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NOTE

From:	Presidency
To:	Permanent Representatives Committee
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Subject:	Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure - Analysis of the final compromise text with a view to agreement

I. INTRODUCTION

1. On 26 May 2014, the European Commission submitted the above-mentioned proposal to the Council and the European Parliament. The Commission's initiative aims at improving the effectiveness of the legal protection of trade secrets against misappropriation within the Internal Market. Such improved legal protection should enhance the competitiveness of European businesses and research bodies which is based on trade secrets and also improve the conditions/framework for the development and exploitation of innovation and for knowledge transfer within the Internal Market. These incentives should help to improve the EU's competitiveness in the global knowledge economy.

II. STATE OF PLAY: FULL COMPROMISE ACHIEVED

2. The Working party on Intellectual Property examined the proposal during the Greek, Italian, Latvian and Luxembourg Presidencies.
3. On 26 May 2014, the Council adopted a General Approach (doc. 9475/1/14 REV 1 + COR 1) granting a mandate to the Presidency to start the negotiations with the Parliament with a view to reaching an agreement at first reading.
4. The EP JURI committee adopted its report on 16 June 2015 together with a mandate to start negotiations with the Council.
5. Negotiations with the European Parliament started on 15 September 2015. The purpose of this first meeting was mostly introductory. Two technical meetings followed where a number of technical issues were addressed.
6. The second informal trilogue meeting took place on 27th October 2015 in Strasbourg and achieved to highlight remaining areas of disagreement, identified respective "red lines" and pointed at possible ways of compromise on a number of outstanding issues. On the basis of the 2nd trilogue results, further technical work took place and approximated the positions between the Co-Legislators.
7. On 27 November the Presidency submitted to the Committee a compromise text and asked for a revised mandate to be presented at the third trilogue as part of general agreement.
8. The third informal trilogue meeting took place on 3 December 2015, in Brussels. Presidency presented Council new proposals to the Parliament who reacted positively. However, it asked for more time in order to examine Council proposals.
9. On 11 December the Presidency asked the Committee for a new revised mandate in order to submit to the parliament some last compromise text at the forthcoming trilogue.
10. At the fourth informal trilogue meeting, which took place on 15 December, a full compromise was achieved. This compromise text is set out in detail in the Annex.

III. CONTENT OF THE COMPROMISE

11. The result achieved presents a compromise that goes to the limits of the flexibility of the co-legislators. It has therefore to be considered as a package-deal that cannot be reopened at any part without jeopardizing the whole agreement.
12. Differences with the text settled in document 14865/1/15 REV 1 are the following:
 - a) Some of the **recitals** have been slightly modified to reflect the agreement reached on the Articles. Some of them have been moved for the same purpose.
 - b) In Article 2a, paragraph 1, letter (c) (mentioning the exercise of the rights of workers and their representatives to information and consultation) has been reintroduced in a spirit of compromise.
 - c) In Article 4 letter (b) the text on "whistle-blowers" corresponding to the mandate of 11 December has been agreed:

'(b) for revealing a misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest'.

- d) In Article 8, paragraph 2, last subparagraph, the last sentence has been deleted because it was considered redundant.

IV. CONCLUSION

The Permanent Representative Committee is thus invited to:

- endorse the annexed compromise text as agreed in the trilogue,
- mandate the Presidency to inform the European Parliament that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of the Treaty, in the form set out in the compromise package contained in the Annex to this document (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of the Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

ANNEX

2013/0402 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the protection of undisclosed know-how and business information (trade secrets) against
their unlawful acquisition, use and disclosure
(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Businesses and non-commercial research institutions invest in acquiring, developing and applying know-how and information, which is the currency of the knowledge economy and gives a competitive advantage. This investment in generating and applying intellectual capital determines their competitiveness and innovative performance in the market and therefore their returns to investment, which is the underlying motivation for business research and development. Businesses have recourse to different means to appropriate the results of their innovative activities when openness does not allow for the full exploitation of their research and innovation investments. Use of intellectual property rights such as patents, design rights or copyright is one of them. Another is to protect access and exploit the knowledge that is valuable to the entity and not widely known. Such valuable know-how and business information, that is undisclosed and intended to remain confidential is referred to as a trade secret. Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right and use confidentiality as a business competitiveness and research innovation management tool, covering a diversified range of information, which extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans or market research and strategies. Small and medium-sized enterprises (SMEs), in particular, value and rely on trade secrets more. By protecting such a wide range of know-how and commercial information, whether as a complement or as an alternative to intellectual property rights, trade secrets allow the creator to derive profit from his/her creation and innovations and therefore are particularly important for business competitiveness as well as for research and development and innovative performance.

(2) Open innovation is a catalyst for new ideas which meet the needs of consumers and tackle societal challenges to find their way to the market. It is an important lever for the creation of new knowledge and underpins the emergence of new and innovative business models based on the use of co-created knowledge. Collaborative research, including cross-border cooperation, is particularly important to increase the levels of business research and development within the internal market. The dissemination of knowledge and information should be considered essential for the purpose of ensuring dynamic, positive and equal business development opportunities, especially for SMEs. In an internal market where barriers to such cross-border collaboration are minimised and where cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products. Such an environment conducive to intellectual creation and innovation, and where employment mobility is not hindered, is also important for employment growth and improving competitiveness of the Union economy. Trade secrets have an important role in protecting the exchange of knowledge between businesses, including, in particular, SMEs, and research institutions within and across the borders of the internal market, in the context of research and development and innovation. Trade secrets are amongst the most used form of protection of intellectual creation and innovative know-how by businesses, yet they are at the same time the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by other parties.

- (3) Innovative businesses are increasingly exposed to dishonest practices aiming at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage, breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises the legitimate trade secret holder's ability to obtain first mover returns using the outputs of its innovative efforts. Without effective and comparable legal means for defending trade secrets across the Union, incentives to engage in innovative cross-border activity within the internal market are undermined and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, affecting the smooth-functioning of the internal market and undermining its growth enhancing potential.
- (4) International efforts taken in the framework of the World Trade Organisation to address this problem led to the conclusion of the Agreement on trade-related aspects of intellectual property (the TRIPS Agreement). It contains, inter alia, provisions on the protection of trade secrets against their unlawful acquisition, use or disclosure by third parties, which are common international standards. All Member States, as well as the Union itself, are bound by this Agreement which was approved by Council Decision 94/800/EC.¹

¹ Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p.1)

- (5) Notwithstanding the TRIPS Agreement, there are important differences in the Member States legislation as regards the protection of trade secrets against their unlawful acquisition, use or disclosure by other persons. Thus, for example, not all Member States have adopted national definitions of trade secrets and/or unlawful acquisition, use or disclosure of a trade secret, so that the scope of protection is not readily accessible and differs throughout Member States. Furthermore, there is no consistency as regards the civil law remedies available in case of unlawful acquisition, use or disclosure of trade secrets as cease and desist orders are not always available in all Member States against third parties who are not competitors of the legitimate trade secret holder. Divergences also exist across the Member States with respect to the treatment of third parties who acquired the trade secret in good faith but subsequently come to learn, at the time of use, that their acquisition derived from a previous unlawful acquisition by another party.
- (6) National rules also differ as to whether legitimate trade secret holders may seek the destruction of goods manufactured by third parties who use trade secrets unlawfully or the return or destruction of any documents, files or materials containing or implementing the unlawfully acquired or used trade secret. Also, applicable national rules on the calculation of damages do not always take account of the intangible nature of trade secrets, which makes it difficult to demonstrate the actual profits lost or the unjust enrichment of the infringer where no market value can be established for the information in question. Only a few Member States allow for the application of abstract rules on the calculation of damages based on the reasonable royalty or fee which could have been due had a licence for the use of the trade secret existed. Additionally, many Member States rules do not provide for appropriate protection of the confidentiality of a trade secret if the trade secret holder introduces a claim for alleged unlawful acquisition, use or disclosure of the trade secret by a third party, thus reducing the attractiveness of the existing measures and remedies and weakening the protection offered.

(7) The differences in the legal protection of trade secrets provided for by the Member States imply that trade secrets do not enjoy an equivalent level of protection throughout the Union, thus leading to fragmentation of the internal market in this area and weakening the overall deterrent effect of the rules. The internal market is affected in so far as such differences lower businesses' incentives to undertake innovative-related cross-border economic activity, including research or manufacturing cooperation with partners, outsourcing or investment in other Member States, which would depend on the use of the information protected as trade secrets. Cross-border network research and development as well as innovation-related activities, including related manufacturing and subsequent cross-border trade, are rendered less attractive and more difficult within the Union, thus also resulting in innovation-related inefficiencies at Union scale. In addition, higher business risk appears in Member States with comparatively lower levels of protection, where trade secrets may be stolen or otherwise unlawfully acquired more easily. This leads to inefficient allocation of capital to growth-enhancing innovation within the internal market because of the higher expenditure on protective measures to compensate for the insufficient legal protection in some Member States. It also favours the activity of unfair competitors who following the unlawful acquisition of trade secrets could spread resulting goods across the internal market. Legislative regime differences also facilitate the importation of goods from third countries into the Union through entry points with weaker protection, when the design, manufacturing or marketing of those goods rely on stolen or otherwise unlawfully acquired trade secrets. On the whole, such differences create a prejudice to the proper functioning of the internal market.

- (8) It is appropriate to provide for rules at Union level to approximate the laws of Member States so as to ensure a sufficient and consistent level of civil redress across the internal market in the event of unlawful acquisition, use or disclosure of a trade secret, without prejudice to the possibility for Member States to provide for more far reaching protection against the unlawful acquisition, use or disclosure of trade secrets as long as the safeguards explicitly provided for in this Directive for protecting the interests of other parties are respected.
- (8a) For this purpose, it is important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation. Such definition should therefore be constructed as to cover business information, technological information and know-how where there is both a legitimate interest in keeping confidential and a legitimate expectation in the preservation of such confidentiality. Such information or know-how should furthermore have commercial value, whether actual or potential. Such information or know-how has commercial value especially insofar as its unauthorized acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it in that it undermines his or her scientific and technical potential, business or financial interests, strategic positions or ability to compete. Such definition excludes trivial information and the experience and skills gained by employees in the normal course of their employment nor to information which is generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

(9) It is also important to identify the circumstances under which legal protection is justified. For this reason, it is necessary to establish the conduct and practices which are to be regarded as unlawful acquisition, use or disclosure of a trade secret.

(9a) It is important to clarify that this Directive should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities, the rules that allow public authorities to collect information for the performance of their duties or rules that allow or require any further disclosure by those public authorities of relevant information to the public. This concerns in particular rules on the disclosure by the Union's institutions and bodies or national public authorities of business-related information they hold pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council², Regulation (EC) No 1367/2006 of the European Parliament and the Council³ and Directive 2003/4/EC of the European Parliament and the Council⁴ or to other rules on public access to documents or on the transparency obligations of national public authorities.

² Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public ac

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(9b) Furthermore the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purpose of this Directive. It notably concerns, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers representatives to information, consultation and participation in accordance with Union and national law or practices, and the collective defence of the interests of workers and employers, including co-determination, as well as the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law. This should nonetheless be without prejudice to any obligation of confidentiality as regards the trade secret or any limitation as to its use that Union or national law may impose on the recipient or acquirer of the information. In particular, this Directive should not release the public authorities from the confidentiality obligations to which they are subject in respect of information passed on by holders of trade secrets, irrespective of whether those obligations are laid down in national or in Union law. This concerns, inter alia, the confidentiality obligations in respect of information forwarded to awarding authorities in the context of procurement procedures, as laid down, for example, in Directive 2014/23/EU of the European Parliament and of the Council⁵, Directive 2014/24/EU of the Parliament and of the Council⁶ and Directive 2014/25/EU of the European Parliament and the Council⁷.

⁵ *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1)*

⁶ *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).*

⁷ *Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).*

- (10) In the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right on the know-how or information protected as trade secrets. Thus, independent discovery of the same know-how or information remains possible. Reverse engineering of a lawfully acquired product is a lawful means of acquiring information except when otherwise agreed by contract. The freedom of entering into such contractual arrangements may however be limited by law.
- (10a) In some industry sectors, where creators and innovators cannot benefit from exclusive rights and where innovation has traditionally relied upon trade secrets, products can nowadays be easily reverse-engineered once in the market. In those cases, those creators and innovators may be victims of practices such as parasitic copying or slavish imitations that free ride on their reputation and innovation efforts. Some national laws dealing with unfair competition address those practices. While this Directive does not aim to reform or harmonize unfair competition law in general, it would be appropriate that the Commission carefully examine the need for Union action in that area.
- (10c) This Directive should not affect the right of the social partners to enter into collective agreements, where foreseen under labour law, as regards duties not to disclose a trade secret or to limit its use and the consequences of a breach of such duties by the party subject to them, provided that any such collective agreement does not restrict the safeguards concerning the exceptions in this Directive when an application for measures, procedures and remedies provided for in this Directive for an alleged acquisition, use and disclosure of a trade secret shall be dismissed.

- (11) In line with the principle of proportionality the measures, procedures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth-functioning internal market for research and innovation, in particular by deterring the unlawful acquisition, use and disclosure of a trade secret, without jeopardising or undermining fundamental rights and freedoms or the public interest, such as public safety, consumer protection, public health and environmental protection, and without prejudice to the mobility of workers. In this respect, the measures, procedures and remedies ensure that competent judicial authorities take into account for factors such as the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret and the impact of such conduct. It should also be ensured that the competent judicial authorities are provided with the discretion to weigh up the interests of the parties to the litigation, as well as the interests of third parties including, where appropriate, consumers.
- (12) The smooth-functioning of the internal market would be undermined if the measures, procedures and remedies provided for were used to pursue illegitimate intents incompatible with the objectives of this Directive. Therefore, it is important to empower judicial authorities to adopt appropriate measures with regard to abusive behaviour by claimants who act abusively or in bad faith and submit manifestly unfounded applications with, for instance, the purpose of unfairly delaying or restricting the respondent's access to the market or otherwise intimidating or harassing the respondent.
- (10b) While this Directive provides for measures and remedies which may consist in preventing the disclosure of information in order to protect the confidentiality of trade secrets, it is essential that the exercise of the right to freedom of expression and information (which encompasses media freedom and pluralism as reflected in Article 11 of the Charter of Fundamental Rights of the European Union) be not restricted, in particular with regard to investigative journalism and the protection of journalistic sources.

(12a) Measures, procedures and remedies provided for under this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This latter should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies where the respondent had all the reasons to believe in good faith that his conduct met the appropriate criteria set out in this Directive.

(13) In the interest of legal certainty and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it appears appropriate to restrict substantive claims or the possibility to initiate actions for the protection of trade secrets to a limited period. National law should also specify, in a clear and unambiguous manner, when that period begins to run and under which circumstances that period is interrupted or suspended.

(14) The prospect of losing the confidentiality of a trade secret during litigation procedures often deters legitimate trade secret holders from instituting proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures, procedures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right to a fair trial, specific requirements aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. Such protection should remain in force after the legal proceedings have ended for as long as the information constituting the trade secret is not in the public domain.

(14a) Those requirements should include, as a minimum, the possibility to restrict the circle of persons entitled to have access to evidence or hearings, bearing in mind that all those persons are subject to the confidentiality requirements set out in this Directive, and to publish only the non-confidential elements of judicial decisions. In this context, considering that assessing the nature of the information which is the subject of the dispute is one of the main purposes of the legal proceedings, it is particularly important to ensure both the effective protection of the confidentiality of trade secrets and compliance with the right to an effective remedy and to a fair trial of the parties to those proceedings. The restricted circle of persons should therefore consist of at least one natural person from each of the parties as well as their respective lawyers and, where applicable, other representatives appropriately qualified in accordance with national law in order to defend, represent or serve the interests of a party in legal proceedings covered by this Directive, who all have full access to such evidence or hearings. In the case that one of the parties is a legal person, that party should be able to propose the natural person or persons who should form part of that circle of persons so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent that the objective of the restriction of access to evidence and hearings is undermined. Those safeguards should not be understood as requiring the parties to be represented by a lawyer or another representative during the legal proceedings when such representation is not necessary in accordance with the relevant rules of national law. Nor should they be understood as restricting the capacity of the courts to decide, in conformity with the applicable rules and practice of the Member State concerned, whether and to what extent relevant court officials should also have full access to evidence and hearings for the exercise of their duties.

- (15) Unlawful acquisition, use or disclosure of a trade secret by a third party could have devastating effects on its legitimate holder since once publicly disclosed it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast effective and accessible provisional measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret, including when such trade secret is used for the provision of services. Such relief must be available without having to await a decision on the substance of the case, with due respect for the rights of defence and the principle of proportionality having regard to the characteristics of the case in question. In certain instances, the alleged infringer may be permitted, subject to the lodging of guarantees, to continue to use the trade secret, in particular, where there is little risk that it will enter the public domain. Guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified request may also be required, particularly where any delay would cause irreparable harm to the legitimate holder of a trade secret.
- (16) For the same reason, it is also important to provide for measures to prevent further unlawful use or disclosure of a trade secret, including when such trade secret is used for the provision of services. For prohibitory measures to be effective and proportionate, their duration, when circumstances require a limitation in time, should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful acquisition, use or disclosure of the trade secret. In any event, no measure of this type should be enforceable if the information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.

- (17) A trade secret may be unlawfully used to design, manufacture or market goods, or components thereof, which may spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In those cases and when the trade secret in question has a significant impact on the quality, value or price of the resulting good or on reducing the cost, facilitating or speeding up its manufacturing or marketing processes, it is important to empower judicial authorities to order effective and appropriate measures with a view to ensure that those goods are not put on the market or are removed from it. Considering the global nature of trade, it is also necessary that these measures include the prohibition of importing those goods into the Union or storing them for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods when other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by means of donations to by charitable organisations.
- (18) A person may have originally acquired a trade secret in good faith but only become aware at a later stage, including upon notice served by the original trade secret holder, that his or her knowledge of the trade secret in question derived from sources using or disclosing the relevant trade secret in an unlawful manner. In order to avoid that under those circumstances the corrective measures or injunctions provided for could cause disproportionate harm to that person, Member States should provide for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure, provided that such compensation does not exceed the amount of royalties or fees which would have been due had that person obtained authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prevented by the original trade secret holder. Nevertheless, where the unlawful use of the trade secret would constitute an infringement of law other than that foreseen in this Directive or would be likely to harm consumers, such unlawful use should not be allowed.

- (19) In order to avoid that a person who knowingly, or with reasonable grounds for knowing, unlawfully acquires, uses or discloses a trade secret benefit from such conduct and to ensure that the injured trade secret holder, to the extent possible, is placed in the position in which he or she would have been had that conduct not taken place, it is necessary to provide for adequate compensation of the prejudice suffered as a result of the unlawful conduct. The amount of damages awarded to the injured holder of the trade secret should take account of all appropriate factors, such as loss of earnings incurred by the trade secret holder or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the trade secret holder. As an alternative, for example where, considering the intangible nature of trade secrets, it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question. The aim is not to introduce an obligation to provide for punitive damages, but to ensure compensation based on an objective criterion while taking account of the expenses incurred by the holder of the trade secret, such as the costs of identification and research. This Directive should not prevent Member States from providing in their rules of national law that the liability for damages of employees is restricted when they acted without intent.
- (20) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions, including where appropriate through prominent advertising, in cases concerning the unlawful acquisition, use or disclosure of trade secrets, as long as such publication does not result in the disclosure of the trade secret nor disproportionately affect the privacy and reputation of natural persons.
- (21) The effectiveness of the measures, procedures and remedies available to trade secret holders could be undermined in case of non-compliance with the relevant decisions adopted by the competent judicial authorities. For this reason, it is necessary to ensure that those authorities enjoy the appropriate powers of sanction.

- (22) In order to facilitate the uniform application of the measures for the protection of trade secrets, it is appropriate to provide for systems of cooperation and the exchange of information as between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by Member States. In addition, in order to review whether these measures fulfil their intended objective, the Commission, assisted, as appropriate, by the European Union Intellectual Property Office, should examine the application of this Directive and the effectiveness of the national measures taken.
- (23) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the right to respect private and family life, the right to the protection of personal data, the freedom of expression and information, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to good administration, access to file and preservation of secrecy of business, the right to an effective remedy and to a fair trial and right of defence.
- (24) It is important that the rights to privacy and personal data protection of any person whose personal data may be processed by the trade secret holder when taking steps to protect a trade secret or of any person involved in litigation concerning the unlawful acquisition, use or disclosure of trade secrets under this Directive and whose personal data are processed be respected. Directive 95/46/EC of the European Parliament and of the Council* governs the processing of personal data carried out in the Member States in the context of this Directive and under the supervision of the Member States competent authorities, in particular the public independent authorities designated by the Member States. Thus, this Directive should not affect the rights and obligations laid down in Directive 95/46/EC, in particular the rights of the data subject to access his or her personal data being processed and to obtain rectification, erasure or blocking of the data where it is incomplete or inaccurate and, where appropriate, the obligation to process sensitive data in accordance with Article 8(5) of Directive 95/46/EC.

- (25) Since the objective of this Directive, to achieve a smooth-functioning internal market through the establishment of a sufficient and comparable level of redress across the internal market in case of unlawful acquisition, use or disclosure of a trade secret, cannot be sufficiently achieved by Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that same Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (26) This Directive should not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, or deal with applicable law. Other Union instruments which govern such matters in general terms should, in principle, remain equally applicable to the field covered by this Directive.
- (27) This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union. The measures provided for in this Directive should not be used to restrict competition unduly in a manner contrary to that Treaty.
- (27a) This Directive should not be understood as restricting the freedom of establishment, the free movement of workers or the mobility of workers as provided for in Union law. Nor is it intended to affect the possibility of concluding non-competition agreements between employers and employees, in accordance with the applicable law.

- (28) This Directive should not affect the application of any other relevant law in other areas, including intellectual property rights, and the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council⁸ and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.
- (29) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001⁹ and delivered an opinion on 12 March 2014¹⁰.

⁸ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L157, 30.4.2004, p.45).

⁹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p.1)

¹⁰ OJ C ...

CHAPTER I

Subject matter and scope

Article 1

Subject matter and scope

1. This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

Member States may provide, in compliance with the provisions of the Treaty, for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required in this Directive, provided that compliance with Articles 2a, 4, 5, Article 6(1), Article 7, the second subparagraph of Article 8(1), Articles 8(3), 8(4), 9(2), Articles 10, 12 and Article 14(3) is ensured.

2. This Directive shall not affect:
 - (a) the exercise of the right to freedom of expression and information as set out in the Charter of Fundamental Rights of European Union, including respect for freedom and pluralism of the media;
 - (b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of their duties;

- (c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by business which they hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;
 - (e) the autonomy of social partners and their rights to enter into collective agreements, in accordance with Union and national law and practices.

- 2a. Nothing in this Directive shall be understood to offer any ground for restricting the mobility of employees. In particular, in relation to the exercise of such mobility, this Directive shall not offer any ground for:

- (a) limiting employees' use of information not constituting a trade secret as defined on point (1) of Article 2;
 - (b) limiting employees' use of the experience and skills honestly acquired in the normal course of their employment;
 - (c) imposing any additional restrictions on employees in their employment contracts other than in accordance with Union or national law.

Article 2
Definition

For the purposes of this Directive, the following definitions shall apply:

- (1) 'trade secret' means information which meets all of the following requirements:
 - (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
 - (b) has commercial value because it is secret;
 - (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;
- (2) 'trade secret holder' means any natural or legal person lawfully controlling a trade secret;
- (3) 'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed trade secrets;
- (4) 'infringing goods' means goods whose design [*in fr* "conception"], characteristics, functioning, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.

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.