



23 January 2015

BUSINESSEUROPE RECOMMENDATIONS 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

I. GENERAL COMMENTS

BUSINESSEUROPE supports in principle the proposed EU directive to protect trade secrets and innovation know-how of companies against theft and misappropriation.

Currently, companies suffer from more costs and business risk when they share knowledge or enforce their trade secrets due to divergent or non-existent rules across Europe.

The proposed directive is a positive step in the right direction to boost technology transfer, innovation and R&D investment.

However, BUSINESSEUROPE is still deeply concerned about the current version of the provisions on exceptions (Article 4.2). As they are currently drafted also following the Council common political approach, they could potentially impact adversely existing national regulations on employer-employee relations regarding trade secrets. The purpose of this proposal is to create minimum protection on trade secrets around EU but the current version of article 4(2) in fact opens up and undermines the existing protection of trade secrets in Member States. We would also highlight here that the purpose of this proposal was not to interfere on fundamental rights and freedoms and how they have been dealt with by EU legislation or national legislation, national constitutions or national constitutional court practices. The proposed directive is not supposed to regulate labour law issues and should leave national laws and practices unaffected. During the Commission's consultation that led to the adoption of the proposal, 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. It is therefore of utmost importance that an appropriate solution is found by the co-legislators.

In view of the above general comments, BUSINESSEUROPE proposes some concrete recommendations for amendments to the Commission proposal and the Council general approach to address these specific concerns and some additional issues.



II. DETAILED RECOMMENDATIONS FOR AMENDMENTS

o AMENDMENT 1 (ARTICLE 1)

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
<p><i>Article 1</i> This Directive lays down rules on the protection against the unlawful acquisition, disclosure and use of trade secrets.</p>	<p><i>Article 1</i> This Directive lays down rules on the protection against the unlawful acquisition, disclosure and use of trade secrets. <i>This Directive does not affect the ability of Member States to maintain or put in place more restrictive measures, in accordance with the Treaty.</i></p>

Justification

The objective of the proposed directive should be to create minimum standards of protection of trade secrets in the Member States, in accordance with the principle of minimum harmonization. In this view, the amendment specifies that the Directive does not affect, in any case, the possibility of Member States to maintain or adopt more restrictive measures against the illicit acquisition of trade secrets

o AMENDMENT 2 (ARTICLE 4 (2) (A))

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
<p>4.2 Member States shall ensure that there shall</p>	<p>4.2 Member States shall ensure that there shall be no entitlement to the application for the</p>



<p>be no entitlement to the application for the measures, procedures and remedies provided for in this Directive when the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:</p> <p>(a) for making legitimate use of the right to freedom of expression and information.</p>	<p>measures, procedures and remedies provided for in this Directive when the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:</p> <p>(a) for making legitimate use of the right to freedom of expression and information.</p>
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Justification

Article 4(2) (a) is, as such, unnecessary as the Directive does not alter or reinforce the scope of protection of fundamental rights such as freedom of expression/information. They are already protected in other EU law instruments.

○ **AMENDMENT 3 (ARTICLE 4 (2) (B))**

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
<p>(b) for the purpose of revealing an applicant's misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest;</p>	<p>(b) for the purpose of revealing an applicant's misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest;</p>

Justification

As this amendment is widely drafted and open to contradictory interpretations, it is preferable for legal certainty to delete it.

○ **AMENDMENT 4 (ARTICLE 4 (2) (C))**

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
(c) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions;	(c) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions, <i>provided that such disclosure was strictly necessary for the exercise of their representative function;</i>

Justification

The proposed amendment clarifies that the disclosure of confidential information carried by workers in favour of its representatives is not only legitimate if it responds to the exercise of their representation functions, but even more if it is strictly necessary for the exercise of these functions . This is also included in the Council's general approach.

○ **AMENDMENT 5 (ARTICLE 4 (2) (D))**

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
(d) for the purpose of fulfilling a non-contractual obligation;	- (d) for the purpose of fulfilling a non-contractual obligation⁴;

Justification

The current provision is excessively broad and generic, with the result that it greatly reduces the effective protection of the holder of the trade secret. The deletion is also proposed by the Council.

○ **AMENDMENT 6 (ARTICLE 4 (2) (E))**

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
(e) for the purpose of protecting a legitimate interest.	(e) for the purpose of protecting a legitimate interest, <i>recognised by Union or national law.</i>

Justification

The current provision is excessively broad and generic, with the result that it greatly reduces the effective protection of the holder of the trade secret. The proposed amendment improves this unintended effect.

○ **AMENDMENT 7 (RECITAL 10C)**



<i>TEXT PROPOSED BY THE COUNCIL</i>	<i>BUSINESSEUROPE AMENDMENTS</i>
<p>Recital 10 c</p> <p>This Directive should not affect the right of the social partners to enter into collective agreements, where foreseen under labour law, as regards duties not to disclose a trade secret or to limit its use and the consequences of a breach of such duties by the party subject to them, provided that any such collective agreement does not restrict the safeguards concerning the exceptions in this Directive when an application for measures, procedures and remedies provided for in this Directive for an alleged acquisition, use and disclosure of a trade secret shall be dismissed.</p>	<p><i>This Directive shall not affect national legislation, practice or the right of the social partners to enter into collective agreements, concerning duties not to disclose a trade secret or to limit its use and the consequences of a breach of such duties by the party subject to them.</i></p>

Justification

The proposed amendment reflects more precisely current national practice in some Member States.

AMENDMENT 8 (ARTICLE 12.3)

<i>TEXT PROPOSED BY THE COMMISSION</i>	<i>BUSINESSEUROPE PROPOSED AMENDMENTS</i>
<p>Member States shall provide that, at the request of the person liable to be subject to the measures provided for in Article 11, the competent judicial authority may order pecuniary</p>	<p>Member States shall provide that, at the request of the trade secret holder, the competent judicial authority may order pecuniary compensation to be paid to the injured party instead of applying those measures if all the following conditions are met:</p> <p>(a) the person concerned originally acquired knowledge of the trade secret in good</p>



<p>compensation to be paid to the injured party instead of applying those measures if all the following conditions are met:</p> <ul style="list-style-type: none"> (a) the person concerned originally acquired knowledge of the trade secret in good faith and fulfils the conditions of Article 3(4); (b) execution of the measures in question would cause that person disproportionate harm; (c) pecuniary compensation to the injured party appears reasonably satisfactory. 	<p>faith and fulfils the conditions of Article 3(4);</p> <ul style="list-style-type: none"> (b) execution of the measures in question would cause that person disproportionate harm; (c) pecuniary compensation to the injured party appears reasonably satisfactory.
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Justification

The proposed pecuniary compensation is made conditional upon the request of the trade secret holder as he should decide whether such request is proportionate to the damages suffered.
