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Subject:	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

Delegations will find attached Commission document COM(2013) 813 final.

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Brussels, 28.11.2013
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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)

{SWD(2013) 471 final}
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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Europe is strong on science and innovation and it has the potential to become a global leader. Striving for science quality is not just the aim of researchers, but provides important public and private returns. Nevertheless, overall research and development (R& D) within the EU is not sufficiently driven by businesses when compared to some major trading partners, in particular the US and Japan. Sub-optimal business investment in R&D adversely impacts on the introduction of new products, processes, services and known-how.

It is therefore desirable to improve the conditions for innovative business activity. As part of its wider Europe 2020 strategy, the Commission has undertaken to create an Innovation Union, protecting investments in the knowledge base, reducing costly fragmentation, and making Europe a more rewarding place for innovation. An environment conducive to innovation should in particular encourage higher levels of investment in R&D by the private sector, through more extensive, including cross-border, collaboration in R&D and technological developments between universities and industry, open innovation and allowing for improved valuation of intellectual property (IP) such that access to venture capital and financing is enhanced for research-oriented and innovative economic agents. Attaining such goals exclusively on a national level is not sufficient and would lead to inefficient duplication of effort in the Union.

The drastically reduced transaction costs in the digital economy have led to new forms of cooperation with open science and open innovation, often leading to new business models for using co-created knowledge. Nevertheless, intellectual property rights (IPRs) are an essential part of an innovation policy. IPRs provide innovators and creators with means of appropriation of the outputs of their efforts, which are intangible in nature, thus providing the necessary incentives for investment in new solutions, inventions and know-how. IPRs tend to protect the results of creative or inventive efforts, but they have a limited scope of application.

During the process of research and creation significant information is compiled and developed, progressively building knowledge of a substantial economic value that often does not qualify for IPR protection, but which is equally important for innovation and for the competitiveness of businesses in general. When securing such assets and attracting financing and investment requires IP to be kept secret, companies, laboratories, universities, as well as the individual inventors and creators, use the most relied upon and long-standing form of appropriation over valuable information: confidentiality.

As research builds on prior work, sharing of knowledge and new findings represent important leverage for further innovation. Depending on the business model of the innovator there are cases when confidentiality may be the requisite basis upon which IP can be nurtured in order for it to be exploited into innovation and increased competitiveness. Every IPR starts with a secret. Writers do not disclose the plot they are working on (a future copyright), car makers do not circulate the first sketches of a new model (a future design), companies do not reveal the preliminary results of their technological experiments (a future patent), companies hold on to the information relating to the launch of a new branded product (a future trade mark), etc.

In legal terminology, information that is kept confidential in order to preserve competitive gains is referred to as “trade secrets”, “undisclosed information”, “business confidential information” or “secret know-how”. Business and academia sometimes use other name tags for it such as “proprietary know-how” or “proprietary technology”.

Trade secrets are also just as important in protecting non-technological innovation. The services sectors, representing some 70% of EU GDP, are very dynamic, and that dynamism depends on innovative knowledge creation. However, the services sector does not rely as much as manufacturing industry on technological process and product innovation (as protected by patents). Confidentiality in this key part of the EU economy is used to build and exploit so-called "soft" innovation for competitiveness, covering the use and application of a diversified range of strategic commercial information, which extends beyond technological knowledge, such as information on customers and suppliers, business processes, business plans, market research, etc.

Economists agree that companies, irrespective of their size, value trade secrets at least as much as all other forms of IP. Trade secrets are particularly important to small and medium-sized enterprises (SMEs) and start-ups as these often lack specialised human resources and financial strength to pursue, manage, enforce and defend IPRs.

Although not protected as a classical IPR, trade secrets are nevertheless a key complementary instrument for the required appropriation of intellectual assets that are the drivers of the knowledge economy of the 21st century. The holder of a trade secret does not have exclusive rights over the information covered by the trade secret. However, in order to promote an economically efficient and competitive process, restrictions to the use of a the trade secret are justified in cases where the relevant know-how or information has been obtained from the trade secret holder against its will by a third party through dishonest means. The assessment of whether and to what extent such restrictions are necessary is subject, on a case-by-case basis, to judicial control.

This means that competitors are free, and should be encouraged, to develop and use the same, similar or alternative solutions, thus competing in innovation, but are not allowed to cheat, steal or deceive in order to obtain confidential information developed by others.

While the development and management of knowledge and information have become ever more central to the performance of the EU economy, the exposure of valuable undisclosed know-how and information (trade secrets) to theft, espionage or other misappropriation techniques has and continues to increase (globalisation, outsourcing, longer supply chains, increased use of ICT, etc.). The risk also increases that stolen trade secrets are used in third countries to produce infringing goods which subsequently compete within the EU with those of the victim of the misappropriation. However, the current diversity and fragmentation of the legal framework on the protection of trade secrets against their unlawful acquisition, use or disclosure is impairing cross-border R&D and the circulation of innovative knowledge by undermining the capacity of European companies to respond to dishonest attacks on their know-how.

Optimisation of the IP infrastructure is one important pillar of the Innovation Union and, in that context, the Commission adopted in May 2011 a comprehensive IP strategy, undertaking to examine the protection of trade secrets[1]. This proposal is one further deliverable on the commitment of creating a single market for intellectual property.

[1] COM(2011)287.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1. Public Consultation

This initiative is based on an evaluation of the importance of trade secrets for innovation and for the competitiveness of companies, the extent to which they are used, their role, and relationship with IPRs, in the generation and economic exploitation of knowledge and intangibles assets, and the relevant legal framework. These assessments were carried out with the help of two external studies and with extensive consultations of stakeholders.

A first study (published in January 2012) provides a comparative law assessment of the protection against misappropriation of trade secrets in the different EU Member States. A second study, published in May 2013, assessed the economic foundations of trade secrets and protection against their misappropriation and further analysed the legal protection of trade secrets throughout the EU. It confirmed the fragmented and diversified nature of the existing protection against misappropriation of trade secrets throughout the Union, considering it to be, in general opaque and imposing unnecessary costs and risks. The study considered that an efficient system to secure the results of R&D is a precondition for businesses to innovate and that the flexibility offered by efficient reliance on trade secrets fits well with the way in which innovation takes place in today's business environment. It concluded that harmonisation of trade secret law in the EU would improve conditions for firms to develop, exchange and use innovative knowledge.

The views of stakeholders were collected in 3 steps. First, civil society, industry, academia and public authorities discussed this issue in a conference organised by the Commission that took place in June 2012.

Second, a survey on trade secret use, associated risks and legal protection was subsequently launched, in the context of the 2nd study, in November 2012. The survey was directed to a representative sample of businesses across the EU, including SMEs which accounted for 60% of the sample. A total of 537 responses to the survey were received. Overall, 75% of respondents ranked trade secrets as strategically important to their company's growth, competitiveness and innovative performance. The survey revealed that over the last 10 years, about one in five respondents had suffered at least one attempt at misappropriation within the EU, whereas nearly two in five respondents stated that the risk of trade secret misappropriation had increased during the same period. Two in three of the respondents indicated support for an EU legislative proposal.

Third, from 11 December 2012 until 8 March 2013 the services of the Commission carried out an open public consultation, focusing on the possible policy options and their impacts. 386 replies were received, mostly from individual citizens (primarily from one Member State) and businesses. 202 respondents found that the legal protection against the misappropriation of trade secrets should be addressed by the EU. However, the views expressed by the two main groups of respondents (citizens and companies) were polarised. Three in four citizens regard trade secrets as having low importance for R&D and find existing legal protection of trade secrets excessive and 75% do not see a need for an EU action. Responding companies, on the other hand, consider trade secrets as highly important for R&D and for their competitiveness. A significant majority regard existing protection as weak, in particular at the cross-border level, and see differences between national legal frameworks as having negative impacts such as higher business risk in the Member States with weaker protection, less incentive to undertake cross-border R&D and increased expenditure in preventive measures to protect information.

2.2. Impact Assessment

The impact assessment showed the national divergences in the protection of trade secrets: few Member States' laws either define trade secrets or specify when they should be protected; cease and desist orders against infringers are not available in all cases; traditional rules on the calculation of damages are often inadequate for trade secret misappropriation cases and alternative methods (e.g. amount of royalties that would have been due under a licence agreement) are not available in all Member States; and criminal rules do not address trade secret theft in all Member States. In addition, many Member States do not have rules aimed at safeguarding trade secrets during litigation, thus deterring victims of trade secret misappropriation from seeking redress in court.

Two main problems resulted:

- Sub-optimal incentives for cross-border innovation activities. When trade secrets are under a risk of misappropriation with ineffective legal protection, incentives to undertake innovation activities (including at cross-border scale) are affected because of (i) the lower expected value of innovation relying on trade secrets and the higher costs for protecting it; and (ii) the higher business risk when sharing trade secrets. For instance, 40% of EU companies would refrain from sharing trade secrets with other parties because of fear of losing the confidentiality of the information through misuse or release without their authorisation. This inhibits innovation and in particular collaborative research and open innovation which requires sharing of valuable information by multiple business and research partners.
- Trade secret-based competitive advantages are at risk (reduced competitiveness): the fragmented legal protection within the EU does not guarantee a comparable scope of protection and level of redress within the Internal Market, thus putting trade-secret based competitive advantages, whether innovation-related or not, at risk and undermining trade secret owners' competitiveness. For instance, the European chemical industry, which strongly relies on process innovation secured by trade secrets, estimates that misappropriation of a trade secret could often entail a turnover reduction of up to 30%.

The objective of the initiative is to ensure that the competitiveness of European businesses and research bodies which is based on undisclosed know-how and business information (trade secrets) is adequately protected and improve the conditions/framework for the development and exploitation of innovation and for knowledge transfer within the Internal Market. Specifically, it aims at improving the effectiveness of the legal protection of trade secrets against misappropriation throughout the Internal Market.

The following possible options for resolving the problem were considered:

– Status quo.

– Provide information on and raise awareness of the national measures, procedures and remedies available against trade secret misappropriation.

– Convergence of national civil law as regards the unlawfulness of acts of misappropriation of trade secrets (but rules on remedies and preservation on confidentiality of trade secrets during legal proceedings to be decided at national level).

– Convergence of national civil law remedies against the misappropriation of trade secrets and rules on preservation of confidentiality of trade secrets during and after legal proceedings (in addition to option 3).

– Convergence of national criminal law in addition to civil law convergence (option 4), including rules on minimum criminal penalties.

The impact assessment concluded that options 4 would be proportionate and would best serve to achieve the objectives pursued.

In terms of impacts, the convergence of civil law remedies would allow innovative businesses to defend their rightful trade secrets more effectively across the EU. Also, if trade secrets' owners could rely on confidentiality during proceedings, they would be more inclined to seek legal protection against potential damages through misappropriation of trade secrets. Increased legal certainty and convergence of laws would contribute to increasing the value of innovations companies try to protect as trade secrets, as the risk of misappropriation would be reduced. Positive impacts on the functioning of the Internal Market result as companies, in particular SMEs, and researchers will be able to make better use of their innovative ideas by cooperating with the best partners across the EU, thus helping to increase private sector investment in R&D within the Internal Market. At the same time, competition should not be restricted as no exclusive rights are being granted and any competitor is free to independently acquire the knowledge protected by the trade secret (including by reverse engineering). Similarly, the hiring and mobility of highly skilled labour (those who have access to trade secrets) within the Internal Market should not be negatively impacted. This should have, over time, positive effects on the competitiveness and growth of the EU economy. This initiative does not negatively affect fundamental rights. In particular, the initiative will promote the right to property and the right to conduct a business. In terms of access to documents in judicial proceedings safeguards have been put in place in order to safeguard the right of defence. The initiative also contains safeguards to ensure that the right to freedom of expression and information is guaranteed.

This initiative is consistent with international obligations (i.e. the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)). Major trading partners have similar legislation on this issue.

3. LEGAL ELEMENTS OF THE PROPOSAL

Article 114 of the Treaty of the Functioning of the European Union (TFEU) provides for the adoption of EU rules harmonising national legislation, whenever necessary for the smooth functioning of the Internal Market. The objective of the proposal is to establish a sufficient and comparable level of redress across the Internal Market in case of trade secret misappropriation (while providing sufficient safeguards to prevent abusive behaviour). The existing national rules offer an uneven level of protection across the EU of trade secrets against misappropriation, which jeopardises the smooth functioning of the Internal Market for information and know-how. Indeed, in order to fulfil all its potential as an economic asset, valuable information (such as manufacturing processes, new substances and materials, non-patented technology, business solutions) must be transferable, in confidence, as it may have different uses for different players in different geographic regions, thus generating income for creators and allowing for an efficient allocation of resources. The scattered legal framework also reduces the incentives to undertake any innovative-related cross-border activity which would depend on the use of information protected as a trade secret, such as establishment in a different Member States for the purposes of manufacturing or marketing goods/services based on trade secrets, supplying goods/services to a company in other Member State or outsourcing the manufacturing to another company in a Member State. In those situations, if the trade secret is misappropriated in another country with lower level of protection, infringing goods may spread across the market. Existing national rules thus render cross-border network R&D

and innovation less attractive and more difficult. They also create a higher business risk in Member States with lower levels of protection, with adverse effects on the whole of the EU economy as, on the one hand, incentives to cross-border trade diminish, and on the other hand, "infringing goods" originating from those Member States (or imported through them) may spread across the Internal Market. The proposal should facilitate cross-border R&D cooperation: a clear, sound and levelled protection of trade secrets against misappropriation promotes cross-border sharing and transfer of confidential business information and know-how by diminishing perceived risks and transactions costs associated with multiple legislation handling. It should also improve incentives to cross-border trade, thanks to the reduction of unfair competition from free-riders in the cross-border market space.

In terms of subsidiarity, the problems identified in the impact assessment are driven by the diversity and inconsistency of the existing regulatory framework that does not ensure a level playing field for EU companies with adverse consequences for their competitiveness and that of the EU as a whole. Achieving greater consistency in redress measures across Member States is central to addressing those problems. Yet such consistency cannot be achieved by action taken solely on the Member State level: experience in this field shows that even when Member States are coordinated to a certain extent, e.g. by the TRIPS Agreement, a sufficient degree of substantive harmonisation of national rules is not achieved. Hence, the necessary scale and effects of the proposed action are at EU level.

4. BUDGETARY IMPLICATION

The proposal has no impact on the European Union budget. All actions proposed to be taken up by the Commission in this proposal are consistent and compatible with the new Multiannual Financial Framework 2014-2020.

5. EXPLANATION OF THE PROPOSAL

5.1. General provisions

Chapter I defines the subject matter (Article 1): the Directive applies to unlawful acquisition, disclosure and use of trade secrets and the measures, procedures and remedies that should be made available for the purpose of civil law redress.

Also in Chapter I, Article 2 defines key concepts. The definition of 'trade secret' contains three elements: (i) the information must be confidential; (ii) it should have commercial value because of its confidentiality; and (iii) the trade secret holder should have made reasonable efforts to keep it confidential. This definition follows the definition of 'undisclosed information' in the TRIPS Agreement.

The definition of 'trade secret holder' incorporates, also following the TRIPS Agreement, the concept of lawfulness of control of the trade secret as a key element. It therefore ensures that not only the original owner of the trade secret but also licensees can defend the trade secret.

The definition of 'infringing good' integrates a proportionality assessment. The goods which are designed, manufactured or marketed carrying out an unlawful conduct must benefit to a significant degree from the trade secret in question to be considered as infringing goods. The test should be used when considering any measures directly affecting goods manufactured or put in the market by an infringer.

Chapter II sets the circumstances under which the acquisition, use and disclosure of a trade secret is unlawful (Article 3), thus entitling the trade secret holder to seek the application of the measures and remedies foreseen in the Directive. The key element for those acts to be unlawful is

the absence of consent of the trade secret holder. Article 3 also determines that the use of a trade secret by a third party not directly involved in the original unlawful acquisition, use or disclosure is also unlawful, whenever that third party was aware, should have been aware, or was given notice, of the original unlawful act. Article 4 expressly clarifies that independent discovery and reverse engineering are legitimate means of acquiring information.

5.2. Measures, procedures and remedies

Chapter III establishes the measures, procedures and remedies that should be made available to the holder of a trade secret in case of unlawful acquisition, use or disclosure of that trade secret by a third party.

Section 1 sets the general principles applicable to the civil enforcement instruments in order to prevent and repress acts of trade secret misappropriation, notably effectiveness, fairness and proportionality (Article 5) and safeguards to prevent abusive litigation (Article 6). Article 7 establishes a period of limitation. Article 8 requires that Member States provide judicial authorities with mechanisms to preserve the confidentiality of trade secrets disclosed in court for the purpose of litigation. The possible measures must include: restricting access to documents submitted by the parties or third parties, in whole or in part; restricting access to hearings and hearing records; ordering the parties or third parties to prepare non-confidential versions of documents containing trade secrets and also preparing non-confidential versions of judicial decisions. These measures should be applied in a proportionate manner so that the rights of the parties to a fair hearing are not undermined. The confidentiality measures must apply during litigation, but also after litigation in case of requests of public access to documents for as long as the information in question remains a trade secret.

Section 2 provides for provisional and precautionary measures in the form of interlocutory injunctions or precautionary seizure of infringing goods (Article 9). It also establishes safeguards to ensure the equity and proportionality of those provisional and precautionary measures (Article 10).

Section 3 provides for measures that may be ordered with the decision of the merits of the case. Article 11 provides for the prohibition of use or disclosure of the trade secret, the prohibition to make, offer, place on the market or use infringing goods (or import or store infringing goods for those purposes) and corrective measures. The corrective measures request, inter alia, the infringer to destroy or deliver to the original trade secret holder all the information he or she holds with regard to the unlawfully acquired, used or disclosed trade secret. Article 12 establishes safeguards to ensure equity and proportionality of the measures provided for in Article 11.

The awarding of damages for the prejudice suffered by the trade secret holder as a consequence of the unlawful acquisition, use or disclosure of his/her trade secret is enshrined in Article 13, which calls for the taking into consideration of all the relevant factors, including the unfair profits obtained by the defendant. The possibility of calculating the damages on the basis of hypothetical royalties is also made available, in line of what is foreseen in the case of infringements of intellectual property rights.

Article 14 empowers the competent judicial authorities to adopt publicity measures at the request of the plaintiff, including the publication of the decision on the merits of the case – provided that the trade secret is not disclosed and after considering the proportionality of the measure.

The Directive does not integrate rules on the cross-border enforcement of judicial decisions as general EU rules on this matter apply, allowing the enforcement in all Member States of a court judgment prohibiting the imports into the EU of infringing goods.

5.3. Sanctions, reporting and final provisions

In order to ensure an effective application of the Directive and the fulfilment of the pursued objectives, Chapter IV foresees the application of sanctions in case of non-compliance with the measures provided for in Chapter III and comprises provisions on monitoring and reporting.

The Commission considers that, in line with the joint declarations concerning explanatory documents[2], there are not sufficient arguments to formally request explanatory documents from Member States to explain the relationship between the content of the Directive and the corresponding parts of national transposition instruments. From a technical perspective, the Directive is not particularly complex, contains only a limited number of legal obligations that require transposition into national law and deals with a well delimited issue that has already been regulated at national level as regards the neighbouring area of IPRs. Therefore, the transposition at national level is not expected to be complicated and this should ease the monitoring of such transposition.

[2] OJ C 369 of 17.12.2011, p.14-15.

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[3],

After consulting the European Data Protection Supervisor[4],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(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 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.

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3 OJ C , , p. .

4 OJ C , , p. .

(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.

(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) 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[5].

(5) Notwithstanding the TRIPS Agreement, 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

[5] 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).

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 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. 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.

(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[6] or to other rules on the access to documents should not be considered unlawful disclosure of a trade secret.

(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.

(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.

(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.

(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

[6] 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).

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. 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 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, 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 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 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.

(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 disproportionally affect the privacy and reputation of natural persons.

(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, 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[7] 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, 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 and can therefore, 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.

(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[8] and the scope of this Directive overlap, this Directive takes precedence as lex specialis.

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[7] 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).

[8] 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).

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

Subject matter and scope

Article 1
Subject matter

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

Article 2
Definitions

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

(1) ‘trade secret’ means 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.

(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 design, quality, 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 intentionally or with gross negligence by:

(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, intentionally or with gross negligence, 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 confidentiality agreement or any other duty to maintain secrecy of the trade secret;

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

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.

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.

Article 4
Lawful acquisition, use and disclosure of trade secrets

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 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.

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 in the internal market.

(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 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:

(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, if Union or national law so allows.

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 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.

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, 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.

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

   (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;

   (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.

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

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

   (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;

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

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.

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.

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
INTERIM AND PRECAUTIONARY MEASURES

Article 9
Interim and precautionary measures

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

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

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

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

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

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 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 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.

3. Member States shall ensure that the interim 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 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.

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

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 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:

   (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.

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

   (a) a declaration of infringement;

(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.

The judicial authorities shall order that those measures 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 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.

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.

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.

3. Member States shall provide that, at the request of the person liable to be subject to the measures provided for in Article 11, 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 originally acquired knowledge of the trade secret in good faith and fulfils the conditions of Article 3(4);

(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 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.

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 commensurate to the actual prejudice suffered.

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.

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 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.

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.

The sanctions provided for shall include the possibility to impose recurring penalty payments in case of non-compliance with a measure adopted pursuant to Articles 9 and 11.

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 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.

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.

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	*For the Council*
The President	*The President*