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### Entry into force of the law on the protection of trade secrets

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Since 2 July 2019, Luxembourg has had full-blown legislation on trade secrets. After a one-year delay, Luxembourg finally transposed **Directive (EU) 2016/943** of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ("**Directive**").

The **Law of 26 June 2019** on trade secrets<sup>1</sup> ("**Trade Secrets Law**") literally transposes the Directive and provides a legal definition of "trade secrets", which was until now only defined by the courts. The Trade Secrets Law defines as "trade secrets" information which fulfils the three following cumulative criteria: (i) it is secret, (i.e. 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), (ii) it has commercial value because it is secret and (iii) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. For example, market studies, business plans, customer databases may be trade secrets.

The Trade Secrets Law fills a gap for businesses for which trade secrets have significant commercial value but do not satisfy the conditions to be protected under intellectual property law or are not registered as an industrial property title (on a voluntary basis) because of their confidential nature. From now on, the trade secret holder will have at its disposal an arsenal of measures and remedies (such as prohibitory injunctions, damages and corrective measures) that may be requested from the court against an alleged infringer in civil proceedings. These actions are time-barred after two years from the time the trade secret holder becomes aware of the unlawful acquisition, use or disclosure of the trade secret and of the infringer's identity.

Protection of trade secrets is not absolute. The Trade Secrets Law provides for a series of derogations from the application of the measures detailed in the Trade Secrets Law which aim at ensuring that the fundamental freedoms such as the right to freedom of expression and information, including respect for the freedom and pluralism of the media (and more particularly investigative journalism), and whistleblower protection are not jeopardised.

The Trade Secrets Law also provides for rules and measures aiming at ensuring the confidentiality of trade secrets during judicial proceedings relating to the latter. Such measures should encourage trade secret holders to assert their rights with respect to the unlawful use or disclosure of their trade secrets before the courts.

1. Law of 26 June 2019 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

## New law on sanctions against geo-blocking discriminations

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**Regulation (EU) 2018/302** on addressing unjustified geo-blocking and other forms of discrimination ("Geo-blocking Regulation"), applicable as from 3 December 2018, sets out rules prohibiting discrimination against consumers, and, as the case may be, undertakings, based on their nationality, place of residence or establishment when they purchase goods or services.

As a matter of general principle, the Geo-blocking Regulation prohibits any EU trader from discriminating customers from EU countries other than the one in which it is established on the basis of their nationality, place of residence or establishment. However the Geo-Blocking Regulation (i) does not prevent traders from making specific offers only to a specific territory within a Member State or other targeted offers to certain groups of customers on a non-discriminatory basis and (ii) does not order traders to deliver goods or services in other (EU) countries.

Therefore, a Luxembourg trader is, for example, allowed to restrict its deliveries of goods to Luxembourg only but cannot refuse a sale to a non-Luxembourg EU resident who organises the pick-up of the product in Luxembourg.

Furthermore, the non-discriminatory obligations to be borne by traders due to the Geo-blocking Regulation may have, under certain circumstances, tax implications, such as the relevant VAT rate to be charged. In this respect, the Geo-Blocking Regulation states that traders subject to Chapter 1 of Title XII of the VAT Directive 2006/112/EC (i.e. SMEs) are exempted from the prohibition of applying different general conditions of access for reasons related to customers' nationality, place of residence or place of establishment, when providing electronically supplied services, as such prohibition would require them to register in order to account for VAT of other Member States, which would be a disproportionate burden, considering the size and characteristics of such traders.

Audiovisual services, including services for which the main purpose is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses, are excluded from the scope of the Geo-blocking Regulation.

In terms of infringements of the provisions set out under the Geo-blocking Regulation, it is stated that Member States shall lay down the rules for the measures applicable to such infringements.

In this respect, the Luxembourg **Law of 26 June 2019** on certain modalities of application and sanctions

in relation with the Geo-blocking Regulation was published in the *Mémorial* on 28 June 2019 (“**Geo-blocking Law**”).

The Geo-blocking Law states that the European Consumer Centre is the entity in charge of providing assistance to consumers in the event of a dispute with traders arising from the application of the Geo-blocking Regulation.

In terms of legal proceedings, the Geo-blocking Law establishes that the President of the *Tribunal d’arrondissement* (Commercial Chamber) may, upon request from any person, professional association, or consumer organisation, order the suspension of the acts in breach of the Geo-blocking Regulation. Appeal against such a court order can be lodged within 15 days.

The law further states that any failure to comply with a binding court order shall be punished by a fine of EUR 251 up to EUR 120,000.

As stated during the parliamentary debates leading to the adoption of the Geo-blocking Law, 68% of Luxembourg residents purchase goods and services online from traders located in other EU countries, so that they are more likely to be subject to discrimination practices.

## Harmonisation of national consumer laws: New directives

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On 20 May 2019, the European Union adopted two new directives on sales contracts for goods and digital content. The objective of these new directives is to further harmonise the different national consumer laws and make it easier and safer for consumers and traders to buy and sell inside the Member States’ borders. In doing so, the new rules intend to reduce the costs supported by businesses stemming from the differences in consumer laws through the European Union. **Directive (EU) 2019/770** is dedicated to the supply of digital content and services (online movies, games, music, e-books, cloud storage, communication services, software, etc.), including when sold on a medium (Blurays, DVDs, etc.), whereas **Directive (EU) 2019/771** governs the sale of goods (online or in shops), including goods embedded with digital components (smart watches, smart TVs, smart fridges, etc.).

Both directives provide in particular for (i) conformity requirements (e.g. quality, interoperability, updates, accessories, fit for purposes, etc.), (ii) remedies for lack of conformity (e.g. repair, replacement, price reduction, full reimbursement etc.), (iii) a 2-year guarantee ensuring traders’ liability for defects, and (iv) rules regarding the burden of proof.

Directive (EU) 2019/770 will apply to the supply of digital content and services even where the counter-performance is not money but personal data. In that respect, the scope of this directive specifies that it applies without prejudice to the requirements of the General Data Protection Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data.

Member States will have to transpose the provisions of both directives into their national laws by 1 July 2021 and effectively apply such provisions from 1 January 2022.

## Adoption of new European Copyright Directive

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On 17 April 2019, the Directive on copyright and related rights in the Digital Single Market<sup>1</sup> (“**New Copyright Directive**”) was finally adopted after months of negotiation. While the European Commission describes the New Copyright Directive as the “right balance between the interests of all players – users, creators, authors, press – while putting in place proportionate obligations on online platforms”<sup>2</sup>, some

Member States – among which Luxembourg – have disapproved the proposed text of the New Copyright Directive and have considered that it is “a step back for the Digital Single Market rather than a step forward<sup>3</sup>”. Those Member States have in particular denounced the lack of legal clarity of the New Copyright Directive.

Over the past months, the debate has focused in particular on the following provisions:

- Article 15 which deals with the protection of press publications concerning online uses: publishers of press publications are granted the rights to reproduction and making available of works to the public for a period of 2 years from 1 January of the year following the date on which that press publication is published; this right can only be invoked against information society service providers such as the news aggregator Google News;
- Article 17 which deals with the use of protected content by online content-sharing service providers (such as YouTube): the New Copyright Directive clarifies that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public, subject to the prior authorisation of the concerned right holders, when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

The general rules laid down by these articles are qualified by exceptions resulting from negotiations between parties with opposing interests and it is likely that further discussions will start within the Member States at the time of transposition of the New Copyright Directive.

Member States shall transpose the New Copyright Directive into their respective national legislations by 7 June 2021. Regarding the controversial Article 17, please note that the New Copyright Directive provides that the European Commission shall issue guidance on the application of this article following the organisation of stakeholder dialogues and the results thereof.

1. **Directive (EU) 2019/790** of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
2. European Commission – Statement, 26 March 2019, **Statement 19/1839**.
3. Council of the European Union, **Joint statement by the Netherlands, Luxembourg, Poland, Italy and Finland**, 15 April 2019, 7986/19 ADD 1 REV 2 (interinstitutional File: 2016/0280(COD)).

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