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DRAFT REPORT

on the proposal for a directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (COM(2013)0813 – C7-0431/2013 – 2013/0402(COD))

Committee on Legal Affairs

Rapporteur: Constance Le Grip
Symbols for procedures

* Consultation procedure
*** Consent procedure
***I Ordinary legislative procedure (first reading)
***II Ordinary legislative procedure (second reading)
***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in **bold italics** in the left-hand column. Replacements are indicated in **bold italics** in both columns. New text is indicated in **bold italics** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in **bold italics**. Deletions are indicated using either the \[ symbol or strikeout. Replacements are indicated by highlighting the new text in **bold italics** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.
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on the proposal for a directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (COM(2013)0813 – C7-0431/2013 – 2013/0402(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

– having regard to the Commission proposal to Parliament and the Council (COM(2013)0813),

– having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0431/2013),

– having regard to Article 294(3) of the Treaty on the Functioning of the European Union,

– having regard to the opinion of the European Economic and Social Committee of 25 March 2014,

– having regard to Rule 59 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy and the Committee on the Internal Market and Consumer Protection (A8-0000/2015),

1. Adopts its position at first reading hereinafter set out;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a directive
Recital 8

(8) It is appropriate to provide for rules at Union level to approximate the national legislative systems so as to ensure a sufficient and consistent level of redress across the internal market in case of unlawful acquisition, use or disclosure of a trade secret. For this purpose, it is important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation. Such definition should therefore be constructed as to cover business information, technological information and know-how where there is both a legitimate interest in keeping confidential and a legitimate expectation in the preservation of such confidentiality. By nature, such definition should exclude trivial information and should not extend to the knowledge and skills gained by employees in the normal course of their employment and which are known among or accessible to persons within the circles that normally deal with the kind of information in question. This information or know-how should have commercial value, whether actual or potential. By nature, such definition should exclude trivial information and should not extend to the knowledge and skills gained by employees in the normal course of their employment and which are known among or accessible to persons within the circles that normally deal with the kind of information in question. In addition, the confidential nature of the information should be indisputable.

Or. fr

Justification

The definition of trade secrets as confidential business information or know-how is consistent with international standards. Some clarifications might be required, however.

Amendment 2

Proposal for a directive
Recital 9
(9) It is also important to identify the circumstances under which legal protection is justified. For this reason, it is necessary to establish the conduct and practices which are to be regarded as unlawful acquisition, use or disclosure of a trade secret. Disclosure by Union’s institutions and bodies or national public authorities of business-related information they hold pursuant to the obligations of Regulation (EC) No 1049/2001 of the European Parliament and of the Council or to other rules on the access to documents should not be considered unlawful disclosure of a trade secret.


Or. fr

Justification

Technical amendment.

Amendment 3

Proposal for a directive
Recital 9 a (new)

Text proposed by the Commission

(9a) Disclosure by Union institutions and bodies or national public authorities of business-related information they hold pursuant to the obligations of Regulation (EC) No 1049/2001 of the European Parliament and of the Council or to other rules on access to documents should
not be considered unlawful disclosure of a trade secret.

_____________________

Or. fr

Justification

Technical amendment.

Amendment 4
Proposal for a directive
Recital 10

Text proposed by the Commission

(10) In the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right on the know-how or information protected as trade secrets. Thus, independent discovery of the same know-how and information remains possible and competitors of the trade secret holder are also free to reverse engineer any lawfully acquired product.

Amendment

(10) In the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right on the know-how or information protected as trade secrets. Thus, independent discovery of the same know-how and information remains possible and competitors of the trade secret holder are also free to reverse engineer any lawfully acquired product. **However, with a view to combating unfair competition and safeguarding innovation, the acquisition, use or disclosure of a trade secret without the consent of its holder which is deemed lawful within the meaning of Article 4(1) should be regarded as unlawful if it is shown to be the result of conduct at odds with honest business practice.**

Or. fr
Justification

This directive seeks to safeguard firms’ innovativeness and creativity. No person who breaches its provisions should be encouraged to perpetrate acts which constitute unfair competition simply by virtue of the existence of such safeguards.

Amendment 5

Proposal for a directive
Recital 10 a (new)

Text proposed by the Commission

(10a) This Directive is without prejudice to national and Union rules authorising or requiring the acquisition, use or disclosure of trade secrets and to action on the part of the administrative and judicial authorities in the context of the exercise of their responsibilities. It does not, however, release the public authorities from the confidentiality obligations to which they are subject in respect of information passed on by holders of trade secrets, whether those obligations are laid down in national or in Union law. This concerns, inter alia, the confidentiality obligations in respect of information forwarded to awarding authorities in the context of procurement procedures, as laid down, for example, in Article 28 of Directive 2014/23/EU of the European Parliament and of the Council, Article 21 of Directive 2014/24/EU of the European Parliament and of the Council and Article 39 of Directive 2014/25/EU of the European Parliament and of the Council.

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Justification

It should be made clear that this directive does not release firms from their transparency and information obligation and will not prevent the public authorities from exercising their responsibilities in accordance with the law.

Amendment 6

Proposal for a directive
Recital 10 b (new)

Text proposed by the Commission

(10b) This Directive should not act as a brake on freedom of information, freedom of expression and media pluralism. No-one should therefore object to the exercise of these freedoms on the grounds that a trade secret must be protected, provided that the person relying on them has acted with a legitimate purpose in view. Member States should enforce to the letter the Charter of Fundamental Rights of the European Union, in particular by guaranteeing effective protection of sources. By the same token, whistle-blowers should be protected, provided that they are acting in the public interest.
Justification

The safeguards introduced by the directive represent a clear step forward by comparison with the standards negotiated in the framework of TRIPS. The media have a fundamental role to play in a democratic and pluralist society and foster public debate. This directive must not pose either a de jure or a de facto threat to journalists’ ability to carry out their work or to the exercise by any person of their freedom of expression, on the basis of legal certainty and in accordance with national and EU law.

Amendment 7

Proposal for a directive
Recital 12

Text proposed by the Commission

(12) The smooth functioning of the internal market would be undermined if the measures and remedies provided for were used to pursue illegitimate intents incompatible with the objectives of this Directive. Therefore, it is important to ensure that judicial authorities are empowered to sanction abusive behaviour by claimants who act in bad faith and submit manifestly unfounded applications. It is also important that measures and remedies provided for should not restrict the freedom of expression and information (which encompasses media freedom and pluralism as reflected in Article 11 of the Charter of Fundamental Rights of the European Union) or whistleblowing activity. Therefore the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest in so far as relevant misconduct or wrongdoing is revealed.

Amendment

(12) The smooth functioning of the internal market would be undermined if the measures and remedies provided for were used to pursue illegitimate intents incompatible with the objectives of this Directive. Therefore, it is important to ensure that judicial authorities are empowered to sanction abusive behaviour by claimants who act in bad faith and submit manifestly unfounded applications. It is also important that measures and remedies provided for should not restrict the freedom of expression and information (which encompasses media freedom and pluralism as reflected in Article 11 of the Charter of Fundamental Rights of the European Union) or whistleblowing activity. Therefore the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest in so far as relevant misconduct or wrongdoing is revealed. In accordance with the settled case law of the European Court of Human Rights, the proper protection of freedom of expression and information must go hand in hand with the effective protection of sources. The legitimate exercise of freedom of expression and information should therefore be understood as to confer on any natural or legal person
wishing to stimulate public debate the right to publish or to encourage the publication of information which contains or which makes it possible to deduce the substance of a third party’s trade secret or secrets. Exercise of these freedoms should not be deemed lawful, however, if it relates to illegal conduct on the part of the person relying on them or if it is not in the public interest.

Or. fr

Justification

The safeguards introduced by the directive represent a clear step forward by comparison with the standards negotiated in the framework of TRIPS. The media have a fundamental role to play in a democratic and pluralist society and foster public debate. This directive must not pose either a de jure or a de facto threat to journalists’ ability to carry out their work or to the exercise by any person of their freedom of expression, on the basis of legal certainty and in accordance with national and EU law.

Amendment 8

Proposal for a directive

Recital 14

Text proposed by the Commission

(14) The prospect of losing the confidentiality of a trade secret during litigation procedures often deters legitimate trade secret holders from instituting proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right to a fair trial, specific requirements aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. These should include the possibility to restrict access to evidence or hearings, or to publish only the non-confidential elements of judicial decisions.

Amendment

(14) The prospect of losing the confidentiality of a trade secret during litigation procedures often deters legitimate trade secret holders from instituting proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right to a fair trial, specific requirements aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. These should include the possibility to restrict access to evidence or hearings, or to publish only the non-confidential elements of judicial decisions.
Such protection should remain in force after the legal proceedings have ended for as long as the information covered by the trade secret is not in the public domain. As the main purpose of the proceedings is to assess the nature of the information which is the subject of the dispute, these restrictions should not be such as to prevent at least one person from each of the parties and their respective legal representatives from having full access to all the documents in the file. It should also be for the judge to satisfy himself, when imposing such restrictions, that each of the parties has adequate representation. Such protection should remain in force after the legal proceedings have ended for as long as the information covered by the trade secret is not in the public domain.

Or. fr

Justification

It is essential to guarantee parties a minimum degree of access to the proceedings as a whole and effective representation.

Amendment 9

Proposal for a directive
Recital 25 a (new)

Text proposed by the Commission

Amendment

(25a) This Directive does not propose criminal penalties to be imposed on persons who unlawfully acquire, use or disclose a trade secret. It is thus without prejudice to the right of the Member States to supplement its civil- and commercial-law provisions with measures under the criminal law. When they draft such measures, however, Member States should take full account of the safeguards laid down in this Directive, in order to ensure that a proper balance is struck between the protection of trade secrets and business freedom, freedom of expression and freedom of information.
Justification

Although the directive does not propose criminal penalties, all the safeguards it lays down should apply in all circumstances.

Amendment 10

Proposal for a directive
Article 1 – paragraph 1

Text proposed by the Commission

This Directive lays down rules on the protection against the unlawful acquisition, disclosure and use of trade secrets.

Amendment

This Directive lays down rules on the protection against the acquisition, disclosure and use of undisclosed know-how and business information (trade secrets), without the authorisation of the holder and in a manner that is contrary to honest business practices.

Justification

The definition should be clarified in the light of the substance of Article 39(2) of the TRIPS Agreement.

Amendment 11

Proposal for a directive
Article 1 – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

This Directive shall be without prejudice to the will of the Member States to impose criminal penalties on the unlawful acquisition, use or disclosure of trade secrets, provided that such penalties are consistent with the safeguards laid down in Article 4.

Amendment

This Directive shall be without prejudice to the will of the Member States to impose criminal penalties on the unlawful acquisition, use or disclosure of trade secrets, provided that such penalties are consistent with the safeguards laid down in Article 4.

Or. fr
Justification

Although the directive does not propose criminal penalties, all the safeguards it lays down should apply in all circumstances.

Amendment 12

Proposal for a directive
Article 2 – paragraph 1 – point 1 – introductory part

Text proposed by the Commission

1) ‘trade secret’ means information which meets all of the following requirements:

Amendment

1) ‘trade secret’ means undisclosed know-how and business information bearing commercial value which meets all of the following requirements:

Or. fr

Justification

The definition should be clarified in the light of the substance of Article 39(2) of the TRIPS Agreement.

Amendment 13

Proposal for a directive
Article 2 – paragraph 1 – point 1 – point b

Text proposed by the Commission

b) has commercial value because it is secret;

Amendment

b) has actual or potential commercial value because it is secret;

Or. fr

Justification

The definition of trade secrets as confidential business information or know-how is consistent with international standards. Some clarifications might be required, however.
Amendment 14
Proposal for a directive
Article 2 – paragraph 1 – point 4

Text proposed by the Commission

4) ‘infringing goods’ means goods whose design, quality, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.

Amendment

4) ‘infringing goods’ means goods whose design, characteristics, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.

Justification

Clarification of the definition to cover various aspects of the life of the product.

Amendment 15
Proposal for a directive
Chapter 2 – title

Text proposed by the Commission

Unlawful acquisition, use and disclosure of trade secrets

Amendment

Acquisition, use and disclosure of trade secrets

Justification

Technical amendment.

Amendment 16
Proposal for a directive
Article 3 – paragraph 2 – introductory part

Text proposed by the Commission

2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful whenever carried

Amendment

2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful whenever carried
It is often very difficult to prove intention or gross negligence in court. This would serve to thwart many legitimate legal actions.

Amendment 17

Proposal for a directive
Article 3 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. By way of derogation from Article 4(1), the acquisition of a trade secret without the consent of its holder shall be deemed unlawful if it serves a purpose which, in the circumstances, is regarded as contrary to honest business practice.

Justification

This directive seeks to safeguard firms’ innovativeness and creativity. No person who breaches its provisions should be encouraged to perpetrate acts which constitute unfair competition simply by virtue of the existence of such safeguards.

Amendment 18

Proposal for a directive
Article 3 – paragraph 3 – introductory part

Text proposed by the Commission

Amendment

3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, intentionally or with gross negligence, by a person who is found to meet any of the following conditions:
It is often very difficult to prove intention or gross negligence in court. This would serve to thwart many legitimate legal actions.

Amendment 19
Proposal for a directive
Article 3 – paragraph 4

Text proposed by the Commission

4. The use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of use or disclosure, knew or should, under the circumstances, have known that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully within the meaning of the paragraph 3.

Amendment

4. The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of acquisition, use or disclosure, knew or should, under the circumstances, have known that the trade secret was obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.

Justification

It is worthwhile specifying the responsibilities borne by ‘secondary’ infringers, in particular in connection with the criterion concerning prior knowledge of an infringement.

Amendment 20
Proposal for a directive
Article 3 – paragraph 5

Text proposed by the Commission

5. The conscious and deliberate production, offering or placing on the market of infringing goods, or import, export or storage of infringing goods for those purposes, shall be considered an unlawful use of a trade secret.

Amendment

5. The production, offering or placing on the market of infringing goods, or import, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret when the person carrying out such activities knew,
or should, under the circumstances, have known that the products were infringing.

Or. fr

Justification

It is worthwhile specifying the responsibilities borne by ‘secondary’ infringers, in particular in connection with the criterion concerning prior knowledge of an infringement.

Amendment 21

Proposal for a directive
Article 4 – paragraph 1 – point b

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) observation, study, disassembly or test of a product or object that has been made available to the public or that it is lawfully in the possession of the acquirer of the information;</td>
<td>b) observation, study, disassembly or test of a product or object:</td>
</tr>
</tbody>
</table>

Or. fr

Justification

The directive cannot deem that a trade secret has been acquired unlawfully if contractual or legal provisions stipulate otherwise.

Amendment 22

Proposal for a directive
Article 4 – paragraph 1 – point b – point i (new)

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>i) which has been made available to the public, or</td>
<td></td>
</tr>
</tbody>
</table>

Or. fr
Justification

With a view to stimulating innovation, it should be possible to authorise reverse engineering in keeping with the general rules laid down by the directive.

Amendment 23

Proposal for a directive
Article 4 – paragraph 1 – point b – point ii (new)

Text proposed by the Commission

Amendment

ii) which is lawfully in the possession of the acquirer of the information, who is not bound by a legally valid obligation to restrict acquisition of the trade secret;

Or. fr

Justification

The directive cannot deem that a trade secret has been acquired unlawfully if contractual or legal provisions stipulate otherwise.

Amendment 24

Proposal for a directive
Article 4 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The acquisition, use and disclosure of trade secrets shall be considered lawful if such acquisition, use or disclosure is required or authorised by Union or national law.

Or. fr

Justification

The directive is without prejudice to the transparency obligations which firms are required to meet and to the standards applicable to them, as laid down in Union and national law.
Amendment 25
Proposal for a directive
Article 4 – paragraph 2 – point b

Text proposed by the Commission
b) for the purpose of revealing an applicant’s misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest;

Amendment
b) for the purpose of revealing misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest;

Or. fr

Justification
It is not only the applicant who may be guilty of misconduct, wrongdoing or illegal activity.

Amendment 26
Proposal for a directive
Article 4 – paragraph 2 – point e

Text proposed by the Commission
e) for the purpose of protecting a legitimate interest.

Amendment
e) for the purpose of protecting a legitimate interest recognised by Union or national law.

Or. fr

Justification
The definition of ‘legitimate interest’ should be based on established legal provisions, with a view to keeping unfounded applications to a minimum.

Amendment 27
Proposal for a directive
Article 6 – paragraph 2 – subparagraph 1 – introductory part
Member States shall ensure that where competent judicial authorities determine that a claim concerning the unlawful acquisition, disclosure or use of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings in bad faith with the purpose of unfairly delaying or restricting the respondent’s access to the market or otherwise intimidating or harassing the respondent, such competent judicial authorities shall be entitled to take the following measures:

**Amendment**

Member States shall ensure that where competent judicial authorities determine that a claim concerning the unlawful acquisition, disclosure or use of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings improperly or in bad faith, such competent judicial authorities shall be entitled to take the following measures:

**Justification**

Bad faith is not the only reason for making an unfounded claim.

**Amendment 28**

**Proposal for a directive**

**Article 7 – paragraph 1**

**Text proposed by the Commission**

Member States shall ensure that actions for the application of the measures, procedures and remedies provided for in this Directive may be brought within at least one year but not more than two years after the date on which the applicant became aware, or had reason to become aware, of the last fact giving rise to the action.

**Amendment**

Member States shall ensure that actions for the application of the measures, procedures and remedies provided for in this Directive may be brought within three years after the date on which the applicant became aware, or had reason to become aware, of the last fact giving rise to the action.

**Justification**

Setting a single deadline makes the law clearer and prevents forum shopping. A deadline of less than three years is too short to compile a convincing file of documents.
Amendment 29

Proposal for a directive
Article 8 – paragraph 1 – subparagraph 2 – point a

Text proposed by the Commission

a) where in the course of the proceedings, the alleged trade secret is found not to fulfil the requirements set in point (1) of Article 2;

Amendment

a) where the alleged trade secret is found by a final decision not to fulfil the requirements set out in point (1) of Article 2;

Or. fr

Justification

Whilst an appeal is still possible, the confidentiality obligations imposed on all the parties to the proceedings should not be lifted.

Amendment 30

Proposal for a directive
Article 8 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of the legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret.

Amendment

Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of the legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow the competent judicial authorities to take such measures on their own initiative.

Or. fr

Justification

This amendment covers practices which are employed in some Member States.
Amendment 31

Proposal for a directive
Article 8 – paragraph 2 – subparagraph 2 – point a

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) to restrict access to any document containing trade secrets submitted by the parties or third parties, in whole or in part;</td>
<td>a) to restrict access to any document containing trade secrets submitted by the parties or third parties, in whole or in part, provided that at least one person from each of the parties, and their respective lawyers and/or legal representatives, are given access to the full file, as required in the context of the proceedings.</td>
</tr>
</tbody>
</table>

Or. fr

Justification

It is essential to guarantee parties a minimum degree of access to all the documents relevant to the proceedings and effective representation.

Amendment 32

Proposal for a directive
Article 8 – paragraph 2 – subparagraph 2 – point b

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) to restrict access to hearings, when trade secrets may be disclosed, and their corresponding records or transcript. In exceptional circumstances, and subject to appropriate justification, the competent judicial authorities may restrict the parties’ access to those hearings and order them to be carried out only in the presence of the legal representatives of the parties and authorised experts subject to the confidentiality obligation referred to in paragraph 1;</td>
<td>b) to restrict access to hearings, when trade secrets may be disclosed, and their corresponding records or transcript, to a clearly defined set of people, provided that it includes at least one person from each of the parties, and their lawyers and/or legal representatives, as required in the context of the proceedings;</td>
</tr>
</tbody>
</table>

Or. fr
Justification

It is essential to guarantee parties a minimum degree of access to all documents relevant to the proceedings and effective representation.

Amendment 33

Proposal for a directive
Article 8 – paragraph 2 – subparagraph 3

Text proposed by the Commission

Where, because of the need to protect a trade secret or an alleged trade secret and pursuant to point (a) of the second subparagraph of this paragraph, the competent judicial authority decides that evidence lawfully in control of a party shall not be disclosed to the other party and where such evidence is material for the outcome of the litigation, the judicial authority may nevertheless authorise the disclosure of that information to the legal representatives of the other party and, where appropriate, to authorised experts subject to the confidentiality obligation referred to in paragraph 1.

Amendment

deleted

Or. fr

Justification

It is essential to guarantee parties a minimum degree of access to all documents relevant to the proceedings and effective representation.

Amendment 34

Proposal for a directive
Article 8 – paragraph 3 a (new)

Text proposed by the Commission

3a. Member States shall stipulate that in the event of a refusal the decisions referred to in paragraph 3 may be the
subject of an appeal.

Justification

Given the implications for holders of trade secrets of the decisions referred to in paragraph 3, it is essential that they should be given the opportunity to lodge an appeal.

Amendment 35

Proposal for a directive
Article 12 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that the measures referred to in point (a) of Article 11(1) are revoked or otherwise cease to have effect, upon request of the respondent if in the meantime the information in question no longer fulfils the conditions of point (1) of Article 2 for reasons that cannot be attributed to the respondent.

Amendment

2. Member States shall ensure that the measures referred to in point (a) of Article 11(1) are revoked or otherwise cease to have effect, upon request of the respondent if in the meantime the information in question no longer fulfils the conditions of point (1) of Article 2 for reasons that cannot be attributed directly or indirectly to the respondent.

Justification

The respondent may only be responsible at a very early stage for the fact that the information no longer meets the definition given in Article 2(1).

Amendment 36

Proposal for a directive
Article 17 – paragraph 1

Text proposed by the Commission

1. By XX XX 20XX [three years after the end of the transposition period], the European Union Trade Marks and Designs Agency, in the context of the activities of the European Observatory on

Amendment

1. By XX XX 20XX [three years after the end of the transposition period], the European Union Intellectual Property Agency, in the context of the activities of the European Observatory on
Infringements of Intellectual Property Rights, shall prepare an initial report on the litigation trends regarding the unlawful acquisition, use or disclosure of trade secrets pursuant to the application of this Directive.

Infringements of Intellectual Property Rights, shall prepare an initial report on the litigation trends regarding the unlawful acquisition, use or disclosure of trade secrets pursuant to the application of this Directive.

Or. fr

**Justification**

*In keeping with the outcome of the negotiations on the ‘Trademarks’ package.*

**Amendment 37**

**Proposal for a directive**

**Article 17 – paragraph 2**

**Text proposed by the Commission**

2. By XX XX 20XX [four years after the end of the transposition period], the Commission shall draw up an intermediate report on the application of this Directive and submit it to the European Parliament and the Council. This report shall take due account of the report prepared by the European Observatory on Infringements of Intellectual Property Rights.

**Amendment**

2. By XX XX 20XX [four years after the end of the transposition period], the Commission shall draw up an intermediate report on the application of this Directive and submit it to the European Parliament and the Council. This report shall take due account of the report referred to in paragraph 1.

Or. fr
EXPLANATORY STATEMENT

Protecting confidential know-how and business information can do much to keep firms competitive, because these intangible assets are fundamental to innovation and research and thus an invaluable factor for growth.

On 28 November 2013, the Commission submitted a proposal for a directive on the protection of undisclosed know-how and business information.

Your rapporteur’s aim was not to rewrite the proposal for a directive. With a view to offering economic operators effective protection, whilst retaining stringent safeguards, she has tabled amendments which seek to clarify certain provisions which might give rise to problems in connection with harmonisation on the internal market, and to strike more effective balances, for example between the various legitimate holders of the same trade secret or between the protection of trade secrets and the upholding of fundamental freedoms. Although it is not part of intellectual property law, this EU legal instrument will offer firms protection against unfair competition.

Your rapporteur also took account of the general orientation agreed by the co-legislator on 26 May 2014 when she felt that the proposals it contained served to clarify the original Commission text and make it more effective.

Addressing the fragmentation of the internal market

One of the aims of the Commission proposal is to create a common set of provisions which can be used to address an issue which at present is dealt with very differently from one Member State to another. A better understanding of what constitutes a ‘trade secret’ will enable firms to come to terms more effectively with their legal environment and will facilitate their contractual and commercial relations. By making exchanges of information more secure, this common set of EU rules will foster the emergence of the ‘knowledge economy’ which must be the EU’s trademark in the 21st century. This should in turn make for a greater degree of trust among partners and stimulate collaborative innovation, both between firms and between firms and institutions.

Accordingly, your rapporteur has sought to clarify the definition of ‘trade secret’ in certain respects, but above all to guarantee the greatest possible degree of harmonisation. She is proposing a single prescription period of three years, enough time for applicants to compile a convincing set of documents in support of their case.

Offer firms effective means of protecting their know-how

In addition to standardising in formal terms the legal provisions governing the protection of confidential know-how and business information, the directive also proposes an effective substantive basis for that protection.

Your rapporteur has focused on the issue of safeguarding firms’ ability to innovate and
retaining a legal framework which provides incentives for economic activity, whilst seeking not to create lock-in effects.

She was keen to provide firms with more effective protection against breaches of confidentiality linked to unfair competition by preventing some infringers from exploiting the exemptions and safeguards provided for in the proposal in order to engage in conduct which might in the circumstances appear to be contrary to honest business practices.

The directive is without prejudice, however, to the provisions on the transparency of business activities set out in other national and EU legal texts, in whatever area.

**Upholding freedoms and fundamental rights**

The safeguards proposed by the Commission in the area of freedom of expression and of information and business freedom must be retained, because they are fundamental to an efficient social market economy and to fair and transparent liberal democracy. In that connection, the directive should not pose either *de jure* or *de facto* threat to journalists’ ability to carry out their work or to the ability of any person to exercise freedom whilst relying on the protection of the law.

What is more, it was essential to uphold in unequivocal terms the right of the defence: restrictions on the disclosure of information in the context of legal proceedings can help to ensure that legal actions concerning the protection of trade secrets are effective, but they must serve only that clearly defined objective and must not call into question in any way the adversarial principle or the right to a fair trial.

**Not going beyond the Union's powers**

Your rapporteur was at pains not to go beyond the Union’s powers, in order not to impose changes in the law on the Member States where this was not necessary.

Although the directive does not propose criminal measures, for the sake of consistency and in order to ensure that the legal environment remains clear and that certain fundamental freedoms are protected, it would be damaging if the safeguards provided for under the civil law were not to apply in the other areas of the law to which some Member States would like to extend the protection of trade secrets.