

Spotlight on Belgium

Is there a draft bill yet?

No official draft bill yet; a preliminary draft bill has been submitted to Council of State for approval.

Any significant deviations from the Directive?

The bill is expected to largely replicate the Directive, but may provide for additional measures such as injunctions.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

No specific guidance yet.

Any specific don'ts when drafting NDAs according to national law case?

The description of confidential information should be specific and precise. NDAs can provide for specific fines and penalty payments.

Are post-contractual confidentiality obligations in employment contracts valid?

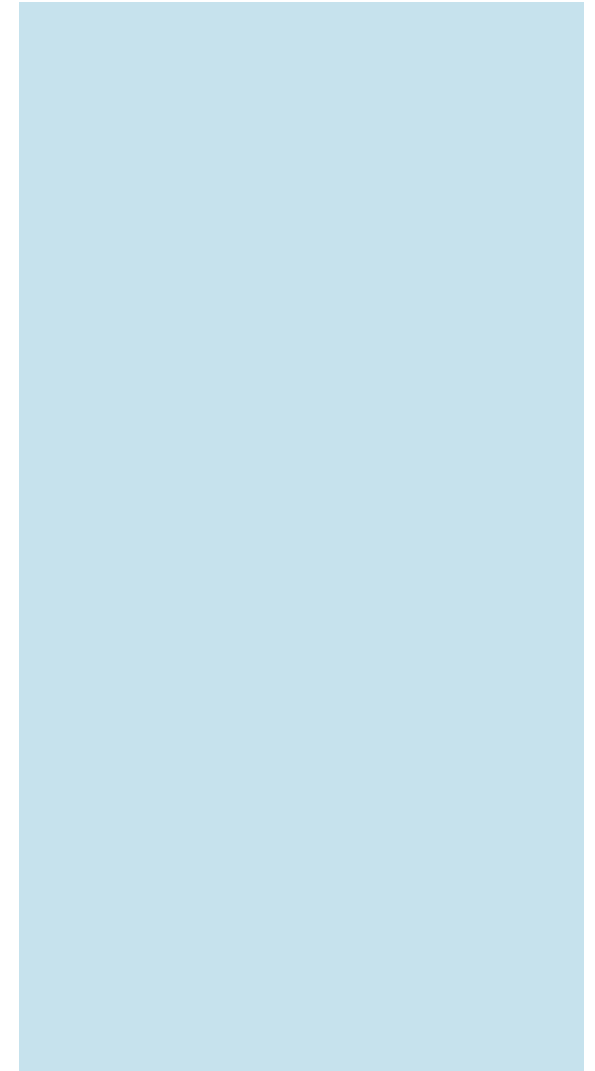
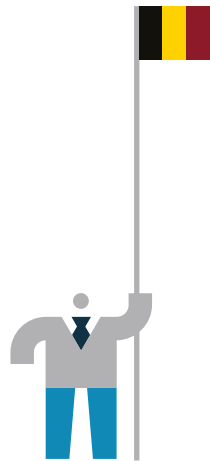
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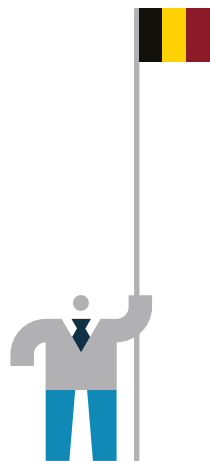
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Is there a draft bill yet?

Belgium has not yet announced an official draft bill. At its meeting of 19 January 2018, the Council of Ministers approved a preliminary draft bill on the protection of trade secrets. The preliminary draft has been submitted to the Council of State for approval. This preliminary proposal is still open for amendments and has not yet reached the status of an official draft bill which will be discussed by the parliament.

The Belgian legislator is expected to announce its official draft bill soon. In the meantime, the draft bill remains officially undisclosed.

The requirements of the Directive will, though, apply in Belgium regardless of specific implementing legislation: Belgian commercial legislation is to be interpreted in conformity with the Directive pending the implementation, based on a catch-all provision regarding unfair market practices.



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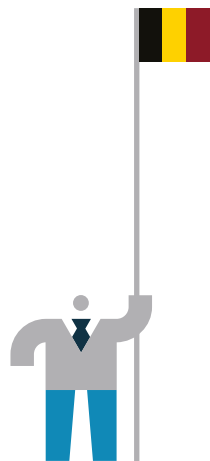
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The preliminary draft bill is expected to largely copy the provisions of the Directive. It may also provide for additional measures going beyond the minimal requirements of the Directive, for instance by allowing the courts to issue orders or injunctions in the event of the future or imminent acquisition of a trade secret. For example, the court could impose corrective and protective measures, such as the destruction of documents containing trade secrets.

Furthermore, the trade secret holder already has the right to compensation for all damages they suffer by the unlawful obtaining, use or disclosure of their trade secrets.

The preliminary draft bill will likely expressly provide for a confidentiality obligation (to be inserted in the Belgian Judicial Code) during the legal proceedings. For example, during a legal procedure between two competitors, confidential documents may need to be submitted to the court to settle the dispute. This confidentiality obligation can be enforced by courts through fines and penalty payments ('astreinte').

Lastly, the Belgian legislator is expected to centralise all actions concerning infringements of trade secrets before the commercial courts of Antwerp, Brussels, Ghent, Liege and Mons, to allow those courts to develop a specialisation in the matter.



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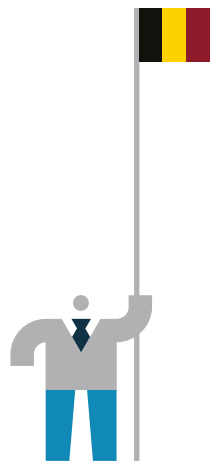
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How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

In the absence of an official bill at this stage, one can only refer to the requirement of 'reasonable steps' to be taken in order to keep the information secret. Such 'steps' remain subject to the discretionary assessment of the court and could take different forms, such as contractual obligations, physical or virtual security mechanisms, or the registration of an idea through an i-depot with the Benelux Office of Intellectual Property.



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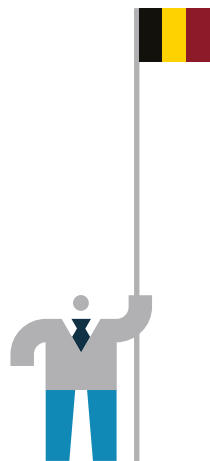
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Any specific don'ts when drafting NDAs according to national law case?

The confidential information should be described in a specific and precise manner, rather than through 'catch-all clauses' that could lead to invalidity of the confidentiality clause.

NDAs should also provide in express terms that the confidentiality of trade secrets which are to be submitted to court or judicial bodies (legally or mandatory upon judicial request) will remain unaffected and shall be respected through use of reasonable measures. Where appropriate, an NDA can also provide for specific fines and penalty payments.



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Are post-contractual confidentiality obligations in employment contracts valid?

Belgian employees are, in principle, already legally obligated to maintain company secrets, business secrets and confidential information, even after the termination of the employment relationship, under their general loyalty duties.

Nevertheless, specific confidentiality clauses are often included in employment contracts. These are only valid if they provide a further explanation or more detailed overview of the confidential information concerned, but they cannot expand, aggravate or render more severe the legal duty of confidentiality. For example, a clause rendering all company information confidential with the exception of information that the employee can demonstrate to be publicly available will be void.

The preliminary draft bill on one hand updates the existing legal duty of confidentiality to the wording of the Trade Secret Directive (without altering previous existing case law on the subject) and on the other hand explicitly confirms the current restraints.

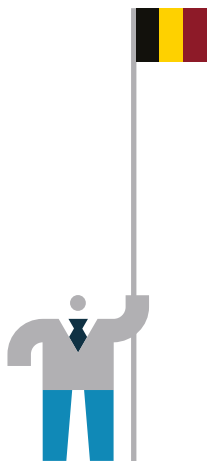
As a consequence, as long as no trade secrets or confidential information are concerned, the duty of confidentiality can never prevent an employee from using their experience and practical knowledge gathered in the course of their previous employment. Any confidentiality clause stipulating the contrary would be aggravating the legal duty of confidentiality and thus invalid.



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Spotlight on France

Is there a draft bill yet?

Yes. The latest version is currently under review and remains open to amendments.

Any significant deviations from the Directive?

The draft bill includes a civil fine against 'dilatory or abusive proceedings', up to 20% of the damages granted to the victim, or €60,000.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The courts will take a case-by-case approach.

Any specific don'ts when drafting NDAs according to national law case?

NDAs must: include a precise definition of the information to be kept confidential; be limited in time as to the confidential nature of the information; and list the people authorised to know that information.

Are post-contractual confidentiality obligations in employment contracts valid?

Yes. Employees are under a general obligation not to disclose confidential information. Specific post-contractual confidentiality obligations that go further are permitted.



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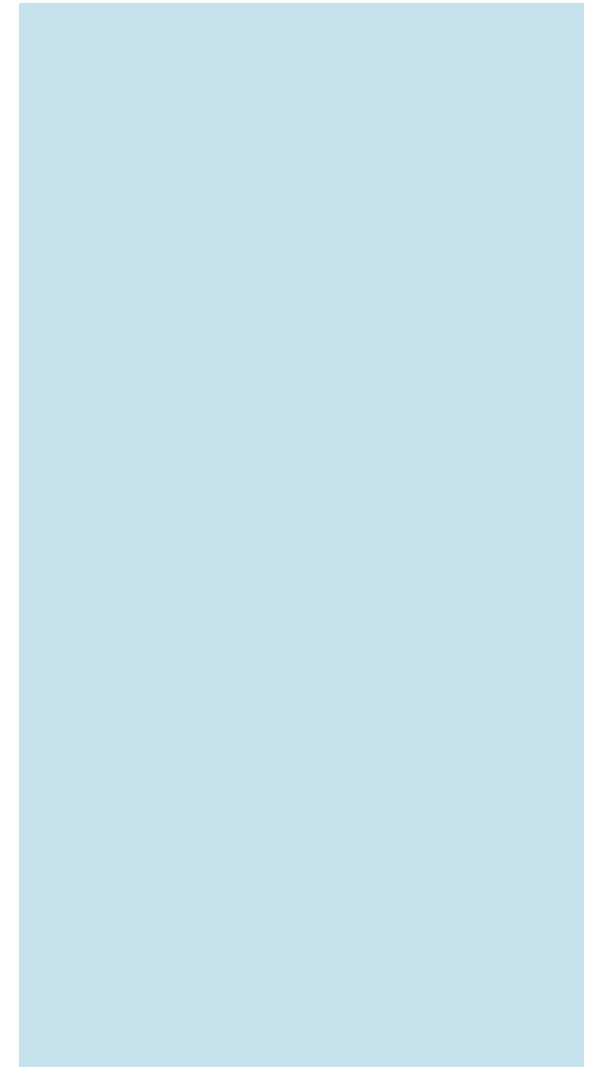
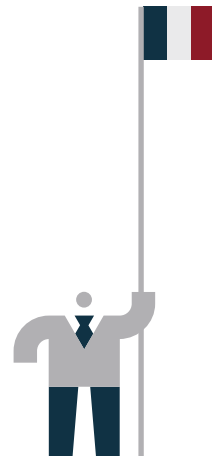
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On 18 March 2018, members of the National Assembly voted for a bill under a fast-track proceeding to transpose the Directive. The Senate then voted an amended version of the bill on 19 April 2018. This latest version is currently under review by a joint committee composed of deputies and senators and is still open for amendments.



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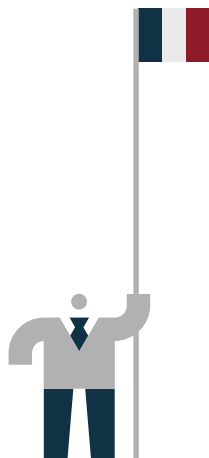
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Any significant deviations from the Directive?

The draft bill is generally an accurate transposition of the Directive. The draft bill also includes a civil fine against 'dilatory or abusive proceedings' to punish those who act in a dilatory or abusive manner on the basis of trade secret, which is not mentioned in the Directive. The fine would be capped at 20% of the amount of the damages granted to the victim, or in the absence of such damages, to a maximum amount of €60,000.

Also, under Article 9 of the Directive, Member States have to implement specific measures to guarantee the protection of confidential information protected under trade secret before the Courts in proceedings directly related to trade secret. The French Parliament has extended these measures to all civil and commercial proceedings and not only those related to trade secrets proceedings.



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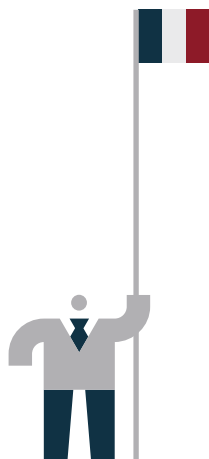
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How does the national legislator construe the requirements to undertake 'reasonable protection measures'?

The National Assembly has transposed the definition of trade secret provided by Article 2 of the Directive as follows: '[...] *it shall be subject to reasonable protection measures by its lawful holder, having regard to the circumstances, to keep it secret, in particular by explicitly stating that the information is confidential*'.

However, the Senate has deleted the part in bold as it could lead people to think that including a label such as '*confidential*' could be sufficient to justify that '*reasonable protection measures*' have been taken. A case-by-case approach by the judge is instead required.



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Any specific don'ts when drafting NDAs according to national case law?

Case law requires that, to be effective, NDAs must:

- include a precise description of the nature/type of information to be kept confidential. Otherwise, the NDA can be set aside by the judge as being too general or imprecise.
- be limited in time regarding the confidential nature of the information, although the time period of the NDA can be unlimited. The confidential nature of the information may, for example, cover the negotiations and a sufficient but reasonable time period after the termination of the NDA.
- list the people authorised to know the confidential information.



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Are post-contractual confidentiality obligations in employment contracts valid?

According to the Labour Code, employees have a general obligation of discretion that is applicable both during and after the employment relationship (even if the employment contract does not provide for any particular obligation in that regard). This obligation prohibits employees from disclosing, to third parties, information that they may become aware of during the performance of their duties and whose disclosure could harm the company.

In addition to this general obligation of discretion, employment contracts can also provide for specific confidentiality obligations that emphasise, on clearly identified topics, a requirement for the employee to keep that information an absolute secret (for example, particular projects or techniques on which the employee is working). These confidentiality obligations can, as with the general obligation of discretion, validly state that they will continue to apply after the termination of the employment contract.

Therefore, if a former employee breaches such confidentiality obligation, they will be liable for the damages suffered by the company because of the disclosure of the information protected by the confidentiality clause of their employment contract.



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Spotlight on Germany

Is there a draft bill yet?

In mid-April the German Federal Ministry of Justice and Consumer Protection published a draft bill ('Referentenentwurf') implementing the Trade Secrets Directive.

Any significant deviations from the Directive?

Along with civil law protection, the draft bill will provide for criminal offences, and will give the trade secret holder a right to certain information about how their trade secrets have been used.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The legislation implements the definition in the Directive, to be interpreted by the courts on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Do not use catch-all clauses. Define trade secrets as precisely as possible. Be aware that penalty clauses may be invalid when used in general terms and conditions.

Are post-contractual confidentiality obligations in employment contracts valid?

In many cases, specific post-contractual confidentiality obligations in employment contracts are invalid due to their broad and vague wording. However, former employees can be obliged to keep a trade secret confidential in certain circumstances



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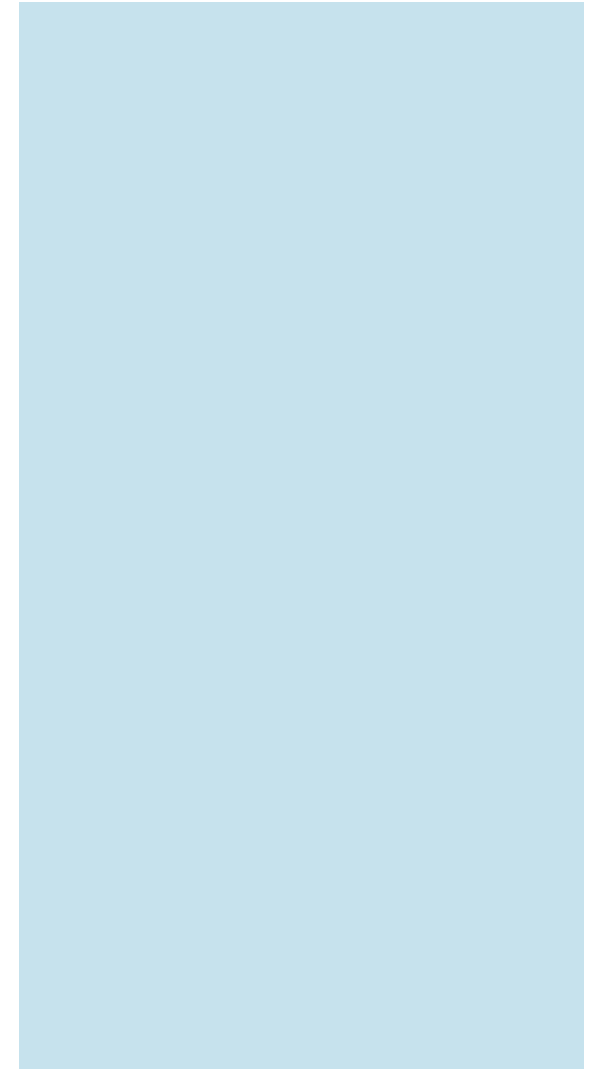
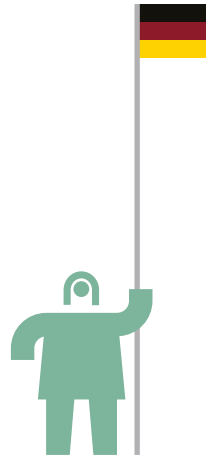
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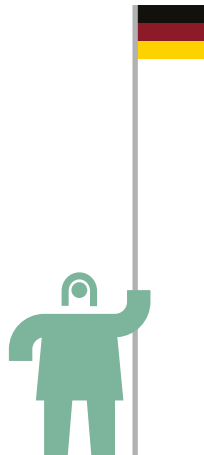
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The legislative process has not been completed yet. However, on 19 April 2018, the General Federal Ministry of Justice and Consumer Protection published a draft bill of the German Trade Secrets Act (Geschäftsgeheimnisgesetz). Before the draft was officially made available, it was – ironically – leaked to the press. The current draft is still open for amendments by the German government before it will be introduced to the parliament. If not implemented within the time limit, the requirements of the Directive will apply in Germany by way of an interpretation in conformity with the Directive of the existing laws.

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Any significant deviations from the Directive?

The draft German legislation largely complies with the provisions of the Directive. However, the draft bill amends further provisions which are not part of the Directive. In addition to the civil law protection of trade secrets, the draft bill contains provisions for criminal offences. The draft bill also includes the right to information regarding the origin and distribution channel of infringing products for the trade secret holder against the infringer and stipulates that the owner of a company whose employee has committed an offence should also be held liable.



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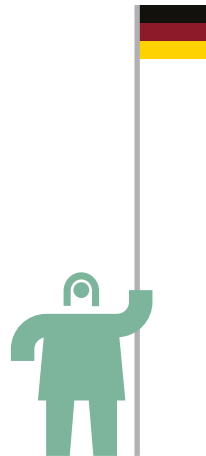
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As it stands, the legislation would implement the Directive's definition of a trade secret. The explanatory memorandum of the draft bill refers to a triad of technical, organisational and contractual measures. In accordance with the explanatory memorandum of the draft bill, the 'reasonableness' should be interpreted by the courts on a case-by-case basis.



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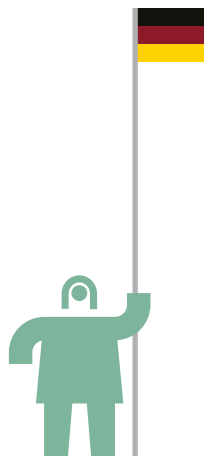
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Any specific don'ts when drafting NDAs according to national case law?

Do not use so-called 'catch-all clauses' that are widely used in practice, as such comprehensive and broad clauses are often invalid. Such clauses would very likely not meet the requirement to undertake 'reasonable' contractual protection measures.

Trade secrets should therefore be defined as precisely as possible, for example by way of project-related NDAs. Also, keep in mind that penalty clauses may be invalid when used in general terms and conditions.



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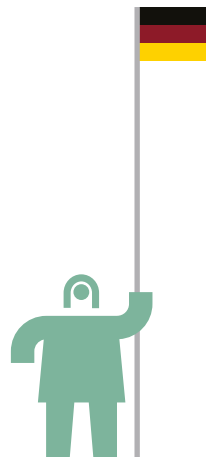
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Spotlight on Germany

Is there a draft bill yet?

In mid-April the German Federal Ministry of Justice and Consumer Protection published a draft bill ('Referentenentwurf') implementing the Trade Secrets Directive.

Any significant deviations from the Directive?

Along with civil law protection, the draft bill will provide for criminal offences, and will give the trade secret holder a right to certain information about how their trade secrets have been used.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The legislation implements the definition in the Directive, to be interpreted by the courts on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Do not use catch-all clauses. Define trade secrets as precisely as possible. Be aware that penalty clauses may be invalid when used in general terms and conditions.

Are post-contractual confidentiality obligations in employment contracts valid?

In many cases, specific post-contractual confidentiality obligations in employment contracts are invalid due to their broad and vague wording. However, former employees can be obliged to keep a trade secret confidential in certain circumstances



Are post-contractual confidentiality obligations in employment contracts valid?

In many cases post-contractual confidentiality obligations in employment contracts are invalid due to their broad and vague wording. Such clauses would not be suitable to contribute to effective and reasonable know-how protection. Nevertheless, employees in Germany are, in principle, obligated to maintain a trade secret even after the termination of the employment relationship due to their general loyalty duties. The requirement to maintain confidentiality does not mean, however, that the former employee cannot use the information which they remember. Generally speaking, in Germany, post-contractual confidentiality obligations must be distinguished from non-compete obligations. The latter are only valid if certain requirements are met, such as a two year limitation and a compensation payment for non-competition. Experience and practical knowledge ('Erfahrungswissen') gathered in the course of the employment can be freely used by the employee and is not covered by confidentiality obligations.



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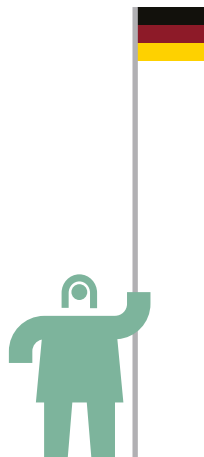
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Spotlight on Italy

Is there a draft bill yet?

Yes. On 8 May 2018 the Italian government passed a Legislative Decree implementing the Directive, but it is presently unclear when it will come into force.

Any significant deviations from the Directive?

No major deviations, but the Italian Legislative Decree introduces some specificities, such as harsher punishments for unlawful disclosure of trade secrets through the use of IT solutions.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The requirement to undertake 'reasonable protection measures' already existed under the regime preceding new Legislative Decree, and is interpreted by the courts on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Avoid general and vague language and try to define what falls within the definition of 'trade secrets' as clearly and precisely as you can.

Are post-contractual confidentiality obligations in employment contracts valid?

Post-contractual confidentiality obligations in employment contracts are valid, in addition to a general obligation of loyalty to the employer.



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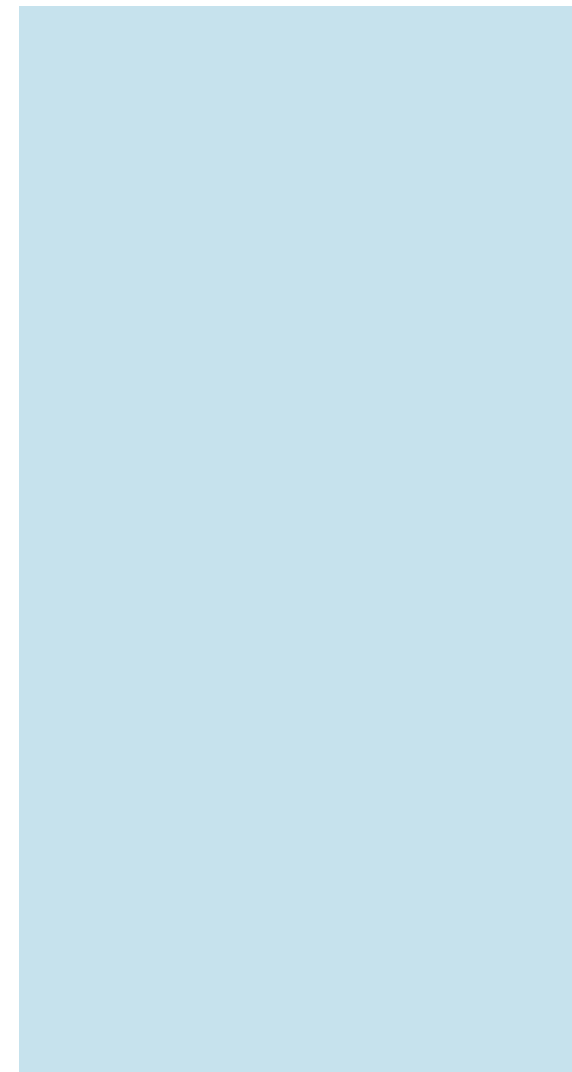
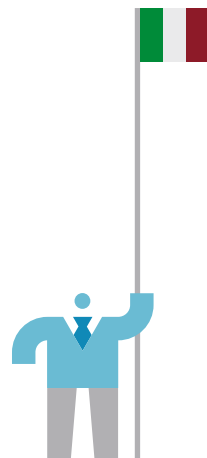
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On 8 May 2018, the Italian government passed a Legislative Decree implementing the Directive. The bill has already been approved by the government, but has not yet been published in the Official Journal. It is, therefore, presently unclear when the bill will enter into force.



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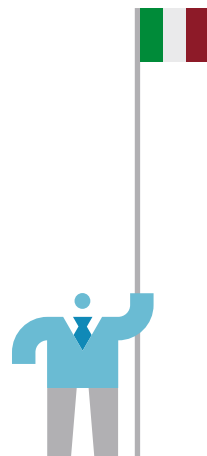
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Any significant deviations from the Directive?

The Italian regulatory framework on trade secrets presents no major deviations from the Directive. However, within the legal framework provided by the Directive, the Italian Legislative Decree introduced some specificities.

In particular, the unlawful disclosure of trade secrets which, under the regime preceding the new regulation, already represented a criminal offence, is now punished more severely where a trade secret is violated through the use of IT solutions.

The Italian bill also provides for a five year limitation period, which is a reduction from the 10 years applicable prior to the coming into effect of the new regulation.



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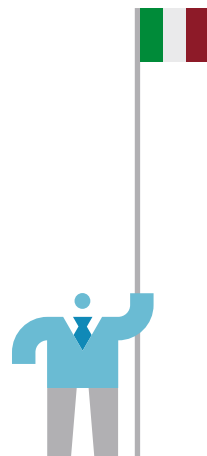
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The requirement to undertake 'reasonable protection measures' already existed under the regime preceding new Legislative Decree. So far, the courts have taken the view that the meaning and practical implications of this requirement must be established on a case-by-case basis. Nonetheless, as a general rule, courts will consider relevant those circumstances showing the employer's conduct as incompatible with the employer's willingness to disclose the relevant information.



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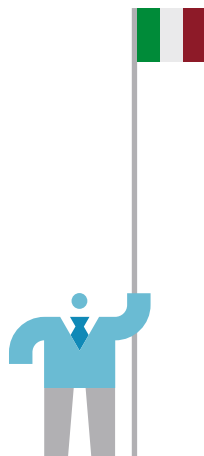
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Any specific don'ts when drafting NDAs according to national law case?

Avoid general and vague language and try to define what falls within the definition of 'trade secrets' as clearly and precisely as you can. You should also avoid 'catch-all clauses', which may be found invalid or unsuitable for the purposes of ensuring the relevant information qualifies as 'confidential information' and, therefore, enjoys the protection reserved to it.

Try to clarify what represents a trade secret, and therefore cannot be used nor disclosed by the employee, as opposed to what constitutes an employee's practical knowledge, which the employee shall remain free to use.



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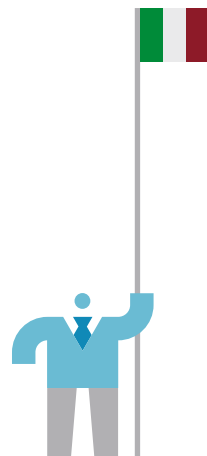
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Post-contractual confidentiality obligations in employment contracts are valid and employees are, in principle, obligated to keep trade secrets confidential even in the absence of specific post-contractual confidentiality obligations in the employment agreement. This is as a consequence of their general loyalty obligation towards their employer.

However, any such contractual confidentiality obligations shall not cover the practical knowledge an employee has gained in the course of the employment, which the former employee will be able to continue to use even after the expiry or termination of the employment agreement.



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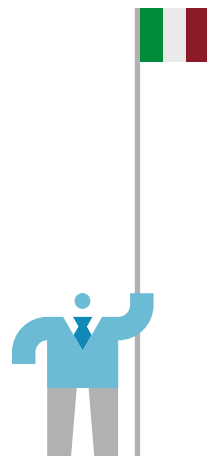
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Spotlight on Spain

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How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

Any specific don'ts when drafting NDAs according to national law case?

Are post-contractual confidentiality obligations in employment contracts valid?

Yes.

No significant deviations in the current draft bill, but some deviations are expected by the time the legislation is finalised.

The draft bill does not include any specific and detailed wording on this requirement.

It is not possible to agree to indefinite obligations. Such clauses may be considered null and void.

Yes, although their enforceability is limited, in particular if the employee was not a director or a relevant individual in the company or if the clauses applied for an indefinite term.



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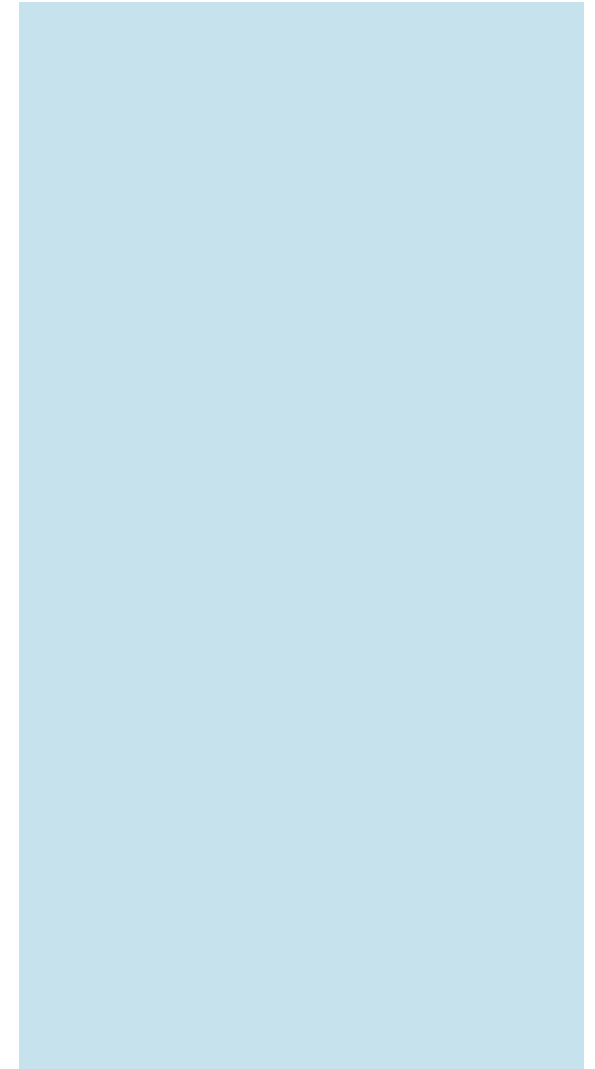
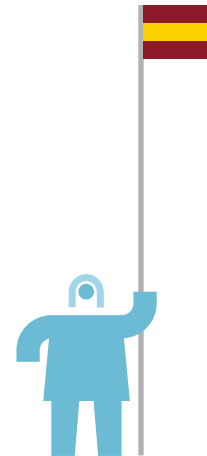
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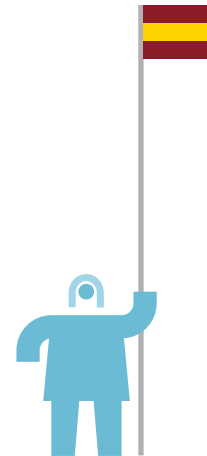
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Any significant deviations from the Directive?

Considering the time constraints and the delay in publishing the first draft bill, no significant deviations are currently included. However, after the public audience period, where relevant stakeholders are entitled to provide comments, some deviations are foreseeable.

In particular, the legislative technique is quite complex, bearing in mind that this draft bill may impact various laws. In addition, certain stakeholders have recommended not enacting a specific law, but, instead, directly incorporating amendments in the Unfair Competition Act and the Civil Procedural law.



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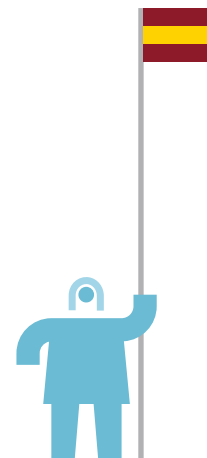
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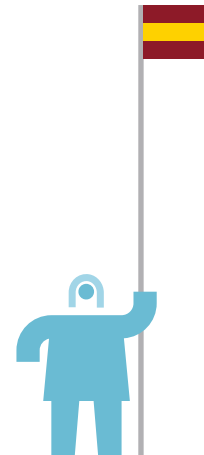
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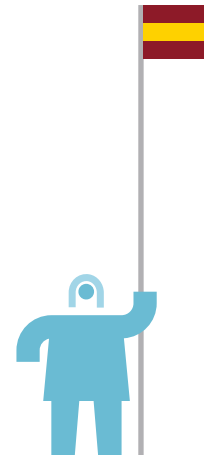
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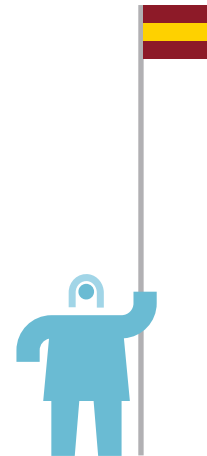
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Spotlight on Sweden

Is there a draft bill yet?

Yes. The bill will be in force from 1 July 2018.

Any significant deviations from the Directive?

No major deviations, but there are some differences worth mentioning.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Swedish bill provides that undertaking reasonable protection measures must involve active measures. The expected level of active measure will be assessed on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Include detailed definitions of the kind of information protected; do not include unfair contract terms between a company and an individual; and if a penalty or damages clauses is included, define the damages that would be covered.

Are post-contractual confidentiality obligations in employment contracts valid?

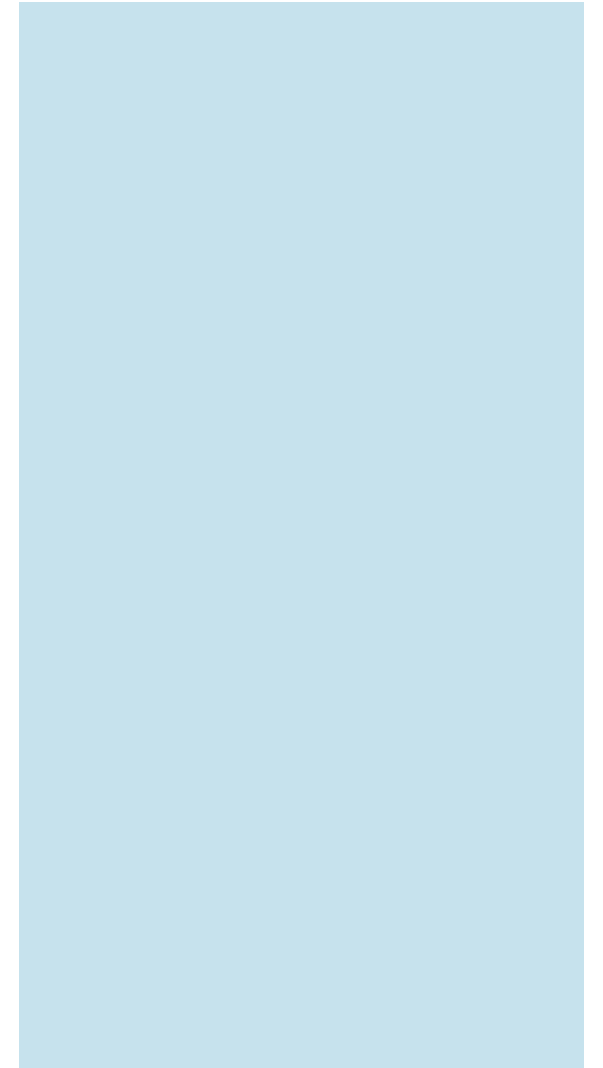
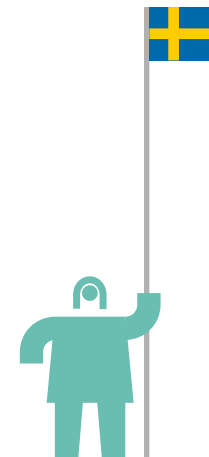
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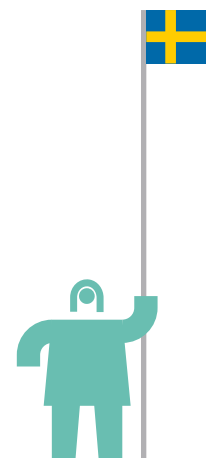
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On 21 March 2018, the Ministry of Justice announced an official bill through which the new Trade Secrets Directive will be implemented in Sweden. The bill will be in force from 1 July 2018.

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Any significant deviations from the Directive?

In order to implement the Directive in Sweden, the current Swedish Act on trade secrets needs to be amended. The new bill will replace the current Act in its entirety, although it retains the structure and terminology of the current Act, rather than the Directive. The bill contains no major deviations from the Directive, but there are some differences that are worth mentioning.

Firstly, the definition of the type of information that constitutes a trade secret is more specific than in the Trade Secret Directive. The Swedish legislation requires that: (i) a trade secret refers to a business or operating relationship in a business (*'affärs- eller driftförhållande i en näringsidkares rörelse'*); and (ii) the disclosure of information is meant to cause harm to the company to which the information relates.

Secondly, the Trade Secrets Directive states that the Member State shall prohibit the infringer from using or disclosing the trade secret. The Swedish bill expands the prohibition to also include future acquisitions of trade secrets.

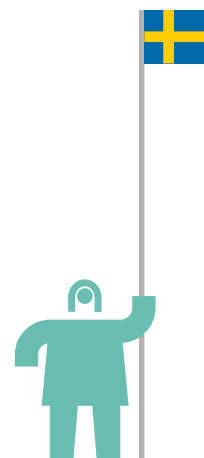
Thirdly, the Swedish bill provides that a trade secret which is revealed in court will only be protected if a further disclosure would lead to considerable damage.



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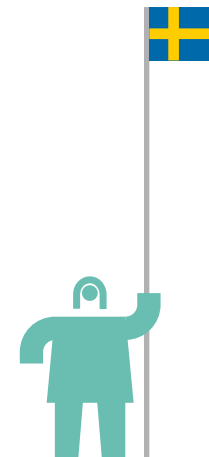
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Any specific don'ts when drafting NDAs according to national law case?

Firstly, it is important to include detailed definitions on what kind of information is protected by the confidentiality obligations, as information not clearly defined as confidential will not be protected by the NDA.

Secondly, it is important not to include unfair contract terms between a company and an individual, as such clauses would most likely be held invalid by a court. Unfair contract terms between two companies are not as tightly controlled.

Lastly, if a penalty clause or damages provision is included in the NDA, it is important to define damages which would be covered.

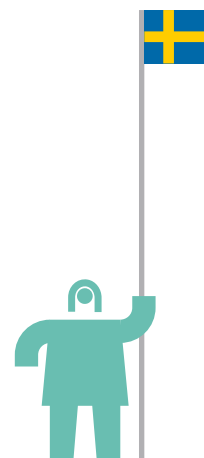
For example, a ruling from the Swedish Supreme Court held in one case that a penalty clause was an exclusive contract provision and limited to a certain amount, in which case a complete damage compensation could not be ordered by the Supreme Court.



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Spotlight on Sweden

Is there a draft bill yet?

Yes. The bill will be in force from 1 July 2018.

Any significant deviations from the Directive?

No major deviations, but there are some differences worth mentioning.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Swedish bill provides that undertaking reasonable protection measures must involve active measures. The expected level of active measure will be assessed on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Include detailed definitions of the kind of information protected; do not include unfair contract terms between a company and an individual; and if a penalty or damages clauses is included, define the damages that would be covered.

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Yes, so long as the employer is not a governmental organisation.

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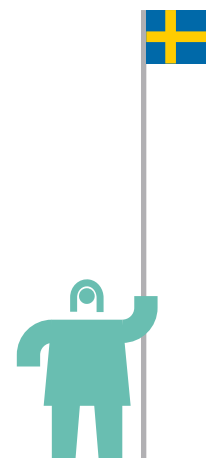
It is a general principle of employment law that an employee is discharged from the obligations of loyalty when the employment terminates. However, if the employee has commenced the employment only for the purpose of accessing trade secrets, the employee could be held liable for infringement. The employee and employer are also free to enter into an individual NDA, as long as the employer is not a governmental organisation.



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Spotlight on UK

Is there a draft bill yet?

Yes. The Trade Secrets (Enforcement, etc) Regulations are in force from 9 June 2018.

Any significant deviations from the Directive?

No. The Regulations are confined to areas where there may be gaps in the current UK legal framework, such as in relation to limitation periods, preservation of confidentiality and available remedies.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Regulations do not bring this requirement into the UK law of breach of confidence. A claimant will only need to satisfy this requirement if it wants to rely on specific provisions concerning limitation periods, preservation of confidentiality and available remedies.

Any specific don'ts when drafting NDAs according to national law case?

Don't apply the NDA to information that is not confidential. If an NDA is drafted too widely, there may be a risk that a court will not uphold the agreement, even for genuinely confidential information.

Are post-contractual confidentiality obligations in employment contracts valid?

Yes, but only to the extent that the confidentiality obligations protect particularly important and valuable confidential information.



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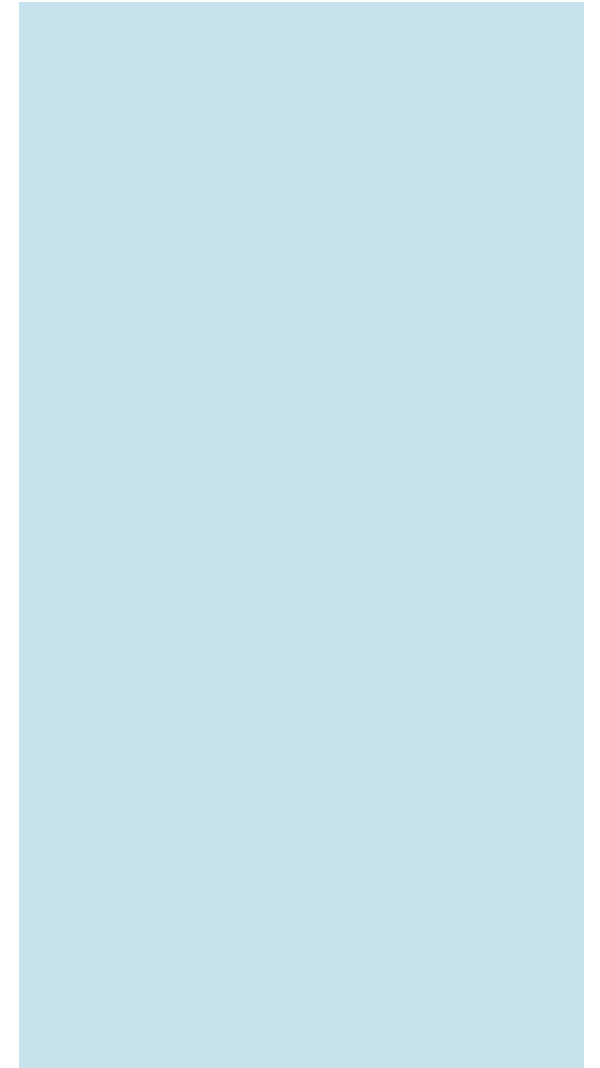
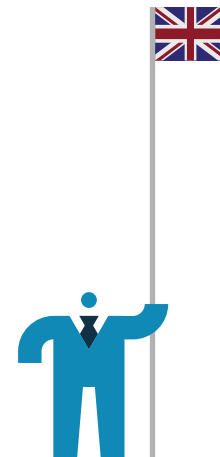
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Is there a draft bill yet?

Yes. The final version of the Trade Secrets (Enforcement, etc) Regulations was laid before Parliament on 18 May 2018 and comes into force on the 9 June 2018 implementation deadline.



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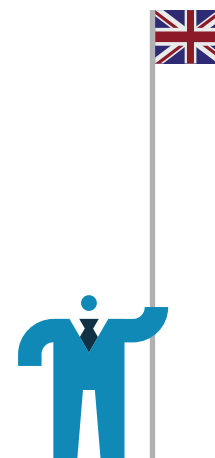
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Any significant deviations from the Directive?

The UK government's view is that UK law already protects and allows for the effective enforcement of trade secrets – mostly through the common law (case law) of breach of confidence and by contract. The Trade Secrets (Enforcement, etc) Regulations do not replicate many of the provisions of the Directive, in particular the provisions in Chapter II and Articles 6, 7 and 16, on the basis that these provisions are already part of UK law. It also explicitly states that whether the acquisition, use or disclosure of a trade secret is unlawful is determined by reference to existing UK law principles of the law of confidence.

The Regulations are therefore confined to areas where there may be gaps in the current UK legal framework, in particular the provisions of the Directive concerning limitation periods, preservation of confidentiality and available remedies.



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How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Regulations do not bring this requirement into the UK law of breach of confidence. A claimant will only need to satisfy this requirement if it wants to rely on the specific provisions in the Regulations (taken from the Directive) concerning limitation periods, preservation of confidentiality and available remedies, i.e. because these provisions are more favourable than under pre-existing UK law.



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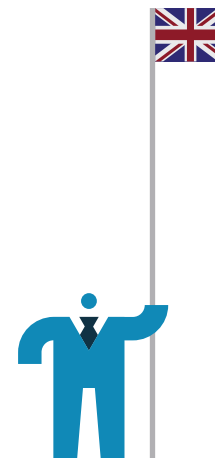
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In order to be protected as confidential information, the information concerned must have 'the necessary quality of confidence'. If an NDA is drafted too widely, so that it covers all information provided, for example, then there may be a risk that a court will not uphold the agreement, even for genuinely confidential information.



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Confusingly, UK courts have in the past referred to this particularly important and valuable confidential information as 'trade secrets', but in this context the expression probably covers a much narrower class of information than the definition of 'trade secrets' in the Directive.

The UK courts have also held that ex-employees have a continuing duty to protect 'trade secrets' (in the traditional UK meaning), even if there is no express obligation for them to do so in their employment contract.



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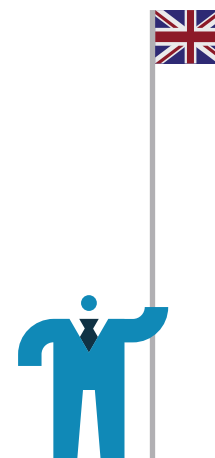
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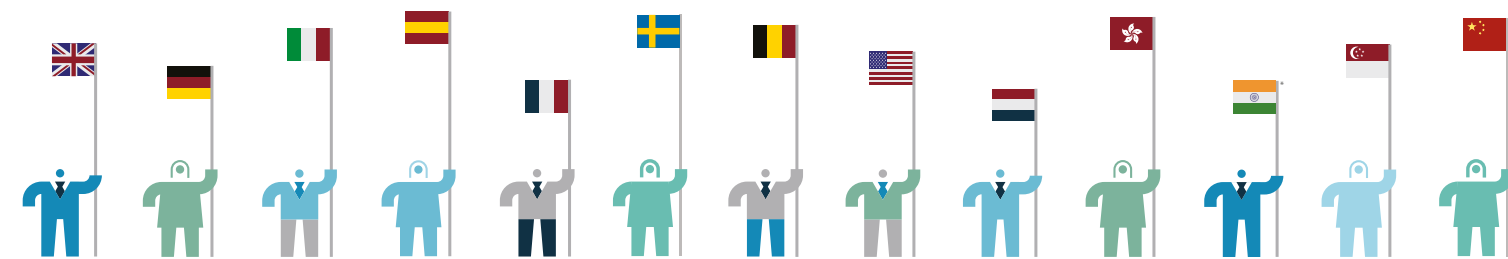
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