

May 31, 2016

On 14 April 2016, the European Parliament approved the new European Union Trade Secrets Directive which will create a minimum legal benchmark to protect secret and valuable business information, known as trade secrets.

The aim of the directive is to protect European companies from having their trade secrets disclosed to their rivals. Before now, it was not always clear what information would be classified as a trade secret and how it could be protected. This was particularly the case where different EU countries could take conflicting approaches in relation to the treatment of trade secrets.

The Directive introduces a new standard definition of a "trade secret" and outlines what constitutes lawful and unlawful use of it. It also sets out the remedies available to trade secrets holders in the event of a misuse or misappropriation of their trade secrets and the measures that a Court can use to prevent the disclosure of trade secrets during legal proceedings.

While many trade secret owners will welcome clarity in this area, the Directive has been criticised as it could lead to journalists and whistleblowers facing criminal sanctions if they publish information that companies deem to be secret.

Although the Directive contains exceptions that, in essence, create a "whistle-blower" defence, there is considerable ambiguity regarding when a disclosure will fall within these exceptions. The Directive will not extend to a disclosure of trade secrets where such disclosure reveals a "misconduct, wrongdoing or illegal activity, provided that the [employee] acted for the purpose of protecting the general public interest".

However, we have already seen in the UK the difficulty with determining what is in the "public interest". It will therefore be very difficult to predict what information could form the basis of a protected disclosure. Furthermore, there is no requirement that an employee's belief that the information is in the public interest is actually reasonable.

The UK will now have two years in which to implement the provisions of the Directive into national law. The UK Parliament has previously indicated that some changes to national legislation will be required as a result of the Directive, including to the Limitation Act 1980 and the Civil Procedure Rules. Please keep an eye on the Dentons UK Employment Hub for further information.

Even though we are still some way from the final legislation being available, employers can start to think about how they can put themselves in the best position to take full advantage of the Directive. The first step should be to clearly identify what are the valuable trade secrets which are currently owned and create policies and procedures that are robust enough to protect them. This could include:

- reviewing IT security and electronic communication policies and procedures;
- providing adequate training to all employees regarding confidential information;
- reviewing existing employment contracts to expressly deal with trade secret protection;

- reviewing employment exit procedures to ensure that all property belonging to the company, including confidential information and trade secrets, are returned;
- ensuring that the company has a clear and transparent whistleblowing policy and that any disclosures are dealt with promptly to reduce the risk of external disclosures.

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