

Bird & Bird & Trade Secrets

Implementation of the Trade Secrets Directive – Some comments from Denmark

This is the 17th in a series of articles written by members of our International Trade Secrets Group, highlighting points of note regarding the protection of Trade Secrets in various jurisdictions.

In this article we move to Denmark where the Trade Secrets Directive (the "TSD") was implemented in June 2018 by the Act on Trade Secrets (Act no. 309 of 25 April 2018) ("The Act").

The Act generally represents a 'close to the text' implementation of the TSD.

The rules protecting trade secrets were previously covered by multiple laws, most notably the Marketing Practices Act. But as a consequence of the implementation of the TSD the rules have largely been compiled into one act – the Act on Trade Secrets. It should be added though that industrial espionage, i.e. misappropriation of trade secrets through gaining unauthorized access to computer systems or premises of others, is still separately criminalized through the Danish Criminal Code.

Noteworthy points are:

- (i) introduction of a definition of trade secrets;
- (ii) legal remedies; and
- (iii) compensation.

These points are to be discussed in further details below.

Definition

The Act imported the TSD's definition of a trade secret into Danish law.

Before the implementation of the TSD, Danish law did not include such definition and the concept of a trade secret was inferred from case law.

However, it follows from the explanatory notes to the Act that the new definition harmonises with the concept inferred from case law.

"Trade Secret" means information which meets all of the following requirements:

- a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- b) has commercial value because it is secret; and
- c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret'

The question of what steps are 'reasonable' will clearly be of huge importance to businesses seeking to protect confidential information and it is expected that the interpretation of this requirement may be subject to reference to the CJEU in due course.

Following the implementation of the TSD, a Danish court has only considered the requirement of what steps are "reasonable" to keep information secret in one case.

The court found in this case that the defendant had unlawfully used the plaintiff's trade secrets in the production, marketing, and sale of measuring apparatus.

The trade secrets consisted of algorithms, software and the underlying data sets and the court found that the special technical measure that prevented customers and competitors from becoming aware of the algorithms and software contained in the plaintiff's apparatus met the requirement of "reasonable steps".

The scope of protection is also expanded as an individual without any connection to the company will now also be covered by civil sanctions under the new rules. In regards to criminal sanctions it follows from the explanatory notes that the misuse of trade secrets by individuals with connection to the company is criminalised pursuant to the new Act and individuals without any connection to the company is criminalised pursuant to the Danish Criminal Code through the rules on industrial espionage, as touched upon above.

Legal remedies

The new Act lays down more gentle conditions for obtaining preliminary injunctions than what follows from the ordinary rules contained in the Administration of Justice Act: it must be proved or rendered probable that a trade secret has unlawfully been acquired, used, or disclosed or there is such immediate risk thereto.

Likewise, the new rules allow for the courts to decide that goods must be handed over as a provisional measure. Also, the Act allows the court to issue penalty payments for non-compliance with a preliminary or permanent injunction and to require the judgement to be made publicly available.

Compensation

The new Act requires that the court's assessment of damages – in addition to the trade secret holder's losses - must also include the infringing party's unjustified profits. Additionally, the new Act allows for the court to order a party to pay compensation for non-economic loss.

Thus, the new Act provides for a more flexible assessment of damages than what was previously the case, and accordingly trade secrets holders are provided with a greater chance of being compensated.

However, the new Act also introduces a time limit for legal action as to obtaining a preliminary or permanent injunction. A request for obtaining such an injunction must be filed at the court within a maximum of 6 months after the trade secrets holder has acquired such knowledge of the unlawful acquisition, use or disclosure of trade secrets, in order to justify that the trade secrets holder has a sufficient basis for seeking this relief.

The question of precisely what constitutes “sufficient basis” will according to the explanatory notes be determined according to the nature and the extent of the case at hand and entails that the time limit will lapse quicker in more simple cases compared to complex cases.

The new time limit is expected to result in more companies acting more quickly in filing a request to obtain a preliminary or permanent injunction to avoid the time limit lapsing, adding that passivity also (as always) could result in the forfeiture of rights.

Needless to say, if the trade secret owner lets time pass before taking action this also creates a risk that evidence of the infringement may “evaporate”.

Get in touch

Peer B. Petersen

Partner

Tel: +4539141687

peer.petersen@twobirds.com



twobirds.com

Abu Dhabi & Amsterdam & Beijing & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Dusseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & San Francisco & Shanghai & Singapore & Stockholm & Sydney & Warsaw & Satellite Office: Casablanca

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.