

The protection of trade secrets organized by Article 871bis JC is supplemented by the power for the judge to order the payment of a penalty (“astreinte”/“dwangsom”) pursuant to Article 1385bis JC:

“The court may, at the request of a party, order the other party, in the event of failure to comply with the main injunction or if the provisions relating to the confidentiality of trade secrets within the meaning of Article 871bis are not complied with, to pay a sum of money, known as a penalty payment, the foregoing being without prejudice to damages, as the case may be. However, a penalty payment may not be imposed in the case of an order for the payment of a sum of money, nor with regard to claims for the enforcement of employment contracts.

The application is admissible, even if it is made for the first time in opposition or on appeal.

The penalty payment cannot be incurred before the service of the decision that decided it.

The judge may grant the losing party a period of time during which the penalty payment may not have to be paid”.

1.2. Relevant acts and stages of the civil proceedings

Article 871bis JC aims to protect any trade secrets contained in “*documents forming part of judicial proceedings*”. This notion is not defined or otherwise limited, so that it may *a priori* include any documents filed, produced, drafted, generated, etc., during and/or within the framework of civil proceedings, such as, for example, submissions, exhibits, court-ordered evidence, technical descriptions, witness statements and pleading notes (see Ent. FR Brussels (Pres.), 31 October 2019, ICIP, 2019/4, p.657).

In addition, Article 871bis JC also aims to protect trade secrets of which a person may become aware “*as a result of their participation in judicial proceedings*”, which may happen as a result of a disclosure through, for example, oral statements, testimonies, and pleadings made in the context of such proceedings, e.g. during a hearing (see, for an example of access restriction to hearings, Ent. NL Brussels (Pres.), 12 March 2020, J.T., 2020/40, p.849).

Despite its apparently broad scope, the Group wonders whether it is possible, or at least still useful, to apply Article 871bis JC to documents initiating the proceedings as such, namely the claimant’s writ of summons or application (“*requête*”/“*verzoekschrift*”) as the case may be. In view of its wording, it seems indeed that the protection conferred by Article 871bis JC may only apply to trade secrets disclosed in (already initiated) civil proceedings, if (and thus only after) the judge has expressly ruled on the confidentiality of (all or part) of the acts and stages of the civil proceedings. In practice, the question of confidentiality will therefore only be raised after the introduction of the proceedings, i.e. after the document initiating the proceedings has already been communicated to the other party (see A. PUTTEMANS, “Chapitre 3 - Transposition en droit belge de la directive 2016/943 sur les secrets d’affaires”, in *Secrets d’affaires*, Brussels, Larcier, 2020, p.128).

Part of the Belgian legal scholarship stresses that the disclosure of a (“real” or alleged) trade secret is only prohibited if (and thus after) the judge has qualified it as confidential in accordance with Article 871*bis* JC, which implies that as long as the judge has not expressly qualified a(n alleged) trade secret as confidential, it is in principle not yet prohibited to disclose it (W. DERIJCKE and O. MALHERBE, “‘Vous me copierez cent fois...’, l’article 871*bis* du Code judiciaire et la protection du secret d’affaires dans les procédures judiciaires”, *J.T.*, 2020/40, p.842). Following this reasoning, one must conclude that a(n alleged) trade secret revealed in the act initiating the proceedings would be considered to have lost its secret character, insofar as it would not have been covered by a decision of the judge ordering the confidentiality of information exchanged during the civil proceedings (in this respect, see Question 3).

Considering the above, it is dubious, in the Group’s opinion, whether Article 871*bis* JC could in fact be applied to documents initiating the proceedings, as they are communicated/disclosed to the court’s clerk upon the initiation of the civil proceedings, and will subsequently be served on the opposing party, prior to any decision made by the judge on the confidentiality of (all or part of) the acts and stages in the civil proceedings.

1.3. Evidence seizure

It is the Group’s understanding that the notion of “evidence seizure” presented in the questionnaire (Questions 1 and 9) refers to descriptive or physical seizure proceedings in the case of intellectual property rights infringement (“saisie en matière de contrefaçon”/“beslag inzake namaak”), and that question 1 is more precisely aimed at finding out whether our current law provides for specific measures of protection of trade secrets that may be discovered/gathered in the framework of such seizure procedures (of which trade secrets are thus not the direct subject-matter). Indeed, under Belgian law, trade secrets holders cannot initiate “evidence seizure” on the basis of an alleged misappropriation of their trade secrets, unlike intellectual property right holders (see Explanatory Memorandum of Law of 30 July 2018, p.9; D. PHILIPPE, T. VAN NOYEN and L. DEVROE, “Protection des secrets d’affaires. Analyse de la loi du 30 juillet 2018 transposant la directive (UE) 2016/943”, *In foro*, 2019, p.42; A. PUTTEMANS, “Chapitre 3 - Transposition en droit belge de la directive 2016/943 sur les secrets d’affaires”, in *Secrets d’affaires*, Brussels, Larcier, 2020, p.124; see already in that sense, prior to the transposition of Directive 2016/943 in Belgium, Gent Court of Appeal, 1st December 2008, *I.R.D.I.*, 2009, p.58; AIPPI report of the Belgian group, “Question Q215 - Protection of trade secrets through IPR and unfair competition law”, *ICIP*, 2010, p.376).

With regard to the trade secrets of the claimant *initiating* the proceedings, the Group has the opinion that it is for such a claimant to anticipate their possible disclosure in the context of the unilateral application that the claimant files to obtain the requested “evidence seizure” and to take all relevant measures to ensure that they are kept confidential, notably by gathering all confidential information in a specific exhibit and to ask the judge to specify in the court’s decision that such an exhibit will not be handed over to the other party(ies) without prior (adversarial) debate on the qualification of the information included therein and the possible protection it should enjoy (on this matter, see W. DERIJCKE and O. MALHERBE, “‘Vous me copierez cent fois...’, l’article 871*bis* du Code judiciaire et la protection du secret d’affaires dans les procédures judiciaires”, *J.T.*, 2020/40, p.842, footnote 53).

With regard to the trade secrets of the person *targeted* by the proceedings, “evidence seizure” is by definition likely to jeopardize their confidentiality, since the designated expert will in principle be granted full access to the defendant’s premises and information carriers, which the expert could then decide to include - and thus disclose - in their report in order to establish the infringement of the intellectual property right invoked (M. BUYDENS, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, *C.J.*, 2011, p.17).

As a rule, trade secrets may not be successfully invoked to prevent an “evidence seizure” (Doc. Parl., 51/2943 et 2944-001, p.67; see also F. DE VISSCHER, “La preuve des atteintes - Réforme de la saisie-description”, in *Sanctions et procédures en droits intellectuels*, Brussels, Larcier, 2008, p.166). However, the Belgian Judicial Code provides for additional safeguards with regard to the trade secrets of the person against who the “evidence seizure” is carried out (M. BUYDENS, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, *C.J.*, 2011, p.17).

Pursuant to Article 1369bis/1 JC, the President of the Court must take trade secrets into account when granting “evidence seizure” and, where appropriate, order measures to ensure their protection (see, in particular, subparagraph 2: “*The order specifies the conditions to which the description is subject, in particular with a view to ensuring the protection of confidential information*”).

Among the possible measures, the President of the court may limit the list of persons authorized to attend the “evidence seizure” or subject their presence to the compliance with conditions to be determined in the court order (see Article 1369bis/4 JC: “§1. *The applicant may not be present or represented at the description unless expressly authorized by the President. In their decision, the President shall give reasons for this authorization specifically in relation to each person so authorized, considering the circumstances of the case, in particular the protection of confidential information. §2. The President may make the right to be present on the premises subject to such conditions as they may determine*”).

In addition, the President of the court may also limit the expert’s mission as well as the list of persons authorized to receive and review the expert’s report (M. BUYDENS, “La protection des secrets d’affaires et la procédure de saisie en matière de contrefaçon”, C.J., 2011, p.18).

In addition, the expert themselves must take the targeted party’s trade secrets into account when drafting their report and, as the case may be, they may decide to set aside the confidential information that would not be strictly necessary for the purpose of fulfilling their mission (see Article 1369bis/6 JC: “*Without prejudice to the applicant’s right to description, the expert shall, throughout the description operations and in drafting their report, ensure that the legitimate interests of the alleged infringer and the holder of the objects described are safeguarded, in particular as regards the protection of confidential information*”; see also Brussels Court of Appeal, 4 December 2009, ICIP, 2009, p.513).

Furthermore, the expert’s report itself has a confidential nature, which entails that the parties are prohibited from using the information contained therein outside of judicial proceedings (see Article 1369bis/7, §2, JC: “*This report, as well as all documents, samples or information collected during the description operations, are confidential and may only be disclosed to or used by the applicant or their successor in title in the context of proceedings, whether Belgian or foreign, on the merits or in summary proceedings, without prejudice to the application of the provisions of international treaties applicable in Belgium*”).

Finally, the Group has the opinion that, regarding the protection of the trade secrets of the person targeted by the “evidence seizure”, the judge may, even *ex officio*, order protective measures to ensure that the trade secrets are kept confidential, for example by appointing an expert to collect the relevant information and keep it under seal (“*comme séquestre*”) until a decision on the merits decides whether the information may be accessed and by who.

1.4. Hearing transcripts

Article 871bis, §2, JC expressly authorizes the judge to limit access to “records or transcripts” of hearings. Although it is not the judicial practice of the Belgian courts to draw up hearing records or transcripts, a broad interpretation of the wording of this provision may suggest that Article 871bis JC may apply to all acts drawn up during a hearing, including both hearing “sheets” (“*feuilles d’audience*”) and hearing minutes (“*procès-verbaux d’audience*”) to the extent that these documents effectively contain trade secrets.

However, taking a literal approach to the wording taken from the text of Directive 2016/943, part of the Belgian legal scholarship considers that the wording of Article 871bis JC should be interpreted restrictively as only relating to *actual* hearing “records or transcripts”, and thus not to hearing “sheets”. These authors even have doubts about the possibility of applying this provision to hearing “minutes” as understood under Belgian law (cf. W. DERIJCKE and O. MALHERBE, “‘Vous me copiez cent fois...’, l’article 871bis du Code judiciaire et la protection du secret d’affaires dans les procédures judiciaires”, J.T., 2020/40, p.844, footnotes 70 and 76).

According to these authors, applying Article 871bis JC to hearing sheets would be contrary to anyone's right to request a copy of (and thus access to) all or part of the public registers held by Belgian Court clerk offices, as enshrined in Article 1380, 1°, JC. Pursuant to Articles 783 and 784 JC, hearing sheets must indeed be collected in the above-mentioned public registers, together with a copy of the original decision. Therefore, making hearing sheets confidential would, according to them, prevent effective access to part of the public registers held by Belgian court clerk offices (W. DERIJCKE and O. MALHERBE, "Vous me copierez cent fois...", l'article 871bis du Code judiciaire et la protection du secret d'affaires dans les procédures judiciaires", *J.T.*, 2020/40, p.844, footnotes 70 and 76).

In the Group's opinion, this obstacle can in theory be overcome by the making available of a non-confidential version of the hearing sheet and of the decision in which all passages containing trade secrets have been deleted or struck out (either at the duly reasoned request of the parties or *ex officio* by the judge), which will then be placed in the register.

Finally, the Group does not see any reason to exclude hearing minutes ("procès-verbaux") from the scope of Article 871bis JC. First, these minutes form part of the case file in accordance with Article 721, 3°, JC, so that they should be considered as "*documents forming part of such judicial proceedings*" that may be subject to confidentiality measures ordered by the judge. Furthermore, the notion of "records" appears to include such "minutes" ("procès-verbaux") since the translation of "records" is "procès-verbaux" in the French version of Article 9.2.d of Directive 2016/943.

1.5. Courts' decisions

Pursuant to Article 871bis, §4, JC, the judge may, at the duly reasoned request of an interested party or *ex officio*, make available a non-confidential version of any judicial decision in which passages containing trade secrets have been deleted or struck out (see Ent. NL Brussels (Pres.), 12 March 2020, *J.T.*, 2020/40, p.852).

This provision does not impose an obligation on the judge to do so *ex officio*. Therefore, the party that wishes to guarantee the confidentiality of their trade secrets should make sure to expressly ask for the court's decision to be made confidential, or risk otherwise to have their trade secrets disclosed if they are contained in a judicial decision (that is in principle public - see Art. 149 of the Belgian Constitution) without specific confidentiality measures taken in this regard.

1.6. Conclusion

Article 871bis JC may in principle apply to all written documents forming part of civil proceedings, as well as to all oral statements, testimonies and pleadings made in the context of such proceedings, if (and thus after) a decision has been taken by the judge on the confidentiality of (all or part) of the acts and stages of the civil proceedings. A *caveat* applies to documents initiating the proceedings, where special measures should be taken by the claimant themselves to safeguard the confidentiality of their trade secrets: if the information contained in such documents cannot be automatically protected as confidential at the stage of the initiation of the proceedings (since no decision has been taken in this sense yet), it seems nevertheless possible for the judge to impose *a posteriori* the confidentiality of (all or part) of the information contained in such documents (on this matter, see above section 1.2 and see below, the Group's answer to Question 3).

2. Under your Group's current law, is there a requirement:

- a. for specificity in the pleadings (e.g., the trade secret allegedly misappropriated is required in written documents provided to the court); and/or
- b. that knowledge of the trade secret details be known by more than defendant's outside counsel (e.g., General Counsel, Managing Director, or other types of representatives),

so that a defendant can properly defend against a charge of misappropriation of a trade secret? If YES, please explain.

Preliminary note

The question as formulated concerns only the requirements applicable in proceedings relating to trade secrets' misappropriation. As a reminder, in Belgium the rules for the protection of trade secrets in legal proceedings apply to all proceedings in which trade secrets are likely to be disclosed, regardless of whether the trade secrets (and, in this case, their alleged misappropriation) are the main subject-matter of the proceedings or whether they are raised only as an incidental issue (see the Group's answer to Question 1, Section 1.1).

For the sake of completeness, there is also the reminder that the applicable rules are likely to benefit (and therefore be relied upon against) both the claimant and the defendant since they are intended to ensure the protection of trade secrets that may be disclosed in the course of legal proceedings, irrespective of the party from whom the secrets emanate.

2.a. Requirement for specificity in the pleadings

In Belgium, there is no specific rule as to what information should be included in pleadings filed within the framework of civil proceedings relating to trade secrets' misappropriation (and/or in any other civil proceedings for whatever matters) to enable the defendant to properly defend themselves against the charge of misappropriation that has been brought against them.

However, reference can usefully be made to Article 702, 3°, JC, which provides that "*subject to nullity*", the writ of summons must contain "*the subject-matter and a summary statement of the reasons for the claim*". In practical terms, this means that when drafting the writ of summons, the claimant (both in the case of trade secrets' misappropriation or other proceedings) is required to *clearly* state the subject-matter of the claim (the "what"), as well as the factual elements underlying it (the "why") so that the defendant can properly prepare their defense. In other words, "*the claimant is not required to describe the subject-matter of their claim in legal terms or to refer in the act instituting the proceedings to the legal provisions they consider applicable, but the wording of their claims must be sufficiently clear and precise to enable the defendant to defend himself*" (H. REGHIF, "L'action en justice", in X., *Droit judiciaire. Commentaire pratique*, I.1-1 - I.3-5, p.4).

When established, the lack of clarity in the formulation of the claims and demands in the writ of summons constitutes a violation of the defendant's rights of defense and, consequently, of their interests within the meaning of Article 861 JC. In such circumstances, the defendant is entitled to raise the exception of "obscuri libelli" and to invoke the nullity of the writ.

To date, the Group is not aware of any cases of trade secrets' misappropriation in which the "obscuri libelli" exception has been applied. However, it can be assumed that, when applied to trade secrets' misappropriation, Article 702, 3°, JC presupposes that the claimant identifies in the writ of summons the trade secrets (or at least the type of trade secrets) that they intend to invoke against the defendant (without having to produce and/or describe them in detail) and furthermore specify the circumstances that, in their opinion, allow them to conclude that those trade secrets have been misappropriated. However, there is no reason to believe that the claimant would be obliged, at the stage of the writ of summons, to produce and/or give access to the defendant to the trade secrets relied upon in support of their action.

Reference may also usefully be made to Article 870 JC and Article 8.4 of the Belgian Civil Code (hereafter, "CC"), according to which each party must prove the facts they allege and, correspondingly, communicate to the other party (and to the court) the documents likely to support their claims (Art. 736 JC). Thus, each party must provide the other party and the court with sufficient information to enable them to understand the facts and the claims made, so that the defendant can effectively exercise their right of defense and the court can take a decision. None of these provisions, however, contain specific requirements as to what information should specifically be included in the pleadings filed during the proceedings and/or what documents should be produced in support thereof

in order to enable the defendant to properly defend themselves against an action for trade secrets' misappropriation.

In addition to the principle that each party has the burden of proving the facts they allege, Article 8.4, 3rd indent, CC and Article 871 JC both also enshrine the principle of loyal collaboration of the parties in the burden of proof, which the Court of Cassation has expressly recognized as a general principle of law (Cass., 14 November 2013, R.G. C.13.0015.N, referred to in J.-P. BUYLE et T. METZGER, *La réforme de la charge de la preuve*, in *Liber amicorum Paul Alain Foriers, Entre tradition et pragmatisme*, Vol.1, Brussels, Larcier, 2021, p.218). It is in particular in application of this principle that the Brussels Dutch-speaking Enterprise Court ruled that while the burden of proof (of ownership and the existence of the trade secret) lies in principle with the claimant, “*since it may be partly negative evidence that the information ‘is not generally known’, the burden of proof will however be shared to a limited extent, in the sense that [the defendant] must prove that the information is generally known if [the claimant] makes it at least plausible that it is not*” (Ent. NL Brussels, 12 March 2020, *J.T.*, 2020, p.849).

Finally, and for the sake of completeness, the group also considers it useful to mention a decision in which the President of the Brussels French-speaking Enterprise Court required a party to expressly identify in their pleadings the confidential information that would be stated/described therein (e.g. by “marking” it as such), so that the other party’ representatives who will gain knowledge of it (in the context of a confidentiality club set up for this purpose - see Question 2.b) would know precisely what information was confidential and could therefore not be used outside the then ongoing proceedings (Ent. FR Brussels (Pres.), 31 October 2019, *Ing. Cons.*, 2019, p.667: “*Confidential information disclosed by [the defendant] shall be clearly indicated in their documents and identified as such in their pleadings, so that those who become aware of it may avoid using it in any way in their business*”). The obligation imposed by the Court to include certain statements in the pleadings was not, however, intended to enable the defendant to properly defend itself against a claim of trade secrets' misappropriation, but was rather intended to ensure the protection of trade secrets that the defendant would be required to disclose in their defense against accusations of infringement of the claimant's patent.

2.b. Requirements that knowledge of the trade secret details be known by more than defendant's outside counsel

Yes.

Article 871*bis* JC adopted following the transposition of Directive 2016/943, and quoted *in extenso* in our answer to Question 1, consolidates a case law practice that has already existed for several years in Belgium.

Article 871*bis*, §1, JC thus firstly provides for the option of imposing an obligation of confidentiality on all persons participating in proceedings in which trade secrets are likely to be disclosed. There is no limit to the number and/or quality of persons who may participate in the proceedings on behalf of and/or alongside the defendant and thus become aware of the trade secrets that may be disclosed during such proceedings. Thus, although this provision does not strictly speaking require that the trade secret details be known by more than the defendant's lawyers, it leaves the 'door open' in this respect.

In addition to the general obligation of confidentiality referred to in Article 871*bis*, §1, JC, Article 871*bis*, §2, provides for the option for the court to adopt special measures to limit the number of persons who may have knowledge of (alleged) trade secrets that may be disclosed in the course of the proceedings. From the outset, the Group notes that the need to adopt a confidentiality club is assessed on a case-by-case basis. The judge may therefore decide to create a confidentiality club for one party and not for the other if the judge considers that only one party will be required to disclose trade secrets to the other (see Ent. NL Brussels (Pres.), 31 October 2019, *Ing. Cons.*, 2019, pp.664-665). Moreover, Article 871*bis*, §2, JC does not limit the number and quality of persons who may be designated as members of the so-called “confidentiality club”, but only provides that its composition must be limited by the need for the party “who is to constitute it” to be able to exercise fully their right to an effective remedy and to have access to an impartial court in the proceedings concerned

(T. TOREMANS, “Commentaar bij art. 871bis ger.W.”, in *Gerechtig recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, OGR, 2020, p.63; also see recital 25 of Directive 2016/943: “In the event that one of the parties is a legal person, that party should be able to propose a natural person or natural persons who ought to form part of that circle of persons so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent the objective of the restriction of access to evidence and hearings from being undermined”).

While Article 871bis, §2, JC expressly states the option of including the parties’ lawyers in the confidentiality club, it does not limit its composition to their sole status/quality and/or presence. Rather, under a strict reading of Article 871bis, §2, JC the confidentiality club that can be set up must include at least:

- One natural person for each party (in addition thus to the parties’ representatives to the proceedings); and
- The parties’ lawyers or the other representatives (e.g. legal, technical, etc.) of the parties to the proceedings under consideration.

The express stipulation that, in addition to the parties’ lawyer(s) (or other representatives in the proceedings), the confidentiality club must necessarily include one natural person per party is intended to ensure the organic representation of legal persons and to preserve the parties’ rights of defense. They must have full access to evidence and hearings (T. TOREMANS, “Commentaar bij art. 871bis ger.W.”, in *Gerechtig recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, OGR, 2020, pp.63-64).

Belgian case law has already ruled several times on the composition of confidentiality clubs since the adoption of Article 871bis, §2, JC:

- In a decision of 16 October 2018, the Antwerp Justice of the Peace rejected a party’s request that the other party should not have access to the confidential documents produced in the proceedings, on the grounds that Article 871bis, §2, JC expressly provides that the confidentiality club set up must always include at least one natural person for each party (JOP Antwerp, 16 October 2018, *R.W.*, 2019, p.77; see also other decisions referring to the need for the confidentiality club to consist of at least one natural person per party: Ent. NL Brussels, 24 December 2020, *I.R.D.I.*, 2021, p.26; Ent. Brussels, 30 July 2020, *I.R.D.I.*, 2021, p.228, cited in B. BURM-HERREGODTS, “Is alle bedrijfsgevoelige informatie voortaan ook een bedrijfsgeheim?”, *In Foro*, 2021, p.27).
- On 13 May 2020, seemingly going against the letter of Article 871bis, §2, JC and taking the opposite view of the decision of 16 October 2018 above, the Antwerp Court of Appeal ruled that only the parties’ lawyers could be part of the confidentiality club set up and not (a natural person for) the parties themselves (Antwerp Court of Appeal, 13 May 2020, *I.R.D.I.*, 2020, p.176). However, this ruling should not be misunderstood, as in this decision the Court first expressly recalled the principle that the confidentiality club should in principle include a natural person for each party, before noting that in the present case the parties had expressly waived this right:

“The Court notes that MELIS and FAW request that only their lawyers would have access to the ‘alleged’ trade secrets. Since this proposal comes from the parties’ mandate holders, the Court assumes that these parties waive the right granted to them under Article 871bis §2 last paragraph Jud. Code (i.e. the right that at least one natural person for each party must be part of the confidentiality club). Although Article 871bis §2 last paragraph Jud. Code indicates that ‘at least’ one natural person for each party must be designated, the Court must interpret this obligation in accordance with the wishes of the parties and the lack of designation of such a person may not result in the procedure being rendered impossible” (See note under that decision by T. HEREMANS and F. BILLEN, “Bescherming van bedrijfsgeheimen in de vertrouwelijkheidskring”, *I.R.D.I.*, 2020, p.183).

Given the confidentiality club's purpose (i.e. to ensure that *no one* outside the club can learn the trade secrets disclosed there), the Court further prohibited the parties' lawyers from sharing with their clients the information disclosed within the confidentiality club, either directly or through discussions in their submissions. Anticipating the practical problems that such a situation might create, the Court clarified that it would still be possible to request, at a later stage, that a "person" be added to the confidentiality club on a temporary basis:

"The Court further emphasizes that MELIS' and FAW's lawyers (who have not designated a natural person for their clients) are prohibited from communicating to their respective clients the documents that are considered to be an 'alleged' trade secret (unless the Court would come to an amended interlocutory judgment in this respect). The same applies, of course, to these lawyers' submissions in which concrete (i.e. detailed) reference is made to such documents. Moreover, the Court wishes to point out a possible increased professional liability of the parties' respective lawyers and the fact that the Court can possibly extend the confidentiality club to one natural person for each party upon request".

- In a decision of 31 October 2019, the President of the Brussels French-speaking Enterprise Court ruled that Article 871*bis*, §2, JC does not impose any limitation as to the number or quality of the persons composing the confidentiality club, and recalled that the only requirement imposed by the legislator is that the number of members should not exceed what is necessary to enable the party for whom the confidentiality club has been set up to exercise their rights of defense (Ent. FR. Brussels (Pres.), 31 October 2019, *Ing.-Cons.*, 2019, p.655). The Court therefore decided that this provision does not prevent a party from using an external patent attorney in addition to their lawyer, including "*persons who are or will be involved in the development of technology in [the] technical field [concerned by the pending proceedings] [...] [including] those who have participated in the development of the invention which is the subject of the patent(s) in question*", as they are very well, and often better, placed to make a technical assessment of the patent in question and whether it is infringed (Ent. FR. Brussels (Pres.), 31 October 2019, *Ing.-Cons.*, 2019, p.655; see also Ent. NL Brussels, 24 December 2020, *I.R.D.I.*, 2021, p.26). In this respect, the Court expressly noted that the function of a patent attorney "*is distinct from that of a lawyer and involves specific skills which may be essential for assessing whether a patent has been infringed and therefore necessary for the exercise of the right to an effective remedy by the party invoking that patent*" (Ent. FR. Brussels (Pres.), 31 October 2019, *Ing.-Cons.*, 2019, p.666).

In response to the defendant's argument, the judge also ruled that Article 871*bis* JC does not require that the persons designated by the parties to take part in the confidentiality club should have a legally binding mandate/power of attorney.

Finally, it was held that in case of impediment, it is possible to replace a member of the confidentiality club without the other party's prior agreement.

- In their ruling of 7 October 2021, the President of the Brussels Dutch-speaking Enterprise Court addressed the defendant's request against an evidentiary for an extensive limitation of the number and type of party's representatives that could have access to allegedly highly confidential information, described in the report of the court appointed expert. In its ruling, the Court considered that even if the information in question would be treated as a trade secret, the right of defense of the other party still had to be taken into account. Consequently, the Court specified that "*imposing a limitation of the number of people that can have access to the report cannot result in a strategic-procedural disadvantage*" (Ent. NL Brussels (Pres.) 7 October 2021, unpubl).

3. Under your Group's current law, do any remedies exist for the holder of the trade secret to "re-establish" or "re-gain" the status of a trade secret exposed during a Disclosure action, or more generally during civil proceedings? That is, can a trade secret exposed during a civil proceeding effectively be made or held "secret" so as to still be considered a trade secret? If YES, please explain.

Yes, although it seems more accurate to say that in such circumstances the (trade) secret is "maintained" instead of "re-established" or "re-gained".

As set out in our answer to Question 1, Belgian law foresees measures to ensure that any trade secret exposed during civil proceedings, including during a Disclosure action, cannot be relied upon outside the court proceedings. In particular, as a reminder, Article 871*bis*, §1, JC provides that "*the parties, their lawyers or other representatives, judges and court staff, witnesses, experts and any other person who, as a result of their participation in judicial proceedings or their access to documents forming part of such judicial proceedings, have become aware of a trade secret or an alleged trade secret within the meaning of Article 1.171/1, 1°, of the Code of Economic Law, which the judge has, in response to a duly reasoned request from an interested party or ex officio, qualified as confidential, are not allowed to use or disclose this trade secret or alleged trade secret*".

A distinction can be made between instances where parties voluntarily disclose information containing trade secrets during proceedings (3.1) and cases where parties are "forced" to disclose such information within the context of a Disclosure action (3.2).

3.1 Voluntary disclosure of trade secrets

As indicated in our answer to Question 2, under Belgian law, each party must prove the facts they allege and, correspondingly, provide the supporting evidence in this respect. In line with the right to a fair trial and the right of defense, each party has to disclose the elements on which their case is based to the other party. If a party bases their case (in part or wholly) on information that they consider to be a trade secret, then that party can request the application of the regime provided under Article 871*bis* JC to protect the confidentiality of their trade secrets and avoid disclosure for any purpose other than for the handling of the case (or the court can do it on its own initiative, i.e. *ex officio*).

The law has not set a specific time limit within which a party should invoke protection of Article 871*bis* JC. However, some legal authors argue for immediate invocation, as soon as it is clear that trade secrets will have to be disclosed during the proceedings. Otherwise, the party's behavior may be deemed contrary to the requirement to cooperate faithfully in proceedings (See H. KEULERS, "*De tegensprekelijkheid in het gerechtelijk deskundigenonderzoek versus de bescherming van bedrijfsgeheimen: kunnen water en vuur verzoend worden?*", in X., *Bestendig Handboek Deskundigenonderzoek*, III.8, Kluwer, Mechelen, 2013, 24-25; O. MALHERBE and W. DERIJCKE, "*Vous me copierez cent fois...*", l'article 871*bis* du Code judiciaire et la protection du secret d'affaires dans les procédures judiciaires", *J.T.*, 2020/40, p.842).

The holder of a trade secret who wants, or needs, to disclose such a secret to make their case would thus act prudently by applying to the court, before disclosure, to request a preliminary order qualifying the information in question as a "trade secret" and thus being granted the corresponding protection. This being said, if the holder discloses the trade secret outright (without previously requesting specific protection), from the wording of Article 871*bis* JC, the court may still qualify it as confidential, either at the request of the disclosing party or even on its own initiative. One may say that, in such circumstances, the trade secret's status is "maintained" ("re-established"). However, acting that way creates a risk for the disclosing party: if the court denies the confidential status, then the trade secret's status will be definitely lost. Moreover, some authors stress that, in this situation, any disclosure or use of the information that would have taken place before the court confirms the "trade secret" status of the information, would be legitimate, thus possibly making any *ex post facto* protection measure useless, as the damage would already be done (O. MALHERBE and W. DERIJCKE, "*Vous me copierez cent fois...*", l'article 871*bis* du Code judiciaire et la protection du secret d'affaires dans les procédures judiciaires", *J.T.*, 2020/40, p.842).

It is unclear whether the court, while considering that the information in question amounts to a trade secret, may deny protection for the reason that such protection was not expressly requested before disclosure. One may consider that, in such a case, the information has lost its qualification as a trade secret, because it no longer meets the requirements set by Article 1.17/1, 1°, of the Belgian Code of Economic Law (hereafter, “CEL”). Indeed, one could argue that the holder has not taken all “reasonable measures” to keep the information secret.

If the court would decide not to grant protection to the disclosed information, then it is unclear whether any documents containing the information can still be withdrawn from the debates by the disclosing party (O. MALHERBE and W. DERIJCKE, “Vous me copierez cent fois...”, *l’article 871bis du Code judiciaire et la protection du secret d’affaires dans les procédures judiciaires*, *J.T.*, 2020/40, p.842). In addition, it is unclear whether the other party, which would already have received the information, would still be under any requirement to keep it confidential in such a case.

3.2 Forceful disclosure of trade secrets

In some cases, an element of proof can (forcefully) be disclosed by a party, even against their will. For example, this can be the case in the following circumstances:

- (i) Article 877 JC: if there are strong assumptions that a party has relevant elements of proof in their possession, then the court can order that party to disclose these elements.
- (ii) In the event that an expert is appointed by the court, *e.g.* on one party’s unilateral request in case of a descriptive seizure (“saisie-contrefaçon”), or otherwise at request of the court or either of the parties.

Under Belgian law, these would be the only examples of “Disclosure actions” as described in the Study Guidelines.

Even in these cases, the confidentiality of trade secrets can be ensured:

- (i) In this situation, a party can refuse to produce the requested document only in case it has a “legitimate reason” to do so (Art. 882 JC, *a contrario*). One such legitimate reason could be that the document contains a trade secret (J.-P. BUYLE, “Le secret des affaires: du droit à l’intimité au secret professionnel”, in *Liber amicorum Guy Horsmans*, Brussels, Bruylant, 2004, p.13; J.P. BUYLE, “La production forcée de documents au regard du secret et de la confidentialité”, *R.D.C.*, 2013/10, p.1081; Ent. Brussels, 14 May 2009, A/08/05692, unpubl., p.6; Ent. Brussels, 3 December 2009, A/08/05692, unpubl.; Labor Mons, 28 October 2015, R.G. 2014/AM/305, unpubl.). However, some authors argue that trade secret holders is held by the obligation to contribute to the burden of proof (see D. MOUGENOT, “Le charme discret des ‘petites’ mesures d’instructions”, *P.&B.*, 2007, p.245,). Furthermore, if a court orders a party to disclose certain elements of proof, it can also determine the modalities of the intended disclosure (Art. 879 JC). Therefore, the court could already foresee measures to protect (potential) trade secrets in any court order. In addition, nothing prevents the disclosing party from relying on the protection regime offered by Article 871bis JC when faced with a disclosing order (or the court may invoke it at the court’s own initiative).
- (ii) The expert appointed in the context of a descriptive seizure is required, both in the course of their mission and in the drafting of their report, to watch over the safeguarding of the legitimate interests of the alleged infringer, in particular the protection of confidential information, which trade secrets obviously are (Art. 1369bis/6 JC; see also *supra* in our response to Question 1). The content of the report is confidential and can only be used for proceedings on the merits (Art. 1369bis/7, §2, JC). Echoing Article 1369bis/7 JC, the Antwerp Court of Appeal has ruled that information obtained by a competitor during a descriptive-seizure can only be used in the framework of the subsequent patent proceedings on the merits (Antwerp Court of Appeal, 6 February 2008, I.R.D.I., 2008, p.173 - the Group notes that this judgment was annulled by the Court of Cassation on grounds unrelated to the restrictions of use). If such proceedings are in effect initiated, then nothing seems to prevent the holder of

the trade secret from also relying on the regime of Article 871bis BJC and requesting protection of their trade secret during and after the descriptive-seizure procedure.

If an expert is appointed by the court in a case where both parties are already represented, then either party can invoke the protection offered by Article 871bis JC to ensure the protection of their trade secrets during the investigation by the expert.

II. POLICY CONSIDERATIONS AND PROPOSALS FOR IMPROVEMENTS OF YOUR GROUP'S CURRENT LAW

4. Could your Group's current law or practice relating to the protection of trade secret(s) during civil proceedings be improved? Please explain.

Yes. See answers to the following questions.

5. In order to limit disclosure of a trade secret, should there be more specific requirements regarding access by a party to a trade secret during a civil proceeding? Please explain.

The scope of this question is not clear to us. Is it about requirements to be put in place to determine whether information qualifies as a trade secret, even before a party is allowed access to that information (5.1.), or is it about requirements to be put in place to regulate a party's access to certain information after it has been qualified (at least on a preliminary basis) as a trade secret (5.2.)?

5.1. With regard to the determination of the trade secret status of the information invoked by one party before the other party is allowed to access to them

The rules aimed at protecting the confidentiality of trade secrets that may be shared in the course of legal proceedings (and thus possibly at controlling the access to these secrets) presuppose that the confidential information in question has first been qualified as a trade secret (not all confidential information necessarily constitutes a trade secret within the meaning of Article XI.17/1 CEL).

In Belgium, the qualification of trade secrets can be made both in a final decision and in a preliminary/intermediary decision. The first option presents the obvious risk that the qualification of trade secrets is made too late (i.e. when the trade secrets have already been disclosed). The second option, which aims precisely at avoiding the pitfall of the first, corresponds to the judgment adopted pursuant to Article 19(3) JC, as well as to the judgments laying down the modalities of investigative/disclosure measures (e.g. Articles 877-878 JC relating to the measures of production of documents; Article 973(2) JC relating to the settlement of disputes in matters of judicial expertise; Article 961/2 JC relating to the production of affidavits) (T. TOREMANS, "Commentaar bij art. 871bis ger.W.", in *Gerechtigd recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, OGR, 2020, pp.54 and 61).

As the provision in question explicitly states, the protection offered by Article 871bis JC is not limited to "proven" trade secrets, but may also apply to "alleged" trade secrets. The judge may therefore, in a preliminary/intermediary judgment and on the basis of a *prima facie* assessment, qualify certain information as a trade secret and, consequently, grant it the related protection until a final decision is taken on its status as a trade secret and, consequently, on whether or not to maintain the protection measures ordered pre-judicially. In this respect, reference can be made to the decision of 9 September 2020 of the Brussels Dutch-speaking Enterprise Court:

"Within the framework of Article 19(3) Jud. Code and in order to order an investigative measure, a party does not have to prove the facts alleged by them and the merits of their claim in advance, but it is sufficient that they state facts which, in the absence of immediate and convincing proof to the contrary, may be assumed to be true and relevant, and the proof of which is permissible and reasonably possible through the requested investigative measure.

In the context of Article 19(3) Jud. Code, only the apparent rights of the parties need to be checked and investigated, without the preliminary measures touching on the substance of the case (VOET, S., Stand van zaken en actuele ontwikkelingen op het gebied van kort geding en versnelde rechtspleging, in Themis, Gerechtelijk recht, Die Keure 2020, nos. 19 -22).

On the basis of the documents before it, the Court, ruling prima facie, is of the opinion that TECNICAS and ESPINDESA have sufficiently demonstrated under number 23 of their submissions that they possess a trade secret within the meaning of Article 1.17/1 CEL” (Ent. NL Brussels, 9 September 2020, I.R.D.I., 2020, pp.261 et seq.; see also Antwerp Court of Appeal, 17 May 2020, I.R.D.I., 2020, p.179; Civ. NL Brussels, 4 December 2019, b-Arbitra, 2021, p.218, n° 3.2.3.3 and 3.2.3.5).

Thus, the holder of the trade secret may invoke the confidential nature of certain information to oppose its disclosure or, at the very least, to determine the terms of its disclosure in order to preserve its confidential nature. For this purpose, the trade secret holder will not have to produce the trade secret from the outset, but will have to produce sufficient evidence to make it plausible that the confidential information the holder claims is indeed a trade secret and justifies the adoption of specific measures to preserve its confidentiality.

While the system set up to allow the trade secret holder to seek legal protection before disclosure seems satisfactory, it does leave some questions open:

- What happens if, after having been communicated to the judge and the other party with a view to assessing whether it can be specifically protected as a trade secret, the judge finds that the confidential information in question cannot be qualified as a trade secret? Can the judge order specific measures to protect the confidential information in question even though the judge has found that it cannot be protected as a trade secret? Can the other party be ordered to not use and/or disclose this information even though it cannot qualify as a trade secret and, therefore, cannot benefit from the corresponding specific protection? Or does the party producing the confidential information in question simply have to accept the risk that the information will not be recognized as a trade secret (even though it was indeed confidential)?
- To avoid the pitfall above, one could imagine submitting the confidential information to be assessed *only* to the judge, possibly assisted by an independent expert, in order to allow the party to whom the information belongs to decide whether it wishes to rely on the documents in the proceedings, depending on whether they have been qualified as trade secrets and, consequently, whether they can benefit from that specific protection. While this has the advantage of protecting a party’s confidential information from unwanted (and unprotected) disclosure in the course of the proceedings, it poses a potential problem regarding the rights of the defense and the adversarial process. Indeed, if the confidential information turns out not to be a trade secret and the holder therefore decides not to produce it in the proceedings, the judge - who cannot simply delete information of which they have become aware from their brain - would therefore be likely to base their decision on elements of which the other party is not aware....

To remedy the problems above, one could consider submitting all applications for trade secret protection measures to a special chamber other than the one that will rule on the merits and that *only* the judge of this chamber (possibly assisted by an independent expert) can take knowledge of the confidential information that should benefit from the protection measures.

5.2. As to the conditions that could be put in place to regulate “physical” access to trade secrets disclosed in the course of proceedings

It is generally accepted that, in addition to the specific measures expressly referred to in Article 871bis, §2, JC (i.e. setting up a confidentiality club that can have access to certain documents, to the hearings and/or to an unredacted version of the judgment - see Question 2.b), the judge has, in practice, a broad discretion and flexibility to order measures to control the production of and access to trade secrets disclosed in the course of proceedings. In this respect, reference can be made to

Articles 878 and 879 JC, which provide that the judge ordering the production of a document will determine the terms and conditions under which the document in question must be produced. Depending on the circumstances, the judge may therefore order specific security measures to ensure an adequate level of protection of trade secrets disclosed during proceedings (for examples, see: T. TOREMANS, “Commentaar bij art. 871bis ger.W.”, in *Gerechtigd recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, OGR, 2020, p.47 et seq.; B. VAN DEN BERGH, *Gerechtigd deskundigenonderzoek in burgerlijke zaken*, APR, Kluwer, 2019, pp.257 et seq.; H. KEULERS, *Bestendig Handboek, Deskundig Onderzoek*, Kluwer, 2018, pp.75 et seq.; W. DERIJCKE and O. MALHERBE, “‘Vous me copierez cent fois...’, l’article 871bis du Code judiciaire et la protection du secret d’affaires dans les procédures judiciaires”, *J.T.*, 2020/40, p.843). In the interests of legal certainty, it might be appropriate to expressly emphasize the judge’s discretion in this regard and, possibly, to provide more precise guidance in this respect by means of, for example, a non-exhaustive list of possible measures (which would be subject to modification in the light of the specific circumstances of each case, as well as in the light of technological progress), while recalling that the principle of proportionality must always govern the adoption of such measures to reconcile the various interests involved.

6. Should remedies to re-establish or regain a trade secret be available to the trade secret holder:

- a. if the disclosure of the trade secret during the proceeding occurred intentionally due to a legal requirement (e.g., a legal requirement to specify the basis of a claim, or in response to a court order/interrogatories, etc.);
- b. if the disclosure of the trade secret occurred intentionally before exhaustion of all available legal protections, (e.g., protection order, redaction of transcripts, etc.);
- c. if the disclosure of the trade secret occurred unintentionally before exhaustion of all available legal protections;
- d. other, namely...?

Please answer YES or NO for each. Please explain.

As a reminder, we believe that “re-establish” or “re-gain” are not the most appropriate terms here, and that we should rather use the term “maintain” (see our response to Question 3).

6.a. If the disclosure of the trade secret during the proceeding occurred intentionally due to a legal requirement (e.g., a legal requirement to specify the basis of a claim, or in response to a court order/interrogatories, etc.).

Yes, if disclosure has taken place following a specific court order, the status of “trade secret” should not be denied/lost, and remedies should remain available. However, where possible, the holder of the trade secrets should proactively seek the application of measures to protect their secrets before disclosure. In this regard, for example, the general legal requirement to specify the basis of a claim should not justify the outright disclosure of trade secrets, before a protective order has been requested and obtained, and the confidential character of the information in question has thus been preserved. Similarly, if the order to produce a document involves the disclosure of trade secrets, then the holder should inform the judge and request the application of safeguards before producing the requested document (the judge being of course free to grant or refuse this request).

6.b. If the disclosure of the trade secret occurred intentionally before exhaustion of all available legal protections (e.g., protection order, redaction of transcripts, etc.).

No, if disclosure happened intentionally, without first exhausting all available legal protections to prevent the other parties from using the trade secret for an indefinite period of time, such disclosure might be viewed as wrongful and protection might thus be definitely lost.

6.c. If the disclosure of the trade secret occurred unintentionally before exhaustion of all available legal protections.

This depends on what is understood by “unintentionally”. If this refers to a disclosure of a trade secret made by a party against their will or by force (e.g. within the context of a descriptive seizure), then it should be possible to maintain (“re-establish”) the trade secret status (see also our response to Question 6.a).

However, if unintentional means “accidental”, i.e. a party disclosed a trade secret by accident without first requesting a protective order (e.g. due to an oversight or because they did not realize that they were about to disclose a trade secret), then it should not be possible to maintain its protective status. In such a situation, the involved party cannot be considered as having taken the necessary reasonable measures to maintain the trade secret status for their (now) disclosed information.

6.d. Other, namely....?

N/A.

7. Are there any other policy considerations and/or proposals for improvement to your Group’s current law falling within the scope of this Study Question?

No.

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

8. Does your Group believe that there should be harmonisation in relation to the protection of trade secrets during civil proceedings? Please answer YES or NO.

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

Yes, in particular to increase the legal security of all parties concerned, starting with trade secrets holders (both when the secret is the main subject-matter of the proceedings and when it is invoked more incidentally), as well as to avoid forum shopping problems.

9. Does your Group’s current law provide for the protection of trade secrets for or during any of the following stages of civil proceedings? Please tick all that apply. Please explain.

- complaint/pleading/writ of summons initiating a proceeding
- any other pleadings or submissions filed in the context of a proceeding
- production of documents during discovery phase or court-ordered production of evidence
- evidence seizure
- prepared-for-litigation technical description/declaration or any other exhibits
- oral hearing
- hearing transcripts

- witness statements made out of court and on the record for use in litigation (e.g., deposition)
- court decision
- potential for future misuse of trade secret information gained from claimant or defendant during the proceeding
- other, namely

Disclaimer: As formulated, the question refers to the applicable “current law”. Since the question is in Section III (“Proposals for on possible harmonisation”), we assume that this is a mistake and that the question is in fact about whether the Group believes that there should be harmonisation in relation to the protection of trade secrets for or during any of the stages of civil proceedings identified above.

The Group has the opinion that the protection of trade secrets should be available for all written documents forming part of or produced in the context of civil proceedings, as well as for all oral statements, testimonies and pleadings made in the context of such proceedings, but that it should only effectively apply if (and thus after) a decision has been taken by the judge on the confidentiality of (all or part) of the acts and stages of the civil proceedings. Regarding documents initiating the proceedings (at a stage where no decision could yet be taken to protect trade secrets), special measures should be taken by the applicant themselves to safeguard the confidentiality of their trade secrets, while it should be possible for the judge to impose *a posteriori* the confidentiality of (all or part) of the information contained in such documents (on this matter, see the Group’s answer to Question 11).

- 10. During a proceeding, what limits and/or restrictions should there be on Disclosure actions and/or procedures (such as a saisie contrefaçon or other seizure) to limit the unnecessary production of trade secrets, thereby reducing the risk of unnecessary disclosure to those involved in the proceeding and leakage into the public domain? For example:**
- a. Should a court bailiff conducting seizure of evidence identify and separate and keep separate documents relating to trade secrets solely by virtue of the document being labelled a trade secret and/or confidential?**

No.

For the sake of good order, we first want to point out that in Belgium, if a bailiff is indeed present during the descriptive-seizure, then their role is rather that of an observer, whereas the descriptive-seizure is actually carried out by an independent expert appointed by the court.

The confidentiality of information that may be discovered during a descriptive-seizure cannot prevent a descriptive-seizure from happening. It is up to the expert, after examining the information gathered, to decide on the relevance of each piece of information for the performance of their mission and to decide whether or not to include it in their report. When faced with trade secrets, the expert may decide to keep them in a separate file, which they will not communicate directly to the parties, but which they will only share with the court so that it can decide, within the framework of an adversarial debate between the parties, on the fate of this information and possible protective measures to be taken.

Considering the above, it is the Group’s opinion that the sole fact for a document to be labeled as a trade secret and/or confidential should not justify that the expert should put it aside right away; the expert should still conduct their own assessment regarding the secret nature of the document and its relevance for their mission. The party targeted by the seizure can of course also draw the expert’s attention to the existence of confidential information to try to have it removed from their report, or at least kept in a separate file. However, the final say in the matter should remain with the expert, unless a party decides to bring the matter before the judge.

It is the expert's responsibility to strike the balance between the interests of the applicant and those of the party subject to the seizure and to decide what will be included in their report (that is in principle shared with all the parties, including the applicant). If the expert decides to communicate some information only to the court, then the court should decide what can be shared with the applicant.

- b. Should a witness testifying about a trade secret do so only in a private/closed hearing with the judge, with the judge and outside counsels, or similar limited-audience proceeding?**

Yes. The court should be able, even *ex officio*, to limit attendance to the hearing to a well-defined group of people whose presence is necessary to guarantee the respect of the parties' right to an effective remedy and access to an impartial court. This group should include, at least, one natural person for each party and each party's lawyer or other representatives (e.g. a patent attorney) of those parties to the judicial proceedings. The Group's opinion is that this would provide an effective framework to prevent disclosure of trade secrets while safeguarding the parties' due process rights.

- c. Should a document (whether or not marked as, e.g., "confidential" and/or "trade secret") containing a trade secret that is accidentally disclosed during a proceeding be retractable and not considered a public disclosure?**

No. In the Group's opinion, if a trade secret has been accidentally disclosed during a proceeding and the judge did not impose *a posteriori* the confidentiality of the document containing this trade secret, it cannot be retracted and will remain on file. Unless otherwise expressly ordered by the judge, the parties' submissions and the other procedural documents are not confidential and their content may be disclosed if the disclosure does not amount to a wrongful act. Therefore, if no injunction has been issued to prohibit the use and further disclosure of the trade secrets by those persons to whom they have already been disclosed, it should be considered as a public disclosure. In the Group's opinion, it should be the responsibility of the trade secret holder to request in due time that the judge orders confidentiality measures, precisely to avoid accidental disclosures during civil proceedings.

- d. Should a broad injunction prohibiting use of a disclosed trade secret accompany a Disclosure action and/or**

Yes, such an injunction should be possible, but it should not be automatic and/or limitless. It is the Group's opinion that such an injunction should be granted where necessary to protect trade secrets in the specific circumstances of the case. Its scope should therefore be confined to what is necessary for such protection and be clearly reasoned in this respect. Its wording should be as precise as possible, especially if such an injunction is accompanied by a penalty payment in the case of an infringement.

- e. Other, namely ...?**

N/A.

- 11. Should a trade secret be able to "re-gain" its trade secret status after a disclosure action during a civil proceeding? What conditions should there be to allow the recovery, e.g., trade secret was appropriately marked as "confidential," and/or "trade secret"?**

Yes, provided that:

- The trade secret holder targeted by the disclosure action was not part of the civil proceedings at the time the disclosure action was filed. Otherwise, in the absence of confidentiality

measures preemptively requested and obtained by the trade secret holder from the judge, the Group has the opinion that the trade secret holder would have to bear the responsibility (and the potentially harmful consequences) of the disclosure.

- Before the disclosure, the element in question qualified as a “trade secret”, which notably means that it has been subject to reasonable steps, having regard to the circumstances, by the person lawfully in control of it to keep it secret. Marking the trade secret as “confidential” and/or “trade secret” could be an indication that the trade secret holder has taken reasonable steps to protect its secrecy, but the Group has the opinion that this should not be the only decisive element to take into account to determine whether the trade secret holder has taken reasonable steps to keep it secret.
- After the disclosure, the trade secret holder should take reasonable steps to maintain (“re-gain”) the secret character of the trade secrets. In principle, this should imply that the trade secret holder acts promptly to file a counterclaim to obtain an injunction against the person(s) to whom the trade secret has already been disclosed, in order to prohibit them from using or further disclosing it.

A trade secret should not lose such status by the mere fact that it is disclosed during civil proceedings. The secret status should at least be maintained if it was disclosed under a protective order from the court.

Furthermore, if a party was “forced” to disclose a trade secret without being able to request a prior protective order (e.g. following a legal requirement or court order), then the disclosing party should at least be able to request measures to keep its trade secret status.

12. Which, if any, of the following should be required or encouraged in any civil litigation in order to maintain a balance between protecting the allegedly misappropriated trade secret and allowing a defendant to defend against a misappropriation charge? Please tick all that apply. Please explain.

- limit access to the trade secret details to defendant’s outside counsels only;
- limit access to the trade secret details to a limited number and type of defendant’s inhouse representatives (e.g., General Counsel, Managing Director, Chief Technology Officer, etc.) and outside counsel;
- limit access to the trade secret details to hired third party expert(s) to view and provide directed findings regarding the trade secret details (e.g., court-ordered expert or defendant’s hired expert and plaintiff’s hired expert meet separate from the parties to compare the plaintiff’s trade secret details with the defendant’s information); and/or,
- allow the defendant to challenge the confidentiality or trade secret status of a document / material during the proceeding
- other, namely....?

To limit the risk of illegitimate disclosure of the trade secrets shared during civil proceedings, it is obviously appropriate to limit the number of persons who may become aware of them. However, this limitation should not be such as to prevent a party from being able to usefully examine the trade secrets in question in order to assess their impact on the opposing party’s claims and/or on their own arguments, which would in fact undermine the effective exercise of their rights of defense. In the Group’s opinion, the composition of the confidentiality club should always be determined on a case-by-case basis. We can therefore not choose *a priori* one of the options proposed above. In certain circumstances, notably depending on the technical nature of the main proceedings and/or of the trade secrets at issue, limiting the confidentiality club to the parties’ lawyers only does not seem appropriate. Limiting the confidentiality club to certain in-house representatives and the parties’ lawyers generally seems more appropriate, although it is not appropriate to determine in advance, without considering the specifics of the case, which in-house representatives should be allowed to be designated.

Finally, the Group has the opinion that not only the defendant, but each party against which a trade secret is invoked during the proceedings, should always have the possibility to challenge the trade secret status of the documents/material invoked against them, certainly when the main subject-matter of the proceedings is precisely the misappropriation of these documents/materials.

- 13. Should there be a requirement in trade secret misappropriation cases such that in response to a first identification of a trade secret, there is an immediate redaction of all specific trade secret details from the hearing transcripts, court decisions, or other written document before publication?**

The notion of “first identification” is not clear to us. Is it a first judgment identifying a document as constituting/containing a trade secret?

In any event, the Group does not believe it is appropriate for all trade secret details to be immediately (i.e. automatically?) deleted from the hearing transcripts, the court’s decisions and/or other procedural acts that may be published. The Group has the opinion that the deletion of such details should be subject to a specific and reasoned decision to that effect.

In addition, the Group has the opinion that the powers of the judge to issue a confidential version of their decision should be extended to all documents that are part of the proceedings, including hearing sheets (“feuilles d’audience”). The judge should have the power to impose that (all or part) of such documents are made confidential (in whole or in part) to preserve the confidential nature of the trade secret(s) identified in the proceedings.

- 14. How can one, since injunctions naturally are limited in geographical scope, adequately protect trade secrets obtained during the course of a proceeding against misuse in a different jurisdiction?**

A distinction should be made between the situation where a party is using material evidence obtained in Belgium in a different jurisdiction and the situation where a party, aware of the existence of a piece of evidence but confronted with a limitation imposed by the Belgian judge, seeks a new measure in a different jurisdiction to obtain such evidence.

In the first situation, the trade secret holder can request the court to prohibit the other party from using the material evidence in question in a different jurisdiction and sanction the injunction with penalty payments. If the other party does not respect the injunction, then the penalty payments can in principle be claimed before the Belgian judge of seizures and the foreign court would typically have no say in the matter.

In the second situation, the answer will largely depend on the extent that the judge in the other jurisdiction feels bound by any Belgian ruling in that regard. We deem it likely that a non-Belgian court can lawfully explain why it would (dis)agree with a Belgian decision and/or why it would decide to not apply it as a precedent in its own jurisdiction (e.g. different laws apply, other factual elements can be taken into account, etc.).

- 15. Should evidence involving trade secrets be preserved by the court after the proceeding has concluded? Please explain.**

The court should request the parties to collect their paper files of exhibits shortly after the decision is issued.

If the court has the practice of keeping all or part of the documents containing trade secrets after the end of the civil proceedings, then measures should be taken by the court’s clerks to protect confidentiality.

In addition, one party could have an interest that the court keeps a copy of the exhibits as filed for future proceedings (e.g. retraction proceedings). In that case, it is the Group’s opinion that the court

should preserve evidence involving trade secrets after the proceedings have concluded (in electronic format if necessary), but at the requesting party's own risks.

16. Please comment on any additional issues concerning the protection of trade secrets in civil proceedings that you consider relevant to this Study Question.

N/A.

17. Please indicate which industry/cultural sector views provided by in-house counsel are included in your Group's answers to Part III

N/A.