

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

2013/0402(COD) - 08/06/2016 - Final act

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.