

## CHAPTER II

### Acquisition, use and disclosure of trade secrets

#### *Article 2a*

#### *Lawful acquisition, use and disclosure of trade secrets*

1. The acquisition of trade secrets shall be considered lawful when they are obtained by any of the following means:
  - (a) independent discovery or creation;
  - (b) observation, study, disassembly or test 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;
  - (c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union and national law or practices;
  - (c) any other practice which, under the circumstances, is in conformity with honest commercial practices.
  
- 1a. The acquisition, use and disclosure of trade secrets shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.

*Article 3*

*Unlawful acquisition, use and disclosure of trade secrets*

1. Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret.
2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:
  - (a) unauthorised access to, appropriation of, or copy of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
  - (f) any other conduct which, under the circumstances, is considered contrary to honest commercial practices;
3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder by a person who is found to meet any of the following conditions:
  - (a) have acquired the trade secret unlawfully;
  - (b) be in breach of a confidentiality agreement or any other duty not to disclose the trade secret;
  - (c) be in breach of a contractual or any other duty to limit the use of the trade secret.

4. The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of acquisition, use or disclosure, knew or should, under the circumstances, have known that the trade secret was obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.
5. The production, offering or placing on the market of infringing goods, or import, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret when the person carrying out such activities knew, or should, under the circumstances, have known that the trade secret was used unlawfully within the meaning of paragraph 3.

*Article 4*  
*Exceptions*

Member States shall ensure that the application for the measures, procedures and remedies provided for in this Directive is dismissed when the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

- (a) for exercising the right to freedom of expression and information as set out in the Charter of Fundamental Rights of the European Union, including respect for freedom and pluralism of the media;
- (b) for revealing a misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;
- (c) the trade secret was disclosed by workers to their representatives as part of the legitimate exercise of their representative functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;
- (e) for the purpose of protecting a legitimate interest recognised by Union or national law.

## CHAPTER III

### Measures, procedures and remedies

#### Section 1

#### General provisions

#### *Article 5*

#### *General obligation*

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against unlawful acquisition, use and disclosure of trade secrets.
2. The measures, procedures and remedies referred to in paragraph 1 shall:
  - (a) be fair and equitable;
  - (b) not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays;
  - (c) be effective and dissuasive.

*Article 6*

*Proportionality and abuse of litigation*

1. The measures, procedures and remedies provided for in accordance with this Directive shall be applied in a manner that:
  - (a) is proportionate;
  - (b) avoids the creation of barriers to legitimate trade in the internal market, and
  - (c) provides for safeguards against their abuse.
  
2. Member States shall ensure that competent judicial authorities -may, upon request of the respondent, apply appropriate measures as provided for in national law, where a claim concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. These measures may, as appropriate, include awarding damages to the respondent, imposing sanctions on the applicant or ordering the dissemination of the information concerning the decision taken in accordance with Article 14.

Member States may provide that these measures are dealt with in separate proceedings.

*Article 7*  
*Limitation period*

1. Member States shall, in accordance with this article, lay down rules on the limitation periods applicable to the substantive claims and actions for the application of the measures, procedures and remedies pursuant to this Directive.

Those rules shall determine when the limitation period begins to run, the duration of the limitation period and the circumstances under which the limitation period is interrupted or suspended.

2. The duration of this limitation period shall not exceed six years.

*Article 8*

*Preservation of confidentiality of trade secrets in the course of legal proceedings*

1. Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in the legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, shall not be permitted to use or disclose any trade secret or alleged trade secret, which the competent judicial authorities have, in response to a duly reasoned application by the interested party, identified as confidential and of which they have become aware as a result of such participation or access. Member States may also allow competent judicial authorities to take such measures on their own initiative.

The obligation referred to in the first subparagraph shall remain in force after the legal proceedings have ended. However, such obligation shall cease to exist in any of the following circumstances:

- (a) where the alleged trade secret is found not to fulfil the requirements set out in point (1) of Article 2 by a final decision;
- (b) where over time, the information in question becomes generally known among or readily accessible to persons within the circles that normally deal with that kind of information.

2. Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures 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 the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.

The measures referred to in the first subparagraph shall at least include the possibility:

- (a) to restrict access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;
- (b) to restrict access to hearings, when trade secrets or alleged trade secrets may be disclosed, and their corresponding records or transcript to a limited number of persons;
- (c) to make available to any person other than those comprised in the limited number of persons referred to in points (a) and (b) a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.

The number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than what is necessary in order to ensure compliance with the right to an effective remedy and to a fair trial of the parties to the proceedings and shall include, -at least, one natural person from each party and the respective lawyers or other representatives of those parties to the proceedings.



3. When deciding on the measures referred to in paragraph 2 and assessing their proportionality, the competent judicial authorities shall take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate of third parties, and any potential harm for either of the parties, and where appropriate third parties, resulting from the granting or rejection of such-measures.
4. Any processing of personal data pursuant to paragraphs 1, 2 and 3 shall be carried out in accordance with Directive 95/46/EC.

Section 2  
Provisional and Precautionary Measures

*Article 9*  
*Provisional and Precautionary Measures*

1. Member States shall ensure that the competent judicial authorities may, at the request of the trade secret holder, order any of the following provisional and precautionary measures against the alleged infringer:
  - (a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret on an provisional basis;
  - (b) the prohibition to produce, offer, place on the market or use infringing goods, or import, export or store infringing goods for those purposes;
  - (c) the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into or circulation within the market.
  
2. Member States shall ensure that the judicial authorities may, as an alternative to the measures referred to in paragraph 1, make the continuation of the alleged unlawful use of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder. Disclosure of a trade secret shall not be allowed against the lodging of guarantees.

*Article 10*

*Conditions of application and safeguards*

1. Member States shall ensure that the competent judicial authorities have, in respect of the measures referred to in Article 9, 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 trade secret holder and that the trade secret has been acquired unlawfully, that the trade secret is being unlawfully used or disclosed, or that an unlawful acquisition, use or disclosure of the trade secret is imminent.
  
2. Member States shall ensure that in deciding on the granting or rejecting of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account the specific circumstances of the case. This assessment shall include, where appropriate, the value of the trade secret, the measures taken to protect the trade secret or other specific features of the trade secret, as well as the conduct of the respondent in acquiring, using or disclosing of the trade secret, the impact of the unlawful use or disclosure of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights.

3. Member States shall ensure that the provisional measures referred to in Article 9 are revoked or otherwise cease to have effect, upon request of the respondent, if:
  - (a) the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority, within a reasonable period determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer;
  - (b) in the meantime, the information in question no longer fulfils the requirements of point (1) of Article 2, for reasons that cannot be attributed to the respondent.
4. Member States shall ensure that the competent judicial authorities may make the provisional measures referred to in Article 9 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the respondent and, where appropriate, by any other person affected by the measures.
5. Where the provisional measures are revoked on the basis of point (a) of paragraph 3, where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no unlawful acquisition, use or disclosure of the trade secret or threat of such conduct, the competent judicial authorities shall have the authority to order the applicant, upon request of the respondent or of an injured third party, to provide the respondent, or the injured third party, appropriate compensation for any injury caused by those measures.

Member States may provide that these measures are dealt with in separate proceedings.

### Section 3

#### Measures Resulting from a Decision of the Merits of the Case

##### *Article 11*

##### *Injunctions and corrective measures*

1. Member States shall ensure that, where a judicial decision taken on the basis of the merits of the case finds an unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant, order *one or more of the following measures* against the infringer:
  - (a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret;
  - (b) the prohibition to produce, offer, place on the market or use infringing goods, or import, export or store infringing goods for those purposes;
  - (c) the adoption of the appropriate corrective measures with regard to the infringing goods.
  - (ca) 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 applicant of all or part of those documents, objects, materials, substances and electronic files.

2. The corrective measures referred to in point (c) of paragraph 1 shall include:
  - (b) recall of the infringing goods from the market;
  - (c) depriving the infringing goods of their infringing quality;
  - (d) destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided that such measure does not undermine the protection of the trade secret in question;
3. Member States may provide that, when ordering the withdrawal of the infringing goods from the market, the judicial authorities may order, at the request of the trade secret holder, that the goods be delivered up to the holder or to charitable organisations.
4. The judicial authorities shall order that the measures referred to in point (c) and (ca) of paragraph 1 be carried out at the expense of the infringer, unless there are particular reasons for not doing so. These measures shall be without prejudice to any damages that may be due to the trade secret holder by reason of the unlawful acquisition, use or disclosure of the trade secret.

## *Article 12*

### *Conditions of application, safeguards and alternative measures*

1. Member States shall ensure that, in considering a request for the adoption of the injunctions and corrective measures provided for in Article 11 and assessing their proportionality, the competent judicial authorities shall be required to take into account the specific circumstances of the case. This assessment shall include, where appropriate, the value of the trade secret, the measures taken to protect the trade secret, or other specific features of the trade secret, as well as the conduct of the infringer in acquiring, using or disclosing of the trade secret, the impact of the unlawful use or disclosure of the trade secret, the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties, the legitimate interests of third parties, the public interest and the safeguard of fundamental rights.

When the competent judicial authorities limit the duration of the measure referred to in points (a) and (b) of Article 11(1), such duration shall be sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, use or disclosure of the trade secret.

2. Member States shall ensure that the measures referred to in points (a) and (b) of Article 11(1) are revoked or otherwise cease to have effect, upon request of the respondent if in the meantime the information in question no longer fulfils the conditions of point (1) of Article 2 for reasons that cannot be attributed directly or indirectly to the respondent.

3. Member States shall provide that, at the request of the person liable to be subject to the measures provided for in Article 11, the competent judicial authority may order pecuniary compensation to be paid to the injured party instead of applying those measures if all the following conditions are met:
- (a) 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;
  - (b) execution of the measures in question would cause that person disproportionate harm;
  - (c) pecuniary compensation to the injured party appears reasonably satisfactory.

When the pecuniary compensation is ordered instead of the order referred to in points (a) and (b) of Article 11(1), such pecuniary compensation shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prohibited.



## *Article 13*

### *Damages*

1. Member States shall ensure that the competent judicial authorities, on the application of the injured party, order the infringer who knew or ought to have known that he or she was engaging in unlawful acquisition, disclosure or use of a trade secret, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret.

Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer when they act without intent.

2. When setting the damages pursuant to paragraph 1, the competent judicial authorities shall take into account all appropriate factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret.

However, the competent judicial authorities may also, in appropriate cases, 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 authorisation to use the trade secret in question

*Article 14*

*Publication of judicial decisions*

1. Member States shall ensure that, in legal proceedings instituted for the unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including publishing it in full or in part.
2. Any measure referred to in paragraph 1 of this Article shall preserve the confidentiality of trade secrets as provided for in Article 8.
3. In deciding whether to order a measure referred to in paragraph 1 and assessing its proportionality, the competent judicial authorities shall take into account, where appropriate, the value of the trade secret, the conduct of the infringer in acquiring, using or disclosing the trade secret, the impact of the unlawful disclosure or use of the trade secret, and the likelihood of further unlawful use or disclosure of the trade secret by the infringer.

The competent judicial authorities shall also take into account whether the information on the infringer would allow to identify a natural person and, if so, whether publication of that information would be justified, in particular in the light of the possible harm that such measure may cause to the privacy and reputation of the infringer.

## CHAPTER IV

### Sanctions, Reporting And Final Provisions

#### *Article 15*

##### *Sanctions for non-compliance with the obligations set out in this Directive*

Member States shall ensure that the competent judicial authorities may impose sanctions on any person who fails or refuses to comply with any measure adopted pursuant to Articles 8, 9, and 11.

The sanctions provided for shall include the possibility to impose recurring penalty payments in case of non-compliance with a measure adopted pursuant to Articles 9 and 11.

The sanctions provided for shall be effective, proportionate and dissuasive.

#### *Article 16*

##### *Exchange of information and correspondents*

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and the Commission.

*Article 17*

*Reports*

1. By XX XX 20XX [three years after the end of the transposition period], the European Union *Intellectual Property Office*, in the context of the activities of the European Observatory on Infringements of Intellectual Property Rights, shall prepare an initial report on the litigation trends regarding the unlawful acquisition, use or disclosure of trade secrets pursuant to the application of this Directive.
2. By XX XX 20XX [four years after the end of the transposition period], the Commission shall draw up an intermediate report on the application of this Directive, and submit it to the European Parliament and the Council. This report shall take due account of the report referred to in paragraph 1.

It shall examine in particular the possible effects of the application of this Directive on research and innovation, mobility of employees and on the exercise of the right of the freedom of expression and information.

3. By XX XX 20XX [eight years after the end of the transposition period], the Commission shall carry out an evaluation of the effects of this Directive and submit a report to the European Parliament and the Council.

*Article 18*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by XX XX 20XX [24 months after the date of adoption of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 19*  
*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

*Article 20*  
*Addressees*

This Directive is addressed to the Member States.

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