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EU Trade Secrets Directive: Will Blowing the Whistle Still Be Possible in Practice?

Fadi Sfeir, associate at French law firm Capstan, examines the impact of the New EU Trade Secrets Directive on Whistleblowing.

European Union Member States adopted a Directive on the protection of trade secrets on 27 May 2016.

Although the Directive was approved by a large majority in the European Parliament, and then unanimously by the Member States, the public debate revealed many concerns. Petitions were drafted and journalists investigated what many believed to be a sword of Damocles hanging over their sources and the whistleblowers.

Some critics claim that exposures such as the Panama Papers would have been impossible if the Directive had already been in effect. Some politicians alleged, for example, that an employee could not disclose to the public a crack in a nuclear reactor without facing repercussions.

As always, the legislator – whether European or national – has to find a balance between opposing interests. On the one hand, companies have a right to have their trade secrets protected – simply because this is what gives them a competitive advantage on the market –, and on the other hand, the public has a right to be informed.
Not all EU Member States have introduced laws offering general protection for whistleblowers.

For example, in France, laws exists to protect those who blow the whistle on specific issues, such as bullying or sexual harassment at work, health and safety issues, bad treatment in hospitals, etc. and a proposed bill will protect those who report violations of European financial regulations, but there is no general framework offering protection. A Member of the National Assembly recently filed a proposed bill on the matter but this has yet to be put on the Assembly's schedule.

Likewise, in Italy there is currently no general protection for whistleblowers but only a specific law for public sector employees. However, coinciding with the adoption of the EU Directive the national Parliament is debating a bill providing ad-hoc protection for public and private sector employees who report unlawful conduct which they are aware of due to their employment. The draft bill provides that the whistleblower (employee) will not be penalized, demoted, dismissed or discriminated against due to a report being filed and the burden of proof justifying any such decision will lie with the employer. The intention seems to be to guarantee social protection to individuals acting in the community's interest. The draft bill will now have to deal with those principles contained in the Directive which have not yet been implemented.

In Sweden also, there is no legal framework in place regarding the protection of whistleblowers at the moment although a legislative proposal is being drafted. The main purpose of the proposal will be to prevent the employer from retaliation in case an employee utilizes his/her right to blow the whistle on abuse.

The European Convention of Human Rights protects whistleblowers, to some extent, thanks to its article 10 which protects the freedom of expression and to its broad interpretation by the European Court of Human Rights.
For the purpose of the EU Directive, trade secret means information which meets the following requirements: a) it 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) it has commercial value because it is secret; c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

The European Parliament justified the need to protect trade secrets based on the trade secrets' value for businesses which is as important as other forms of intellectual property rights.

The Parliament also held that the exercise of the right to freedom of expression and information, as reflected in the Charter of Fundamental Rights of the European Union must be protected.

Because of the criticism levelled at the proposed text, the Parliament introduced safeguards by providing several exceptions to the protection of trade secrets.

Firstly, when trade secrets are revealed for exercising the right to freedom of expression and information, including respect for the freedom and pluralism of the media.

Secondly, for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest – a notion that is important but not defined by the Directive, which may discourage whistleblowers.

Thirdly, the disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions.

These safeguards have not fully satisfied the critics however as some hold that the text inadequately protects whistleblowers who are exempted from sanctions in cases that are too limited. Further criticism relates to the fact that, whistleblowers revealing legal but morally questionable behaviour may not be protected as it is not clear whether this would qualify under the “public interest” test described above.

The President of the Ecologist group in the Parliament, Philippe Lamberts, “regretted that the burden of proof is on the whistleblowers and not on the companies”, which, according to some critics, will make it impossible, in practice, to blow the whistle without taking important risks.

Member States will have two years to transpose the Directive into national law, from its enactment. This will require some work as the discrepancies between national legislation and the text of the new Directive are significant.

In Germany, for instance, for something to be regarded as a trade secret there is no prerequisite that reasonable efforts have been made to keep the information concerned confidential. As the Directive holds the existence of such non-disclosure measures as one of the three criteria for a trade secret, employers now have to check their non-disclosure regulations and measures. Employers will no longer be able to allege that all documentation internal to the company is a trade secret.
They must also determine how to deal with trade secrets and trade secrets holders especially with regard to the non-disclosure measures during business trips and in cases where trade secret holders are leaving the company.

Clearly, according to its content and the procedures and remedies it provides for, the Directive should not prevent individuals from blowing the whistle. Thus, it is assumed that the German parliament will expressly forbid employers from retaliating against employees who blew the whistle in good faith.

In Sweden, the Act on the Protection of Trade Secrets prohibits any use or disclosure of a trade secret, which could potentially harm the employer's business. The Swedish definition of "trade secret" is very extensive and may include, for example, information about customers, contracts and marketing strategies.

The Directive defines the meaning of an "unlawful acquisition" in a clearer way than the Swedish legislation, something which will impact the employers' possibilities to take legal action. It is unknown, at this stage, whether there will be conflicts between the existing legal framework and the new EU Directive.

In the UK, the whistleblowing exemption in the Directive differs from national whistleblowing protections for employees in two important respects. Firstly, while the Directive appears to require whistleblowers to prove the wrongdoing or misconduct, in the UK whistleblowers need only have a “reasonable belief” that it is true (a lower standard). However, it is unlikely that the Directive’s objective test of wrongdoing will be transposed into UK law.

Secondly, unlike the Directive, whistleblowing law in the UK requires whistleblowers to show that their belief that the disclosure was in the public interest is “reasonable”. Without this requirement the Directive appears to broaden the scope for whistleblowers to defend disclosures of trade secrets somewhat.

The requirement for disclosures to be in the “public interest” was introduced into UK whistleblowing law in 2013 and has proved contentious. Cases have interpreted it narrowly, so that disclosures in respect of limited classes of individuals may still be in the public interest. It is likely that there will be similar difficulties in the courts interpreting the “general public interest” requirement in the Directive.

The Ukrainian concept of trade secrets protection is similar to that prescribed by the EU Directive. The “trade secret” definition is identical to that of the Directive but there are certain exemptions (e.g. constitutive and tax documents are not protected as trade secrets).

In Ukraine, the unlawful collection and disclosure of trade secrets are criminalized and punished, provided that such actions have caused substantial damage to the trade secret owner. Companies may sue wrongdoers within a

standard three-year limitation period if an unlawful trade secret collection or disclosure has caused damage.
Moreover, the draft Labor Code, which is expected to be adopted, envisages that a trade secret disclosure will be grounds for dismissal provided an employee has signed an NDA.

The EU-Ukraine Association Agreement does not require the transposition of the EU Directive into Ukrainian law as the Directive did not exist at the time the Agreement was drafted.

The European Union tried to find a balance which may be criticized but that debate has ended and the text has now been adopted.

It will now be up to national Parliaments to implement the safeguards they see fit for a very complex subject, at the crossroads between freedom of expression and the necessary desire to safeguard corporations' competitiveness in the global market.

The article features insight from Oksana Voynarovska, partner at Ukrainian law firm Vasil Kisil & Partners, Alexander Ulrich, partner at German law firm Kliemt & Vollstädt, Petter Wenehult, associate at Swedish law firm ELMZELL Advokatbyrå, Emanuela Nespoli, partner at Italian law firm Toffoletto De Luca Tamajo e Soci, and Nicholas Hadaway, partner at UK law firm Lewis Silkin.

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