Implementation EU Trade Secret Directive

5 Facts – 8 Countries

March 2019

Start

Spotlight on Belgium

Is there a draft/final bill yet?

The Belgian Law on the protection of trade secrets of 30 July 2018 entered into force on 24 August 2018.

Any significant deviations from the Directive?

Where possible, the Belgian Law replicates the provisions of the Directive. Further additions and specificities are in line with the existing national framework on IP rights.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The requirement of 'reasonable protection measures' is subject to the discretionary assessment of the court and could take various forms.

Any specific don'ts when drafting NDAs according to national law case?

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Are post-contractual confidentiality obligations in employment contracts valid?

Belgian employees are subject to general duties of loyalty. Specific post-contractual obligations cannot expand or render more severe this general duty.

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The EU Directive 2016/943 of 8 July 2016 has been transposed by the Belgian Law on the protection of trade secrets of 30 July 2018., which entered into force on 24 August 2018.

The Belgian Law is welcomed as no specific regulatory framework providing for the protection of trade secrets previously existed in Belgium. Not only was there no legal definition of the concept of trade secrets, but also the action possibilities for curbing its unlawful acquisition were very limited.

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Any significant deviations from the Directive?

The Belgian Law on the protection of trade secrets largely copies the provisions of the Directive, although certain provisions have not explicitly been incorporated into the Belgian Law, because their underlying concepts and/or protection mechanisms already existed un-der Belgian law (e.g. abuse of process).

The Belgian Law provides for similar procedures and remedies to those already available for IP rights holders (such as cessation of unlawful use or disclosure, prohibition of production, seizure / destruction measures, claims for damages, etc.). However, the Belgian descriptive seizure procedure ("saisie contrefaçon") will not be available to the holder of a trade secret.

Belgian courts can take specific measures to guarantee the protection of trade secrets dur-ing court proceedings relating to such trade secrets, subject to fines ranging from EUR 500 to EUR 25,000.

The Belgian Law provides for a statute of limitation of five years from the day following the day on which the claimant becomes aware of (i) the conduct and the fact that it constitutes an unlawful obtaining, use or disclosure of a trade secret; and (ii) the identity of the infring-er. In any event, a maximum limitation period of 20 years applies from the day following the day on which the unlawful acquisition, use or disclosure occurred.

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How does the national legislator construe the requirement to undertake "reasonable protection measures"?

The recitals of the Belgian Law state that the 'reasonable protection measures to be undertaken' are subject to the discretionary assessment of the court and could take various forms depending upon the factual circumstances, such as: contractual obligations, physical or virtual security mechanisms, or the registration of an idea through an idepot with the Benelux Office of Intellectual Property – or a combination of these possibilities.

This list is non exhaustive. In practice, companies should therefore be prepared to demonstrate that actual and practical steps have been implemented in order to protect the confidentiality, integrity and availability of their business sensitive information.

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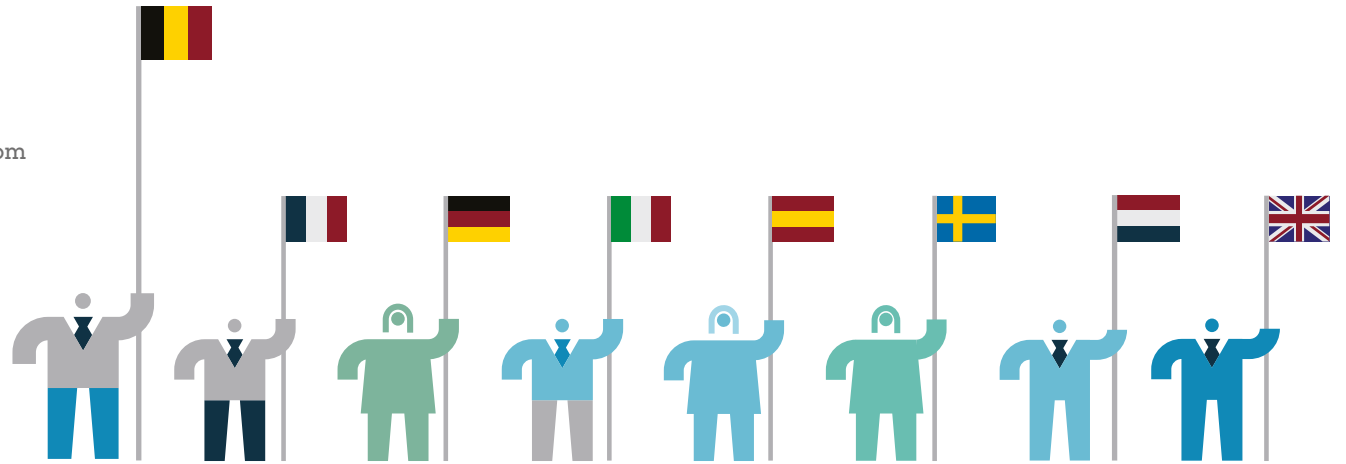

Any specific don'ts when drafting NDAs according to national law case?

The confidential information should be described in a specific and precise manner, rather than through 'catch-all clauses' that could lead to invalidity of the confidentiality clause.

NDAs should also provide in express terms that the confidentiality of trade secrets which are to be submitted to court or judicial bodies (legally or mandatory upon judicial request) will remain unaffected and shall be respected through use of reasonable measures.

Where appropriate, an NDA can also provide for specific fines and penalty payments.

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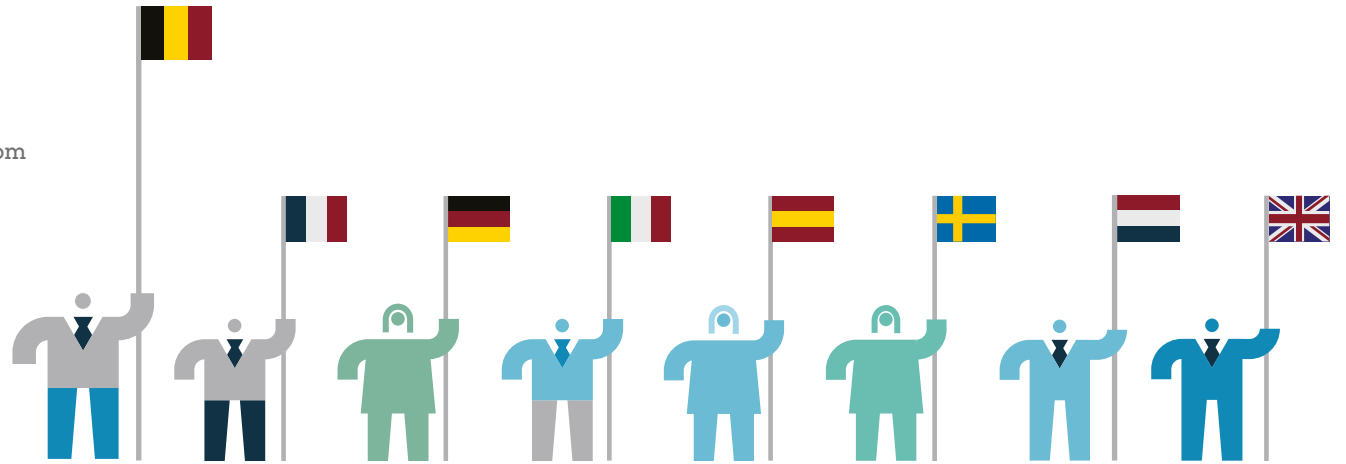

Are post-contractual confidentiality obligations in employment contracts valid?

Belgian employees are, in principle, already legally obligated to maintain company secrets, business secrets and confidential information, even after the termination of the employment relationship, under their general loyalty duties.

Nevertheless, specific confidentiality clauses are often included in employment contracts. These are only valid if they provide a further explanation or more detailed overview of the confidential information concerned, but they cannot expand, aggravate or render more se-vere the legal duty of confidentiality. For example, a clause rendering all company infor-mation confidential with the exception of information that the employee can demonstrate to be publicly available will be void.

The Belgian Law on one hand updates the existing legal duty of confidentiality to the word-ing of the trade secret directive (without altering previous existing case law on the subject) and on the other hand explicitly confirms the current restraints.

As a consequence, as long as no trade secrets or confidential confirmation are concerned, the duty of confidentiality can never prevent an employee from using their experience and practical knowledge gathered in the course of their previous employment. Any confidentiality clause stipulating the contrary would be invalid.

OC in numbers

Spotlight on France

Is there a draft/final bill yet?

The French Law no. 2018-670 on the protection of trade secrets was adopted on 30 July 2018.

Any significant deviations from the Directive?

The draft bill includes a civil fine against 'dilatory or abusive proceedings', up to 20% of the damages granted to the victim, or €60,000 where no damages are claimed.

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No indications of 'reasonable protection measures' were provided by the national legislator. The courts will take a case-by-case approach.

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NDAs must: include a precise definition of the information to be kept confidential; be limited in time as to the confidential nature of the information; and list the people authorised to know that information.

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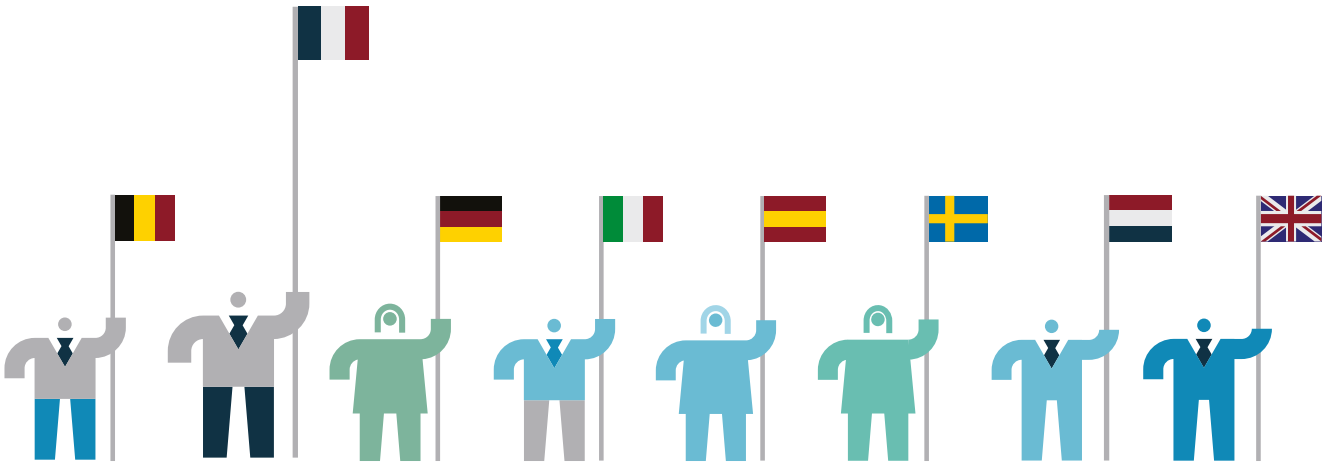

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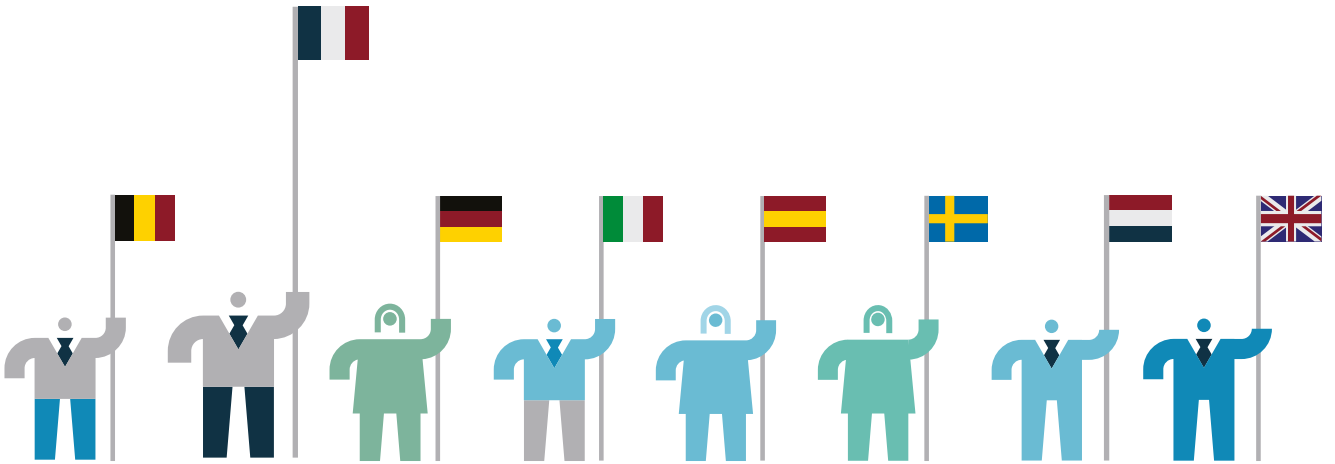

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The French Constitutional Court ('Conseil constitutionnel') ruled in its decision dated 26 July 2018 that the final version of the draft bill was in conformity with the Constitution, enabling the adoption of the Law no. 2018-670 dated 30 July 2018 on the protection of trade secrets.

The Decree no. 2018-1126 dated 11 December 2018 was adopted to implement the Law. The transposition measures are now fully effective in France.

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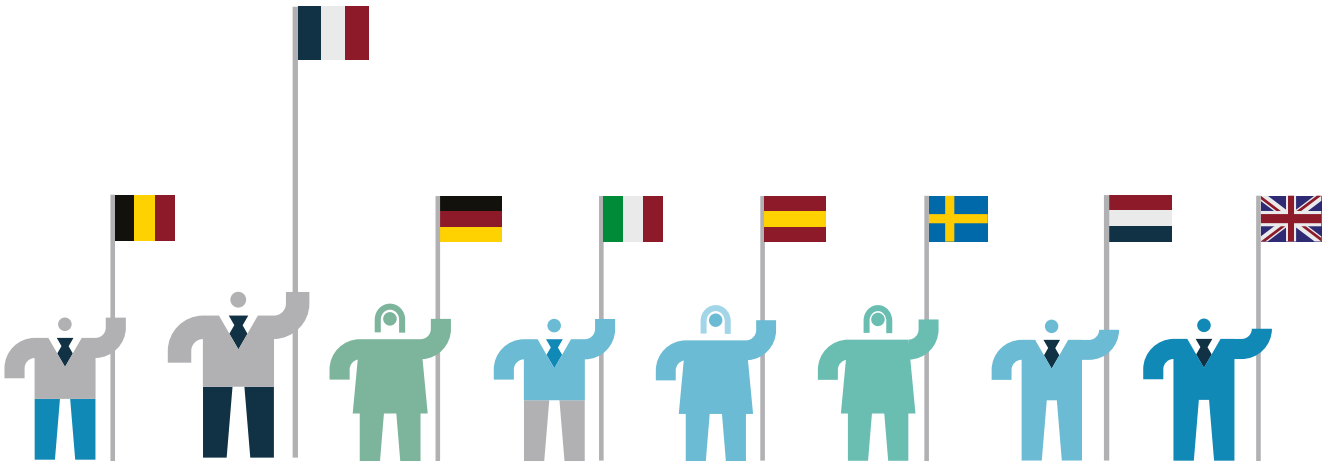

Any significant deviations from the Directive?

The Law on the protection of trade secrets is generally an accurate transposition of the Directive. The Law includes a civil fine against 'dilatory or abusive proceedings' to punish those who act in a dilatory or abusive manner on the basis of trade secret. This fine is capped at 20% of the amount of the damages claimed by the victim, or in the absence of such claim, to a maximum amount of €60,000.

Also, under Article 9 of the Directive, Members States have to implemented specific measures to guarantee the protection of confidential information protected under trade secret before the Courts in proceedings directly related to trade secret. The French Parliament has extended these measures to all civil and commercial proceedings and not only those related to trade secrets proceedings.

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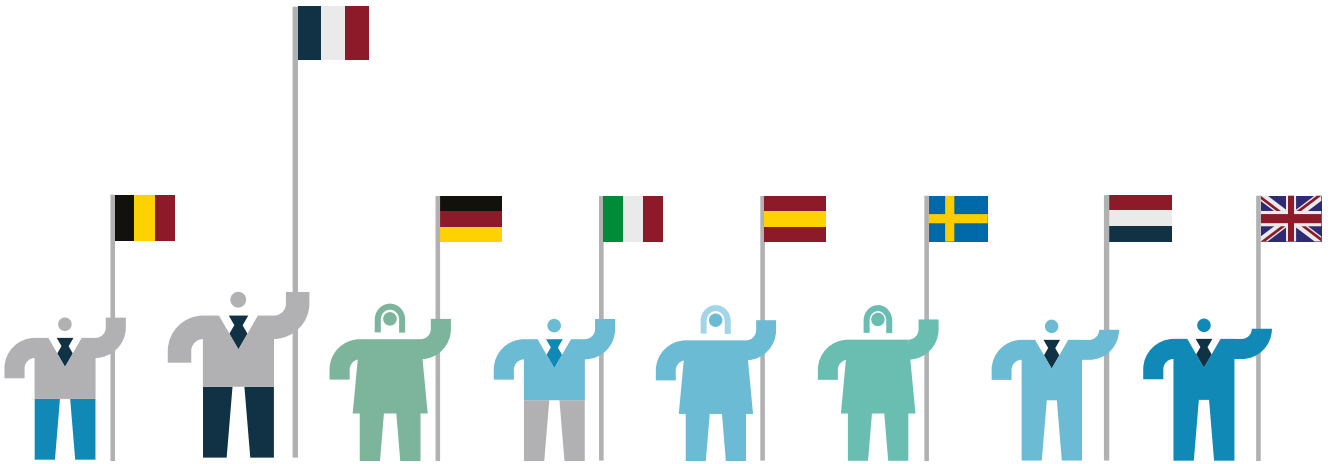

How does the national legislator construe the requirments to undertake 'reasonable protection measures'?

Debates had taken place during the legislative process but the Parliament finally decided not to mention any specific 'reasonable protection measures' in the Law. As a consequence, it is up to the companies to set up their own protection measures (for example, a policy on confidential information, labelling of documents, limitations on access to information, or use of NDAs) and the existence of such measures will be assessed by courts.

The Parliament had formerly been willing to mention the use of a "Confidential" label as a protection measure in the draft bill but this idea was finally abandoned.

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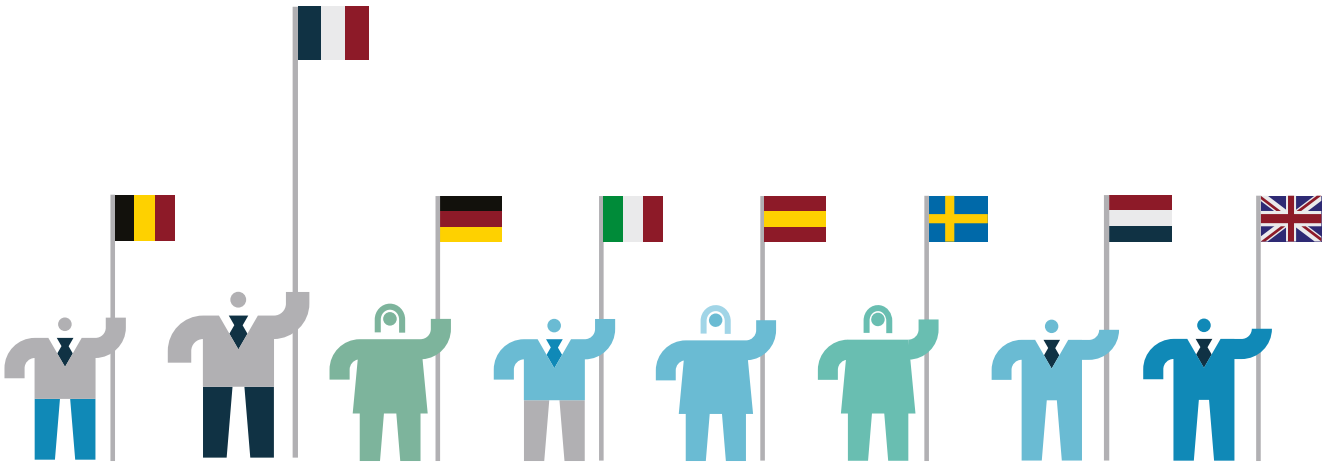

Any specific don'ts when drafting NDAs according to national case law?

Case law requires that, to be effective, NDAs must:

- include a precise description of the nature/type of information to be kept confidential. Otherwise, the NDA can be set aside by the judge as being too general or imprecise.
- be limited in time regarding the confidential nature of the information, although the time period of the NDA can be unlimited. The confidential nature of the information may, for example, cover the negotiations and a sufficient but reasonable time period after the termination of the NDA.
- list the people authorised to know the confidential information.

Unilateral obligations should be avoided if the transfer of information is bilateral, in order to limit the risk that the NDA causes a significant imbalance to the parties' rights and obligations.

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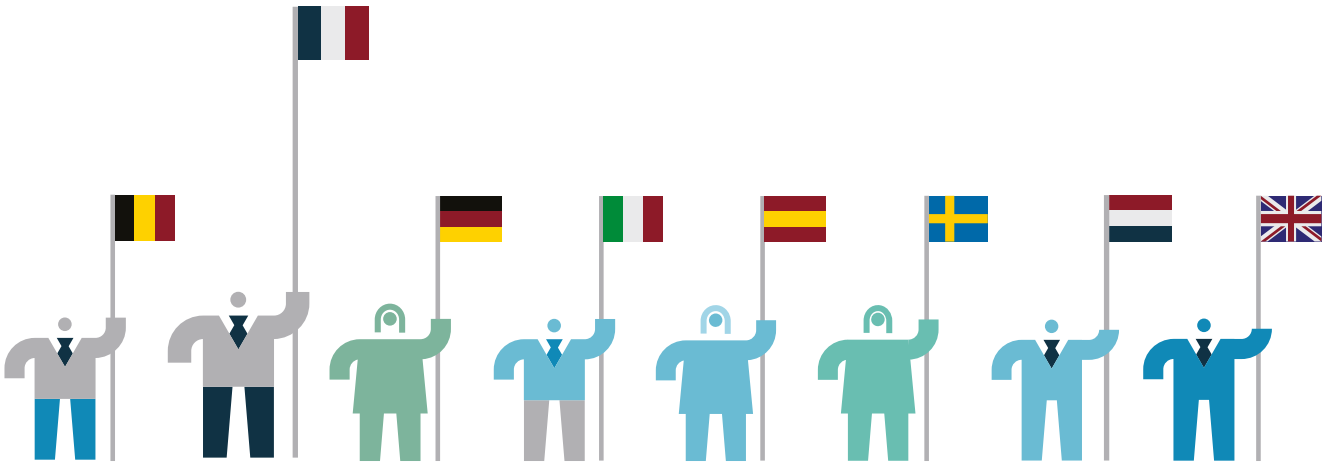

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Are post According to the Labour Code, employees have a general obligation of discretion that is applicable both during and after the employment relationship (even if the employment contract does not provide for any particular obligation in that regard). This obligation prohibits employees from disclosing, to third parties, information that they may become aware of during the performance of their duties and whose disclosure could harm the company.

In addition to this general obligation of discretion, employment contracts can also provide for specific confidentiality obligations that emphasise, on clearly identified topics, a requirement for the employee to keep that information an absolute secret (for example, particular projects or techniques on which the employee is working). These confidentiality obligations can, as with the general obligation of discretion, validly state that they will continue to apply after the termination of the employment contract.

Therefore, if a former employee breaches such confidentiality obligation, they will be liable for the damages suffered by the company because of the disclosure of the information protected by the confidentiality clause of their employment contract.

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Is there a draft/final bill yet?

In mid-July the German Federal Government protection published a draft bill (Regierungsentwurf) implementing the Trade Secrets Directive.

Any significant deviations from the Directive?

Along with civil law protection, the draft bill will provide for criminal offences, and will give the trade secret holder a right to certain information about how their trade secrets have been used.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The legislation implements the definition in the Directive, to be interpreted by the courts on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Do not use catch-all clauses. Define trade secrets as precisely as possible. Be aware that penalty clauses may be invalid when used in general terms and conditions.

Are post-contractual confidentiality obligations in employment contracts valid?

Employees in Germany are under general post-contractual confidentiality obligations. In many cases, specific post-contractual confidentiality obligations in employment contacts are invalid due to their broad and vague wording.

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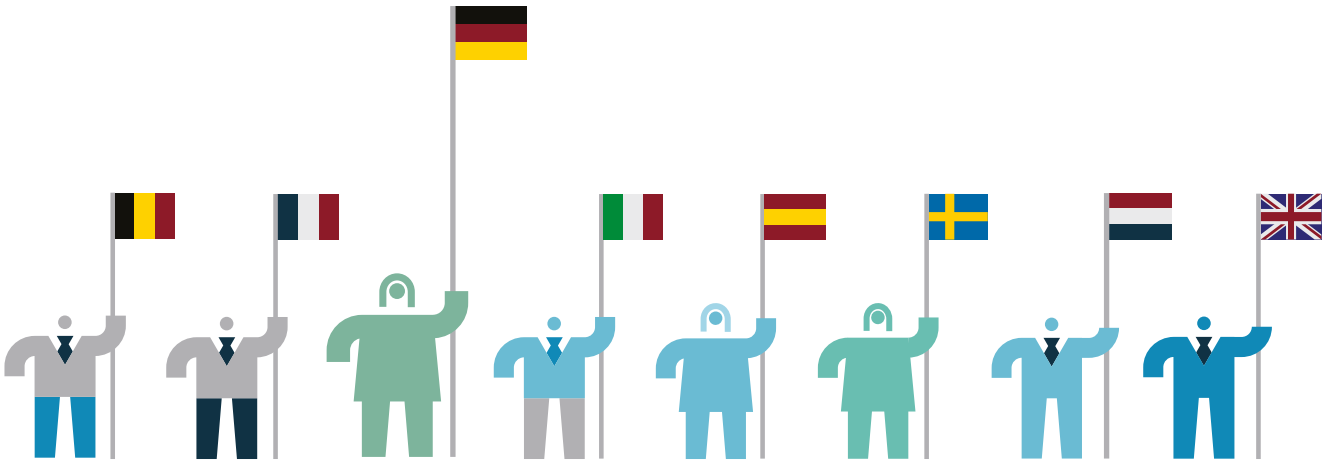

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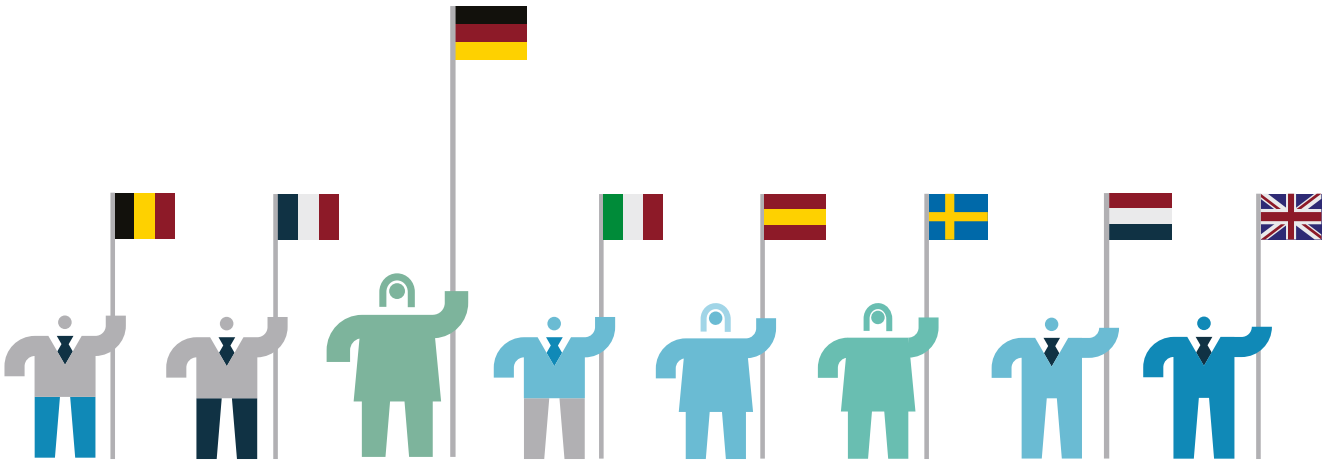

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The legislative process has not been completed yet. However, on 19 April 2018, the General Federal Ministry of Justice and Consumer Protection published a first draft bill of the German Trade Secrets Act (Geschäftsgeheimnisgesetz). Before the draft was officially made available, it was – ironically – leaked to the press. On 18 July 2018, the German Federal Government published a further draft bill. As it was not implemented within the time limit, the requirements of the Directive apply in Germany by way of an interpretation in conformity with the Directive of the existing laws.

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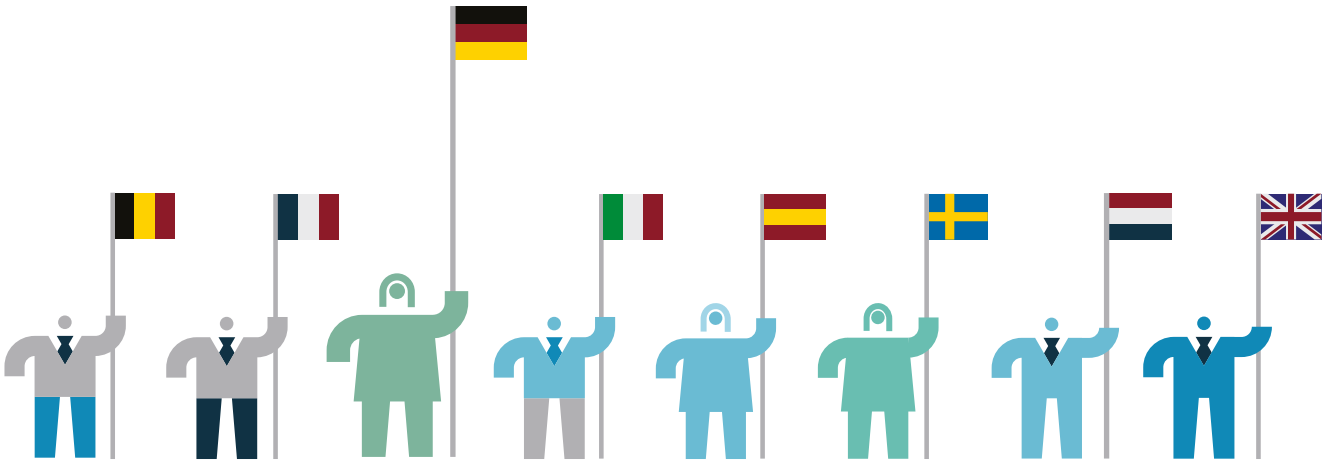

Any significant deviations from the Directive?

The draft German legislation largely complies with the provisions of the Directive. However, the draft bill amends further provisions which are not part of the Directive. In addition to the civil law protection of trade secrets, the draft bill contains provisions for criminal offences. The draft bill also includes the right to information regarding the origin and distribution channel of infringing products for the trade secret holder against the infringer and stipulates that the owner of a company whose employee has committed an offence should also be held liable.

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Is there a draft/final bill yet?

In mid-July the German Federal Government protection published a draft bill (Regierungsentwurf) implementing the Trade Secrets Directive.

Any significant deviations from the Directive?

Along with civil law protection, the draft bill will provide for criminal offences, and will give the trade secret holder a right to certain information about how their trade secrets have been used.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The legislation implements the definition in the Directive, to be interpreted by the courts on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Do not use catch-all clauses. Define trade secrets as precisely as possible. Be aware that penalty clauses may be invalid when used in general terms and conditions.

Are post-contractual confidentiality obligations in employment contracts valid?

Employees in Germany are under general post-contractual confidentiality obligations. In many cases, specific post-contractual confidentiality obligations in employment contacts are invalid due to their broad and vague wording.

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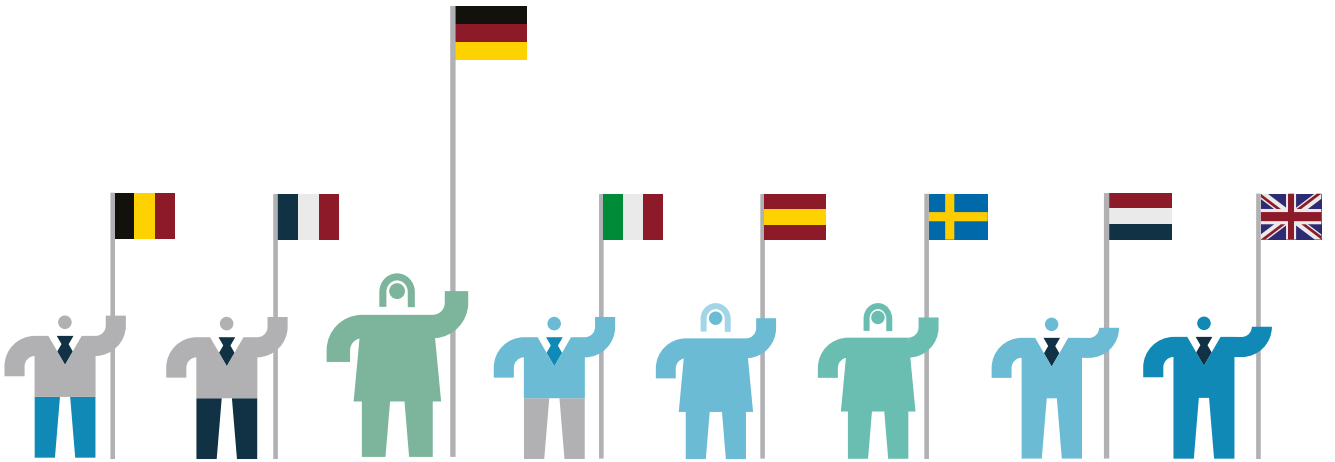

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

As it stands, the legislation would implement the Directive's definition of a trade secret. The explanatory memorandum of the draft bill refers to a triad of technical, organisational and contractual measures. In accordance with the explanatory memorandum of the draft bill, the 'reasonableness' should be interpreted by the courts on a case-by-case basis.

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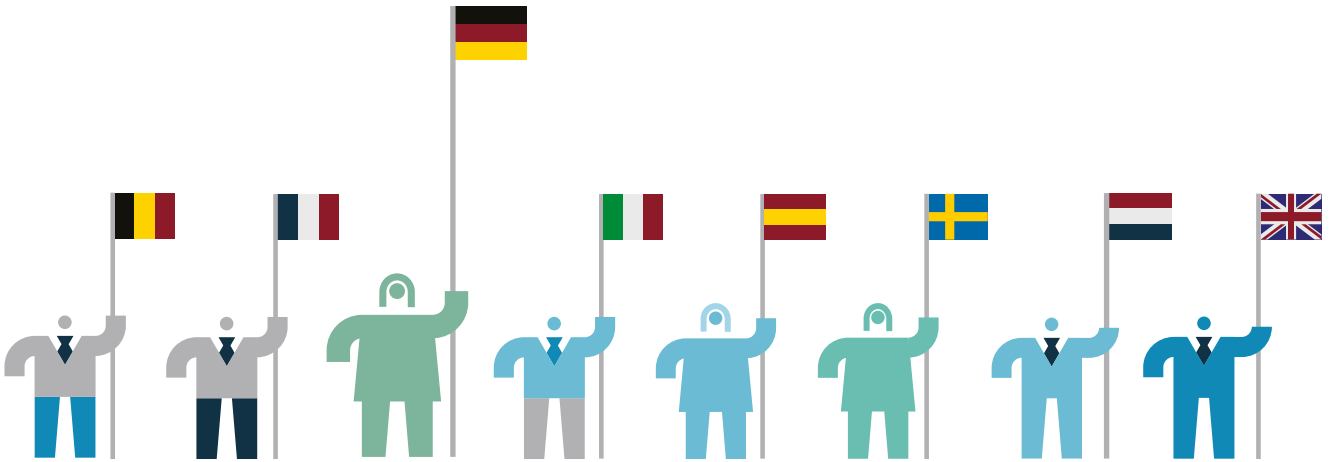

Any specific don'ts when drafting NDAs according to national case law?

Do not use so-called 'catchall clauses' that are widely used in practice, as such comprehensive and broad clauses are often invalid. Such clauses would very likely not meet the requirement to undertake 'reasonable' contractual protection measures.

Trade secrets should therefore be defined as precisely as possible, for example by way of project-related NDAs. Also, keep in mind that penalty clauses may be invalid when used in general terms and conditions.

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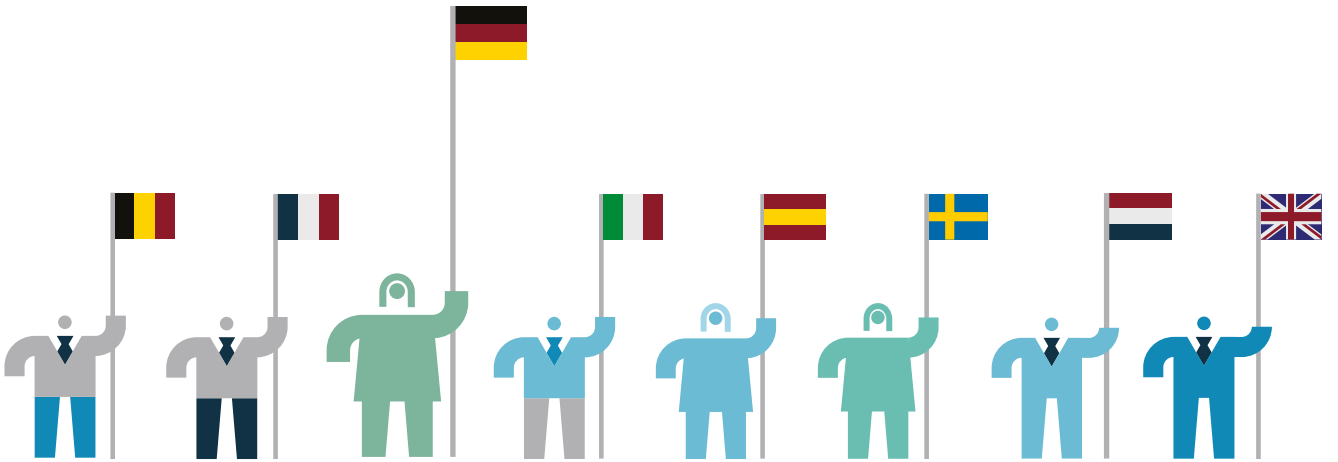

Are post-contractual confidentiality obligations in employment contracts valid?

In many cases post-contractual confidentiality obligations in employment contracts are invalid due to their broad and vague wording. Such clauses would not be suitable to contribute to effective and reasonable know-how protection. Nevertheless, employees in Germany are, in principle, obligated to maintain a trade secret even after the termination of the employment relationship due to their general loyalty duties. The requirement to maintain confidentiality does not mean, however, that the former employee cannot use the information which they remember.

Generally speaking, in Germany, post-contractual confidentiality obligations must be distinguished from non-compete obligations. The latter are only valid if certain requirements are met, such as a two year limitation and a compensation payment for non-competition. Experience and practical knowledge ('Erfahrungswissen') gathered in the course of the employment can be freely used by the employee and is not covered by confidentiality obligations.

Spotlight on Italy

Is there a draft/final bill yet?

On 7 June 2018 the Legislative Decree implementing the Directive was published in the Official Gazette. It entered into force on 22 June 2018.

Any significant deviations from the Directive?

No major deviations, but the Italian Legislative Decree introduces some specificities, such as harsher punishments for unlawful disclosure of trade secrets through the use of IT solutions.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The requirement to undertake 'reasonable protection measures' already existed under the regime preceding new Legislative Decree, and is interpreted by the courts on a case-by-case basis.

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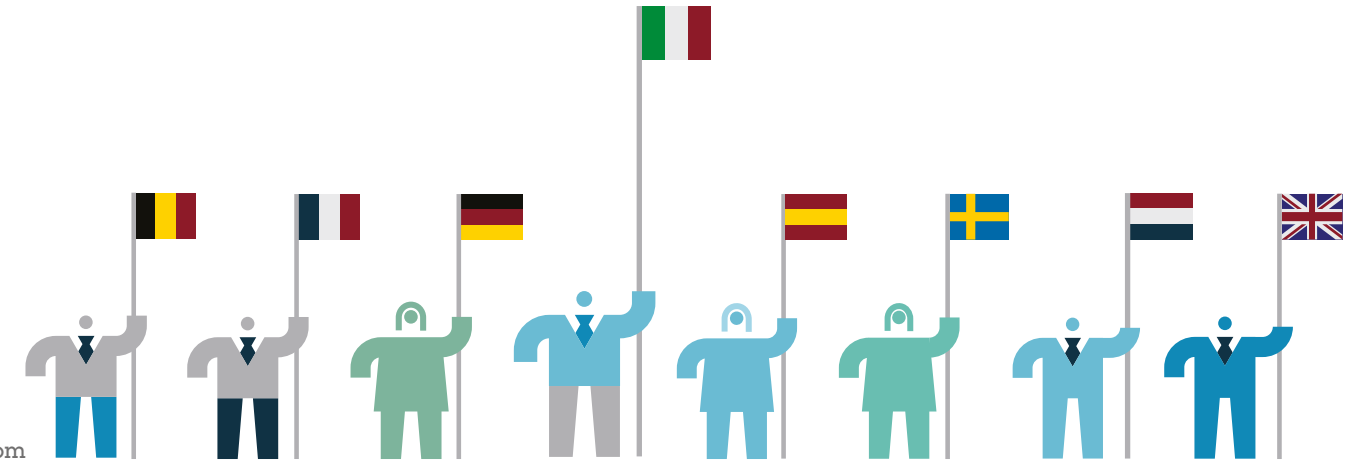

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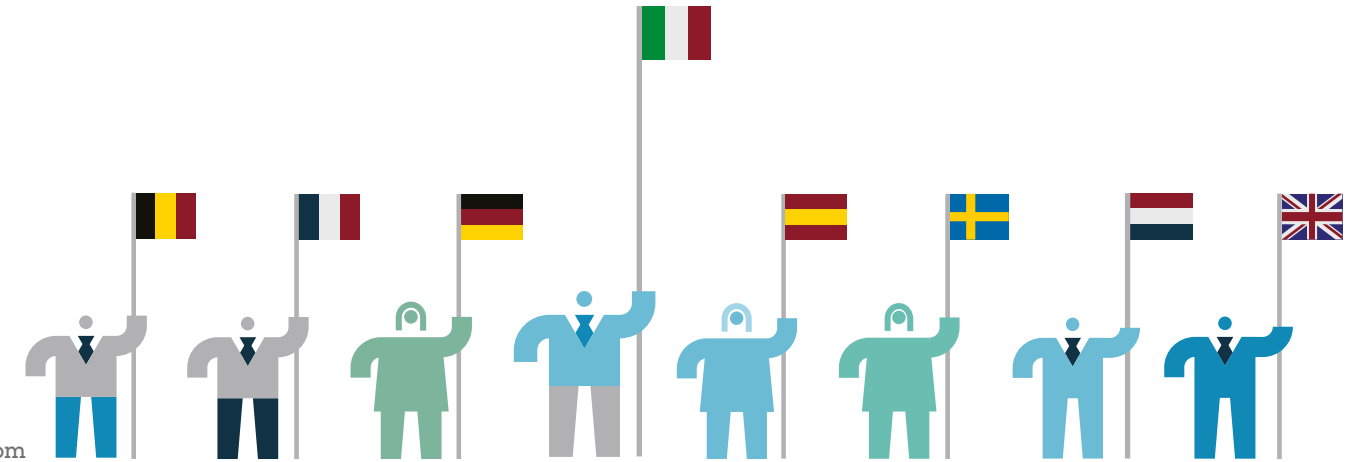

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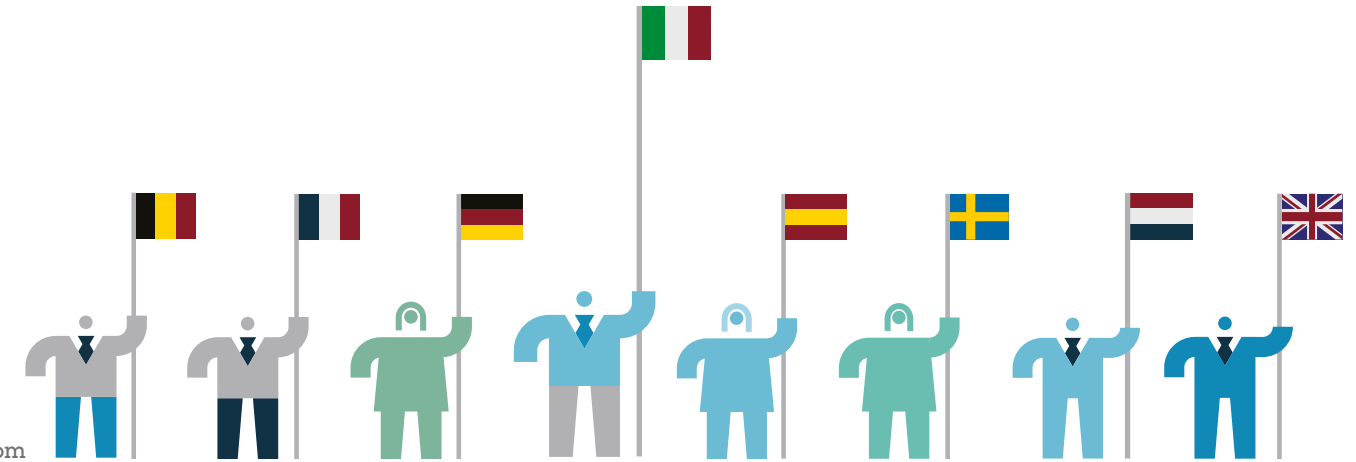

Any significant deviations from the Directive?

The Italian regulatory framework on trade secrets presents no major deviations from the Directive. However, within the legal framework provided by the Directive, the Italian Legislative Decree introduced some specificities.

In particular, the unlawful disclosure of trade secrets which, under the regime preceding the new regulation, already represented a criminal offence, is now punished more severely where a trade secret is violated through the use of IT solutions.

The Italian bill also provides for a 5 year limitation period, which is a reduction from the 10 years applicable prior to the coming into effect of the new regulation in the case of contractual breaches.

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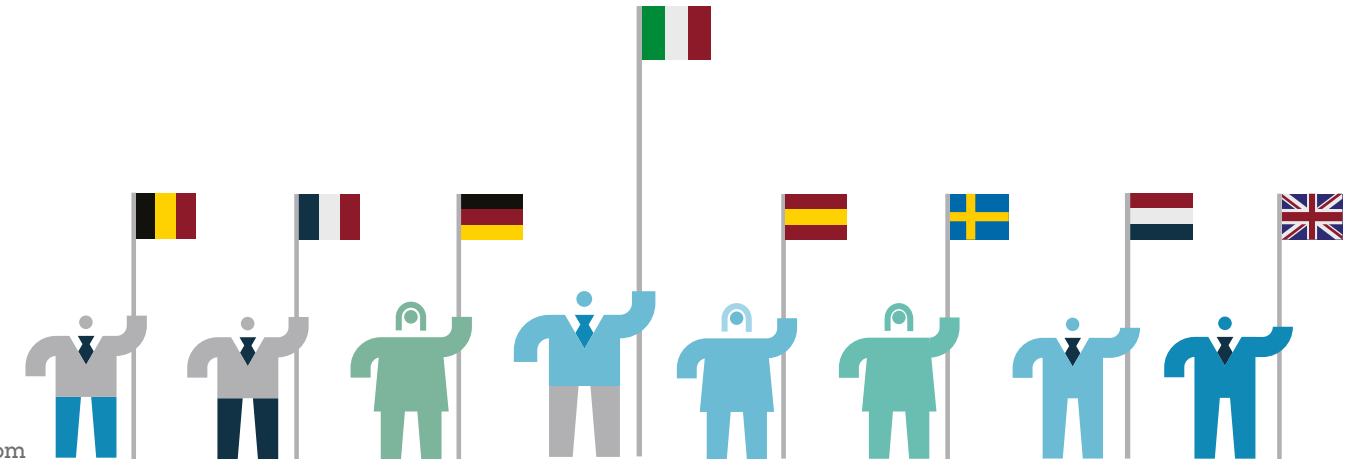

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How does the national legislator construe he requirement to undertake 'reasonable protection measures'?

The requirement to undertake 'reasonable protection measures' already existed under the regime preceding new Legislative Decree. So far, the courts have taken the view that the meaning and practical implications of this requirement must be established on a case-by-case basis. Nonetheless, as a general rule, courts will consider relevant those circumstances showing the employer's conduct as incompatible with the employer's willingness to disclose the relevant information.

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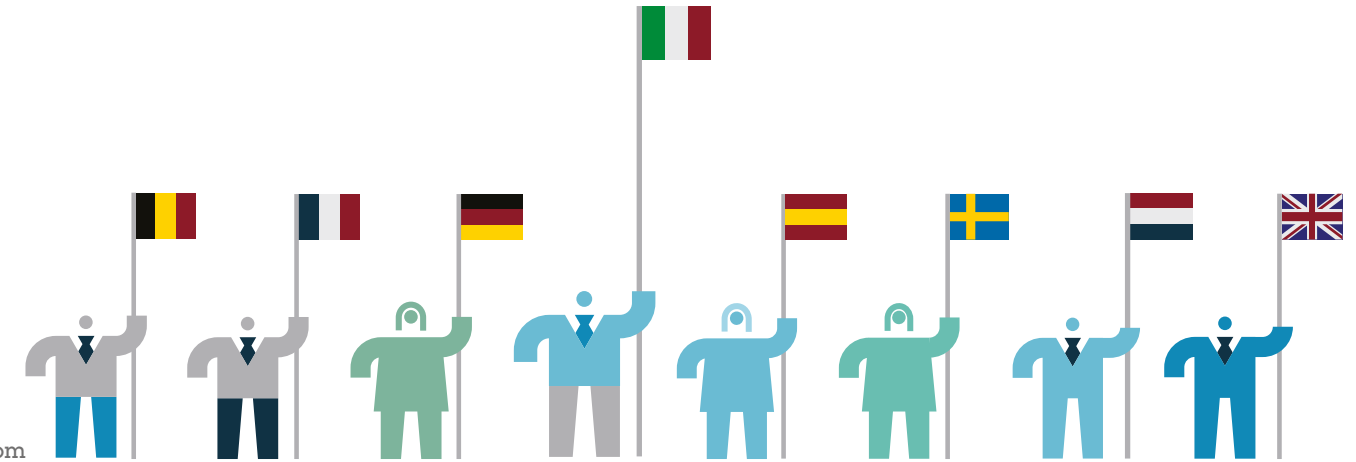

Any specific don'ts when drafting NDAs according to national law case?

Avoid general and vague language and try to define what falls within the definition of 'trade secrets' as clearly and precisely as you can. You should also avoid 'catch-all clauses', which may be found invalid or unsuitable for the purposes of ensuring the relevant information qualifies as 'confidential information' and, therefore, enjoys the protection reserved to it.

Try to clarify what represents a trade secret, and therefore cannot be used nor disclosed by the employee, as opposed to what constitutes an employee's practical knowledge, which the employee shall remain free to use.

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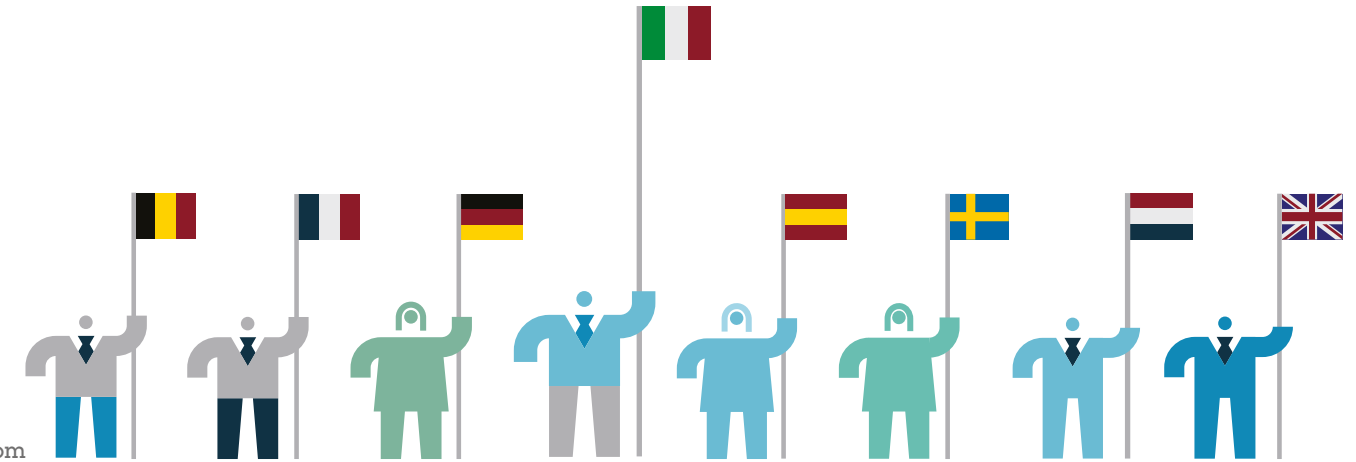

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Post-contractual confidentiality obligations in employment contracts are valid and employees are, in principle, obligated to keep trade secrets confidential even in the absence of specific post-contractual confidentiality obligations in the employment agreement. This is as a consequence of their general loyalty obligation towards their employer.

However, any such contractual confidentiality obligations shall not cover the practical knowledge an employee has gained in the course of the employment, which the former employee will be able to continue to use even after the expiry or termination of the employment agreement.

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Spotlight on Spain

Is there a draft/final bill yet?

The Spanish Law 1/2019 on Trade Secrets was enacted on 21 February 2019 and is in force from 13 March 2019.

Any significant deviations from the Directive?

The Spanish Law uses the terms "business secret" (instead of "trade secret"), giving proprietary rights to the "owner" (instead of "holder") that may be assigned, transferred or licensed. The Spanish Law also envisages joint ownership of a trade secret.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Spanish Law does not include any specific and detailed wording on this requirement.

Any specific don'ts when drafting NDAs according to national law case?

It is not possible to agree to indefinite obligations. Such clauses may be considered null and void.

Are post-contractual confidentiality obligations in employment contracts valid?

Yes, although their enforceability is limited, in particular if the employee was not a director or a relevant individual in the company or if the clauses applied for an indefinite term.

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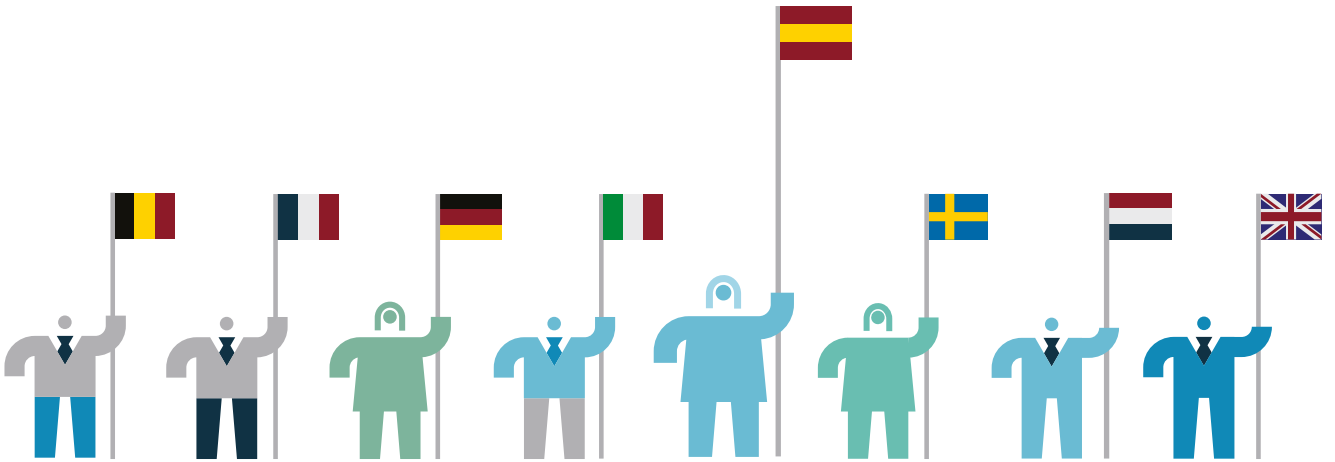

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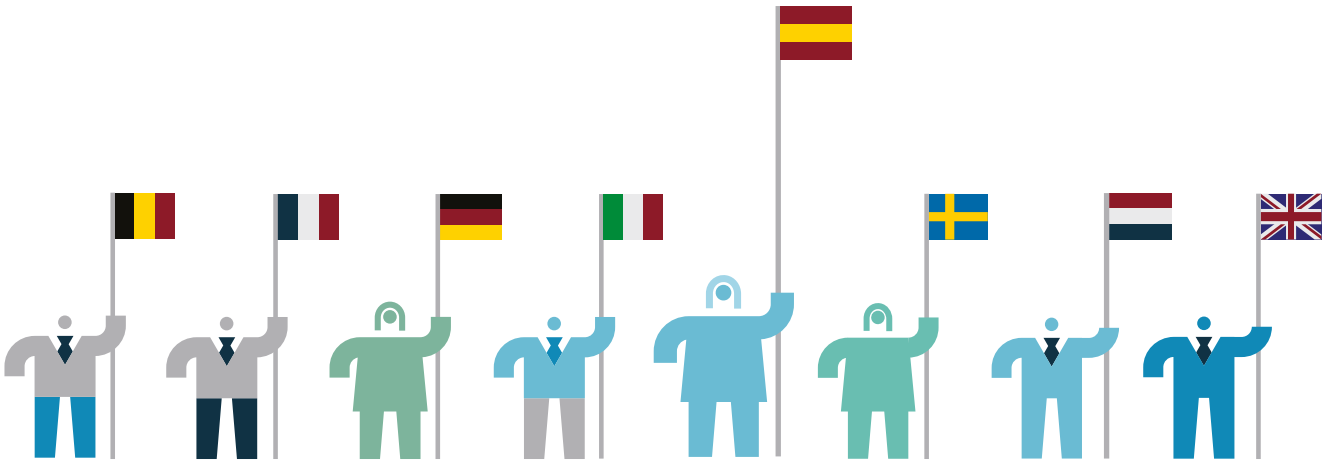

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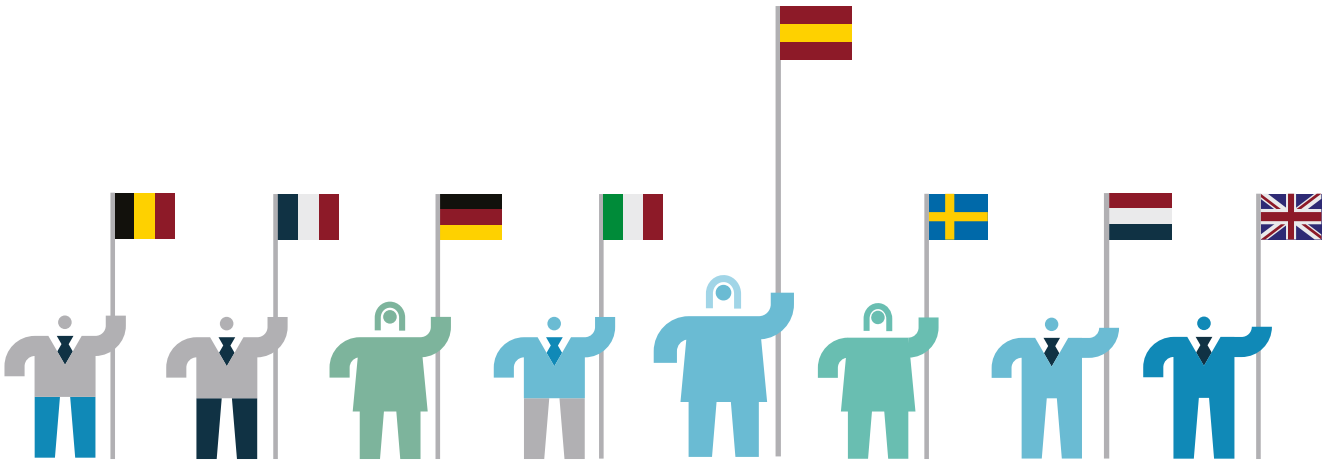

Any significant deviations from the Directive?

The Spanish Law maintains, as traditionally used by legislation, case-law and academic doctrine, the term "business secret" (instead of "trade secret"), giving the "owner" (instead of the "holder") a subjective and property nature right, which may be partially or totally assigned, transferred, or licensed. In this sense, the Spanish Law also envisages the joint ownership of a trade secret, whose exploitation may be carried out by any joint owner simply notifying the rest of the joint owners.

Also, among the requirements to be met for a piece of information to qualify as trade secret, it is required that "it has commercial value, either actual or potential, precisely because it is secret", which was already anticipated in the recitals of the Directive but not in the relevant Article.

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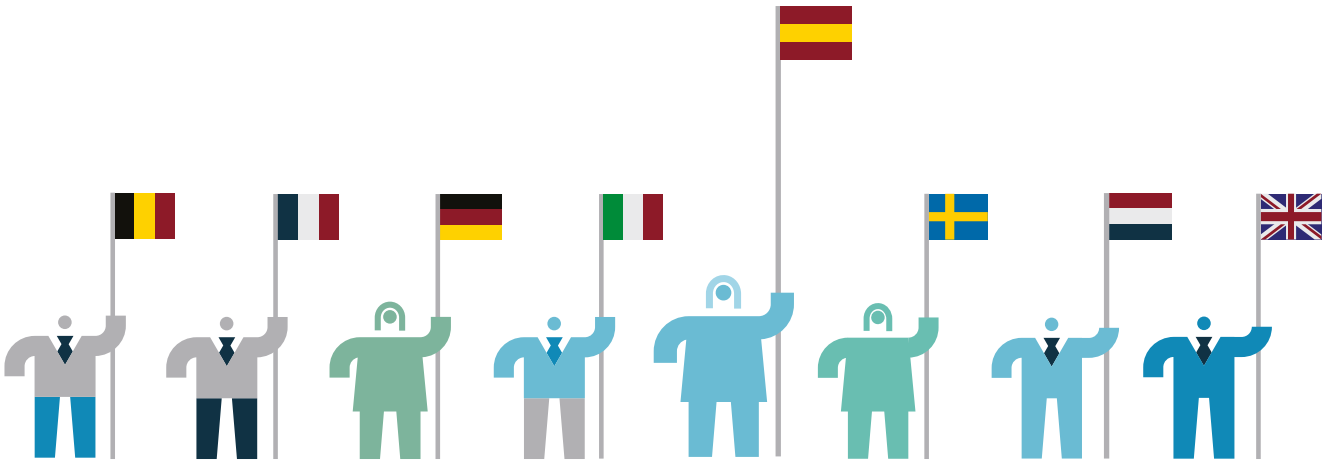

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Spanish Law does not include any specific and detailed wording on this requirement, such that these "reasonable protection measures" remaining unspecified. However, before the enactment of this Law, the Spanish case law on the matter has required that the existence of some measures should have been adopted in order to consider that there has been an unlawful use, access, discovery, or disclosure of a trade secret. The main aspects of a "business secret" under the previous Spanish law on the matter were confidentiality (which shows the will to keep it away from third parties), exclusivity (relating just to the relevant company), economic value (which enshrines an economic advantage) and lawfulness (pertaining to a lawful activity).

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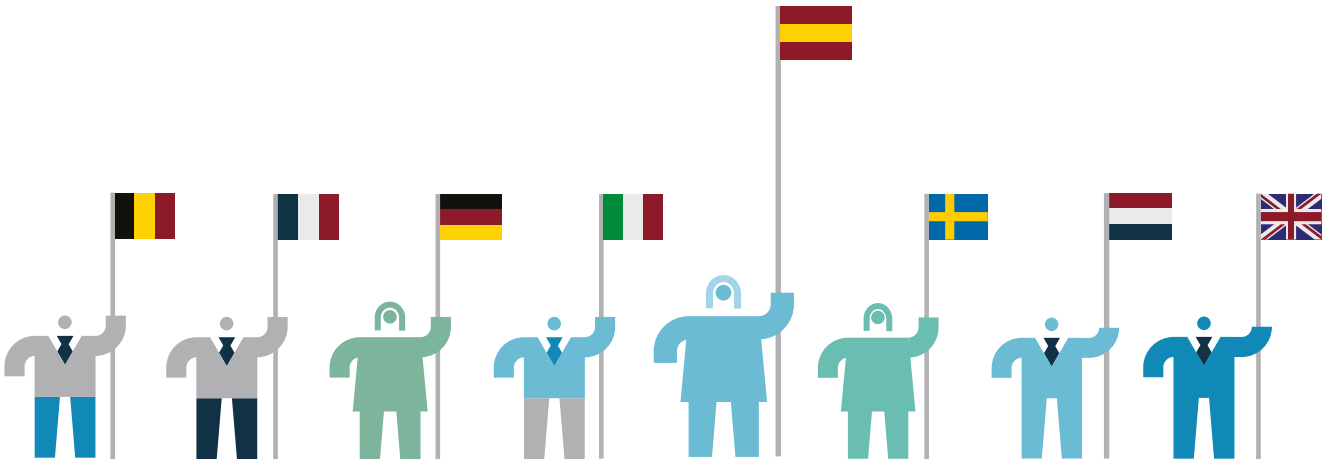

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In addition, according to the Spanish Law implementing the Directive, trade secrets cannot be the basis for restricting employees mobility or limiting the use of competences and experience fairly acquired by them throughout their professional career.

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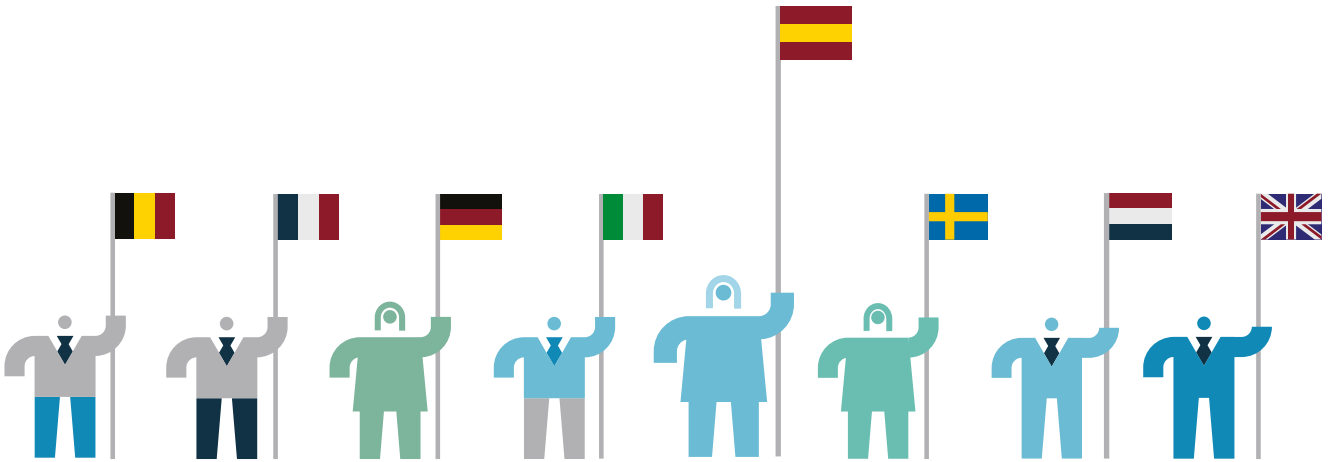


Spotlight on Sweden

OC in numbers

Is there a draft/final bill yet?

The Trade Secrets Directive has been implemented into Swedish law as of 1 July 2018.

Any significant deviations from the Directive?

No major deviations, but there are some differences worth mentioning.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

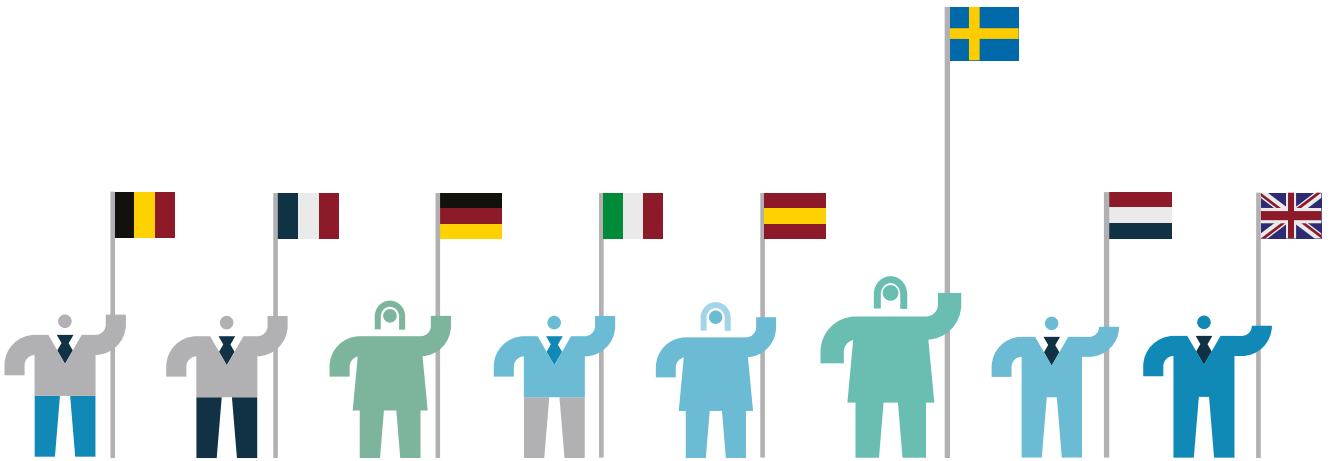
The Trade Secrets Act states that undertaking reasonable protection measures must involve active measures. The expected level of active measure will be assessed on a case-by-case basis.

Any specific don'ts when drafting NDAs according to national law case?

Include detailed definitions of the kind of information protected; do not include information that does not meet the trade secret definition, penalty clauses or unfair contract clauses.

Are post-contractual confidentiality obligations in employment contracts valid?

Yes, so long as the employer is not a governmental organisation.



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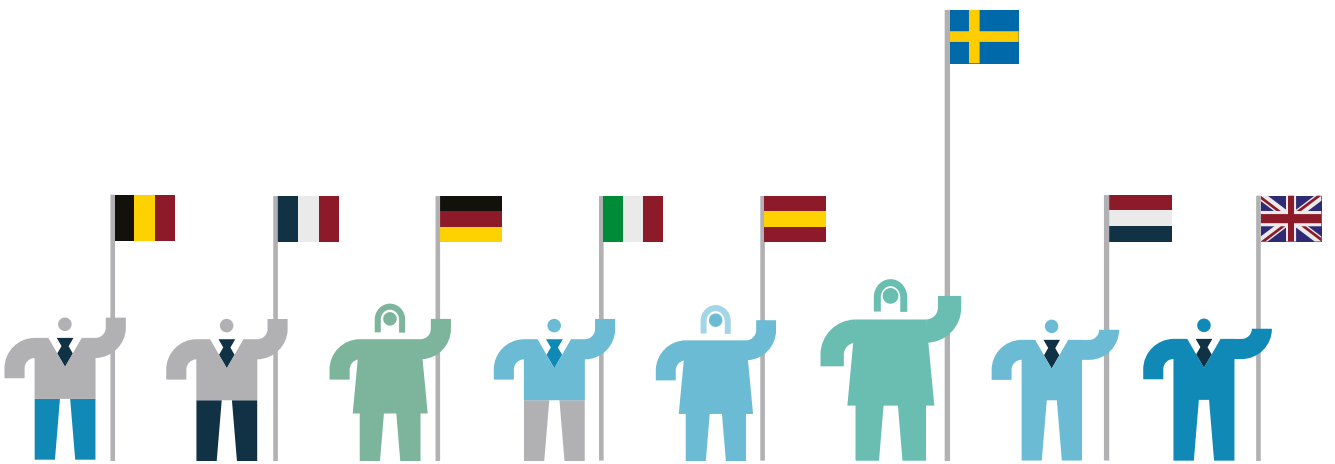

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Is there a draft/final bill yet?

As of 1 July 2018 the Trade Secrets Directive has been implemented into Swedish law by the Trade Secrets Act 2018:558 (Lag om företagshemligheter) (the 'Trade Secrets Act').

Spotlight on Sweden

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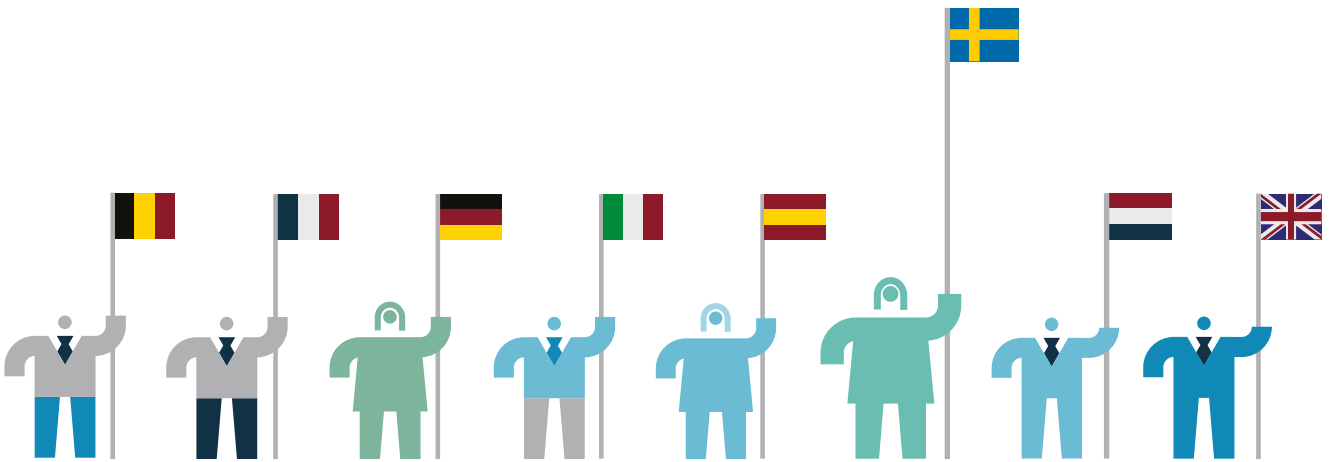

Any significant deviations from the Directive?

The Trade Secrets Act retains the structure and terminology of its predecessor, rather than the Trade Secrets Directive's. However, the Trade Secrets Act's material content does not significantly deviate from the Trade Secrets Directive's, but there are some differences that are worth mentioning.

The definition of the type of information that constitutes a trade secret in the Trade Secrets Act differentiates somewhat from the definition set out in the Trade Secrets Directive. While the Directive states that the information has commercial value because it is secret, the Trade Secrets Act instead states that (i) a trade secret refers to a course of business or operational conditions in a business and (ii) the disclosure of information is meant to cause harm to the trade secret holder.

The Trade Secrets Directive states that Member States shall ensure that the trade secret holder can order provisional measures against an alleged infringer to cease use and disclosure of trade secrets. The Trade Secrets Act expands the provisional measures to also include such events (and acquisition) that are imminent.

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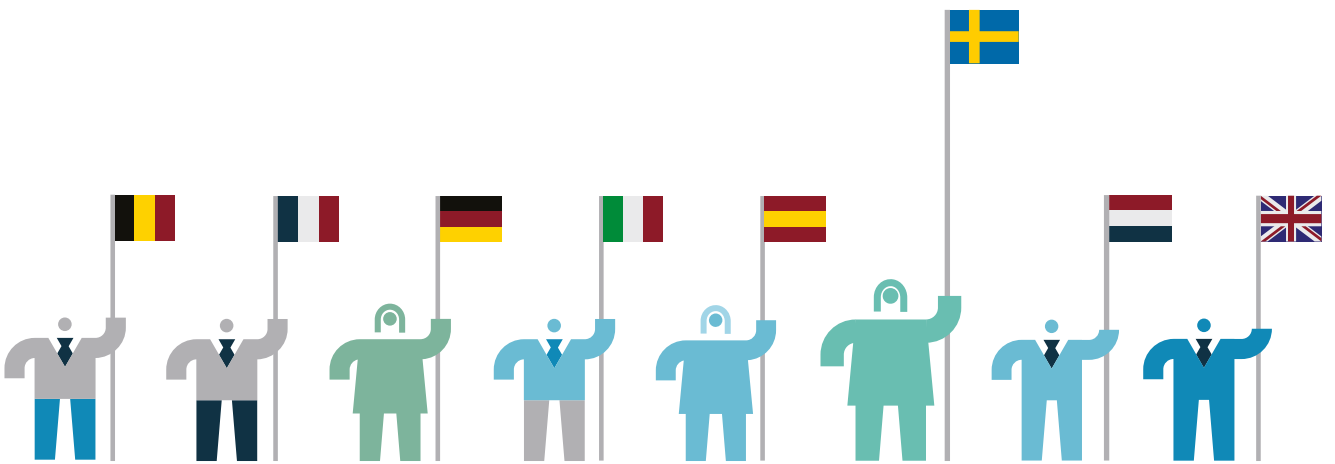

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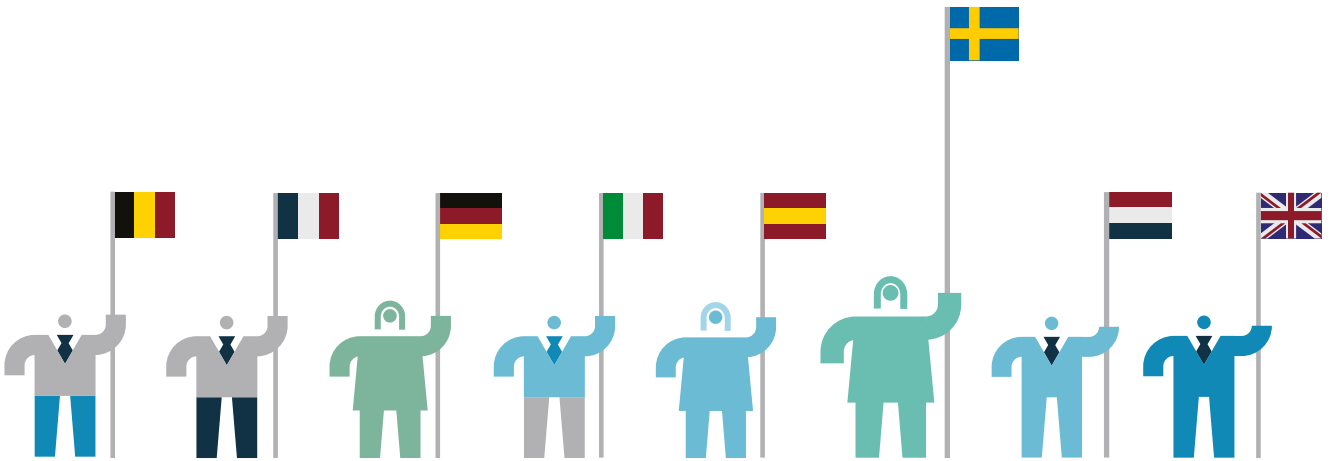

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Any specific don'ts when drafting NDAs according to national law case?

Include detailed definitions of the kind of information protected. Do not include:

- information that does not meet the trade secret definition, as such information most likely would be denied legal effect in court;
- broad definitions of trade secret information as they can give rise to interpretation issues regarding the scope of the NDA;
- penalty clauses or damages provisions without specifying the damages and the form of payment which would be covered by them; or
- unfair contract clauses as they could be subject to adjustment or be denied legal effect in court, although in most cases only between signed parties of unequal strength.

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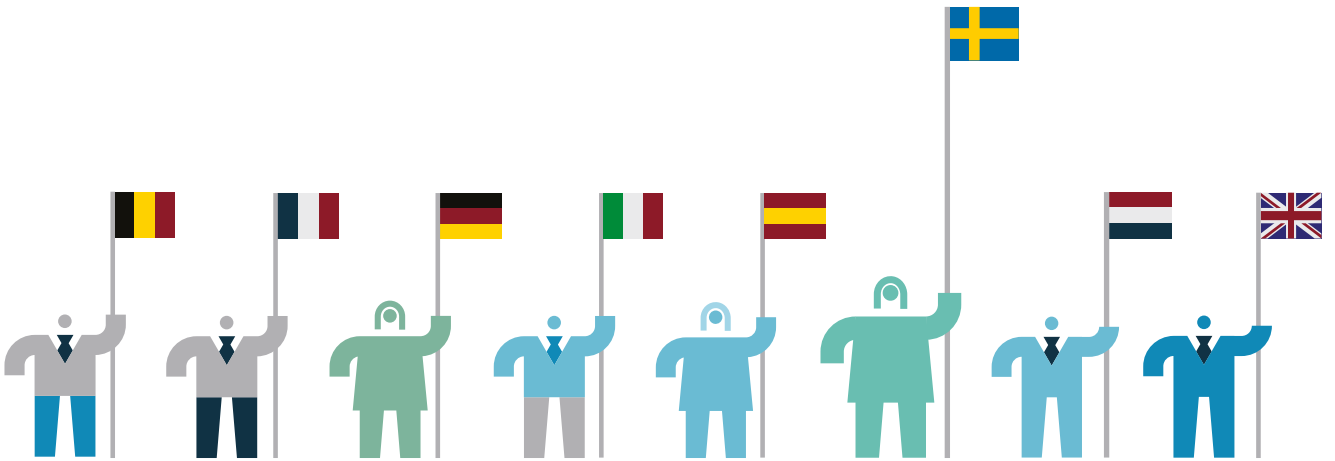

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Are post-contractual confidentiality obligations in employment contracts valid?

As a general principle under Swedish employment law, an employee is discharged from the obligations of loyalty once the employment has been terminated. However, if exceptional reasons are at hand, for example if the employee has commenced the employment solely for the purpose of accessing trade secrets, post contractual confidentiality obligations in employment contracts are valid.

The employer and the employee may also enter into an individual NDA, as long as the employer is not a governmental organisation. An individual NDA would not require exceptional reasons in order to claim a confidentiality breach. However, an NDA may be denied legal effect in court if it is unfair.

In order for an NDA with post-contractual confidentiality obligations to be valid, it must cover information that meets the trade secret definition. In addition, such obligations must not be unfair, meaning that e.g. (i) they must be limited in time (depends on what field and what kind of trade secret) and (ii) the employee's interest of using information covered by the NDA in the labour market should be taken into account when assessing the time limit as well as the NDA's fairness in itself.

Spotlight on the Netherlands

Is there a draft/final bill yet?

The Dutch Trade Secrets Act (Wet Bescherming Bedrijfsgeheimen) entered into force on 23 October 2018.

Any significant deviations from the Directive?

No, there are no significant deviations from the Directive

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Trade Secrets Act implements the requirement to undertake reasonable protection measures. The explanatory memorandum to the Trade Secret Act non-exhaustively lists several technical, contractual and digital measures the legislator deems "obvious".

Any specific don'ts when drafting NDAs according to national law case?

Trade secrets should be defined as precisely as possible, without deviation from the statutory definition of "trade secrets". NDAs can provide for penalty payments. Specific requirements apply to employment contracts.

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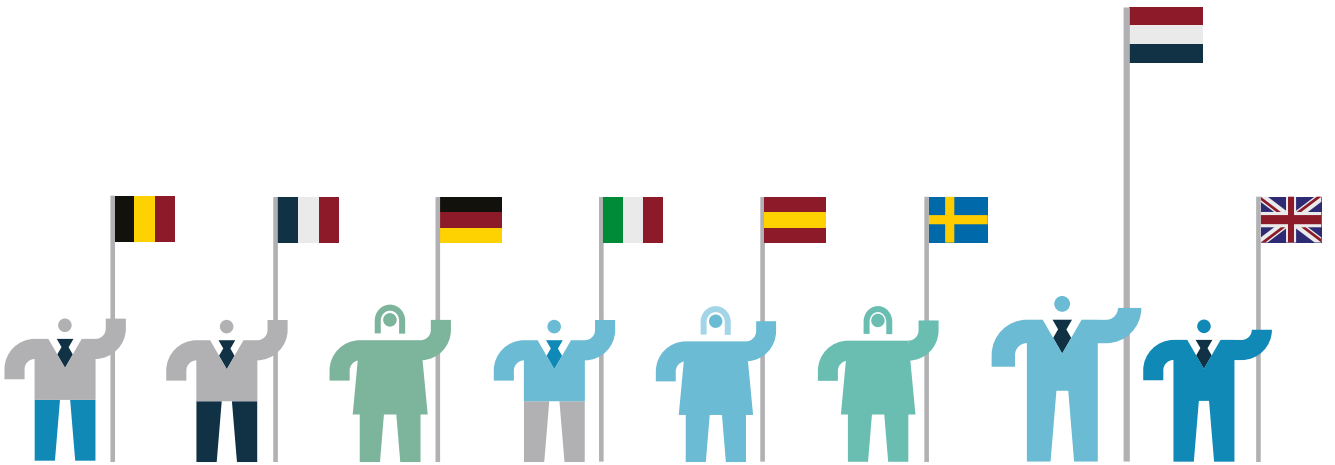
Post-contractual confidentiality obligations in employment contracts are allowed.



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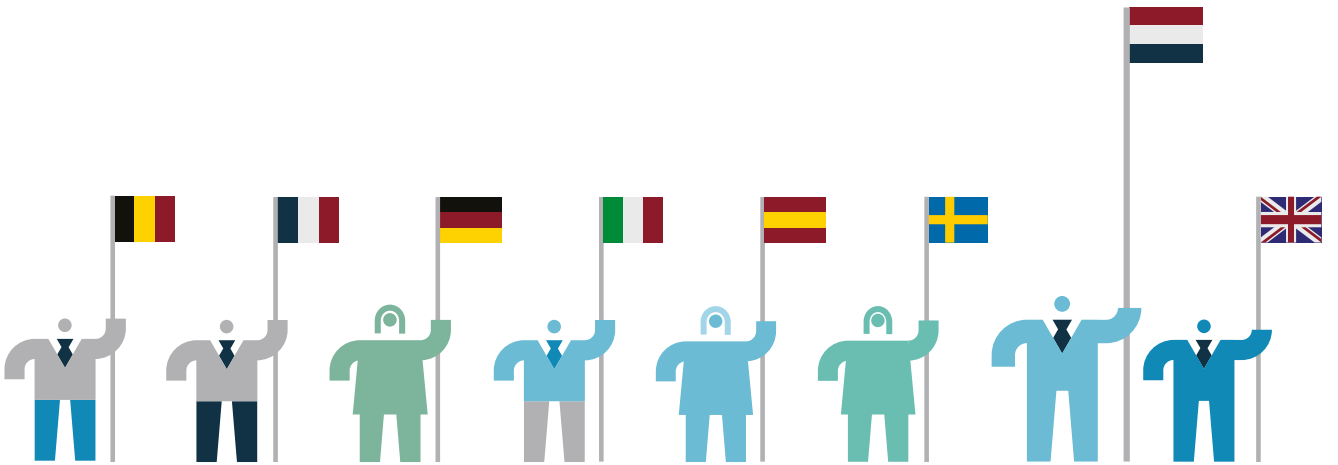

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The legislative proposal for implementation of the Trade Secrets Directive was submitted to the House of Representatives on 10 November 2017, where a majority voted in favour of the (amended) legislative proposal on 17 April 2018. The Senate voted in favour of the bill on 16 October 2018, paving the way for the Dutch Trade Secrets Act to enter into force on 23 October 2018.

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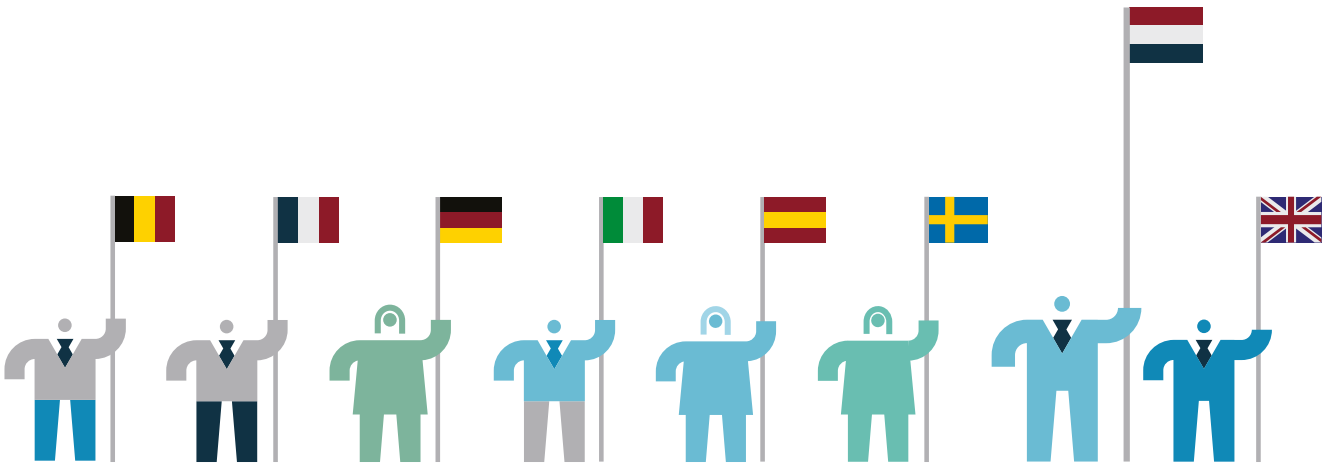

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Any significant deviations from the Directive?

The Trade Secrets Act does not significantly deviate from the Directive.

The Trade Secrets Act amends not only the Dutch Civil Code; the legislator also amended the Dutch Code of Civil Procedure to include several provisions that explicitly apply to trade secrets to meet the requirements set by the Directive.

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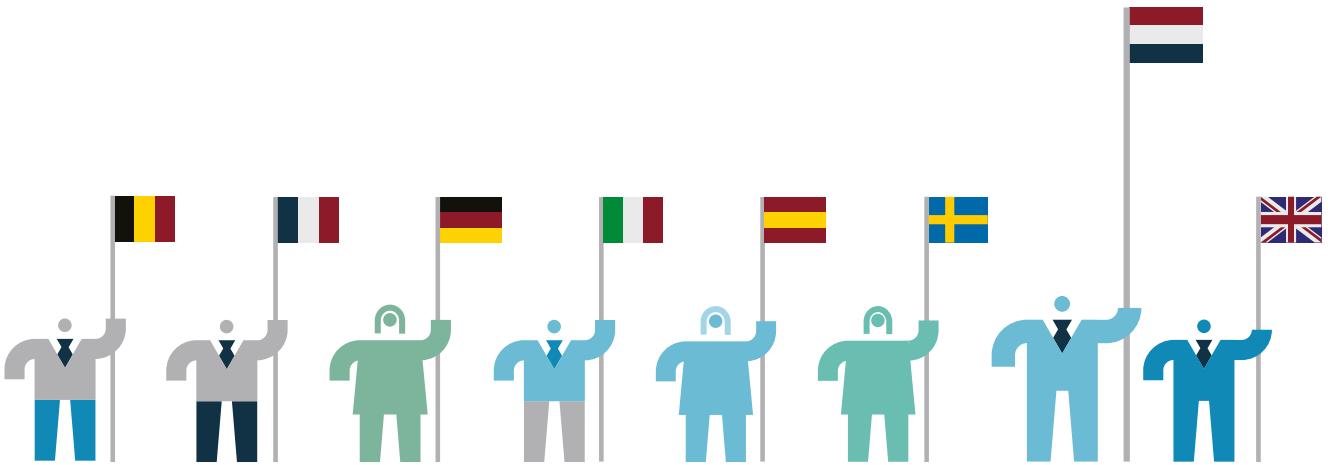

How does the national legislator construe the requirement to undertake "reasonable protection measures"?

The Trade Secrets Act does not define the requirement to undertake "reasonable protec-tion measures". The explanatory memorandum provides a non-exhaustive summary of "ob-vious" protection measures:

- Technical and contractual measures such as: including NDA's in commercial con-tracts, including NDA's in employment contracts and working regulations, explicitly la-belling or registering trade secrets (i.e. an organisational security measure, such as a provision that only key figures in a company have access to these secrets or perform-ing an i-DEPOT) and ensuring the physical security of company grounds or specific in-stallations.
- Digital measures such as encryption, for example to prevent hacking of computer files or emails.

The limited guidance provided by the legislator means that courts will have broad discretion to determine whether, in a specific case, reasonable measures were taken. Over time, the requirement of "reasonable measures" will undoubtedly further be developed in case law.

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Post-contractual confidentiality obligations in employment contracts are allowed.

Any specific don'ts when drafting NDAs according to national case law?

Deviation from the definition of "trade secrets" precludes reliance on the protection of the Trade Secrets Act. However, the legislator has clarified that using a different definition does not make the NDA invalid, which means that other protections than those provided by the Trade Secrets Act may still apply.

The NDA can provide for a penalty. If a penalty is included in an employment contract, spe-cific requirements apply, such as that the penalty may not directly or indirectly benefit the employer or the person or entity authorised to impose the penalty.

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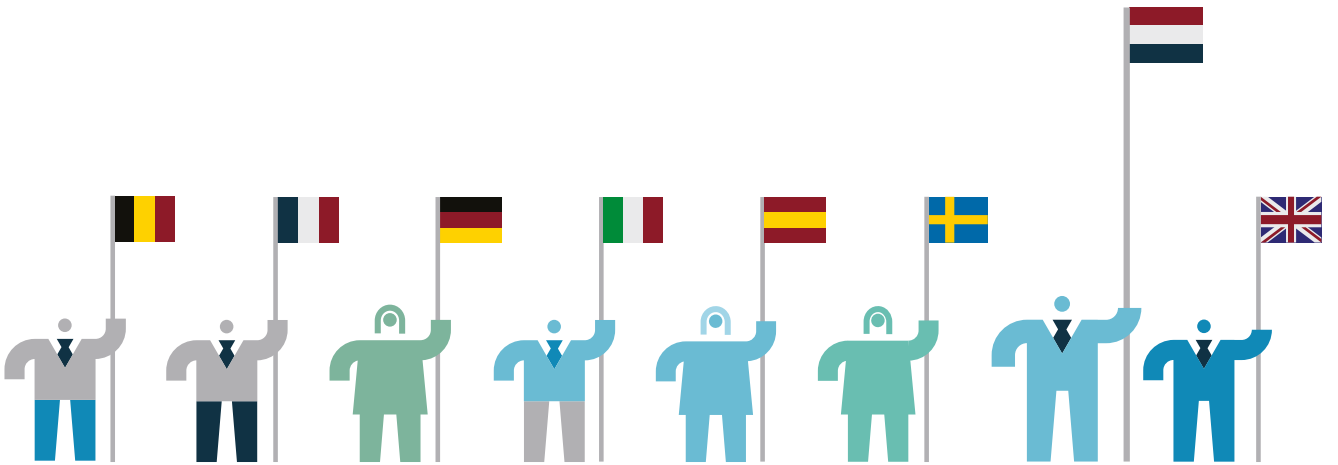

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Confidentiality obligations can survive the contractual relation between employer and employee. However, (post-)contractual confidentiality obligations may be limited in scope by the right of freedom of expression. Additionally, whistle-blowers enjoy specific privileges to disclose information, which may effectively detract from their confidentiality obligations.

Employers should also explicitly require that any and all contractual confidentiality obligations remain in effect when concluding a termination agreement with which the employee is granted final discharge. Otherwise, the final discharge may also cover any prior contractual confidentiality obligations.

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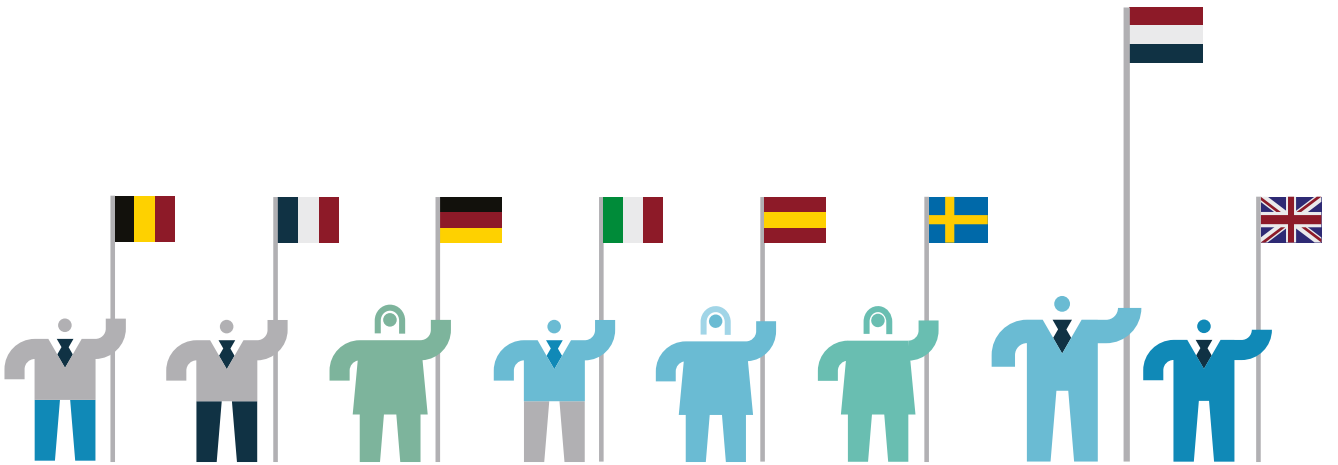

Spotlight on UK

OC in numbers

Is there a draft/final bill yet?

Yes. The Trade Secrets (Enforcement, etc) Regulations came into force on 9 June 2018.

Any significant deviations from the Directive?

The UK already had strong protection for trade secrets under the existing UK law of breach of confidence. However, the UK Regulations provide for a new potential claim which in cer-tain circumstances may provide wider protection for holders of trade secrets.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Regulations do not bring this requirement into the UK law of breach of confidence. A claimant will only need to satisfy this requirement if it wants to rely on specific provisions concerning limitation periods, preservation of confidentiality and available remedies.

Any specific don'ts when drafting NDAs according to national law case?

Don't apply the NDA to information that is not confidential. If an NDA is drafted too widely, there may be a risk that a court will not uphold the agreement, even for genuinely confidential information.

Are post-contractual confidentiality obligations in employment contracts valid?

Yes, but only to the extent that the confidentiality obligations protect particularly important and valuable confidential information.

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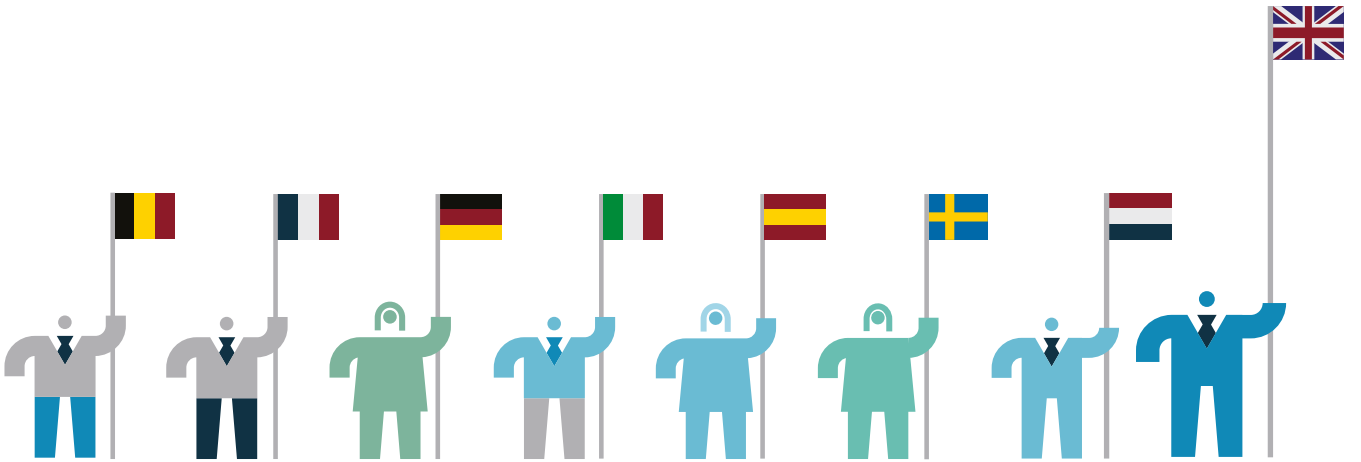

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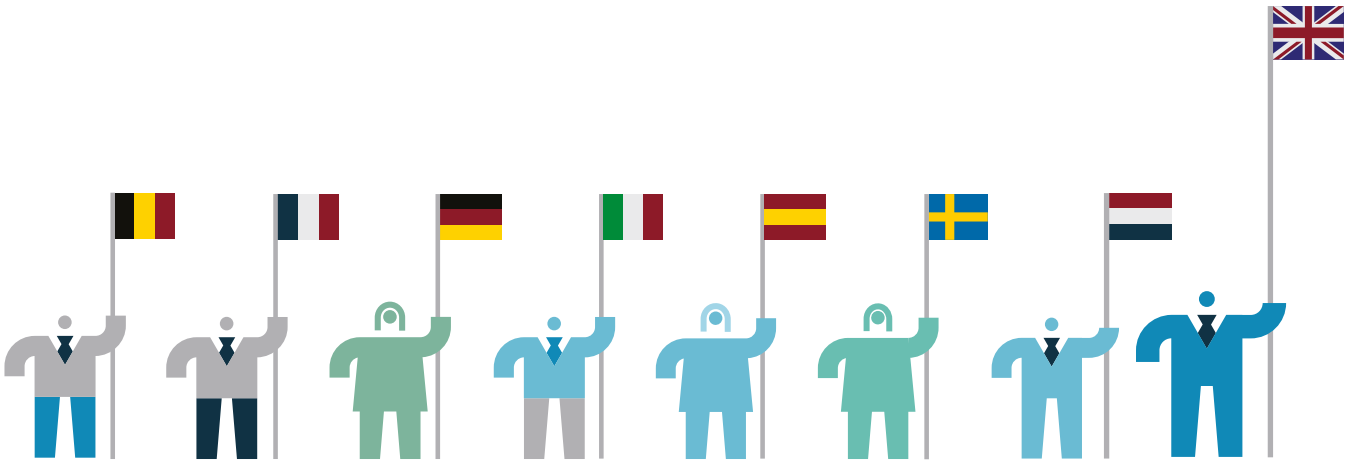

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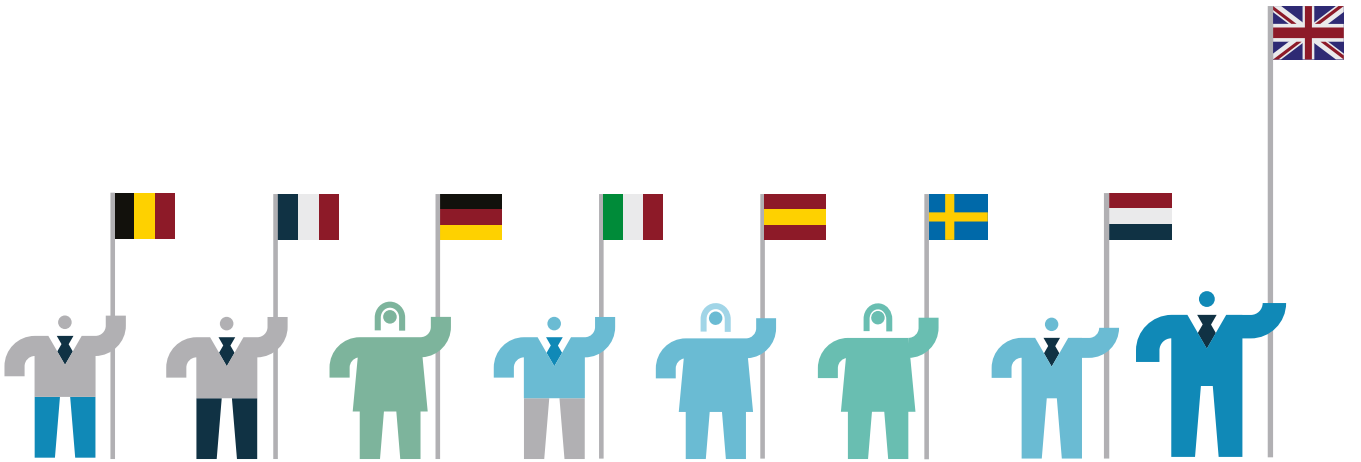

Any significant deviations from the Directive?

The UK already had strong protection for trade secrets under the existing UK law of breach of confidence and the UK Regulations leave in place this pre-existing UK law. In particular, the requirement to undertake 'reasonable protection measures' has not been incorporated into the UK law of breach of confidence.

However, the UK Regulations provide for a new alternative potential claim in accordance with the Trade Secrets Directive which in certain circumstances may provide wider protection for holders of trade secrets, for example because the Directive's provisions concerning limitation periods, preservations of confidentiality and available remedies will apply and these could be more favourable than under pre-existing UK law. If a trade secret holder wants to rely on this alternative claim then they will need to satisfy the requirement that they have undertaken 'reasonable protection measures'.

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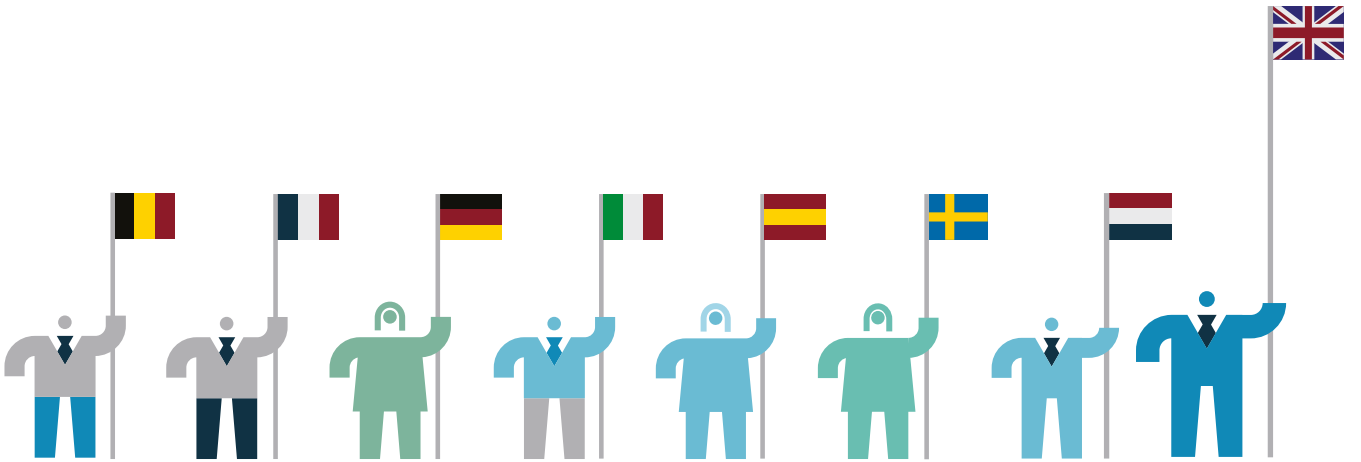

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The UK Regulations require a trade secret to have been 'subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret'. How this will be interpreted will be a matter for the UK courts and ultimately the Court of Justice (at least whilst the UK still follows or take accounts of its decisions).

The UK Regulations do not bring this requirement into the UK law of breach of confidence, so the interpretation of this requirement will only become crucial if a claimant wants to rely on specific provisions that have been taken from the Directive which provide wider protection that the pre-existing UK law. We expect that this will not be necessary in most cases of misuse of trade secrets or breach of confidence in the UK.

OC in numbers

Spotlight on UK

Is there a draft/final bill yet?

Yes. The Trade Secrets (Enforcement, etc) Regulations came into force on 9 June 2018.

Any significant deviations from the Directive?

The UK already had strong protection for trade secrets under the existing UK law of breach of confidence. However, the UK Regulations provide for a new potential claim which in cer-tain circumstances may provide wider protection for holders of trade secrets.

How does the national legislator construe the requirement to undertake 'reasonable protection measures'?

The Regulations do not bring this requirement into the UK law of breach of confidence. A claimant will only need to satisfy this requirement if it wants to rely on specific provisions concerning limitation periods, preservation of confidentiality and available remedies.

Any specific don'ts when drafting NDAs according to national law case?

Don't apply the NDA to information that is not confidential. If an NDA is drafted too widely, there may be a risk that a court will not uphold the agreement, even for genuinely confidential information.

Are post-contractual confidentiality obligations in employment contracts valid?

Yes, but only to the extent that the confidentiality obligations protect particularly important and valuable confidential information.

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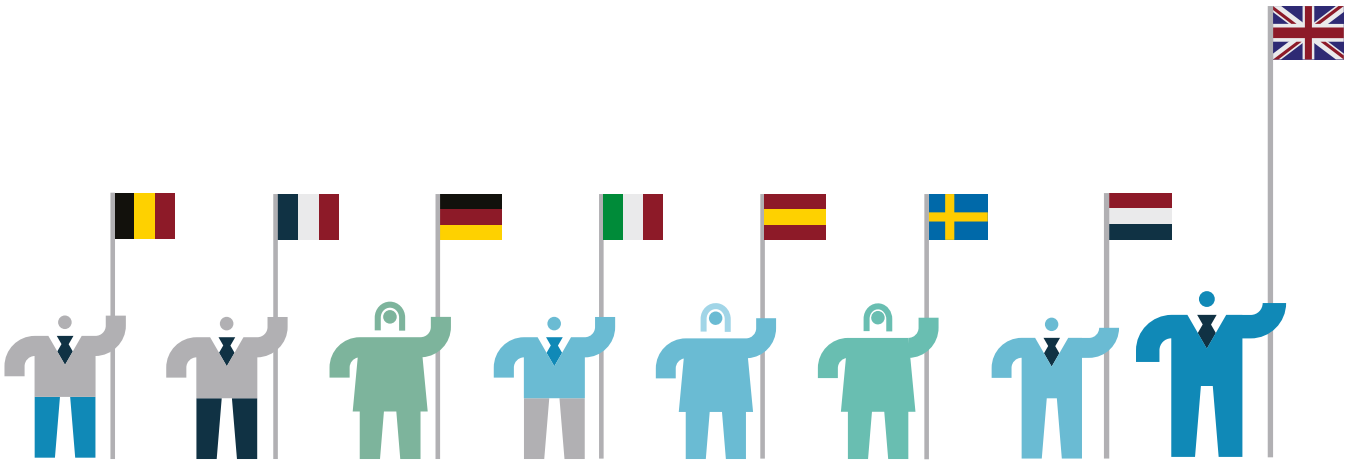

Any specific don'ts when drafting NDAs according to national law case?

Don't apply the NDA to information that is not confidential.

In order to be protected as confidential information, the information concerned must have 'the necessary quality of confidence'. If an NDA is drafted too widely, so that it covers all information provided, for example, then there may be a risk that a court will not uphold the agreement, even for genuinely confidential information.

Spotlight on UK

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Yes, but only to the extent that the confidentiality obligations protect particularly important and valuable confidential information. Confusingly, UK courts have in the past referred to this particularly important and valuable confidential information as 'trade secrets', but in this context the expression probably covers a much narrower class of information that the definition of 'trade secrets' in the Directive.

The UK courts have also held that ex-employees have a continuing duty to protect 'trade secrets' (in the traditional UK meaning), even if there is no express obligation for them to do so in their employment contract.

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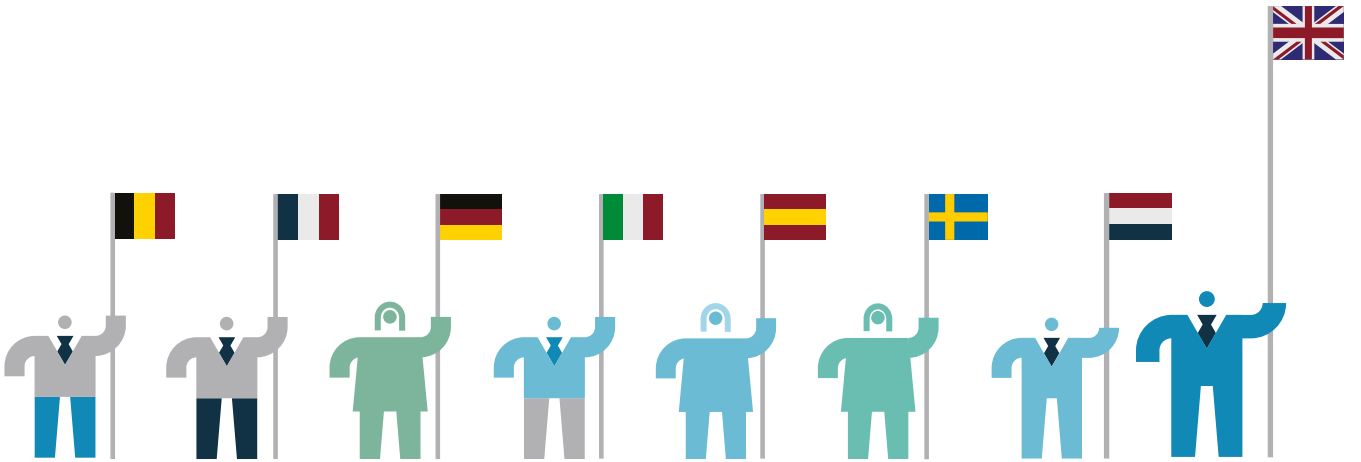

OC in numbers

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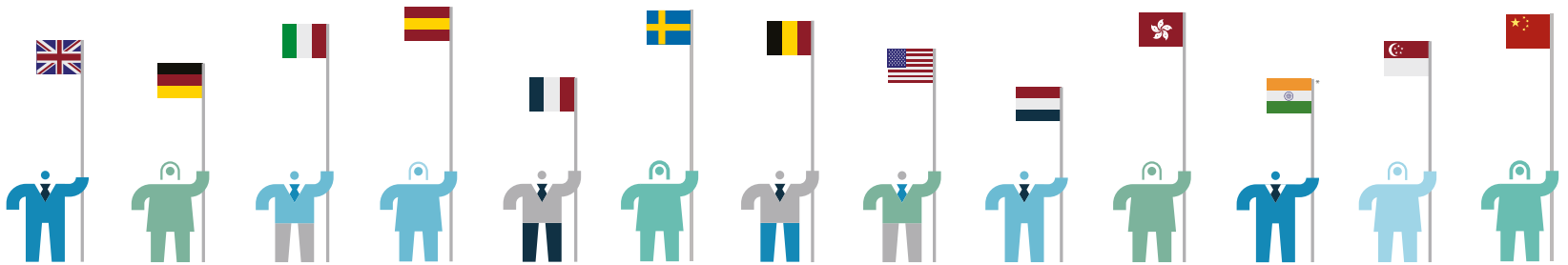

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