

## CCBE position European Commission proposal for a Directive on the protection of undisclosed know-how and business information (trade secret) against their unlawful acquisition, use and disclosure (COM(2013) 813 final, 2013/0402 (COD))

31/10/2014

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE has been following very closely the initiative of the European Commission in improving the conditions for innovative business activity, in particular to adequately improve the effectiveness of the legal protection of trade secrets against misappropriation through the Internal Market.

The significant differences in the legal protection of trade secrets provided for by the EU-Member States imply that trade secrets do not enjoy an equivalent level of protection throughout the European Union; this fragmentation actually leads to legal uncertainty and negative effects to the functioning of the Internal Market. The CCBE, therefore, agrees with the Commission that it seems to be appropriate to approximate the national legal rules in order to ensure a sufficient and consistent level of protection of trade secrets throughout the European Union.

Overall, the proposal seems to be well balanced bearing in mind that on the one hand an adequate level of protection of trade secrets against unlawful misappropriation is an indispensable precondition for further innovation and the development of innovative business models but that on the other hand too strict and too far-reaching rules on the protection of trade secrets also could negatively effect innovation and competition.

Furthermore, the procedural rules for proceedings in connection with the alleged misappropriation of trade secrets shall provide a sufficient level of preservation of trade secrets in the course of any such proceedings in order not to deter the owner of trade secrets to start legal proceedings; but at the same time, the procedural rules shall fully respect the rights of all parties involved to a fair trial.

However, the CCBE is concerned that some of the rules proposed by the Commission do not sufficiently take into account of lawyers' position within the administration of justice and contradict the principle of fair trial. The duty of loyalty to the client includes the obligation to promptly, conscientiously and diligently advise and represent the client and to keep the client informed as to the progress of the matter with which the lawyer has been entrusted (*cp. CCBE Code of Conduct, art 3.1.2*). The principle of fair trial requires (among others) that all and any information relevant for the court decision must be disclosed to all parties involved in the proceedings in order to allow them to properly defend their rights.

The main concern in this respect relates to Article 8 of the proposal of the EU-Commission (preservation of confidentiality of trade secrets in the course of legal proceedings). This provision would grant the judge far reaching rights to restrict access to any document and/or hearing containing trade secrets. Art 8 para 2 lit a) and b) of the proposal of the Commission provide for the possibility:

*"(a) to restrict access to any document containing trade secrets submitted by the parties or third parties, in whole or in part;*

*(b) to restrict access to hearings, when trade secrets may be disclosed, and their corresponding records or transcript. In exceptional circumstances, and subject to appropriate justification, the competent judicial authorities may restrict the parties' access to those hearings and order them to be carried out only in the presence of the legal representatives of the parties and authorised experts subject to the confidentiality obligation referred to in paragraph 1;"*

This means that a lawyer who has access to documents which form part of those legal proceedings shall not be permitted to use or disclose to his client any such documents or other evidence which the lawyer has become aware of as a result of such proceedings.

The CCBE is of the opinion that such a provision is not compatible with Article 6 of the European Convention on Human Rights. A fair trial requires that all parties shall have the unrestricted right to comment on all and any evidence presented to the court; otherwise the fundamental principle of equality of all parties involved as well as the right to be heard is not safeguarded.

Moreover, one has to be aware that without full and unrestricted disclosure of all and any documents and other evidence, a party is not in a position to review if the decision of the judge is correct. This also is true with respect to the decision under art 8 of the proposal of the Commission under which the judge can decide not to disclose documents and/or other evidence which is not material: without having access to the documents/evidence it is not possible for the party/its legal representative to review or appeal such decision, especially to review if the excluded documents/evidence actually are not material for the outcome of the proceedings.

Furthermore, this provision contradicts the lawyers' obligation of loyalty towards his client. If the lawyer is bound by a confidentiality obligation, the lawyer is hindered to properly and comprehensively inform the client about the status of the proceedings. In this context one has to take into account that the lawyer needs the information and factual input by the client in order to properly represent the interests of the client: if the lawyer cannot inform the client of the evidence presented to the court by the other party, the lawyer cannot seek for the information and evidence necessary to properly react to the documents presented by the other party and/or to the other evidence produced during the proceedings. This again clearly shows that the provision proposed by the Commission is not compatible with the principle of fair trial.

The CCBE, therefore, concurs with the opinion of the Member States expressed in the "[General Approach](#)" by the Council (Interinstitutional File 2013/0402 [COD]) "*that the mechanism for preservation of confidentiality of information foreseen in Article 8 should be subject to additional safeguards, requirements and limits aimed to reinforcing legal certainty and full respect for the rights of the parties to a fair trial*".

In this context, the CCBE is of the opinion that the version of the directive proposal as amended by the Member States is a step in the right direction and addresses in a constructive and balanced way the concerns raised above.

In particular, the CCBE underlines that article 8 (1) as amended by the Council no longer lists «legal representatives» among the circle of persons on which a judicial authority may under certain circumstances put an obligation of non-disclosure. The CCBE reaffirms that a lawyer can in no way be subject to an obligation of non-disclosure towards his client: the right to a fair trial implies the right for a lawyer to communicate freely with his client and to keep his client informed on all the matters with which the lawyer has been entrusted, including information relating to trade secrets or alleged trade secrets.

The modified wording of article 8 (2) which addresses the possibility for judicial authorities to take under certain circumstances specific measures in order to preserve the confidentiality of alleged trade secrets also represents an improvement compared to the initial draft proposal by the Commission stipulating that measures restricting the number of persons that may have access to documents containing trade secrets or alleged trade secrets and / or to hearings and their corresponding records or transcripts can be taken by judicial authorities «*provided that at least one person from each party, its respective lawyer or representative to the proceedings... are given full access to any such document ..... and are given full access to such hearing, records or transcript*». To avoid any doubts as to the circle of those persons that cannot be prevented by judicial measures from having access to all documents and to all hearings, records and transcripts of hearings, the CCBE suggests a redrafting of the amended article 8 (2) in order to clarify that «*at least one person from each party and the respective lawyer or representative to the proceedings of each party*» shall have access to all such documents and hearings.

In addition, the CCBE likes to draw the attention to Art 7 of the proposal: neither in the proposal of the Commission nor in the version amended by the Council there is a clear definition as to the time when the limitation periods starts to run: thus follows that the Member States are free to determine the time when the limitation period starts to run. The more, whereas under the proposal of the Commission the Member States were bound to set the limitation period in a narrow range between 1 and 2 years, the amended version deletes the minimum limitation period and extends the maximum limitation period to six years, thereby allowing the Member States to fix the limitation period anywhere between a couple of days and up to six years. Already now, there are very heterogenous provisions in the national laws of the Member States as to the duration and starting point of limitation periods with respect to claims in connection with the infringement of immaterial property rights, including trade secrets. Such diversity not only is the source of legal uncertainty but also increases the likelihood of "forum-shopping". The CCBE, therefore, strongly recommends to amend art 7 of the proposal by including a provision on the beginning of the limitation period as well as by fixing the duration of the limitation period in order to actually harmonise the national rules with respect to the statute of limitation.

The CCBE expects that its suggestions will be duly taken into account in the further legislative process.