



EUROPEAN COMMISSION
Impact Assessment Board

Brussels,
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Opinion

Title

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

(draft version of 27 March 2013)*

(A) Context

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

Trade secrets are the most used form of protection of innovative knowledge but also the least securitised against unlawful misappropriation in the EU where different national regimes co-exists. This could discourage investment in research and development (R&D) at both the national and cross-border level, thus contributing to the EU innovation gap with 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: NEGATIVE

The report needs to be significantly improved in a number of important respects. First, the problem definition should clarify whether the key problem is insufficient legal protection or legal fragmentation. To do so, the report should rely on greater evidence of the identified issues and a more detailed presentation of the national legal frameworks in place and their differences. The analysis of the options should also be strengthened with more evidence, where possible quantitative. In particular, the impacts on innovation, cross-border cooperation and labour mobility need to be backed by clearer and more robust arguments. The report should analyse further the impact on competitiveness, Member States and third countries of the retained package of options. Furthermore, the effectiveness in addressing the identified problems of both the retained measures and the chosen legal instrument (i.e. a directive), needs to be more critically discussed. Finally, stakeholders' views should be presented in a more complete and balanced way. The views of Member States should be described and dissenting views should be more openly reported and discussed.

Given the nature of these concerns, the IAB requests DG MARKT to submit a revised version of the IA report on which it will issue a new opinion.

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

(C) Main recommendations for improvements

(1) Improve the problem description. The report should identify more clearly, and on the basis of greater evidence, what the key problem is: a weak legal framework (i.e. legislative gap) or the existence of too many differences across national legal frameworks (legal fragmentation)? In the first case, the report should clearly indicate what is lacking in terms of protection (and provide evidence thereof): is the absence of a definition of trade secrets in certain Member States handicapping EU firms? If, instead, legal fragmentation is the key issue, the report should describe in greater detail the differences in national legal frameworks and better show the consequences for firms' cross-border activity. The focus of the problem definition should also be rebalanced away from its current emphasis on the EU innovation and R&D gaps vis-à-vis 3rd countries, such as the US, Japan and China, given that trade secrets are not only important for innovative firms but also for long-established firms in less innovative industries that nevertheless need to protect the competitive advantage of their existing products. The report should also discuss, as part of the baseline scenario, the scope for addressing the identified problems in the context of EU-US trade negotiations. Finally, the report should also clarify the reasons or on-going trends as to why action needs to be taken now.

(2) Strengthen the assessment of impacts. The analysis of the impacts is mainly qualitative and should be strengthened with further evidence, where possible quantitative. In particular, the impacts on innovation, cross-border cooperation and on labour mobility need to be better described and underpinned with more robust arguments. Furthermore, the report should also better describe and discuss possible impacts on different types of law in the Member States, and notably on labour law and contractual employment relations. Currently, a number of examples/reported views seem to contradict some of the conclusions (e.g. regarding research cooperation and transfer of know-how across borders). The impacts on European businesses' competitiveness and on the different Member States also need to be discussed in more detail.

(3) Better demonstrate the effectiveness of the retained measures. The report should analyse more critically the extent to which the retained measures would solve identified problems, like fighting the misappropriation of trade secrets by players from third countries or fostering more cross-border R&D activities. Any qualification in this regard should be taken into due account when discussing the choice of the legal instrument.

(4) Better present stakeholders' views. The report should more openly discuss the potential drawbacks flagged by certain stakeholders (e.g. the risk of duplicative research) explaining why these issues are not considered significant. The report should also better present stakeholders' views since consultation statistics do not always appear to support the analysis (e.g. only 24% of respondents consider that better protection will result in more R&D cooperation). Finally, the report should explain what the main concerns of those actors disagreeing with the initiative are (e.g. trade unions) and provide more detail on the views of Member States.

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

The report should avoid repetitions, in particular in the introduction and the sections on problem analysis, baseline and impact of the "do nothing" option. In addition, the

presentation could be further improved by enhancing data consistency and systematically indicating the sources of graphs and tables.

(E) IAB scrutiny process	
Reference number	2013/MARKT/002
External expertise used	No
Date of IAB meeting	24 April 2013