



A Quick Guide Comparing the Defend Trade Secrets Act and the EU Trade Secrets Directive

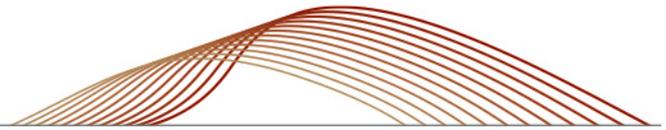
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The European Commission unanimously adopted the EU Trade Secrets Directive on Friday, following the recent passage in the U.S. of the Defend Trade Secrets Act (“DTSA”). Both regimes seek to provide uniformity of trade secret law across their respective jurisdictions, recognizing the substantial value of trade secrets to the economy. It is little surprise that—particularly in light of the similar foundational provisions found in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”)—both the DTSA and the Directive take analogous stances on the basics of trade secret law, including what constitutes a trade secret and how a violation occurs. The below table compares the two frameworks and highlights important nuances in each locale’s rules that affect how companies should consider enforcing trade secret rights across those major international jurisdictions.

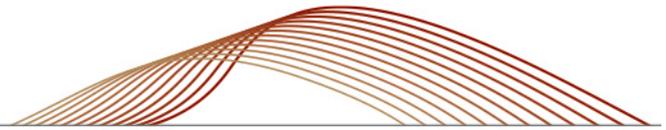
Aspect	DTSA	Directive	Notes
Trade Secret Definitions	<ul style="list-style-type: none"> Covers “all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information” 	<ul style="list-style-type: none"> Covers information that “(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 to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; [and] (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret” 	Similar scope



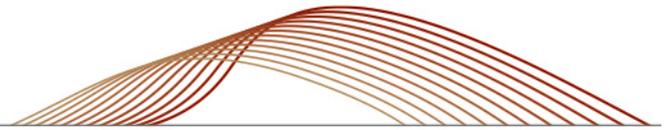
Aspect	DTSA	Directive	Notes
Requirements for Misappropriation	<ul style="list-style-type: none"> ▪ Wrongful acquisition ▪ Wrongful use or disclosure 	<ul style="list-style-type: none"> ▪ Wrongful acquisition ▪ Wrongful use or disclosure, including in breach of a confidentiality agreement or other duty not to disclose 	Similar scope
Standing	<ul style="list-style-type: none"> ▪ Owner 	<ul style="list-style-type: none"> ▪ Owner ▪ Potentially licensee or others who “lawfully control[]” the trade secret 	Directive arguably may provide broader standing to non-exclusive licensees or others who control the trade secret
Lawful Conduct	<ul style="list-style-type: none"> ▪ Reverse engineering ▪ Independent derivation ▪ Other lawful means of acquisition 	<ul style="list-style-type: none"> ▪ Independent development ▪ Reverse engineering ▪ Other honest commercial practices ▪ “[E]xercise of the right of workers or workers’ representatives to information and consultation in accordance with Union law and national laws and practices,” provided that such disclosure was necessary for that exercise ▪ “[E]xercise of the right to freedom of expression and information which encompasses media freedom and pluralism,” as set out in the Charter of EU Fundamental Rights 	Directive presents some broader, as of yet undefined, potential carve-outs



Aspect	DTSA	Directive	Notes
Remedies (cont.)	<ul style="list-style-type: none"> ▪ Enhanced/punitive damages of up to two times damages where willful and malicious misappropriation ▪ Attorney's fees for bad faith litigation positions 	<ul style="list-style-type: none"> ▪ No enhanced/punitive damages; but Directive requires Member States to ensure that where court finds claim is manifestly unfounded and initiated in bad faith, it may impose sanctions and order publication of the decision, without prejudice to right of respondent to claim damages if permitted by Union or national law ▪ Silent on attorney's fees 	<p>Attorney's fees in the EU governed by general litigation rules</p>
Confidentiality during Litigation	<ul style="list-style-type: none"> ▪ Sealed filings ▪ Protective order 	<ul style="list-style-type: none"> ▪ Equivalent to sealed filings ▪ Equivalent to protective order ▪ Party representative access 	<p>Similar scope but Directive always allows a party representative access to opposing party trade-secret documents</p>
Statute of Limitations	<ul style="list-style-type: none"> ▪ Three years from date victim knew or should have known of misappropriation 	<ul style="list-style-type: none"> ▪ No more than six years; Member States determine "in a clear and unambiguous manner," when the period begins and under what circumstances it may be interrupted or suspended 	<p>Directive may provide longer absolute period but DTSA provides flexibility with "reasonable discovery" element</p>

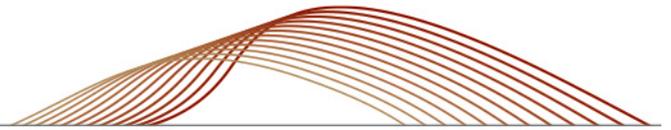


Aspect	DTSA	Directive	Notes
Employee Mobility	<ul style="list-style-type: none"> ▪ Prohibits injunctions that prevent a person from entering into an employment relationship ▪ Prohibits injunctions that otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business ▪ Permits injunctions placing conditions on employment when based on evidence of threatened misappropriation and not merely on information the person knows 	<ul style="list-style-type: none"> ▪ Directive provides that it shall not be understood to offer any ground for restricting the mobility of employees, including neither limiting “employees’ use of the experience and skills honestly acquired in the normal course of their employment” nor “imposing any additional restrictions on employees in their employment contracts other than in accordance with Union or national law” ▪ Directive articulates other considerations concerning rights of employees, as discussed in Lawful Conduct and Remedies sections above 	<p>Both regimes are attentive to employee rights</p>
Whistleblower Protections	<ul style="list-style-type: none"> ▪ Immunity for employees, contractors, and consultants from liability under Federal and State civil and criminal trade secret law for confidential disclosures made to the government for the sole purpose of reporting a suspected legal violation ▪ Disclosures made in claims for retaliation must be filed under seal and not disclosed further absent court order ▪ Employers shall provide notice of the immunity to employees, contractors, and consultants in confidentiality agreements entered into or amended after May 11, 2016 	<ul style="list-style-type: none"> ▪ Immunity for “revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest,” or in good faith, believing that one’s conduct has revealed misconduct, wrongdoing, or illegal activity in furtherance of the public interest ▪ Immunity for “exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media” 	<p>Directive provides broader protections for whistleblowers</p>



Aspect	DTSA	Directive	Notes
Jurisdiction over Extraterritorial Conduct	<ul style="list-style-type: none"> Applies to conduct occurring outside the U.S. if the misappropriator is a U.S. citizen or entity or “an act in furtherance of the offense” was committed in the U.S. 	<ul style="list-style-type: none"> Silent on extraterritorial conduct 	<p>DTSA arguably provides courts with broad jurisdiction over violations</p> <p>Member States likely can provide for broader jurisdictional reach by their national courts</p>
Criminal Liability and Penalties	<ul style="list-style-type: none"> Potential criminal liability for wrongful acquisition, use, or disclosure under Economic Espionage Act (into which the DTSA was incorporated) Remedies include fines; forfeiture of property constituting or derived from the violation and proceeds thereof; destruction of that property; restitution to the victim; and jail time Greater penalties if misappropriation constitutes “espionage,” i.e., the violation benefits a foreign government, agent, or instrumentality 	<ul style="list-style-type: none"> No criminal liability in the Directive 	<p>Member States may supplement Directive with national-level criminal provisions in line with the protections afforded by the Directive</p>

While there is significant foundational overlap between the DTSA and Directive, each regime has unique provisions—for instance, the Directive’s emphasis on employee mobility and potentially broader standing versus the DTSA’s expanded remedies and potential criminal liability—and operates in the context of a larger system of litigation practices that a global company will have to consider when crafting its internal policies and directing litigation in those jurisdictions. Aggrieved companies who have standing to sue in the U.S. may be attracted to the DTSA’s *ex parte* seizure mechanism in certain cases and U.S. courts’ broader scope of discovery, as well as the potential availability of criminal prosecution. Those companies therefore may consider filing misappropriation claims in the U.S., at least initially, to avail themselves of those procedures. In each case, aggrieved companies should evaluate the requirements and available remedies for misappropriation in all potential



jurisdictions to ensure that their intellectual property rights are protected and litigation strategy is optimized across international jurisdictions.



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