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European Legal Informatics Study Programme (No. 20)

- Master Thesis -

**The protection of trade secrets
in the European Union:
An analysis of the current proposal by the EU
regarding the protection of trade secrets
against their unlawful acquisition, use and
disclosure.**

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1. Introduction

On 28th November 2013, the European Commission submitted the “proposal for a directive of the European Parliament and the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure” (the “Commission draft”).¹ The proposal is part of the Europe 2020 strategy by the Commission, which aims at the promotion of business innovation in the European Union. In this regard, the Commission also came to the conclusion to strengthen and to harmonize the protection of trade secrets against misappropriation on a European level in order to ensure the development and exchange of confidential information between the Member States.²

Trade secrets are an important economic factor nowadays.³ They can include valuable information for business and research bodies, such as formulas, recipes or technical procedures. To keep this information confidential is essential, especially in cases where the information does not satisfy the strict eligibility requirements of either patents or copyright, the granting of such rights may take a long time or the protection under intellectual property laws is not affordable.⁴ Thus, it has been recognized that trade secrets are an increasingly important asset in the competitive game.⁵

Corresponding to the increased impact of trade secrets, the misappropriation of confidential information, especially on cross-border level, has emerged.⁶ Still, the level of protection for trade secrets is not harmonized in the European Union.⁷ In fact, the protection of trade secrets in the Member States differs heavily from each other and thereby provides an uneven level safeguards.⁸ As a result of this poor level of protection and the increased risk of

¹ The Commission draft (COM (2013) 813 final) is available at: http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/131128_proposal_en.pdf (Last Visit: 10.09.2015).

² Cf. *Drzewiecki*, P. 20; *Aplin*, P. 2; *Gärtner*, NZG 2014, 650.

³ Cf. *Rauer*, GRUR-Prax 2014, P. 2; *McGuire*, GRUR 2015, P. 425.

⁴ Cf. *McGuire*, GRUR 2015, P. 425.

⁵ Cf. *Bronckers/McNelis*, P. 2.

⁶ Cf. the Impact Assessment by the European Commission, P. 6, available at: http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/131128_impact-assessment_en.pdf (Last Visit: 10.09.2015).

⁷ Cf. *Drzewiecki*, P. 20.

⁸ Cf. *Ohly*, GRUR 2014, P. 2; *Rauer*, GRUR-Prax 2014, P. 2.

misappropriation, the Commission put the preservation of trade secrets on its agenda in order to avoid a possible fragmentation of the internal market in this area. The result is the above-mentioned proposal. In the meantime, this draft was subject to comprehensive discussions by various institutions and authors who provided several opinions and amendments. Following the legislative process, the Council of the European Union (“the Council”) as well as the European Parliament (“the Parliament”) published own revised versions of the trade secrets directive.⁹

This master thesis will present and analyze the revised draft directive by the European Parliament as it constitutes the latest working document in the legislative process regarding the introduction of a European directive on the protection of trade secrets. This will include, at first, an overview about the legislative process of the draft in order to represent the current state of play. Following this, the thesis will focus on the substantive and procedural provisions laid down in chapters 1 to 3 of the draft directive. In this context, the paper will present the particular provisions in more detail and at the same time try to point out existing and predictable issues regarding the interpretation and implementation of those provisions. Finally, the thesis will discuss aspects that are currently missing in the revised draft directive by the Parliament but are worth considering. In this regard, it is noteworthy that the master thesis will deem trade secrets, in accordance with the prevailing opinion in the Member States, not as an intellectual property right but rather as a complementary or auxiliary right to intellectual properties.¹⁰

⁹ The Council Draft (Doc. 9870/14) is available at: <http://register.consilium.europa.eu/pdf/en/14/st09/st09870.en14.pdf> (Last Visit: 10.09.2015); The Parliament Draft can be found under: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2015-0199&language=EN> (Last Visit: 10.09.2015).

¹⁰ The question is highly disputed in the Member States, cf. *Saias*, P. 721; *Baker & McKenzie*, “Study on Trade Secrets and Confidential Business Information in the Internal Market” by, MARKT/2011/128/D, P. 1 and 7, available at: http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf (Last Visit: 10.09.2015).

2. Legislative process

The first draft by the Commission was published in November 2013 and followed two commissioned studies, the “Study on Trade Secrets and Confidential Business Information in the Internal Market”¹¹ and the “Study on Trade Secrets and Parasitic Copying (Look-alikes)”¹², a Commission conference¹³ and a public online consultation phase.¹⁴

After releasing the draft directive, the Commission invited representatives, practitioners and institutions all over Europe to give feedback on the announced draft. These consultations resulted in several opinions and statements by various European and national institutions, such as the European Economic and Social Committee¹⁵ and the Directorate General for Internal Policies, as well as non-governmental institutions, like the Max Planck Institute for Innovation and Competition and the International Chamber of Commerce.

In May 2014, the Council agreed on a general approach for establishing a new legal framework for the protection of trade secrets and provided a revised draft directive (the "Council Draft").¹⁶ This revised draft contained several amendments proposed by the General Secretariat of the Council, which were discussed and criticized by the above-mentioned institutions. However, the draft version was subject to reoccurring critics, especially with regards to the protection of fundamental rights and interests.

Following this, the Legal Affairs Committee of the European Parliament (“JURI”) approved in June 2015 a draft report by MEP Constance Le Grip and also gave their backing to the opening of negotiations on the final text of the directive between the Parliament and the Council. Similar to the Council draft, the report provides a revised draft version which includes various amendments (the

¹¹ *Ibidem*.

¹² http://ec.europa.eu/internal_market/iprenforcement/docs/parasitic/201201-study_en.pdf (Last Visit: 10.09.2015).

¹³ “Trade Secrets: Supporting Innovation, Protecting Know-how” Brussels, 29 June 2012.

¹⁴ http://ec.europa.eu/internal_market/consultations/2012/trade-secrets_en.htm (Last Visit: 10.09.2015).

¹⁵ <http://www.eesc.europa.eu/?i=portal.en.int-opinions.30312> (Last Visit: 10.09.2015).

¹⁶ Cf. the press release by the Council of the European Union from 26th May 2014 (No. 10200/14), available at:

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/intm/142780.pdf (Last Visit: 10.09.2015).

“Parliament Draft”). The next event in the legislative process will be a 1st reading on the 24th November 2015.¹⁷

3. Analysis of the draft directive

3.1. Objectives

The directive pursues a wide range of goals. Initiatively, the proposal aims at the establishing of an effective and harmonized framework for the protection of trade secrets against their unlawful misappropriation within the Member States.¹⁸

As it was pointed out before, the rules regarding the protection of trade secret are diverging in the Member States. At the moment, the only common instrument is provided by Article 39 (2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). However, this provision only provides minimum standards for the protection of trade secrets. Besides, it is unclear to which extend Article 39 (2) TRIPS is currently implemented in the national laws of the Member States.¹⁹

Taking this into account, the current national laws in the Member States represent a patchwork of differentiating rules, whereby the level as well as the method of protection differs essentially.²⁰ With regards to the method of protection, several Member States, such as Germany or Austria, have incorporated rules on the protection of trade secrets in their unfair competition laws. Other countries have implemented rules either in their general tort law, their criminal law or intellectual property law. Then again, countries with a common-law background, such as the UK or Ireland, rely solely on their case-law with regards to the breach of confidence-doctrine.²¹ The only country in the

¹⁷ <http://parltrack.euwiki.org/dossier/2013/0402%28COD%29> (Last Visit: 10.09.2015).

¹⁸ Cf. *Saias*, P. 723; See also Recital 13.

¹⁹ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 2.

²⁰ Cf. *Rauer*, GRUR-Prax 2014, P.2.

²¹ Cf. *Ohly*, GRUR 2014, P. 2; *Cook*, P. 54.

EU that has established a specific legal act on trade secrets is Sweden.²² In terms of the level of protection, great disparities exist as well. For instance, some Member States do not provide a clear definition for trade secrets or do not make available appropriate legal remedies and measures in order to stop or prevent infringements.²³

The draft directive detects these aspects as great obstacles for providing cross-border collaborations and innovation in the Internal Market. Pursuant to Recital 7, these differences in the legal protection lead to a fragmentation of the internal market in the area of trade secrets as they lower business incentives to undertake innovative related cross-border economic activity, including research or manufacturing. Following this, Recital 8 clarifies that it is appropriate to provide rules on a European level to approximate the national legislative systems in order to ensure a sufficient and consistent level of redress across the internal market in case of a trade secret infringement.²⁴

3.2. Structure

The Parliament draft consists of four chapters. The first chapter includes substantive provisions regarding the subject matter and scope of the draft directive (Article 1). Furthermore, it provides definitions on common used terms in the directive, such as “trade secrets” or “infringing goods” (Article 2). Chapter 2 of the proposal contains in Article 3 a catalogue of actions that constitute a trade secret infringement under the regime of the draft directive, whereby Article 4 enlists several grounds that may justify a trade secret violation. The third chapter (Articles 5 – 14) stipulates remedies, measures and procedures that come into play in case of a trade secret infringement. The chapter is separated in 3 sections, including in the first section general provisions for the adoption of the provided remedies, measures and procedures (Articles 5 to 7) as well as specific measures to ensure the confidentiality in legal proceedings (Article 8), followed by provisional and precautionary measures in section 2 (Articles 9 and

²² Act on the Protection of Trade Secrets (1990:409), available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=129537 (Last Visit: 10.09.2015).

²³ Cf. *Drzewiecki*, P. 23; See also Recitals 4 and 5.

²⁴ In the following discourse, the term “trade secrets Infringement” will refer to the unlawful acquisition, use and disclosure as described in Article 3.

10) and measures resulting from a decision of the merits of the case in section 3 (Article 11 and 12). The draft closes in chapter 4 with final regulations on sanctions (Article 15) and monitoring and reporting duties regarding the transposition of the directive (Article 16 and 17).

3.3. Substantive provisions

3.3.1. Subject matter and scope - Article 1

Pursuant to Article 1 (1) of the Parliament draft,²⁵ the directive lays down rules on the protection against the unlawful acquisition, use and disclosure of undisclosed know-how and commercial business information (trade secrets). In this regard, the provision refers to terms that are regulated in more detail in Articles 2 and 3. Besides this general provision in paragraph 1, Article 1 contains further provisions in paragraphs 2 and 3 in order to define the scope and subject matter of the directive.

3.3.1.1. Exempted areas

Article 1 (2) includes a catalogue of aspects that shall not be affected by the draft directive. This comprises, inter alia, the freedom and pluralism of the media as enshrined in Article 11 (2) of the Charter of Fundamental Rights (lit. a), the use of information, knowledge, experience and skills honestly acquired by employees in the normal course of their previous employment, or in some other contractual relationship, which are not covered by the definition of a trade secret as provided for in Article 2 (1) of the proposal (lit. d) as well as the autonomy of social partners and their rights to enter into collective-agreements (lit. e), the obligations of the Member States to ensure effective protection against unfair competition (lit. f) and the rules of criminal law in the Member States (lit. g).

²⁵ Articles and Recitals that are named in the following discourse and do not contain a statutory description are those of the draft directive in the version provided by the European Parliament.

The paragraph was added in the current draft version and clarifies the scope of the directive in further detail. Apparently, some provisions seem to be a reaction to the reoccurring criticism by journalists and other institutions that came up since the original draft by the Commission was released.²⁶ These critics feared, inter alia, that the directive would restrict the freedom of expression and information too much.²⁷ In this regard, the provision can be regarded as clear signal that the protection of fundamental rights and other interests is recognized by the proposal.

3.3.1.2. Cases of lawful acquisition

Article 1 (3) enlists in subparagraph 1 several ways when the acquisition of a trade secret shall be considered lawful. This includes that the trade secret was obtained by independent discovery or creation (lit. a), by observation, study, disassembly or testing of a product or object that has been made available to the public or that it is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret (b), by exercise of the right of workers or workers' representatives to information and consultation in accordance with Union and national law and/or practices (lit. c) or any other practice which, under the circumstances, is in conformity with honest commercial practices (lit. d).

3.3.1.2.1. Systematical position

The catalogue was originally incorporated in Article 4 (1). Then again, the exceptions and justification grounds, which are now laid down in Article 4 (1), were formerly regulated in paragraph 2. Taking this into account, it seems that the European legislator wanted to point out a prioritization of the cases that are now laid down in Article 1 (3). However, as Article 3 regulates the unlawful

²⁶ Cf. *JURI*, "Trade secrets: freedom of expression must be protected, say legal affairs MEPs"; available at: <http://www.europarl.europa.eu/news/de/news-room/content/20150615IPR66493/html/Trade-secrets-freedom-of-expression-must-be-protected-say-legal-affairs-MEPs> (Last Visit: 10.09.2015).

²⁷ Cf. *Euobserver*, "EU trade bill threatens media freedom"; available at: <https://euobserver.com/opinion/129103> (Last Visit: 10.09.2015).

acquisition, use and disclosure of trade secrets and the current Article 4 deals with exceptions and justification grounds in case of such an infringement, it seems more consistent to place Article 1 (3) between those two provisions (again), because it also concerns primarily the question whether a trade secret is infringed or not.

3.3.1.2.2. Reverse engineering

One of the most disputed elements concerns the lawfulness of a trade secret acquisition in case of reverse engineering, which is covered by Article 1 (3) lit. b). In general, the provision is welcomed. This derives from the fact that, even though most of the Member States allow the practice of reverse engineering, the concrete requirements differ from each other.²⁸ In order to avoid these legal diversities a harmonized regulation seems to be inevitable. However, the provision still raises certain concerns.

Contrary to the original Commission draft, the provision now explicitly requires that the acquirer, who is in possession of the information, must be free from any legally valid duty to limit the acquisition of the trade secret. This clause was added in the current draft and clarifies that trade secret holders can limit the reverse engineering by establishing adequate contractual duties.²⁹ Although this does not apply when the object in question has been made available, it enables trade secret holders at least to restrict reverse engineering in cases where contractual relationships are established.

Another issue concerns the question whether the provision in question also allows the subsequent use or exploitation of a trade secret after being obtained via reverse engineering or is only limited to the previous acquisition. Article 1 (3) lit. b) only mentions several ways how to obtain a trade secret, such as observation, study or testing but it does not explicitly allow or prohibit the subsequent use of trade secret. According to *Harte-Bavendamm* and *Kalbfus*, the directive does not only recognize the acquisition but also the subsequent

²⁸ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 35.

²⁹ The requirement that the duty needs to be “legally valid” indicates that the provision only means contractual duties.

use and exploitation of a trade secret which was previously obtained via reverse engineering.³⁰ This seems convenient because otherwise the practical relevance of reverse engineering would be too limited and Article 1 (3) lit. b) rather meaningless. However, taking into consideration that the subsequent use shall be covered by the directive, it must be questioned whether this use must be limited by adequate rules.

Currently, the directive misses out to provide adequate restrictions regarding the use of trade secrets that were obtained by reverse engineering.³¹ This might be crucial especially in those sectors where no intellectual property protection is available but the trade secrets can be decoded easily by reverse engineering.³² Without adequate restrictions in this matter, further investments and developments of new products could be prevented and thereby contradict the aims of the directive to foster business and innovation in the Internal Market.³³ The draft directive recognizes these dangers in Recital 10a as well, which explicitly mentions in the following that the innovators and creators can be nowadays the victim of parasitic copying or slavish imitations. Following this, it is essential to implement further criteria and safeguards to limit the subsequent use.³⁴ Such criteria could include, inter alia, the requiring of a specific purpose. In this regard, it would be thinkable to limit reverse engineering to the effect that only such practices should be legitimate which aim at the creation of a further development or an aberration of the reverse engineered product.³⁵ Of course, this would require the evaluation of further criteria in order to classify when such an advanced product would be achieved.

³⁰ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 455; See also *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 35 who come to the same conclusion.

³¹ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 455; *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 37.

³² See *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 37 who name as an example the cosmetic industry.

³³ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 37

³⁴ It is noteworthy that recital 10a indicates the need for such restriction as well. However, it does not state how these limitations could like but refers the issue to the Commission in order to examine the need for Union actions in this field.

³⁵ For a corresponding "purpose-bound" approach, see Article 6 in the Software Directive 2009/24/EC which also limits the decompilation of software "to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs". See also *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 455 who tend to provide a similar approach.

3.3.1.2.3. Honest commercial practices

Lastly, Article 1 (3) lit. d) stipulates that any other practice which is in conformity with honest commercial practices shall be regarded lawful. The term "honest commercial practices" was adopted from Article 39 (2) TRIPS and is used repetitively in the draft directive (see Article 3 (2) lit. f). The systematical position as well as the wording indicate that the provision functions as a catchall-regulation in case the previous listed cases are not relevant. Thereby, the use of a loose term like "honest commercial practices" is reasonable, because it provides a flexible way to react on new, maybe yet unknown situations. Unfortunately, the directive does not provide further guidance on the interpretation of this term. Thus, the subsumption of new or unknown cases under this term appears to be difficult in the future. Taking this into account, it will be up to the competent courts to establish case-groups. These will have to orientate themselves on the previous mentioned cases, laid down in lit. a) to c), in order to provide a certain comparability and to not extend the scope of the provision.³⁶ In order to avoid legal uncertainty and inconsistent interpretations in the Member States, the European legislator should nevertheless provide at least further exemplarily guidance.

3.3.1.2.4. Lawfulness in case of Union or national law

Following the lawfulness of the acquisition in subparagraph 1, Article 1 (3) subparagraph 2 recognizes that the acquisition as well as the use and disclosure shall be considered lawful if such actions are required or allowed by Union or national law, without prejudice to any other duty not to disclose the trade secret or to limit its use that may be imposed by Union or national law. Contrary to subparagraph 1 (see above), this provision covers also the use and disclosure of trade secrets. This is reasonable, because it appears to be inadequate to consider only the acquisition of a trade secret as lawful in specific cases. Still, the wording seems in its current form rather broad. It enables the European and the national legislators to establish corresponding rules regarding the lawfulness of the acquisition, use and disclosure of trade secrets without

³⁶ Arguing in the same direction: *Gärtner*, NZG 2014, P. 651.

laying down any conditions or safeguards. This should be the case in order to avoid too diverging legal frameworks as well as to avoid that the rules in the directive against the unlawful acquisition, use and disclosure could be easily circumvented.

3.3.2. Definition of key terms - Article 2

Article 2 provides definitions for the terms “trade secret”, “trade secret holder”, “infringer” and “infringing goods”. These expressions are repetitively used in the draft directive. Thereby, the definitions of those terms will allow a better understanding and harmonization of the rules in the draft directive.

3.3.2.1. Trade secret

According to paragraph 1, a trade secret means know-how and business information which 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 (lit. a), has commercial value because it is secret (lit. b) and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret (lit. c).

3.3.2.1.1. Know-how and business information

Following this, the definition is based to a large extent on the definition of Article 39 (2) TRIPS. One aberration in the proposal concerns the terms “know-how” and “business information”, which were added, in contrast to TRIPS and the original draft by the Commission, to the original “information” requirement.

Taking this amendment into account, it appears that the current wording of the provision (“a trade secret *means* know-how and business information...”) stipulates an additional step in the overall assessment whether a trade secret is existent. In this case, it would be required to evaluate at first whether the

information in question constitutes know-how or business information.³⁷ Only then, it could be evaluated whether these information fulfill the further criteria laid down in Article 2 (1) lit. a) to c).

This causes several concerns. At first, it seems conflicting because the draft directive does not provide a definition of the terms “know-how” and “business information”. Secondly, the terms “know-how” and “business information” are often used as synonyms for trade secrets.³⁸ The formulation in Article 1 (1) indicates the same understanding. Thereby, it is not reasonable to use these terms as a requirement for a trade secret. Following this, the European legislator should delete the terms know-how and business information in Article 2 and refer only to basic requirement of “information”.

In this regard it is also noteworthy that the draft directive should provide a uniform terminology in order to describe or define trade secrets. In particular, the draft directive explicitly names in Recital 8 technical information as to be covered by trade secrets as well. Thereby, the proposal should recognize such information as a part of trade secrets equally to know-how and business information.

3.3.2.1.2. Commercial value

Besides the requisite of being secret,³⁹ Article 2 (1) requires that the information in question has commercial value.⁴⁰ Recital 8 clarifies that it is sufficient that the information in question has actual or potential commercial value in order to fulfill the requirement of Article 2 (1) lit. b). The implementation of potential value is reasonable because it allows the protection of information as a trade secret in such cases where it is not determinable - due to the early point of development

³⁷ This is also indicated by Recital 8 which states that a definition for trade secrets should be construed to *cover* business information, technological information and know-how.

³⁸ Cf. *McGuire*, GRUR 2015, P. 425; See also Fn. 20 in the Impact Assessment by the European Commission which explicitly states that “trade secrets are often referred to as “confidential business information”, “(secret) know-how”, “proprietary information/technology”, “undisclosed information”, “business secrets”, etc.”.

³⁹ Cf. Article 2 (1) lit. a)

⁴⁰ Cf. Article 2 (1) lit. b).

or adoption - whether the information in question may already have actual commercial value but it can be surely assumed that it will have.

The current version of the draft now also explicitly states that trivial information are excluded from the protection in the directive.⁴¹ This includes, inter alia, ideal secrets which are protected as a part of personality. As Recital 28 explicitly mentions that the application of any other relevant law in other areas, including privacy, shall not be affected by the directive, it is consistent that ideal secrets shall not fall under the scope of protection by the draft directive.⁴²

3.3.2.1.3. Reasonable steps

Lastly, the information needs to be “subject to reasonable steps under the circumstances [...] to keep it secret”. The directive does not provide any guidance on the question which kind of steps should be taken in order to be reasonable. In general, it is convincing that this element covers either factual measures (such as safekeeping in a vault or encryption) or contractual agreements in order to keep the information secret.⁴³ In this regard, the level of reasonable steps might change due to the specific circumstances of the case. Apparently, this will require a case-by-case evaluation, whereby the range of steps can include either simple instructions as well as complex mechanisms.

Another question that arises is whether the provision always requires the adoption of reasonable steps or may allow the absence of such as well. This is interesting in situations where it is evident that the information is confidential but no explicit measures were taken. The wording does not deny such interpretation.⁴⁴ In fact, the provision can be interpreted to the effect that *under the circumstances* of the specific case reasonable measures might be expendable.

⁴¹ See Recital 8.

⁴² Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454.

⁴³ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 20; *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454.

⁴⁴ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454.

3.3.2.1.4. Knowledge honestly acquired by employees

Pursuant to the last subparagraph in Article 2 (1), experience and skills honestly acquired by employees in the normal course of their employment shall not be considered as a trade secret. The rule was amended in the Parliament version in order to provide a better workers' mobility.⁴⁵ Even though this goal is welcomed, it can cause serious problems regarding the distinction whether specific confidential information must be considered as experiences and skills acquired by a (former) employee or as a trade secret. In practice, this differentiation might be very hard to find.⁴⁶ Unfortunately, the draft directive does not provide any guidance how to draw this differentiation. Thereby, the European legislator should clarify in the recitals how to accomplish this distinction in order to provide legal certainty.

3.3.2.2. Infringing goods

The definition for the term “infringing goods” in Article 2 (4) was also subject to several changes in the revised Parliament draft. Pursuant to this provision, the term “infringing goods” means goods whose conception, characteristics, functioning, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.

The criteria “conception”, “characteristics” and “functioning” were added in the current draft version, whereby the former terms “design” and “quality” were deleted. The decision is reasonable, because the former terms could be connected to goods in very different ways and allowed a broad application of the provision. The same concerns still apply to the terms “manufacturing process” and “marketing”, because these expressions are not directly connected to the good itself but rather constitute a precursor (in case of manufacturing process) or follow-up to the production of a certain good (in case

⁴⁵ Cf. Recital 27a which clarifies that the directive should not affect the freedom of movement for workers.

⁴⁶ Cf. *Out-Law.com*, “MEPs back changes to proposed EU trade secrets rules”, available under: www.out-law.com/en/articles/2015/june/meps-back-changes-to-proposed-eu-trade-secrets-rules/ (Last Visit: 10.09.2015).

of marketing).⁴⁷ Thereby, these elements seem to be out of place as well. Taken this into account, the affected terms should be removed from the draft. On the other hand, the newly added criteria are welcomed, because they allow the inclusion of several aspects that are *directly* attributed to the good itself then the form quality-criterion.⁴⁸

Still in question is the understanding of the element of a “significant benefit”. Even though the criterion of a significant benefit indicates that a certain degree must be reached, the directive does not provide when such a degree should be accomplished in order to provide that a good significantly benefits from a trade secret infringement.⁴⁹ In case that the European legislator will not provide further guidance on the interpretation of the criterion, it will be up to the competent courts to decide in the concrete case when such degree might be fulfilled or not.

3.3.2.3. Interim conclusion

Taking this previous remarks into account, it can be stated that the provision already provides a sufficient basis to define the most common terms in the proposal. Especially, the close alignment of the trade secret definition to the rules in Article 39 (2) TRIPS allows a homogenous interpretation of both legal frameworks. However, the European legislator should take up the above-mentioned concerns in order to provide further clarification.

3.3.3. Unlawful acquisition, use and disclosure of trade secrets - Article 3

Article 3 (1) obliges the Member States to provide the holder of a trade secret with civil law protection against the unlawful acquisition, use or disclosure of a trade secret in order to prevent or to obtain redress for those infringements.

⁴⁷ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 22; in the same direction see: *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454.

⁴⁸ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 23.

⁴⁹ In the same direction, see *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454.

Following this general obligation, paragraphs 2 and 3 of Article 3 list several cases in which the acquisition, use or disclosure of a trade secret shall be regarded unlawful.

3.3.3.1. Unlawful acquisition

Article 3 (2) comprises several cases in which the *acquisition* of a trade secret shall be considered unlawful. This requires primarily that the trade secret was acquired without the consent of the trade secret holder. Following this, the unauthorized access to or copy of any documents, objects, materials, substances or electronic files which contain the trade secret or from which the trade secret can be deduced constitute a trade secret infringement when those things were lawfully under the control of the trade secret holder.⁵⁰ Further cases include theft, bribery or deception⁵¹ as well as the breach or inducement to breach a confidentiality agreement or any other duty to maintain secrecy.⁵² Lastly, any other conduct which can be considered, under the circumstances, contrary to honest commercial practices can represent a trade secret infringement.⁵³

3.3.3.1.1. Removal of fault elements

At first, it is noteworthy that the current draft of the provision does not require anymore any elements of fault.⁵⁴ Thereby, one of the biggest controversies regarding the wording of the provision was sufficiently amended.⁵⁵ This decision is to be welcomed, because elements of fault regularly play a role only with regards to damages,⁵⁶ whereby the assessment of a breach of duty or of legal interest must be separated from the question of fault. Such an amalgamation of

⁵⁰ Article 3 (2) lit. (a).

⁵¹ Article 3 (2) lit. (b) to (d).

⁵² Article 3 (2) lit. (e); a further analysis of this regulation is provided in Chapter 3.3.3.4 of thesis.

⁵³ Article 3 (2) lit. (f).

⁵⁴ Cf. Article 3 (2) of the Commission draft which required that the acquisition was carried out intentionally or with gross negligence.

⁵⁵ See inter alia: *Kalbfus/Harte-Bavendamm*, GRUR 2014, P.454; *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 27.

⁵⁶ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 27.

both elements is now avoided. Furthermore, the decision is also a huge benefit for a trade secret holder who applies for injunctions or corrective measures, because he or she would not be obliged anymore to provide evidence in order to prove the (sometimes difficult) question of fault on the side of the infringer.

3.3.3.1.2. Reference to criminal law terms

Another aspect affects the reference to terms with criminal law connotations in Articles 3 (2) lit. (b) to (d). The laid down offences are not harmonized in the Member States, whereby the notion could be interpreted in an inconsistent manner within the different Member States.⁵⁷ Another problem in this regard derives from the fact that those notions regularly require elements of fault as well. As it was mentioned before, such elements should be excluded from the question if a trade secret infringement is present. In order to avoid the above-named concerns different terms should be amended in the directive by using neutral and objectified terms.⁵⁸ The Max Planck Institute proposed the incorporation of terms like “taking of documents” or “procurement of information through deception” as well as “other unlawful means”.⁵⁹ Another solution would be the deletion of the actions laid down in lit. b) to d) and the amendment of the general term “appropriation” in lit. a) in order to provide an additional act that could cover the actions in question.⁶⁰ In case that the term “unauthorized” does not cover deceptive actions, this term could also be incorporated in lit. a).

3.3.3.2. Unlawful use or disclosure

Article 3 (3) of the draft directive lays down cases where the *use or disclosure* of a trade secret shall be considered unlawful. Like in the previous paragraph, the provision requires as a precondition the missing consent by the trade secret holder. In addition, the unlawful acquisition of a trade secret (lit. a), the breach

⁵⁷ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 28.

⁵⁸ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454.

⁵⁹ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 29.

⁶⁰ See a similar proposal in the draft of the Council which amended the wording in Article 3 (2) lit. a) by adding the term “appropriation” as a further possibility of an unlawful acquisition and deleting the cases laid down in Articles 3 (2) lit. (b) to (d).

of a legally valid confidentiality agreement or any other duty maintain secrecy of the trade secret (lit. b) as well as the breach of a legally valid contractual or any other duty to limit the use of the trade secret (lit. c) can constitute an unlawful use or disclosure in the sense of paragraph 3. The last two variants cover cases where the trade secret was obtained in a lawful way but was used or disclosed in breach of a certain duty.

Like Article 3 (2), the Parliament draft removed any elements of fault in paragraph 3. This is consistent as the above mentioned arguments apply here as well.

3.3.3.3. Exceptions for experience and skills honestly acquired by employees

Pursuant to Article 3 (3a), paragraph 3 does not provide any ground to trade secret holders to limit the use of experience and skills honestly acquired by employees in the normal course of their employment or add any restriction for employees to occupy a new position, to those provided for in their employment contract, in compliance with relevant Union and national law.

The paragraph was added in the current draft version by the Parliament to ensure that the use of knowledge by a (former) employee does not fall under the scope of Article 3 (3) lit. b) and c).⁶¹ This aspect plays a substantial role in the mobility of former employees because obtained knowledge very often constitutes an important professional asset. Thus, the restriction by a former employer to use or disclose such knowledge could limit the employee significantly in finding or establishing a new occupation. Taking this into account, the provision connects with the regulation laid down in Article 2 (1) subparagraph 2 which also aims at the protection of labor mobility.⁶²

⁶¹ See the critics to the original draft by *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 32.

⁶² See Chapter 3.3.2.1.4.

3.3.3.4. Secondary violations

Pursuant to Article 3 (4), the acquisition, use or disclosure of a trade secret by a third party shall be considered unlawful whenever he or she knew or should have known under the circumstances at the time of the acquisition (by him or her) that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3. Basically, this covers so-called “secondary infringements”, where the trade secret is obtained by a third party (or second acquirer) from a person who has previously acquired the trade secret unlawfully.⁶³ In contrast to the unlawful acts laid down in paragraphs 2 and 3, this provision contains elements of fault. This is reasonable because the liability is here extended to third parties in case of secondary actions. In this regard, the additional fault element provides to limit the scope of such secondary infringements and to differentiate these violations from direct infringements.⁶⁴

Taking this into account, it would be consistent to include the unlawful acquisition of a trade secret carried out in breach of a confidentiality agreement or other duty to maintain secrecy, laid down in Article 3 (2) lit e), into Article 3 (4). Paragraph 2 covers situations where the trade secret has been obtained by a person before and is now acquired in breach of a confidentiality agreement by a third party.⁶⁵ Thus, this kind of violation can be regarded as secondary infringement, similar to those that are already regulated in paragraph 4. As a consequence, the variant would have to require the presence of fault as well.

3.3.3.5. Actions with regard to infringing goods

Article 3 (5) includes unlawful acts with regards to infringing goods. According to this provision, this includes the production, offering or placing on the market of infringing goods as well as the import, export or storage of those goods for the

⁶³ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 454; *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 29.

⁶⁴ See also footnote 10 to Article 39 TRIPS which requires in case of the acquisition of undisclosed information by third parties the provision of knowledge or gross negligence in failing to know.

⁶⁵ Whereby cases where a trade secret is used or disclosed in breach of a confidentiality agreement fall under the scope of Article 3 (3) lit. b).

first mentioned purposes. Contrary to the original draft by the Commission, the new draft version also requires now that the person engaging in the described activity was or - depending on the circumstances - should have been aware of the fact that unlawful use had been made of the trade secret within the meaning of paragraph 3.

The acts listed in Article 3 (5) can be regarded as a form of secondary or indirect infringement as well, as they build on a prior violation of a trade secret. Under these circumstances, it is reasonable to hold third parties liable only in case of fault. Otherwise, this would allow a too broad legal responsibility in such cases.

According to the wording, the awareness must be related to the unlawful acquisition, use or disclosure of a trade secret by the first infringer. However, the directive does not provide any date *when* this requirement must be provided by the engaging person. Thereby, it can be concluded that it does not matter whether the person in question was aware of the primary infringement before, during or after engaging in one of those activities laid down in paragraph 5. This is consistent, because the covered activities (primarily) constitute continuous actions that take place over some period. In this case, it would be inequitable to make the liability dependent on a specific date, for example the beginning of the activity in question, because it would be mostly a coincidence whether the person engaging in those activities would be aware of the previous infringement before or after this date.

Other issues concern the interpretation of the terms "import" and "export". For instance, the directive does not define these terms in further detail and does not provide guidance whether these terms cover only trade with third countries or also intra-Community trade. In this regard, it seems convincing that the provision should only cover trade with third countries. Otherwise the field of application of the term "offering and placing on the market" could be obsolete or at least limited.⁶⁶ Still, this should be clarified in the directive in order to avoid a long-lasting preliminary ruling procedure by the CJEU.

⁶⁶ Pointing in the same direction: *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 34.

Unlike some authors in the literature, it does not appear to be necessary to clarify the provision to the effect that it does not apply in case of the import or export of infringing goods for the personal use or consumption. In fact, it is convincing that "the mere use of goods that benefit from infringement of trade secrets is not a violation in itself".⁶⁷ However, by requiring that the import, the export or the storage of infringing goods has to take place *for the purpose of producing, placing or offering* of these goods on the market, the provision already seems to have a sufficient criterion to exclude the personal use or consumption.⁶⁸

3.3.3.6. Interim conclusion

All in all, the provisions laid down in Article 3 are welcomed and provide a consistent regulation. The establishing of a catalogue of pre-defined actions, which constitute an infringement under the regime of the draft directive, provides a conclusive basis for the remedies, measures and procedures laid down in the third chapter of the proposal. In this context, it also constitutes a significant advantage towards the Enforcement Directive. The latter does not incorporate a similar catalogue of defined violation forms, but only refers to the general term of "infringing activities" (see for example Article 13). Thus, the draft directive provides a much easier and precise application of the remedies, measures and procedures laid down in the draft directive.⁶⁹

Due to the removal of the fault elements in paragraph 1 as well as the adoption of rules regarding the use of experience and skills acquired by employees the level of protection will be raised as well. However, as it was pointed out before, the provision still offers enough room for further improvements.

⁶⁷ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 34.

⁶⁸ For a different opinion see: *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 34.

⁶⁹ It is noteworthy that this also applies to regulation of exceptions and justifications, laid down in Articles 1 (3) and 4, as the Enforcement directive does not incorporate any exculpation grounds, see *Metzger*, P. 6.

3.3.4. Exceptions - Article 4

Article 4 contains a catalogue of exceptions when the alleged infringement of a trade secret can be justified. In this case, the measures, procedures and remedies provided in this directive do not apply.

3.3.4.1. Freedom of expression and information

Article 4 lit. (a) covers the case that the alleged violation was carried out for making legitimate use in accordance with the Charter of Fundamental Rights of the European Union of the right to freedom of expression and information, including media freedom. The aim behind this provision is to ensure a stronger protection of journalistic work, in particular with regards to investigative research, protection of sources and the right of the public to be informed. This is undermined by Recital 12b which explicitly states that it is essential to respect the freedom of the press and the media, as enshrined in Article 11 (2) of the Charter of Fundamental Rights of the European Union.

3.3.4.2. Revelation of misconduct

Article 4 lit (b) concerns the case that the alleged violation of a trade secret was carried out for revealing a misconduct, wrongdoing, fraud or illegal activity, provided that the respondent acted in the public interest. As Recital 12a clarifies, the provision aims at the protection of whistleblowing activities.⁷⁰

In contrast to the original draft by the Commission, the wording of the provision was significantly amended. Initially, the original draft by the Commission required that the alleged trade secret infringement was carried out *for the purpose* of revealing the above named activities. The current draft dispenses the purpose criterion and only requires that the respondent acted in the public interest.⁷¹ Following this, it is conceivable that the scope of the provision will be

⁷⁰ Cf. Recital 12a which was amended in the current draft version.

⁷¹ In this regard, it is probable that the criterion of “acting in the public interest” only constitutes an objective criterion and does not require any purpose of the respondent to act in this interest.

expanded in favor of whistleblowers who were acting with just a subsidiary or even without a primary intent to reveal a certain misconduct. All in all, this decision is welcomed, because it gives whistleblowers a broader possibility to find protection under the provision even if they decide later on to reveal the misconduct.

3.3.4.3. Disclosure by workers to their representatives

In case that the trade secret was disclosed by workers to their representatives, Article 4 lit. c) permits such action if it was part of the legitimate exercise of their representative functions in accordance with Union and national law, provided that such disclosure was necessary for that exercise.

The provision intends to protect workers as well as to ensure the function of worker representatives due to the fact that the disclosure of trade secrets can cause serious conflicts in the execution of representative's functions. This seems to be significant, especially in those cases where the representatives have consultation or information duties.

3.3.4.4. Protection of legitimate interests

Lastly, Article 4 lit. (e) allows the acquisition, use or disclosure of a trade secret if they were carried out for the purpose of protecting a general public interest or any other legitimate interest, recognized by Union or national law and through judicial practice.

Following up the adoption of those terms in other directives of the European Union as well as the systematical place, it is most likely that Article 4 lit. e) is intended to function as a general stipulation that catches those cases that do not fall under the cases laid down in Article 4 lit. a) to c), but should be excluded from the liability regime of the draft directive. In this regard, it is understandable that the directive does not provide any definition for the terms of a "general public interest" or "other legitimate interests". This allows a broad interpretation and field of application. However, it will be up to the Member States and the

competent courts to substantiate these criteria on the basis of upcoming cases.

3.3.4.5. Interim conclusion

Article 4 enlists appropriate cases where the infringement of a trade secret might be justified. Thereby, the interests of involved third parties, such as journalists or whistleblowers, are properly safeguarded. However, it must be pointed out that directive should not exclude the interests of trade secret holders. At the moment, the wording rather gives the impression that the listed grounds per-se justify an infringement. This would however constitute a too strict prioritization in favor of the affected third parties at the expense of trade secret holders. Especially the broad wording of Article 4 lit. b) can cause serious conflicts with the interests of trade secret holders. Thereby, the directive should clarify in more detail that the laid down cases do not constitute per-se a justification but still require a balance with the interests of the trade secret holder.⁷²

3.4. Measures, remedies and procedures

Chapter 3 of the draft directive incorporates provisions on measures, procedures and remedies in case of a trade secret infringement.

3.4.1. General provisions - Articles 5 and 6 (1)

In this regard, Article 5 (1) stipulates a general obligation for the Member States to provide measures, procedures and remedies in order to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets. Pursuant to paragraph 2 of Article 5, these provided measures need to fulfill certain criteria, inter alia, being fair and equitable (lit. a), not unnecessarily complicated or costly (lit. b), effective and dissuasive (lit. c).

⁷² Cf. Gärtner, NZG 2014, P. 651.

Following, Article 6 (1) obliges the competent judicial authorities to apply the measures, procedures and remedies provided for in the draft directive in a manner that is proportionate (lit. a), avoids the creation of barriers to legitimate trade, competition and worker mobility (lit. b) and provides safeguards against their abuse (lit. c).

3.4.2. Abuse of litigation - Article 6 (2)

Article 6 (2) lays down several measures that can be taken by the competent judicial authorities in case a claim concerning a trade secret infringement is manifestly unfounded and the applicant acted abusively or in bad faith. This includes the imposing of sanctions (lit. a) and/or dissemination of the information concerning the decision (lit. b).⁷³

The rationale behind the provisions is to deter the application of unjustified and abusive claims.⁷⁴ However, it can still be questioned whether such a provision is legitimate in the context of trade secret protection. According to *Harte-Bavendamm* such sanctions are not necessary, because there is no higher risk of abusive lawsuits in trade secret proceedings compared to other fields of law, especially intellectual property cases.⁷⁵ However, it is evident that alone the accusation in an unjustified infringement proceeding can intimidate a party or can have negative effects on the reputation, resulting inter alia in the loss of business contacts or difficulties to entry a certain market.⁷⁶ Furthermore, the legal proceedings may cause great costs. Taking into account that trade secrets are part or at least related to unfair competition law which aims at the controlling of market behavior, provisions like those in question seem appropriate in a trade secret context as well.⁷⁷

Besides this general concern, Article 6 (2) of the draft directive causes further questions regarding the interpretation and implementation. At first, the draft directive does not provide clear guidelines which sanctions are covered by

⁷³ Article 6 (2) lit. b) refers to Article 14.

⁷⁴ In order to ensure a smooth functioning of the internal market, See Recital 12.

⁷⁵ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 456.

⁷⁶ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 41.

⁷⁷ See also national provisions like Section 8 of the German Unfair Competition Law (UWG), which provides similar measures in case of abusive lawsuits.

Article 6 (2) lit. a).⁷⁸ The only explicitly mentioned sanction is the publication of the decision (lit. b), whereas the imposing of sanctions is left to national law. According to *Kefferpütz*, the incorporation of sanctions is contributed to the lack of cost reimbursement in case an action is dismissed in several Member States.⁷⁹ In favor of such an approach speaks that Article 6 (2) does not refer - unlike other provisions in the directive - to the term of compensation. However, in that case it would seem to be more preferable to establish a provision similar to Article 14 of the Enforcement Directive, which covers the bearing of costs on a general level and not only in case of abusive lawsuits. Besides, taking the previous mentioned negative aspects into account, it is conceivable that these losses should be compensated as well. No matter how, the legislator should clarify the scope of the provision in more detail in order to provide at least a certain level of harmonization in this matter.

Finally, it is worth mentioning that the directive now requires in Article 6 (2) subparagraph 2 that the sanctions in question shall be determined in a separate proceeding. This clause was added in the current draft and resolves the original concerns by several authors on the question how a court should decide whether the applicant acted in bad faith pursuant to Article 6 (2) in an infringement proceeding without just simply dismissing the case when it is already unfounded.⁸⁰

Taking all the aspects into account, the European legislator should evaluate the necessity of the provision at hand. In case he approves this approach, he should definitely clarify the provision in further detail regarding the type of sanctions, including the possible extend in case of financial compensation.

3.4.3. Limitation period - Article 7

The draft directive provides in Article 7 a temporal limitation for civil actions in case of a trade secret infringement to a period of three years. According to Article 7 (1), the application of measures, procedures and remedies provided in

⁷⁸ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 43.

⁷⁹ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 456.

⁸⁰ In this regard, see the concerns by *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 42.

the directive must be brought within three years after the date on which the applicant became aware of the last fact giving rise to the action or at least had reason to become aware of it.

Following this, it is noteworthy that the limitation period was increased by the Parliament, presumably, because of the reoccurring criticisms in the last months.⁸¹ Another change affects the newly added subparagraph 2 which clarifies that the Member States are free to determine the applying rules regarding the suspension and interruption of the limitation period. Taking this last aspect into account, it can be questioned whether the decision to leave the determination of the suspension and interruption up to the Member States may not contradict the overall aim of the directive to provide a sufficient level of harmonization in the Member States. Apparently, the great deviations regarding the limitation period in the Member States led the European legislator to the incorporation of a corresponding provision.⁸² Thereby, it seems to be more consistent to regulate all aspects regarding the limitation period in Article 7.

Another issue concerns the reference to the criterion of having "awareness of the last fact giving rise to an action" in order to define the beginning of the limitation period. According to several authors, the criterion does not sufficiently provide an answer when the limitation period begins in cases of continuing actions. Such actions are typical in cases of an unlawful use of trade secret where the information in question is used in different stages, such as production, marketing, etc. or the action occurs over a certain period.⁸³ Taking this into account, it should be clarified that the competent courts need to assess if the continuous actions are closely connected or constitute separate actions, whereby in case of the latter the limitation period needs to be assessed for each action separately.⁸⁴

Further concerns affect the element of "having reason to become aware" in order to define the beginning of the limitation period. The directive leaves it

⁸¹ See inter alia the demand for a period of three years by *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 45 and 47.

⁸² Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 456.

⁸³ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 46.

⁸⁴ It seems to be sufficient that this is clarified in the recitals, because the above-mentioned criterion of "awareness of the last fact giving rise to an action" does at least not deny such interpretation.

unclear which degree must be accomplished in order to constitute such reason and also if this criterion includes all forms of negligence. Those questions seem to be critical especially in cases of trade secrets infringements where a reason to become aware might be easily given, however, the gathering of information and evidence might be very difficult and time-consuming.⁸⁵ Thereby, it should be clarified that a reason to become aware requires a level of knowledge which would allow the application of legal proceedings.⁸⁶ Regarding the implementation of a fault element, it would be recommendable to amend the wording corresponding to section 199 Para. 1 of the German Civil Code (BGB).⁸⁷

Despite the above-mentioned concerns, the introduction of a limitation period constitutes an exceptional case in the legislative history of the European Union. Depending on the reactions by the Member States and the effect on the legal protection, the current proposal might be a starting point for further developments in this area.

3.4.4. Preservation of confidentiality in the course of legal proceedings - Article 8

Article 8 contains detailed rules regarding the protection of confidentiality of trade secrets in legal - interim and main - proceedings. While paragraph 1 lays down a general obligation to ensure that trade secrets are not used or disclosed by the involved persons during and after an infringement proceeding, paragraph 2 stipulates a non-exhaustive catalogue⁸⁸ of specific measures how to preserve the confidentiality in the course of such procedure.

The importance of this provision results from the fact that confidentiality is an essential element in trade secret infringement proceedings. Without appropriate measures the secrecy of a trade secret could be lost by the mere act of filing

⁸⁵ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 456.

⁸⁶ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 456.

⁸⁷ This provision requires that the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence.

⁸⁸ See the wording of Para. 2, which states that "the measures [...] shall *at least* include the possibility...".

the lawsuit, leading to the dismissal of all claims that are based on the violation of a trade secret.⁸⁹ Thereby, it is conceivable that missing rules on the confidentiality of trade secrets in court proceedings can constitute barriers for the protection and enforcement of trade secret rights. Taking this into account, the provision can be regarded as one of the core elements in the draft directive.

3.4.4.1. General obligation to preserve confidentiality

According to Article 8 (1) subparagraph 1, Member States are obliged to ensure that persons who are participating in legal proceedings relating to a trade secret infringement or who are having access to documents which form part of those proceedings shall not be permitted to use or disclose those information if the competent judicial authorities have identified the information as confidential. This obligation covers the parties, their legal representatives and lawyers as well as court officials, witnesses, experts and any other person involved.

Due to the open wording of the provision it is ensured that even initiating submissions are covered by the obligation.⁹⁰ This enables the trade secret holder to protect the confidentiality of his or her trade secret right from the start of a legal procedure. As it was mentioned before, this is a significant element, because otherwise the secrecy of a trade secret could be compromised right from the beginning of a legal procedure.

Regarding the adopting of appropriate measures, Article 8 (1) requires a “duly-reasoned” application by the interested party. Besides, the judicial authority can also apply appropriate measures on their own initiative.⁹¹ The last clause was added in the recent proposal by the Parliament, presumably, to ensure the confidentiality in cases where the trade secret holder forgot to apply for appropriate measures or did not even recognize the confidential character of his or her information. Even though the rationale of this clause is welcomed, it also causes further questions. For instance, it can be asked whether the provision constitutes an obligation for the competent court to adopt measures. If this

⁸⁹ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 47.

⁹⁰ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P.456.

⁹¹ See Article 8 (1), last sentence of subparagraph 1.

would be the case, it could be asked whether this can cause a liability of the competent court or state in case that appropriate measures were not adopted. The draft directive does not lay down any guidance in this matter. However, following the general principle of party disposition in civil procedures, the parties exercise - in principle - the sole control over legal proceedings. Thereby, a liability of the state or court seems to contradict with this principle and, thus, should be excluded in the draft.

3.4.4.2. Cease of effect

The second subparagraph of Article 8 (1) clarifies that the above-described obligation shall remain in force after the end of proceeding. However, it also enables to cease an adopted confidentiality measure if a final decision finds that the alleged trade secret does not fulfill the requirements set out in Article 2 (1) or where the information in question becomes over the time generally known among or readily accessible to persons within the circles that normally deal with that kind of information.

The rationale behind the provision seems to be that it would not be justified to keep up an existing confidentiality measure against a respondent in case that the original subject of protection lapsed and no need for ensuring the confidentiality is required anymore. This might be even more important in a commercial context, where competitors of a former infringer will be free to use the information in question in case the trade secret protection lapsed, whereby the infringer would still be restricted under a confidentiality order. The provision at hand allows to avoid such (economic) disadvantages.

3.4.4.3. Specific measures

Pursuant to Article 8 (2), judicial authorities may take *specific* measures that are necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to *in the course* of the legal proceedings relating to a trade secret infringement. Following this, the provision stipulates in

subparagraph 2 a non-exhaustive catalogue of measures in order to preserve the required confidentiality in legal proceedings. Equally to paragraph 1, this requires a duly-reasoned application by a party or the own initiative by the court.

The measures enlisted in subparagraph 2 include at least the possibility to restrict the access to any document containing a trade secret or alleged trade secret and submitted by the parties or third parties to a limited number of persons in whole or in part (lit. a) as well as the access to hearings and their corresponding records or transcripts to a limited number of persons, when trade secrets or alleged trade secrets may be disclosed (lit. b). In both cases, the provision demands that at least one person from each of the parties and, where appropriate in view of the proceedings, their respective lawyers are given full access to the document. Finally, subparagraph 2 also includes the possibility to make available to third parties a non-confidential version of any judicial decision, in which the passages containing information defined as trade secrets have been removed or redacted (lit. c).

One of the most significant changes in the current draft concerns the restriction of access to documents and hearings. The new draft by the Parliament requires – in contrast to the original draft by the Commission – that at least one person from each party should be given full access.⁹² Taking this into account, it can be questioned whether this approach is still in accordance with the aim of the directive. In particular, Recital 14 stipulates that the directive aims at protecting the confidentiality of litigated trade secrets. However, the directive recognizes in Recital 14 also the principle of fair trial. Clearly, the current approach recognizes the right of the involved parties for a fair trial and fair hearings in more detail than the original draft by the Commission. However, even though these principle are important constitutional safeguards, the current draft seems to overplay the importance of these principles at the expense of the protection of the trade secret holders. Following the current proposal, it is thinkable that trade secret holders would rather refrain from bringing legal actions because of

⁹² Cf. Article 8 (2) of the Commission draft. While lit. b) allows in exceptional circumstances, and subject to appropriate justification, that the competent judicial authorities may restrict the parties' access to hearings and order them to be carried out only in the presence of the legal representatives of the parties and authorized experts, lit. a) does not contain any exemption in favor of the other party or their legal representative.

the possibility to lose their trade secret even if only one person of the other party has access to it.

Taking this into account, the European legislator should revise the chosen approach. In this regard, a possible solution could be to give only the lawyers of the other party full access to documents and hearings, whereby the party itself or at least one person of the party would get access only in appropriate or strictly necessary cases. In every case, it should also be clarified that those persons would be subject to the confidentiality obligation referred to in paragraph 1. This should be applied even in case that the proposal decides to stay with the current approach.

3.4.4.4. Interim conclusion

All in all, the provision provides a good starting point to preserve the confidentiality in legal proceedings. Due to the fact that the European legislator decided to not provide detailed but rather general obligations in order to ensure the confidentiality, it will be up to the Member States to define specific solutions when they implement the required measures into their national framework. This approach may set out the risk to not provide a fully harmonized legal framework. However, it allows a flexible way to implement the draft directive in accordance with the national frameworks of the Member States. In this regard, further discussions will surely concern the question which specific measures, despite those listed in Article 8 (2), will be implemented by the Member States in order to preserve the confidentiality properly and whether those measures will be still in compliance with the aims of the directive, to preserve the confidentiality of trade secrets on one side and the rights of fair trial and fair hearing on the other side.

3.4.5. Provisional and precautionary measures - Article 9

Article 9 of the draft directive provides provisional and precautionary measures in case of a trade secret infringement.

3.4.5.1. Included measures

Paragraph 1 of the provision lists several measures that may be ordered by the judicial authority against the alleged infringer at the request of the trade secret holder. Those measures include the cessation or the prohibition of the use or disclosure of a trade secret (lit. a), the prohibition to produce, offer, place on the market or use of infringing goods as well as their import, export or storing for those purposes (lit. b), the seizure up or delivery of suspected infringing goods, including imported goods, in order to prevent their entry into or circulation within the market (lit. c).

The named measures give the trade secret holder the opportunity to prevent or stop an infringement of his trade secret on an interim basis. This is an important aspect in the protection of trade secrets, because otherwise the confidentiality of the information in question would be in constant danger if the infringing act continues. In this regard, it is also noteworthy that Article 15 enables judicial authorities to impose sanctions in case that a party, who is subject to one of the measures referred to in Article 9 (1), fails or refuses to comply with those measures. In this case, the provision explicitly stipulates that non-compliance shall be subject to a recurring penalty payment if provided by national law.⁹³

3.4.5.2. Continuation of conduct

Alternatively to the measures laid down in Article 9 (1), paragraph 2 allows the judicial authorities to make the continuation of an alleged unlawful acquisition or use of a trade secret subject to the lodging of guarantees. These securities must be intended to ensure the compensation of the trade secret holder. In contrast to the original draft, the new proposal by the Parliament requires also that the disclosure of a trade secret shall not be allowed against the lodging of guarantees.⁹⁴

⁹³ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 48 who come to the conclusion that the (Commission draft) directive does not contain corresponding sanctions in order to accomplish the compliance of the affected respondent. Against such conclusion speaks the wording of Article 15 which explicitly refers to those measures in Article 9.

⁹⁴ Sentence 2 of Article 9 (2).

Following this, the provision gives an alleged infringer the possibility to continue his allegedly infringing conduct against the depositing of appropriate securities for the trade secret holder.⁹⁵ In general, this mechanism is not unlikely in interim measures. The Enforcement Directive provides in Articles 9 (1) lit. a) similar rules in case of an alleged violation of intellectual properties. However, the question arises whether this is also justified in trade secret infringements. Even though the guarantee shall be intended to compensate the trade secret holder, it seems more likely that the confidential nature of trade secrets contradict with this mechanism. In contrast to intellectual properties, trade secret are dependent to remain secret. Thus, this secret nature would be endangered if the further use of the information is allowed.⁹⁶ Even though the disclosure of such trade secret was excluded in the amended version of the Parliament (see above), it is probable that the secret nature can still be jeopardized in case that the court permits the further use. Following this, it seems appropriate to remove Article 9 (2) completely. The interests of all involved parties, especially those of the respondent, can be adequately ensured by simply applying the conditions and safeguards set out in Article 10.⁹⁷ This would comprise, inter alia, the possibility by the court to order the *applicant* of such measures to lodge securities in order to compensate the alleged infringer.⁹⁸

3.4.6. Conditions of application and safeguards - Article 10

Following the provision of interim measures in Article 9, Article 10 specifies the conditions and safeguards of those applicable measures. Due to interim character of those measures laid down in Article 9, the legislator decided to incorporate corresponding protective provisions.

⁹⁵ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 50.

⁹⁶ *Ibidem*.

⁹⁷ See Chapter 3.4.9. for a detailed analysis.

⁹⁸ Cf. Article 10 (4).

3.4.6.1. Provision of available evidence

In this respect, Article 10 (1) lays down that the judicial authorities have the authority to require the applicant to provide evidence that may reasonably be considered available in order to satisfy themselves with a sufficient degree of certainty, that a trade secret exists, that the applicant is the legitimate trade secret holder and that the trade secret has been infringed or a violation is at least imminent.

The provision is similar to Article 9 (3) of the Enforcement Directive, which requires available evidence to be presented by the applicant. This is contributed to the expedited character of interim proceedings, where a fast evaluation of evidence is necessary in order to provide a decision in time. However, it can be noted that the directive does not clarify what types of evidence do fall under the scope of the provision. Therefore, it will be up to the Member States to determine the applicable types of evidence in interim proceedings, allowing them for instance to cover their traditional types of proof according to their national law.⁹⁹

Another issue concerns the requirement of a “sufficient degree of certainty”. The directive does not provide when such degree shall be accomplished. In contrast to Article 12 of the draft directive, which covers the conditions of measures resulting from a final decision, the wording of Article 10 (2) explicitly mentions this requirement. Taking this and the urgent character of interim proceedings into account, it can be assumed that Article 10 (2) requires a specific, reduced degree of proof in order to satisfy the burden of proof. In order to avoid legal uncertainties and to provide an adequate harmonization in the Member States, the draft should still clarify this aspect. Corresponding to the requirements in a German civil interim procedure, it could be stated that such a sufficient degree is reached when the court considers the applicant's submission predominantly true.¹⁰⁰

⁹⁹ For instance, the statutory declaration in lieu of an oath in section 294 of the German Civil Procedure Code (ZPO).

¹⁰⁰ Cf. *Greger*, P. 30.

3.4.6.2. Assessment of proportionality

Article 10 (2) requires the judicial authority to take into account the specific circumstances of the case in order to assess the proportionality of the measures in question. The assessment includes different aspects, such as the value of the trade secret, the measures taken to protect the trade secret, other specific features of the trade secret, the conduct - intentional or unintentional - of the respondent. Besides, the regulation also requires to respect legitimate interests of third parties, the public interest and the safeguard of fundamental rights.

In general, the proportionality of a measure is not unlikely in the context of interim proceedings. For instance, the German Code of Civil Procedure (ZPO) recognizes the principle of proportionality in interim procedures in section 938 as well.¹⁰¹ However, it seems unusual that the assessment includes third party and public interests. Taken the contradictorily character of a civil procedure, it is more likely that only the interests of the involved parties should be balanced with each other.

3.4.6.3. Cease of effect, securities and compensation

Paragraphs 3 to 5 of Article 10 provide additional safeguards in favor of the respondent of interim measures.

Similar to Article 8 (1) of the draft directive, Article 10 (3) lays down several cases when the provisional measures referred to in Article 9 can cease to have effect upon a request of the respondent. This shall be the case when the applicant does not institute proceedings leading to a final decision of the case within a certain time (lit. a)¹⁰² or the information in question does no longer fulfill the requirements of a trade secret, laid down in Article 2 (1), for reasons that cannot be attributed to the respondent (lit. b). The existence of the provision is reasonable and contributed to the specific circumstances in interim

¹⁰¹ According to the prevailing opinion in the legal literature, the term "required" ("erforderlich") in section 938 ZPO incorporates the principle of proportionality, cf. *Greger*, P. 29.

¹⁰² According to Article 10 (3) lit. 3), it is up to the court to determine a reasonable period. Otherwise the period shall not exceed 20 working days or 31 calendar days, whichever is the longer.

proceedings. These comprise the summary evaluation of evidence as well as the prevention to create a *fait accompli* prior to a final judicial clarification.

Article 10 (4) enables the competent judicial authorities to make the provisional measures laid down in Article 9 subject to the lodging of adequate securities by the applicant in order to compensate the respondent or any other person affected by those measures for any prejudice suffered. The draft directive does not provide any guidance when the lodging should be taken into consideration by the court. Thereby, it will be up to the Member States or the national courts to create corresponding guidelines or to refer to existing legal traditions. Yet unclear is the inclusion of "any other person" into the scope of the provision. In this regard, the wording is too broad because it could require the court to take into consideration multiple persons when setting the amount of the securities. Following the contradictorily character of a civil proceeding, the security should only compensate the respondent of such measure. Any other person that could suffer damages from those measures should be excluded from the provision and referred to the general civil or tort law in order to claim compensation.

Lastly, Article 10 (5) allows an injured respondent or third party to apply for compensation for any injury caused by the provisional measures if they are revoked because the applicant does not institute proceedings leading to a final decision within a certain time,¹⁰³ the measures lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no trade secret infringement. Similar to the above-mentioned concerns, the provision also covers third parties. In favor of such approach may speak that in practice also third parties can be affected and suffer damages by an ordered measures, for example in case that a third cannot re-sale alleged infringing goods due to the seizure or prohibition to sell against the respondent. However, as this example shows are these kind of damages only based on indirect injuries. Thereby, it must be asked whether indirect damages by third parties should be recoverable under the strict liability of Article 10 (5).¹⁰⁴ Against such an approach speaks that the applicant of interim measures could face a boundless

¹⁰³ Cf. the reference in paragraph 5 to Article 10 (3) lit. a).

¹⁰⁴ In general, the question is not unknown in legal literature. For instance, it is disputed in the legal literature whether section 945 ZPO - which corresponds with the rules laid down in Article 10 (5) - also provides compensation for third parties, cf. *Mayer in Vorwerk/Wolf*, BeckOK, Section 945 ZPO, Para. 5.

liability. This problem is even enhanced by the fact that the directive does not provide any limitation regarding the personal scope of the liability regime of Article 10 (5), but rather covers any injured third party. Taking this into account, it is conceivable that such a broad liability could have a deterring effect on trade secret holders to apply for measures in legal proceedings. This again would evidently contradict with the aim of the draft directive to remove obstacles for the protection of trade secrets. Thus, third parties should be deleted from the strict liability regime in Article 10 (5).

3.4.6.4. Element of urgency and adoption of measures without consultation

Despite the above-mentioned aspects, the provision also misses to cover certain aspects. In general, interim measures require an element of urgency in order to justify the reduced examination requirements regarding the granting of relevant measures.¹⁰⁵ The draft directive does not include such a requirement, nor does it clarify that the urgency is in case of a trade secret infringement presumed. Thereby, the draft directive should either incorporate a corresponding element of urgency or implement a corresponding presumption for the case that a trade secret is unlawfully acquired, used or disclosed.¹⁰⁶

Another missing aspect concerns the possibility to order an interim measure without an oral hearing and consultation of the respondent. Article 9 (4) of the Enforcement Directive provides such procedure in case that any delay would cause irreparable harm to the rightholder. Such a provision seems to be even more essential in trade secret cases. Due to the fact that the continuing use or disclosure of an information can lead to the loss of secrecy and thereby the legal protection, trade secret holders have a great interest in having effective measures against the violation of their trade secret. However, this efficiency is ensured most likely if the measures can be ordered without the knowledge of the infringer. Otherwise, the infringer could even facilitate the use or disclosure and

¹⁰⁵ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 52.

¹⁰⁶ See inter alia section 12 (2) of the German Unfair Competition Law (UWG) which lays down a presumption of urgency in order to secure the cessation and desistance claims specified in this Act.

thereby endanger the loss of confidentiality even more. Taking this into consideration, it is convincing that the directive should be supplemented with a regulation that allows the stop or prevention of an infringement without the previous knowledge of the opponent party.

3.4.7. Measures resulting from a final decision - Article 11

In case a final decision is taken that finds a trade secret infringement, Article 11 provides trade secret holders with injunctions and corrective measures against the infringer in question. The provision stipulates the complement to Article 9, which incorporates measures in case of interim proceedings.

The measures laid down in Article 11 (1) lit. a) and b) are similar to those regulated in Article 9 (1) lit. a) and b).¹⁰⁷ In addition, Article 11 (1) provides further measures which are not incorporated into Article 9. This includes the possibility of corrective measures (lit. c) and the destruction of all or part of any physical and/or electronic media containing or implementing the trade secret or, where appropriate, the delivery to the applicant (lit. ca).¹⁰⁸ The corrective measures are regulated in more detail in paragraph 2 of Article 11. These comprise the recall of infringing goods (lit. b), the depriving of infringing goods from their infringing quality (lit. c) and the destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided that such an action does not undermine the protection of the trade secret in question (lit. d). Another corrective measure is the destruction of all or part of any document, object, material, substance or electronic file containing or implementing the trade secret or, where appropriate, the delivery up to the trade secret holder of the named things (lit. e).

3.4.7.1. General remarks

As the wording indicates, the trade secret holder can apply for "one or more" of the included measures. Thereby, the current draft clarifies - contrary to the

¹⁰⁷ See Chapter 3.4.8.2.

¹⁰⁸ This provision was added in the Parliament draft.

original draft - the possibility to apply for several measures at same time in order to provide sufficient protection.

In contrast to the original draft by the Commission, the possibility to apply for a declaration of infringement (lit. f) was deleted. This may derive from the fact that the trade secrets directive provides in Article 14 the publication of a judicial decision, whereby a separate claim of the trade secret holder for a specific declaration would have been redundant.

Regarding the new introduced Article 11 (1) lit. ca) which covers the destruction or delivery of physical or electronic media, it can be questioned whether this provision is placed systematically correct. The measures resemble the corrective measures laid down in Article 11 (2) lit. e). Thus, the amended measures should be incorporated in the catalogue of corrective measures.

3.4.7.2. Delivery of goods

Following the possibility of withdrawing infringing goods from the market, laid down in Article 11 (2) lit. b), Article 11 (3) subparagraph 1 allows the delivery of those goods up to the holder or to charitable organizations upon his or her request, provided that the judicial authority determines conditions which prevent the re-entry of the goods in question into the market.

Taking into account that trade secret holders will most likely favor the complete removal of the infringing goods - by destroying the goods in question or delivering up to him - in order to prevent any further uncontrolled distribution, the practical relevance of the delivery to a charitable organization can be called into question. Although the provision obliges the judicial authority to provide specific conditions to avoid this issue, it might be doubtful whether trade secret holders will rely on this in practice.

Regardless of this aspect, the proposal should still clarify that the delivery must be in compliance with the principle of proportionality. Article 11 (3) subparagraph 3 and Article 12 (1), which include safeguards for the application of the mentioned injunctions and corrective measures, do not apply directly to

the measure in Article 11 (3).¹⁰⁹ As the infringer loses his property throughout the delivery of his or her goods and the directive does not contain any compensation, it should be at least clarified that the measure is subject to the safeguards in Article 12 (1).

3.4.8. Conditions, safeguards and alternative measures - Article 12

Article 12 stipulates further conditions and safeguards regarding the adoption of injunctions and corrective measures laid down in Article 11. This includes primarily the application of the principle of proportionality and the revocation of granted measures once the information in question cannot be regarded as a trade secret any longer. In this regard, the provision contains similar aspects as Article 10. However, unlike Article 10, Article 12 provides in paragraph 3 also alternative measures in form of pecuniary compensation.

3.4.8.1. Conditions regarding the adoption of relevant measures

Article 12 (1) requires a case-by-case evaluation of several criteria in order to assess the proportionality of the requested measures. The contained elements are equal to those laid down in Article 10 (2). Thereby, the above-mentioned remarks apply in the same matter.¹¹⁰

In addition, Article 12 (1) lays down in subparagraph 2 that the competent authorities limit the length of duration of the measures referred to in Article 11 (1) lit. a) to ensure that it is sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the trade secret infringement in question and to avoid the creation of unjustified obstacles.¹¹¹ With regard to those obstacles, the provision names fair competition, innovation

¹⁰⁹ Cf. the wording of both provisions, which explicitly refers only to injunctions and corrective measures.

¹¹⁰ See Chapter 3.4.9.3.

¹¹¹ Those measures include the cessation or prohibition of the use or disclosure of a trade secret.

and labor mobility. The provision has no correspondent in Article 10, which is reasonable due to the provisional character of the interim measures, and also no equivalent in the Enforcement Directive.

The intention behind the provision seems to be to exclude too time-extensive prohibitions against the infringer of a trade secret. This decision is welcomed. Still, the current wording of the provisions seems to require that the length of duration must be limited every time a measure referred to in Article 11 (1) lit. a) is ordered. In this regard, the original draft by the Commission provided a clearer solution by stating that “*when* the competent authorities limit the duration of the measure [...], such duration shall be sufficient to eliminate any commercial or economic advantage”. Taking this into consideration, the proposal should clarify that the judicial authorities “*may* limit the length of the duration”.

3.4.8.2. Revocation of granted measures

Article 12 (2) lays down that the measures referred to in Article 11 (1) lit. (a) and (b) are revoked or otherwise cease to have effect upon request of the respondent. Like Articles 8 (1) lit. a) and 10 (3) lit. b), this requires that the information in question no longer fulfils the conditions of Article 2 (1) for reasons that cannot be attributed directly or indirectly to the respondent. Due to the corresponding wording, the previous made remarks apply in the same manner. The only difference is that the cease of effect now concerns measures that are ordered in main proceedings which result in a final decision. This could lead to a situation where the requirements of Article 12 (3) might be fulfilled but normal legal remedies be already time-barred. In that case, the Member States will have to provide specific procedures to allow the revocation of a final decision without any temporal limitation in order to transpose the provision properly.

3.4.8.3. Alternative measure: pecuniary compensation

Article 12 (3) provides the possibility of pecuniary compensation as an alternative to the injunctions and corrective measures laid down in the draft.

Pursuant to this provision, the competent judicial authority may order such pecuniary compensation to the injured party in case that the measures provided for in Article 11 are being applied and all of the requirements laid down in lit. (a) to (c) are fulfilled. This includes that the person concerned at the time of use or disclosure neither knew nor had reason, under the circumstances, to know that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully (lit. a), the execution of the measures in question would cause that person disproportionate harm (lit. b) and the pecuniary compensation to the injured party appears reasonable satisfactory (lit. c). In case that the alternative measure is ordered instead of the cessation or prohibition laid down in Article 11 (1) lit. a) and b), subparagraph 2 of Article 12 (3) allows to limit the extend of the pecuniary compensation.¹¹²

Summarized, the provision enables a differentiated liability for those infringers who acquired a trade secret in good faith but only became aware at a later stage that the information in question was unlawfully obtained by another person before.¹¹³ This provision is welcomed, because it allows a more differentiating liability for those persons who acted in good faith. In this case, it is reasonable to avoid the application of injunctions or corrective measures, as these measures can be very harmful, for example by causing high costs or financial losses. In this context, it is also appreciated that the current proposal amended the wording to the effect that the initiation of such an alternative measure can be now ordered at the request of *one* of the parties. Taking the beneficial character behind this provision into account, it is only reasonable that

¹¹² Pursuant to Article 12 (3) subparagraph 2, the pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had the person requested authorization to use the trade secret in question, for the period of time for which use of the trade secret could have been prohibited.

¹¹³ Cf. Recital 18.

the infringer is able to request the adoption of such alternative measure as well.¹¹⁴

3.4.9. Damages - Article 13

Article 13 of the draft directive allows the trade secret holder to claim damages from the infringer in case of the culpable violation of the trade secret.¹¹⁵

3.4.9.1. Basic requirements

According to Article 12 (1), the competent judicial authority can order the infringer, on the application of the injured party, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, disclosure or use of a trade secret if the infringer knew or ought to have known that he or she was engaging in a trade secret violation.

Taking this, the provision basically requires the infringement of a trade secret pursuant to Article 3 of the draft directive, the fault of the infringer and the suffering of damages by the trade secret holder as a result of the infringement. Regarding the element of fault, the wording of the draft covers intentional and negligent behavior of the infringing person, whereby Article 13 covers - due to the lack of differentiation - ordinary and gross negligence.

In addition to the original draft by the Commission, the Parliament draft regulates now in Article 13 (1a) explicitly the liability of employees for damages. According to this provision, Member States can limit the liability of employees in accordance with their national laws and practices in case they acted without intent. This decision is also welcomed, because it allows the Member States to apply their national rules and traditions regarding the liability relief of employees.¹¹⁶

¹¹⁴ Cf. Article 12 (3) of the Commission draft which enables only the applicant to request such compensation.

¹¹⁵ A corresponding provision is laid down in Article 13 of the Enforcement Directive.

¹¹⁶ For instance, see the liability-restricting principles of in-company damage compensation in Germany (innerbetrieblicher Schadensausgleich).

3.4.9.2. Determining of the remunerable damages

Regarding the setting of the recoverable damages, Article 13 (2) subparagraph 1 requires the competent judicial authority to take into account all appropriate factors. Pursuant to this provision, this comprises several factors, such as negative economic consequences, including lost profits, any unfair profits made by the infringer and non-economical factors such as the moral prejudice caused to the trade secret holder by the trade secret infringement. Alternatively, Article 13 (2) subparagraph 2 allows the judicial authority, in appropriate cases, to set the damages as a lump sum on the basis of elements such as, at a minimum, the amount of royalties or fees which would have been due if the infringer had requested authorization to use the trade secret in question.

Taking this into account, the paragraph corresponds with the rules laid down in the Enforcement Directive.¹¹⁷ Equal to Article 13 (1) lit. a) of the Enforcement Directive, the provision covers lost profits of the trade secret holder, unfair profits made by the infringer and non-economical factors. However, despite the similarities between both legal frameworks, it must be questioned whether the current version of the draft is appropriate and in compliance with the rationale of the draft directive and the characteristics of trade secret and their infringements.

3.4.9.2.1. Unfair Profits

At first, the question arises whether unfair profits of the infringer should be recoverable under the regime of the trade secrets directive. The compensation of unfair profits in intellectual property cases results from the fact that the right holders often cannot number if and to which amount their property got damaged by an infringement.¹¹⁸ This derives, among other things, from the immaterial and ubiquitous character of intellectual properties. Under these circumstances, intellectual property laws grant the right holders the claim for unfair profits, even though this claim is not (primarily) focused on compensation of the right holder

¹¹⁷ See Article 13 (1), subparagraph 2, lit. (a) and (b) of the Enforcement directive. Despite minor modifications, the wording is very concordant.

¹¹⁸ Cf. *Metzger*, P. 10.

but absorption of profits from the infringer as a kind of surrogate.¹¹⁹ Taking these aspects into account, it is reasonable to apply them in the same manner to trade secret infringements. Trade secrets share significant elements with intellectual properties,¹²⁰ so that trade secret holders face the same issues in proving their suffered losses in case of a violation of their trade secrets. Thereby, it is consistent to provide trade secret holders with the same rights as intellectual property right holders, including the claim for unfair profits. This is also in accordance with the aim of the draft directive. The draft explicitly states in Recital 11 that it aims to deter infringements of trade secrets. Thereby, the rationale of the draft also corresponds with the deterring effect of absorbing the unfair profits from the infringer.¹²¹

3.4.9.2.2. Moral factors

Another issue affects the incorporation and interpretation of moral factors. The draft directive does not clarify whether those factors include only immaterial damages and/or reputational damages resulting from a trade secret infringement.¹²² In case of the latter, those factors could be recognized as material damages or - in the wording of the draft directive - economic consequences. In the first case, the question would be whether the compensation of immaterial damages can be justified in the context of trade secret protection. This depends on whether trade secrets also constitute - similar to intellectual property rights - an outflow of the personality of the right holder.¹²³ Taking into consideration that trade secret protection results from ensuring the confidential character of an information, the protection of personality seems to be excluded or at least secondary. Under these circumstances, the incorporation of immaterial factors would seem to be inconsistent. However, this approach is of course not fixed. Therefore, the European legislator should re-evaluate the protection of personality in the field

¹¹⁹ Cf. *Metzger*, P. 11 and 12.

¹²⁰ Such as the ubiquitous and immaterial character, see *McGuire*, GRUR 2015, P. 426.

¹²¹ Cf. *Metzger*, P. 13 who states that the absorbing of unfair profits has a punitive and thereby deterring effect.

¹²² Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 457.

¹²³ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 457.

of damages. In case that this is approved, this should be clarified in the proposal in more detail.

3.4.9.2.3. Relation between different damage factors

Coming to the conclusion that lost profits and unfair profits are recoverable, another issue affects the relation of the listed factors in Subparagraph 1. While the setting of a lump sum clearly functions as an alternative to those factors in subparagraph 1, the relationship between the different factors within subparagraph 1 is unclear, especially if the trade secret holder is entitled to claim unfair profits and lost profits cumulatively or just alternatively. Following this, the European legislator should clarify the wording or provide further guidance in the recitals.

3.4.9.2.4. Setting of a lump sum

Regarding the claim of a lump sum by the trade secret holder, the provision allows the setting in “appropriate cases”. The possibility of claiming a lump sum plays a significant role in intellectual property cases. This is contributed to the above-mentioned circumstances, whereby right holders often fail to number and prove their suffered losses. In case the infringer does not have any unfair profits, it is recognized in several jurisdictions of the Member States to grant the right holder of intellectual property compensation in form of a lump sum on the basis of hypothetically due royalties (so-called “license analogy”).¹²⁴ As trade secret holders can face the same issues in numbering and proving their damages as, the application of a lump sum in the draft directive is consistent as well.

According to the wording in paragraph 2, the courts are allowed to set the sum *at a minimum* of due royalties. This indicates that the courts can also set higher amounts. This is contributed to the different traditions in the Member States (especially with regards to intellectual property cases), whereby some countries

¹²⁴ Cf. Metzger, P. 14 with regards to intellectual property cases.

grant the simple amount of royalties, while others grant twice or even third the amount of due royalties.¹²⁵ Due to the open wording, which gives the competent court a margin, the provision recognizes the different traditions in the Member States. Besides, it allows a flexible reaction to different cases, inter alia, in case of commercial or private infringement of trade secrets.¹²⁶ In order to avoid too extensive royalties, a cap of the recoverable amount will most likely result from the general principle of proportionality, which is laid down as a general element in Articles 5 (2) lit. a) and 6 (1), lit. a).¹²⁷

3.4.9.3. Interim conclusion

All in all, Article 13 of the draft directive provides a sufficient framework for the applicant to claim damages. Due to the essential parallels to rules laid down in the Enforcement Directive, a homogenous system for damage claims can be established in the European legal framework. However, the provision still lacks minor issues which should be clarified by the European legislator until the directive will entry in force.

3.4.10. Publication of judicial decisions - Article 14

Article 14 of the draft directive regulates the publication of judicial decisions referring to trade secret infringements. According to paragraph 1, the competent judicial authority may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision. This encases the publishing of the decision in full or in part in printed or electronic media, including the webpage of the infringer. As the wording indicates, the listed measures are not exclusive. Thereby, other measures are also conceivable like the publication of a press release which contains the necessary information.¹²⁸

¹²⁵ Cf. *Metzger*, P. 14 u. 15 with regards to intellectual property cases.

¹²⁶ Cf. *Metzger*, P. 16 with regards to intellectual property cases.

¹²⁷ Cf. *Metzger*, P. 16 for a similar approach in the context of the Enforcement directive.

¹²⁸ In this regard, see Recital 20 which states that the publication of decisions includes prominent advertising.

The aim behind the provision seems to be the deterrence of further infringements as well as the sensitization of the public.¹²⁹ In addition, it strengthens the rights of applicants by giving him an enforceable right to publish the decision and the necessary information referring to the case.

Contrary to the Enforcement Directive, Article 14 provides more detailed requirements regarding the order of such publication measures. For instance, the taken measures shall preserve the confidentiality of trade secrets as provided for in Article 8 of the draft directive.¹³⁰ Furthermore, the competent judicial authorities need to assess whether a measure complies with the principle of proportionality. In this regard, the provision lays down in paragraph 3 several aspects which need to be taken into account. Pursuant to this paragraph, this comprises the question whether the information on the infringer would allow the identification of a natural person and, if so, whether the publication of that information would be justified. In this regard, the criteria that shall be taken into consideration concern, in particular, the possible harm that such a measure may cause to the privacy and reputation of the infringer, his conduct and the likelihood of further unlawful use or disclosure of the trade secret by him.

3.4.11. Sanctions - Article 15

Article 15 requires the Member States to ensure that competent judicial authorities may impose sanctions on the parties, their legal representatives and any other person who fails or refuses to comply with any measure adopted pursuant to Articles 8, 9 and 11. In case of Articles 9 and 11, the draft requires the imposing of recurring penalty payments, provided that the national law of a Member State provides those sanctions. As it was already pointed out in chapter 3.4.8.2, the provision aims to ensure the compliance with the measures laid down in the above-mentioned provisions. Thereby, Article 15 can be regarded as a useful supplement to those provisions.

¹²⁹ Cf. Recital 20.

¹³⁰ Cf. Article 14 (2).

3.5. Missing aspects

Despite the fact that the draft directive contains detailed substantive and procedural rules, the draft also lacks regulating certain aspects.

3.5.1. Right to information and preservation of evidence

One of these aspects affects the incorporation of claims for information and preserving of evidence.¹³¹

The Enforcement Directive provides in Articles 6 to 8 detailed rules regarding the right of information and preserving of evidence in order to enable the right holders of intellectual properties to enforce their rights efficiently. In this regard, the rights laid down in the Enforcement Directive supplement the right holder to get access to the necessary information from the opponent party and preserve them from being destroyed or getting lost. Thereby, it is assured that the “main” claims of a rights holder resulting from an infringement, for example applying for injunctions or claiming damages, can be substantiated in a legal proceeding with reasonable evidence. Without supplementary claims, the enforcement of rights in a legal proceeding could be jeopardized.

The same aspects apply in trade secret cases as well. According to *Harte-Bavendamm*, the access to as well as the preservation of information and evidence are essential in the field of trade secret protection.¹³² Thereby, the provision of appropriate rules is recommendable. Nevertheless, these provisions would need to respect the specific features of trade secret protection.¹³³ In this regard, *Kalbfus* states that the right to information and to preserve evidence are primarily focused on the reconstruction of information flows in order to find out who acquired, used or disclosed the trade secret.¹³⁴ Thus, not only information about distribution channels, quantities or prices of

¹³¹ In this regard see also the remarks by *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 457 and *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 56.

¹³² Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 457.

¹³³ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 57; *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 457.

¹³⁴ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 457.

infringing goods are necessary but also names of persons that might be involved in the infringement.

The incorporation in the draft directive is also preferable because it would allow to establish harmonized rules in the Member States. Even though the national laws may already provide certain rules in this behalf, it seems consistent to stipulate a uniform regulation in order to avoid or reduce legal diversities.¹³⁵ Furthermore, it would allow the European legislator to lay down appropriate safeguards and conditions, such as the recognition of the principle of proportionality, protection of confidentiality and prohibition of misuse.¹³⁶

3.5.2. Relationship to the Enforcement Directive

Another point concerns the question in which relation the draft directive stands to the Enforcement Directive, especially to which extend the rules of the Enforcement directive can be applied if the draft directive does not provide any appropriate rules.

Recital 28 of the draft directive states that the measures adopted to protect trade secrets should not affect any other relevant law in other areas including intellectual property law. However, where the scope of application of the Enforcement Directive and the current proposal overlap, the trade secrets directive shall take precedence as *lex specialis*.

Following this wording, the recital is rather misleading. Article 1 of the Enforcement directive mentions that the respective directive provides rules for the enforcement of intellectual property rights. Thus, the first sentence of recital 28 in the draft directive rather precludes the application the Enforcement Directive in general due to its application to intellectual property rights. Another conclusion would be conceivable if one assumes that sentence 2 of Recital 28 constitutes an exemption from the exclusion of intellectual property rights in favor of the Enforcement Directive so that the directive would be applicable to the protection of trade secrets if the draft directive does not provide adequate

¹³⁵ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 56.

¹³⁶ Cf. *Knaak/Kur/Hilty*, Comments of the Max Planck Institute, Para. 56 and 57.

provisions in a specific context.¹³⁷ This interpretation seems consistent due to the great structural parallels between the Enforcement Directive and the trade secrets draft. However, it seems to be contradicted by Recital 10. This recital lays down that the provisions of the draft directive should not create any exclusive right. According to several authors, this indicates that the directive recognizes trade secrets rather as a part of unfair competition law than as intellectual property.¹³⁸ Taking this into consideration, it could be assumed that the trade secrets directive does not *overlap* with the Enforcement directive due to the application in different areas of law. Following this discourse, the draft directive should clarify in Recital 28 the application of the Enforcement Directive in further detail.

As the foregoing discussion has shown, it would be also desirable to regulate the legal status of trade secrets in a more clear way. This would not only help to clarify the application of the Enforcement Directive but also the application of Articles 6 or 8 of the Rome II regulation.¹³⁹

3.5.3. Level of harmonization

Another issue affects the question which level of harmonization the proposed directive stipulates. The draft directive does not provide a clear solution in this matter. Thereby, it is not clear whether the directive aims at establishing a concept of full harmonization, which excludes stricter rules by the Member States, or minimum harmonization, which would allow the Member States to establish stricter rules where admitted.¹⁴⁰ This should be amended in the recitals or Article 1 in order to provide sufficient clarification for the Member States in case that the directive will be transposed.

¹³⁷ Cf. *Cook*, P. 56; *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 11 and 12.

¹³⁸ Cf. *Knaak/Kurl/Hilty*, Comments of the Max Planck Institute, Para. 11, 12 and 17, who also come to the conclusion that it is not clear whether this effect may be binding for the Member States.

¹³⁹ Cf. *Cook*, P. 56.

¹⁴⁰ Cf. *Kalbfus/Harte-Bavendamm*, GRUR 2014, P. 453.

4. Conclusion

Taking the foregoing analysis into consideration, the current draft directive provides a well-balanced solution for the protection of trade secrets. Due to the additional amendments provided by the Legal Affairs Committee in the current version of the draft directive, the proposal contains further conditions and safeguards which are essential for such a balance as well as clarifications in order to provide a better understanding of the directive.

The alignment to the Enforcement Directive in chapter 3 allows a coherent protection of trade secrets and intellectual properties. Another benefit of the current proposal is established through the substantive provisions laid down in chapter 1 and 2. The incorporated definitions for several key terms enable a concrete application of the remedies, measures and procedures laid down in chapter 3 and thereby allow an efficient and harmonized level of protection.

Despite those positive effects, this thesis has also shown that the draft directive still offers room for several improvements. This is contributed, *inter alia*, to the use of open clauses and the lack of sufficient clarifications in the directive. Even though these clauses provide a flexible approach for the Member States and competent courts, the directive should provide further guidance and clarifications in order to ensure that the objectives pursued by the directive are achieved properly. This could avoid possible preliminary rulings by the CJEU in the future and at the same facilitate the application of the draft directive.

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