DRAFT OPINION

of the Committee on Industry, Research and Energy

for the Committee on Legal Affairs

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))

Rapporteur: Michèle Rivasi
SHORT JUSTIFICATION

Protection against unlawful acquisition, disclosure and use of trade secrets is key to allow a fair commercial environment for businesses. However, it is important to remember that the circulation of knowledge and information is also essential to the innovation and creation process. Enterprises are often more interested in exchanging trade secrets than in keeping them secret. Meanwhile, transparency and access to information is also necessary for informing important public policies such as environmental, health and consumer protection.

A proper balance needs to be found so as not to open the door to abusive claims of improper trade secrets acquisition or circulation and to avoid that information that should be shared and exchanged is kept secret through a too overbroad protection. To ensure this balance the rapporteur has proposed amending the Commission proposal along four important axis.

**Clarifying the definitions and making the directive more precise**

The EU harmonizing of legal procedures and remedies against unlawful acquisition, disclosure and use of trade secrets need to go together with a clear understanding of the scope and definition of the matter at stake. This is all the more important since this directive will lead to the introduction of a new legal concept in most EU national laws. Too vague a definition of what can be a trade secret will create legal uncertainties and facilitate abuses of the notion by the most powerful economic players to the detriment of the smaller one and of society as a whole.

The rapporteur proposes to clarify the definition of what should be considered as trade secrets. It is not only essential to allow proper implementation of the directive but also because this new directive will serve as the only EU benchmark in the context of the negotiation of the TTIP agreement.

Trade secrets protection, although important, is not an intellectual property right (IPR). Therefore its application should not lead to the creation of new exclusive rights. The use of IPR terminology in the Commission proposal creates ambiguities and may impact legal interpretations in cases of litigation. This is why the rapporteur proposes to change some of the terms used to avoid language typically belonging to the IPR legal context.

**Ensuring legitimate rights and access to information**

The scope of the directive is to ensure, within a business-to-business environment, an adequate level of defense against dishonest commercial practices.

However, the directive needs to establish, without any ambiguity, cases where the disclosure of information shall not fall under the scope of this directive. This is the case of information which disclosure is required by EU/national rules or public authorities within their mandate.

More generally protection of trade secrets shall not undermine legitimate public interest, such as consumer protection, the protection of workers, the protection of human, animal or plant life, the protection of the environment, the safeguard of fundamental rights, including freedom of expression and information, the prevention of unfair competition.
Guaranteeing mobility of employees

Circulation of knowledge and skills is also what make industrial actors and research sectors dynamic and creative, as the Silicon Valley is proving it: this goes hand in hand with the mobility of the employees. It is important for innovation and professional development that skilled employees are able to move from company to company. Therefore the protection against unlawful acquisition, disclosure and use of trade secrets should not become an impediment to employees mobility.

Several studies have demonstrated that regions/states enforcing strong non-compete agreements between employers and employees are subject to «brain drain» of the most high skilled workers, reduced investments and innovation.

This need to be taken into account when setting a limitation period to the measures, procedures and remedies provided for in this Directive: it would not be reasonable to burden employees with the limitation period longer than a year. Generally, there need to be a proper balance between the employees who create new ideas and the companies who provide the resources and the environment for the development of these ideas. The directive needs to reflect this balance.

Ensuring fair litigation processes in particular for small businesses

As is the case for other litigations, larger business entities have the financial capacity to access justice that small and medium size enterprises usually do not have. It is important to ensure that larger players do not abuse the trade secret claims to push potential competitors out of the market.

The protection of a trade secret does not create any proprietary rights but tackle the unlawful nature of the acquisition, disclosure and use. Therefore it is the person lawfully in control of the undisclosed information that should bear the burden of proof of the fact that this acquisition was indeed unlawful.

AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on Legal Affairs, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive
Article 1 – paragraph 1

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>This Directive lays down rules on the protection against the <strong>unlawful</strong> acquisition, disclosure and use of trade secrets.</td>
<td>This Directive lays down rules on the protection against the acquisition, disclosure and use of <strong>undisclosed know</strong>-</td>
</tr>
</tbody>
</table>

PE544.342v01-00 4/27 PA\1043332EN.doc
how and business information (trade secrets), without the authorization of the natural or legal persons that are lawfully controlling them and in a manner that is contrary to honest commercial practices.

Or. en

Justification

The scope of the directive needs to be more clearly defined. It is important to use correct terminology to which the use of the term trade secret refers to and to clarify that the purpose of this directive is to prevent unfair or dishonest commercial practices.

Amendment 2

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

Text proposed by the Commission

Any information of which disclosure is required by Union or national rules or by public authorities within the context of their mandate shall not fall within the scope of this Directive.

Amendment

Justification

This clarification of scope is necessary in order to avoid that companies circumvent obligations regarding disclosure of information that is established by law in the Member States or in the Union through claim of "trade secret".

Amendment 3

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

Text proposed by the Commission

Member States may provide, in compliance with the Treaties for more precise definitions and rules and
comprehensive description of lawful acquisition, use and disclosure of trade secrets, provided that compliance with Articles 5, 6 and 7, the second subparagraph of Article 8(1), Articles 8(3), 8(4) and 9(2), Articles 10 and 12, and Article 14(3) of this Directive is ensured.

Justification

Several Member States have already more specific legislation in place while others have none. However all need to comply with at least with the requirements of the articles outlined in particular lawful acquisition, proportionality, limitation period, application of safeguards.

Amendment 4

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

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(1) ‘trade secret’ means information which meets all of the following requirements:</td>
<td>(1) ‘trade secret’ means undisclosed know-how and business information bearing commercial value which meets all of the following requirements:</td>
</tr>
</tbody>
</table>

Justification

The definition is too vague. It needs to be made clear that it is not just any "information" but that it should be related to the commercial activity of the business in question.

Amendment 5

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

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to</td>
<td>(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, known among or readily accessible to persons within the</td>
</tr>
</tbody>
</table>
persons within the circles that normally deal with the kind of information in question; circles that normally deal with the kind of information in question or persons who could obtain economic value from its disclosure or use;

Or. en

Justification

To be considered a secret that has a commercial value, the information should at least not be known by experts in the subject matter or by competitors.

Amendment 6

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 significant commercial value because it is secret and because the disclosure of it would be significantly detrimental to the legitimate economic interest of the person lawfully controlling it;

Or. en

Justification

The notion of legitimate economic interest is key to address the problem of unfair commercial practices.

Amendment 7

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

Text proposed by the Commission
(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Amendment
(c) has been subject to reasonable and demonstrable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. Those reasonable steps shall be assessed by the competent judicial authorities on the basis, in particular, of the legitimate
use of technical and contractual means by
the person lawfully in control of the
information.

Or. en

Justification
To ensure that claims of unlawful acquisition is not used as an unfair commercial practice or
in an anti-competitive way, the persons lawfully in control of the trade secret must take clear
steps and precautions to prevent disclosure and must be able to demonstrate how secrecy is
ensured.

Amendment 8

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

Text proposed by the Commission

(2) 'trade secret holder' means any
natural or legal person lawfully
controlling a trade secret;

Amendment

deleted

(This amendment applies throughout the
text. Adopting it will necessitate
corresponding changes throughout.)

Or. en

Justification
This definition of "holder" is misleading and unnecessary since it leads to the notion of
ownership of intellectual property rights, which is not what trade secrets are. Using the text
the terms "any natural or legal person lawfully controlling a trade secret" is more accurate,
and we propose to use these terms throughout the text.

Amendment 9

Proposal for a directive
Article 2 – paragraph 1 – point 3

Text proposed by the Commission

(3) ‘infringer’ means any natural or legal
person who has unlawfully acquired, used
or disclosed trade secrets;

Amendment

(3) 'defendant' means any natural or legal
person who has intentionally unlawfully
acquired, used or disclosed trade secrets
for purposes of commercial nature and in a manner contrary to honest commercial practices;

(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Justification

The use of the term "infringer" is typically used in the context of intellectual property law and therefore misleading in this context, since trade secret is not an intellectual property right.

Amendment 10

Proposal for a directive
Article 2 – paragraph 1 – point 4

<table>
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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tr>
<td>(4) 'infringing goods' means goods whose design, quality, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.</td>
<td>(4) 'unlawful goods' means goods that are placed on the market whose design, quality, manufacturing process or marketing are demonstrated to have benefited from trade secrets unlawfully acquired, used or disclosed.</td>
</tr>
</tbody>
</table>

(The amendment replacing 'infringing' with 'unlawful' applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Justification

The use of the term "infringing goods" is typically used in the context of intellectual property law and therefore misleading in this context.

Amendment 11

Proposal for a directive
Article 3 – paragraph 1
1. Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of a trade secret.

Text proposed by the Commission

1. Member States shall ensure that natural or legal persons lawfully controlling a trade secret are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to obtain redress for, the unlawful acquisition, use or disclosure of a trade secret.

Amendment

Justification

See previous AM on the definition of "holder". Using "holder" is misleading and unnecessary since it leads to the notion of ownership of intellectual property rights, which is not what trade secrets are. Using the text the terms "any natural or legal person lawfully controlling a trade secret" is more accurate, and we propose to use these terms throughout the text.

Amendment 12

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 out intentionally or with gross negligence by:

Amendment

2. The acquisition of a trade secret without the consent of the natural or legal person lawfully controlling a trade secret shall be considered unlawful whenever carried out intentionally with the aim of acquiring an economical gain or of causing economic detriment to person lawfully controlling it or with gross negligence by:

Justification

The intention to engage in a dishonest commercial practice, as opposed to making use of a legitimate public interest to access to information, must be inherent to the definition of when acquisition is unlawful.
### Amendment 13

**Proposal for a directive**  
**Article 3 – paragraph 2 – point a**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tr>
<td>(a) unauthorised access to <strong>or copy of</strong> any documents, objects, materials, substances or electronic files, <strong>lawfully under the control of</strong> the trade secret <strong>holder,</strong> containing the trade secret or from which the trade secret can be deduced;</td>
<td>(a) unauthorised access to <strong>the trade secret</strong> (any documents, objects, materials, substances or electronic files containing the trade secret), <strong>lawfully under the control of</strong> the <strong>natural or legal person</strong> <strong>lawfully controlling a</strong> trade secret;</td>
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</table>

**Justification**

The terminology 'from which the trade secret can be deduced' creates ambiguity with regards to reverse engineering, the possibility of which must always be ensured.

### Amendment 14

**Proposal for a directive**  
**Article 3 – paragraph 2 – point f**

<table>
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<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tr>
<td><strong>(f) any other conduct which,</strong> under the circumstances, is considered contrary to <strong>honest commercial practices.</strong></td>
<td>deleted</td>
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</tbody>
</table>

**Justification**

This provision is too vague and could lead to abuses. Point (a) to (e) clearly outline what is unlawful practice or a dishonest commercial practice.

### Amendment 15

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

<table>
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<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>3. The use or disclosure of a trade secret</td>
<td>3. The use or disclosure of a trade secret</td>
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</table>
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:

shall be considered unlawful whenever carried out, without the consent of the natural or legal person lawfully controlling a trade secret, intentionally and with the aim of acquiring an economic gain or advantage or of causing economic detriment to the person lawfully controlling it or with gross negligence, by a person who is found to meet any of the following conditions:

Or. en

Justification

The intention to engage in a dishonest commercial practice, as opposed to making use of a legitimate public interest to access to information, must be inherent to the definition of when acquisition is unlawful.

Amendment 16

Proposal for a directive
Article 3 – paragraph 3 – point b

Text proposed by the Commission

(b) is in breach of a confidentiality agreement or any other duty to maintain secrecy of the trade secret;

Amendment

(b) is in breach of a legally valid confidentiality agreement under to national or Union law to maintain secrecy of the trade secret;

Or. en

Justification

"Any other duty" should only be understood as a contractual duty and is covered by point (c).

Amendment 17

Proposal for a directive
Article 3 – paragraph 3 – point c

Text proposed by the Commission

(c) is in breach of a contractual or any other duty to limit the use of the trade

Amendment

(c) is in breach of a legally valid contractual duty to limit the use of the
Justification

It is unclear to what "any other duty", other than a contractual agreement covered in (b) or a confidentiality agreement covered by this subparagraph it is referred to. The vague wording should be avoided.

Amendment 18

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

Text proposed by the Commission

Amendment

(-a) a commercial contract between the person who is legally in control of the trade secret and an acquirer;

Or. en

Justification

The most common way of acquisition of trade secret is the simple commercial way as confirmed by the impact assessment study: 60% of the enterprises exchange trade secret.

Amendment 19

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

Text proposed by the Commission

Amendment

(c) exercise of the right of workers representatives to information and consultation in accordance with Union and national law and/or practices;

(c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union and national law and/or practices;

Or. en

Justification

Not all enterprises have workers representatives as for instance many SMEs.
Amendment 20
Proposal for a directive
Article 4 – paragraph 1 – point c

Text proposed by the Commission
(c) any other practice which, under the circumstances, is in conformity with honest commercial practices.

Amendment
(c) any other practice which, under the circumstances, is in conformity with honest commercial practices or is required or authorised by public institutions fulfilling their mandate in accordance with national or Union law.

Or. en

Justification

Enterprises should not be able to oppose the claim of 'trade secret' when confronted with requests for information that are required by law and public institutions in the fulfillment of their mandate. Many examples of such practice exist and often public authorities or institutions, especially at local level, do not have the capacity to respond to the refusal of disclosure of information.

Amendment 21
Proposal for a directive
Article 4 – paragraph 2 – introductory part

Text proposed by the Commission
2. Member States shall ensure that there shall be no entitlement to the application for the measures, procedures and remedies provided for in this Directive when the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

Amendment
2. The acquisition, use and disclosure of trade secrets shall be considered lawful to the extent that the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

Or. en

Justification

What is lawful must be clearly defined.
Amendment 22

Proposal for a directive
Article 4 – paragraph 2 – point a

Text proposed by the Commission
(a) for making legitimate use of the right to freedom of expression and information;

Amendment
(a) for making use of the right to freedom of expression and information;

Justification
The proposed wording 'legitimate' is restrictive to the principle of right to freedom of expression and may cause unintended interpretations. The scope of the directive is not to set limitation to the right to freedom of expression which should be considered only in very exceptional circumstances (defamation, hate speech, etc.)

Amendment 23

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 an applicant’s misconduct, fraud, wrongdoing, illegal or unethical 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;

Justification
To ensure, for instance, protection of whistleblowers, not just illegal but also unethical activities must qualify as a legitimate purpose for revealing a trade secret.

Amendment 24

Proposal for a directive
Article 4 – paragraph 2 – point b a (new)
(ba) when fulfilling the terms of the employment contract of workers;

Amendment 25
Proposal for a directive
Article 4 – paragraph 2 – point c

(c) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions;

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

(d) for the purpose of fulfilling a non-contractual obligation;
**Amendment 27**

**Proposal for a directive**

**Article 4 – paragraph 2 – point e a (new)**

<table>
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<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tr>
<td>(ea) for the purpose of protecting public order, including the protection of human, animal or plant life or health or in order to avoid serious prejudice to the environment.</td>
<td></td>
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</tbody>
</table>

*Or. en*

**Justification**

*In order to avoid uncertainty between primacy of law, access to information for the aim of ensuring a high level of social and environmental protection must clearly be established as lawful acquisition.*

**Amendment 28**

**Proposal for a directive**

**Article 4 – paragraph 2 – point e b (new)**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(eb) the trade secret is requested and/or disclosed by a public institution in accordance with their mandate, as required or allowed by national or Union law.</td>
<td></td>
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</tbody>
</table>

*Or. en*

**Justification**

*Enterprises should not be able to oppose the claim of 'trade secret' when confronted with requests for information that are required by law and public institutions in the fulfillment of their mandate. Many examples of such practice exist and often public authorities or institutions, especially at local level, do not have the capacity to respond to the refusal of disclosure of information.*
Amendment 29
Proposal for a directive
Article 5 – paragraph 2 – point a

Text proposed by the Commission

(a) be fair and equitable;

Amendment

(a) be fair, equitable and take into account the means of the defendant, so as to be adapted to them;

Or. en

Amendment 30
Proposal for a directive
Article 6 – paragraph 1 – point a

Text proposed by the Commission

(a) is proportionate;

Amendment

(a) is proportionate to the actual economic detriment for the holder of the trade secret due to the alleged unlawful access, disclosure or use of it;

Or. en

Amendment 31
Proposal for a directive
Article 6 – paragraph 1 – point b

Text proposed by the Commission

(b) avoids the creation of barriers to legitimate trade in the internal market.

Amendment

(b) avoids the creation of barriers to legitimate trade, competition and worker's mobility in the internal market;

Or. en

Justification

According to the latest research restrictive measures have a clear and considerable negative impact on innovation especially in high-tech clusters/companies. Member States shall
ensure that measures do not hinder competition and worker's mobility.

Amendment 32
Proposal for a directive
Article 6 – paragraph 1 – point c

Text proposed by the Commission
(c) provides for safeguards against their abuse.

Amendment
(c) provides for safeguards against their abuse and ensures that in the event that defendants are wrongfully accused of unlawful action, they are fully compensated for any detriment suffered due to such wrongful accusation.

Or. en

Justification
Providing safeguards against abuses must entail sufficient economic disincentives to deter false claims, as well as ensure proportionate compensation for the wrongfully accused. This is ever more important for SMEs.

Amendment 33
Proposal for a directive
Article 6 – paragraph 1 – point c a (new)

Text proposed by the Commission
(ca) ensures that the burden of proof that the trade secret was unlawfully acquired is borne by the person lawfully in control of the trade secret and that none of the exceptions mentioned in Article 4 applies.

Amendment
(ca) ensures that the burden of proof that the trade secret was unlawfully acquired is borne by the person lawfully in control of the trade secret and that none of the exceptions mentioned in Article 4 applies.

Or. en

Justification
Protection of trade secrets does not create any proprietary rights, therefore the protection is against the unlawful nature of the acquisition. This means that the person lawfully in control of the undisclosed information should bear the burden of proof of the fact that this acquisition was indeed unlawful, and no exception applies. If not, this person would de facto enjoy a proprietary right.
Amendment 34

Proposal for a directive
Article 6 – paragraph 2 – subparagraph 1 – introductory part

Text proposed by the Commission

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 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, or of preventing the disclosure of information of public interest, such competent judicial authorities shall be entitled to take the following measures:

Justification

Measures to sanction unfound claim shall apply to all cases (as outlined in article 4) where the acquisition, disclosure or use is deemed lawful.

Amendment 35

Proposal for a directive
Article 6 – paragraph 2 – subparagraph 1 – point a a (new)

Text proposed by the Commission

(aa) provide for full compensation for economic damages and losses incurred if any, as well as for potential moral prejudice to the alleged unlawful accessor, acquirer or user of trade secrets.

Amendment

Proportionate compensation must be ensured for the wrongfully accused.

Justification

Proportionate compensation must be ensured for the wrongfully accused.
Amendment 36
Proposal for a directive
Article 7 – paragraph 1 a (new)

Text proposed by the Commission

In the case of legal action opposing former employers and employees the limitation period shall not exceed one year in order not to affect or prevent employees' mobility.

Justification
In the interest of innovation and free competition, the limitation period should be limited to one year. Experience demonstrates that strong non-compete agreements entail brain drain, reduced levels of investments and innovation.

Amendment 37
Proposal for a directive
Article 7 – paragraph 1 b (new)

Text proposed by the Commission

Member States shall be entitled to lay down rules determining the circumstances under which the limitation period is interrupted or suspended.

Amendment 38
Proposal for a directive
Article 8 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Member States shall ensure that the parties, their legal representatives, court officials,
witnesses, experts and any other person participating in the legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, shall not be permitted to use or disclose any trade secret or alleged trade secret of which they have become aware as a result of such participation or access.

witnesses, experts and any other person participating in the legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, shall not be permitted to use or disclose any trade secret or alleged trade secret of which they have become aware as a result of such participation or access, and which has been identified as confidential by the competent authorities after consultation of both parties.

Or. en

Justification

Both parties in the proceeding should be aware of what information must be preserved confidential

Amendment 39

Proposal for a directive
Article 8 – paragraph 1 – subparagraph 2 – point b a (new)

Text proposed by the Commission

(ba) where any national or Union law adopted subsequent to this Directive requires the disclosure or use of the information concerned.

Amendment

(ba) where any national or Union law adopted subsequent to this Directive requires the disclosure or use of the information concerned.

Or. en

Amendment 40

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

Text proposed by the Commission

(a) to restrict access to any document containing trade secrets submitted by the parties or third parties, in whole or in part;

Amendment

(a) to restrict access to any document containing trade secrets submitted by the parties or third parties, in whole or in part,
provided that both parties involved or their representative have access to them;

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**Amendment 41**

**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>
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<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, provided that both parties involved or their representative have access to them. 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>
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**Amendment 42**

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

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>(c) to make available a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed.</td>
<td>(c) to make publicly available a non-confidential version of any judicial decision, in which the passages containing information confirmed as trade secrets have been redacted.</td>
</tr>
</tbody>
</table>
Justification

Redacted means "blacked-out". It makes it clear that no specific document will be edited but that the passages (sentences) of a document containing trade secrets will simply be blacked-out.

Amendment 43

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 44

Proposal for a directive
Article 9

Text proposed by the Commission

Interim and precautionary measures

1. Member States shall ensure that the competent judicial authorities may, at the request of the trade secret holder, order any of the following interim and precautionary measures against the
alleged infringer:

(a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret on an interim basis;

(b) the prohibition to produce, offer, place on the market or use infringing goods, or import, export or store infringing goods for those purposes;

(c) the seizure or delivery of the suspected infringing goods, including imported goods, so as to prevent their entry into or circulation within the market.

2. Member States shall ensure that the judicial authorities may make the continuation of the alleged unlawful acquisition, use or disclosure of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder.

Or. en

Justification

There should be a judicial decision, based on the fact that unlawful acquisition has been demonstrated before such measures are taken. In the case of an unfounded claim against an SME, this precautionary measure could bring the company to bankruptcy before it can demonstrate its good faith or innocence. This article could lead to abusive claims.

Amendment 45

Proposal for a directive
Article 10 – paragraph 1

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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<tbody>
<tr>
<td>1. Member States shall ensure that the competent judicial authorities have, in respect of the measures referred to in Article 9, the authority to require the applicant to provide evidence that the matter involved qualifies as a trade secret, that the applicant is the legitimate natural or legal person lawfully controlling a trade secret, that the trade secret has been</td>
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</table>
trade secret has been acquired unlawfully, and
that the trade secret is being unlawfully used or disclosed.

or that an unlawful acquisition, use or disclosure of the trade
secret is imminent.

Or. en

Justification

The applicant must be able to demonstrate that the trade secret exists and qualifies as such by providing concrete proof and information.

Amendment 46

Proposal for a directive
Article 10 – paragraph 5

Text proposed by the Commission

5. Where the interim measures are revoked on the basis of point (a) of paragraph 3, where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no unlawful acquisition, disclosure or use of the trade secret or threat of such conduct, the competent judicial authorities shall have the authority to order the applicant, upon request of the respondent or of an injured third party, to provide the respondent, or the injured third party, appropriate compensation for any injury caused by those measures corresponding to the full recovery of the economic and moral damages.

Amendment

5. Where the interim measures are revoked on the basis of point (a) of paragraph 3, where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no unlawful acquisition, disclosure or use of the trade secret or threat of such conduct, the competent judicial authorities shall have the authority to order the applicant, upon request of the respondent or of an injured third party, to provide the respondent, or the injured third party, appropriate compensation for any injury caused by those measures corresponding to the full recovery of the economic and moral damages.
Text proposed by the Commission

(a) a declaration of infringement;

(a) a declaration of unlawful access, disclosure or use;

Or. en

Amendment 48

Proposal for a directive
Article 11 – paragraph 2 – point c

Text proposed by the Commission

(c) depriving the infringing goods of their infringing quality;

(c) depriving the unlawful goods of the quality that derived from the use of the trade secret;

Or. en

Amendment 49

Proposal for a directive
Article 13 – paragraph 1

Text proposed by the Commission

1. Member States shall ensure that the competent judicial authorities, on the application of the injured party, order the infringer who knew or ought to have known that he or she was engaging in unlawful acquisition, disclosure or use of a trade secret, to pay the trade secret holder damages commensurate to the actual prejudice suffered.

1. Member States shall ensure that the competent judicial authorities, on the application of the injured party, order the defendant who knew or ought to have known that he or she was engaging in unlawful acquisition, disclosure or use of a trade secret, to pay the natural or legal person lawfully controlling a trade secret damages commensurate to the actual prejudice suffered as a result of the unlawful access, disclosure or use of the trade secret.

Or. en