



EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
D(2013)

Opinion

Title

DG MARKT - Impact Assessment on a Proposal for a Directive on the protection of trade secrets against misappropriation

(draft version of 24 June 2013) *

(A) Context

As part of the Europe 2020 strategy, the Commission committed itself to examining the question of trade secrets through the May 2011 strategy to revamp the legal framework for intellectual property and the 2012 Communication on industrial policy.

Trade secrets are the most common form of protection of innovative knowledge but also the least securitised against unlawful misappropriation in the EU where different national regimes co-exist. This could discourage investment in research and development (R&D) at both national and cross-border level, thus contributing to the innovation gap between EU and major third countries (such as the US or Japan). In addition, trends like globalisation, outsourcing, longer supply chains, increased use of information and communication technology, etc. suggest the risk of trade secret misappropriation may be increasing.

(B) Overall opinion: POSITIVE

While the report has been enhanced to some extent along the lines of the recommendations in the Board's first opinion, it should be further improved in a number of respects. The report should establish more convincingly, with factual evidence where possible, that the reported fragmented legal protection of trade secrets against misappropriation significantly contributes to the problems identified (i.e. sub-optimal incentives for cross-border innovation activities and reduced EU competitiveness). Moreover, the report should better assess the size of these problems, as well as the added-value and proportionality of addressing them through binding EU intervention. With regards to the assessment of the options, the report should reinforce the analysis of their impacts, in particular on labour mobility, e.g. by better linking the expected impacts to the issues identified in the problem definition. Furthermore, it should critically assess the effectiveness of the retained measures in addressing the two identified problems.

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

(C) Main recommendations for improvements

(1) Strengthen the problem definition with further factual evidence. While the problem definition provides now a more informative description of the different national legal frameworks, it should be still strengthened with further factual evidence. In particular, the report should better demonstrate the existence and strength of the link between the main driver (legal fragmentation) and the resulting problems (lower cross-border innovative collaboration and reduced business competitiveness). Likewise, the relation between the identified problems and some of their (wider) consequences (e.g. labour mobility restrictions) needs to be supported with further data or practical examples. Moreover, greater efforts need to be undertaken to clarify the magnitude of the problem and the extent to which it stems from the identified drivers (as opposed to other possible drivers). The report should also better justify the added-value and proportionality of (binding) EU action (for example, by assessing the actual relevance of trade secret protection related costs in a cross-border context). In addition, the description of the problems should be streamlined in order to avoid overlaps or inconsistencies. For instance, the "lower expected value of innovation" argument, discussed under the problem of "sub-optimal incentives for cross-border innovation activities", seems more relevant for the discussion on the "reduced business competitiveness" one.

(2) Strengthen the analysis of the impacts and better demonstrate the effectiveness of the retained measures. The analysis remains essentially qualitative and therefore the effectiveness of the retained measures in addressing the identified problems (in particular, regarding cross-border innovation activities) is not completely clear. The analysis of a number of impacts needs therefore to be further strengthened and substantiated. For example, identified impacts on labour mobility seem minor (e.g. easier for the employee to make the choice for a new employer) or unrelated to the issues identified in the problem definition. Thus, while the retained options are said to reduce the risk of disproportionate employer's claims for alleged misappropriation of trade secrets, the report does not provide evidence on the existence, size and frequency of such claims. The report should furthermore clarify the importance of the expected reduction in protection costs. In particular considering that some costs would be unavoidable since, in order to be covered by the envisaged definition of trade secrets, the secret holder will need to take in any case 'reasonable steps' to keep the information secret.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report

(D) Procedure and presentation

Some incomplete sentences throughout the text (e.g. footnotes 32 and 96) should be filled in.

(E) IAB scrutiny process

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| Reference number | 2013/MARKT/002 |
| External expertise used | No |
| Date of IAB meeting | Written procedure An earlier version of this report was submitted to the IAB in March 2013, for which the Board issued an opinion on 26 April 2013. |