

## The Trade Secrets Directive—Norway

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### 1. Trade Secrets Protection: Legal Framework

The Ministry of Justice and Public Security (“Ministry of Justice”) in Norway has drafted a proposal for a new act on the protection of trade secrets (hereinafter “Proposal”). The proposal has been on a public consultation and the Ministry of Justice is now reviewing the results of the consultation.

The main purpose of the Proposal is to implement the EU Directive 2016/943 on the protection of trade secrets (hereafter, “Directive”).

Norway does currently not have a specific act for trade secrets. Instead rules on trade secrets exist in various legislations, particularly in sections 28 and 29 in the Norwegian Marketing Control Act and sections 207 and 208 of the Norwegian Criminal Code. The Proposal compiles and clarifies these rules, and on some points the protection of trade secrets is strengthened. The Proposal will be described in more detail below. Please note that citations from the Proposal are not official translations.

### 2. Definitions

The term “trade secrets” is defined in section 2 of the Proposal as follows:

*“In this act, trade secrets means information which:*

*(a) 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;*

*(b) has commercial value because it is secret;*

*(c) the holder has taken reasonable steps to keep secret.*

*General knowledge and skills that an employee has attained under an employment, does not constitute trade secrets. [..].”*

This definition is in line with the definition of “trade secrets” in article 2 of the Directive.

### 3. Lawful Acts

Article 3 of the Directive sets out lawful acts concerning the acquisition, use and disclosure of trade secrets. The Proposal does not have a corresponding provision, as this has legislatively been considered unnecessary. The Ministry of Justice notes that acts shall be considered as lawful if they are not covered by the unlawful acts listed in the Proposal’s sections 3 and 4. This shall be determined through a general interpretation of said provisions.

### 4. Unlawful Acts

Unlawful acts concerning the acquisition, use and disclosure of trade secrets are set out in sections 3 and 4 of the Proposal, which implements articles 3 to 5 of the Directive.

Section 3 of the Proposal reads as follows:

*“No one shall infringe a trade secret by acquiring knowledge of or access to a trade secret by unlawfully attaining access to, appropriating, or copying documents or other objects of the trade secret holder; or by any other conducts contrary to honest commercial practices.*

*No one shall infringe a trade secret by unlawfully using or disclosing a trade secret that he or she has acquired knowledge of:*

*a) contrary to the first paragraph*

*b) in connection with a service, a position of trust or a business relationship*

*c) pursuant to the provisions of law or regulation*

*No one shall infringe a trade secret by unlawfully acquiring knowledge of or access to, use or dispose of a trade secret which the person at the time of the acquisition, use or disclosure knew or ought to have known was derived from someone who was acting contrary to the second paragraph”.*

Section 4 of the Proposal reads as follows:

*“No one shall produce, offer or place on the market goods which he or she knew, or ought to have known constitute an infringement of a trade secret. The same applies to the import, export or storage of goods which constitute infringement in a trade secret, for the purpose of placing the goods on the market.*

*Goods constitute an infringement in trade secrets when they have a design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed”.*

### 5. Exceptions

Article 5 of the Directive lists cases where applications for enforcement measures, procedures and remedies shall be dismissed. These exceptions are not explicitly regulated in the Proposal. Instead, it is assumed that such cases will not be considered as “unlawful” according to the Proposal’s section 3 and that the defendant will therefore not be held liable.

## 6. Enforcement: Measures, Procedures and Remedies

### 6.1. Injunctions and Corrective measures

Section 6 of the Proposal holds in accordance with the Directive's article 12, no. 1 *litra* a and b, that a person who has infringed a trade secret or aided and abetted thereto, may be prohibited by judgment from repeating the action. In addition, the provision holds that a person who has made significant preparations with a view to carry out an action that would infringe a trade secret, or who has in some other manner acted in a way that gives particular grounds for fearing that the person in question will commit an infringement, may be prohibited by judgment from carrying out the action. The injunctions may be temporary.

Article 12 no. 1 *litra* c and d of the Directive, as well as article 12 no. 2 is implemented in the Proposal's section 7. According to said provision, the court may, insofar as this is deemed to be reasonable, order corrective and preventive measures in order to mitigate the consequences of an infringement or to prevent further infringement. The court may, *inter alia*, order the destruction of documents or objects containing or embodying the trade secret, or order that such documents or objects are delivered to the trade secret holder. Further measures are listed in the provision's second paragraph. These measures cover those set out in the Directive's article 12 no. 2.

According to the third paragraph of the Proposal's section 7, the court shall base its decision as to whether measures should be imposed, and the choice of measures, on a proportionality assessment, taking into account, *inter alia*, the severity of the infringement, the consequences of the measures and the interests of third parties.

Article 13 no. 2 of the Directive requires that injunctions and corrective measures are revoked or cease to have effect, upon the request of the respondent, if the information in question can no longer be considered a trade secret for reasons that cannot be attributed directly or indirectly to the respondent. This right is already regulated in the third paragraph of section 19-15 of the Dispute Act.

### 6.2. Damages

In addition to the above-mentioned measures, the trade secret holder is entitled to compensation for any damages suffered as a result of the trade secret infringement. This is regulated in the Proposal's section 9. The provision has a somewhat different wording than the compensation rule in article 14 of the Directive. According to the Ministry of Justice, the provision provides trade secret holders with a stronger position in terms of compensation compared to the minimum requirements of the Directive.

Section 9 of the Proposal reads as follows:

*"In the event of wilful or negligent infringement of sections 3 or 4, the infringing party shall pay to the trade secret holder remuneration or compensation which shall be set in accordance with on that of the following basis which is the most beneficial for the trade secret holder:*

- a) *remuneration corresponding to a reasonable license fee for use, as well as compensation for damages resulting from the infringement that would not have occurred in the event of licensing*
- b) *compensation for damages resulting from the infringement*
- c) *remuneration corresponding to the gain obtained as a result of the infringement.*

*The first paragraph shall apply correspondingly for cases involving aiding and abetting".*

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## 7. Preliminary injunctions

The Ministry of Justice considers that the rules on preliminary injunction in chapter 34 of the Norwegian Dispute Act are for the most part in accordance with the requirements set out in articles 10 and 11 of the Directive. Only one minor amendment is therefore proposed, namely the establishment in section 34-8 of the Dispute Act of a duty for the courts to set a deadline for the plaintiff to bring legal action on the main claim in cases where preliminary injunctions are given on the basis of alleged infringement in trade secrets.

## 8. Alternative Measures

Section 8 of the Proposal holds that the court may order pecuniary compensation to be paid to the trade secret holder instead of applying the above mentioned measures, given that certain conditions are met. The conditions are the same as those set forth in the Directive's article 13 no. 3. The pecuniary compensation shall not exceed the amount of royalties which the trade secret holder, within reason, could have requested for the period of time for which use of the trade secret could have been prohibited.

As a further alternative, article 10 no. 2 requires that judicial authorities may make the continuation of the alleged unlawful use of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder. This option follows from section 34-4, third paragraph, last sentence of the Dispute Act.

## 9. Limitation Period

Section 5 of the Proposal implements article 8 of the Directive relating to limitation periods, and reads as follows:

*“Claims of infringement of a trade secret pursuant to sections 3 and 4 are time-barred after three years from the trade secret holder obtained or should have obtained necessary knowledge of the infringement and the infringer.*

*The limitation period in the first paragraph applies correspondingly to claims [for preliminary injunction] pursuant to chapter 34 of the Dispute Act due to infringement in a trade secret”.*

## 10. Trade Secrets as an Object of Property

Although trade secrets are generally not considered intellectual property in a strict sense, they are closely related to intellectual property and, therefore, are subject to protection.

Certain information may be protected as both a trade secret and an intellectual property right. A computer program and its source code may, for example, be protected as a copyright, whilst the source code may in addition be kept confidential and protected as a trade secret.

Whilst not considered an object of property or intellectual property, trade secrets can be subject to co-ownership, assignment and licenses.

Unlike intellectual property, trade secrets will only be protected as long as they are secret and their duration of protection can therefore not be clearly defined. Another difference is that the rules on trade secrets do not give the trade secret holder an exclusive right to prohibit others from attaining, using or disclosing the same information if so is done lawfully, for example if attaining through an independent analysis of a product.

## 11. Protection of Trade Secrets in Court Proceedings

The main rule under Norwegian law is that court proceedings are public, and that negotiations and court decisions can be rendered public, unless otherwise stipulated in law or by the court pursuant to law.

The protection of trade secrets in court proceedings is regulated in chapter 22 of the Dispute Act, particularly section 22-10 and section 22-12 of the Dispute Act.

Section 22-10 of the Dispute Act holds that a party or a witness may refuse to provide access to evidence that cannot be made available without revealing trade or business secrets. The court may nevertheless order such evidence to be made available if the court finds this necessary after balancing the relevant interests.

Section 22-12 of the Dispute Act set out rules on

the duty of confidentiality and hearings *in camera*. The Ministry of Justice proposes to add a new third and fourth paragraph to section 22-12 of the Dispute Act, in order to implement the confidentiality requirements in article 9 of the Directive. Section 22-12 of the Dispute Act applies to all legal proceedings. Therefore, the amendments go beyond what is required by Article 9, which is limited to legal proceedings for infringement of trade secrets.

The proposed third paragraph holds that when evidence containing trade secrets is presented, the court shall impose on the persons present a duty of confidentiality and a prohibition to use the trade secret that may be derived from the evidence. Oral hearing of the evidence shall be held behind closed doors. The court may further limit the parties' access to use legal assistants and expert witnesses to which the court considers necessary.

The proposed fourth paragraph holds that prohibitions and injunctions under the third paragraph shall apply until a final judgment or ruling states that the information does not constitute trade secrets, or the protection lapses as a result of the information becoming generally known or readily accessible.

## 12. Recommendations for Corporate Trade Secrets Policies

Business information will only be considered a trade secret within the definition of the Proposal if it is kept secret, has commercial value because it is secret and if the holder has taken reasonable steps to keep it secret. On this basis companies are recommended to take measures to preserve the confidentiality of their trade secrets. In this respect, companies are recommended to *inter alia*:

- i. Identify and document information deemed to be confidential and classify its value and sensitivity;
- ii. Identify whom may have access to confidential information and limit access to a need-to-know basis;
- iii. Create agreements, policies and procedures to establish and document trade secret protection;
- iv. Establish physical and electronic access restriction; and
- v. Ensure that those who have access to confidential information are informed of their confidentiality duties. ■

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