


















Procedure file

Informations de base	
COD - Ordinary legislative procedure (ex-codecision procedure) Directive	2013/0402(COD) Procedure completed
Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure	
Sujet 3.50.15 Intellectual property, copyright 3.50.16 Industrial property, European patent, Community patent, design and pattern	

Acteurs principaux			
European Parliament	Commission au fond	Rapporteur(e)	Date de nomination
	 Legal Affairs	 LE GRIP Constance	22/09/2014
		Rapporteur(e) fictif/fictive	
		 COFFERATI Sergio Gaetano	
		 DZHAMBAZKI Angel	
		 CAVADA Jean-Marie	
		 REDA Felix	
		 FERRARA Laura	
	Commission au fond précédente		
	 Legal Affairs		
Commission pour avis	Rapporteur(e) pour avis	Date de nomination	
 Employment and Social Affairs	La commission a décidé de ne pas donner d'avis.		
 Industry, Research and Energy		22/07/2014	
	 RIVASI Michèle		
 Internal Market and Consumer Protection		07/10/2014	
	 COMI Lara		
Commission pour avis précédente			
 Internal Market and Consumer Protection			
 Industry, Research and Energy			
Council of the European Union	Formation du Conseil	Réunion	Date

European Commission	Competitiveness (Internal Market, Industry, Research and Space) 3470	26/05/2016
	Competitiveness (Internal Market, Industry, Research and Space) 3317	26/05/2014
European Economic and Social Committee	DG de la Commission Financial Stability, Financial Services and Capital Markets Union	Commissaire BIEŃKOWSKA Elżbieta

Evénements clés			
28/11/2013	Legislative proposal published	COM(2013)0813	Résumé
09/12/2013	Committee referral announced in Parliament, 1st reading		
20/10/2014	Committee referral announced in Parliament, 1st reading		
16/06/2015	Vote in committee, 1st reading		
16/06/2015	Committee decision to open interinstitutional negotiations with report adopted in committee		
22/06/2015	Committee report tabled for plenary, 1st reading	A8-0199/2015	Résumé
28/01/2016	Approval in committee of the text agreed at 1st reading interinstitutional negotiations		
13/04/2016	Debate in Parliament		
14/04/2016	Results of vote in Parliament		
14/04/2016	Decision by Parliament, 1st reading	T8-0131/2016	Résumé
26/05/2016	Act adopted by Council after Parliament's 1st reading		
08/06/2016	Final act signed		
08/06/2016	End of procedure in Parliament		
15/06/2016	Final act published in Official Journal		

Informations techniques	
Référence de procédure	2013/0402(COD)
Type de procédure	COD - Ordinary legislative procedure (ex-codecision procedure)
Sous-type de procédure	Legislation
Instrument législatif	Directive
Base juridique	Treaty on the Functioning of the EU TFEU 114
Autre base juridique	Rules of Procedure EP 159
Consultation obligatoire d'autres institutions	European Economic and Social Committee
Etape de la procédure	Procedure completed
Dossier de la commission parlementaire	JURI/8/00273

Portail de documentation					
Legislative proposal		COM(2013)0813	28/11/2013	EC	Résumé
Document attached to the procedure		SWD(2013)0471	28/11/2013	EC	
Document attached to the procedure		SWD(2013)0472	28/11/2013	EC	
Document attached to the procedure		SWD(2013)0493	28/11/2013	EC	
Committee draft report		PE546.885	11/02/2015	EP	
Amendments tabled in committee		PE552.084	26/03/2015	EP	
Amendments tabled in committee		PE552.111	26/03/2015	EP	
Committee opinion	IMCO	PE541.656	30/03/2015	EP	
Committee opinion	ITRE	PE544.342	29/04/2015	EP	
Committee report tabled for plenary, 1st reading/single reading		A8-0199/2015	22/06/2015	EP	Résumé
Amendments tabled in committee		PE580.556	04/04/2016	EP	
Text adopted by Parliament, 1st reading/single reading		T8-0131/2016	14/04/2016	EP	Résumé
Commission response to text adopted in plenary		SP(2016)372	31/05/2016	EC	
Draft final act		00076/2015/LEX	08/06/2016	CSL	

Informations complémentaires	
Commission européenne	EUR-Lex

Acte final
Directive 2016/943 JO L 157 15.06.2016, p. 0001 Résumé

Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure

PURPOSE: to establish a sufficient and comparable level of redress across the Internal Market in cases of unlawful acquisition, disclosure and use of trade secrets.

PROPOSED ACT: Directive of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: although they are not protected as a classical intellectual property rights (IPR), trade secrets are nevertheless a key complementary instrument for the appropriation of intellectual assets that are the drivers of the knowledge economy of the 21st century.

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 for SMEs and start-ups as these often lack specialised human resources and financial strength to manage and defend IPRs.

Due to globalisation, the exposure of trade secrets to theft, espionage or other misappropriation techniques continues to increase. A survey launched in 2012 revealed that, over the last 10 years, about one in five respondents had suffered at least one attempt at misappropriation within the EU. The risk also increases that stolen trade secrets are used in third countries to produce sub-standard goods that subsequently compete within the EU with those of the victim of the misappropriation.

Member States legislation offer an uneven level of protection of trade secrets against their unlawful acquisition, thus leading to fragmentation of the internal market of information and know-how. The Commission considers that harmonisation of trade secret law in the EU would

improve conditions for firms to develop, exchange and use innovative knowledge.

The Commission adopted in May 2011 a [comprehensive IP strategy](#), undertaking to examine the protection of trade secrets.

This proposal is a product of the commitment to create a single market for intellectual property.

IMPACT ASSESSMENT: the option favoured by the Commission to strengthen the efficacy of legal protection for trade secrets involves 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.

The convergence of civil law remedies would allow innovative businesses to defend their rightful trade secrets more effectively across the EU.

CONTENT: the draft directive establishes a definition of trade secret and sets out the means for victims of the misappropriation of such a secret to obtain reparation.

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 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The key element for the acquisition, use and disclosure of a trade secret to be unlawful is the absence of consent of the trade secret holder. The use of a trade secret by a third party is also unlawful, from the moment that third party was aware, should have been aware, or was given notice, of the original unlawful act.

Measures, procedures and remedies: the proposal 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. Specifically, the proposal:

- sets the general principles applicable to the civil enforcement instruments in order to prevent and repress acts of trade secret misappropriation, and safeguards to prevent abusive litigation;
- establishes a limitation period of at least one year but not more than two years to bring actions for the application of the measures, procedures and remedies provided for in the Directive;
- requires that Member States provide judicial authorities with mechanisms to preserve the confidentiality of trade secrets disclosed in court for the purpose of litigation, such as restricting access to documents submitted by the parties or third parties. 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;
- provides for provisional and precautionary measures in the form of interlocutory injunctions or precautionary seizure of infringing goods;
- establishes safeguards to ensure equity and proportionality of the provisional and precautionary measures.

The proposal also sets out the measures that may be ordered with the decision on the merits of the case:

- 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;
- awarding of damages for the prejudice suffered by the trade secret holder and the possibility of calculating the damages on the basis of hypothetical royalties;
- empowering 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.

Sanctions, reporting and final provisions: in order to ensure an effective application of the Directive the proposal provides for the application of sanctions in case of non-compliance with the measures provided for and includes provisions on monitoring and reporting.

Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure

The Committee on Legal Affairs adopted the report by Constance LE GRIP (EPP, FR) 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.

The committee recommended that the position of the European Parliament in first reading following the ordinary legislative procedure should amend the Commission proposal as follows:

Subject matter and scope: the Directive laid down rules on the protection against the unlawful acquisition, use and disclosure of undisclosed know-how and commercial business information (trade secrets). Members specified that the Directive should not affect:

- the freedom and pluralism of the media as enshrined in the Charter of Fundamental Rights;
- the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of their duties;
- the disclosure by the Unions 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;
- 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;
- the autonomy of social partners and their rights to enter into collective agreement;
- Member States' obligations to ensure effective protection against unfair competition in accordance with their international commitments

The Directive did not provide a trade secret holder with any ground to refuse disclosing information whenever such disclosure was required by law or by administrative or judicial authorities for the performance of their duties.

The acquisition of a trade secret should be considered lawful when obtained by any of the following means: (i) independent discovery or creation; (ii) observation, study, disassembly or testing of a product that had been made available to the public or lawfully in the possession of the acquirer of the information who was free from any duty to limit the acquisition of the trade secret; (iii) exercise of the right of workers or workers' representatives to information and consultation.

Furthermore, in order to ensure the mobility of workers, trade secret holders should not 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.

Exceptions: the Legal Affairs Committee specified that there should be no entitlement to any remedy when the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

- 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;
- revealing a misconduct, wrongdoing, fraud or illegal activity, provided that the respondent acted in the public interest;
- for the purpose of protecting a general public interest or any other legitimate interest, recognised by Union or national law and through judicial practice.

Preservation of confidentiality of trade secrets in the course of legal proceedings: when deciding on the granting or the rejection of measures for the preservation of a trade secret, the competent judicial authorities shall take into account the need to guarantee the right to an effective remedy and to a fair trial.

Injunctions and corrective measures: amongst the corrective measures that might be taken against an infringer, Members added 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.

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

Safeguards measures: competent authorities should limit the duration of the measures on the prohibition of the use or disclosure of the trade secret, 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 avoided the creation of unjustified obstacles to fair competition, innovation and labour mobility.

Publication of judicial decisions: in deciding whether to order a measure for the dissemination of the information, the competent judicial authorities should 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 the light of certain criteria, including the possible harm that such measure may cause to the privacy and reputation of the infringer.

Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure

The European Parliament adopted by 503 votes to 131 with 18 abstentions, a legislative resolution on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

The position of the European Parliament adopted in first reading following the ordinary legislative procedure amended the Commission proposal as follows:

Purpose and scope: the Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets. Parliament specified, however, that the Directive shall not affect:

- the exercise of the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;
- the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;
- the application of Union or national rules requiring or allowing Union institutions or national public authorities to disclose information submitted by businesses which those institutions hold pursuant to the obligations set out in Union or national law;
- the autonomy of social partners and their right to enter into collective agreements, in accordance with Union law and national laws and practices.

Furthermore, nothing in the Directive shall be understood to offer any ground for restricting the mobility of employees. In particular, in relation to the exercise of such mobility, this Directive shall not offer any ground for:

- limiting employees' use of information that does not constitute a trade secret;
- limiting employees' use of experience and skills honestly acquired in the normal course of their employment;
- imposing any additional restrictions on employees in their employment contracts other than restrictions imposed in accordance with Union or national law.

Lawful acquisition, use and disclosure of trade secrets: the amended text states that the acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:

- independent discovery or creation;

- observation, study, disassembly or testing of a product or object that has been made available to the public or that 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;
- exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;
- any other practice which, under the circumstances, is in conformity with honest commercial practices.

The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.

Unlawful acquisition, use and disclosure of trade secrets: Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in the Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret. However, an application for the measures, and remedies must be dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

- for exercising the right to freedom of expression and information as set out in the Charter , including respect for the freedom and pluralism of the media;
- for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;
- disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;
- for the purpose of protecting a legitimate interest recognised by Union or national law.

Proportionality and abuse of process: Member States shall ensure that competent judicial authorities may, upon the request of the respondent, apply appropriate measures as provided for in national law, where an application is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. Such measures may, as appropriate, include awarding damages to the respondent.

Limitation period: Member States shall lay down rules on the limitation periods applicable to substantive claims and actions for the application of the measures, procedures and remedies. The rules shall determine when the limitation period begins to run, the duration of the limitation period and the circumstances under which the limitation period is interrupted or suspended. The duration of the limitation period shall not exceed six years.

Preservation of confidentiality of trade secrets in the course of legal proceedings: lawyers or other representatives, participating in legal proceedings are not 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 an interested party, identified as confidential. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.

Injunctions and corrective measures: amongst the measures which may be ordered against the infringer Members added the destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or, where appropriate, the delivery up to the applicant of all or part of those documents, objects, materials, substances or electronic files.

Damages and interest: 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 where they act without intent.

Publication of judicial decisions: in deciding whether to order a measures for the dissemination of the information concerning a judicial decision, the competent judicial authorities shall also take into account whether the information on the infringer would be such as to allow a natural person to be identified and, if so, whether publication of that information would be justified, in particular in the light of the possible harm that such measure may cause to the privacy and reputation of the infringer.

Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure

PURPOSE: to establish a sufficient and comparable level of redress across the Internal Market in cases of unlawful acquisition, disclosure and use of trade secrets.

LEGISLATIVE ACT: Directive (EU) 2016/943 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

CONTENT: the Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets. Trade secrets are one of the ways of protecting intellectual capital and innovative know-how most used by businesses, including SMEs.

Subject matter and scope: the measures, procedures and remedies intended to protect trade secrets should deter the unlawful acquisition, use and disclosure of a trade secret, without undermining fundamental rights and freedoms or the public interest, such as public safety, consumer protection, public health and environmental protection, and mobility of workers.

The Directive does 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 application of rules that allow public authorities to collect information for the performance of their duties, or rules that allow or require any subsequent disclosure by those public authorities of relevant information to the public;
- the right of social partners to enter into collective agreements, where provided for under labour law, as regards any obligation not to disclose a trade secret;

- the exercise of the right to freedom of expression and information which encompasses media freedom and pluralism, as reflected in the Charter of Fundamental Rights of the European Union, in particular with regard to investigative journalism and the protection of journalistic sources.

Furthermore, nothing in the Directive shall be understood to offer any ground for restricting the mobility of employees. In particular, the Directive does not offer any ground for:

- limiting employees' use of experience and skills honestly acquired in the normal course of their employment;
- imposing any additional restrictions on employees in their employment contracts other than restrictions imposed in accordance with Union or national law.

Whistle-blowers: the measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets does not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed, where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in the Directive.

An application for remedies must be dismissed where the alleged disclosure of trade secrets took place for the purpose of protecting a legitimate interest recognised by Union or national law.

Measures, procedures or remedies: Member States shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets. The measures shall be fair and equitable, effective and dissuasive, and not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays. They must provide for safeguards against their abuse. The duration of the limitation period shall not exceed 6 years.

Injunctions and corrective measures: where a judicial decision taken on the merits of the case finds that there has been 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:

- the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret;
- the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes;
- the destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or, where appropriate, the delivery up to the applicant of all or part of those documents, objects, materials, substances or electronic files.

The competent judicial authorities, upon the request of the injured party, shall order an infringer who knew or ought to have known that he was engaging in unlawful acquisition, use or disclosure of a trade secret, to pay the trade secret holder damages appropriate to the actual prejudice suffered.

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 where they act without intent.

Publication of judicial decisions: as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, 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.

However, such publication should not result in the disclosure of the trade secret or disproportionately affect the privacy and reputation of a natural person.

Reports: by 9 June 2021, 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 disclosure of trade secrets. By 9 June 2022, the Commission shall draw up an intermediate report on the application of the Directive, and shall submit it to the European Parliament and to the Council.

ENTRY INTO FORCE: 5.7.2016.

TRANSPOSITION: by 9.5.2018.