

## Q283

### Protection of trade secrets during civil proceedings

National group	The Netherlands
Contributors	Tobias Cohen Jehoram, Jos Klaus, Alexander de Leeuw, Richard Trouborst, Maurits Westerik, Bram Woltering
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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.

In principle, civil proceedings in the Netherlands are in public. The Dutch Code of Civil Procedure ("DCCP") provides for exceptions on the aforementioned principle. A distinction should be made between general provisions and provisions that may apply in trade secret litigation.

General provisions allows the court to limit access to information (art. 22a DCCP), order closed hearings (art. 27 DCCP), prohibit communications to third parties about confidential information (art. 28 DCCP), and to render a decision without sharing confidential information publicly (art. 29 DCCP).

Article 1019ib DCCP was added when the EU Directive on the Protection of Trade Secrets (2016/943) was implemented. This provision provides protective measures that can be applied in trade secret litigation: i.e. cases where trade secrets are argued to have been unlawfully acquired, used or disclosed. Article 1019ib DCCP provides measures such as restricting access to any document containing trade secrets, restricting access to hearings, and making available a non-confidential version of a judicial decision, in which the passages containing trade secrets have been removed or redacted. A newly introduced aspect is that the confidentiality pool must contain at least one natural person of each party (right to a fair trial).

Information is classified as a trade secret when the following requirements are met: (1) information is secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, (2) the information has commercial value because it is secret and (3) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

- complaint/pleading/writ of summons initiating a proceeding

Writ of summons initiating a proceeding are not publicly available. Only the judge and defendant receive a copy. In it, the plaintiff may request the court to take measures to preserve the confidentiality of trade secrets.

- any other pleadings or submissions filed in the context of a proceeding

See above.

- production of documents during discovery phase or court-ordered production of evidence

Dutch law does not know the legal concept of discovery. The court can request a party to provide certain information (art. 22 DCCP) and it is possible to request the other party to submit specific documents (art. 843a DCCP). The court can take measures to safeguard the confidentiality of the information or documents that are disclosed in this manner.

- evidence seizure

The party ordering the seizure does not automatically have access to the seized evidence. An independent third party, such as a bailiff or notary, takes custody of the seized evidence. In order to gain access to this evidence, the seizing party must initiate access proceedings in which the court will determine to what extent access is granted and in which the court can take the appropriate confidentiality measures.

- prepared-for-litigation technical description/declaration or any other exhibits

In general, parties themselves determine which documents they choose to submit in proceedings, unless ordered thereto by the court. Parties can request the court to take measures to safeguard confidentiality. Where materials are prepared for litigation in correspondence with outside counsel, legal privilege is likely to apply. So, in principle, the other party has no access to (confidential) prepared-for-litigation technical descriptions/declarations.

- oral hearing

Under certain circumstances, such as the right to privacy (which covers also legal entities' trade secrets), a party can file a request at the court to order closed hearings that are not accessible to third parties or only to certain persons (Article 27 DCCP).

Article 28 DCCP prohibits parties to communicate to third parties anything that has been dealt with during closed hearings or, any other data disclosed in proceedings when the court has ordered so. This prohibition is primarily aimed at the parties. The court can expressly address the prohibition to communicate about the proceedings also to third parties who are present at the closed hearing but are not parties to the proceedings, such as witnesses or experts. The party requesting confidentiality can request that the confidentiality be reinforced by a penalty.

In case of trade secret litigation, article 1019ib DCCP allows the court to restrict access to the hearing to a limited number of persons. At least one natural person from each party and the respective lawyers or other representatives of those parties must have access to the hearing. Article

1019ib DCCP article prohibits parties to disclose the trade secrets discussed and also prohibits the use of trade secrets discussed.

hearing transcripts

In case hearing transcripts are made, access is restricted to a limited number of people. The same applies for audio(visual) recordings of hearings. Transcripts – if made – are not verbatim, and will typically not contain identified trade secrets.

witness statements made out of court and on the record for use in litigation (e.g., deposition)

Dutch law does not provide for witness statements made out of court. Such witness statements are personal declarations made at the initiative of the parties, who are responsible for keeping such documents secret. Once submitted, the rules described above apply.

court decision

According to Article 29 DCCP judgements are rendered in public. In case one of the parties would have a serious interest, a decision can be rendered on an anonymous basis or with certain (confidential) parts removed/redacted. Third parties can request a copy or extract of the judgement. In case of closed hearings, the registry provides an copy or extract in which passages containing trade secrets have been removed or redacted. Documents belonging to the court file, such as pleadings, that are not attached to the judgements shall not be provided to third parties. So, only non-confidential parts of any judgement/decision are publicly available.

potential for future misuse of trade secret information gained from claimant or defendant during the proceedings

The court may prohibit parties to use or disclose any trade secret identified as confidential. This obligation shall remain in force after the proceedings have ended (art. 28 and 1019ib DCCP). The confidentiality can be reinforced by a penalty.

other, namely .....

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.

YES. In trade secret litigation, the court shall ensure a fair trial. With the implementation of the Trade Secrets Directive into Dutch law, in case the access to documents or hearings is restricted to a limited number of persons, at least one natural person from each party and the respective lawyers or other representatives of those parties must be granted access, although cases are known to the members of this working group that initially saw the court order one party to use only outside persons for its part of the 'confidentiality club'. The court should state the reasons to restrict access to the hearing, since hearings are in principle meant to be open to the public. For those parts of the hearing where the trade secrets are not discussed, the hearing should be in public, if possible.

If disclosure of documents to a party would disproportionately harm the protection of trade secrets, the court may limit access to documents containing trade secrets to a party's representative (in most cases a lawyer) only (art. 22a DCCP). It is assumed in the literature that this option should be applied with restraint. In practice, the court may allow the parties to mutually agree on alternative measures to safeguard confidentiality.<sup>1</sup>

- 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.

NO. In general no 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 during civil proceedings. As also considered in the Trade Secret Directive (under 26) once a trade secret is publicly disclosed it is impossible for the holder of the trade secret to revert to the situation prior to the loss of the trade secret.

Rather it appears a factual assessment is required as to what extent a trade secret has become (publicly) available. i.e. whether it has been exposed to an extent that the trade secret must be considered to have been 'lost'. If this is the case, Dutch law provides no remedy. If the trade secret has become (publicly) available due to someone other than the owner of the trade secret, it would potentially be possible to claim compensation in the form of damages.

This Group believes that the mere exposure of a trade secret during a disclosure action or during civil proceeding should not necessarily lead to the loss of the status as a trade secret. Dutch law provides procedural means that allow the information to be kept inside the proceedings and thus, to an extent, confidential.

In the Netherlands no general disclosure/discovery exists. In relation to the Disclosure actions possible under Dutch law such as evidence gathering/preservation efforts, the requestor of the seizure will only be able to get access to the information following inter partes proceedings establishing that said party is entitled to the information at issue. Hence, a seizure should not lead to any potential trade secrets being disclosed to the requestor, let alone lead to a public disclosure. Where access is being requested to the seized information in inter partes procedures, options are available to protect (the confidentiality) of trade secrets (see answers Question 1). Also - more in general - during civil proceedings - there are options to protect (the confidentiality) of trade secrets (see answers Question 1).

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<sup>1</sup> Court of The Hague 14 July 2021, ECLI:NL:RBDHA:2021:15304, par. 2.8.

If a trade secret is accidentally disclosed during an evidentiary seizure, Dutch law provides no specific means to re-establish trade secret protection.

## 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, the Dutch group sees room for improvement in the current practices of the courts, in protecting trade secrets during, and after, civil proceedings. Specifics as to the desired rules governing so-called confidentiality clubs, reference is made to the answer to sub question 5.

As a preliminary matter, if parties to a litigation agree on certain rules and requirements with respect to the way in which the trade secrets in suit should be protected in, during and after litigation, such rules and requirements should in principle be accepted by the court, unless it would constitute a violation of the law, would be contrary to public order, would be in violation of the rules of due process or if it would violate third party rights.

The Dutch group would be in favour of Dutch courts adopting best practices, to be incorporated in the procedural guidelines, regarding the receiving, use and returning (or destroying) materials that contain trade secrets, both when it concerns physical documents and electronic documents (together hereafter: "Documents").

These best practices should:

- set specific technical and practical requirements for parties on the submission to the court of Documents that contain (alleged) trade secret information (hereafter: "Trade Secret Documents");
- set specific technical and practical requirements for the court and its judges on how they will keep on record, use and restrict access to the Trade Secret Documents;
- set standards on which (type of) parties can get access to Trade Secret Documents and under which conditions;
- set specific technical and practical requirements for the court on how it will handle, protect and return to the submitting party the Trade Secret Documents;
- set specific technical and practical requirements for the court on how it will dispose of Trade Secret Documents in case the submitting party agrees to destruction (instead of returning) of the Trade Secret Documents;
- set specific rules and limitations on how to deal with the natural persons of a party who gets access to trade secrets as part of a confidentiality club, in order to on the one hand provide sufficient protection of the trade secret and on the other hand allow such persons to continue to do work in this field without too many restrictions;
- set specific technical and practical requirements on how the courts will keep on record any Trade Secret Documents, should such keeping on record be required. In that case also

specific technical and practical restrictions on access to Trade Secret Documents should be incorporated in the procedural guidelines; and

- require certification of third parties that are engaged in any of the above-mentioned activities, at least when it comes to cyber security, translators, interpreters and destruction of Documents.

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.

Best practices as outlined above should help in this regard. More 'phased' approaches in which the court at a case management hearing and/or by means of an external expert can assess which parts are trade secrets and which are not, as well as how to deal with the specific types of trade secret information in the given case, could be useful. Technical and practical measures that are known to have been used by Group members are e.g. allowing only physical copies with copy protection stickers or watermarks, keeping physical sets in personal locked suitcases for each trade secret information receiving member of the confidentiality club, requiring an independent expert to first assess the trade secret as well as possible misappropriation before providing the parties access to the evidence, as well as encrypted copies kept on standalone laptops with biometric protection, to be returned at the end of the case.

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.

NO, regarding (a) – (c) in general. Once publicly disclosed one cannot re-establish or regain a trade secret. Re-establishing or regaining a trade secret seems hard to reconcile with the requirement of a trade secret not being 'generally known' and is therefore deemed undesirable. This regardless of the exact circumstances under which such a public disclosure occurred. The matter depends on the question whether or not the disclosed trade secret has become publicly/generally known.

The group stresses that it should be possible to 'maintain' the status of a trade secret if a trade secret has been disclosed but is not yet (factually) become public (i.e. outside the proceedings). If the disclosure occurred in the context of imposed confidentiality obligations then status of trade secret should be maintained (as is the current practice). As to the described situations under a) – c)

specifically, if at the time of disclosure no confidentiality obligations were imposed it should be possible to 'contain' the disclosure by afterwards imposing confidentiality obligation to whom the described intentional or unintentional disclosure took place, as long as the trade secret has not yet become public.

- 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?

In addition to the aforementioned recommendations, in particular adopting best practices as outlined in question 4, the Group has a recommendation regarding the imposition of a penalty to reinforce confidentiality. In practice, confidentiality is currently regularly reinforced with a penalty, without distinguishing between parties and lawyers. However, a distinction is justified, as the professional secrecy already applies to the lawyer. Besides this, a breach of confidence by the lawyer, can also lead to liability and disciplinary actions. The added value of a penalty is therefore limited, while it does entail risks when it comes to the access to legal aid, when lawyers are unwilling to represent a client due to the risk of excessive penalties. Therefore, the Group has the opinion that the imposition of penalties to reinforce the lawyer's confidentiality should be applied with restraint.

### III. Proposals for harmonization

*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. As a matter of general principle this Group believes that international harmonisation is desirable. This is because we believe that harmonisation is beneficial to commerce in general. Furthermore, trade secrets by their nature are not territorially limited, and a trade secret is only as strong as its weakest link in terms of protection. Considering that civil proceedings are a core aspect to the protection of trade secrets, we believe that it would be beneficial to harmonise the protection of trade secrets during civil proceedings. This will avoid forum shopping and the potential loss of protection due to less stringent rules in a certain country.

- 9) Does your Group believe that there should be 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

The Group deems it crucial for any trade secret litigation that certain information can be marked confidential in the writ of summons and be protected as such. The party who wants to bring a claim should be able to substantiate this with all the available evidence without the risk of losing protection of confidential information because it was included in a writ of summons.

- any other pleadings or submissions filed in the context of a proceeding

The same applies as to the writ of summons.

- production of documents during discovery phase or court-ordered production of evidence

During a discovery phase or court-ordered production of evidence it is generally unclear yet to what extent trade secret misappropriation has taken place. It is therefore important to safeguard the confidentiality of trade secrets during this procedural phase.

- evidence seizure

See above with regard to discovery and court-ordered production of evidence.

- prepared-for-litigation technical description/declaration or any other exhibits

See above.

- oral hearing

It is quite common in the Netherlands for oral hearings to be closed off for the public when trade secrets will be discussed. This makes sense. Once information has been labelled a trade secret and is protected as such during the proceedings, similar protection should apply during an oral hearing.

- hearing transcripts

See above with regard to oral hearing.

- witness statements made out of court and on the record for use in litigation (e.g., deposition)

See above with regard to other submissions filed in the context of a proceeding.

- court decision

Although it is important that court decisions are made publicly available and set out the facts and arguments of the case, the decision should not contain any trade secret information.

potential for future misuse of trade secret information gained from claimant or defendant during the proceeding

other, namely .....

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;

As mentioned above, under Dutch law a seizure of evidence does not automatically provide access to that evidence. The bailiff will seize all information that falls within the scope of the court order and store it in a secure location. The requesting party must then initiate separate proceedings in order to gain access to any of the seized evidence. In those proceedings, the party whose information has been seized is heard and the court will assess to what extent access is warranted. The party whose information has been seized can then object to the disclosure of certain information, for example because it contains a trade secret / is confidential.

This Group sees no particular reason to shift the decision in labelling certain information as confidential and separating that information to the bailiff. This decision can best be made by the court, once both parties have been able to assess the situation and are heard by the court. This is not a decision for a bailiff to make.

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;

If a witness will testify about confidential/trade secret information, this should be done in a private/closed hearing with limited access. Outside counsel should be present at the hearing.

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;

This Group believes that a document containing a trade secret that is accidentally disclosed during proceedings should be retractable and not considered a public disclosure. In principle, an accidental disclosure of a trade secret within litigation will remain within a fairly limited group of persons (the claimant, the defendant and the court). As long as this information has not ended up in a public document, this Group deems it fair to be able to correct the accidental disclosure. A distinction could be made with regard to information that was accidentally disclosed, but that is relevant to the merits of the proceedings. In that case, this Group would suggest to keep the information in the proceedings, but impose confidentiality obligations to the parties with regard to that information.

d) should a broad injunction prohibiting use of a disclosed trade secret accompany a Disclosure action and/or

Although Dutch law has safeguards for disclosure actions – i.e. evidentiary seizures, which require separate access proceedings for the disclosure of documents – this Group believes that it would be desirable to impose a broad injunction prohibiting the use of trade secret information at the start of the seizure action. This can then be lifted in subsequent access proceedings and tailored to the information provided to the claimant. Although strictly speaking there should be no disclosure before the proceedings in which access is requested have been completed, this can provide a further safeguard in the delicate matter of trade secret protection.

e) other, namely ....?

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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”?

No, re-establishing or regaining a trade secret that has been publicly disclosed seems hard to reconcile with the requirement of a trade secret not being ‘generally known’. A disclosure action during civil proceedings does not cause it to lose its trade secret status if it was disclosed under confidentiality obligations. As such means are available to ‘maintain’ the status of a trade secret (also see Question 3 and 6).

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 ....?

- 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 Dutch group agrees that, in response to a first identification of a trade secret, there should be an immediate redaction of all specific trade secret details from court decisions, and from any materials the court grants access to. The same should apply to other written documents before publication or before access is granted to those. As hearing transcripts in the Netherlands are not verbatim, this is less of an issue here, but in the drafting of such transcripts specific trade secret details should be avoided (which is currently the practice in the Dutch courts), or if that is not possible, they should be redacted before sending it to, or granting access to, any party not privy to this specific information.

- 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?

Injunctions for traditional IP rights are naturally limited in scope because their validity is subject to the exclusive jurisdiction of the country in which the right was granted. However, trade secrets are of a different nature, as they come into being by their creation and adequate protection. Hence, this Group sees no restrictions for courts in being able to impose cross-border injunctions in order to protect trade secrets obtained during the course of proceedings. The court can simply prohibit the parties to the litigation from making any statement to any third party with respect to the information concerned, or from using that information. This does not have to be limited to the jurisdiction in which litigation takes place.

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

In Dutch civil proceedings the procedural file is returned by the court to the party that has submitted it, after the proceedings before that court have been completed. This means that Trade Secret Documents are typically not preserved by the court. That being said, the Dutch group refers to the best practices proposed under sub question 4, which it feels should safeguard the interests at stake.

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

Parliamentary history (34 821 nr 3) demonstrates that, in implementing the Trade Secrets Directive EC/2016/943, proportionality was considered to be essential in relation to the enforcement measures available to a trade secrets owner. The legislature considered that this criterion was *inter alia* met since a plaintiff is obliged to present its evidence and/or substantiation of its claims in accordance with the principles of duty of truth (article 21 DCCP). In some regards, article 21 DCCP may cause friction in demonstrating the existence of and/or infringement upon a trade secret in infringement proceedings. Dutch doctrine seems to be underdeveloped in respect to this concrete article, yet the *communis opinio* (*Procederen bij dagvaarding in eerste aanleg (BPP nr. 1) 2011/90*) seems to be

that, for 'important reasons', article 21 DCCP may indeed not fully apply (see as well: *Tjong Tjin Tai, GS Burgerlijke Rechtsvordering, art. 1019ib*) and is set aside by article 22 DCCP (see answers above).

Likewise, the duty to specify the underlying claim in proceedings to gain access to evidence based on article 843a DCCP is at friction with article 6 ECHR. This was acknowledged by the Court of Appeal of The Hague in *Dow/Organik*, in which it held: "Organik has rightly argued that Dow must present its statements in such a concrete manner that Organik and the Court are able to assess whether there is a legal relationship within the meaning of article 843a DCCP and that Dow is therefore in principle obliged to substantiate its claims. In this case, however, this principle clashes with Dow's right to effective protection of its alleged trade secrets and the right of access to the courts in order to effectuate that right, as provided for by article 6 ECHR. Imposing an obligation to specify Dow's trade secrets would mean that Dow would have to disclose its trade secrets to Organik in these proceedings. This is problematic, because it has not yet been determined whether and to what extent Organik is already in the possession of those trade secrets and Dow must be able to use the current access proceedings to gain more clarity in that regard."<sup>2</sup>

Another issue, as raised under our answer to question 4, is the burden that falls upon the individual natural person that is admitted on behalf of a party to the confidentiality club. Individuals within the parties to the proceedings tend to be best placed to assess what is and what is not a trade secret. However, choosing to involve them risks obtaining 'tainted' information and presents a personal burden for the employee involved, also 'tainting' the individual involved. This has an impact far beyond the litigation in which the individual is involved and makes him/her vulnerable to trade secret misappropriation claims in the future (whether at the current employer or at a future employer). The interests here should be balanced.

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

The Group obtained input from several in-house counsel. It became clear that in-house counsel active in the field of trademarks are not keen on sharing marketing efforts, budgets and the like with competitors in proceedings dealing with e.g. acquired distinctiveness. Therefore, a confidentiality club would be welcomed.

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<sup>2</sup> Court of Appeal of The Hague 19 July 2016, ECLI:NL:GHDHA:2016:2255 , par. 4.20.