

Bird & Bird & The Trade Secrets Directive

Navigating the new landscape for trade secret protection in Europe

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

Until now trade secret protection in Europe has been fragmented and complicated to navigate; the EU's new Trade Secrets Directive will simplify things.

Businesses should understand what the Directive will do and plan how best to take advantage of the new rules; the deadline for implementation into national law is **9 June 2018**.

What can be protected as a trade secret in Europe?

EU Member States will be required to provide trade secret protection for all 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. This is the minimum which Member States must protect. Some may extend their protection to other categories of information.

The new definition presents businesses with an opportunity to create value and to secure a competitive advantage by taking advantage of the new protection. However, failure to act may also mean that valuable business information which could and should be protected is not.

How will trade secrets be protected?

Following implementation of the Directive, civil proceedings to protect trade secrets will be possible in every EU jurisdiction. The Directive will strengthen the protection against third parties who acquire a trade secret from another where they ought to have known under the circumstances that

it had been unlawfully used or disclosed. It will also strengthen the protection available in relation to goods whose design, functioning, production or marketing significantly benefit from a trade secret, greatly helping in cases where goods are imported into the EU, having been manufactured in jurisdictions with less stringent trade secret protection.

Interim and preliminary remedies will also be enhanced; interim prohibitions on the use or disclosure of a trade secret will be available in every jurisdiction as will preliminary injunctions and seizures relating to goods which significantly benefit from a trade secret.

Protecting trade secrets during litigation

Before the Directive, rules on maintaining secrecy of trade secrets during court proceedings also differed between jurisdictions, leaving some trade secrets holders hesitant to start proceedings and risk their trade secret becoming public as a result. The Directive requires Member States to allow for confidentiality clubs, private hearings and the redaction of judgments which will give trade secret owners more confidence to bring enforcement actions. Some jurisdictions also plan to extend the rules to provide protection for trade secrets which are disclosed in other types of court proceedings.

Will the rules be implemented on time?

National implementation of the Directive is well underway in the UK, Italy, France, Netherlands, Denmark, Sweden and Hungary and is expected on or around the 9 June 2018 deadline. Work on implementation is also underway in Poland, Finland, Spain, Belgium and Czech Republic, but implementation might come slightly after the

deadline. Germany is currently lagging behind as the recent political deadlock surrounding the formation of the new government has delayed the legislative agenda, although a draft bill has been promised for the first half of 2018.

How to benefit from the new protection

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 could 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;

Check the limitation periods for trade secret actions; the Directive provides that limitation periods can be no longer than 6 years, but many jurisdictions have chosen to implement significantly shorter limitation periods; and

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.

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