[DE] Bundestag votes for draft Trade Secrets Act

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On 21 March 2019, despite criticism from media associations and the opposition, the German Bundestag adopted a draft act tabled by the federal government to implement Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, as contained in a recommended resolution drawn up by the Bundestag Law and Consumer Protection Committee. Directive 2016/943 obliges member states to protect trade secrets through civil law provisions.

According to the act's explanatory memorandum, trade secrets have considerable economic value, but until now have not received any special legal protection under an instrument such as the Patent Act or Copyright Act. In the federal government's view, the current protection of trade secrets in German law, provided under the criminal law provisions of Articles 17 to 19 of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) and Articles 823 and 826 of the Bürgerliche Gesetzbuch (Civil Code - BGB), if necessary in conjunction with Article 1004 BGB, is not sufficient to meet the directive's requirements. Under the government's proposal, the directive will be transposed through a new Gesetz zum Schutz von Geschäftsgeheimnissen (Act on the protection of trade secrets - GeschGhG), which will provide consistent protection against unlawful acquisition, use and disclosure of trade secrets. The draft act contains extensive civil law remedies and, in some circumstances, criminal law provisions to deal with such offences.

In this context, the Bundestag also welcomed the fact that the federal government, during the negotiations on the European Commission's proposal for a directive on the protection of persons reporting on breaches of Union law (COM (2018) 218 final - Whistleblower Protection Directive), advocated rules on the protection of whistleblowers that are coherent and protect the interests of all. At the same time, however, it asked the government, during the ongoing trilogue negotiations, to keep in mind possible interactions between the Whistleblower Protection Directive and Directive (EU) 2016/943, and to seek a reasonable balance between the need to protect whistleblowers, the need for private and commercial confidentiality and the public's right to information.

The draft has been criticised partly because it could significantly hamper freedom of reporting, especially investigative journalism. In a statement of 20 February

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2019, for example, the public service broadcasters and journalists' associations complained that insufficient account had been taken of the fact that the media often needed access to information and documents relating to internal business processes in order to expose wrong-doing in companies, institutions or authorities. A clear exemption was needed for the media, including the right not to disclose sources in order to be able to continue guaranteeing informant confidentiality. A narrower definition of trade secrets was also required.

Under the current draft act, the disclosure of trade secrets can be justified on the basis of the freedom of expression and freedom of information enshrined in the Charter of Fundamental Rights of the European Union, which includes respect for media freedom and plurality. However, without a clear exemption, journalists' associations claimed that civil and criminal law proceedings could still be instigated. In their view, the draft was stricter than it needed to be under EU law and would therefore harm investigative journalism.

Pressemitteilung zur Abstimmung im Deutschen Bundestag

https://www.bundestag.de/dokumente/textarchiv/2019/kw12-de-schutz-geschaeftsgeheimnisse-628876

Press release on the vote at the German Bundestag

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