



EUROPEAN COMMISSION
Directorate General Internal Market and Services
INTELLECTUAL PROPERTY
Fight against counterfeiting and piracy

**PUBLIC CONSULTATION ON THE PROTECTION AGAINST MISAPPROPRIATION OF TRADE SECRETS
AND CONFIDENTIAL BUSINESS INFORMATION**

SUMMARY OF RESPONSES

The public online consultation was launched on 11 December 2012 and closed on 8 March 2013. The questionnaire was made available in all official languages of the Union. This summary provides an overview of the responses and results.

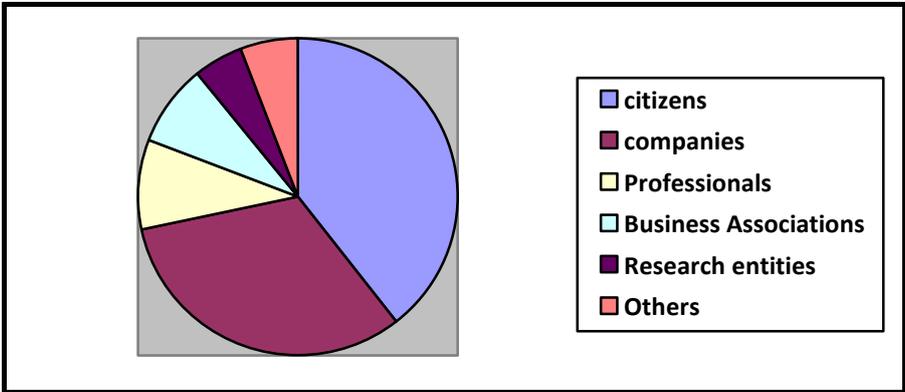
386 responses were filed using the online tool¹, coming from almost every Member State. No replies came from Greece, Lithuania, Luxembourg, Latvia, and Malta². Germany (111 replies) and France (70) were by far the Member States from which most responses came from. Together Germany and France account for 47% of the responses. Belgium (36) Sweden (26), Poland (22), Spain (18), Italy (15), Austria (11) have also had significant levels of participation and together account for one third of the total number of responses. Around 10% of the responses came from EU-wide organisations.

Table 1: Number of respondents by geographic origin

Austria	11	Greece	0	Portugal	4
Belgium	36	Hungary	2	Romania	3
Bulgaria	2	Ireland	1	Slovak Republic	1
Cyprus	1	Italy	15	Slovenia	1
Czech Republic	7	Latvia	0	Spain	18
Denmark	3	Lithuania	0	Sweden	26
Estonia	2	Luxemburg	0	United Kingdom	4
Finland	3	Malta	0		
France	70	Netherlands	8	EU-wide	28
Germany	111	Poland	22	Other	7

Concerning the type of respondent³, the consultation triggered many replies from both citizens (152 responses - 39% of the total) and companies (125 - 32%). 35 responses came from professionals (9%), 32 from business associations (8%), 19 from research entities (5%), seven from trade unions (2%), 5 from NGOs (1%) and three from public authorities (1%)⁴. The eight remaining respondents did not indicate any of the above categories. 15% of the respondents were SMEs and micro-enterprises (59 responses in total).

Figure 1: Share of respondents by type



¹ The Commission services also received position papers from some interested parties, triggered by this public consultation. These position papers have not been taken into account for this summary.

² The consultation was carried out when Croatia was not yet a member of the EU.

³ These figures are based on the self-declaration by respondents. However, although seven respondents have declared themselves as trade unions, two of them should probably not be considered as such as it seems that the French word used for 'trade union', 'syndicat', also means 'association', and that is what these two respondents from France seem to be. Furthermore, one trade union has submitted its contribution twice. See also Box 1.

⁴ Namely the Governments of Sweden and Estonia, as well as the government of Friuli Venezia Giulia (Regione Autonoma Friuli Venezia Giulia).

Box 1: Observations regarding multiple or copied contributions

An analysis of individual responses suggests that there has been a particularly strong mobilisation in some sectors. Two economic groups have provided a total of eight replies via four affiliated companies in each case. Another economic group provided three replies from different affiliated companies, and in one case, an economic group provided two replies. Citizens have also been mobilised by a political party in several Member States. This led to a significant number of identical responses which follow a dedicated template ('answering guide') published on the Internet and promoted by that party.

I. Role and importance of trade secrets

The importance of Trade secrets for R&D, innovation, competitiveness, growth and jobs (questions I.1 and I.2)

The majority of respondents see a strong positive influence of trade secrets on: R&D in companies (44%); the exploitation of innovation (45%); innovation and competitive performance of SMEs (42%); large companies operating internationally (44%).

More than 65% of companies see a strong positive influence of trade secrets in the above-mentioned areas.

For 67% of SMEs trade secrets have a strong positive impact on SMEs' innovative and competitive performance.

Citizens have a contrasting view on the role and importance of trade secrets. While a majority sees a weak positive impact on the exploitation of innovation, trade secrets are otherwise generally seen as having a negative impact (either weak or strong) on R&D (in both research entities and companies), on innovative and competitive performance (of both SMEs and large companies) and on growth and jobs as well as on competitiveness of the EU in the world.

There was a split across the respondents as to whether trade secrets have a strong negative (37%) or strong positive (31%) influence on research in research institutions. 37% of research entities find that trade secrets have a strong negative influence on research in research institutions, while 26% see a strong positive influence. However, 53% of research entities regard trade secrets as having a strong positive influence in R&D in companies.

37% of all respondents indicated that trade secrets have a strong positive influence on the competitiveness of the EU in the world, whereas 13% see a strong negative influence.

Views are split about the importance of trade secrets for growth and jobs: 37% of all respondents consider that they are of high importance, 17% find them important and 43% stated that trade secrets are of low importance. 44% of SMEs and micro-enterprises, and 60% of all companies, find trade secrets highly important for growth and jobs.

27% of all respondents find that trade secrets have a positive influence on consumer choice, while 23% are of the opposite view. 51% of all respondents see a negative correlation between trade secrets and lower prices for goods and services. The majority of citizens see no influence on consumer choice (56%), but a larger number of them (69%) regard trade secrets as having a strong negative effect on prices of goods and services.

Trade secrets as a tool for business and research bodies (question I.3)

58% of respondents find that trade secrets are an important tool for business and research bodies to protect their valuable information. 40% of the respondents do not agree that trade secrets are an important tool for business and research bodies to protect their valuable information.

63% of responding research entities finds that trade secrets are an important tool for business and research bodies to protect their valuable information.

91% of participating companies see trade secrets as an important tool. Nearly half of those see trade secrets as complementing intellectual property rights, while the other half finds them important as both a complement and alternative to intellectual property rights. Only 2% of responding companies see trade secrets exclusively as an alternative to intellectual property rights.

II. Views on the existing level of protection of trade secrets against their misappropriation

Under the current state of affairs the protection of trade secrets is weak, appropriate or excessive? (question I.4)

A substantial part of the respondents (between 37% and 39%) find that protection of trade secrets is excessive at national level and internationally, both within the EU and globally (for example when trade secrets are misappropriated in a non-EU country and then used in the EU to compete against its legitimate owner).

23% of respondents find legal protection appropriate at national level. 15% find it appropriate throughout the EU and only 8% find it appropriate at International level.

28% of respondents find that the existing national protection against misappropriation of trade secrets is weak; 37% are of the opinion that protection in the EU in a cross-border context is weak, and 43% see the protection at global scale as weak.

Replies from companies and research entities (i.e. those more likely to hold trade secrets and to be exposed to trade secret misappropriation) show a substantially different picture: 45% find the protection at national level weak (whereas 31% find it appropriate); 57% find that protection in a cross-border context in the EU is weak (whereas 16% find it appropriate); and 63% find that the protection at a global level is weak.

Member States referred to as providing a weak level of protection (question I.5)

Respondents that considered national protection as weak were asked to indicate the Member State or Member States they were referring to.

The table below shows the number of respondents that have indicated a particular Member State as having a weak level of legal protection of trade secrets against misappropriation.

Sweden, Finland, Denmark, Portugal and Germany were the countries least mentioned.

France, Poland, Bulgaria, Czech Republic, the United Kingdom, Belgium and Cyprus were identified by at least 20 respondents as countries with a weak level of protection.

Table 2: Number of responses identifying protection in a certain Member State as weak

Austria	19	Germany	4	Netherlands	18
Belgium	20	Greece	19	Poland	24
Bulgaria	22	Hungary	17	Portugal	4
Cyprus	20	Ireland	4	Romania	23
Czech Republic	21	Italy	19	Slovak Republic	18
Denmark	2	Lithuania	19	Slovenia	18
Estonia	19	Luxemburg	15	Spain	11
Finland	1	Latvia	18	Sweden	1
France	74	Malta	4	United Kingdom	21

Weakness of protection (question I.6)

Respondents were also asked to specify where they see the weakness on the current legal protection against misappropriation of trade secrets when doing business across borders. Multiple replies were possible.

Table 3: Weakness of protection

	% of all	% of all companies	% of all citizens	% of all liberal professionals	% of all business associations	% of all Research entities
Differences in the scope of protection in the EU Member States	38%	61%	14%	48%	75%	26%
Cost of litigation and enforcement in other EU Member States	35%	60%	11%	48%	60%	26%
Difficulties associated with insufficient knowledge on the legal framework of other EU Member States	38%	60%	12%	40%	81%	32%
Non-EU goods using stolen trade secrets are not barred from entering into the EU	34%	58%	11%	40%	69%	26%
Other	14%	10%	1%	8%	19%	0%

15 respondents indicated other weaknesses. Some reported that in certain Member States trade secrets protection legislation is fragmented or embedded in different pieces of legislation, thus hindering its legibility and visibility. Others highlighted that insufficient respect for trade secrets in the EU makes the EU less attractive for industry compared to third countries with more robust protection. Other respondents referred to difficulties in obtaining sufficient evidence of misappropriation.

Impact of divergent national protection of trade secrets against misappropriation when carrying out business across borders in the EU (question I.7)

Respondents were asked whether divergent rules had an impact, and if so, what the nature of the resulting impact would be. According to one third of the respondents (131) there is no impact, whereas 62% of the respondents (241 in total, including 114 companies, 53 citizens, 32 business associations, 19 liberal professionals and 16 research entities) find that such an impact exists, in particular the following:

- higher business risk in the Member States with weaker protection when doing business across borders (indicated by 50% of all respondents and 82% of the companies);
- less incentive to undertake cross-border R&D (38% of all respondents, 59% of companies and 42% of research entities), and
- increased expenditure in preventive measures to protect information (37% of all respondents, 54% of companies and 42% of research entities)

51% of the companies and 42% of the research entities have further indicated that different national rules on the protection of trade secrets against misappropriation reduce cross-border business activity as trust in legal protection in other Member States is diminished.

For 67% of citizens differences in national laws have no impact on trade secret protection. 18% find that such differences cause higher business risk in the Member States with weaker protection.

III. Possible action from the European Union

Should legal protection against misappropriation of trade secrets be addressed at EU level? (Question I.8.)

According to 52% of the respondents the legal protection against the misappropriation of trade secrets should be addressed by the EU. Companies, SMEs, professionals, business associations and research entities are in general favourable of EU action. A vast majority of citizens, however, does not see a need for EU action. The table below shows the extent of support for an EU initiative within the specific categories of respondents.

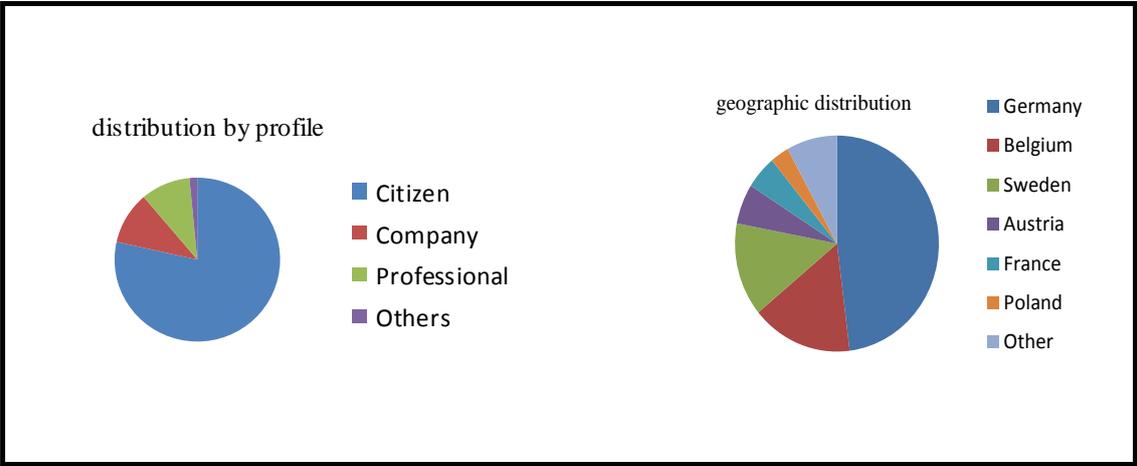
Table 4: Need of EU action

	No of respondents	EU should act	No EU action required	No opinion or no answer
All respondents	386	52%	41%	7%
Citizens	152	19%	75%	6%
Companies (including SMEs)	125	80%	12%	8%
SMEs	59	73%	13%	15%
Professionals	35	49%	40%	11%
Business associations	32	94%	6%	0%
Research entities	19	58%	32%	11%

Respondents of the opinion that no action is required (158 in total) are mostly citizens (114). There are also 15 companies and 14 liberal professionals. Nearly 80% of respondents that do not see a need for an EU initiative come from Germany, Belgium or Sweden.

46% of respondents not favouring an EU initiative declare not to hold any trade secrets and 15% claim to hold trade secrets of crucial importance. The charts below provide an overall view of the profile and geographic distribution of respondents for whom no EU action is required. For the position of trade unions and public authorities, see boxes 5 and 6.

Figure 2: Respondents not in favour of EU action by category and country



General options for an EU initiative (question I.8.1)

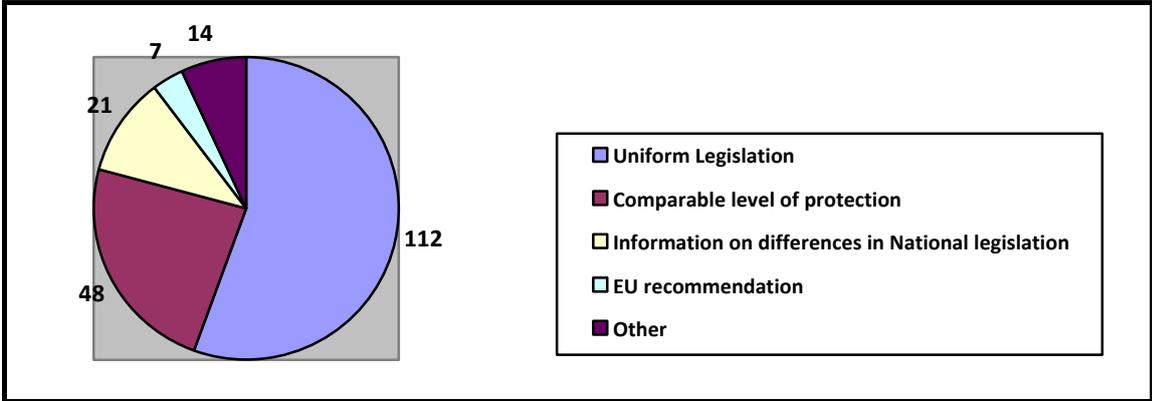
Respondents favourable to an EU action (202), half of which are companies, are geographically more widespread (29% from France, 14% from Germany, 12% from an EU wide organisation, 8% from Poland, 7% from Spain, 5% from Italy and 4% from Belgium). 12% hold no trade secrets and 58% of them hold trade secrets which they consider of crucial importance. These respondents were provided with four general options for a possible EU initiative and asked to choose only one:

- 55% indicated that “there should be uniform EU legislation on the misappropriation of trade secrets”
- 24% opted for an “EU legislation establishing a comparable level of protection.”

The other two options were (a) the provision of information on the differences in national legislation (preferred by 10% of the respondents favourable to an EU action) and (b) a Recommendation from the

European Commission inviting Member States to improve national laws (4% of the respondents favourable to an EU action).

Figure 3: Possible EU initiative



Other options suggested by respondents: some supported the combination of a legislative option and an information action by an EU body. One respondent was in favour of the “fastest option to implement”. Some respondents suggested that EU action should also address the “protection of trade secrets/confidential information disclosed by companies to public authorities, including EU institutions”.

What should the content of a possible EU legislative instrument or recommendation be? question I.9).

Respondents were asked to give their views on the content of a possible recommendation from the European Commission or EU legislation. They were provided with seven non-exclusive options (multiple replies possible) and the possibility of suggesting other measures.

According to the majority of respondents an EU initiative should include the following:

Table 5: Possible content of an EU initiative – need for action

	Yes ⁵	No
Prohibition of acts of misappropriation of trade secrets and definition of such acts	53%	42%
Rules ensuring that the confidentiality of the trade secret is kept during court proceedings and hearings, so that the trade secret is not further disclosed in the course of legal action	51%	41%
Empower courts to order a stop to the unlawful use of the misappropriated trade secrets in the whole of the EU	49%	42%
Empower courts to order all customs authorities in the EU to stop at the EU borders imports of products manufactured in a non-EU country using misappropriated trade secrets	48%	43%

For a majority of respondents the EU should not act in the following areas:

⁵ Thus the percentages here indicate of the portion of all respondents to the consultation that are in favour of the measure in question

Table 6: Possible content of an EU initiative – no need for action

	No	Yes
Uniform contractual rules on non-compete and/or non-disclosure clauses between the trade secrets owner and employees	55%	32%
Rules on criminal penalties and/or fines for individuals and organisations responsible for misappropriation of trade secrets	52%	39%

Views are split as regards to whether or not there should be EU rules on the calculation of damages allowing taking into consideration all relevant factors, such as lost sales, unjustified profits by the defendant or fictitious/presumed royalties.

Table 7: Possible content of an EU initiative – inconclusive results

	No	Yes
Rules on the calculation of damages making it possible to consider all relevant factors (including presumed royalties)	43%	43%

The great majority of citizens are not favourable to any of the above-mentioned measures (with rejection rates above 75%).

By contrast the following content is supported by more than 60% of companies:

Table 8 Possible content of an EU initiative – companies' view

	Yes	No
Prohibition of acts of misappropriation of trade secrets and definition of such acts	82%	11%
Empower courts to order the stop of the unlawful use of the misappropriated trade secrets in the whole of the EU	76%	14%
Empower courts to order all customs authorities in the EU to stop at the EU borders imports of products manufactured in a non-EU country using misappropriated trade secrets	77%	13%
Rules ensuring that the confidentiality of the trade secret is kept during court proceedings and hearings, so that the trade secret is not further disclosed in the course of legal action	78%	11%
Rules on the calculation of damages making it possible to consider all relevant factors (including presumed royalties)	66%	14%
Rules on criminal penalties and/or fines for individuals and organisations responsible for misappropriation of trade secrets	62%	24%

Half of the companies also find that an EU initiative should comprise uniform contractual rules. 30% of the companies do not agree.

Concerning other stakeholders, see the following table.

Table 9: Possible content of an EU initiative – by profession

	% of all citizens		% of all liberal professionals		% of all business associations		% of all research entities	
	Yes	No	Yes	No	Yes	No	Yes	No
Prohibition, and definition, of acts of misappropriation	18%	80%	51%	46%	88%	6%	63%	26%
Court orders stopping unlawful use of trade secrets in the EU	18%	76%	46%	49%	88%	3%	60%	32%
Court orders requesting customs to stop imports of infringing goods at EU borders	17%	77%	40%	51%	84%	6%	47%	32%
Rules on the calculation of damages	19%	77%	46%	46%	50%	19%	37%	42%
Uniform rules on non-compete and/or non-disclosure contractual clauses	15%	81%	34%	57%	22%	63%	53%	32%
Rules on criminal penalties and/or fines	16%	82%	31%	63%	47%	41%	53%	32%
Rules ensuring the confidentiality of trade secrets in civil law proceedings	20%	76%	40%	49%	91%	3%	63%	32%

Other possibilities

Several respondents called for clear definitions of ‘trade secrets’, ‘misappropriation’ and ‘owner of trade secrets’. At the same time, it was recognised that these definitions should not be overly prescriptive as these concepts are likely to evolve together with technology.

Some respondents were in favour of legislation on corrective measures, such as the destruction of the goods manufactured using misappropriated trade secrets.

A few respondents suggested addressing evidence-related issues. One respondent underlined that, in his view, reverse engineering should not be allowed.

In their comments, several respondents underlined that contractual freedom is important, thus reinforcing the replies against EU action on uniform contractual rules on non-compete/non-disclosure clauses. However, a few of them suggested that, even if EU action was not appropriate, Member States should improve their rules in this regard.

Positive and negative effects and impacts of a possible EU level legislation (question I.10)

For 51% of the respondents EU legislation would have positive effects. Respondents were allowed to indicate more than one positive effect (if any) and more than one negative effect (if any).

58% of research entities and 81% of the companies indicated one or more positive effects. Only 6% of citizens have indicated positive effects.

The table below shows the different positive effects indicated by respondents.

Table 10: Positive effects and impacts of EU legislation

	Total No	Share
Better protection against the misappropriation of trade secrets/confidential business information	178	46%
Safer business environment would create better opportunities for different players to cooperate in R&D and innovation projects ("network/collaborative innovation" as opposed to "in-house innovation")	164	43%
A better legal protection of the results of innovative activities would trigger more investment in R&D and innovation	139	36%
Companies/researchers could better rely on effective cross-border law enforcement and costs would be lower when litigating in other EU Member States	131	34%
Greater expected returns from sharing, licensing or transferring know-how	115	30%
Better conditions for SMEs to raise funding or venture capital	105	27%
Companies/researchers would have to spend less for company-specific protective measures	74	19%

For 95% of companies an EU action would result in better protection against misappropriation. A majority of companies expected the positive effects suggested to materialise (with rates ranging from 54% to 78%); the only exception being 'savings would be made on company-specific protective measures' which only one third of the companies expect.

Table 11: Positive effects and impacts of EU legislation – by type of respondent

	Companies	Citizens	Liberal professionals	Business associations	Research entities
Better protection against the misappropriation	95%	11%	40%	91%	53%
Safer business environment would create better opportunities for "network innovation" as opposed to "in-house innovation"	78%	15%	40%	88%	47%
More investment in R&D and innovation	68%	10%	37%	78%	42%
More effective cross-border enforcement and costs lower litigation costs in other EU Member States:	33%	9%	34%	41%	32%
Greater expected returns from sharing, licensing or transferring know-how	55%	6%	31%	78%	37%
Better conditions for SMEs to raise funding or venture capital	54%	6%	29%	69%	32%
Lower expenditure in company-specific protective measures	32%	8%	19%	41%	21%

Some respondents referred to improved deterrence, more legal certainty and encouragement of innovation as additional positive impacts which could result from EU rules. A few respondents underlined that the international credibility of the EU would increase, thereby providing a positive example to third countries which are currently not protecting trade secrets.

Negative effects and impacts of a possible EU level legislation (question I.10)

43% of all respondents attach at least one negative effect to a possible EU legislation.

Table 12: Negative effects and impacts of EU legislation

	Total No	All respondents	Citizens	Companies
More court cases where companies try to raise market barriers for competitors	149	39%	97%	13%
Waste of resources in duplicative research ('re-inventing the wheel' if know-how is kept secret):	140	36%	96%	10%
Risk of abusive behaviour by competitors	138	36%	88%	12%
Incremental innovation more difficult (harder to build on others' innovation)	138	36%	94%	11%
Risk of endangering the existing balance between labour, civil and criminal law at national level	134	35%	86%	10%
Less labour mobility:	111	29%	76%	7%

The negative effect most often mentioned by respondents is the increase in the number of court cases where companies try to raise market barriers for competitors. This is also the case when only citizens or only companies are considered

The least frequently mentioned negative effect indicated by respondents is lower job mobility. Once again, this is also the case when only citizens or only companies are considered.

Similar results are obtained when separately looking at the responses provided by liberal professionals, business associations and research entities: a higher number of litigation cases brought for the purpose of raising barriers for competitors and the risk of abusive behaviour are the two possible negative impacts most often mentioned, whereas lower labour mobility is the least frequently mentioned negative impact associated with a possible EU legislation on misappropriation of trade secrets.

Table 13: Negative effects and impacts of EU legislation – by type of respondent

	Liberal professionals	Business associations	Research entities
More court cases where companies try to raise market barriers for competitors	37%	13%	37%
Waste of resources in duplicative research ('re-inventing the wheel' if know-how is kept secret)	34%	8%	32%
Incremental innovation more difficult (harder to build on others' innovation)	34%	7%	32%
Risk of abusive behaviour by competitors	37%	20%	42%
Risk of endangering the existing balance between labour, civil and criminal law at national level	37%	7%	37%
Less labour mobility	29%	7%	26%

In their comments, some respondents expressed concerns that protection of trade secrets at EU level could be detrimental to innovation (e.g. contrary to a patent, protected information is not disclosed to the public, so society would not benefit) or could result in anti-competitive behaviour. A few respondents highlighted that protection of trade secrets could threaten freedom of speech, the right of information or whistleblowing practices. It was also invoked that EU rules on trade secret protection could facilitate opaque political action and undermine the transparency of public institutions and companies.

EU legislation on misappropriation of trade secrets and the Internal Market for intellectual property (question I.11)

46% of respondents find that the functioning of the Internal Market for intellectual property would benefit from EU legislation on misappropriation of trade secrets, mainly because:

- greater legal certainty and easier enforcement would further encourage the exchange of intellectual property across borders in the EU (156 or 40% of all respondents);
- better coordination and/or harmonisation would help in deterring misappropriation from non-EU countries and make intra-EU cooperation more attractive (144 or 37% of all respondents). 72% of the companies agreed with these views.

However, a similar percentage of respondents (43%) do not agree. According to them the functioning of the Internal Market for intellectual property would not benefit from EU legislation on the misappropriation of trade secrets because such legislation would only incentivise companies to control and protect their intellectual property even more (143 respondents – 37% of all respondents) or because research cooperation and transfer of know-how across borders in the EU will not increase much as other factors hamper such activities and would not be solved (135 respondents 35% of all respondents).

Some respondents noted that EU legislation would in addition increase competitiveness of EU industry as well as accelerating growth and sustainable economic recovery. It was also underlined that improved protection against misappropriation of trade secrets will not result in fewer patents, but in a better tool to foster innovation and it would provide greater choice and flexibility to R&D companies. According to some respondents, EU entities would be less reluctant to develop certain markets and more willing to engage and partner with other actors across borders. A respondent indicated that “the current lack of harmonised protection for intellectual property in the form of trade secrets remains a big hole in the achievement of the single market”.

Several respondents added that the concept "internal market for intellectual property" was not understandable. Individual comments also included the following:

- focusing on intellectual property is negative for society, research, innovation and the economy.
- less laws is better than new laws.
- the EU should protect individuals, not corporations.

IV. Use of trade secrets, their misappropriation and legal action

Holding trade secrets and making efforts to protect them (questions II.1 and II.2)

223 respondents (58% of all respondents) declare to hold trade secrets. Of these 150 respondents (40% of all respondents) claim to hold trade secrets that they consider of crucial importance. 37% of all respondents make considerable efforts to protect their trade secrets.

Most respondents declaring to hold trade secrets of crucial importance are companies (63%), individuals working in liberal professions (7%) and research entities (4%) but, interestingly, a substantial part of those trade secret holders are citizens (19%). The views expressed by these different stakeholders diverge. For the majority of the citizens that claim to hold trade secrets that they consider of crucial importance trade secrets are not an important tool for business and research bodies in the EU (55%), they consider legal protection at national level excessive (52%) and do not see a need for EU action on legal protection against misappropriation of trade secrets (52%). By contrast, companies, liberal professionals and research entities, holding trade secrets of crucial importance, regard trade secrets as an important tool for business and research bodies in the EU (95%), consider legal protection at national level weak (54%) and favour EU action (88%).

70% of all responding companies and research entities hold trade secrets of crucial importance and 65% make considerable effort to protect them; for SMEs and micro-enterprises the respective figures are 61% and 58%.

Technology and know-how agreements (question II.3)

41% of all respondents have entered into technology or know-how transfer agreements. These are mostly companies (60%), but also citizens (22%), liberal professionals (8%) and research entities (6%). Most companies (77%) are or have been parties to such agreements either at national level or abroad.

Instances of trade secret misappropriation and typical actors (questions II.4 and II.5)

75 respondents (19% of all respondents), mainly companies (77%), but also citizens (15%) report to have suffered misappropriation of an important trade secret, either once or twice (38 respondents) or more frequently (37 respondents). Typical perpetrators of trade secret misappropriation are:

- former employees (indicated by 53% of respondents that have been subject to trade secret misappropriation),
- suppliers/customers (indicated by 52%), and
- competitors (48%).

The percentages do not add up as some respondents have suffered misappropriation more than once. In addition, several actors might have been involved in one instance of misappropriation (for example, a competitor acting together with a customer or employee).

32% of the responding companies reported never to have been victims of trade secret misappropriation, whereas 46% have at some point suffered misappropriation of important trade secrets. (22% once or twice, 25% more often). The vast majority of companies from which trade secrets have been misappropriated are either active EU wide (24%) or operating from France (29%), Germany (14%) Austria, Spain or Poland (5% each).

Legal action against misappropriation of trade secrets (question II.5)

Respondents that have reported instances of trade secret misappropriation were asked to indicate whether they sought legal redress. Given that half of them suffered trade secrets misappropriation more than once multiple choices were allowed and therefore percentages do not add up to 100. In at least 33 instances no action was taken. In at least 18 instances action was taken but it was not successful. In 19 cases, action was taken but it was not sufficient to compensate for the damages suffered. In at least 3 instances, action was taken and damages were sufficiently compensated.

In order to cover also other courses of action and outcomes respondents were given the possibility of submitting comments. This was used by some respondents to indicate that in some cases legal proceedings have been subsequently settled out of Court. In at least one case, the settlement was, in view of the respondent, for an “inappropriately low amount”, a result essentially due to “inappropriate protection”. Another respondent pointed out that it was unsuccessful in obtaining the destruction of the infringing goods. A respondent underlined that the decision not to initiate legal action was due to costs. Another one reported that once an injunctive order is obtained, claims for damages are often not pursued, due to complexity. In some cases, the legal action initiated by respondents was still pending.

Trade secrets and use of other forms of intellectual property (questions II.7 and II.8)

54% of all respondents use copyright, 38% trademarks, 32% patents and 24% designs.

Respondents do not have strong views on what could be a reason for not using patents, with 42% indicating ‘no opinion’. Some respondents stated that sometimes they would not be using patents because they were expensive (19%), ineffective (17%) or because they were not available for the subject matter at hand (17%). Within companies the reason most often indicated for not using patents is lack of availability (25%).

Respondents were even less assertive with respect to other intellectual property rights and possible reasons behind non-use of such forms of protection, with ‘no opinion’ rising to 47% in case of designs, 52% in case of trademarks, 49% in case of copyright and 53% in case of geographical indications.

V. Views of respondents by category

This chapter presents the findings of this consultation by category of respondents instead of by question.

What citizens say

Of the 152 participating citizens, nearly half (46%) are from Germany, 15% from Belgium, 11% from Sweden, 7% from France, 4% from Austria and 3% from Spain.

Most citizens regard trade secrets as having low importance for R&D (75%) as opposed to 18% that find them highly important. 77% do not believe that trade secrets are important for economic growth and jobs in the EU (77%). A similar majority considers that trade secrets are of medium importance for: (a) exploitation of innovation (i.e. turning an invention into a marketable product) (71%), (b) Innovative and competitive performance of SMEs (74%) and (c) Innovative and competitive performance of large companies which operate internationally (69%). While 55% of citizens find that trade secrets have no impact on consumer choice, 24% find that they have a strong negative impact on prices.

Three in four citizens regard existing legal protection of trade secrets as excessive at all levels (National, EU and International). 67% find that divergence of national laws has no impact on the protection of trade secrets against misappropriation and 75% do not see a need for an EU action, (against 19% that are supportive of an action at EU level). A large majority of responding citizens finds that a EU legislation would have the following negative impacts: more court cases where companies try to raise market barriers for competitors (97%), waste of resources in duplicative research (96%); incremental innovation would be more difficult (94%), increase risk of abusive behaviour by competitors (88%).

What SMEs and micro enterprises say

SMEs

48 SMEs (excluding micro enterprises) participated in the consultation. 13 respondents are from France, 9 from Germany, 6 from Italy, 5 from Poland and 3 from Spain. The remaining come from Austria, Belgium, Denmark and the Netherlands (with either one or two participants).

SMEs tend to regard trade secrets as highly important for R&D (81%) and exploitation of innovation (i.e. turning an invention into a marketable product) (75%). 25% find trade secrets of medium importance to the innovative and competitive performance of SMEs, whereas 69% see trade secrets as highly important for that matter. 88% consider trade secrets an important tool to protect valuable information either complementing or replacing intellectual property rights.

A significant proportion of SMEs finds protection in the EU weak at national level (44%) and even more consider it to be weak on a cross-border level (52%). 80% find that having different/divergent national rules means that there is a higher business risk in the Member States with weaker protection and for 60% of the SMEs this implies that there is less incentive to undertake research and development activities in a cross border context. According to 54% SMEs different/divergent national rules reduces cross-border business activity. 10% do not see a negative impact.

Half of the respondent SMEs hold patents. The major reasons for not using patents are: non-availability (indicated by one in three) and expensiveness (23%). 65% of SMEs consider trade secrets to be of crucial importance. 23% of SMEs were victims of trade secret misappropriation once or twice whereas 13% have been misappropriated more frequently. Thus, 36% of responding SMEs have suffered from trade secret misappropriation.

73% of the SMEs are in favour of having EU legislation on misappropriation of trade secrets, and 13% find that no such initiative is required. Those calling for action believe that such an initiative should cover: prohibition and definition of trade secrets (75%), empowering courts to order the stop of the use

of the misappropriated trade secrets in the whole EU and rules ensuring confidentiality of trade secrets during litigation (73%) and empowering EU customs authorities to stop infringing goods at borders (71%).

Micro enterprises

11 micro enterprises participated in the consultation. 55% consider that trade secrets have low importance for R&D and are not an important tool to protect valuable information. At the same time 91% find that trade secrets have a medium to high importance in the innovative and competitive performance of SMEs. 55% find existing protection at national level excessive (against 36% that see it as too weak) and see no negative impact from having different national laws throughout the Union. 64% are of the opinion that no EU action is required in this field.

What business organisations say

32 business organisations responded to the consultation, a large portion being French-based and EU wide organisations (10 and 8, respectively). 81% of the business organisations consider trade secrets to be highly important for growth and jobs in the EU, and around 90% find trade secrets as highly important for: R&D, exploitation of innovation, innovative and competitiveness of SMEs as well of large companies operating internationally. Business organisations tend to find trade secret protection as weak at national level (40%) against 16% that find it appropriate and 3% that find it excessive. There is a broader consensus on the weakness of protection on an EU level (81%) and globally (75%).

For 94% legal protection against the misappropriation of trade secrets should be addressed at EU level. 50% favour the adoption of uniform EU legislation, 22% would prefer legislation establishing a comparable level of protection across the EU, whereas for 8% Member States should be invited to improve their laws.

All responding business organisations perceive negative impacts in having different/divergent national rules on the protection of trade secrets against misappropriation. These include: higher business risk in the Member States with weaker protection (91%), increased expenditure in preventive measures to protect information (88%), less incentive to undertake research and development activities in a cross-border context (78%), increased costs in adapting licensing models to different/divergent national rules (63%) and reduced cross-border business activity as trust in legal protection in other Member States diminishes 53%).

A vast majority (94%) see positive effects/impacts in an EU initiative, including: better protection against misappropriation (91%), a safer business environment with better opportunities for different players to cooperate in R&D and innovation projects (88%), more investment in R&D and innovation and greater expected returns from sharing, licensing or transferring know-how (78%), more reliable cross-border enforcement and lower litigation costs (72%) and better conditions for SMEs to raise funding or venture capital (69%).

Some business organisations have also indicated negative impacts associated with an EU initiative, such as more court cases where companies try to raise market barriers for competitors (13%), risk of abusive behaviour by competitors and less labour mobility (9%)

According to more than 87% of responding business organisations an EU initiative should address the following (1) prohibition of acts of misappropriation of trade secrets and definition of such acts; (2) empowerment of courts to stop unlawful use of misappropriated trade secrets throughout the EU, and (3) rules ensuring the confidentiality of trade secrets during court proceedings and hearings.

Business organisations do not support the setting up of EU rules on non-compete and/or non-disclosure clauses, and are split on whether the EU should put forward criminal penalties or fines on misappropriation of trade secrets (47% in favour and 41% against).

What Member States say

Sweden agrees that it is meaningful to examine the possible benefits of EU action, but notes that misappropriation of trade secrets involves not only economic issues but also difficult and sensitive issues of how EU legislation would interrelate with national rules on labour law, whistleblowing and freedom of expression, which have not been addressed in the consultation. As a possible initiative from the European Commission Sweden would favour a Green Paper or a Communication (not limited to an economic or technical perspective) to be subsequently subject to a public consultation before any further action is taken.

Estonia finds trade secrets highly important for R&D, exploitation of innovation, innovative and competitive performance of both SMEs and large companies. It considers the protection of trade secrets against misappropriation weak at cross-border level in the EU and it favours the adoption by the European Commission of a recommendation inviting Member States to improve their respective national laws.

Denmark and France have sent written contributions outside the framework of the Internet based questionnaire.

Denmark attaches considerable importance to an effective protection of business and research information, which it considers of vital importance for competition in European markets, growth and employment in the European Economy and the international competitiveness of Europe as a whole. Legal protection against cross-border use of illegally acquired trade secrets can be improved. However, the public consultation in Denmark has resulted in no responses from stakeholders, and therefore the Danish Government finds that a more detailed examination of the issue, i.e. through a Green paper, should be carried out before taking any steps further towards legislation.

France considers that trade secrets have a strong positive impact on: (1) R&D in companies and research entities; (2) exploitation of innovation, innovation and competitive performance of SMEs and large companies; (3) growth and jobs as well as in competitiveness of the EU in the world, and (4) competitiveness of the EU in the world. France considers the existing legal protection of trade secret against misappropriation to be weak in the EU on a cross-border level and also at the global level. A definition of trade secrets at EU level should be inspired by the definition provided by TRIPS, and be sufficiently flexible to allow some margin of manoeuvre to Member States. France favours the dissemination of reliable information by a European body on the legal frameworks and the importance of protecting trade secrets as well as guidance on best practices. A possible EU legislation, or Recommendation, should comprise a definition of trade secrets and of misappropriation of trade secrets, and allow for court orders stopping unlawful use of trade secrets in the EU

What trade unions say

Four trade unions have participated in the survey. The three Swedish trade unions do not favour an EU initiative of legal protection on the trade secrets against misappropriation as they fear that it may disrupt the existing balance between labour, civil and criminal law in Sweden and hinder job mobility. Two of them further stressed the need to preserve transparency and freedom of expression, and expressed particular opposition to any EU initiative on criminal sanctioning of misappropriation of trade secrets.

A French association is in favour of an EU initiative leading to uniform EU legislation on the misappropriation of trade secrets.

What NGOs say

Five respondents have filed their replies to the public consultation as NGOs (Non-Governmental Organisations) although one of the contributions does not actually express any view on any of the questions asked. Two NGOs (Vrijschrift and European Digital Rights) do not see trade secrets as having a positive role for in R&D, innovation, competitiveness or growth and jobs, and do not support

an EU initiative in this field. Two others (Foundation pour le droit continental and ECTA -European communities Trade Mark Association) have the opposite view.

What patent owners say

122 respondents (31% of all respondents) are patent owners. Trade secrets are generally perceived as complementing other industrial property rights. The views expressed by patent holders strongly support this assertion. Between 79% and 82% considered trade secrets highly important for R&D, exploitation of innovation, innovation and competitive performance of SMEs, and for large companies operating internationally.

88% of responding patent owners consider trade secrets as either complementary or both complementary and alternative to intellectual property rights. One patent owner sees trade secrets exclusively as an alternative to intellectual property rights.

78% find that EU legislation should address misappropriation of trade secrets. 80% state that they hold trade secrets of crucial importance and 48% have been victims of trade secret theft, either once or twice (21%) or more frequently (27%).

What owners of design rights say

93 respondents (one in four of all respondents) own design rights. 82% of them hold trade secrets which they consider of crucial importance and they consider trade secrets as being complementary (39%) or both complementary and alternative to intellectual property rights (44%). 18% of design owners were once or twice victims of trade secret misappropriation and 30% have suffered from misappropriation of trade secrets more frequently.

76% find that the legal protection against the misappropriation of trade secrets should be addressed at EU level, in particular for the purposes of prohibiting misappropriation of trade secrets and providing a definition of what is misappropriation (81%), empowering courts to order all customs authorities in the EU to stop at the EU borders imports of products manufactured in a non-EU country using misappropriated trade secrets (75%), and ensuring that the confidentiality of the trade secrets/confidential business information is kept during court proceedings and hearings (75%).