

Bird & Bird & Trade Secrets

Implementation of the Trade Secrets Directive – Some comments from Sweden

This is the 18th (and final) 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 Sweden where the Trade Secrets Directive was implemented in July 2018 by the Trade Secrets Act (the “**Act**”) that replaced the Law (1990:409) on the Protection of Trade Secrets (the “**old Law**”). In this article we consider key changes made and our views on their impact or potential impact on the protection of Trade Secrets in Sweden going forward.

Trade Secrets in Sweden prior to the Directive

Sweden implemented regulations for the protection of trade secrets in July 1990 through the old Law. The old Law consisted of 14 sections, which regulated criminal offences as well as damages for the violation of trade secrets.

According to the old Law from 1990, information was considered a trade secret if the information:

- (a) concerned information in a business;
- (b) which was kept secret; and
- (c) the disclosure of which would likely to lead to competitive loss.

The old Law was only applicable in cases of misappropriation by way of acquisition, getting access to, use of and/or disclosure of Trade Secrets. The Law did not prevent disclosure of trade secrets to authorities where it could reasonably be expected that the information concerned a criminal offence that could render a prison sentence.

Besides a well-known Supreme Court case from 1998 where damages were awarded, most of the case law regarding the old Law concerned claims related to employees’ or former employees’ misappropriation of trade secrets.

The new Swedish Trade Secrets Act

The new Trade Secrets Act (the “**Act**”) entered into force on 1 July 2018 and constitutes a partial incorporation of the Directive. The Act consists of 28 sections and regulates criminal offences, damages for the violation of trade secrets as well as injunctions and preliminary injunctions.

Information that is considered trade secret under the Act is information that:

- (a) concerns the business or operational circumstances of a trader's business or a research institution's activities;
- (b) which, either as a body or in the precise configuration and assembly of its components, is not generally known or readily accessible to persons who normally have access to information of the relevant kind;
- (c) which the holder has taken reasonable measures to keep secret; and
- (d) the disclosure of which is likely to lead to competitive loss for the holder.

The scope of protection has been widened through the Act. It can also be noted that the holder now must take reasonable measures to keep the information secret in comparison to the old Law where the information should be kept secret.

The Act is applicable to misappropriation of trade secrets, but whistleblowing does not constitute a misappropriation. The Act defines misappropriation as any situation where a person, without the consent of the holder of the trade secret

- (a) accesses, appropriates or otherwise acquires the trade secret;
- (b) uses the trade secret; or
- (c) discloses the trade secret.

It is noteworthy that appropriation (*sw. tillägnande*) is a new form of misappropriation that was not explicitly covered by the old Law. Furthermore, it is no longer possible to acquire a trade secret in good faith. A misappropriation in good faith will not be punishable as a criminal offence and will not be subject to damages but it is still possible to issue an injunction to prohibit further use of the trade secret. Under the Act it is possible to obtain an injunction also when a misappropriation of a trade secret is imminent.

Another novelty is that the Act provides protection for trade secrets in judicial proceedings. For example any party representative who intentionally or negligently uses or discloses a trade secret which he or she learned, in his or her capacity as representative as a result of a judicial decision, may be held liable to compensate the holder of the trade secret for the loss incurred. This is also applicable to information learned in conjunction with an *in camera* judicial proceeding.

Conclusion

Sweden already has a fairly long history of protecting trade secrets under law and the Directive does not significantly change their regulation in Sweden. However, the implementation of the Directive through the Act is aimed at further strengthening the protection of trade secrets under Swedish law.

Lawyers and other party representatives should be mindful that the disclosure of trade secrets learned through court decisions may lead to liability in damages.

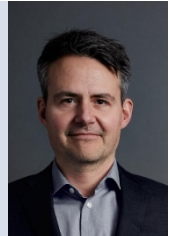
However, it will take some more time for case law to develop under the Act. At the time of writing it can be mentioned that the Swedish Labour Court has in a recent case noted that under the new Act it is possible to present one and the same claim for damages, including both economic and non-economic damages.

This appears to be more a matter of form than of substance, since the Court confirmed that the possibilities to claim damages are roughly the same under the new Act as under the old Law.

Get in touch

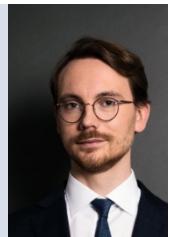
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Clients rate Gabriel Lidman highly and say “What stands out are his excellent negotiation skills.”

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