Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance)

DIRECTIVE (EU) 2016/943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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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[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

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 and provides a competitive advantage. This investment in generating and applying intellectual capital is a determining factor as regards their competitiveness and innovation-related performance in the market and therefore their returns on investment, which is the underlying motivation for business research and development. Businesses have recourse to different means to appropriate the results of their innovation-related activities when openness does not allow for the full exploitation of their investment in research and innovation. Use of intellectual property rights, such as patents, design rights or copyright, is one such means. Another means of appropriating the results of innovation is to protect access to, and exploit, knowledge that is valuable to the entity and not widely known. Such valuable know-how and business information, that is undisclosed and intended to remain confidential, is referred to as a trade secret.

(2) Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right. They use confidentiality as a business competitiveness and research innovation management tool, and in relation to a diverse range of information that extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans, and market research and strategies. Small and medium-sized enterprises (SMEs) value and rely on trade secrets

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even more. By protecting such a wide range of know-how and business information, whether as a complement or as an alternative to intellectual property rights, trade secrets allow creators and innovators to derive profit from their creation or innovation and, therefore, are particularly important for business competitiveness as well as for research and development, and innovation-related performance.

(3) Open innovation is a catalyst for new ideas which meet the needs of consumers and tackle societal challenges, and allows those ideas to find their way to the market. Such 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. Collaborative research, including cross-border cooperation, is particularly important in increasing the levels of business research and development within the internal market. The dissemination of knowledge and information should be considered as being essential for the purpose of ensuring dynamic, positive and equal business development opportunities, in particular for SMEs. In an internal market in which barriers to cross-border collaboration are minimised and cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products. Such an environment conducive to intellectual creation and innovation, and in which employment mobility is not hindered, is also important for employment growth and for improving the competitiveness of the Union economy. Trade secrets have an important role in protecting the exchange of knowledge between businesses, including in particular SMEs, and research institutions both within and across the borders of the internal market, in the context of research and development, and innovation. Trade secrets are one of the most commonly used forms of protection of intellectual creation and innovative know-how by businesses, yet at the same time they are the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by other parties.

(4) Innovative businesses are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, and the 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 legitimate trade secret holders' ability to obtain first-mover returns from their innovation-related efforts. Without effective and comparable legal means for protecting trade secrets across the Union, incentives to engage in innovation-related 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, thereby affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.

(5) International efforts made 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 Rights (the TRIPS Agreement). The TRIPS Agreement contains, inter alia, provisions on the protection of trade secrets against their unlawful acquisition,

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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[(3)].

(6) 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. For example, not all Member States have adopted national definitions of a trade secret or the unlawful acquisition, use or disclosure of a trade secret, therefore knowledge on the scope of protection is not readily accessible and that scope differs across the Member States. Furthermore, there is no consistency as regards the civil law remedies available in the event of unlawful acquisition, use or disclosure of trade secrets, as cease and desist orders are not always available in all Member States against third parties who are not competitors of the legitimate trade secret holder. Divergences also exist across the Member States with respect to the treatment of a third party who has acquired the trade secret in good faith but subsequently learns, at the time of use, that the acquisition derived from a previous unlawful acquisition by another party.

(7) National rules also differ as to whether legitimate trade secret holders are allowed to seek the destruction of goods produced by third parties who use trade secrets unlawfully, or the return or destruction of any documents, files or materials containing or embodying the unlawfully acquired or used trade secret. Furthermore, 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 national rules do not provide for appropriate protection of the confidentiality of a trade secret where the trade secret holder introduces a claim for alleged unlawful acquisition, use or disclosure of the trade secret by a third party, thereby reducing the attractiveness of the existing measures and remedies and weakening the protection offered.

(8) 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 a weakening of the overall deterrent effect of the relevant rules. The internal market is affected in so far as such differences lower the incentives for businesses to undertake innovation-related cross-border economic activity, including research cooperation or production cooperation with partners, outsourcing or investment in other Member States, which depends on the use of information that enjoys protection as trade secrets. Cross-border network research and development, as well as innovation-related activities, including related production and subsequent cross-border trade, are rendered less attractive and more difficult within the Union, thus also resulting in Union-wide innovation-related inefficiencies.

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(9) In addition, there is a higher risk for businesses in Member States with comparatively lower levels of protection, due to the fact that 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, subsequent to the unlawful acquisition of trade secrets, could spread goods resulting from such acquisition across the internal market. Differences in legislative regimes also facilitate the importation of goods from third countries into the Union through entry points with weaker protection, when the design, production or marketing of those goods rely on stolen or otherwise unlawfully acquired trade secrets. On the whole, such differences hinder the proper functioning of the internal market.

(10) It is appropriate to provide for rules at Union level to approximate the laws of the Member States so as to ensure that there is a sufficient and consistent level of civil redress in the internal market in the event of unlawful acquisition, use or disclosure of a trade secret. Those rules should be without prejudice to the possibility for Member States of providing for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets, as long as the safeguards explicitly provided for in this Directive for protecting the interests of other parties are respected.

(11) This Directive should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities. Nor should it affect 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. Such rules include, in particular, rules on the disclosure by the Union's institutions and bodies or national public authorities of business-related information they hold pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council[(4)], Regulation (EC) No 1367/2006 of the European Parliament and of the Council[(5)] and Directive 2003/4/EC of the European Parliament and of the Council[(6)], or pursuant to other rules on public access to documents or on the transparency obligations of national public authorities.

(12) This Directive should not affect 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 or to limit its use, and the consequences of a breach of such an obligation by the party subject to it. This should be on the condition that any such collective agreement does not restrict the exceptions laid down in this Directive when an application for measures, procedures or remedies provided for in this Directive for alleged acquisition, use or disclosure of a trade secret is to be dismissed.

(13) This Directive should not be understood as restricting the freedom of establishment, the free movement of workers or the mobility of workers as provided for in Union law. Nor is it intended to affect the possibility of concluding non-competition agreements between employers and employees, in accordance with applicable law.

(14) 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 so as to cover know-how, business information and technological information where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved. Furthermore, such know-how or information should have a commercial value, whether actual or potential. Such know-how or information should be considered to have a commercial value, for example, where its unlawful acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential, business or financial interests, strategic positions or ability to compete. The definition of trade secret excludes trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question.

(15) It is also important to identify the circumstances in which legal protection of trade secrets 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.

(16) In the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right to know-how or information protected as trade secrets. Thus, the independent discovery of the same know-how or information should remain possible. Reverse engineering of a lawfully acquired product should be considered as a lawful means of acquiring information, except when otherwise contractually agreed. The freedom to enter into such contractual arrangements can, however, be limited by law.

(17) In some industry sectors, where creators and innovators cannot benefit from exclusive rights and where innovation has traditionally relied upon trade secrets, products can nowadays be easily reverse-engineered once in the market. In such cases, those creators and innovators can be victims of practices such as parasitic copying or slavish imitations that free-ride on their reputation and innovation efforts. Some national laws dealing with unfair competition address those practices. While this Directive does not aim to reform or harmonise the law on unfair competition in general, it would be appropriate that the Commission carefully examine the need for Union action in that area.

(18) Furthermore, the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. This concerns, in particular, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers' representatives to information, consultation and participation in accordance with Union law and national laws and practices, and the collective defence of the interests of workers and employers, including co-determination, as well as the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law. However, such treatment of the acquisition of a trade secret as lawful should be without prejudice to any obligation of confidentiality as regards the trade secret or any limitation as