

Bird & Bird

# The Trade Secrets Directive (2016/943)

*International Intellectual Property, Litigation Procedure and Employment Law Gap Analysis*

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# Introduction

*Member States now have until 9 June 2018 to adopt Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) ("the Directive") as part of their national law. Whilst the Directive sets out a minimum level of protection for trade secrets it doesn't preclude Member States from offering additional protection if they choose to do so. It also introduces a number of obligations and exceptions in relation to trade secrets protection which could result in changes to national law even in those Member States which already meet the principal minimum standards of trade secret protection set by the Directive.*

*The aims of the Directive appear straightforward, but how is existing law actually going to change in each Member State as a result? To help businesses identify the changes arising from the Directive and better understand the new landscape for trade secret protection in Europe, Bird & Bird has conducted a comparative analysis of the current and future position in ten major jurisdictions: **Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Poland, Spain and the United Kingdom**. The analysis has been put together by Bird & Bird's experts in Intellectual Property and Employment law from each jurisdiction.*

# General Themes

*Whilst the anticipated changes vary from jurisdiction to jurisdiction some jurisdictions are going to be more affected than others. Belgium in particular will need to make some significant changes to the protection it currently offers whilst Denmark, Italy, Spain and the UK already offer most elements of the protection required by the Directive. However, even in the less affected jurisdictions there will be potentially significant changes to some aspects of current national law.*

**Article 4(4)** of the Directive will strengthen the protection available in the majority of jurisdictions against third parties who acquire a trade secret from another without actual knowledge at the time of acquisition that it had been unlawfully obtained. This includes Germany, France, the Netherlands, Spain, Belgium, Denmark and Poland. This increased protection could help clamp down on the market for stolen trade secrets (e.g. those obtained in cyber-attacks) by increasing the risk of the acquirer also being found liable despite their lack of actual knowledge that the information was stolen at the time of acquisition.

**Article 4(5)** will also strengthen the protection available in the majority of jurisdictions in relation to goods whose design, functioning, production or marketing significantly benefit from a trade secret. This will be of significant benefit to those seeking to enforce trade secret protection against parties who deal in such goods, especially in cases where the goods are manufactured outside the EU and imported in.

The whistleblowing exception contained in [Article 5\(b\)](#) is new to Germany, Belgium and Poland where no such exception to trade secret protection is currently recognised. Even in jurisdictions where the exceptions under Article 5 are currently recognised, existing legislation and case law may need to be revisited to ensure compliance with the Directive.

[Article 9](#) will improve the protection available to trade secrets during the course of litigation in a number of jurisdictions including France, the Netherlands, Spain, Belgium, Poland and Finland. This is likely to give trade secret owners more confidence to bring enforcement actions in these jurisdictions by removing the risk that such an action could result in disclosure of their trade secret to the public.

*The tables overleaf are designed to provide you with a "gap analysis" outlining the changes businesses can expect, in various jurisdictions, and what they may need to do to ensure protection under the new regime. The analysis has been broken down into three sections, in question and answer format, covering intellectual property, litigation procedure and employment law.*

*Whatever the precise effect on the legislation landscape across Europe, one thing is clear: the unified definition means that if businesses wish to avail themselves of protection under the Directive, they will at least need to consider what are, and then adopt, "reasonable steps" to maintain the secrecy of their trade secrets.*

# Intellectual Property

Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?

Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?

Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?

What new legal concepts, if any, will the Directive introduce?

# Belgium



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>Currently, Belgian law protects secret information having a technical and/or commercial nature, depending on the legal basis that is asserted. Certain case law considers trade secrets in all categories listed in the Directive.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>Under current Belgian law it is questionable whether one could stop further dissemination of information that has already been leaked and a right of action against a third party (not having leaked the information) is unavailable, except in specific cases of passing off. Therefore only the activities listed in Article 4(2)(b) are currently covered.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. The protection provided by Article 4(5) does not exist in Belgium in relation to trade secrets at the moment.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>As there is currently not a lot of Belgian legislation dealing with trade secrets, the Directive introduces a number of concepts that are new in Belgian law (such as the definition of trade secrets itself). However, some of these concepts already existed more or less in Belgian case law. In addition, the concepts contained within the Directive still need to be implemented into national law.</p>

# Denmark



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>The categories of information covered by Article 2 are already protected under Danish law.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in Article 4 are already covered by Danish law. The activities in Article 4(4) strengthen and arguably extend the protection available in relation to an innocent recipient of a trade secret with subsequent knowledge of its improper disclosure.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>No. The Danish Marketing Practices Act § 19 already contain a similar regulation as in the Directive.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>Most likely none.</p>



# Finland



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>In practice, it will not. The definition of trade secret in the Directive is in practice equivalent to the one adopted in Finnish law.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in the Directive are substantially the same as in the Finnish Unfair Business Practices Act (78/1061). However, with the Directive, infringing non-disclosure agreement becomes automatically unlawful behaviour in certain cases.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. With the Directive, all business activity with respect to infringing goods will be subject to the corrective measures introduced in Article 12 which are a novelty to Finnish trade secrets regulation.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Finnish Criminal Code already contains a similar definition of "trade secret". Nevertheless, employers will likely have greater access to legal remedies/redress relating to employee use of trade secrets.</p>

# France



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>French law does not currently provide any specific trade secret protection. Protection is instead obtained by way of a claim for unfair competition (a tort action). The Directive will not extend but will define for the first time the category of information which can be protected as a trade secret.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in Articles 4(1) to 4(3) are already covered by French law. Conversely, it has always proved to be difficult taking action against a recipient of trade secrets in the circumstances identified in Article 4(4). The Directive will therefore strengthen and arguably extend the protection of trade secrets in this respect.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. With respect to the protections offered against the production, offering or placing on the market of infringing goods as listed at Article 4(5), the Directive will strengthen and arguably extend the protection of trade secrets in this respect. Indeed, it has proved to be complicated under French law to take action against the activities of a recipient of trade secrets who did not take part in the primary unlawful acquisition of the trade secret.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive should introduce criminal sanctions for the violation of trade secrets. It should be noted that the French government attempted to do this in early 2015 and faced a general uprising from the French media and NGOs. The bill had provided for a potential sentence of up to three years imprisonment and a 375,000 Euro fine. It was also provided that these penalties would be increased to seven years imprisonment and 750,000 Euro fine if the security or economic interests of the country were at stake. The bill was eventually removed.</p>

# Germany



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>The categories of information covered by Article 2 are already protected under German law. The Directive's definition of a trade secret is even somewhat narrower since it places a higher burden of proof on the proprietor with regard to Article 2(1)(c).</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in Articles 4(1), 4(2)(a) and 4(3)(a) are already covered by German law. The vague term "honest commercial practices" in Article 4(2)(b) could be interpreted more broadly than current German law. The activities under Articles 4(3) (b) and (c) extend protection in the way that not only employees, but also third parties which are bound by confidentiality agreements are included. Unlike Article 4(4), German law currently only covers recipients who show conditional intent, but not gross negligence. Article 4(4) also extends the protection in relation to an innocent recipient of a trade secret with subsequent knowledge of its improper disclosure.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. Article 4(5) extends protection against the offering of infringing goods, as it only requires gross negligence but not conditional intent. Further, it extends protection against an infringer who gains subsequent knowledge of the improper disclosure of the trade secret (see above).</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive is generally consistent with existing concepts under German Law and jurisdiction in the context of Labour Law. Some provisions, like Article 4(b) will probably be subject to interpretation, since it is not entirely clear, in which cases "a general public interest" exists. Also regarding Article 13(1), it is not clear whether this provision will also apply to damages incurred after conclusion of the employment relationship.</p>

# Italy



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>The categories of information covered by Article 2 are already protected under Italian law.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in Article 4 are already unlawful under Italian law.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>The protections afforded by the Directive to the trade secret holder are already available under Italian law.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive introduces a clear new definition of "trade secrets", which may also be helpful in employment contracts and settlements; and the possibility to refer to the provisions of "unlawful acquisition, use and disclosure of trade secrets" in case the employment contract does not include a specific confidentiality section.</p>

# The Netherlands



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>Before the Directive, trade secret protection in the Netherlands was a matter of general tort law. However, the information that could be protected as a trade secret under general tort law was generally taken to correspond with the information as defined in Article 39(2) of TRIPS. With the Directive, this would now be explicitly codified, but there are no significant material changes to be expected.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in Articles 4(2)(a) and 4(3) would generally already be covered by Dutch law. However, in order to establish a tort, a number of criteria need to be met under Dutch law. These will now be replaced with the criteria of the Directive. The acquisition "contrary to honest commercial practices" as described in Article 4(3)(b) may in practice correspond to the threshold applied in general tort law, but will provide more legal certainty. The activities listed in Article (4)(4), especially with regard to an innocent recipient of a trade secret with subsequent knowledge of its improper disclosure, will strengthen and extend the protection available. The Directive will convert protection under general tort law into protection against infringement, very similar to the protection offered for full IP rights.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. While some of the protection provided by Article 4(5) will have been provided before the Directive by general tort law and general procedural law, Article 4(5) is wider in scope and provides for more legal certainty. Further, the concept of "infringing goods" was unknown in Dutch law.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive is generally consistent with existing case law, but will lay down new measures to protect trade secrets, such as seizure before judgment and the possibility for trade secrets to remain confidential during legal proceedings.</p>

# Poland



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>The categories of information covered by Article 2 are already protected under Polish law. Only slight differences may result from the change in wording (the impact on the new wording on the actual difference will be subject to courts' interpretation).</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The general scope of activities will remain the same, although Polish law provided for exception in case of recipients who acquired information in good faith and for valuable consideration. This exception must now be amended in line with Article 4(4).</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. The goods 'directly connected' with the commitment of an unfair completion act were already covered by Polish law, but the new definition of 'infringing goods' is broader.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive introduces a new definition of "trade secrets". The main difference is a clarification that the trade secret is information which is not "generally known among or readily accessible to persons within the circles that normally deal with that kind of information". The Directive will also introduce the protection of whistle-blowers, which was not previously regulated in Polish law.</p>

# Spain



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>The categories of information covered by the Directive were already protected under Spanish law, because Article 39(2) of TRIPS has direct effect.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The Spanish Unfair Competition Act defines in a generic and broad manner what activities are unlawful. In any case, it will provide with more legal certainty (especially in the case of an innocent recipient).</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>No. They are already covered by the Spanish Unfair Competition Act.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive is consistent with the existing legal concepts derived from case law. However, in our opinion the Directive gives more prominence to confidentiality and "trade secrets" related clauses, whose infringement will be considered an unlawful disclosure of trade secrets.</p>



# United Kingdom



<p>Will the Directive extend the category of information which can be protected as a trade secret in your jurisdiction?</p>	<p>The categories of information covered by Article 2 are already protected under English law.</p>
<p>Will the Directive extend the activities in relation to a trade secret which are considered unlawful in your jurisdiction?</p>	<p>The activities listed in Articles 4(1) and 4(2) are already covered by English law. Article 4(4) arguably strengthens the protection available in relation to an innocent purchaser for value of a trade secret with only subsequent knowledge of its improper disclosure.</p>
<p>Will the Directive extend the protections offered in relation to infringing goods in your jurisdiction?</p>	<p>Yes. Whilst manufacturing goods using a trade secret is already an actionable misuse of confidential information, Article 4(5) clarifies and arguably strengthens the position in relation to subsequent acts involving those goods, especially where those acts are carried out by a third party.</p>
<p>What new legal concepts, if any, will the Directive introduce?</p>	<p>The Directive is generally consistent with the concepts to have emerged from common law, although it does introduce alien terminology likely to require interpretation from the CJEU. For example, Article 4(b) and the idea of conduct which is "contrary to honest commercial practices" to establish unlawful acquisition is not one known in English law in this context.</p>



# Litigation Procedure

Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?

Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?

Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?

Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?

# Belgium



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. There are no clearly defined rules in Belgian procedural law regarding confidentiality. Exceptionally, some courts have allowed initiatives to organize a "confidentiality club" or a private hearing. The Directive will help regulate and clarify this situation, and strengthen the party's rights to confidentiality in the course of legal proceedings by providing for an explicit legal basis.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>Yes. The remedies set out in Article 10 of the Directive include provisional and precautionary measures that do not exist in Belgium at the moment in respect of trade secrets. The Directive will therefore provide more protection for the owner of a trade secret. Article 14 also provides specific elements that the judge will need to take into account when evaluating damages. This will arguably lead to an increase in the amount of damages the owner of a trade secret can get.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>No. Belgian Court decisions are generally given in public (subject to appropriate redaction of confidential information). Apart from that, Belgian Courts can order specific publication of the decision, such as in professional magazines or on the company website.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>The general limitation period for breach of contract under Belgian law is 10 years. However, in employment law, the limitation period is one year from the end of the contract or five years from the breach. The limitation period for non-contractual claims is five (and 20) years. The difficulty will be to find the right balance for trade secrets.</p>

# Denmark



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>No. The Danish legal system already has similar protection allowing limited access to court documents due to confidentiality and protection of trade secrets for third parties and the possibility of demanding closed court hearings.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>No. The remedies set out in the Directive including preliminary and final injunctions, orders for delivery up, damages and account of profits. These remedies are already available in the Danish legal system. Member States may however limit the liability of employees to pay damages for the unlawful use of an employer's trade secrets if the employees acted without intent, and such limitation is already available in the Danish legal system if the damages are devastating for the employee.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>No. Danish Court decisions are generally given in public (subject to appropriate redaction of confidential information). The court can even demand that the infringer pays compensation to the infringed party to cover publication costs in Danish media, e.g. Newspapers.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>No. The statutory limitation period for breach of contract under Danish law is three years from the date of breach which is a shorter period than the six years in the Directive, and it is unlikely that we will see an extension of the period for trade secrets only.</p>

# Finland



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. In Finland it is already possible to keep trial documents secret and arrange closed proceedings under the Act on the Publicity of Court Proceedings in General Courts (370/2007). However, restricting the parties' access to documents containing trade secrets and to hearings where trade secrets are disclosed is an exception to the parties' right to be informed of all material in connection to the court proceeding. Thus, the Directive introduces the system of "confidentiality clubs" into Finnish trade secrets regulation.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>Yes. The remedies set out in the Directive are mostly contained in Finnish law. However, as the Directive is very specific with the available remedies, it will provide more legal certainty. In particular, the possibility to set damages based on the unfair profits made by the infringer and the amount of hypothetical royalties is new to the Finnish system. The corrective measures regarding infringing goods also provide more extensive means to intervene in infringements.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>Finnish Court decisions are generally given in public. The right to apply for publication is, in principle, already possible under the Unfair Business Practices Act (78/1061) but is rarely used. With the Directive, the field of application of the provision is likely to broaden.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>No. Under the Act on Limitation of Debt (728/2003) claims for damages shall be presented within three years from the date of noticing the breach.</p>

# France



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. Hearings in private and a confidential version of the Court decision are either very uncommon or not available under French law and the confidentiality of exhibits filed during proceedings is not expressly protected by law. "Confidentiality clubs" are an option only recently explored (for IP matters) by French courts. They should become more frequent following the implementation of the Directive.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>Yes. Under French law, breaches of trade secrets generally only result in the award of damages and possibly in the grant of final injunctions. Seizure, destruction or recall of the infringing goods are remedies which are not commonly used by French judges.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>No. Publication measures are already available with respect to trade secrets disputes.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>No. The limitation period for initiation of civil actions is five years from the date on which the holder knew or should have known the facts enabling him to exercise such action (Article 2224 C.Civ.).</p>

# Germany



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>No. The measures described in Article 9 are in line with the discretion of German courts to preserve the confidentiality of sensitive information during the proceedings. When assessing whether the confidentiality of the information has to be preserved German courts generally weigh the public interest against the proprietor's interest to keep a secret.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>The remedies according to the Directive are already available in German jurisdiction. However, unlike German law Article 13 stipulates that the proportionality has to be assessed also with regard to the injunction measures. A limitation on employee liability towards their employers for unintentional acts as laid down in Article 14(1) already exists in German labour case law.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>No. German court decisions are generally publicly available. Confidential information will be redacted and blacked out.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>No. According to German unfair competition law, which is currently applicable for trade secrets protection, the statutory limitation period for damages and injunctive relief is only six months after the claimant ought to have known about the relevant circumstances. The limitation for breach of contract is three years.</p>

# Italy



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. Some Italian Tribunals currently allow access only to lawyers or experts bound by professional ethics. Article 9(2) of the Directive arguably offers less protection as it requires access to documents containing trade secrets to at least one natural person from each party.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>No. The remedies afforded by the Directive are already available to the trade secret holder under Italian law.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>Both the right to apply for dissemination of the judgment, and rules governing its redaction for the protection of the trade secret and of the parties' privacy and reputation are already part of Italian practice.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>No. The limitation period for infringement of trade secrets by way of a tort in Italy is 5 years: hence it is already shorter than the maximum set by Article 8 of the Directive. Limitation in cases of infringement of trade secret by way of a breach of contract is 10 years, but should not be affected by Article 8 (since Article 8 governs the special measures and remedies afforded by the Directive, and not the ordinary remedies afforded by the general law of contracts).</p>



# The Netherlands



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. While Dutch procedural law already provides some possibilities for preserving the confidentiality during proceedings, these are largely discretionary such that the application may vary and depend on the judge. The Directive provides explicit protections, new possibilities to preserve confidentiality and more legal certainty in this regard by introducing the concept of a "confidentiality club", which can be imposed by the court and will therefore increase the ability to preserve the confidentiality of trade secrets during proceedings.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>The remedies set out in Articles 10 to 15 of the Directive are generally already available under Dutch law. However, the Directive is more specific and explicit in this regard, which may extend the possible remedies to some degree. The Directive itself specifically does not provide for evidentiary seizures, but Member States may introduce those in national law. So far, in the Netherlands evidentiary seizures were not available for trade secret litigation, but it is likely that this will be introduced into national law when the Directive is implemented.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>Yes. Currently, most judicial decisions regarding trade secrets would be expected to be published by the judicial authorities and any one may apply for publication of a decision. However, whether to publish a decision is decided currently by the PR department subsequent to the proceedings. Insofar, the Directive now provides for the possibility for the court itself to order publication as part of the proceedings. It is however unlikely that this will be requested often.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>Most likely not: the limitation period for a claim under general tort law and for a claim for breach of contract are both five years after the claim becomes known to the claimant and there is no desire to change this. However, a general limitation period of 20 years applies after the date of the tort or breach regardless of the claim being known to the claimant. The Directive appears to allow such a period under Article 8(1).</p>



# Poland



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. The Polish Code of Civil Procedure did not provide for adequate measures to preserve the confidentiality of trade secrets from the opposing party and persons involved in the proceedings. There was a possibility to have a non-public hearing, but expert witnesses and an opposing party had unrestricted access to all case materials. We expect a significant change in this respect.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>No. The remedies available to owners should remain in general the same.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>In practice Polish law currently provides for the publication of a statement by an infringer (usually a public apology) and not of a judgment itself. Nevertheless, Polish courts interpret this provision more broadly and sometimes use it as grounds for an order to publish a judgment - the Directive will only formally confirm this practice.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>The current limitation period under the Polish Unfair Competition Act is three years. Since the limitation period in the Directive is set as a maximum, Poland will not be forced to extend it.</p>

# Spain



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>Yes. Although the Spanish Civil Procedure Act already provides the possibility of preserving the confidentiality of the process, the Court is often reluctant to apply this provision, in view of the principle of disclosure of the judicial process. With the Directive, this practice will hopefully change.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>No. The remedies introduced by the Directive could be considered already contained in Spanish law. However, since the Directive is very specific with the available remedies, it will provide more legal certainty. In particular, with respect to the hypothetical royalties established by Article 14(2) it should be noted that our case law rarely has applied this criterion of compensation. With the new Directive, it seems that this criterion will be used more often.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>No. The publication of the judicial decision was already provided by Article 32.2 of Spanish Unfair Competition Act.</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>The current limitation period, as provided by the Spanish Unfair Competition Act, is one year from the date when the claimant had knowledge of the infringement and, in any event, three years from the cessation of the infringing activity.</p>

# United Kingdom



<p>Will the Directive affect a party's ability to preserve the confidentiality of trade secrets during legal proceedings in your jurisdiction?</p>	<p>No. Article 9 requires Member States to put in place measures for the preservation of confidentiality during legal proceedings. The English Courts are well-versed in the protection of confidential information through the use of "confidentiality clubs" and hearings in private. The Directive will therefore make little change.</p>
<p>Will the Directive affect the remedies available to owners of trade secrets (against infringers who unlawfully acquire, disclose or use a trade secret) in your jurisdiction?</p>	<p>No. The remedies set out in the Directive include interim and final injunctions, orders for delivery up, damages and account of profits. These remedies are already available from the English Courts so we expect little change. Member States may however limit the liability of employees to pay damages for the unlawful use of an employer's trade secrets if the employees acted without intent.</p>
<p>Will the right of a party to apply for the publication of a judicial decision be a change to current procedure (Article 15)?</p>	<p>No. English Court decisions are generally given in public (subject to appropriate redaction of confidential information).</p>
<p>Will the Directive affect the limitation period for bringing a trade secrets claim in your jurisdiction?</p>	<p>No. The statutory limitation period for breach of contract under English law is six years from the date of breach which is consistent with the approach taken by the Directive.</p>

# Employment

Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?

Will the Directive have an impact on whistleblowing activities in your jurisdiction?

Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?

Will employers need to do anything in order to secure protection under the Directive?

# Belgium



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. Trade secrets were already protected under Belgian law. However Belgian law did not contain a clear definition of what is considered a trade secret. Although the new Directive will not result in a huge increase in protection for employers, it will provide a clearer framework and legal remedies.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>Yes. There is currently no legislation dealing with whistleblowing for the private sector. The whistleblowing exception in the Directive might make it necessary to adopt such legislation in Belgium.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>The Directive expressly promotes the free movement of workers. It also allows each Member State to establish its own rules on non-compete clauses.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Yes. In order to secure protection under the Directive an employer must be able to demonstrate the information it wishes to protect meets the definition of a trade secret. This necessitates a strategy for ensuring reasonable steps are taken to identify and actively protect the information.</p>

# Denmark



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The definition of "trade secret" in Article 2 and the definitions of lawful/unlawful activities in Articles 3 and 4 are generally similar to existing Danish law. The remedies provided for in the Directive are also generally similar to existing Danish law. The level of protection and associated remedies are therefore expected to remain broadly similar.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>Most likely not, but this depends on how Danish courts will view the contemplated balance of the Directive. Danish employment law is not greatly affected by whistle-blower regulation, and the disclosure of trade secrets as a part of whistleblowing activities is likely to be considered a mitigating factor under current Danish law.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>No. The Directive states that it shall not offer any ground for imposing any additional restrictions on employees in their employment contracts, other than restrictions imposed in accordance with Union or national law. In Denmark, there is the Danish Act on Restrictive Covenants, which allows the employer and employee under certain conditions to agree on a post termination non-competition and non-solicitation clause.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>No. But according to Danish case law, an employer has a "better case" if he has mentioned the relevant provisions/and what information he wishes to protect within the employment agreement.</p>

# Finland



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The level of protection is expected to remain broadly similar. Protection against competing activities and the use of trade secrets during the term of employment is already provided by the Finnish Employment Contracts Act. In addition, the violation of a trade secret is a criminal offence under the Finnish Criminal Code, which binds the employee and protects the employer's trade secrets for two years after the end of the employment relationship. The Unfair Business Practices Act includes also a section relating to trade secrets.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>No. We do not expect the Directive to have a direct impact on whistleblowing activities in Finland.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>The Directive expressly states that its provisions shall not impair employees' freedom of movement – an existing right under Finnish law. (Please note that Finnish law does allow employers and employees, under certain conditions, to agree on a post termination non-competition and non-solicitation clause. In addition, the Finnish Criminal Code (which protects against the violation of trade secrets) binds the employee and protects the employer's trade secrets for two years after the end of the employment relationship.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Not directly. However, employers should take proactive steps to protect their trade secrets/bind their employees in order to capitalise on the protection that the Directive provides. To this end, employers should explicitly refer employees to the relevant legislation/provisions within the Directive and set out what information they wish to protect as a 'Trade Secret' in the contract of employment.</p>

# France



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The level of protection should remain fairly similar notably due to the fact that trade unions and NGOs have a strong influence in France and any fundamental addition to the employer's protection against that of the employee would lead to a general uprising.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>Under French labour law, whistle-blowers are already protected. An employee cannot be sanctioned or discriminated against for having revealed potential wrongdoings in <u>good faith</u>.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>The Directive will not add restraints on workers in terms of mobility which do not already exist. Indeed, French labour law and case law has strictly outlined the possibility of restricting an employee from carrying out certain activities post termination and protects the employee's freedom to work and to undertake economic activities.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Yes. Employers will need to demonstrate that the information that requires protection meets the definition of a trade secret. Employers would have to identify this information notably when terminating an employment contract or when informing and consulting the staff representatives, although the Directive significantly protects staff representatives from law suits when acting in the course of their duties.</p>



# Germany



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. Know-how lawfully acquired by employees during service is generally allowed to be used after conclusion of the employment relationship. Further, Articles 1 and 2(a) of the Directive clarify that its provisions must not be used to hinder the professional advancement of former employees. The parameters for permissible non-competition clauses have been shaped by case-law and the law. The Directive will leave those principles unaffected.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>Yes. Article 5(b) of the Directive provides that whistleblowing may be permitted if there is a "general public interest". Generally under German law so far, whistleblowing can quickly constitute a breach of the employment contract. In such cases, termination for cause and/or claims for damages may be the consequences. By generally permitting whistleblowing in case of a general public interest, the Directive may have an effect on the actions that can be taken by the employer in such cases. Case law will show whether this is the case.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>As mentioned above, the Directive promotes the free movement of former employees after termination.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Generally, in order to secure protection under the Directive, the employer must be able to demonstrate that the information meets the definition of a "trade secret", as set out at Article 2(1). Otherwise, the provisions of the Directive do not apply. To this end, we recommend increasing protection through contractual stipulations and penalties.</p>

# Italy



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The Directive is not expected to significantly affect Italian law. As a matter of fact, Article 2105 of the Italian Civil Code (regarding "loyalty obligations" during the employment relationship) already prevents employees from disclosing any valuable information concerning the employer's business or organisation.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>Yes. The provisions regarding the permission to reveal misconduct, wrongdoing or illegal activities which are covered by trade secret protection in order to protect the general public interest could lead the Italian government to regulate "whistleblowing" activity which is currently unregulated.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>The Directive expressly promotes the free movement of workers. Indeed, a proper and deep protection of trade secrets will allow workers to easily move after termination, creating less apprehension amongst former employers.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Yes, in order to secure protection under the Directive, the employer must demonstrate that the information it wishes to protect falls under the definition of "trade secret" provided by the Directive.</p>

# The Netherlands



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The Directive is not expected to mark a fundamental shift in the level of protection against competing employees, since there is already well-developed case law similar to the provisions of the Directive.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>The Directive may have some impact on whistleblowing activities, since this matter has not yet been well-developed in case law and statutory law in the Netherlands. However, it will all depend on its implementation into Dutch law.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>The Directive promotes the freedom of movement of workers and does not restrict the use of non-compete clauses. Therefore, it is expected that the Directive will have no significant effect on current legislation.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Yes. In order to secure protection under the Directive an employer must be able to demonstrate the information it wishes to protect meets the definition of a trade secret. This necessitates a strategy for ensuring reasonable steps are taken to identify and actively protect the information.</p>

# Poland



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The level of protection will remain similar. According to current Polish law the competing employees face civil, criminal and employment liability (respectively: Articles 18 and 23 of the Polish Unfair Competition Act, and Article 100 of the Polish Labour Code).</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>Yes. It would be the first regulation of any aspect of whistleblowing in Polish law. Therefore, the explicit exclusion of liability in case of whistle-blowers will be a new addition to Polish law.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>No. In Poland the employer may enter an additional non-compete agreement with the employee, setting forth the circle of activity being considered as competitive. Such an agreement may be concluded on a period no longer than three years after the termination of the employment contract and under remuneration.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Yes. In order to secure protection under the Directive an employer must be able to demonstrate that the information it wishes to protect meets the definition of a trade secret.</p>

# Spain



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The level of protection will be fairly similar. The Directive might nonetheless provide a higher level of legal certainty for companies with the legal regulation of unlawful acquisition of trade secrets and the regulation on damages, leaving less ground for discretion within employment courts.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>No. The Directive should not have a direct impact, but will help to develop these practices.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>No. The Directive expressly states that its provisions will not impair freedom of movement, which is an employment right already protected by employment courts in Spain. Also, since Member States have freedom to regulate non-compete clauses, we do not anticipate a change in this regard.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>In Article 4(3), the Directive gives pre-eminence to the breach of confidentiality clauses and contractual duties as indicators of the unlawful gain of trade secrets. In our opinion, this opens the door for companies to draft more elaborate and specific confidentiality and trade secret related clauses to protect their interests. We expect that employment courts will develop different criteria giving more relevance to such clauses.</p>

# United Kingdom



<p>Will the Directive mark a fundamental shift in the level of protection available to employers against competing employees?</p>	<p>No. The level of protection is expected to remain broadly similar. However we may see a shift in emphasis, with courts 'rewarding' employers for taking appropriate steps to maintain secrecy rather than the more qualitative approach to confidential information adopted now.</p>
<p>Will the Directive have an impact on whistleblowing activities in your jurisdiction?</p>	<p>The parameters for whistleblowing protection in the UK have been shaped through a relatively well-developed body of case law and statutory amendment to narrow opportunity for abuse. This jurisprudence is arguably undermined by the 'whistleblowing exception' text in the Directive.</p>
<p>Will the Directive affect the freedom of movement of workers or the ability to curtail employee activities post termination?</p>	<p>The Directive expressly promotes the free movement of workers. It also allows each Member State to establish its own rules on non-compete clauses.</p>
<p>Will employers need to do anything in order to secure protection under the Directive?</p>	<p>Yes. In order to secure protection under the Directive an employer must be able to demonstrate the information it wishes to protect meets the definition of a trade secret. This necessitates a strategy for ensuring reasonable steps are taken to identify and actively protect that information.</p>

# Contacts

## Belgium

Bruno Vandermeulen  
**Partner**  
Tel: +32 (0)2 282 6000  
bruno.vandermeulen@twobirds.com

Anton Aerts  
**Associate**  
Tel: +32 (0)2 282 6000  
anton.aerts@twobirds.com

## Denmark

Soren Pedersen  
**Partner**  
Tel: +45 72 24 12 12  
soren.pedersen@twobirds.com

## Finland

Maisa Nikkola  
**Partner**  
Tel: +358 (0)9 622 6670  
maisa.nikkola@twobirds.com

Tom Vapaavuori  
**Partner**  
Tel: +358 (0)9 622 6670  
Tom.vapaavuori@twobirds.com

## France

Yves Bizollon  
**Partner**  
Tel: +33 (0)1 42 68 6000  
yves.bizollon@twobirds.com

Nathalie Devernay  
**Partner**  
Tel: +33 (0)4 78 65 6000  
nathalie.devernay@twobirds.com

## Germany

Matthias Meyer  
**Partner**  
Tel: +49 (0)89 3581 6000  
matthias.meyer@twobirds.com

Ralph Panzer  
**Partner**  
Tel: +49 (0)89 3581 6000  
ralph.panzer@twobirds.com

## Italy

Giovanni Galimberti  
**Co-managing partner**  
Tel: +39 02 30 35 60 00  
Giovanni.galimberti@twobirds.com

Amedeo Rampolla  
**Partner**  
Tel: +39 02 30 35 60 00  
amedeo.rampolla@twobirds.com

## The Netherlands

Philip Hartman  
**Partner**  
Tel: +31 (0)70 353 8800  
philip.hartman@twobirds.com

Wouter Pors  
**Partner**  
Tel: +31 (0)70 353 8800  
wouter.pors@twobirds.com

## Poland

Piotr Dynowski  
**Partner**  
Tel: +48 22 583 7900  
piotr.dynowski@twobirds.com

Karolina Stawicka  
**Partner**  
Tel: +48 22 583 7900  
karolina.stawicka@twobirds.com

## Spain

Manuel Lobato  
**Partner**  
Tel: +34 91 790 6000  
manuel.lobato@twobirds.com

Miguel Pastur  
**Partner**  
Tel: +34 91 790 6000  
miguel.pastur@twobirds.com

## United Kingdom

James Froud  
**Partner**  
Tel: +44 (0)20 7415 6000  
james.froud@twobirds.com

Robert Williams  
**Partner**  
Tel: +44 (0)20 7415 6000  
robert.williams@twobirds.com

## twobirds.com

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