

LEGAL ASPECTS OF ECONOMIC ESPIONAGE

Lecturer **Ovidiu Horia MAICAN**¹

Abstract

Economic espionage is the unlawful targeting and theft of critical economic intelligence, such as trade secrets and intellectual property. The term refers to the clandestine acquisition or outright theft of invaluable proprietary information in a number of areas, including technology, finance, and government policy. Offenders get cheap access to critical information, leading victims to suffer economic losses.

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JEL Classification: K21, K33

1. Introduction

Whilst espionage is no longer a new occurrence, it has received remarkably little research attention in Europe. Espionage crimes are of a combined character and embody two separate phenomena: ‘classic’ or financial espionage by way of intelligence services of an overseas state, and incidents of aggressive company or industrial espionage, industrial spying or industrial theft².

Both phenomena are characterised by actually equal *modi operandi*, the aim of unlawful obtainment of knowhow and other information as nicely as the mostly same targets or victims in shape of the proprietors of know-how and/or intellectual property such as enterprise and alternate secrets.

The latter may additionally stem both from the economy or science. In substance, the distinction between monetary and industrial espionage is solely the exceptional motivation – in accomplishing either a political or a financial advantage. Both types of espionage are located at the intersection of conventional (physical) crime and cybercrime³.

2. Theoretical aspects

The fundamental grasp of these crimes, their legal framework as properly as the organisational diagram of administrative competences and jurisdictions is nonetheless generally shaped through the Cold War period. Legal modernisations have now not stored tempo with the changing political conditions.

Former political frontlines were dissolved and in some instances replaced by using economic cooperation. At the identical time, new friend-foe patterns evolved along the fluid lines of contemporaneous political interests.

While attacks on monetary know-how originating from some regions are still persecuted as state crime, delinquents originating from pleasant international locations are termed to be ‘friendly spies’ and only hesitatingly prosecuted – if at all.⁴

In light of the ongoing trends in the European political arena, an un-reflected classification of these phenomena as state crime (in Germany punishable beneath § ninety-nine of the German Criminal Code) is increasingly more much less compelling⁵.

A survey of 325 U.S. - based corporations by the American Society for Industrial Security (ASIS) published that between 1992 and 1995, breaches of company protection climbed by means of 323% and those have been simply the said breaches-corporate victims are regularly silent about successful raids in opposition to their intellectual property. Considering undetected and unreported

¹ Ovidiu Horia Maican – Department of Law, Bucharest University of Economic Studies, Romania, ovidium716@gmail.com.

² Carl S., *An unacknowledged crisis – economic and industrial espionage in Europe*, Essays in Honour of Nestor Courakis Ant. N. Sakkoulas Publications L.P. 2017, p. 2.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

thefts, ASIS estimates that U.S. enterprise loses two billion bucks per month to intellectual property pirates. This figure is alarming considering the fact that proprietary knowledge makes up greater than half of a regular manufacturer's complete market value.⁶

Congress' enactment of the Economic Espionage Act of 1996 (EEA) - the first countrywide regulation designed to crack down on economic espionage by foreign and domestic companies-sent a clear sign that exchange secret theft is a serious hassle necessary of national attention. With the EEA, Congress radically departed from the way of life of state-prescribed alternate secret laws,' and involved federal assets in the battle against exchange secret theft. During the years of debate, testimony and investigation that led to the EEA, FBI Director Freeh and other professionals pointed out that kingdom alternate secret laws, which have no crook liability connected to them, lacked the reach or power to deal with foreign-sponsored monetary espionage.⁷

Furthermore, experts said that civil suits are hard to win and seldom recoup the harm done, because the alternate secret thief's financial resources are often inadequate, in particular if the thief has been indemnified via his principal. While the EEA is a necessary reform, one commentator remarks that it is unclear whether "federal authorities will be inclined to prosecute as criminal violations those things that had been historically resolved as private business disputes." Criminal statutes enacted on the kingdom level arguably would do greater to deter dumpster diving than the EEA, which will possibly be applied only in sensational instances involving exchange secrets and techniques well worth massive quantities of money⁸.

Economic espionage is a serious problem. In ordinary terms, it is the act of targeting or acquiring exchange secrets and techniques from home organizations or authorities entities to knowingly benefit a foreign state. It differs from industrial espionage in that the things to do are carried out or sponsored with the aid of government, as adverse to private, entities. States have shifted their focus from constructing army protection in the direction of attaining economic supremacy. Many states now consider economic espionage a count of countrywide security. It earnings contributors and saves the time and monetary assets required to boost technologies independently⁹.

The consequences of the exercise are felt globally, but it most acutely affects U.S. businesses, as they have the difference of being targeted extra than these of different states. The fact that the United States spends more money on lookup and improvement than any other state, coupled with the open nature of its economy, makes it an attractive goal for states in search of low-cost technological upgrades. Further, the proliferation of electronically-stored records has made the stealing of electronic data as effortless as the push of a button. Economic espionage diminishes a business's goodwill and popularity while lessening its competitive advantage, core technologies, and profitability. States' tries to outspend one another to gather the other's secrets and techniques are subsequently wasteful. The trouble has reached epic proportions and will now not go away on its own¹⁰.

The outcomes of monetary espionage are nearly completely negative. Economic espionage erodes the price of a target state's belongings. It may additionally disrupt trade between target states and conceivable buyers. It discourages innovation. It might also damage a business's well-merited competitive gain and stifle financial momentum. It might also undermine cutting-edge enterprise plans, smash income projections and "spell the difference between extinction and profitability."

Research costs may also have to be recouped by way of charging higher fees to customers. Businesses already undercut by means of lower foreign places production charges may no longer be practicable after factoring in the value of these thefts. On a larger scale, financial espionage may also have the long-term impact of weakening existing army alliances and change coalitions. Economic espionage has been in contrast to fighting considering the fact that both task the safety and balance

⁶ Wingo, H., *Dumpster Diving and the Ethical Blindspot of Trade Secret Law*, „Yale Policy and Law Review”, Volume 16, Issue 1, 1997, p. 199.

⁷ *Idem*, p. 200.

⁸ *Idem*, p. 201.

⁹ Danielson, M., *Economic Espionage: A Framework for a Workable Solution*, „Minnesota Journal of Law, Science and Technology”, Volume 10, Issue 2, 2009, p. 503.

¹⁰ *Idem*, p. 504.

of sovereign nations¹¹.

All states are encouraged to undercover agent on their “competition.” It would be irresponsible for a kingdom to be unconcerned about its neighbor’s activities. However, because the end of the Cold War, standard spying has grown to be less essential as states focus their efforts on building economic, not military, security.

As monetary protection grows extra vital to national security, the hobby in economic espionage turns into greater significant. This vogue is anticipated to continue.

Economic espionage is most prevalent in economically aggressive countries. Thus, it is generally superior Western states that bear the burden of financial espionage. As before noted, the United States is a top target. The latest ASIS survey suggests that the top three foreign countries in search of to get admission to U.S. records in 2005 were China, Russia, and India.¹²

This stability is shifting. States earlier bored to death in gathering economic statistics are fixing their sights on the United States. Entities from a record variety of countries – 108 - sought to retrieve sensitive or protected records between October 1, 2004 and September 30, 2005. Seventy percent of data compromises pronounced through those companies responding to the most latest ASIS survey have been supposed to benefit foreign individuals, firms, or governments. This determine only consists of these incidents in which the recipient could be identified. In many instances, respondents were unable (or unwilling) to identify whether or not information was meant to advantage U.S. or foreign entities. Often, a conclusive link between an overseas government and the wrongdoer can't be established¹³.

The Federal Bureau of Investigation (“FBI”) estimated in 2005 there were over 3000 such corporations placed in the United States designed to serve Chinese authorities interests¹⁴.

Front businesses are difficult to recognize. The variety of valid commercial activities in which they participate makes it difficult to distinguish between authentic and illegitimate transactions.

The United States has been reluctant to publicly become aware of governments carrying out financial espionage campaigns, specifically when the governments concerned are regarded allies.

The FBI, for instance, does not officially identify those states enticing in economic espionage in opposition to the United States.

The home legal guidelines of many states, along with the United States, do not restrict the intrusion into foreign territories for the motive of amassing economic Genius U.S. regulation can also in reality affirmatively support such activity. Therefore, any inclination to adopt a “holier than thou” mind-set closer to another state’s economic espionage practices may additionally be perceived as hypocritical.

The “dual-track” concept helps explain why the United States has been reluctant to publicly accuse some of its ordinary allies of information theft¹⁵.

Economic espionage is perceived by way of offending states as a lesser offense than political espionage. Many states reflect on consideration on the practice fundamental to their continued stability and success - to these states, financial spying is a matter of national security.

Recognizing the damage that financial espionage used to be inflicting U.S. businesses, Congress exceeded the Economic Espionage Act, which grew to become effective October 11, 1996. Prior to its introduction there was no federal statute that without delay dealt with monetary espionage. The Act criminalizes the copying or controlling of exchange secrets with the intent to (1) benefit an overseas government, instrumentality, or agent, with the intent to convert a trade secret for the economic benefit of a man or woman different than the rightful owner. The first section, §1831, prohibits financial espionage, whilst the second, §1832, prohibits industrial espionage. A “trade secret” is commonly described as business statistics which the proprietor has taken “reasonable measures” to hold secret and is now not “generally known” or “readily ascertainable” to the

¹¹ *Idem*, p. 507.

¹² *Idem*, p. 508.

¹³ *Idem*, p. 510.

¹⁴ *Idem*, p. 504.

¹⁵ *Idem*, p. 512.

customary public via suitable means. Individuals determined in violation of § 1831 are difficulty to most penalties of fifteen years in prison and fines up to \$500,000.¹⁰⁷ Any enterprise that violates § 1831 is difficulty to a most quality of \$10,000,000¹⁶.

Further, the Act prescribes mandatory forfeiture of the fruits of the offense and any property used to facilitate the offense to the U.S. Government. The Act applies to habits happening outside the United States, but only in limited circumstances. The offender has to be a citizen of the United States or an organization prepared underneath U.S. laws, or an act in furtherance of the offense should be dedicated in the United States.¹⁷

3. International aspects

TRIPS establishes comprehensive minimum requirements for the protection of IP. It is administered via the World Trade Organization (“WTO”) and was adopted for the duration of the Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”) in 1994¹⁸.

Article 39 provides perpetual alternate secret protection, supplied the secret is now not “generally recognised or with ease accessible” to the common public, the secret has “commercial value due to the fact it is a secret,” and the character controlling the secret has taken reasonable steps to stop its disclosure. Article 39(1) requires signatories to shield personal data submitted to governments or governmental agencies. This prevents foreign states from inspecting government files in the hope of discovering beneficial information¹⁹.

TRIPS does now not particularly tackle financial espionage. The truth that proprietary statistics theft is not among its enumerated things to do “contrary to sincere commercial practices” may additionally suggest change secret safety is an ancillary concern in TRIPS’ overall IP safety scheme. Further, Article 8(1) of the Agreement provides a broad exception that allows governments to adopt opposite countrywide legal guidelines “to promote the public interest in sectors of crucial significance to their socio-economic and technological development.” This approves states to keep away from prohibitions in opposition to monetary espionage that are now not forbidden by using the agreement in particular terms²⁰.

The North American Free Trade Agreement (“NAFTA”) operates between the United States, Canada, and Mexico and entered into effect on January 1, 1994. The treaty is the first international settlement to supply specific safety for exchange secrets. The IP protections afforded under NAFTA usually mirror those in TRIPS, besides that NAFTA defines “commercial value” in a manner defending statistics with future or potential commercial value in addition to statistics with present value. two Under NAFTA, a misappropriation of proprietary records is now not actionable until the obtaining celebration knew, or was once grossly negligent in failing to know, its actions have been illegal. This is a higher general than is required beneath U.S. tort law, which solely requires one to show an infringer’s true or optimistic knowledge²¹.

There are two U.N. resolutions that may indirectly address monetary espionage. Resolution 1236, “Peaceful and neighborly relations amongst States”, calls upon states to enhance pleasant and cooperative members of the family and jointly appreciate one another’s sovereignty. Resolution 2131, “Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,” states “[n]o State has the right to intervene, directly or indirectly, for any purpose whatever, in the inside or external affairs of any other State.” Further, it condemns the “interference ... towards the character of the State or towards its political, monetary and cultural elements.”²²

On the surface, it would show up that each of these resolutions should be construed to prohibit

¹⁶ *Idem*, p. 516.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Idem*, p. 519.

²⁰ *Idem*, p. 520.

²¹ *Ibid.*

²² *Idem*, p. 521.

economic espionage. However, resolutions of this form are persuasive - not binding - resources that tend to be overlooked via states. They are now not a manageable preferred against which suitable or unacceptable talent practices may additionally be measured. Finally, a variety of states experience that Resolution 2131 conveys a political, instead than legal, view. Consequently, customary political pressure may additionally be the only recourse in phrases of enforcement behavior monetary espionage.

The OECD Convention on Combating Bribery of Foreign Public Officials (the “OECD Convention”), superb in view that 1999, has served as a minor setback for these looking for to have interaction in financial espionage. First, many cases of monetary espionage do no longer involve bribery²³.

Second, the OECD Convention solely prohibits the bribery of government officers - in many instances, bribes can also be paid to humans with no government affiliation. Finally, the OECD Convention has been ratified through only thirty-seven countries. In many states there stay no legal guidelines prohibiting the bribery of overseas authorities’ officials.

4. National legislations

The phenomena of ‘economic espionage’ and ‘industrial spying’ are not explicitly defined in Belgian law. In a wide sense, it consists of covert movements aimed at gathering records to dispose of a competitor’s market advantage. When this is organized, sponsored or orchestrated by means of an overseas state, this qualifies as economic espionage²⁴.

These phenomena are now not new and there are many varieties. For our lookup we will think about financial espionage and industrial spying as a synonym for ‘trade secret theft’. With ‘theft’ we do no longer solely refer to the particular ‘theft’ offence however to each and every act which can also qualify as an offence beneath Belgian crook law and which covers the illegal obtainment, disclosure and use of exchange secrets. In general, it can show up in two ways, an ‘insider’ who misappropriates a company’s change secret for his/her personal advantage or to harm the organisation and an ‘outsider’ (usually a competitor or an overseas nation) misappropriates a company’s trade secrets and techniques to strengthen his very own (economic) interests. As we will see in addition on, the offences which cover these acts can be situated in the areas of kingdom crime, monetary crime and cybercrime.

The included criminal pastimes are country wide security, the freedom of exchange and honest competition, property (or extra general: assets) and the confidentiality, integrity and availability of IT structures and data²⁵.

As to non-criminal protection, Belgium law does no longer reflect on consideration on exchange secrets as mental property and, therefore, does now not supply unique (proprietary) safety to the secret information itself. This then again does now not imply that one can target or disclose trade secrets and techniques except any legal consequences. Protection is granted in a vary of exceptional prison areas. These regimes shield the secret persona of the data and no longer the facts as such. A first type of safety regime is the safety in opposition to illicit means to acquire change secrets (the *modi operandi*)²⁶.

Chapter II of Title I of the Belgian Criminal Code criminalizes a number of acts of treason which endanger the protection of the country vis-à-vis other states (the exterior state security).

One of the acts criminalized is the intentional verbal exchange to the enemy or to any man or woman who acts in the pastime of the enemy of documents, plans, writings or talent which have to be stored secret from the enemy to safeguard the defense of the territory or the exterior safety of the

²³ *Idem*, p. 522.

²⁴ De Schepper, K., Vandebroek, E., Verbruggen, F., *Countering economic espionage and industrial spying. A belgian criminal law perspective*, Working Paper 172, Leuven Centre for Global Governance Studies, 2016, p. 6.

²⁵ *Ibid.*

²⁶ *Ibid.*

state²⁷.

Information which has to be stored secret from the enemy in the hobby of the territorial defense does now not lose its secrecy by the reality that it has previously been communicated to the enemy in any other way. It suffices that the new launch of records confirms and reinforces the credibility of the facts earlier obtained.

We come throughout similar crimes in articles 118 and 119 BCC, which criminalize the intentional communication of secret documents, plans, writings or Genius that have to be kept secret to shield the defense of the territory or the external security of the state, to a foreign strength or any character who acts in the hobby of an overseas power (article 118 BCC) or to any unauthorized person (article 119 BCC)²⁸.

Article 119 also criminalizes whoever discloses state secrets or makes them public besides authorization of the capable authority. The person who knowingly receives the secrets and techniques except authorization is criminally liable as nicely (article 120 BCC). Article 120 BCC similarly criminalizes the character who possesses or transfers country secrets and techniques in violation of the applicable regulations, as well as the person, who via virtue of his or her reputation or profession has understanding of the secrets entrusted to him/her and through his or her negligence enabled the destruction, misappropriation or copying of the secrets²⁹.

Articles 116, 117 and 118 BCC incorporate a very particular penalty - detention (hechtenis/détention) - reserved for political crimes (cf. *infra*). However, when the act is committed with the intent to seek profit, the detention is changed into imprisonment. In this case it no longer constitutes a political crime (article 123ter al. 2 BCC). The intent to searching for income requires that the offence has been committed to reap any kind of advantage. For example, a journalist who photographs navy installations besides authorization does now not commit a political offence as he acts in his professional ability and thus seeks profit.

According to article 120octies BCC, offenses under article 118 and further are punishable with the same penalties when dedicated in opposition to a state with which Belgium is united through a regional agreement in view of a frequent defense. This applies, for example, to offenses committed towards NATO-members³⁰.

If the offenses of art. 118, 119 and one hundred twenty BCC had been dedicated during wartime, this constitutes a worrying circumstance (article one hundred twenty BCC).

As already mentioned, article 309 BCC protects a very unique type of exchange secrets, the manufacturing secret or technical know-how. This is lots narrower than an exchange secret in general, which also encompasses commercial know-how. It, therefore, does now not supply for a complete criminal regulation safety of exchange secrets. Technical expertise must make a contribution to the manufacturing processes. It concerns the techniques, abilities and expertise that are used to manufacture a positive product.

Article 309 BCC solely protects manufacturing processes, for instance the use of laser strategies for clinical merchandise such as a pacemaker in the 1950's or 3D-printing nowadays. However, some authors argue that the thought of a manufacturing secret is broader and also encompasses records associated to the manufacturing process, such as lists of suppliers, records about the great of the product, etc., as this statistic is also used to manufacture a product³¹.

Nevertheless, the (scarce) case regulation holds on to the strict interpretation. The article only refers to the secrets of a factory because it dates lower back to 1867, the era of the industrial revolution. Usually, a manufacturing unit is recognized for its mechanical or chemical production processes. We marvel whether or not in today's digitized society, digital tactics would also be blanketed via article 309 BCC. An interpretation of the article which takes this evolution into account

²⁷ *Idem*, p. 9.

²⁸ *Idem*, p.10.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Idem*, p. 11

be possible³².

The scope of the crook offence is additionally confined in different ways. The article only envisages employees or former employees of the factory. "Is working or has worked" does now not only refer to people with a formal employment contract however also to directors, enterprise managers, (sub)contractors or brief workers. Persons who carry out occasional activities at the site, such as preservation of the building, are also envisaged.

Article 309 BCC does now not envisage a third character (for instance a competitor) who passively receives the data and consequently uses it. This is one of the predominant weaknesses of the article: as soon as the secret is unlawfully disclosed, the article no longer protects the information. A man or woman can however be prosecuted as a confederate to the illegal disclosure when he has committed one of the confederate acts of article sixty-six BCC. For instance, when he has instigated the disclosure by using supplying money. This may want to also qualify as the offence of active bribery³³.

Secondly, the offence solely criminalizes the conversation of the secret to others. 'Others' is an open class and can refer to competitors however also journalists etc. It is each and every man or woman who ought no longer to know the secret. A (former) worker can fantastic the data for his own non-public use, for occasion to start his own business. He or she cannot communicate the data to the new personnel or coworkers. The article will regularly provide a greater level of safety than contractual non-compete provisions, which only supply safety for a limited duration and space.

Disclosure out of mere lack of knowledge or negligence does not suffice. Malicious intent skill that the offender must have acknowledged that the facts used to be confidential.

If the proprietor of the secret has taken precise precautions to preserve the records secret, it will be less complicated to establish this knowledge³⁴.

The culprit has to have acted maliciously (special intent). This means that the (former) employee must have acted with the intent to harm or to reap for himself or another an unlawful advantage, i.e. an advantage which he would not have had if he had not committed the offence. Disclosure out of mere lack of knowledge or negligence does not suffice. Malicious intent potential that the offender need to have recognised that the records used to be confidential. If the proprietor of the secret has taken specific precautions to keep the statistics secret, it will be simpler to establish this knowledge.

The disclosure of manufacturing secrets and techniques with a particular national protection interest constitutes a separate offence. In some cases, a manufacturing secret will not only be of hobby to the manufactory however will additionally be a depend of countrywide security. For instance, facts from the Belgian weapon enterprise may also supply useful statistics about Belgium's navy capacities. The disclosure of these kind of secrets in war with national security pastimes is criminalized with the aid of article 1 (and 13) of the Law of January 10, 1955.³⁵

This offence is now not limited to personnel or former personnel in the way that article 309 BCC is (supra). It additionally encompasses outsiders who are acquainted with the information, such as politicians, journalists, military staff, etc. Another vital distinction with article 309 BCC is that the offence does not require a distinctive intent. It suffices that the offender acted willingly and knowingly (direct intent) or recklessly (indirect intent). The article even criminalizes whoever discloses these secrets out of negligence. In both cases the public prosecutor must show that the wrongdoer has recognized that the disclosure used to be opposite to country wide safety interests. The capable ministers can make a joint declaration that the disclosure of positive records will affect country wide protection hobbies and can explicitly forbid such disclosure. This requires a positive policy on behalf of the government, which has to figure out which new technologies (nuclear, chemical, IT, etc.) are of unique activity to country wide security. This is now not convenient for a small, politically vulnerable country in a world full of effective multinationals with cross-border lookup and

³² *Ibid.*

³³ *Ibid.*

³⁴ *Idem*, p. 12

³⁵ *Ibid.*

development activities³⁶.

Conduct which aims change secrets and techniques will frequently entail different offences, depending on the instances of the case. They go from tangible to intangible items because of the digitization of society has resulted in new vulnerabilities. Provisions associated to cybercrime will, therefore, play an important role in addressing alternate secret theft. We will make a distinction between the regular offences to address this phenomenon and cybercrime associated offences ('cyberespionage')³⁷.

First of all, offence of theft remains an important provision in the framework of the safety of trade secrets. The majority of Belgian legal doctrine holds on to the greater standard (yet contested) opinion that information, such as trade secrets, can't be stolen. Because a trade secret is an intangible good, the exchange secret 'owner' cannot be deprived of it. It stays in his possession. The alternate secret can nevertheless be included in a tangible good or bodily 'carrier', such as documents, plans, a portable device, etc. This tangible asset can be the object of theft (art. 461 BCC or art. 464 BCC if the culprit is an employee). This capability that the theft of a treasured asset is virtually reduced to the theft of a piece of paper. This is tested through case regulation which mentioned that the worker who misappropriates floppy disks with laptop software from his employer, commits the offence³⁸.

5. Conclusions

All the states must adopt efficient prison provisions in the subject of industrial (economic) espionage.

The reason is that economic espionage is a structural element of unfair competition.

The states see a direct relation between their monetary protection and their countrywide security.

States frequently regard countrywide regulation as the main felony framework for combatting monetary espionage. The utility of national law is undermined by means of the reality that states discover it difficult to exercising their jurisdiction over authorities' retailers as soon as they have lower back to their home state

States did no longer take into consideration too much the role that international regulation can play in confronting financial espionage, such as the agreements comprising worldwide alternate regulation and which are designed to guard industrial and mental property rights.

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4. Wingo, H., *Dumpster Diving and the Ethical Blindspot of Trade Secret Law*, Yale Policy and Law Review, Volume 16, Issue 1, 1997.

³⁶ *Ibid.*

³⁷ *Idem*, p. 16.

³⁸ *Ibid.*