



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk
www.ligue.org

SUMMARY NOTE

Recent Developments in Trade Secrets Protection: An EU and US Perspective

Date: Tuesday 13 September 2016

Venue: Arnold & Porter (UK) LLP

Speaker: Professor Tanya Aplin (King's College London) (TA)

Chair: Michael Browne (Redd Solicitors LLP)

1. The purpose of the presentation was to address recent EU and US developments in trade secrets protection, in particular the EU Trades Secrets Directive 2016 (**TSD**) and the US Defend Trade Secrets Act 2016 (**DTSA**).
2. The speaker viewed the most likely impact of the TSD would be the convergence of procedural law mechanisms to protect trade secrets in EU member states. She doubted the effectiveness of the TSD in bringing about convergence of substantive law.
3. The accompanying slide deck provides comprehensive coverage of all topics discussed.

Presentation

4. TA introduced the topic of the presentation: recent developments in trade secrets protection in the EU and US, in particular the TSD and DTSA. She explained that more time would be given to discussion of the TSD than the DTSA.

The EU Trade Secrets Directive 2016

5. TA gave an overview of the history of the TSD, commenting that there were significant differences between the initial proposed text and the final adopted text. She explained that a number of these changes resulted from disagreements and concerns raised in relation to issues such as whistle-blowing, freedom of expression and the scope for the lawful acquisition of information (for example, via reverse engineering).
6. TA set out the principal justifications put forward in support of the TSD: increase in innovation; increase in competition; and legal certainty and convergence. However, TA was critical of the EU Commission's assumption that the proposed legislation would give effect to these aims. She observed that the TSD:
 - a. only prescribes minimum harmonisation principles in the substantive law of trade secret protection;
 - b. grants a great deal of flexibility, allowing Member States to choose what form of protection trade secrets are granted; and



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

www.ligue.org

- c. may itself give rise to uncertainty, as key provisions, such as ‘trade secret’, are not clearly defined.
7. TA concluded that the TSD will have its biggest impact in harmonising procedural law aspects of trade secret protection, such as remedies and enforcement. By contrast, harmonisation in the substantive law of trade secret protection will be a slow and uncertain process, and will rely on judicial intervention.

US Defend Trade Secrets Act 2016

8. TA gave an overview of the history of the DTSA, observing that the US had a similar desire to converge the protection of trade secrets at a federal level, which were traditionally protected by state level common law. She noted the significant parallels between the EU and US’s approach to protection, and asked whether this would open up opportunity for comparative law scholarship as a tool to inform our interpretation of the TSD.
9. TA noted that prior to the DTSA, US trade secret law has been well protected at the state level, with substantial uniformity of protection between many states. An example of this can be seen in the 1979 Uniform Trade Secrets Act, which has been adopted by all but three states. There are clear parallels between the principles applied at US state level and the TSD.
10. TA also explained that prior to the DTSA, and under the Economic Espionage Act 1996 (**EEA**), only the Government had a right of civil action. The EEA relied on criminal law to protect trade secrets. The DTSA introduced a new private civil cause of action. TA drew parallels to the TSD, which omits all criminal actions.
11. TA set out criticisms of the DTSA, including: the costs and length of litigation at federal level; the possible prejudice to small businesses and innovators; the likely reduction in convergence, as state law protection to co-exist; and the possibility of shopping between jurisdictions.

Conclusions

12. TA made the following concluding remarks:
 - a. she restated that US trade secrets protection may be a useful source of jurisprudence when looking to resolve uncertainties in the TSD; and
 - b. she acknowledged that the introduction of criminal sanctions to protect trade secrets may be re-considered in the future, given the existing US criminal provisions and trade negotiations.