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*Plenary sitting*

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**A8-0199/2015**

22.6.2015

**\*\*\*I**  
**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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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**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<sup>1</sup>,
  - 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 (A8-0199/2015),
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.

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<sup>1</sup> OJ C 226, 16.7.2014, p. 48.

## Amendment 1

### AMENDMENTS BY THE EUROPEAN PARLIAMENT\*

to the Commission proposal

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2013/0402 (COD)

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**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

After consulting the European Data Protection Supervisor<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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\* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ■.

<sup>1</sup> OJ C 226, 16.7.2014, p. 48.

<sup>2</sup> OJ C , , p. .

- (1) Businesses and non-commercial research institutions invest in acquiring, developing and applying know-how and information, which is the currency of the knowledge economy *and gives a competitive advantage*. This investment in generating and applying intellectual capital determines their competitiveness *and innovative performance* in the market and therefore their returns to investment, which is the underlying motivation for business research and development. Businesses have recourse to different means to appropriate the results of their innovative activities when openness does not allow for the full exploitation of their research and innovation investments. Use of **■** intellectual property rights such as patents, design rights or copyright is one of them. Another is to protect access and exploit the knowledge that is valuable to the entity and not widely known. Such *valuable* know-how and business information, that is undisclosed and intended to remain confidential is referred to as a trade secret. Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right and use confidentiality as a business *competitiveness* and research innovation management tool, covering a diversified range of information, which extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans or market research and strategies. *Small and medium-sized enterprises (SMEs), in particular, value and rely on trade secrets more, because the use of intellectual property rights tends to be expensive and SMEs often do not have sufficient specialised human and financial resources to manage and protect such rights*. By protecting such a wide range of know-how and commercial information, whether as a complement or as an alternative to intellectual property rights, trade secrets allow the creator to derive profit from his/her creation and innovations and therefore are particularly important *for business competitiveness as well as* for research and development and innovative performance.
- (2) Open innovation is *a catalyst for new ideas which meet the needs of consumers and tackle societal challenges to find their way to the market*. It is an important lever for the creation of new knowledge and underpins the emergence of new and innovative business models based on the use of co-created knowledge. **■** Collaborative research, including cross-border cooperation, is particularly important to increase the levels of business research and development within the internal market. *The dissemination of*

*knowledge and information should be considered essential for the purpose of ensuring dynamic, positive and equal business development opportunities, especially for SMEs.* In an internal market where barriers to such cross-border collaboration are minimised and where cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products. Such an environment conducive to intellectual creation and innovation, *and where employment mobility is not hindered*, is also important for employment growth and improving competitiveness of the Union economy. *Trade secrets have an important role in protecting the exchange of knowledge between businesses, including, in particular, SMEs, and research institutions within and across the borders of the internal market, in the context of research and development and innovation.* Trade secrets are amongst the most used form of protection of intellectual creation and innovative know-how by businesses, yet they are at the same time the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by third parties.

- (3) Innovative businesses are increasingly exposed to dishonest practices aiming at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage, breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises the legitimate trade secret holder's ability to obtain first mover returns using the outputs of its innovative efforts. Without effective and comparable legal means for defending trade secrets across the Union, incentives to engage in innovative cross-border activity within the internal market are undermined and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, affecting the smooth functioning of the internal market and undermining its growth enhancing potential.
- (4) ■ The Agreement on trade-related aspects of intellectual property (the TRIPS Agreement) ■ contains, *inter alia*, provisions on the protection of trade secrets against their unlawful acquisition, use or disclosure by third parties, which are common



international standards. All Member States, as well as the Union itself, are bound by this Agreement which was approved by Council Decision 94/800/EC<sup>1</sup>. *In order to protect trade secrets against misappropriation, some Member States have legislation in place; however some Member States have not defined trade secrets and do not have binding legislation to protect against the misappropriation of trade secrets. Such a situation creates gaps and barriers to the effective functioning of the internal market. It is also appropriate to define at Union level the situations where the acquisition, use and disclosure of a trade secret is lawful or unlawful, and to limit the period of application of redress procedures, so that this Directive can serve its purpose of consistent protection of trade secrets in the Union.*

- (5) ■ There are important differences in the Member States legislation as regards the protection of trade secrets against their unlawful acquisition, use or disclosure by other persons. Thus, for example, not all Member States have adopted national definitions of trade secrets and/or unlawful acquisition, use or disclosure of a trade secret, so that the scope of protection is not readily accessible and differs throughout Member States. Furthermore, there is no consistency as regards the civil law remedies available in case of unlawful acquisition, use or disclosure of trade secrets as cease and desist orders are not always available in all Member States against third parties who are not competitors of the legitimate trade secret holder. Divergences also exist across the Member States with respect to the treatment of third parties who acquired the trade secret in good faith but subsequently come to learn, at the time of use, that their acquisition derived from a previous unlawful acquisition by another party.
- (6) National rules also differ as to whether legitimate trade secret holders may seek the destruction of goods manufactured by third parties who use trade secrets unlawfully or the return or destruction of any documents, files or materials containing or implementing the unlawfully acquired or used trade secret. Also, applicable national rules on the calculation of damages do not always take account of the intangible nature of trade secrets, which makes it difficult to demonstrate the actual profits lost or the unjust enrichment of the infringer where no market value can be established for the

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<sup>1</sup> Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p.1).

information in question. Only a few Member States allow for the application of abstract rules on the calculation of damages based on the reasonable royalty or fee which could have been due had a licence for the use of the trade secret existed. Additionally, many Member States rules do not guarantee the preservation of the confidentiality of a trade secret if the trade secret holder introduces a claim for alleged unlawful acquisition, use or disclosure of the trade secret by a third party, thus reducing the attractiveness of the existing measures and remedies and weakening the protection offered.

- (7) The differences in the legal protection of trade secrets provided for by the Member States imply that trade secrets do not enjoy an equivalent level of protection throughout the Union, thus leading to fragmentation of the internal market in this area and weakening the overall deterrent effect of the rules. The internal market is affected in so far as such differences lower businesses' incentives to undertake innovative-related cross-border economic activity, including research or manufacturing cooperation with partners, outsourcing or investment in other Member States, which would depend on the use of the information protected as trade secrets. Cross-border network research and development as well as innovation-related activities, including related manufacturing and subsequent cross-border trade, are rendered less attractive and more difficult within the Union, thus also resulting in innovation-related inefficiencies at Union scale. In addition, higher business risk appears in Member States with comparatively lower levels of protection, where trade secrets may be stolen or otherwise unlawfully acquired more easily. This leads to inefficient allocation of capital to growth-enhancing innovation within the internal market because of the higher expenditure on protective measures to compensate for the insufficient legal protection in some Member States. It also favours the activity of unfair competitors who following the unlawful acquisition of trade secrets could spread resulting goods across the internal market. Legislative regime differences also facilitate the importation of goods from third countries into the Union through entry points with weaker protection, when the design, manufacturing or marketing of those goods rely on stolen or otherwise unlawfully acquired trade secrets. On the whole, such differences create a prejudice to the proper functioning of the internal market.

- (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. ***Such information or know-how should furthermore have commercial value, whether actual or potential. Such information or know-how should be considered to have commercial value especially where its unauthorized acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, or where it undermines his or her scientific and technical potential, business or financial interests, strategic positions or ability to compete.*** 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 ***generally*** known among or ***readily*** accessible to persons within the circles that normally deal with the kind of information in question.
- (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. ■

**(9a) *It is important to clarify that the measures adopted to protect trade secrets against their unlawful acquisition, use and disclosure should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities, the rules that allow public authorities to collect information for the performance of their duties or rules that allow any further disclosure by those public authorities of relevant information to the public. This concerns in particular rules on the disclosure by the Union's institutions and bodies or national public authorities of business-related information they hold pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council<sup>1</sup>, Regulation (EC) No 1367/2006 of the European Parliament and the Council<sup>2</sup> and Directive 2003/4/EC of the European Parliament and the Council<sup>3</sup> or to other rules on public access to documents or on the transparency obligations of national public authorities.***

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<sup>1</sup> *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).*

<sup>2</sup> *Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13).*

<sup>3</sup> *Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 041, 14.02.2003, p. 26).*

***(9b) The acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purpose of this Directive, without prejudice to any obligation of confidentiality as regards the trade secret or any limitation as to its use that Union or national law may impose on the recipient of the information. In particular, this Directive should not release the public authorities from the confidentiality obligations to which they are subject in respect of information passed on by holders of trade secrets, irrespective of 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 Directive 2014/23/EU of the European Parliament and of the Council<sup>1</sup>, Directive 2014/24/EU of the European Parliament and of the Council<sup>2</sup> and Directive 2014/25/EU of the European Parliament and of the Council<sup>3</sup>.***

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<sup>1</sup> *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).*

<sup>2</sup> *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).*

<sup>3</sup> *Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).*

- (9c) *This Directive does not provide for 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. Where Member States draft such measures, however, they 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.*
- (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, while healthy competition brought about by the lawful use of data, including data generated by reverse engineering, should be encouraged, it is essential to tackle dishonest commercial practices.*
- (10a) *In some industry sectors, where creators and innovators cannot benefit from exclusive rights and where innovation has traditionally relied upon trade secrets, products can nowadays be easily reverse-engineered once in the market. In those cases, those creators and innovators may be victims of practices such as parasitic copying or slavish imitations that free ride on their reputation and innovation efforts. Some national laws dealing with unfair competition address those practices. While this Directive does not aim to reform or harmonize unfair competition law in general, it would be appropriate that the Commission carefully examine the need for Union action in that area.*
- (11) In line with the principle of proportionality the measures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth functioning internal market for research and innovation, *in particular by having a deterrent effect against the unlawful acquisition, use and disclosure of a trade secret*, without jeopardising *or undermining fundamental rights and freedoms or the public interest, such as public safety, consumer protection, public health and environmental protection, and without any prejudice to the mobility of workers*. In this respect, the measures and remedies ensure that competent judicial authorities account for *factors*

*such as* the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret as well as the impact of such conduct. It should also be ensured that the competent judicial authorities are provided with the discretion to weigh up the interests of the parties to the litigation, as well as the interests of third parties including, where appropriate, consumers.

- (12) The smooth functioning of the internal market would be undermined if the measures and remedies provided for were used to pursue illegitimate intents, *such as creating unjustified barriers to the internal market or to labour mobility, that are* 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. ■
- (12a) *Measures and remedies provided for under this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct or wrongdoing is revealed. The latter should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies where the respondent had all the reasons to believe in good faith that his conduct met the appropriate criteria set out in this Directive.*
- (12b) *It is essential that Member States respect the freedom of the press and the media, as enshrined in Article 11(2) of the Charter of Fundamental Rights of the European Union in order to ensure that the Directive does not restrict journalistic works, in particular with regard to investigation, protection of sources, and the right of the public to be informed.*
- (12c) *The increased use of online web services to conduct business and research, the storage of more confidential data in virtual storage places, and the increased use of e-commerce and digitalization as a whole, gives rise to a need for harmonized legislation across the Union, which would protect misappropriated use of trade secrets, and which in turn would ensure trust and protection among businesses and consumers and promote the formation of the Digital Single Market, which is one of*

*the foundations of an effectively functioning internal market.*

- (13) In the interest of *preserving the smooth functioning of the internal market for research and innovation and in the interest of* legal certainty and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it appears appropriate to restrict the possibility to initiate actions for the protection of trade secrets to a **■** period of *three years* following the date on which the trade secret holders became aware, or had reason to become aware, of the unlawful acquisition, use or disclosure of their trade secret by a third party.
- (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. *As the main purpose of the proceedings is to assess the nature of the information which is the subject of the dispute, those 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.
- (15) Unlawful acquisition, *use or disclosure* of a trade secret by a third party could have devastating effects on its legitimate holder since once publicly disclosed it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast and accessible interim measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret. Such relief must be available without having to await a decision on the substance of



the case, with due respect for the rights of defence and the principle of proportionality having regard to the characteristics of the case in question. Guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified request may also be required, particularly where any delay would cause irreparable harm to the legitimate holder of a trade secret.

- (16) For the same reason, it is also important to provide for measures to prevent further unlawful use or disclosure of a trade secret. For prohibitory measures to be effective **and proportionate**, their duration ■ should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful acquisition, use or disclosure of the trade secret, **including when such a trade secret is used for the provision of services, and should be limited in time so as to avoid the creation of unjustified barriers to competition in the internal market**. In any event, no measure of this type should be enforceable if the information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.
- (17) A trade secret may be unlawfully used to design, manufacture, **develop** or market **services or** goods, or components thereof, which may spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In **the cases where unlawful acquisition has been demonstrated** and when the trade secret in question has a significant impact on the quality, value or price of the resulting good or on reducing the cost, facilitating or speeding up its manufacturing or marketing processes, it is important to empower judicial authorities to order appropriate measures with a view to ensure that those goods are not put on the market or are removed from it. Considering the global nature of trade, it is also necessary that these measures include the prohibition of importing those goods into the Union or storing them for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods when other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by means of donations to by charitable organisations.

- (18) A person may have originally acquired a trade secret in good faith but only become aware at a later stage, including upon notice served by the original trade secret holder, that his or her knowledge of the trade secret in question derived from sources using or disclosing the relevant trade secret in an unlawful manner. In order to avoid that under those circumstances the corrective measures or injunctions provided for could cause disproportionate harm to that person, Member States should provide for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure, provided that such compensation does not exceed the amount of royalties or fees which would have been due had that person obtained authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prevented by the original trade secret holder. Nevertheless, where the unlawful use of the trade secret would constitute an infringement of law other than that foreseen in this Directive or would be likely to harm consumers, such unlawful use should not be allowed.
- (19) In order to avoid that a person who knowingly, or with reasonable grounds for knowing, unlawfully acquires, uses or discloses a trade secret benefit from such conduct and to ensure that the injured trade secret holder, to the extent possible, is placed in the position in which he or she would have been had that conduct not taken place, it is necessary to provide for adequate compensation of the prejudice suffered as a result of the unlawful conduct. The amount of damages awarded to the injured holder of the trade secret should take account of all appropriate factors, such as loss of earnings incurred by the trade secret holder or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the trade secret holder. As an alternative, for example where, considering the intangible nature of trade secrets, it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question. The aim is not to introduce an obligation to provide for punitive damages, but to ensure compensation based on an objective criterion while taking account of the expenses incurred by the holder of the trade secret, such as the costs of identification and research.

- (20) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions, including where appropriate through prominent advertising, in cases concerning the unlawful acquisition, use or disclosure of trade secrets, as long as such publication does not result in the disclosure of the trade secret nor disproportionately affect the privacy and reputation of natural persons. ***There is also a necessity to raise awareness, especially for SMEs, of the availability of redress and remedies in cases of unlawful acquisition, use or disclosure of trade secrets.***
- (21) The effectiveness of the measures and remedies available to trade secret holders could be undermined in case of non-compliance with the relevant decisions adopted by the competent judicial authorities. For this reason, it is necessary to ensure that those authorities enjoy the appropriate powers of sanction.
- (22) In order to facilitate the uniform application of the measures for the protection of trade secrets, it is appropriate to provide for systems of cooperation and the exchange of information as between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by Member States. In addition, in order to review whether these measures fulfil their intended objective, the Commission, assisted, as appropriate, by the European Observatory on the Infringements of Intellectual Property Rights, should examine the application of this Directive and the effectiveness of the national measures taken.
- (23) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to respect private and family life, the right to the protection of personal data, the freedom of expression and information, ***including media freedom***, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to good administration, access to file and preservation of secrecy of business, the right to an effective remedy and to a fair trial and right of defence.

- (24) It is important that the rights to privacy and personal data protection of any person involved in litigation concerning the unlawful acquisition, use or disclosure of trade secrets and whose personal data are processed are respected. Directive 95/46/EC of the European Parliament and of the Council<sup>1</sup> governs the processing of personal data carried out in the Member States in the context of this Directive and under the supervision of the Member States competent authorities, in particular the public independent authorities designated by the Member States.
- (25) Since the objective of this Directive, namely to achieve a smooth functioning internal market through the establishment of a sufficient and comparable level of redress across the internal market in case of unlawful acquisition, use or disclosure of a trade secret, cannot be sufficiently achieved by Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that same Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (26) This Directive should not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, or deal with applicable law. Other Union instruments which govern such matters in general terms should, in principle, remain equally applicable to the field covered by this Directive.
- (27) This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union. The measures provided for in this Directive should not be used to restrict competition unduly in a manner contrary to that Treaty.
- (27a) This Directive should not affect the freedom of movement for workers and the freedom of establishment, in particular as laid down in Articles 48 and 49 of the Treaty on the Functioning of the European Union and Article 15 of the Charter of***

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<sup>1</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p.31).

*Fundamental Rights of the European Union. This should be taken into account when applying the measures, procedures and remedies provided for in this Directive.*

- (28) The measures adopted to protect trade secrets against their unlawful acquisition, disclosure and use should not affect the application of any other relevant law in other areas including *protection of the environment and environmental liability, consumer protection, health and safety requirements, health protection*, intellectual property rights, privacy, access to documents and *information, and* the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council<sup>1</sup> and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*,

HAVE ADOPTED THIS DIRECTIVE:

## Chapter I

### Subject matter and scope

#### Article 1

##### *Subject matter and scope*

1. This Directive lays down rules on the protection against the unlawful acquisition, **use and disclosure** of *undisclosed know-how and commercial business information* (trade secrets).
2. *This Directive shall not affect:*
  - (a) *the freedom and pluralism of the media as enshrined in Article 11(2) of the Charter of Fundamental Rights;*
  - (b) *the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets,*

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<sup>1</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, p. 45).

*to the public or to administrative or judicial authorities for the performance of their duties;*

- (c) the disclosure by the Union's institutions and bodies or national public authorities of business-related information they hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;*
- (d) the use of information, knowledge, experience and skills honestly acquired by employees in the normal course of their previous employment, or in some other contractual relationship, which are not covered by the definition of a trade secret as provided for in point (1) of Article 2;*
- (e) the autonomy of social partners and their rights to enter into collective agreement, in accordance with the Union and national law and practices;*
- (f) Member States' obligations to ensure effective protection against unfair competition, in accordance with their international commitments;*
- (g) Member States' rules of criminal law. However, Member States may not restrict exemptions provided for in Article 4 by applying criminal law provisions which penalise unlawful acquisition, use or disclosure of a trade secret, as defined in point (1) of Article 2.*

*This Directive does not provide a trade secret holder with any ground to refuse disclosing information whenever such disclosure is required by law or by administrative or judicial authorities for the performance of their duties. Such disclosure shall be without prejudice to any duty not to further disclose the information or limit its use that may be imposed by Union or national law on the recipient of the information in question.*

- 3.** *For the purposes of this Directive, the acquisition of a trade secret shall be considered lawful when obtained by any of the following means:*

- (a) independent discovery or creation;*

- (b) *observation, study, disassembly or testing 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 who is free from any legally valid duty to limit the acquisition of the trade secret;*
- (c) *exercise of the right of workers or workers' representatives to information and consultation in accordance with Union and national law and/or practices;*
- (d) *any other practice which, under the circumstances, is in conformity with honest commercial practices.*

*The acquisition, use and disclosure of trade secrets shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law, without prejudice to any other duty not to disclose the trade secret or to limit its use that may be imposed by Union or national law.*

## *Article 2*

### *Definitions*

For the purposes of this Directive, the following definitions shall apply:

- (1) 'trade secret' means *know-how and business* information which meets all of the following requirements:
  - (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 persons within the circles that normally deal with the kind of information in question;
  - (b) has commercial value because it is secret;
  - (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

*Experience and skills honestly acquired by employees in the normal course of their employment shall not be considered a trade secret.*

- (2) 'trade secret holder' means any natural or legal person lawfully controlling a trade secret;
- (3) 'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed trade secrets;
- (4) 'infringing goods' means goods whose *conception, characteristics, functioning*, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.

## Chapter II

### Unlawful acquisition, use and disclosure of trade secrets

#### *Article 3*

#### *Unlawful acquisition, use and disclosure of trade secrets*

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.
2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful whenever carried out *in the following cases*:
  - (a) unauthorised access to or copy of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
  - (b) theft;
  - (c) bribery;
  - (d) deception;



- (e) breach or inducement to breach a confidentiality agreement or any other duty to maintain secrecy;
  - (f) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.
3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder ■ , by a person who is found to meet any of the following conditions:
- (a) has acquired the trade secret unlawfully;
  - (b) is in breach of a *legally valid* confidentiality agreement or any other duty to maintain secrecy of the trade secret;
  - (c) is in breach of a *legally valid* contractual or any other duty to limit the use of the trade secret.
- 3a. *Paragraph 3 does not provide any ground to trade secret holders to limit the use of experience and skills honestly acquired by employees in the normal course of their employment or add any restriction for employees to occupy a new position, to those provided for in their employment contract, in compliance with relevant Union and national law.***
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.
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, *in cases where the person engaging in such activity was, or depending on the circumstances, should have been, aware of the fact that unlawful use had been made of the trade secret within the meaning of paragraph 3.*

*Article 4*  
***Exceptions***

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:

- (a) for making legitimate use *in accordance with the Charter of Fundamental Rights of the European Union* of the right to freedom of expression and information, *including media freedom*;
- (b) for revealing a misconduct, wrongdoing, *fraud* or illegal activity, provided that the respondent acted in the public interest;
- (c) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions *in accordance with Union and national law, provided that such disclosure was necessary for that exercise*;
- (d) for the purpose of protecting a *general public interest or any other* legitimate interest, *recognised by Union or national law and through judicial practice*.

## Chapter III

### Measures, procedures and remedies

#### SECTION 1

#### GENERAL PROVISIONS

##### *Article 5*

##### *General obligation*

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against unlawful acquisition, use and disclosure of trade secrets.
2. Those measures, procedures and remedies shall:
  - (a) be fair and equitable;
  - (b) not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays;
  - (c) be effective and dissuasive.

##### *Article 6*

##### *Proportionality and abuse of litigation*

1. Member States shall ensure that the measures, procedures and remedies provided for in accordance with this Directive are to be applied by the competent judicial authorities in a manner that:
  - (a) is proportionate;
  - (b) avoids the creation of barriers to legitimate trade, ***competition and worker mobility***.

- (c) provides for safeguards against their abuse.
2. 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 ***abusively or*** in bad faith **■**, such competent judicial authorities shall be entitled to take the following measures:
- (a) impose sanctions on the applicant;
- (b) order the dissemination of the information concerning the decision taken in accordance with Article 14.

The measures referred to in the first subparagraph shall be without prejudice to the possibility for the respondent to claim damages **■**. ***Member States may provide for those measures to be determined in separate proceedings.***

#### *Article 7*

##### *Limitation period*

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.

***Member States shall determine the rules applying to the suspension and interruption of the limitation period.***

#### *Article 8*

##### *Preservation of confidentiality of trade secrets in the course of legal proceedings*

1. Member States shall ensure that the parties, their legal representatives ***or lawyers***, 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, ***which the***

*competent judicial authorities have, in response to a duly reasoned application by the interested party, identified as confidential and* of which they have become aware as a result of such participation or access. *Member States may also allow competent judicial authorities to take such measures on their own initiative.*

The obligation referred to in the first subparagraph shall *remain in force after the end of the legal proceedings. However, it shall* cease to exist in any of the following circumstances:

- (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;
- (b) where over time, the information in question becomes generally known among or readily accessible to persons within the circles that normally deal with that kind of information.

2. 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 competent judicial authorities to take such measures on their own initiative.*

The measures referred to in the first subparagraph shall at least include the possibility:

- (a) to restrict access to any document containing trade secrets *or alleged trade secrets* submitted by the parties or third parties *to a limited number of persons*, in whole or in part *provided that at least one person from each of the parties, and, where appropriate in view of the proceedings, their respective lawyers and/or legal representatives, are given access to the document in full*;
- (b) to restrict access to hearings, when trade secrets *or alleged trade secrets* may be disclosed, and their corresponding records or transcript *to a limited number of persons, provided that it includes at least one person from each of the*

*parties, and, where appropriate in view of the proceedings, their lawyers and/or legal representatives;*

- (c) to make available *to third parties* a non-confidential version of any judicial decision, in which the passages containing *information defined as* trade secrets have been removed *or redacted*.

■

- 3. When deciding on the granting or the rejection of *measures for the preservation of a trade secret* and assessing *their* proportionality, the competent judicial authorities shall take into account *the need to guarantee the right to an effective remedy and to a fair trial*, the legitimate interests of the parties and, where appropriate of third parties, and any potential harm for either of the parties, and where appropriate third parties, resulting from the granting or rejection of *those measures*.
- 4. Any processing of personal data pursuant to paragraphs 1, 2 and 3 shall be carried out in accordance with Directive 95/46/EC.

## SECTION 2

### *PROVISIONAL AND PRECAUTIONARY MEASURES*

#### *Article 9*

#### *Provisional 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 *provisional* 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 *provisional* 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 *up* 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, *as an alternative to the measures referred to in paragraph 1*, make the continuation of the alleged unlawful acquisition, use of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder. *Disclosure of a trade secret shall not be allowed against the lodging of guarantees.*

#### Article 10

##### *Conditions of application and safeguards*

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 may reasonably be considered available in order to satisfy themselves, *with a sufficient degree of certainty*, that a trade secret exists, that the applicant is the legitimate trade secret holder and that the trade secret has been acquired unlawfully, that the trade secret is being unlawfully used or disclosed, or that an unlawful acquisition, use or disclosure of the trade secret is imminent.
2. Member States shall ensure that in deciding on the granting or rejecting of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account *the particular circumstances of the case. Their assessment shall, if appropriate, take into consideration* the value of the trade secret, the measures taken to protect the trade secret, *or other specific features of the trade secret, as well as the intentional or unintentional* conduct of the respondent in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.
3. Member States shall ensure that the *provisional* measures referred to in Article 9 are revoked or otherwise cease to have effect, upon request of the respondent, if:

- (a) the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority, within a reasonable period determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer;
  - (b) in the meantime, the information in question no longer fulfils the requirements of point (1) of Article 2, for reasons that cannot be attributed to the respondent.
4. Member States shall ensure that the competent judicial authorities may make the *provisional* measures referred to in Article 9 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the respondent and, where appropriate, by any other person affected by the measures.
5. Where the *provisional* 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.

### SECTION 3

#### MEASURES RESULTING FROM A DECISION OF THE MERITS OF THE CASE

##### *Article 11*

##### *Injunctions and corrective measures*

1. Member States shall ensure that, where a *final* judicial decision is taken finding an unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant, order *one or more of the following measures* against the infringer:



- (a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret;
- (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 adoption of the appropriate corrective measures with regard to the infringing goods;
- (ca) *the destruction of all or part of any physical and/or electronic media containing or implementing the trade secret or, where appropriate, the delivery to the applicant of all or part of physical and/or electronic media.***

2. The corrective measures referred to in point (c) of paragraph 1 shall include

- (b) recall of the infringing goods from the market;
- (c) depriving the infringing goods of their infringing quality;
- (d) destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided that such action does not undermine the protection of the trade secret in question;
- (e) the destruction of all or part of any document, object, material, substance or electronic file containing or implementing the trade secret or, where appropriate, the delivery up to the trade secret holder of all or part of those documents, objects, materials, substances and electronic files.

3. Member States shall ensure that, when ordering the withdrawal of the infringing goods from the market, the judicial authorities may order, at the request of the trade secret holder, that the goods be delivered up to holder or to charitable organisations under conditions to be determined by the judicial authorities aimed at ensuring that the goods in question do not re-enter the market.

*When considering a request for corrective measures, the seriousness of the infringement, the remedies to be imposed, and the interests of third parties shall be weighed up appropriately, in accordance with the principle of proportionality.*

The judicial authorities shall order that *the* measures *referred to in point (c) of paragraph 1* be carried out at the expense of the infringer, unless there are particular reasons for not doing so. These measures shall be without prejudice to any damages that may be due to the trade secret holder by reason of the unlawful acquisition, use or disclosure of the trade secret.

## Article 12

### *Conditions of application, safeguards and alternative measures*

1. Member States shall ensure that, in considering a request for the adoption of the injunctions and corrective measures provided for in Article 11 and assessing their proportionality, the competent judicial authorities ***are required to*** take into account ***the specific circumstances of the case. That assessment shall include, where appropriate,*** the value of the trade secret, the measures taken to protect the trade secret, the conduct of the infringer in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

***Member states shall ensure that*** the competent authorities limit the ***length of*** duration of the measure referred to in point (a) of Article 11(1), ***accordingly, so as to ensure that it is*** sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, disclosure or use of the trade secret ***and that it avoids the creation of unjustified obstacles to fair competition, innovation and labour mobility.***

2. Member States shall ensure that the measures referred to in ***points (a) and (b)*** 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.

3. Member States shall provide that, at the request *of one of the parties, in the event of the* measures provided for in Article 11 *being applied*, the competent judicial authority may order pecuniary compensation to be paid to the injured party instead of applying those measures if all the following conditions are met:
  - (a) the person concerned *at the time of use or disclosure neither knew nor had reason, under the circumstances, to know that* the trade secret *was obtained from another person who was using or disclosing the trade secret unlawfully*;
  - (b) execution of the measures in question would cause that person disproportionate harm;
  - (c) pecuniary compensation to the injured party appears reasonably satisfactory.

When the pecuniary compensation is ordered instead of the order referred to in *points (a) and (b)* of Article 11(1), such pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prohibited.

### *Article 13*

#### *Damages*

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 *appropriate* to the actual prejudice suffered *as a result of the unlawful acquisition, use or disclosure of the trade secret*.
  - 1a. In accordance with their national laws and practices, Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer when they act without intent.*

2. When setting the damages, the competent judicial authorities shall take into account all appropriate factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret.

However, the competent judicial authorities may also, in appropriate cases, set the damages as a lump sum on the basis of elements such as, at a minimum, the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the trade secret in question.

#### *Article 14*

##### *Publication of judicial decisions*

1. Member States shall ensure that, in legal proceedings instituted for the unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including publishing it in full or in part *in printed and electronic media, including the official webpage of the infringer*.
2. Any measure referred to in paragraph 1 of this Article shall preserve the confidentiality of trade secrets as provided for in Article 8.
3. In deciding whether to order a measure *referred to in paragraph 1* and assessing its proportionality, the competent judicial authorities shall take into account *whether the information on the infringer would allow the identification of a natural person and, if so, whether publication of that information would be justified, in particular in the light of the following criteria:* the possible harm that such measure may cause to the privacy and reputation of the infringer, ■ the conduct of the infringer in acquiring, disclosing or using the trade secret ■ and the likelihood of further unlawful use or disclosure of the trade secret by the infringer.

## Chapter IV

### Sanctions, reporting and final provisions

#### *Article 15*

##### *Sanctions for non-compliance with the obligations set out in this Directive*

Member States shall ensure that the competent judicial authorities may impose sanctions on the parties, their legal representatives and any other person who fails or refuses to comply with any measure adopted pursuant to Articles 8, 9, and 11.

***Where provided by national law, non-compliance with a measure adopted pursuant to Articles 9 and 11 shall, where appropriate, be subject to a recurring penalty payment.***

The sanctions provided for shall be effective, proportionate and dissuasive.

#### *Article 16*

##### *Exchange of information and correspondents*

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and the Commission.

#### *Article 17*

##### *Reports*

1. By XX XX 20XX [three years after the end of the transposition period], the ***European Union Intellectual Property Office***, 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.

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, *including with regard to the potential effects thereof on fundamental rights, worker mobility, protection against unfair competition and possible further improvements in relation to cooperation and innovation*, 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.
3. By XX XX 20XX [eight years after the end of the transposition period], the Commission shall carry out an evaluation of the effects of this Directive and submit a report to the European Parliament and the Council.

#### *Article 18*

##### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by XX XX 20XX [24 months after the date of adoption of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 19*

##### *Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 20*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

20.4.2015

## **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 defence 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

##### Recital 1

###### *Text proposed by the Commission*

(1) Businesses and non-commercial research institutions invest in acquiring, developing and applying know-how and information, which is the currency of the knowledge economy. This investment in generating and applying intellectual capital determines their competitiveness in the market and therefore their returns to investment, which is the underlying motivation for business research and development. Businesses have recourse to different means to appropriate the results of their innovative activities when openness does not allow for the full exploitation of their research and innovation investments. Use of *formal* intellectual property rights such as patents, design rights or copyright is one of them. Another is to protect access and exploit the knowledge that is valuable to the entity and not widely known. Such know-how and business information, that is undisclosed and intended to remain confidential is referred to as a trade secret. Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right and use confidentiality as a business and research innovation management tool, covering a diversified range of information, which extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans or market research and strategies. By protecting such a wide range of know-how and commercial information, whether as a complement or as an alternative to

###### *Amendment*

(1) Businesses and non-commercial research institutions invest in acquiring, developing and applying know-how and information, which is the currency of the knowledge economy *and gives a competitive advantage*. This investment in generating and applying intellectual capital determines their competitiveness *and innovative performance* in the market and therefore their returns to investment, which is the underlying motivation for business research and development. Businesses have recourse to different means to appropriate the results of their innovative activities when openness does not allow for the full exploitation of their research and innovation investments. Use of intellectual property rights such as patents, design rights or copyright is one of them. Another is to protect access *to commercially valuable information* and exploit the knowledge that is valuable to the entity and not known *among, or readily accessible to, persons within the circles that normally deal with the kind of information in question or by other persons who might obtain economic value from its disclosure or use*. Such know-how and business information, that is undisclosed and intended to remain confidential is referred to as a trade secret. *Small and medium-sized enterprises (SMEs), especially, value and rely on trade secrets more, because the use of intellectual property rights tends to be expensive and SMEs often do not have sufficient specialised human and*

intellectual property rights, trade secrets allow the creator to derive profit from his/her creation and innovations and therefore are particularly important for research and development and innovative performance.

***financial resources to manage and protect intellectual property rights***. Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right and use confidentiality as a business and research innovation management tool, covering a diversified range of information, which extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans or market research and strategies. By protecting such a wide range of know-how and commercial information, whether as a complement or as an alternative to intellectual property rights, trade secrets allow the creator to derive profit from his/her creation and innovations and therefore are particularly important for research and development and innovative performance.

## Amendment 2

### Proposal for a directive Recital 2

#### *Text proposed by the Commission*

(2) Open innovation is ***an important lever for the creation of new knowledge and underpins the emergence of new and innovative business models based on the use of co-created knowledge. Trade secrets have an important role in protecting the exchange of knowledge between businesses within and across the borders of the internal market in the context of research and development and innovation.*** Collaborative research, including cross-border cooperation, is particularly important to increase the levels of business research and development within the internal market. ***Open innovation is a catalyst for new ideas to find their way to the market meeting the needs of consumers and tackling societal challenges. In an internal market where***

#### *Amendment*

(2) Open innovation is ***a catalyst for new ideas to find their way to the market - meeting the needs of consumers and tackling societal challenges. It is an important lever for the creation of new knowledge and underpins the emergence of new and innovative business models based on the use of co-created knowledge.*** Collaborative research, including cross-border cooperation, is particularly important to increase the levels of business research and development within the internal market. Such an environment conducive to intellectual creation and innovation ***and where employment mobility is ensured*** is also important for employment growth and improving competitiveness of the Union economy. Trade secrets ***have a role in protecting the***

*barriers to such cross-border collaboration are minimised and where cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products.* Such an environment conducive to intellectual creation and innovation is also important for employment growth and improving competitiveness of the Union economy. Trade secrets *are amongst the most used form of protection of intellectual creation and innovative know-how by businesses, yet they are at the same time the least protected by the existing* Union legal framework against their unlawful acquisition, *use or disclosure by third parties.*

### Amendment 3

#### Proposal for a directive Recital 4

*Text proposed by the Commission*

(4) *International efforts taken in the framework of the World Trade Organisation to address this problem led to the conclusion of the Agreement on trade-related aspects of intellectual property (the TRIPS Agreement). It contains, inter alia, provisions on the protection of trade secrets against their unlawful acquisition, use or disclosure by third parties, which are common international standards. All Member States, as well as the Union itself, are bound by this Agreement which was approved by Council Decision 94/800/EC<sup>5</sup>.*

*exchange of knowledge between businesses and/or research institutions, within and across the borders of the internal market, in the context of research and development and innovation. The existing* Union legal framework against unlawful acquisition, *use or disclosure of trade secrets by third parties is fragmented in 28 different laws, which creates barriers to the effective functioning of the internal market.*

*Amendment*

(4) The Agreement on trade-related aspects of intellectual property (the TRIPS Agreement) contains, inter alia, provisions on the protection of trade secrets against their unlawful acquisition, use or disclosure by third parties, which are common international standards. All Member States, as well as the Union itself, are bound by this Agreement which was approved by Council Decision 94/800/EC<sup>5</sup>. *In order to protect trade secrets against misappropriation, some Member States have legislation in place, however some Member States have not defined trade secrets and do not have binding legislation against misappropriation of trade secrets, which creates gaps and barriers to the effectively functioning of the internal market. It is also appropriate to define at Union level the situations where the acquisition, use and disclosure of a trade secret is lawful or unlawful, and to limit the period of application of*

*redress procedures, for this Directive to serve its purpose of consistent protection of trade secrets in the Union.*

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<sup>5</sup> Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p.1).

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<sup>5</sup> Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p.1).

#### **Amendment 4**

##### **Proposal for a directive Recital 8**

###### *Text proposed by the Commission*

(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. 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.

###### *Amendment*

(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. Such definition should therefore be constructed as to cover business information and undisclosed know-how where there is a legitimate interest in keeping confidential, **a commercial value of this information because it is kept 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 **and by competitors. The conditions establishing unlawful use or disclosure should not limit the use of acquired experience and know-how**

*through honest practices for instance in the framework of a labour agreement or any other contractual relationship. This should ensure that labour mobility will not be endangered while at the same time ensuring adequate protection for trade secrets. This Directive is without prejudice to the autonomy of the social partners and their right to enter into collective agreements in accordance with national law, traditions and practices and while respecting the provisions of the Treaty.*

## Amendment 5

### Proposal for a directive Recital 9

#### *Text proposed by the Commission*

(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<sup>6</sup> or to other rules on the access to documents should not be considered unlawful disclosure of a trade secret.

#### *Amendment*

(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<sup>6</sup> or to other rules on the access to documents is not be considered unlawful disclosure of a trade secret. ***Similarly, the acquisition or disclosure of a trade secret by a public body, fulfilling its mandate in accordance with national or Union law, should not constitute unlawful use or disclosure. This should also be the case for ensuring the protection of a legitimate interest, including consumer protection, the protection of workers, the protection of health and the environment, the safeguard of fundamental rights, including freedom of expression and information, and the prevention of unfair***

*competition.*

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<sup>6</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p.43).

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<sup>6</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p.43).

## **Amendment 6**

### **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 ***and its implementation should*** not create any exclusive right on the know-how or information protected as trade secrets. ***The provisions for protection of trade secrets conferred by this Directive do not constitute an intellectual property right and it should not be possible for them to be invoked solely in order to restrict competition.*** 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, ***as long as this is in line with honest commercial practices.***

## **Amendment 7**

### **Proposal for a directive Recital 10 a (new)**

*Text proposed by the Commission*

*Amendment*

***(10a) More and more frequently the marketing of many products, in particular in the context of procurement procedures, is contingent on the notification to the regulatory and administrative authorities***

*of confidential data, some of it obtained by means of tests which are very costly to set up. The disclosure of some or all of the information in question by the authorities and its acquisition by third parties should not lead to it being used unfairly on the market.*

#### *Justification*

*Lawful acquisition, use or disclosure are not systematically linked and can, in practice, be followed by unlawful reuse or re-disclosure. If the right to information outweighs to a disproportionate extent the need to protect trade secrets, firms will be reluctant to divulge their confidential information to government institutions and the number of improper requests for access will increase.*

### **Amendment 8**

#### **Proposal for a directive**

##### **Recital 11**

###### *Text proposed by the Commission*

(11) In line with the principle of proportionality the measures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth functioning internal market for research and innovation without jeopardising other objectives and principles of public interest. In this respect, the measures and remedies ensure that competent judicial authorities account for the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret as well as the impact of such **conduct**. It should also be ensured that the competent judicial authorities are provided with the discretion to weigh up the interests of the parties to the litigation, as well as the interests of third parties including, where appropriate, consumers.

###### *Amendment*

(11) In line with the principle of proportionality the measures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth functioning internal market for research and innovation, **by having in particular a deterrent effect against the unlawful acquisition, use and disclosure of a trade secret**, without jeopardising other objectives and principles of public interest, **such as consumer protection, health and environment protection**. In this respect, the measures and remedies ensure that competent judicial authorities account for **all relevant circumstances such as** the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret as well as the impact of such **use or disclosure**. It should also be ensured that the competent judicial authorities are provided with the discretion to weigh up the interests of the parties to the litigation, as well as the interests of third parties including, where appropriate, consumers.



## Amendment 9

### Proposal for a directive Recital 11 a (new)

*Text proposed by the Commission*

*Amendment*

***(11a) With the introduction and implementation of a uniform definition of trade secrets, and with the introduction and implementation of uniform rules for the protection of trade secrets within the internal market, other measures that directly or indirectly could restrict the sharing and use of knowledge and the hiring and mobility of labour, should respect the principle of proportionality in the interest of innovation and free competition.***

## Amendment 10

### Proposal for a directive Recital 12

*Text proposed by the Commission*

*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.

(12) The smooth functioning of the internal market would be undermined if the measures and remedies provided for were used to pursue illegitimate intents, ***such as creating unjustified barriers to the internal market or to labour mobility, that are*** 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 11

### Proposal for a directive Recital 12 a (new)

*Text proposed by the Commission*

*Amendment*

***(12a) The increased use of online web services to conduct business and research, storing more confidential data in virtual storage places, increased use of e-commerce and digitalization as a whole calls for harmonized legislation across the Union, which would protect misappropriated use of trade secrets, which in turn would ensure trust and protection among businesses and consumers and promote the formation of the Digital Single Market, which is one of the foundations for an effectively functioning internal market.***

## Amendment 12

### Proposal for a directive Recital 13

*Text proposed by the Commission*

*Amendment*

(13) In the interest of legal certainty and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it appears appropriate to restrict the possibility to initiate actions for the protection of trade secrets to a limited period following the date on which the trade secret holders became aware, or had reason to become aware, of the unlawful acquisition, use or disclosure of their trade secret by a third party.

(13) In the interest of ***preserving a smooth functioning of the internal market in research and innovation***, of legal certainty and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it appears appropriate to restrict the possibility to initiate actions for the protection of trade secrets to a limited period following the date on which the trade secret holders became aware, or had reason to become aware, of the unlawful acquisition, use or disclosure of their trade secret by a third party.

### *Justification*

*The practical impact of a limitation period of two years is limited given that businesses usually deal with misappropriation of trade secrets quickly by seeking interim measures. However, it is important that a strict limitation period is applied to avoid abuses that would lead to hindering innovation and delaying access to the internal market.*

### **Amendment 13**

#### **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. 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.

##### *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 **a balance between** appropriate safeguards ensuring the right to a fair trial **and** 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 **for persons not connected with the parties**, or to publish only the non-confidential elements of judicial decisions. **To ensure sufficient access to information, in cases where access is restricted, at least one person from each party and their respective lawyer should have access to evidence or hearings.** 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.

### *Justification*

*Makes it clear that, in order to respect the right which parties have to a fair trial, they must be able to participate with the benefit of the necessary information and that this requirement should be brought into balance with the need to protect the confidentiality of trade secrets to which proceedings relate.*

## Amendment 14

### Proposal for a directive

#### Recital 15

##### *Text proposed by the Commission*

(15) Unlawful acquisition of a trade secret by a third party could have devastating effects on its legitimate holder since once publicly disclosed it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast and accessible interim measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret. Such relief must be available without having to await a decision on the substance of the case, with due respect for the rights of defence and the principle of proportionality having regard to the characteristics of the case in question. Guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified request may also be required, particularly where any delay would cause irreparable harm to the legitimate holder of a trade secret.

## Amendment 15

### Proposal for a directive

#### Recital 16

##### *Text proposed by the Commission*

(16) For the same reason, it is also important to provide for measures to prevent further unlawful use or disclosure of a trade secret. For prohibitory measures to be effective, their duration, ***when circumstances require a limitation in time***, should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful acquisition, use or disclosure of the trade secret. In any event, no measure of this type should be enforceable if the

##### *Amendment*

(15) Unlawful acquisition, ***use or disclosure*** of a trade secret by a third party could have devastating effects on its legitimate holder since once publicly disclosed it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast and accessible interim measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret. Such relief must be available without having to await a decision on the substance of the case, with due respect for the rights of defence and the principle of proportionality having regard to the characteristics of the case in question. Guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified request may also be required, particularly where any delay would cause irreparable harm to the legitimate holder of a trade secret.

##### *Amendment*

(16) For the same reason, it is also important to provide for measures to prevent further unlawful use or disclosure of a trade secret. For prohibitory measures to be effective, their duration should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful acquisition, use or disclosure of the trade secret ***and should be limited in time to avoid the creation of unjustified barriers to competition in the internal market***. In any event, no measure

information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.

of this type should be enforceable if the information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.

### *Justification*

*if the defendant no longer gains a commercial advantage from the misappropriation, the further extension of an injunction only serves the purpose of deterrence and sanction while in the meantime hindering competition and innovation.*

## **Amendment 16**

### **Proposal for a directive**

#### **Recital 17**

##### *Text proposed by the Commission*

(17) A trade secret may be unlawfully used to design, manufacture or market goods, or components thereof, which may spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In *those* cases and when the trade secret in question has a significant impact on the quality, value or price of the resulting good or on reducing the cost, facilitating or speeding up its manufacturing or marketing processes, it is important to empower judicial authorities to order appropriate measures with a view to ensure that those goods are not put on the market or are removed from it. Considering the global nature of trade, it is also necessary that these measures include the prohibition of importing those goods into the Union or storing them for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods when other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by means of donations to by charitable organisations.

##### *Amendment*

(17) A trade secret may be unlawfully used to design, manufacture, ***develop*** or market ***services or*** goods, or components thereof, which may spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In ***the*** cases ***where unlawful acquisition has been demonstrated*** and when the trade secret in question has a significant impact on the quality, value or price of the resulting good or on reducing the cost, facilitating or speeding up its manufacturing or marketing processes, it is important to empower judicial authorities to order appropriate measures with a view to ensure that those goods are not put on the market or are removed from it. Considering the global nature of trade, it is also necessary that these measures include the prohibition of importing those goods into the Union or storing them for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods when other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by means of donations to by charitable

organisations.

### *Justification*

*There is a need to clarify that the misappropriation of trade secrets to develop services is covered by this Directive*

### **Amendment 17**

#### **Proposal for a directive**

#### **Recital 19**

##### *Text proposed by the Commission*

(19) In order to avoid that a person who knowingly, or with reasonable grounds for knowing, unlawfully acquires, uses or discloses a trade secret benefit from such conduct and to ensure that the injured trade secret holder, to the extent possible, is placed in the position in which he or she would have been had that conduct not taken place, it is necessary to provide for adequate compensation of the prejudice suffered as a result of the unlawful conduct. The amount of damages awarded to the injured holder of the trade secret should take account of all appropriate factors, such as loss of earnings incurred by the trade secret holder or unfair profits made by the infringer and, **where appropriate**, any moral prejudice caused to the trade secret holder. As an alternative, for example where, considering the intangible nature of trade secrets, it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question. The aim is not to introduce an obligation to provide for punitive damages, but to ensure compensation based on an objective criterion while taking account of the expenses incurred by the holder of the trade secret, such as the costs of identification and research.

##### *Amendment*

(19) In order to avoid that a person who knowingly, or with reasonable grounds for knowing, unlawfully acquires, uses or discloses a trade secret benefit from such conduct and to ensure that the injured trade secret holder, to the extent possible, is placed in the position in which he or she would have been had that conduct not taken place, it is necessary to provide for adequate compensation of the prejudice suffered as a result of the unlawful conduct. The amount of damages awarded to the injured holder of the trade secret should take account of all appropriate factors, such as loss of earnings incurred by the trade secret holder or unfair profits made by the infringer and, **when the trade secret holder is a natural person**, any moral prejudice caused to the trade secret holder. As an alternative, for example where, considering the intangible nature of trade secrets, it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question. The aim is not to introduce an obligation to provide for punitive damages, but to ensure compensation based on an objective criterion while taking account of the expenses incurred by the holder of the trade secret, such as the costs of identification and research.

## Justification

*There is a need to clarify that only natural persons can claim damages for moral prejudice*

### Amendment 18

#### Proposal for a directive

##### Recital 20

###### *Text proposed by the Commission*

(20) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions, including where appropriate through prominent advertising, in cases concerning the unlawful acquisition, use or disclosure of trade secrets, as long as such publication does not result in the disclosure of the trade secret nor disproportionately affect the privacy and reputation of natural persons.

###### *Amendment*

(20) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions, including where appropriate through prominent advertising, in cases concerning the unlawful acquisition, use or disclosure of trade secrets, as long as such publication does not result in the disclosure of the trade secret nor disproportionately affect the privacy and reputation of natural persons. ***There is also a necessity to raise awareness, especially for SMEs, of the availability of redress and remedies in cases of unlawful acquisition, use or disclosure of trade secrets.***

### Amendment 19

#### Proposal for a directive

##### Recital 22

###### *Text proposed by the Commission*

(22) In order to facilitate the uniform application of the measures for the protection of trade secrets, it is appropriate to ***provide for*** systems of cooperation and ***the*** exchange of information ***as*** between Member States, on the one hand, and between the Member States and the Commission on the other, ***in particular by creating a network of correspondents designated by Member States***. In addition, in order to review whether these measures fulfil their intended objective, the Commission, ***assisted, as appropriate, by the European Observatory on the***

###### *Amendment*

(22) In order to facilitate the uniform application of the measures for the protection of trade secrets, it is appropriate to ***use existing*** systems of cooperation and exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other. In addition, in order to review whether these measures fulfil their intended objective, the Commission should examine the application of this Directive and the effectiveness of the national measures taken.

***Infringements of Intellectual Property Rights***, should examine the application of this Directive and the effectiveness of the national measures taken.

#### *Justification*

*As a trade secret is not considered as an Intellectual property right and is protected in a context of unfair competition, the EOIPR does not seem the appropriate body to assist the Commission. In addition, Member states and the European Commission should use existing networks of cooperation and information and not create new ones, in order to limit administrative burden*

### **Amendment 20**

#### **Proposal for a directive Recital 23**

##### *Text proposed by the Commission*

(23) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to respect private and family life, the right to the protection of personal data, the freedom of expression and information, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to good administration, access to file and preservation of secrecy of business, the right to an effective remedy and to a fair trial and right of defence.

##### *Amendment*

(23) ***The implementation of*** this Directive ***should ensure that it*** respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to respect private and family life, the right to the protection of personal data, the freedom of expression and information, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to good administration, access to file and preservation of secrecy of business, the right to an effective remedy and to a fair trial and right of defence. ***Thus the provisions of this Directive should not apply, if the disclosure of information is in the overriding public interest or can be considered as a fundamental right.***

### **Amendment 21**

#### **Proposal for a directive Recital 27**

##### *Text proposed by the Commission*

(27) This Directive should not affect the

##### *Amendment*

(27) This Directive should not affect the



application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union. The measures provided for in this Directive should not be used to restrict competition **unduly** in a manner contrary to that Treaty.

application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union. The measures provided for in this Directive should not be used to **unfairly** restrict competition, **delay access to the internal market, or create barriers to labour mobility** in a manner contrary to that Treaty.

## Amendment 22

### Proposal for a directive

#### Recital 27 a (new)

*Text proposed by the Commission*

*Amendment*

***(27a) This Directive should not affect the application of the freedom of movement for workers and the freedom of establishment. It should also not affect the right of workers' representatives to the acquisition and disclosure of trade secrets in the context of the exercise of their rights to information, consultation and participation in accordance with Union and national law and practises.***

## Amendment 23

### Proposal for a directive

#### Recital 28

*Text proposed by the Commission*

*Amendment*

(28) The measures adopted to protect trade secrets against their unlawful acquisition, disclosure and use should not affect the application of any other relevant law in other areas including intellectual property rights, privacy, access to documents and the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council<sup>8</sup> and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.

(28) The measures adopted to protect trade secrets against their unlawful acquisition, disclosure and use should not affect the application of any other relevant law in other areas including ***protection of the environment and environmental liability, consumer protection, health and safety requirements, health protection,*** intellectual property rights, privacy, access to documents and ***information, and*** the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council<sup>8</sup> and the scope of this Directive overlap, this

Directive takes precedence as *lex specialis*.

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<sup>8</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L157, 30.4.2004, p.45).

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<sup>8</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, p. 45).

## Amendment 24

### Proposal for a directive Article 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 unlawful acquisition, disclosure and use of ***undisclosed know-how and business information*** (trade secrets), ***without the authorization of the natural or legal persons that are in lawful control of such information, and in a manner that is contrary to honest commercial practices. The Member States may provide for more far-reaching provisions, provided that compliance with Articles 4 and 5, Article 6(1), Article 7, the second subparagraph of Article 8(1), Article 8(3) and (4), Article 9(2), Articles 10 and 12 and Article 14(3) is ensured.***

## Amendment 25

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

#### *Text proposed by the Commission*

#### *Amendment*

***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.***

#### *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 26**

### **Proposal for a directive**

#### **Article 1 – paragraph 1 b (new)**

*Text proposed by the Commission*

*Amendment*

***This Directive shall be without prejudice to the autonomy of the social partners and their right to enter into collective agreements in accordance with national law, traditions and practices and while respecting the provisions of the Treaty.***

## **Amendment 27**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 1 – introductory part**

*Text proposed by the Commission*

*Amendment*

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

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

## **Amendment 28**

### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point 1 – point a**

*Text proposed by the Commission*

*Amendment*

(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 persons within the circles that normally deal with the kind of information in question;

(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 circles that normally deal with the kind of information in question;

## Amendment 29

### Proposal for a directive

#### Article 2 – paragraph 1 – point 1 – point b

(b) has commercial value because it is secret;

(b) has *actual or potential significant* commercial value because it is secret *and because its disclosure would be significantly detrimental to the legitimate economic interest of the person lawfully controlling it*;

## Amendment 30

### 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 by the person lawfully in control of the information, to keep it secret, *through means (including technical and contractual) that can be verifiable by the relevant competent judicial authorities*.

## Amendment 31

### 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*

(2) 'trade secret holder' means any *registered market operator legally established as being in control of* a trade secret;

*Justification*

*Control over a trade secret must have been properly established in law, so as to ensure that there are no 'secret' trade secrets.*

## Amendment 32

### 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) '*offender*' means any natural or legal person who, *either directly or through a third party*, has unlawfully acquired, used or disclosed trade secrets, *in a manner contrary to honest commercial practices*;

## Amendment 33

### Proposal for a directive

#### Article 2 – paragraph 1 – point 4

*Draft opinion*

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

*Amendment*

(4) '*unlawful goods*' means *products or services* whose design, *characteristics*, manufacturing process or marketing *are demonstrated to have benefited from* from trade secrets unlawfully acquired, used or disclosed.

## Amendment 34

### Proposal for a directive

#### Article 3 – paragraph 1

*Text proposed by the Commission*

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.

*Amendment*

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.

#### *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 35**

#### **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 trade secret holder shall be considered unlawful whenever carried out intentionally by:

#### *Justification*

*In the context of this proposal the term "gross negligence" does not bring clarity on how it will be enforced in a uniform manner by the judicial competent authorities*

### **Amendment 36**

#### **Proposal for a directive**

#### **Article 3 – paragraph 2 – point a**

*Text proposed by the Commission*

(a) unauthorised access to **or** copy of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;

*Amendment*

(a) unauthorised access to, copy **or appropriation** of any **trade secret, whether in the form of** documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;

### **Amendment 37**

#### **Proposal for a directive**

#### **Article 3 – paragraph 2 – point b**

*Text proposed by the Commission*

**(b) theft;**

*Amendment*

**deleted**

## Amendment 38

### Proposal for a directive Article 3 – paragraph 2 – point c

*Text proposed by the Commission*

*Amendment*

*(c) bribery;*

*deleted*

## Amendment 39

### Proposal for a directive Article 3 – paragraph 2 – point d

*Text proposed by the Commission*

*Amendment*

*(d) deception;*

*deleted*

## Amendment 40

### Proposal for a directive Article 3 – paragraph 2 – point e

*Text proposed by the Commission*

*Amendment*

(e) breach or inducement to breach *a confidentiality* agreement *or any other duty* to maintain *secrecy*;

(e) breach or inducement to breach *an* agreement to maintain *confidentiality*;

## Amendment 41

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

*Text proposed by the Commission*

*Amendment*

(f) *any other* conduct *which, under the circumstances, is* considered contrary to honest commercial practices.

(f) conduct considered contrary to honest commercial practices

## Amendment 42

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

*Text proposed by the Commission*

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:

*Amendment*

3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the **natural or legal person in lawful control of a trade secret**, intentionally **and with the aim of acquiring an economic gain or advantage or of causing economic detriment to the person in lawful control of it** or with gross negligence, by a person who is found to meet any of the following conditions:

*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 43**

**Proposal for a directive**

**Article 3 – paragraph 3 – point a**

*Text proposed by the Commission*

(a) has acquired the trade secret unlawfully;

*Amendment*

(a) has acquired **and used or disclosed** the trade secret unlawfully;

**Amendment 44**

**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 national or Union law** or any other duty to **limit the use or disclosure** of the trade secret;

**Amendment 45**

**Proposal for a directive**

**Article 3 – paragraph 3 – point c**



*Text proposed by the Commission*

*Amendment*

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

(c) is in breach of a **legally valid** contractual duty to limit the use **or disclosure** of the trade secret.

#### **Amendment 46**

##### **Proposal for a directive Article 3 – paragraph 3 – point c a (new)**

*Text proposed by the Commission*

*Amendment*

***(ca) has acquired the trade secret lawfully but uses or discloses it in a manner contrary to honest commercial practices and likely to harm the commercial interests of the person in lawful control of a trade secret and/or the smooth functioning of the internal market.***

*Justification*

*Lawful acquisition, use or disclosure are not systematically linked and can, in practice, be followed by unlawful (re)use or (re)disclosure.*

#### **Amendment 47**

##### **Proposal for a directive Article 3 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. The obligations laid down in paragraph 3 may not arbitrarily limit the use of experience acquired honestly through employment or some other contractual relationship. The rules on collective agreements and national labour law systems shall not be affected.***

*Justification*

*The use of professional experience must not be arbitrarily restricted, so as not to create an obstacle to worker mobility.*

## Amendment 48

### 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 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 ***directly or indirectly*** from another person who was using or disclosing the trade secret unlawfully within the meaning of the paragraph 3.

*Justification*

*Holders of trade secrets must be able to take action against any person who has received information which was unlawfully obtained.*

## Amendment 49

### 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 trade secret was acquired, used or disclosed unlawfully within the meaning of paragraph 3.***

*Justification*

*Prior knowledge must be the criterion which determines whether the conduct of passive recipients of information is unlawful.*

## Amendment 50

### Proposal for a directive

#### Article 4 – paragraph 1 – introductory part

*Text proposed by the Commission*

1. ***The acquisition of*** trade secrets shall be considered ***lawful when*** obtained ***by any of the following means:***

*Amendment*

1. Trade secrets shall ***not*** be considered ***to cover information*** obtained ***as a result of:***

#### *Justification*

*Intellectual property rights should be registered in another form than trade secrets, because, as is clear from the definition, both existing and potential patents, industrial designs and copyright should not be subject to trade secrecy.*

## Amendment 51

### 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 lawfully in control of the trade secret and an acquirer;***

#### *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 52

### Proposal for a directive

#### Article 4 – paragraph 1 – point a

*Text proposed by the Commission*

(a) independent ***discovery*** or ***creation***;

*Amendment*

(a) independent ***technological discoveries and designs*** or ***independent manufacture of goods with properties that are identical or similar to those placed on the market by persons in lawful control of a trade secret;***

*Justification*

*If trade secrecy is restricted solely to market- and trade-related activities and elements of existing or potential intellectual property are excluded from the definition, no independent discovery or innovation can be the subject of an accusation of trade secret infringement.*

**Amendment 53**

**Proposal for a directive**

**Article 4 – paragraph 1 – point b**

*Text proposed by the Commission*

(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***;

*Amendment*

(b) observation, study, disassembly or test of a product or object that has been made available to the public or that is lawfully in the possession of ***a natural person or market operator with access to independent technological discoveries and designs and goods manufactured on the basis thereof***;

*Justification*

*The fact that one business holds a trade secret should not hinder the research and development activities of another business where technological progress is concerned.*

**Amendment 54**

**Proposal for a directive**

**Article 4 – paragraph 1 – point c**

*Text proposed by the Commission*

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

*Amendment*

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

**Amendment 55**

**Proposal for a directive**

**Article 4 – paragraph 1 – point c a (new)**

*Text proposed by the Commission*

*Amendment*

***(ca) required or authorised by public institutions fulfilling their mandate in***

**Amendment 56**

**Proposal for a directive**

**Article 4 – paragraph 1 – point c b (new)**

*Text proposed by the Commission*

*Amendment*

*(cb) the knowledge, qualifications and skills gained by employees in previous employment. Obligations of contracts and other actions that may limit the use of such knowledge shall comply with the principle of proportionality in the interest of innovation and free competition.*

**Amendment 57**

**Proposal for a directive**

**Article 4 – paragraph 1 – point c c (new)**

*Text proposed by the Commission*

*Amendment*

*(cc) performance of the accountability requirements imposed on boards of directors or supervisory boards.*

**Amendment 58**

**Proposal for a directive**

**Article 4 – paragraph 2 – introductory part**

*Text proposed by the Commission*

*Amendment*

*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:*

*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:*

**Amendment 59**

**Proposal for a directive**

**Article 4 – paragraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

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

(a) for making legitimate use of the right to freedom of expression and information ***as reflected in Article 11 of the Charter of Fundamental Rights of the European Union;***

## **Amendment 60**

### **Proposal for a directive**

#### **Article 4 – paragraph 2 – point b**

*Text proposed by the Commission*

*Amendment*

(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;***

(b) the purpose of revealing an applicant's misconduct, wrongdoing or illegal activity ***in an appropriate way***, provided that the ***accused, without being negligent, could assume that*** the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation;

## **Amendment 61**

### **Proposal for a directive**

#### **Article 4 – paragraph 2 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

***(ba) when fulfilling the terms of the employment contract of workers;***

## **Amendment 62**

### **Proposal for a directive**

#### **Article 4 – paragraph 2 – point e**

*Text proposed by the Commission*

*Amendment*

(e) for the purpose of protecting a legitimate interest.

(e) for the purpose of protecting a legitimate interest, ***as recognised by Union or national law.***

## **Amendment 63**

### **Proposal for a directive**

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

*Text proposed by the Commission*

*Amendment*

***(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.***

*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 64**

### **Proposal for a directive**

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

*Text proposed by the Commission*

*Amendment*

***(eb) disclosure of a trade secret to members of boards of directors or supervisory boards of non-listed companies in the performance of accountability requirements;***

## **Amendment 65**

### **Proposal for a directive**

#### **Article 4 – paragraph 2 – point e c (new)**

*Text proposed by the Commission*

*Amendment*

***(ec) the trade secret is requested and/or disclosed by a public institution in accordance with its mandate, as required or allowed by national or Union law.***

*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 66**

##### **Proposal for a directive**

##### **Article 6 – paragraph 1 – point a**

*Text proposed by the Commission*

(a) is proportionate;

*Amendment*

(a) is proportionate *to the economic detriment incurred by the trade secret holder*;

#### **Amendment 67**

##### **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, *and of restrictions of competition and workers' mobility* in the internal market.

#### **Amendment 68**

##### **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, *which ensure compensation of defendants in the event of abusive or wrongful accusation*.

#### **Amendment 69**

##### **Proposal for a directive**

##### **Article 6 – paragraph 1 – point c a (new)**

*Text proposed by the Commission*

*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 apply.*

*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 70**

**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 71**

**Proposal for a directive**

**Article 6 – paragraph 2 – subparagraph 1 – point a a (new)**

*Text proposed by the Commission*

*Amendment*

*(aa) provide for full compensation for economic damage and losses incurred if*

*any, as well as for potential moral prejudice to the alleged unlawful accessor, acquirer or user of trade secrets.*

*Justification*

*Proportionate compensation must be ensured for the wrongfully accused.*

**Amendment 72**

**Proposal for a directive  
Article 7**

*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 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 73**

**Proposal for a directive  
Article 7 - paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

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

**Amendment 74**

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

*Text proposed by the Commission*

*Amendment*

1. 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.

1. Member States shall ensure that the parties, their 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 ***which the competent judicial authorities have identified as confidential after consultation of the parties and*** of which they have become aware as a result of such participation or access.

#### **Amendment 75**

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

*Text proposed by the Commission*

The obligation referred to in the first subparagraph shall ***cease to exist*** in any of the following circumstances:

*Amendment*

The obligation referred to in the first subparagraph shall ***continue to apply until after the end of the legal proceedings, except*** in any of the following circumstances:

#### **Amendment 76**

##### **Proposal for a directive Article 8 – paragraph 1 - 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 in the course of the proceedings, the alleged trade secret is found, ***in a final and binding decision*** not to fulfil the requirements set in point (1) of Article 2;

#### **Amendment 77**

##### **Proposal for a directive Article 8 – paragraph 2 - point a**

*Text proposed by the Commission*

*Amendment*

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

(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, their respective lawyer or representative in the proceedings and where relevant their experts, and court officials have full access to such documents;***

## **Amendment 78**

### **Proposal for a directive Article 8 – paragraph 2 - point b**

#### *Text proposed by the Commission*

(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;

#### *Amendment*

(b) to restrict access to hearings, when trade secrets may be disclosed, and their corresponding records or transcript ***provided that each party, their respective lawyer or representative in the proceedings and where relevant their experts, and court officials are given full access to such hearing, 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 ***one representative of each party and*** the legal representatives of the parties and authorised experts subject to the confidentiality obligation referred to in paragraph 1;

## **Amendment 79**

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

#### *Text proposed by the Commission*

(c) to make available a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed.

#### *Amendment*

(c) to make ***publicly*** available a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed.

## Amendment 80

### Proposal for a directive

#### Article 8 – paragraph 2 - subparagraph 3

*Text proposed by the Commission*

*Amendment*

*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.*

*deleted*

## Amendment 81

### Proposal for a directive

#### Article 8 – paragraph 3

*Text proposed by the Commission*

*Amendment*

3. When deciding on the granting or the rejection of the application referred to in paragraph 2 and assessing its proportionality, the competent judicial authorities shall take into account the legitimate interests of the parties and, where appropriate of third parties, and any potential harm for either of the parties, and where appropriate third parties, resulting from the granting or rejection of such application.

3. When deciding on the granting or the rejection of the application referred to in paragraph 2 and assessing its proportionality, the competent judicial authorities shall take into account ***the need to ensure the rights to an effective remedy and to a fair trial***, the legitimate interests of the parties and, where appropriate of third parties, and any potential harm for either of the parties, and where appropriate third parties, resulting from the granting or rejection of such application.

*Justification*

*Protection of trade secrets during legal proceedings must not be at the cost of a fair trial.*

## Amendment 82

### Proposal for a directive Article 10 – paragraph 1

*Text proposed by the Commission*

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 may reasonably be considered available in order to satisfy themselves*** that a trade secret ***exists***, that the applicant is the ***legitimate*** trade secret holder and that the trade secret has been acquired unlawfully, that the trade secret is being unlawfully used or disclosed, or that an unlawful acquisition, use or disclosure of the trade secret is imminent.

## Amendment 83

### Proposal for a directive Article 10 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that in deciding on the granting or rejecting of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account the value of the trade secret, the measures taken to protect the trade secret, the conduct of the respondent in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

*Amendment*

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 know-how or business information involved qualifies as*** a trade secret, that the applicant is the trade secret holder and that the 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 ***expected***.

*Amendment*

2. Member States shall ensure that in deciding on the granting or rejecting of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account the ***specific circumstances of the case. This assessment shall include, where appropriate, the*** value of the trade secret, the measures taken to protect the trade secret, ***the intentionality of the respondent in acquiring, disclosing or using the trade secret,*** the conduct of the respondent in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of

fundamental rights, including freedom of expression and information.

## **Amendment 84**

### **Proposal for a directive**

#### **Article 10 – paragraph 3 – point a**

*Text proposed by the Commission*

(a) the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority, within a reasonable period determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer;

*Amendment*

(a) the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority, within a reasonable period determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer, ***commencing on the date of the ruling by the judicial authority***;

*Justification*

*The period for which interim measures would apply has to be determined by reference to a specified starting date in order to provide legal certainty.*

## **Amendment 85**

### **Proposal for a directive**

#### **Article 10 – paragraph 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***5a. Once the competent judicial authorities are satisfied that a trade secret exists, that the applicant is the legitimate trade secret holder and that an unlawful acquisition, use or disclosure of the trade secret is imminent, the interim precautionary measures referred to in Article 9 shall apply and no other measures provided for in other Directives shall apply.***

*Justification*

*Article 9 on the Interim and precautionary measures shall apply to cases involving a trade*

*secret. The aim of the amendment is to clarify that these provisions are exclusively stand-alone and separate from the measures contemplated in the Enforcement of Intellectual Property Rights Directive 2004/48/EC, to avoid confusion and misinterpretation, and to provide the necessary safeguards so that no Member State or Court would apply the measures of the Enforcement of IPRs Directive to a situation involving a trade secret once this directive is implemented.*

## **Amendment 86**

### **Proposal for a directive**

#### **Article 11 – paragraph 1 – introductory part**

*Text proposed by the Commission*

1. Member States shall ensure that, where a judicial decision is taken finding an unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant order against the infringer:

*Amendment*

1. Member States shall ensure that, where a ***final*** judicial decision is taken finding an unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant order against the infringer:

## **Amendment 87**

### **Proposal for a directive**

#### **Article 11 – paragraph 1 - point -a (new)**

*Text proposed by the Commission*

*Amendment*

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

## **Amendment 88**

### **Proposal for a directive**

#### **Article 11 – paragraph 1 - point c a (new)**

*Text proposed by the Commission*

*Amendment*

***(ca) the destruction of all or part of any physical and/or electronic media containing or implementing the trade secret or, where appropriate, the delivery to the applicant of all or part of physical and/or electronic media.***

## **Amendment 89**

### **Proposal for a directive**



## Article 11 – paragraph 2 - point a

*Text proposed by the Commission*

*Amendment*

**(a) a declaration of infringement;**

**deleted**

## Amendment 90

### Proposal for a directive

#### Article 11 – paragraph 2 - point c

*Text proposed by the Commission*

*Amendment*

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

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

## Amendment 91

### Proposal for a directive

#### Article 11 – paragraph 2 - point d

*Text proposed by the Commission*

*Amendment*

(d) **destruction of the infringing goods or, where appropriate, their withdrawal from the market**, provided that such action does not undermine the protection of the trade secret in question;

(d) withdrawal **of the unlawful goods** from the market **and their distribution to charitable organisations under conditions to be determined by the judicial authorities aimed at ensuring that the goods in question do not re-enter the market and** provided that such action does not undermine the protection of the trade secret in question;

## Amendment 92

### Proposal for a directive

#### Article 11 – paragraph 2 - point d a (new)

*Text proposed by the Commission*

*Amendment*

**(da) as last resort, destruction of the goods;**

## Amendment 93

### Proposal for a directive

#### Article 11 – paragraph 2 - point e

*Text proposed by the Commission*

*Amendment*

*(e) the destruction of all or part of any document, object, material, substance or electronic file containing or implementing the trade secret or, where appropriate, the delivery up to the trade secret holder of all or part of those documents, objects, materials, substances and electronic files.*

*deleted*

#### **Amendment 94**

##### **Proposal for a directive**

##### **Article 11 – paragraph 3 – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

*3. Member States shall ensure that, when ordering the withdrawal of the infringing goods from the market, the judicial authorities may order, at the request of the trade secret holder, that the goods be delivered up to holder or to charitable organisations under conditions to be determined by the judicial authorities aimed at ensuring that the goods in question do not re-enter the market.*

*deleted*

#### **Amendment 95**

##### **Proposal for a directive**

##### **Article 11 – paragraph 3 – subparagraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

*When considering a request for corrective measures, the seriousness of the infringement, the remedies to be imposed, and the interests of third parties shall be weighed up appropriately as determined by the principle of proportionality.*

##### *Justification*

*It should be made clear that measures taken by judicial authorities must be based on the proportionality principle.*

## Amendment 96

### Proposal for a directive

#### Article 12 - paragraph 1 – subparagraph 1

*Text proposed by the Commission*

1. Member States shall ensure that, in considering a request for the adoption of the injunctions and corrective measures provided for in Article 11 and assessing their proportionality, the competent judicial authorities take into account the value of the trade secret, the measures taken to protect the trade secret, the conduct of the infringer in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

*Amendment*

1. Member States shall ensure that, in considering a request for the adoption of the injunctions and corrective measures provided for in Article 11 and assessing their proportionality, the competent judicial authorities take into account ***all relevant aspects of the case, such as the*** value of the trade secret, the measures taken to protect the trade secret, ***the intentionality of the infringer in acquiring, disclosing or using the trade secret,*** the conduct of the infringer in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

## Amendment 97

### Proposal for a directive

#### Article 12 - paragraph 1 - subparagraph 2

*Text proposed by the Commission*

***When*** the competent authorities limit the duration of the measure referred to in point (a) of Article 11(1), ***such*** duration ***shall be*** sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, disclosure or use of the trade secret.

*Amendment*

***Member states shall ensure that*** the competent authorities limit the ***length of*** duration of the measure referred to in point (a) of Article 11(1), ***accordingly, so as to ensure that it is*** sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, disclosure or use of the trade secret ***and that it avoids the creation of unjustified obstacles to fair competition, innovation and labour mobility.***

## Amendment 98

### Proposal for a directive Article 12 - paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that the measures referred to in *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) **and (b)** 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 99

### Proposal for a directive Article 12 - paragraph 3 - point a

*Text proposed by the Commission*

(a) the person concerned *originally acquired knowledge* of the trade *secret in good faith and fulfils the conditions of Article 3(4)*;

*Amendment*

(a) the person concerned ***at the time of use or disclosure neither knew nor had reason, under the circumstances, to know that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully***;

## Amendment 100

### Proposal for a directive Article 12 - paragraph 3 - subparagraph 2

*Text proposed by the Commission*

When the pecuniary compensation is ordered instead of the order referred to in point (a) of Article 11(1), such pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade secret in

*Amendment*

When the pecuniary compensation is ordered instead of the order referred to in point (a) **and (b)** of Article 11(1), such pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade

question, for the period of time for which use of the trade secret could have been prohibited.

secret in question, for the period of time for which use of the trade secret could have been prohibited.

## **Amendment 101**

### **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.

*Amendment*

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 ***as a result of the unlawful access to, disclosure or use of the trade secret.***

## **Amendment 102**

### **Proposal for a directive Article 13 - paragraph 1 - subparagraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***In accordance with their national law and practice, Member States shall restrict the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer, when they act without intent. This option also applies when unlawful acquisition, use and disclosure of trade secrets occurs after the employment of an employee has terminated.***

## **Amendment 103**

### **Proposal for a directive Article 13 - paragraph 2**

*Text proposed by the Commission*

2. When setting the damages, the competent judicial authorities shall take into account all **appropriate** factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret.

**Amendment 104**

**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 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.

*Amendment*

2. When setting the damages, the competent judicial authorities shall take into account all **relevant** factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret.

*Amendment*

1. By XX XX 20XX [three years after the end of the transposition period], the European **Commission** 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.

*Justification*

*As a trade secret is not considered as an Intellectual property right and is protected in a context of unfair competition, the EOIPR does not seem the appropriate body to assist the Commission*

**Amendment 105**

**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

*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 *prepared by the European Observatory on Infringements of Intellectual Property Rights*.

Commission shall draw up an intermediate report on the application of this Directive, *including on its possible deleterious effects on fundamental rights and on workers' mobility as well as possible further improvements on innovation cooperation, paying special attention to the effects on SMEs*, and submit it to the European Parliament and the Council. This report shall take due account of the report *on litigation trends and shall evaluate the impact of this Directive in particular on the levels of open innovation, collaborative research and labour mobility*.

#### *Justification*

*As a trade secret is not considered as an Intellectual property right and is protected in a context of unfair competition, the EOIPR does not seem the appropriate body to assist the Commission*

## PROCEDURE

<b>Title</b>	Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure	
<b>References</b>	COM(2013)0813 – C7-0431/2013 – 2013/0402(COD)	
<b>Committee responsible</b> Date announced in plenary	JURI 9.12.2013	
<b>Opinion by</b> Date announced in plenary	ITRE 9.12.2013	
<b>Rapporteur</b> Date appointed	Michèle Rivasi 22.7.2014	
<b>Discussed in committee</b>	25.9.2014	22.1.2015
<b>Date adopted</b>	14.4.2015	
<b>Result of final vote</b>	+: 46 -: 5 0: 4	
<b>Members present for the final vote</b>	Bendt Bendtsen, Jerzy Buzek, Soledad Cabezón Ruiz, Philippe De Backer, Pilar del Castillo Vera, Christian Ehler, Peter Eriksson, Adam Gierek, Theresa Griffin, András Gyürk, Roger Helmer, Hans-Olaf Henkel, Dawid Bohdan Jackiewicz, Kaja Kallas, Barbara Kappel, Seán Kelly, Jeppe Kofod, Miapetra Kumpula-Natri, Janusz Lewandowski, Ernest Maragall, Edouard Martin, Csaba Molnár, Nadine Morano, Dan Nica, Aldo Patriciello, Miloslav Ransdorf, Michel Reimon, Herbert Reul, Paul Rübig, Algirdas Saudargas, Dario Tamburrano, Patrizia Toia, Evžen Tošenovský, Claude Turmes, Miguel Urbán Crespo, Vladimir Urutchev, Adina-Ioana Vălean, Kathleen Van Brempt, Henna Virkkunen, Martina Werner, Hermann Winkler, Anna Záborská, Flavio Zanonato	
<b>Substitutes present for the final vote</b>	Pascal Arimont, Simona Bonafè, Lefteris Christoforou, Cornelia Ernst, João Ferreira, Eugen Freund, Michèle Rivasi, Maria Spyrali, Pavel Telička, Marco Zullo	
<b>Substitutes under Rule 200(2) present for the final vote</b>	Daniela Aiuto, Stanisław Ożóg	



30.3.2015

## **OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION**

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: Lara Comi

### **SHORT JUSTIFICATION**

This proposal is of particular importance, because its main aim is to identify a set of rules with a view to improving the competitiveness of European businesses through innovation, to strengthen Europe's role as a leader on the global industrial market.

During the process of research and creation of new ideas, products or services, there is a great deal of information which is vital for the competitiveness of the idea or the business and which falls outside the scope of the protection of intellectual property rights.

Trade secrets are therefore a complementary protection instrument and it is important and necessary to regulate, at EU level, their acquisition, use or disclosure.

The Committee on the Internal Market and Consumer Protection (IMCO) has looked at the aspects relating to the internal market and consumer protection and, by a very large majority, has adopted a text which has found very balanced solutions to the most controversial points and taken into consideration all the relevant interests.

In the recitals, some clarifications have been made, to facilitate the interpretation of the legislative text. In particular, it has been specified that the directive does not adversely affect fundamental rights, the public interest, worker mobility and the trade unions' right to negotiate, as recognised in some Member States.

In addition, it was deemed important to specify that this legislation is to be applied to trade secrets relating not only to products, but also to services.

The definition of 'trade secret' has been aligned to that given in the title of the proposal for a directive, specifying that its commercial value should be actual or potential, thus ensuring a

sufficiently broad scope.

The acquisition, use or disclosure of a trade secret are to be considered legitimate where national and EU law so require and where they are authorised by the laws protecting the rights of the trade secret holder. This directive, indeed, pursues the aim of increasing the competitiveness of companies by protecting trade secrets during the process of research and creation of new ideas.

To reinforce this aim, unlike the Commission, which has proposed the assignment of responsibility on the basis of the guilt principle, namely by assessing intentionality or negligence, IMCO advocates objective responsibility, to give greater protection to trade secrets and companies, especially SMEs.

With regard to the limitation period, one of the most controversial issues, it was decided to adopt a single period of time, contrary to the Commission's proposal of a minimum and maximum period. It was thus decided that three years was the most appropriate time frame within which to bring an action to protect a trade secret.

This single time frame will enable this important aspect to be harmonised in all national laws, so that operators will enjoy the same right all over the Union. The three-year duration appears to be a reasonable term which can protect all the interests at stake, in a balanced way.

As regards the protection and mobility of workers, it was agreed to safeguard their right to use any information and knowledge acquired from previous professional activities, but limiting it to that which is not deemed to be unlawful under Article 3.

Likewise, it was decided not to jeopardise the use of information and trade secrets by public authorities in the performance of their duties under national or EU law.

Last but not least, the committee decided to strengthen the confidentiality of trade secrets during the course of legal proceedings, limiting the number of people who might get to know the trade secret in question.

The IMCO committee's proposed amendments, should they be accepted by the Committee on Legal Affairs, the committee responsible, will make this new instrument more effective in terms of the aims pursued, particularly in making our EU companies –and therefore the internal market – more competitive , in addition to protecting consumers.

## **AMENDMENTS**

The Committee on the Internal Market and Consumer Protection calls on the Committee on Legal Affairs, as the committee responsible, to take into account the following amendments:

### **Amendment 1**

#### **Proposal for a directive Recital 2**

(2) Open innovation is an important lever for the creation of new knowledge and underpins the emergence of new and innovative business models based on the use of co-created knowledge. Trade secrets have an important role in protecting the exchange of knowledge between businesses within and across the borders of the internal market in the context of research and development and innovation. Collaborative research, including cross-border cooperation, is particularly important to increase the levels of business research and development within the internal market. Open innovation is a catalyst for new ideas to find their way to the market meeting the needs of consumers and tackling societal challenges. In an internal market where barriers to such cross-border collaboration are minimised and where cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products. Such an environment conducive to intellectual creation and innovation is also important for employment growth and improving competitiveness of the Union economy. Trade secrets are amongst the most used form of protection of intellectual creation and innovative know-how by businesses, yet they are at the same time the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by third parties.

(2) Open innovation is an important lever for the creation of new knowledge and underpins the emergence of new and innovative business models based on the use of co-created knowledge. Trade secrets have an important role in protecting the exchange of knowledge between businesses within and across the borders of the internal market in the context of research and development and innovation. Collaborative research, including cross-border cooperation, is particularly important to increase the levels of business research and development within the internal market. Open innovation is a catalyst for new ideas to find their way to the market meeting the needs of consumers and tackling societal challenges. In an internal market where barriers to such cross-border collaboration are minimised and where cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products. Such an environment conducive to intellectual creation and innovation is also important for employment growth and improving competitiveness of the Union economy. Trade secrets are amongst the most used form of protection of intellectual creation and innovative know-how by businesses, yet they are at the same time the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by third parties. ***The dissemination of knowledge and information should be considered essential to ensuring dynamic, positive and equal business development opportunities, especially for small and medium-sized enterprises.***

## Amendment 2

### Proposal for a directive Recital 8

#### *Text proposed by the Commission*

(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.

#### *Amendment*

(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 ***civil*** 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. ***Such information or know-how should furthermore have commercial value, whether actual or potential, and the disclosure of it would be likely to harm the legitimate economic interest of the person lawfully controlling it.*** 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 generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

### **Amendment 3**

#### **Proposal for a directive Recital 10 a (new)**

*Text proposed by the Commission*

*Amendment*

***(10a) This Directive should not affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Union law.***

### **Amendment 4**

#### **Proposal for a directive Recital 10 b (new)**

*Text proposed by the Commission*

*Amendment*

***(10b) The acquisition or disclosure of a trade secret by a public body, whether imposed or permitted by law, should not constitute an unlawful use or disclosure. Such acquisition or disclosure should however be clearly within the mandate of the relevant public body, and exceeding this mandate should constitute an unlawful act.***

#### *Justification*

*There is a need to clarify that the acquisition or disclosure of a trade secret is not unlawful when requests of information from public bodies are prescribed by the law.*

### **Amendment 5**

#### **Proposal for a directive Recital 11**

*Text proposed by the Commission*

(11) In line with the principle of proportionality the measures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth functioning internal market for research and innovation without jeopardising *other objectives and principles of* public interest. In this respect, the measures and remedies ensure that competent judicial authorities account for the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret as well as the impact of such conduct. It should also be ensured that the competent judicial authorities are provided with the discretion to weigh up the interests of the parties to the litigation, as well as the interests of third parties including, where appropriate, consumers.

*Amendment*

(11) In line with the principle of proportionality the measures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth functioning internal market for research and innovation, *in particular by having a deterrent effect against the unlawful acquisition, use and disclosure of a trade secret*, without jeopardising *fundamental rights and freedoms or the* public interest, *such as public safety, consumer protection, public health and environmental protection and without any prejudice to the mobility of workers*. In this respect, the measures and remedies ensure that competent judicial authorities account for *factors such as* the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret as well as the impact of such conduct. It should also be ensured that the competent judicial authorities are provided with the discretion to weigh up the interests of the parties to the litigation, as well as the interests of third parties including, where appropriate, consumers.

## **Amendment 6**

### **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

*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, *such as creating unjustified barriers to the internal market or to labour mobility, that are* incompatible with the objectives of this Directive. Therefore, it is important to ensure that judicial authorities are

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.

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 7

### Proposal for a directive Recital 13

#### *Text proposed by the Commission*

(13) In the interest of legal certainty and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it appears appropriate to restrict the possibility to initiate actions for the protection of trade secrets to a **limited** period following the date on which the trade secret holders became aware, or had reason to become aware, of the unlawful acquisition, use or disclosure of their trade secret by a third party.

#### *Amendment*

(13) In the interest of ***preserving the smooth functioning of the internal market for research and innovation and of*** legal certainty and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it appears appropriate to restrict the possibility to initiate actions for the protection of trade secrets to a period ***of three years*** following the date on which the trade secret holders became aware, or had reason to become aware, of the unlawful acquisition, use or disclosure of their trade secret by a third party.

## Amendment 8

### Proposal for a directive Recital 15

#### *Text proposed by the Commission*

(15) Unlawful acquisition of a trade secret by a third party could have devastating effects on its legitimate holder since once publicly disclosed it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast and accessible interim measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret. Such relief must be available without having to await a decision on the substance of the case, with due respect for the rights of defence and the principle of proportionality having regard to the characteristics of the case in question. Guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified request may also be required, particularly where any delay would cause irreparable harm to the legitimate holder of a trade secret.

#### *Amendment*

(15) Unlawful acquisition of a trade secret by a third party could have devastating effects on its legitimate holder since once publicly disclosed it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast and accessible interim measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret, ***including when such a trade secret is used for the provision of services***. Such relief must be available without having to await a decision on the substance of the case, with due respect for the rights of defence and the principle of proportionality having regard to the characteristics of the case in question. Guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified request may also be required, particularly where any delay would cause irreparable harm to the legitimate holder of a trade secret.

## Amendment 9

### Proposal for a directive Recital 16

#### *Text proposed by the Commission*

(16) For the same reason, it is also important to provide for measures to prevent further unlawful use or disclosure of a trade secret. For prohibitory measures to be effective, their duration, ***when circumstances require a limitation in time***, should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful

#### *Amendment*

(16) For the same reason, it is also important to provide for measures to prevent further unlawful use or disclosure of a trade secret. For prohibitory measures to be effective ***and proportionate***, their duration should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful acquisition, use or disclosure of the trade



acquisition, use or disclosure of the trade secret. In any event, no measure of this type should be enforceable if the information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.

secret, *including when such a trade secret is used for the provision of services, and should be limited in time to avoid the creation of unjustified barriers to competition in the internal market.* In any event, no measure of this type should be enforceable if the information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.

## Amendment 10

### Proposal for a directive Recital 17

#### *Text proposed by the Commission*

(17) A trade secret may be unlawfully used to design, manufacture or market goods, or components thereof, which may spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In *those* cases and when the trade secret in question has a significant impact on the quality, value or price of the resulting good or on reducing the cost, facilitating or speeding up its manufacturing or marketing processes, it is important to empower judicial authorities to order appropriate measures with a view to ensure that those goods are not put on the market or are removed from it. Considering the global nature of trade, it is also necessary that these measures include the prohibition of importing those goods into the Union or storing them for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods when other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by means of donations to *by* charitable

#### *Amendment*

(17) A trade secret may be unlawfully used to design, manufacture or market goods, or components thereof, which may spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In *the cases where unlawful acquisition has been demonstrated* and when the trade secret in question has a significant impact on the quality, value or price of the resulting good or on reducing the cost, facilitating or speeding up its manufacturing or marketing processes, it is important to empower judicial authorities to order appropriate measures with a view to ensure that those goods are not put on the market or are removed from it. Considering the global nature of trade, it is also necessary that these measures include the prohibition of importing those goods into the Union or storing them for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods when other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by

organisations.

means of donations to charitable organisations.

## Amendment 11

### Proposal for a directive Recital 27

#### *Text proposed by the Commission*

(27) This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union. The measures provided for in this Directive should not be used to restrict competition **unduly** in a manner contrary to that Treaty.

#### *Amendment*

(27) This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union. The measures provided for in this Directive should not be used to **unfairly** restrict competition, **delay access to the internal market and/or create barriers to labour mobility** in a manner contrary to that Treaty.

## Amendment 12

### Proposal for a directive Recital 28

#### *Text proposed by the Commission*

(28) The measures adopted to protect trade secrets against their unlawful acquisition, disclosure and use should not affect the application of any other relevant law in other areas including intellectual property rights, privacy, access to documents and the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council<sup>8</sup> and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.

#### *Amendment*

(28) The measures adopted to protect trade secrets against their unlawful acquisition, disclosure and use should not affect the application of any other relevant law in other areas including **protection of the environment and environmental liability, consumer protection, health and safety requirements, health protection,** intellectual property rights, privacy, access to documents and **information, and** the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council<sup>8</sup> and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.

<sup>8</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L157, 30.4.2004, p.45).

<sup>8</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L157, 30.4.2004, p.45).

### Amendment 13

#### Proposal for a directive Article 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 unlawful acquisition, *use and* disclosure of *undisclosed know-how and business information* (trade secrets).

### Amendment 14

#### 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 *know-how and business* information which meets all of the following requirements:

### Amendment 15

#### 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;

## Amendment 16

### 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 steps under the circumstances, by the *trade secret holder*, to keep it secret.

*Justification*

*Replacement in order to ensure coherence with the terminology used in Article 2 para. 2.*

## Amendment 17

### Proposal for a directive

#### Article 2 – paragraph 1 – point 1 – point c a (new)

*Text proposed by the Commission*

*Amendment*

*(ca) concerns trials, tests or other secret data which, in order to be developed, require a significant commitment and upon the submission of which marketing authorisation for chemical, pharmaceutical or agricultural products involving the use of new chemicals depends.*

## Amendment 18

### 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, quality, *characteristics, functioning*, manufacturing process or marketing benefits from trade secrets unlawfully acquired, used or disclosed.

### *Justification*

*The addition of the terms “characteristics” and “functioning” includes other aspects beyond the quality of the goods. A good should be considered as infringing if it benefits in any way from a misappropriated trade secret, regardless how “significantly” it benefited therefrom.*

#### **Amendment 19**

##### **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 trade secret holder shall be considered unlawful whenever carried out by:

#### **Amendment 20**

##### **Proposal for a directive**

##### **Article 3 – paragraph 2 – point a**

###### *Text proposed by the Commission*

(a) unauthorised access to or copy of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret *or from which the trade secret can be deduced*;

###### *Amendment*

(a) unauthorised access to or copy of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret ;

### *Justification*

*There is a need to clarify that the trade secret holder is only protected against the unlawful acquisition of the trade secret and not against reverse engineering, which is lawful*

#### **Amendment 21**

##### **Proposal for a directive**

##### **Article 3 – paragraph 3 - introductory part**

###### *Text proposed by the Commission*

3. The use or disclosure of a trade secret

###### *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:

shall be considered unlawful whenever carried out, without the consent of the trade secret holder by a person who is found to meet any of the following conditions:

## Amendment 22

### 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.

## Amendment 23

### 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 trade secret was used unlawfully within the meaning of paragraph 3.***

## Amendment 24

### Proposal for a directive Article 4

#### *Text proposed by the Commission*

1. The acquisition of trade secrets shall be considered lawful when obtained by any of the following means:

- (a) independent discovery or creation;
- (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;
- (c) exercise of the right of workers representatives to information and consultation in accordance with Union and national law and/or practices;
- (c) any other practice which, under the circumstances, is in conformity with honest commercial practices.

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:

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

#### *Amendment*

1. The acquisition of trade secrets shall be considered lawful when obtained by any of the following means:

- (a) independent discovery or creation;
- (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 ***who is free from any legally valid duty to limit the acquisition of the trade secret;***
- (c) exercise of the right of workers representatives to information and consultation in accordance with Union and national law and/or practices;
- (d) any other practice which, under the circumstances, is in conformity with honest commercial practices.

***The acquisition, use and disclosure of trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required by Union or national law and allowed by provisions thereof protecting the rights of the trade secret holder.***

2. ***The acquisition, use or 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:

- (a) for making legitimate use of the right to freedom of expression and information;
- (b) for the purpose of revealing ***a*** misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary

secret was necessary for such revelation and that the respondent acted in the public interest;

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

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

(e) for the purpose of protecting a legitimate interest.

for such revelation and that the respondent acted in the public interest;

(c) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions *in accordance with Union and national law and practices;*

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

*2a. This Directive shall not affect:*

*(a) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to public authorities for the performance of their duties;*

*(b) the use of information, knowledge, qualifications and skills of employees obtained in previous employment, to the extent that it is not covered by Article 3.*

## Amendment 25

### 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 workers' mobility* in the internal market;



## Amendment 26

### Proposal for a directive Article 7

*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.

## Amendment 27

### 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.

*Amendment*

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. ***Member States may also allow competent judicial authorities to take such measures on their own initiative.***

## Amendment 28

### Proposal for a directive Article 8 – paragraph 1 – subparagraph 2 – introductory wording

*Text proposed by the Commission*

*Amendment*

The obligation referred to in the first subparagraph shall cease to exist in any of the following circumstances:

The obligation referred to in the first subparagraph shall ***remain in force until the legal proceedings have ended. In any case, the obligation shall*** cease to exist in any of the following circumstances:

**Amendment 29**

**Proposal for a directive**

**Article 8 – paragraph 1 – subparagraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

(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;

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

**Amendment 30**

**Proposal for a directive**

**Article 8 – paragraph 2 – subparagraph 1**

*Text proposed by the Commission*

*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 shall also ensure that the competent judicial authorities may, on a 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 authorise the competent judicial authorities to adopt ex officio measures.***

**Amendment 31**

**Proposal for a directive**

**Article 8 – paragraph 2 – subparagraph 2 – point a**

*Text proposed by the Commission*

*Amendment*

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

(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;***

*Justification*

*To ensure that both parties have access to the information which has an essential bearing on the content of the case*

**Amendment 32**

**Proposal for a directive**

**Article 8 – paragraph 2 – subparagraph 2 – point b**

*Text proposed by the Commission*

*Amendment*

(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;***

(b) to restrict access to hearings, when trade secrets ***or alleged trade secrets*** may be disclosed, and their corresponding records or transcript, ***to a limited number of persons, provided that at least one person from each party, its respective lawyer or representative to the proceedings and court officials are given full access to such hearing, records or transcript;***

**Amendment 33**

**Proposal for a directive**

**Article 8 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

3. When deciding on the granting or the rejection of ***the application referred to in paragraph 2*** and assessing ***its*** proportionality, the competent judicial authorities shall take into account the

3. When deciding on the granting or the rejection of ***measures for preservation of a trade secret*** and assessing ***their*** proportionality, the competent judicial authorities shall take into account ***the need***

legitimate interests of the parties and, where appropriate of third parties, and any potential harm for either of the parties, and where appropriate third parties, resulting from the granting or rejection of such application.

*to guarantee the right to an effective remedy and to a fair trial*, the legitimate interests of the parties and, where appropriate of third parties, and any potential harm for either of the parties, and where appropriate third parties, resulting from the granting or rejection of such application.

#### **Amendment 34**

##### **Proposal for a directive**

##### **Article 9 – paragraph 1 – introductory wording**

*Text proposed by the Commission*

*Amendment*

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:

*(Does not affect the English version)*

*Justification*

*(Does not affect the English version)*

#### **Amendment 35**

##### **Proposal for a directive**

##### **Article 9 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

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.

2. Member States shall ensure that the judicial authorities may, *as an alternative to the measures laid down in paragraph 1*, 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.

## Amendment 36

### Proposal for a directive Article 10 – paragraph 1

*Text proposed by the Commission*

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 may reasonably be considered available in order to satisfy themselves that a trade secret **exists**, that the applicant is the **legitimate** trade secret holder and that the trade secret has been acquired unlawfully, that the trade secret is being unlawfully used or disclosed, or that an unlawful acquisition, use or disclosure of the trade secret is imminent.

*Amendment*

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 may reasonably be considered available in order to satisfy themselves that **the matter involved qualifies as** a trade secret, that the applicant is the trade secret holder and that the trade secret has been acquired unlawfully, that the trade secret is being unlawfully used or disclosed, or that an unlawful acquisition, use or disclosure of the trade secret is imminent.

## Amendment 37

### Proposal for a directive Article 10 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that in deciding on the granting or rejecting of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account the value of the trade secret, the measures taken to protect the trade secret, the conduct of the respondent in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

*Amendment*

2. Member States shall ensure that in deciding on the granting or rejecting of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account **all relevant aspects of the case, such as** the value of the trade secret, the measures taken to protect the trade secret, the conduct of the respondent in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

## Amendment 38

### Proposal for a directive Article 10 – paragraph 4

*Text proposed by the Commission*

4. Member States shall ensure that the competent judicial authorities may make the interim measures referred to in Article 9 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the respondent and, where appropriate, by any other person affected by the measures.

*Amendment*

*(Does not affect the English version).*

*Justification*

*(Does not affect the English version)*

## Amendment 39

### Proposal for a directive Article 11 – paragraph 1 – introductory wording

*Text proposed by the Commission*

1. Member States shall ensure that, where a judicial decision is taken finding an unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant order against the infringer:

*Amendment*

1. Member States shall ensure that, where a judicial decision is taken finding an unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant, order ***one or more of the following measures*** against the infringer:

## Amendment 40

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

*Text proposed by the Commission*

***(a) a declaration of infringement;***

*Amendment*

***deleted***

## Amendment 41

### Proposal for a directive

#### Article 12 – paragraph 1 – subparagraph 1

##### *Text proposed by the Commission*

Member States shall ensure that, in considering a request for the adoption of the injunctions and corrective measures provided for in Article 11 and assessing their proportionality, the competent judicial authorities take into account the value of the trade secret, the measures taken to protect the trade secret, the conduct of the infringer in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

##### *Amendment*

Member States shall ensure that, in considering a request for the adoption of the injunctions and corrective measures provided for in Article 11 and assessing their proportionality, the competent judicial authorities ***shall be required to take into account the specific circumstances of the case. This assessment shall include, where appropriate,*** the value of the trade secret, the measures taken to protect the trade secret, the conduct of the infringer in acquiring, disclosing or using of the trade secret, the impact of the unlawful disclosure or use of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights, including freedom of expression and information.

## Amendment 42

### Proposal for a directive

#### Article 12 – paragraph 1 – subparagraph 2

##### *Text proposed by the Commission*

***When*** the competent authorities limit the ***duration*** of the measure referred to in point (a) of Article 11(1), ***such duration shall*** be sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, disclosure or use of the trade secret.

##### *Amendment*

***Member states shall ensure that*** the competent authorities limit the ***length*** of the measure referred to in point (a) of Article 11(1) ***accordingly, as to*** be sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, disclosure or use of the trade secret .

## *Justification*

*If the defendant can no longer gain any commercial advantage from the misappropriation, the further extension of an injunction only serves the purpose of deterrence and sanction while in the meantime hindering competition and innovation.*

### **Amendment 43**

#### **Proposal for a directive**

#### **Article 12 – paragraph 3 – subparagraph 2**

##### *Text proposed by the Commission*

When the pecuniary compensation is ordered instead of the order referred to in *point (a)* of Article 11(1), such pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prohibited.

##### *Amendment*

When the pecuniary compensation is ordered instead of the order referred to in *points (a) and (b)* of Article 11(1), such pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prohibited.

### **Amendment 44**

#### **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.

##### *Amendment*

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 *appropriate* to the actual prejudice suffered *as a result of the infringement*.

*In accordance with their national law and practice, Member States may restrict the liability for damages of employees towards their employers for the unlawful*



*acquisition, use or disclosure of a trade secret of the employer when they act without intent.*

## Amendment 45

### Proposal for a directive Article 14 – paragraph 3

#### *Text proposed by the Commission*

3. In deciding whether to order a **publicity** measure and assessing its proportionality, the competent judicial authorities shall take into account the possible harm that such measure may cause to the privacy and reputation of the infringer, **whenever the infringer is a natural person, as well as the value of the trade secret**, the conduct of the infringer in acquiring, disclosing or using the trade secret, **the impact of the unlawful disclosure or use of the trade secret**, and the likelihood of further unlawful use or disclosure of the trade secret by the infringer.

#### *Amendment*

3. In deciding whether to order a measure **referred to in paragraph 1** and assessing its proportionality, the competent judicial authorities shall take into account **whether the information on the infringer would allow to identify a natural person and, if so, whether publication of that information would be justified, in particular in the light of the following criteria:** the possible harm that such measure may cause to the privacy and reputation of the infringer, the conduct of the infringer in acquiring, disclosing or using the trade secret and the likelihood of further unlawful use or disclosure of the trade secret by the infringer.

## PROCEDURE

<b>Title</b>	Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure			
<b>References</b>	COM(2013)0813 – C7-0431/2013 – 2013/0402(COD)			
<b>Committee responsible</b> Date announced in plenary	JURI 9.12.2013			
<b>Opinion by</b> Date announced in plenary	IMCO 9.12.2013			
<b>Rapporteur</b> Date appointed	Lara Comi 7.10.2014			
<b>Discussed in committee</b>	18.3.2014	5.11.2014	17.11.2014	3.12.2014
	21.1.2015	23.2.2015	16.3.2015	
<b>Date adopted</b>	24.3.2015			
<b>Result of final vote</b>	+: -: 0:	27 4 7		
<b>Members present for the final vote</b>	Dita Charanzová, Carlos Coelho, Sergio Gaetano Cofferati, Lara Comi, Daniel Dalton, Nicola Danti, Pascal Durand, Vicky Ford, Ildikó Gáll-Pelcz, Evelyne Gebhardt, Maria Grapini, Antanas Guoga, Sergio Gutiérrez Prieto, Liisa Jaakonsaari, Jiří Maštálka, Marlene Mizzi, Jiří Pospíšil, Virginie Rozière, Christel Schaldemose, Andreas Schwab, Olga Sehnalová, Igor Šoltes, Ivan Štefanec, Catherine Stihler, Róza Gräfin von Thun und Hohenstein, Mylène Troszczynski, Anneleen Van Bossuyt, Marco Zullo			
<b>Substitutes present for the final vote</b>	Roberta Metsola, Franz Obermayr, Adam Szejnfeld, Ulrike Trebesius, Sabine Verheyen, Inês Cristina Zuber			
<b>Substitutes under Rule 200(2) present for the final vote</b>	Jonathan Arnott, Philippe De Backer, Ashley Fox, Andrey Novakov			

## PROCEDURE

<b>Title</b>	Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure			
<b>References</b>	COM(2013)0813 – C7-0431/2013 – 2013/0402(COD)			
<b>Date submitted to Parliament</b>	27.11.2013			
<b>Committee responsible</b> Date announced in plenary	JURI 9.12.2013			
<b>Committees asked for opinions</b> Date announced in plenary	EMPL 23.10.2014	ITRE 9.12.2013	IMCO 9.12.2013	
<b>Not delivering opinions</b> Date of decision	EMPL 23.10.2014			
<b>Rapporteurs</b> Date appointed	Constance Le Grip 22.9.2014			
<b>Discussed in committee</b>	13.10.2014	11.11.2014	23.3.2015	16.4.2015
<b>Date adopted</b>	16.6.2015			
<b>Result of final vote</b>	+ : 19 - : 2 0 : 3			
<b>Members present for the final vote</b>	Max Andersson, Joëlle Bergeron, Marie-Christine Boutonnet, Jean-Marie Cavada, Kostas Chrysogonos, Therese Comodini Cachia, Mady Delvaux, Rosa Estaràs Ferragut, Laura Ferrara, Enrico Gasbarra, Lidia Joanna Geringer de Oedenberg, Mary Honeyball, Dietmar Köster, Gilles Lebreton, Jiří Maštálka, Emil Radev, Julia Reda, Evelyn Regner, Pavel Svoboda, József Szájer, Axel Voss			
<b>Substitutes present for the final vote</b>	Sergio Gaetano Cofferati, Angel Dzhambazki, Jytte Guteland, Constance Le Grip, Cecilia Wikström			
<b>Date tabled</b>	22.6.2015			