

The EU Trade Secrets Directive (December 2014)

Introduction

The IP Federation represents the views of a significant number of major innovative UK companies in matters concerning intellectual property policy. A list of members is attached. Our member companies are extensively involved with IP in Europe and internationally. Not only do they own considerable numbers of IP rights, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions.

The proposed EU trade secrets directive

The following are the IP Federation's views on key issues relating to the proposed EU trade secrets directive (the Directive). We believe the trade secrets directive is an important legislative initiative and have been engaged with the legislative process from the outset.¹

The IP Federation has also been supportive of the proposed Directive thus far. However, the issues addressed in this paper are crucial to its success. In particular, certain of the amendments that have been proposed to the Directive could fundamentally undermine its effectiveness, potentially even rendering it harmful to innovation and productivity in Europe.

The key issues that we are concerned with are the following:

- (a) Setting a minimum standard: Consistent with the Commission's original intent, we support an express statement that the Directive does not prevent Member States from imposing more stringent protections under national law. We do not believe full harmonisation is possible or appropriate at this stage, since the protection provided in Member States is currently too diverse. An attempted harmonisation would inevitably serve to dilute levels of protection in some countries (e.g. the UK), which would be unacceptable.
- (b) Overly broad carve-outs: Whilst it is desirable for the Directive to prevent abusive litigation, protect fundamental rights (e.g. freedom of expression) and allow certain whistleblowing activities, the various carve-outs set out in Article 4(2) of the Directive are overly broad and insufficiently clearly defined. We believe this could allow individuals, companies and Member States to avoid the effects of the Directive,

¹ See IP Federation Policy Papers PP03/13, PP02/14 and PP04/14, copies of which are annexed to this paper.

fundamentally undermining its objective of setting minimum standards of protection across Europe.

- (c) The definition of “trade secret”: Despite calls to restrict the scope of this definition, we believe it must remain as originally drafted. There are three main reasons for this. First, the definition as originally drafted is taken from TRIPs, which means the definition is aligned with pre-existing obligations of Member States. Secondly, it is important that the Directive applies to the full spectrum of information that businesses legitimately need to protect (as was intended by TRIPs). Thirdly, the concerns about abusive litigation are greatly overstated, since the Directive already contains extensive safeguards.
- (d) Possible interference with labour mobility: Again, we believe concerns in this area are misplaced and that only minimal changes to the text are needed (if any). We do not believe the proposed Directive was intended to impact on the existing national laws governing the relationship between employees and employers, nor should it do so. It is also clear that the majority of those responding to the Commission’s original consultation did not want this. The simple solution is for the Directive to state unambiguously that its provisions are without prejudice as to existing national law in the relation to employees’ obligations as regards confidential information of their former employers.

These issues are addressed in greater detail in turn below. A number of less critical issues are also addressed at the end of this paper.

Setting minimum standards

In line with the Commission’s original intention, we believe the Directive should expressly state that it only seeks to provide minimum standards of protection. The current landscape of trade secret protection within Europe is extremely diverse, which means that full harmonisation is unrealistic at this stage. A degree of ongoing diversity should therefore be permitted.

In this regard, a number of Member States currently provide higher levels of protection than are provided under the Directive, and this should be allowed to continue. This particularly arises in relation to remedies - for instance, there are a number of remedies and procedural tools contained in the IP Enforcement Directive (Directive 2004/48/EC) that are available to trade secrets holders in some Member States (e.g. disclosure and pre-action disclosure) but which are not included in the proposed Directive. Similarly, *ex parte* proceedings are available in some countries but are not mentioned as a possibility in the proposed Directive.

We believe these higher standards of protection must be permitted to continue. A clear statement should therefore be included in the Directive to state that the Directive shall not prevent Member States from maintaining higher standards of protection under national laws. We note that such an amendment was agreed without controversy during the EU Council discussions.

Overly broad carve-outs

The proposed Directive contains a number of safeguards to prevent abusive litigation. The IP Federation broadly agrees with the safeguards as listed below on page 4, but we have concerns as to the scope and clarity of the carve-outs set out in Article 4(2) of the Directive.

Our starting point is to say that we believe the protection of trade secrets is a general interest recognised by the Union within the meaning of Article 52 of the Charter of Fundamental Rights of the European Union (2000/C 364/01). We also believe the provisions of the Directive are necessary and genuinely meet this objective.

The result is that we do not believe, as some would suggest, that the need to protect fundamental freedoms (e.g. freedom of expression and information) must trump the other provisions of the Directive. On the contrary, we believe such rights must at all times be balanced with the legitimate interests that the Directive serves to protect.

The same is true in relation to whistleblowing, where we believe the relevant carve-out (in Article 4(2)(c) is drafted too broadly and ambiguously. We believe such disclosures should only be exempted from remedies insofar as they are necessary and are made to the appropriate authorities (for example, selling a story to the newspapers should not be exempted). Such disclosures should also themselves not be made in a manner contrary to honest commercial practices.

Further we believe broad and ambiguous carve-outs, such as those in Articles 4(2)(d) and 4(2)(e) should be removed from the Directive entirely.

The definition of “trade secret”

A key aspect of the proposed Directive was the introduction of a common definition of “*trade secret*” across Europe, which appears at Article 2(1) of the proposed Directive.² This states that:

“‘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 See the Explanatory Memorandum accompanying the proposed Directive, explaining that Article 2 “*defines key concepts*”. See also recital 8 to the proposed Directive, which notes that: “... *it is important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation.*”

The substance of this definition is taken from Article 39 of the TRIPs (trade-related aspects of intellectual property rights) treaty.³ The definition is therefore consistent with obligations that Member States are already under with respect to the protection of confidential information.

The IP Federation endorses this definition. In keeping with TRIPs, we believe it is important to protect the full range of confidential information that businesses legitimately need to protect, which ranges from very sensitive confidential information (such as secret manufacturing processes) to the more routine confidential information (such as customer lists). It is important that all such information has the capability of being protected, as is already the case in many Member States.

In this regard, we are aware of concerns raised by certain parties that a broad definition of "*trade secret*" will lead to abusive litigation against SMEs and/or employees. There have accordingly been calls to narrow the scope of this definition. We do not however believe this is necessary or appropriate for three main reasons:

- (1) First, the definition of trade secret is already drafted such that trivial and/or public information will not be protected as a result of the Directive. In particular, the definition only extends to information that "*... is not ... generally known ... or readily accessible ... [and] ... has commercial value because it is secret*". As a result, it is already clear that non-confidential and/or trivial information cannot be relied on to bring an action under the Directive;
- (2) Secondly, the Directive already contains general safeguards relating to the circumstances in which national courts might impose remedies, with considerable discretion being left to the judicial authorities to act in an appropriate manner. In particular, Articles 10(2) and 12(1) set out factors that the courts can take into consideration, which include the "*value of the trade secret ... the conduct of the [respondent/infringer] ... the impact of the unlawful disclosure or use ... the legitimate interests of the parties ... the public interest and the safeguard of fundamental rights, including freedom of expression and information*". The result is that the courts are unlikely to grant damages or injunctions in circumstances where the litigation may be abusive. Rather than further narrowing the definition of "trade secret" at the outset, we believe the judicial authorities should be given discretion to grant the appropriate remedy (if any) in each case; and
- (3) Thirdly, the Directive also already contains specific safeguards relating to abusive litigation. In particular, Article 6(1) provides that all remedies must be applied in a manner that is "*proportionate*", "*avoids the creations of barriers to legitimate trade*", and "*provides for safeguards against their abuse*". Article 6(2) also provides for "*sanctions*" against any party that brings a claim that is "*manifestly*

³ The Explanatory Memorandum notes (at paragraph 5.1) that: "*This definition follows the definition of 'undisclosed information' in the TRIPs Agreement.*"

unfounded and ... initiated ... in bad faith with the purposes of unfairly delaying or restricting the respondent's access to the market or otherwise intimidating or harassing the respondent ..."

In view of this, we believe calls to narrow the definition of "trade secret" should be resisted. We believe any narrowing of the definition would fundamentally undermine the objectives of the Directive.

Possible Interference with labour mobility

Concerns have also been raised by certain parties that the Directive will impact on the free movement of labour and will interfere with the existing laws of the Member States in this regard. We understand these concerns, but for the reasons explained below do not believe they necessitate major changes to the Directive.

As noted in our previous papers, the issue of labour mobility is a sensitive one that is not directly addressed in the Directive - Recital 8 merely states that the definition of trade secrets: "*... 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.*"⁴

In fact, we do not believe the Directive should attempt to legislate in this sensitive area at all, for three reasons:

- (1) First, there is substantial diversity in labour law in this area between Member States, which has not been subject to detailed study during the preparation of the Directive. Before legislation should be attempted in this difficult area, we believe a specific impact study should be undertaken (previous studies undertaken on behalf of the Commission have not addressed this issue in sufficient detail);
- (2) Secondly, arising from the above, the issue is too controversial and/or emotive for clear and workable amendments to be agreed. As a result, any legislation on this issue will inevitably be sub-optimal and could well serve to undermine the protection that already exists in some Member States. This would be unacceptable to many businesses (including the IP Federation's members) and would lead to support for the Directive being withdrawn; and
- (3) Thirdly, above all else, we note that a majority of the respondents to the Commission's consultation did not want EU legislation that provided uniform contractual rules for employees on non-compete and non-disclosure clauses (which is essentially what is at issue here).

⁴ A relatively minor concern we have with this recital is that it appears to be inconsistent with the EU's obligations under TRIPs. For this reason, the Council compromise text amended Recital 8 to align with TRIPs (the Council text therefore referred to information that is "... *generally known among or readily accessible to ...*" those who normally deal with that kind of information). As such, if this recital is retained in the Directive, it should be amended as per the Council text.

We believe the solution to this issue is simple. We believe the Directive should not seek to interfere with relevant national law in this area, which could be achieved by, for example, an additional provision stating that: "*The provisions of this directive shall be without prejudice to existing national law relating to the rights and obligations of employees in respect of confidential information passing to them during the course of their employment*".

A related concern that certain parties have expressed is that the Directive would interfere with workers' rights of representation and information (e.g. the right to have a representative on the company's board), as well as rights of collective bargaining. We understand that these issues arise in some Member States but not others. Again, however, we do not believe these issues necessitate major amendments to the Directive. On the contrary, these issues can be dealt with clarifying that the Directive is without prejudice to such existing national rights.

Other issues

Limitation period

Article 7 of the Directive provides that: "*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.*"

We believe this two year limitation period is too short and would inevitably result in actions being initiated solely in order to avoid them becoming time-barred. In other words, more legal proceedings would be likely to be commenced as a result of this short limitation period, since companies would not wish to miss the opportunity to bring their claim. Further, this phenomenon would impact negatively on both large companies and SMEs. If anything, SMEs would suffer from this more as they would be increasingly involved in unnecessary litigation.

We therefore believe a limitation period of at least 3 years would be more appropriate. Further, we note that the drafting of the existing provision is unclear, since it is not explained what would constitute "*the last fact giving rise to the action*". This should be clarified.

Unlawful acquisition etc.

Under Article 3(2) of the Directive, any "*unlawful acquisition*" of trade secrets must be "*carried out intentionally or with gross negligence*".

This requirement is in addition to the need for one of the acts listed in Article 3(2)(a)-(f) to have occurred, namely "*unauthorised access*", "*breach or inducement to breach a confidentiality agreement ...*", or "*conduct ... contrary to honest commercial practices*". However we believe the acts set out in Articles 3(2)(a)-(f) should on their own be sufficient to render the acquisition in question unlawful. In addition, we believe the requirement for intention or gross negligence creates undue complexity, is potentially an

overly high standard (although the concept receives different treatment under different countries' laws), and will reduce the effectiveness of the proposed Directive.

Similar requirements (i.e. that acts take place "*intentionally or with gross negligence*") appear in Article 3(3) in relation to the unlawful use or disclosure of trade secrets. We have the same concerns in this context. Again, we believe the provisions listed in Articles 3(3)(a)-(c) should be sufficient without the additional requirement that the acts should occur "*intentionally or with gross negligence*". For instance, it is well established under English law that misuse of confidential information can take place subconsciously. In addition, it is clearly possible to breach a confidentiality agreement inadvertently, but this should not be without possible sanction.

Article 3(2) of the proposed Directive also incorporates concepts such as "*theft*", "*bribery*" and "*deception*", which may be defined differently in the laws of each of the Member States. Furthermore, the acts complained of may well have taken place in a different country, so there will be an issue as to which law should be applied. It is also unclear whether the courts should apply the higher criminal standard of proof rather than the civil one. Because of these complexities, we do not believe it is sensible to incorporate these additional tests into the Directive. We continue to believe the amendments made in the Council text were sensible and should be adopted.

Lawful acquisition

Article 4(1) spells out conditions where acquisition is considered lawful. For example, the draft Directive allows lawful acquisition through disassembly of a publicly available product, without any reference to whether such acquisition is unlawful for other reasons. The ability to disassemble, without limit, a publicly available product to reveal trade secrets implies that any information that is encapsulated as a constituent part of a publicly available product would be incapable of being a trade secret.

The Article does not clarify whether such acts are "lawful" only to an extent under the Directive, or whether they are to be considered "lawful" even in spite of other rights. To clarify this point, the Article should be amended to clarify that "irrespective of this Directive, the acquisition, use and disclosure of trade secrets shall be considered lawful only to the extent that such acquisition, use or disclosure is required or allowed by Union or national law". This would clarify that the Trade Secret Directive should be used in parallel with, for example, Intellectual Property (IPR) laws, rather than instead of such laws. As a further example the "disassemble" language of Art 4(1) b could not then be interpreted as an authorisation for decompilation of software beyond the scope authorised in the European or national copyright law.

Such clarification would strike the right balance between consumers' access to publicly available trade secrets, and the legitimate interests of rights holders, to provide a proper incentive to innovation in Europe.

Confidentiality during court proceedings

We are generally in favour of the original drafting of the proposed Directive, although we are aware that concerns have been raised from some stakeholders. We believe these concerns are greatly overstated.

Consistent with the responses to the Commission's consultation, we believe courts throughout Europe should be able to protect confidential information such that it does not automatically and necessarily become public as a result of litigation. For example, we believe courts should be able to sit in private when appropriate in order to prevent public disclosure of parties' confidential information. Likewise, courts should have mechanisms for the filing of confidential documents with the court such that confidentiality is maintained.

That said, we believe judges and national courts should be able to exercise discretion as to how confidential information is to be protected in any given case. We also believe that it should only be in the most exceptional cases that the parties themselves (or, at least, a senior representative of each of the parties) should not have access to the confidential information that is the subject of the dispute.

Article 9 – Interim and precautionary measures

We believe Article 9 could usefully distinguish between the right to continue "possession" or "use" of a trade secret before trial and the right to "publish" (or otherwise destroy the confidentiality of) a trade secret before trial. Publication (which might occur through use) destroys the trade secret and so, where there is a case for interim relief, there should be a strong presumption against allowing publication (or any other acts that would destroy confidentiality).

IP Federation
2 March 2015



IP Federation members 2015

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. The CBI, although not a member, is represented on the Federation Council, and the Council is supported by a number of leading law firms which attend its meetings as observers. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

AGCO Ltd
Airbus
ARM Ltd
AstraZeneca plc
Babcock International Ltd
BAE Systems plc
BP p.l.c.
British Telecommunications plc
British-American Tobacco Co Ltd
BTG plc
Caterpillar U.K. Ltd
Dyson Technology Ltd
Element Six Ltd
Eli Lilly & Co Ltd
Ericsson Limited
ExxonMobil Chemical Europe Inc.
Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
GlaxoSmithKline plc
Glory Global Solutions Ltd
Hewlett-Packard Ltd
IBM UK Ltd
Infineum UK Ltd
Johnson Matthey PLC
Merck Sharp & Dohme Ltd
Nokia UK Ltd
Pfizer Ltd
Philips Electronics UK Ltd
Pilkington Group Ltd
Procter & Gamble Ltd
Renishaw plc
Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Syngenta Ltd
The Linde Group
UCB Pharma plc
Unilever plc
Vectura Limited

Trade secrets consultation

Protection of business and research know-how

Introduction

The IP Federation represents the views of a significant number of major innovative UK companies in matters concerning intellectual property policy. A list of members is attached. Not only do our companies own considerable numbers of IP rights, both in Europe and internationally, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions.

The consultation

Keeping valuable information secret is often the only or the most effective way that companies have to protect their intellectual property (such as the results of their research and innovation efforts). Although patents play a decisive role in this area, there are limitations as to what can be patented. New business solutions, marketing data and many incremental technological improvements, for example, are not patentable). Concerns regarding the effectiveness of the legal protection against the misappropriation of trade secrets in the Internal Market are already being voiced.

The differences between national laws of Member States are claimed to be such as to make it difficult to ensure that the right protective measures against such misappropriation are being applied in cross-border business. The current redress possibilities are claimed not to represent a sufficiently strong deterrent against theft of such confidential business information. This could dissuade the sharing of confidential business information across borders with business partners who could offer valuable possibilities to develop new markets for innovative products.

In view of these concerns, the European Commission has decided to analyse the current situation in the Union in more detail and to collect views with regard to the protection of business and research know-how in the Union.

A new [consultation](#) in the form of an on-line questionnaire was launched on 11 December 2012. The deadline for submissions was **8 March 2013**.

IP Federation response

The IP Federation responded, indicating that trade secrets / confidential business information are of high importance in all the following areas:

- Research and development.
- Exploitation of innovation, i.e. turning an invention into a marketable product.
- Innovative and competitive performance of SMEs.
- Innovative and competitive performance of large companies which operate internationally.
- Growth and jobs in the EU economy in general.

Furthermore, we think that trade secrets / confidential business information influence a number of areas, especially the following:

- Research in research institutions.
- Research and development in companies.
- Exploitation of innovation, i.e. turning an invention into a marketable product.
- SMEs innovative and competitive performance.
- The innovative and competitive performance of large companies which operate internationally.
- Growth and jobs in the EU in general.
- Competitiveness of the EU in the world.

EU Action

There is no EU legislation specifically addressing the misappropriation of trade secrets, and national rules on this issue differ. Thus we think that the legal protection against the misappropriation of trade secrets / confidential business information should specifically be addressed at EU level. A European body could provide easily accessible, reliable and accurate information on the differences in national legislation, e.g. via a dedicated website. An EU Directive could also be passed, providing a common harmonised minimum standard of protection that all Member States will abide by. The Directive could beneficially include protection in Europe against the commercialisation of goods and services derived from trade secrets / confidential business information misappropriated in other parts of the world. However, we do not believe this should require Member States to treat the misuse or disclosure of confidential information as a criminal act.

Effects and impact of EU level legislation

In our view, positive effects or impacts of EU level legislation include:

- Better protection against the misappropriation of trade secrets / confidential business information.
- Companies / researchers could better rely on effective cross-border law enforcement and costs would be lower when litigating in other EU Member States.
- A better legal protection of the results of innovative activities would trigger more investment in R&D and innovation.

- Safer business environment would create better opportunities for different players to cooperate in R&D and innovation projects (“network / collaborative innovation” as opposed to “in-house innovation”).
- Greater expected returns from sharing, licensing or transferring know-how.
- Better conditions for SMEs to raise funding or venture capital.

By setting a positive example on protection of trade secrets and confidential business information, the EU will influence governments outside Europe into improving the situation in their countries, notably in “misappropriation hot-spots” such as China.

However, negative effects or impacts include:

- more court cases where companies try to raise market barriers for competitors; and
- risk of abusive behaviour by competitors.

We believe that any attempt to impose consistent / minimum standards in relation to employer / employee restrictive covenants would endanger the existing balance in the labour market for mobility.

Final comment

The IP Federation would make the following specific points that are not covered by our answers to the questionnaire.

First, we note that the IP Federation is generally opposed to the introduction of criminal penalties for the misuse or disclosure of confidential information. These matters do not currently carry criminal penalties in the UK, save in extreme cases where the relevant activities also fall within criminal offences directed to computer misuse (i.e. hacking) and/or fraud. Misuse and/or disclosure of confidential information is therefore dealt with almost exclusively as a civil matter. We believe the current balance is broadly correct and, moreover, we believe there are serious dangers in introducing wider criminal penalties.

Our reason for the above view is that we believe criminal sanctions should be reserved for only the most serious offences and those where wrongdoing can be clearly and readily established. Whilst misuse of confidential information is undoubtedly a serious matter, the issues of fact and law to be decided are often finely balanced and difficult to predict. In this context, we believe it is crucial that businesses are able to make commercial and pragmatic decisions, without the undue fear of criminal consequences. Indeed, we believe the possibility of criminal penalties would engender overly conservative behaviour amongst businesses and would have a dampening effect on innovation (e.g. it would reduce companies’ willingness to share confidential information).

In line with the above, we do not believe the protection of confidential information should necessarily be considered alongside the issues cybersecurity. Whilst the issues overlap to some extent, the legal framework relating to misuse of confidential information must deal with a much broader spectrum of scenarios, most of which have nothing to do with cybercrime - for instance, it must deal with disputes between employers and employees, R&D / collaboration / joint venture partners, individuals / companies and the media, etc. Likewise, the law must cater for different degrees of sensitivity of confidential information - some that will be a company's most important and valuable information, and other information that will be more mundane. It should not be assumed that the same framework and/or penalties should apply in all cases.

A related concern we note is that the Commission's consultation appears to be intended (at least in part) to improve the position for SMEs. However, whilst SMEs (like companies of all sizes) benefit greatly from IPR protection, it does not follow that SMEs will necessarily benefit from, for example, the introduction of criminal sanctions for the misuse of confidential information. On the contrary, we believe that SMEs will just as often be on the receiving end of proceedings (whether civil or criminal). However, they will typically have less financial resource to deal with them and any legal reform could therefore be counterproductive.

As for how the Commission address these matters across Europe, we believe that, overall, the English common law has struck a reasonable balance. Its weakness is that the position has been arrived at purely through case law and has never been set out in statute. Codification could therefore help to raise public awareness and aid clarity. In addition, we are aware that the position across Europe is disparate (with protection being inferior in some countries) and this will inevitably act as a barrier to cross-border sharing of confidential information. Subject to the points made above, the IP Federation is therefore generally in favour of setting a minimum standard of protection in Europe.

IP Federation
11 March 2013

IP Federation members 2013

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. Its Council also includes representatives of the CBI, and its meetings are attended by IP specialists from three leading law firms. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

AGCO Ltd
ARM Ltd
AstraZeneca plc
Babcock International Ltd
BAE Systems plc
BP p.l.c.
British Telecommunications plc
British-American Tobacco Co Ltd
BTG plc
Caterpillar U.K. Ltd
Delphi Corp.
Dyson Technology Ltd
Element Six Ltd
Eli Lilly & Co Ltd
ExxonMobil Chemical Europe Inc
Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
GlaxoSmithKline plc
Hewlett-Packard Ltd
IBM UK Ltd
Infineum UK Ltd
Merck Sharp & Dohme Ltd
Microsoft Limited
Nokia UK Ltd
Nucletron Ltd
Pfizer Ltd
Philips Electronics UK Ltd
Pilkington Group Ltd
Procter & Gamble Ltd
Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Syngenta Ltd
The Linde Group
UCB Pharma plc
Unilever plc
Vectura Limited

IP Federation comments on the proposed EU trade secrets directive

Introduction

The IP Federation represents the views of a significant number of major innovative UK companies in matters concerning intellectual property policy. A list of members is attached. Our member companies are extensively involved with IP in Europe and internationally. Not only do they own considerable numbers of IP rights, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions.

The proposed Directive

The following are the IP Federation's comments on the proposed 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 (2013/0402 (COD)).

The IP Federation remains in favour of harmonisation via an EU Directive and believes the Commission's proposal has much to commend it. That said, for the reasons explained below, we also believe the draft could be improved in certain areas.

General comments

As a general comment, we note that the proposed Directive places significant emphasis on cyber-security and industrial espionage-related issues (see e.g. recital 3). However, the importance of these issues relative to others can be overstated - as commented in our response to the Commission's open consultation, the law relating to trade secrets must deal with a broad range of scenarios, most of which have nothing to do with cyber-security or industrial espionage. Indeed, from the perspective of our members, the biggest legal issues arise in relation to: (i) employees / former employees (i.e. "insiders" to the company); and (ii) commercial counterparties with whom confidential information is shared. It will be important that Member States provide adequate protection in all of these sets of circumstances.

A second general comment is that, given the importance of the proposed Directive and the complexities involved, the legislative process should not be rushed. We would strongly encourage a detailed review of the proposal by an expert working group, once a set of general principals have been agreed between the Member States. Our members would prefer, above all else, to see greater certainty and clarity in the drafting of the Directive. The proposed Directive necessarily leaves much discretion in the hands of

the individual court / judge. However, further time spent at this stage could avoid future legal uncertainty, including unnecessary referrals to the CJEU, with undesirable time and cost consequences for businesses.

A third general point is that, in line with what we understand to be the Commission's intentions, we believe the Directive should expressly state that it only seeks to provide minimum standards of protection. A number of Member States currently provide higher levels of protection, particularly in terms of available remedies. For instance, there are a number of remedies and procedural tools contained in the IP Enforcement Directive (Directive 2004/48/EC) that are available to trade secrets holders in some Member States (e.g. disclosure and pre-action disclosure) but which are not included in the proposed Directive. We do not believe higher standards should be discouraged.*

Specific comments

Our more specific comments focus on the following:

1. The impact of the proposed Directive as regards employees: the text of recital 8 is inconsistent with the definition of "trade secret", potentially suggesting that trade secrets will receive less protection in the context of employer / employee relationships. This would be undesirable, does not appear to have been the Commission's intention, would be inconsistent with TRIPs and should be clarified.
2. The requirement that unlawful acts of acquisition, use or disclosure of trade secrets must be carried out "intentionally or with gross negligence": we believe this is an unnecessary requirement that adds undue complexity and would reduce the effectiveness of the proposed Directive.
3. The potential liability of "innocent" third parties who receive information without initially knowing that it has been acquired unlawfully: we believe the provisions of Article 3(4) could benefit from further clarification. The proposed Directive should also adopt a consistent test throughout.
4. The provisions in Article 3(2) relating to unlawful acquisition: there are serious complexities with these provisions and it is unclear how they will work in practice, particularly with respect to the applicable law (e.g. for acts taking place outside the EU). In addition, where the unlawful acquisition is based on a criminal act (e.g. "theft"), it is unclear whether the criminal or civil standard of proof should be applied. It is also unclear whether a conviction is necessary before a trade secrets action can be commenced.
5. The limitation period in Article 7: the 2 year period provided for is too short and will cause unnecessary litigation, since parties will find

* We note that the final sentence of recital 28 could suggest that, to the extent that remedies are not provided for in the proposed Directive, they are not permitted. This sentence should therefore be deleted.

themselves forced to issue proceedings solely to avoid their suits becoming time-barred. The clarity of this provision could also be improved.

6. The lack of provision for *ex parte* measures: The proposed Directive contains no provisions relating to *ex parte* relief (e.g. search orders and *ex parte* interim injunctions). We support the availability of *ex parte* search orders only when there is a serious prospect that evidence will be destroyed or hidden. The Directive certainly should not prevent the granting of such relief where national law permits (see our third general comment above).
7. The absence of a “loser pays” costs shifting provision: the proposed Directive contains no provision corresponding to that in Article 14 of the IP enforcement directive (Directive 2004/48/EC). We believe such a provision would reduce the potential for abusive litigation and should be included.
8. The provisions relating to the protection of confidentiality during court proceedings: We are generally in favour of the current drafting of the proposed Directive and believe that, despite concerns raised by some Member States, courts throughout Europe should be able to protect confidential information such that it does not automatically and necessarily become public as a result of litigation.

Our views on each of these are more fully explained in turn below.

1. Employer / employee relationships

We note that the proposed Directive contains no provisions relating specifically to the employer / employee relationship. As such, it appears the provisions of Articles 3 and 4 relating to unlawful acquisition, disclosure or use of trade secrets will also be applicable in the employer / employee context.

If this was the Commission’s intention then, in the interests of clarity, we believe it should be expressly stated (e.g. in the recitals). However, the Directive will then inevitably impact upon the established laws of the Member States in this delicate area, where the commercial interests of employers must be balanced against the interests of workers and the public interest.[†]

In this regard, the text of the proposed Directive is problematic because recital 8 states that “trade secrets” 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*” (emphasis added). Unfortunately these words appear inconsistent with the definition of “trade secret” in Article 2 of the proposed Directive, which (in keeping with TRIPs)

[†] We note that, in response to the Commission’s consultation, the majority of respondents did not believe the EU should provide uniform contractual rules on non-compete and/or non-disclosure clauses between trade secrets owners and employees (55% of respondents were against this; only 32% were in favour).

allow for the protection of information that is "*not generally known ... or readily accessible*" (emphasis added).

Recital 8 could therefore be taken to mean that trade secrets will be less well protected in the context of employer / employee relationships ("known" and "accessible" being lower thresholds than "generally known" and "readily accessible"). We do not believe this to have been the Commission's intention and, indeed, we believe it would be incompatible with TRIPs. It would be highly undesirable for trade secrets to automatically receive less protection in this context - as noted above, one of the most common ways in which companies' trade secrets are unlawfully acquired and/or misused in practice is via employees and former employees.[‡] The protection of companies against the actions of "insiders" is therefore crucial and we believe the Article 2 / TRIPs wording must be used in recital 8.[§]

On the other hand, we would not wish the proposed Directive to interfere with the legitimate movement of workers between different companies. Whilst the wording of recital 8 should therefore be amended, we believe the text of the Directive should expressly provide either:

- (A) that the extent to which a person can be prevented from making use of trade secrets learnt during the course of their previous employment shall be a matter for national law; or
- (B) that the need to balance the commercial interests of the former employer in protecting its trade secrets, on the one hand, and the public interest in the free movement of labour, on the other, shall be a matter taken into account by any court when exercising its discretion as to remedies (Articles 10 and 12 could be amended accordingly).

2. Requirement that unlawful acts occur "intentionally or with gross negligence"

For there to be an "*unlawful acquisition*" of trade secrets under Article 3(2) of the proposed Directive, the relevant acts must be "*carried out intentionally or with gross negligence*". We believe this imposes an unnecessary additional requirement, creates undue complexity and would reduce the effectiveness of the proposed Directive. We also note that the concept of "gross negligence" receives different treatment under different countries' laws, giving rise to an unnecessary source of uncertainty in the proposed Directive. Instead, we believe the acts listed in Articles 2(a)-(f) (e.g. "*unauthorised access*", "*theft*" etc.) should be sufficient on their own to render the acquisition in question unlawful.

[‡] For instance, the Commission's consultation revealed that former employees were the most commonly cited perpetrators of trade secret misappropriation (53% of respondents indicating that they had been subject to trade secret misappropriation by former employees; 52% indicated misappropriation by suppliers/customers; 48% indicated misappropriation by competitors).

[§] We note that it could also usefully be clarified that "*within the circles that normally deal with the kind of information in question*" is to be determined on an industry-wide basis (i.e. the fact that a high proportion of employees within the company concerned knew about the information would not be relevant).

Similar requirements (i.e. that acts take place "*intentionally or with gross negligence*") appear in Article 3(3) in relation to the unlawful use or disclosure of trade secrets. Our concerns are even stronger in this context. For instance, we note that companies and individuals will inevitably make judgment calls as to whether they are able to use particular information (e.g. a company might believe it has developed a particular trade secret independently, despite the fact that similar information was disclosed to it under the terms of an NDA). Having made this judgment call (which might be made in good faith), a dispute could arise with the counterparty to the NDA. There would be no "intention" or "gross negligence" to misuse trade secrets involved, but the party in question may still have acted wrongly. We do not believe the courts should be precluded from deciding this type of dispute - this is the type of dispute that arises in practice.

To give a second example, it is well established under English law that misuse of confidential information can take place subconsciously.** Again, we believe the provisions listed in Articles 3(3)(a)-(c) are sufficient without the additional requirement that the acts should occur "*intentionally or with gross negligence*". Alternatively, these concerns could be addressed by an express clarification that the Directive does not prevent Member States from upholding more rigorous standards of trade secret protection under national law (see our third general comment above).

3. Liability of innocent third parties

Article 3(4) specifies that the use or disclosure of a trade secret will be 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 ...*" (emphasis added). Likewise, Article 3(5) states that 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*" (emphasis added).

Both of these provisions make it possible to bring actions against third parties who were not involved in the initial unlawful acquisition or use of the trade secret (i.e. "innocent" third parties). Indeed, the Commission's explanatory memorandum states that third parties who are "*given notice ... of the original unlawful act*" can be guilty of unlawful use. It is therefore particularly important that these provisions are clearly drafted.

In the case of Article 3(4), it is not entirely clear when it will be said that the third party "*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. We believe the appropriate balance would be to clarify that these acts will only be unlawful if, either subjectively or objectively, the third party has sufficient information to cause him to realise that it is *likely* (i.e. greater than 50% probability) that the trade secret was obtained from another who was using or disclosing it unlawfully.

** *Seager v Copydex* [1967] 1 W.L.R. 923.

Likewise, in the case, of Article 3(5), it is unclear when a third party could be said to have engaged in the “*conscious and deliberate*” production, offering or placing on the market of infringing goods, or import, export or storage of infringing goods. In this case, we believe the appropriate balance would be to clarify that these acts will only be conscious and deliberate if the third party has sufficient information to cause him to realise that the goods are *likely* to be infringing goods. As with Article 3(4), we believe the test should be both subjective and objective - the “*knew or should, under the circumstances have known*” language should therefore be used for consistency.

4. “Unlawful acquisition” based on “theft”, “bribery” or “deception”

Some of the provisions in the proposed Directive relating to “*unlawful acquisition*” appear to be aimed at providing civil remedies against industrial espionage activities. For instance, they specify that the acquisition of trade secrets by “*theft*”, “*bribery*” or “*deception*” is unlawful, provided that it is done “*intentionally or with gross negligence*”.

However, leaving aside the requirement for intention or gross negligence (see our comments above), the proposed Directive does not elaborate on how the presence of “*theft*” (for example) will be determined. For instance, the crime of “*theft*” will (assuming it exists at all) be defined differently in the laws of each of the Member States. Furthermore, the acts complained of may well have taken place outside the EU and may or may not have amounted to “*theft*” (or even any similar offence) under the laws of the country concerned.

A fundamental question is therefore which law will be applied by the courts for the purposes of Article 3(2), which brings up issues of choice of law. In this regard, we note that the proposed Directive does not deal with jurisdictional issues (for which the Brussels Regulation (Regulation 44/2001) will generally apply) or governing law issues (meaning that the Rome I and Rome II Regulations (Regulations 593/2008 and 864/2007) will generally apply).^{††}

A related question is whether, in determining the presence or otherwise of “*theft*” (for example) the courts would apply the higher criminal standard of proof rather than the civil one. There is also a question as to whether a criminal conviction should be a pre-requisite for the bringing of a civil action under the terms of the Directive. We do not believe a criminal conviction should be a pre-requisite for the bringing of a civil action under the terms of the Directive, since this will lead to unnecessary delay and uncertainty. However, the answers to the remaining issues above are much less clear. In particular, we understand that the proposed Directive seeks to prevent companies in Europe from being harmed by the unlawful acquisition or misuse of their trade secret. However, the acquisition or use in question may have been lawful in the country where it occurred (even if the same acts would not have been lawful in some or all of the Member States).

These issues also do not just arise in relation to criminal acts such as “*theft*”, “*bribery*” or “*deception*”, both Article 3(2) and Article 3(3) cater

^{††} Recital 26 of the proposed Directive makes clear that these matters were not intended to be within scope.

for circumstances where there has been a "*breach a confidentiality agreement or any other duty to maintain secrecy*". For instance, both the "*confidentiality agreement*" and the "*other duty to maintain secrecy*" could arise under the law of a third country (e.g. an NDA governed by US law, or an equitable duty of confidentiality under Australian law). Alternatively, there may be no "*duty to maintain secrecy*" under the law of the country where the trade secrets are transferred, but there would have been a duty had the same activities taken place in a Member State.

Again, it is not clear how the proposed Directive would deal with these scenarios. The options appear to be either:

- (A) that courts in Member States are permitted to analyse the laws of non-EU countries to decide whether an unlawful acquisition or use of trade secrets has occurred in accordance with the law of that non-EU country; or
- (B) that courts in the Member States are permitted to consider events taking place in non-EU countries to decide whether those events would have constituted unlawful acquisition or use of trade secrets if they had taken place in the Member State concerned.

We believe either of these options would be acceptable, but the drafting of the Directive needs to be clear.

5. The limitation period in Article 7

Article 7 provides that actions for any of the measures, procedures and remedies provided for in the proposed Directive must be brought "*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*" (see also recital 13). We believe this two year limitation period is too short, since it would inevitably result in actions being initiated solely to avoid them becoming time-barred. It would therefore generate unnecessary litigation. We believe a limitation period of 3 years (or even longer) would be more appropriate. It is also unclear what would constitute "*the last fact giving rise to the action*". This should be clarified.

6. Availability of ex parte measures

The proposed Directive contains no provisions relating to *ex parte* relief (e.g. search orders and *ex parte* interim injunctions). It should certainly be clarified that the Directive does not prevent the granting of such relief where national law permits, which we believe was the Commission's intention. We would also support the availability of *ex parte* search in cases where there was a serious prospect that evidence would be destroyed or hidden.

7. Loser pays costs provisions

The Directive does not seek to impose the "loser pays" principle. In contrast, Article 14 of the IP enforcement directive provides that: "*Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne*

by the unsuccessful party, unless equity does not allow this." We believe a corresponding provision should be included in the proposed Directive in order to minimise abusive litigation.

8. Protection of confidentiality during court proceedings

As noted, we are generally in favour of the current drafting of the proposed Directive. Our comments are therefore made in support of the current approach, given concerns that we have heard raised.

Consistent with the responses to the Commission's consultation, we believe courts throughout Europe should be able to protect confidential information such that it does not automatically and necessarily become public as a result of litigation. For example, we believe courts should be able to sit in private when appropriate in order to prevent public disclosure of parties' confidential information. Likewise, courts should have mechanisms for the filing of confidential documents with the court such that confidentiality is maintained. We believe this is the minimum that parties should be able to expect.

That said, we believe judges and national courts should be able to exercise discretion as to how confidential information is to be protected in any given case. We also believe that it should only be in the most exceptional cases that the parties themselves (or, at least, a senior representative of each of the parties) should not have access to the confidential information that is the subject of the dispute.

IP Federation
26 February 2014



IP Federation members 2014

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. Its Council also includes representatives of the CBI, and its meetings are attended by IP specialists from three leading law firms. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

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Babcock International Ltd
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Caterpillar U.K. Ltd
Dyson Technology Ltd
Element Six Ltd
Eli Lilly & Co Ltd
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Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
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Hewlett-Packard Ltd
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Nokia UK Ltd
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Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Syngenta Ltd
The Linde Group
UCB Pharma plc
Unilever plc
Vectura Limited

IP Federation comments on the 1 April 2014 compromise text for the proposed EU trade secrets directive

Introduction

The IP Federation represents the views of a significant number of major innovative UK companies in matters concerning intellectual property policy. A list of members is attached. Our member companies are extensively involved with IP in Europe and internationally. Not only do they own considerable numbers of IP rights, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions.

The compromise proposal

The following are the IP Federation's comments on the Presidency compromise proposal dated 1 April 2014 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 lawful acquisition, use and disclosure. We understand that the Presidency has sought final comments on the text by 23 April 2014 and are therefore providing these on an urgent basis. Whilst the IP Federation continues to support the proposed Directive and believes the current proposal is of high quality, the following issues should nonetheless be addressed.

Article 3(4): We believe that the addition of the words "*... was obtained (directly or indirectly) from another person ...*" would significantly clarify the intent of this provision. In particular, it should be possible to prevent the downstream misuse of trade secrets regardless of whether they were obtained directly or indirectly from a person who initially acquired them unlawfully. Trade secret owners should be able to take action directly against the current custodian of the information, without needing to sue any intervening parties.

Article 3(4) (in combination with Article 9): We are concerned that a potential loophole exists between Article 3(4) and Article 9 which would make it impossible to obtain an *ex parte* or urgent injunction against a person who initially acquired a trade secret innocently (i.e. without initially having cause to believe the trade secret was obtained "*from another person who was using or disclosing the trade secret unlawfully*"). In particular, until such person has been put on notice of facts suggesting the trade secret was so obtained, no action would be possible. We would suggest a clarification in Article 9 that: "*In appropriately urgent cases, where it appears to a court that a trade secret has been acquired (directly or indirectly) from another person who was using or disclosing the trade secret unlawfully,*

courts of Member States shall be empowered to grant provisional and precautionary measures under Article 9 even before the relevant facts giving rise to the claim have been provided to the respondent. However, in such cases, the respondent shall be put on notice of the relevant facts as soon as possible after any hearing and shall have the opportunity to request the court to review its decision."

Article 4(1)(a): We believe the new text in this Article is highly ambiguous and could seriously undermine the objectives of the proposed Directive, in terms of providing a consistent, basic level of trade secrets protection across Europe. In particular, the exemption for acquisition, use or disclosure of trade secrets where this is "... *allowed by ... national law ...*" would allow Member States to ignore the Directive and implement their own laws entirely. If an exemption of this nature is needed then the drafting must be considered carefully and should specify clearly the areas in which national law can overrule the terms of the Directive. However, we do not believe such an exemption is necessary, given that the appropriate areas are already listed in Article 4(2).

Article 5: We believe the clarity of this provision would be substantially improved if the following change was to be made: "... should, under the circumstances, have known that ~~the goods were infringing goods~~ ~~the trade secret was used unlawfully within the meaning of paragraph 3.~~" In particular, the reference to whether "*the trade secret was used unlawfully*" is ambiguous, since it is unclear who must have undertaken the misuse, and also where and when it must have taken place. Trade secret holders should be able to prevent the importation and use etc. of infringing goods regardless of where, when or by who in the production chain the trade secret misuse occurred (e.g. upstream misuse outside the EU). The suggested amendment would clarify this.

Article 7: The increase in the upper range of the limitation period to 5 years is welcomed. However, since evidence gathering is a long process and parties should not be forced into unnecessary litigation, a minimum limitation period of at least 2 years should also be provided for. If no minimum period is specified then it would be open to Member States to implement extremely short limitation periods (e.g. 2 days), which would prevent trade secrets holders from having any effective remedy.

Article 8(2): Whilst we generally welcome the changes that have been made to Article 8, we believe it is only necessary that "... *at least one person from each party has been given sufficient access to any necessary documents to understand the case that the party must address*". We do not believe it is necessary, as a general rule, for parties or their representatives to be given "*full access*" to *all* confidential documents. Moreover, if the term "*full access*" is to be retained it should be clarified that this access should remain subject to confidentiality (i.e. the access should only be for the purpose of the proceedings and the confidentiality of the documents must be protected).

Article 9: We believe Article 9 could usefully distinguish between the right to continue "possession" or "use" of a trade secret before trial and the right

to “publish” (or otherwise destroy the confidentiality of) a trade secret before trial. Publication (which might occur be through use) destroys the trade secret and so, where there is a case for interim relief, there should be a strong presumption against allowing publication (or any other acts that would destroy confidentiality). This should be the presumption regardless of the lodging of any guarantee under Article 12(2).

Article 11: We support the comment, which has been widely made, that Article 11 should contain a presumption in favour of an injunction (i.e. an order under Article 11(1)) when the court has found that trade secret misuse has occurred or is occurring. Whilst it is correct that the court should be able to take account of the circumstances of the case (e.g. “... *where appropriate, the value of the trade secret, the measures taken to protect the trade secret, or other specific features of the trade secret, as well as the conduct of the infringer ...*”), it should only be in the exceptional circumstances outlined in Article 12(3) that an injunction should not be granted.

Article 12(3): Whilst we believe this article should only apply in exceptional circumstances (see above), we do not believe the calculation of damages under the final paragraph should be any different to the usual basis for calculation under Article 13. Otherwise, the incentive to avoid infringement will be undermined.

Article 13(1): We do not understand the need for, or intention of, the new text that has been added to this Article (i.e. the statement that “*Member States may adopt rules restricting the liability of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer when they act without intent*”). This text has the potential substantially to undermine the protection provided by the directive in the context of employees, which form an extremely important group in relation to the protection of trade secrets. In particular:

- the threshold of “intent” is ambiguous but potentially very high. For example, ignorance of the law could allow employees to avoid liability, even when they have clearly acted unlawfully;
- the provision leaves too much discretion in the hands of Member States, undermining the consistency that the Directive was intended to achieve;
- even if a provision limiting employees’ liability for damages was considered appropriate, we believe the employee should still be subject to an injunction. We do not believe it was intended that injunctions would be unavailable. However, the drafting is ambiguous and this should be clarified.

IP Federation
24 April 2014



IP Federation members 2014

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Caterpillar U.K. Ltd
Dyson Technology Ltd
Element Six Ltd
Eli Lilly & Co Ltd
ExxonMobil Chemical Europe Inc.
Ford of Europe
Fujitsu Services Ltd
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