

The Trade Secrets Directive—Denmark

By *Martin Dræbye Gantzhorn and Dan Bjerg Geary*

1. Trade Secrets Protection: Legal Framework

The protection of trade secrets is governed by both the Danish Act on Trade Secrets and the Danish Criminal Code. The Danish Act on Trade Secrets entered into force on 9 June 2018 and is an implementation of the Trade Secret Directive. The protection of trade secrets under the Danish Criminal Code is found in Section 263 and Section 264.

2. Definition

The definition of trade secrets under Section 2 of the Danish Act on Trade Secrets is a direct transposition of Article 2 of the Trade Secrets Directive and is consistent with the definition in Article 39 of the TRIPS Agreement.

3. Lawful Acts

According to Section 3(1) of the Danish Act on Trade Secrets, the acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:

- (1) independent discovery or creation;
- (2) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;
- (3) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;
- (4) any other practice which, under the circumstances, is in conformity with honest commercial practices.

In addition, the acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law, cf. Section 3(2) of the Danish Act on Trade Secrets.

4. Unlawful Acts

According to Section 4(1) of the Danish Act on Trade Secrets, the acquisition of a trade secret, without the consent of the trade secret holder, shall be considered unlawful, whenever carried out by:

- (1) unauthorized access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the

control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;

- (2) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

According to Section 4(2) of the Danish Act on Trade Secrets, the use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:

- (1) having acquired the trade secret unlawfully;
- (2) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;
- (3) being in breach of a contractual or any other duty to limit the use of the trade secret.

The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought to have known, under the circumstances, that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of Section 4(2) of the Act, cf. Section 4(3) of the Danish Act on Trade Secrets.

The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully within the meaning of Section 4(2) of the Act, cf. Section 4(3) of the Danish Act on Trade Secrets.

5. Exceptions

Pursuant to Section 5 of the Danish Act on Trade Secrets, an application for the measures, procedures and remedies provided for in the Danish Act on Trade Secrets shall be dismissed where the alleged acquisition, use or disclosure of the trade secret was carried in any of the following cases:

■ Martin Dræbye Gantzhorn,
Bech-Bruun Law Firm,
Partner,
Copenhagen, Denmark
E-mail: mdg@bechbruun.com

■ Dan Bjerg Geary,
Bech-Bruun Law Firm,
Partner,
Aarhus, Denmark
E-mail: dbg@bechbruun.com

- (1) for exercising the right to freedom of expression and information, including respect for the freedom and pluralism of the media;
- (2) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;
- (3) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise.

6. Enforcement: Measures Procedures and Remedies

The Danish Maritime and Commercial High Court is the competent court for the enforcement of trade secrets.

Where a judicial decision taken on the merits of the case finds that there has been unlawful acquisition, use or disclosure of a trade secret, the court may, at the request of the applicant, order one or more of the following measures against the infringer:

- (1) the cessation of or, as the case may be, an injunction against the use or disclosure of the trade secret;
- (2) the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes;
- (3) recall of the infringing goods from the market;
- (4) depriving the infringing goods of their infringing quality;
- (5) destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided that the withdrawal does not undermine the protection of the trade secret in question;
- (6) the destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or, where appropriate, the delivery up to the applicant of all or part of those documents, objects, materials, substances or electronic files.

When deciding on the granting or rejection of one or more of the measures described above, the court is required to take into account the specific circumstances of the case, including, where appropriate:

- (1) the value and other specific features of the trade secret;
- (2) the measures taken to protect the trade secret;
- (3) the conduct of the respondent in acquiring, using or disclosing the trade secret;
- (4) the impact of the unlawful use or disclosure of the trade secret;
- (5) the legitimate interests of the parties and the impact which the granting or rejection of the

measures could have on the parties;

- (6) the legitimate interests of third parties;
- (7) the public interest; and
- (8) the safeguard of fundamental rights.

7. Preliminary Injunctions

The Danish Maritime and Commercial High Court is the competent court for preliminary injunctions and orders in case of unlawful use of trade secrets.

In case of unlawful acquisition, use or disclosure of trade secrets, the court may, upon request, grant a preliminary injunction and/or order, if the applicant may prove or at least render it likely that:

- (1) there is a trade secret;
- (2) the applicant is the legal holder of the trade secret; and
- (3) the trade secret is acquired unlawfully, the trade secret is used or disclosed unlawfully, or there is an immediate risk of unlawful acquisition, use or disclosure of the trade secret. These requirements are stipulated in Section 8 of the Danish Act on Trade Secrets.

When deciding on the granting or rejection of the request of a preliminary injunction and/or order, the court is required to take into account the specific circumstances of the case, including, where appropriate:

- (1) the value and other specific features of the trade secret;
- (2) the measures taken to protect the trade secret;
- (3) the conduct of the respondent in acquiring, using or disclosing the trade secret;
- (4) the impact of the unlawful use or disclosure of the trade secret;
- (5) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;
- (6) the legitimate interests of third parties;
- (7) the public interest; and
- (8) the safeguard of fundamental rights.

The court may, in whole or in part, lift a preliminary injunction and/or order, if the information that constituted the basis of the injunction and/or order no longer constitutes a trade secret due to reasons which cannot be attributed to the defendant, cf. Section 8(4) of the Danish Act on Trade Secrets.

The court may also, in whole or in part, lift any preliminary injunction and/or order, if (1) the conditions for the court's grant of preliminary injunction and/or order are no longer met, (2) the applicant unduly delays the case or (3) a confirmatory action is not initiated within two weeks after the grant of the preliminary injunction and/or order.

8. Alternative Measures

The Trade Secrets Act has introduced new provisions

that entitle the Danish enforcement courts to impose daily or weekly penalties on any person who fails or refuses to comply with a court order granting a preliminary injunction or a decision on prohibition on production or an order for recall or destruction of goods.

An important alternative to the application of the ordinary measures is created by Section 13 of the Trade Secrets Act which introduces the legal institute of payment of financial compensation by the alleged infringer to the rights holder. This may be an alternative to all ordinary measures such as e.g. prohibition against future use of the relevant trade secrets, prohibition against production, or orders for recall, confiscation or destruction of goods. The application of this alternative measure of payment for compensation is subject to all of the following requirements:

- At the time of the use or disclosure, the defendant was not, nor should have been, aware that the trade secrets had been obtained by the third party unlawfully using or disclosing them;
- The execution of these measures would be unduly burdensome for the defendant;
- The payment is commensurate to the damages suffered by the party seeking the application of relieving measures and, in any event, it does not exceed the amount that would have been paid on account of royalties for the use of the trade secrets throughout the challenged period of time.

Furthermore, Section 8 of the new Trade Secrets Act provides a similar alternative to the application of the precautionary measures such as preliminary injunctions: in all proceedings aimed at seeking protective measures for trade secrets, the judge may authorise the defendant to continue to use the trade secrets, subject to providing an appropriate security for compensation of any damages suffered by their legitimate owner.

9. Limitation Period

According to Section 14 of the Danish Act on Trade Secrets, an application for the granting of a preliminary injunction or an order must be filed with the court:

“within six months from the time when trade secret holder obtained such knowledge about the unlawful acquisition, use or disclosure of the trade secret that the trade secret holder has sufficient grounds for submitting the application”.

The Danish Limitation Act governs the limitation period for claims. The period of limitation is three years, cf. section 3(1) of the Danish Limitation Act, and this period runs from the earliest date on which the claimant could raise its claim. In case the claimant did not know about the claim, the limitation period runs from the later date when the claimant had or should have had knowledge of the claim, cf. section 3(2) of the Danish Limitation Act regarding suspension.

10. Trade Secrets as an Object of Property

Under Danish law, a trade secret is regarded as intellectual property which may be subject to co-ownership, assignment and licenses.

11. Protection of Trade Secrets in Court Proceedings

According to Section 6 of the Act on Trade Secrets, any person, who works, or has worked, in the public service and who participates in legal court proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, may be subject to criminal liability according to the Danish Criminal Code, if such persons unauthorized use or disclose any trade secret or alleged trade secret of which they have become aware as a result of the participation in the proceedings or access to such information, and which the competent judicial authorities have identified as confidential.

12. Recommendations for Corporate Trade Secrets Policies

We recommend that trade secret holders limit and restrict the access to identified trade secrets and minimise the risk for potential misappropriation by developing and incorporating employee policies for managing trade secrets (“how-to”), including implementation of technical precautions such as use of access cards/passwords to enter specific facilities, establishment of surveillance and/or entering non-disclosure agreements with relevant third parties.

Generally, we advise companies to have a firm policy for use of confidentiality obligations and increase the use of contractual management of trade secrets in the form of *inter alia* agreements, policies and logs. This will allow companies to better comply with the requirement formally introduced in the new Trade Secrets Act for rights holders to demonstrate which active steps they have taken to protect the confidential nature of an alleged trade secrets.

In light of the very strict deadline of six months for prosecuting misappropriations of trade secrets in Denmark, we further recommend that processes are implemented to ensure proper detection of and response to any possible case of unlawful acquisition, use and disclosure of trade secrets in order to pursue legitimate claims as quickly as possible. We advise all international companies with affiliate companies, branch offices, representatives or business partners operating in Denmark, to have a plan for monitoring and responding to possible trade secrets misappropriation which addresses the need to act within the six-month time limit governing in Denmark. ■

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