

# 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 Trade Secrets Directive will simplify things.**

Businesses should understand what the Directive will do and implement steps to take advantage of the new rules; the deadline for implementation into national law was **9 June 2018**, and the majority of EU Member States have now complied.

## ***What can be protected as a trade secret in Europe?***

EU Member States are 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 have extended their protection to other categories of information.

The new definition presents businesses with an opportunity to create value and to secure a competitive benefit 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 (defined as "infringing goods"), 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 have also been enhanced; interim prohibitions on the use or disclosure of a trade secret should be available in every jurisdiction together with preliminary injunctions and seizures relating to infringing goods.

## ***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.

## Implementation status

At the time of writing, legislation to implement the Directive has been passed in the majority of EU Member States, and only remains pending in a handful of others. It has most recently been implemented, after much debate, in Germany as of March 21, 2019.

The approach to implementation has varied depending on the existing scope of protection and therefore the extent to which the law needs to be updated.

## 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;

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; and

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.

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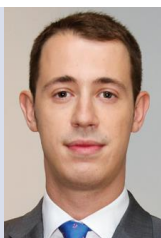
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