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

2013/0402(COD) - 22/06/2015 - Committee report tabled for plenary, 1st reading/single reading

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.