

The Trade Secrets Directive

Navigating a new landscape for trade secret protection

2022

Trade secrets are a key asset for many businesses; but their value can evaporate if not carefully protected.

Until recently, trade secret protection in Europe was fragmented and complicated to navigate. The Trade Secrets Directive has simplified things and increased protection levels in all EU member states (and the UK).

Businesses have an opportunity to create value and to secure a competitive benefit by taking advantage of the harmonised protection. However, failure to act may also mean that protection is not available.

What can be protected as a trade secret?

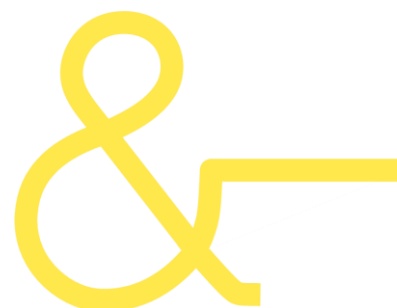
Member States are now required to provide protection to any information which (a) is secret (i.e. not generally known); (b) has commercial value because it is secret; and (c) has been subject to reasonable steps to keep it secret.

How will trade secrets be protected?

The Directive has strengthened the protection of trade secret holders by allowing them to act against infringers and also third parties acquiring a trade secret where they ought to have known that it had been unlawfully used or disclosed. Further, by defining goods whose design, functioning, production or marketing significantly benefit from a trade secret as so-called "infringing goods" as such, the Directive has significantly strengthened the trade secrets holders' legal position, allowing them also to act against goods (possibly even services and software) that originate from jurisdictions which may offer less stringent trade secret protection regimes. Different civil proceedings are available, allowing to seek for interim and preliminary relief, for instance against further use or disclosure of a trade secret or against further distribution of infringing goods.

Protecting trade secrets during litigation

Before the Directive, rules on maintaining secrecy of trade secrets during court proceedings were inexistent or at least differed between jurisdictions, leaving some trade secret holders hesitant to start proceedings. Today, confidentiality clubs, private hearings and the redaction of judgments may give trade secret owners more confidence to actually initiate enforcement actions.



How to benefit from the new regime

- Familiarise yourself with the definition of what can be protected as a trade secret under the Directive and review the categories of business information you can protect as a trade secret.
- Ensure you can demonstrate to a court that you have taken reasonable steps to keep the information you want to protect secret. This will almost certainly require you to take proactive steps in a number of areas, such as reviewing and updating commercial and employment contracts, implementing and reinforcing HR policies, auditing data flows and IT data security measures. Trade secret protection does not include only legal and IT measures but requires security awareness and actions from the entire organisation.
- Include trade secret enforcement strategies as part of your information security incident response plan; defining internal responsibilities and lines of communication along with internal and external legal and technical support which can be called upon in the event of an incident will enable your organisation to best leverage the benefit from the potential interim remedies provided by the Directive.
- Check differences in national legislation. Even if the protection has been harmonized there are many differences in member states. The Directive leaves also many aspects open, such as the confidentiality obligation of employees and business partners.

For further information or advice, please contact our international trade secrets team.



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