

Business Confidentiality Measures Strengthened at EU Level

*In anticipation of infringement of European companies's trade secrets, the European institutions have planned new legislation to protect themselves. Thus, the **directive (EU) 2016/943 8 June 2016** on "protection of know-how and undisclosed information (trade secrets) against illegal acquisition, use, and disclosure", was adopted.*

This future directive will offer companies uniform and coherent regulations to **better protect their company know-how and confidential business information** against theft and illicit use. It will **harmonize the rules** the Member States currently have in place.



When is it effective?

The directive will most probably be transposed into law in France and other European countries this year, otherwise it will be no later than June 9, 2018.

What information is protected?

To be classified as a "business secret" information must meet all of the following conditions (art. 2):

- ▶ **Secret:** not known to people in the media / not accessible;
- ▶ **Commercial value** because they are secret;
- ▶ **Reasonable steps** to keep information secret.

What constitutes illegal or legal use?

Illegal use (art.4):

- ▶ Realization through unauthorized access, appropriation or copying of an electronic object, material or file containing the said business secret;
- ▶ Behaviours considered "contrary to honest practices in commercial matters";
- ▶ Acts committed by a person in an unlawful manner, in violation of a confidentiality agreement or other binding obligation (non-disclosure, contractual ...).

Legal use (art.3) and exemptions (art.5):

- ▶ Obtaining business secrets through discovery or independent creation;
- ▶ Result of observation, disassembly or testing of a product obtained lawfully;
- ▶ Practices "in accordance with honest practices in commercial matters";
- ▶ The protection of business secrecy cannot affect the exercise of the right to freedom of expression and information, the disclosure of a fault provided that the defendant has acted with the aim of protecting the interest Public interest, to freedom of labour and to the protection of a legitimate interest.

Legal Measures in the European framework:

First, a limitation period for applications and actions **may not exceed 6 years**.

Provisional measures may be ordered by the judicial authority such as the cessation or prohibition of the use / disclosure of secret business information on a provisional basis, or **their destruction** in the event of a proven breach of confidentiality.

The offender may be sentenced to damages and interest intended to repair the damage suffered, and the conviction decision can be published and disseminated.

Trade secrets are currently partially¹ protected in France by:

The Code of Intellectual Property (CIP):

- ▶ Information protected by **copyright**;
- ▶ Database produced (if it takes the form of a technical innovation) preserved by the **right to prohibit its extraction** and / or reuse;
- ▶ Manufacturing secrets, if revealed, then punished by **article L621-1 of CIP**;
- ▶ Business secrets protected by against illegal acquisition / disclosure by a third party under **the TRIPS agreement²**.

Penal Code:

- ▶ Possible basis for legal action: breach of **professional secrecy**, secrecy of correspondence, theft, breach of trust.

Other:

- ▶ **Unfair competition** activity, under specified conditions;
- ▶ Information protected by **contracts** (contracts concerning disclosure of company know-how, confidentiality clauses / contracts).

Primexis, a leading independent Accounting and Consulting firm who has assisted French and International groups and subsidiaries for over 30 years, assists you in securing your business secrets and protecting you against their illegal acquisition, and use or disclosure by a third part



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- ▶ [Directive \(UE\) 2016/943 of 8 June 2016](#)
- ▶ [BARBIERE. C, "Journalists and whistle-blowers protected under new Trade Secrets Directive", EurActiv.fr, 12/01/2016](#)
- ▶ ["Whistle-blowers under threat? MEPs agree new rules on 'trade secrets' ", Euronews, 14/04/2016](#)

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¹ The project of Law n°2447 for business growth, called "Loi Macron", inserted a section on the "trade secrets" protection which has not been realised.

² Agreement on the Rights of Intellectual property as applied to business, see [here](#)