

LIGUE INTERNATIONALE DU DROIT DE LA CONCURRENCE
INTERNATIONAL LEAGUE OF COMPETITION LAW
INTERNATIONALE LIGA FÜR WETTBEWERBSRECHT

Question B: The Protection of Trade Secrets and Know-How
Are countries providing enough or too much protection?

RESOLUTION

- A. Whereas the investment in the acquisition, development and application of trade secrets forms the backbone of the knowledge based economy.
- B. Whereas the due protection of trade secrets has a crucial economic impact on the efficiency of international business.
- C. Whereas strong non-contractual protection of trade secrets facilitates transactions and the flow of information and stimulates research, development and innovation.
- D. Whereas this purpose is endangered if different national rules on the protection of trade secrets create gaps and inconsistencies.
- E. Whereas a considerable variety of national protection systems against the misuse of trade secrets still characterises the existing international regulatory framework.
- F. Whereas in particular, a consistent definition of trade secrets, as well as a clear and well-balanced integration of this protection tool into the system of intellectual property rights is absent.
- G. Whereas a unified trade secret protection system should be well balanced against other fundamental rights and the legitimate public interest, in particular fair competition.
- H. Whereas a new system should protect the disclosure of trade secrets if it serves the legitimate public interest i.e. in the case of whistleblowing or the freedom of the media.
- I. Whereas it is also essential to provide for efficient and appropriate measures to prevent further misuse of trade secrets.

J. Whereas trade secrets are defined in article 39 (2) of the TRIPs Agreement.

K. Whereas trade secrets in many jurisdictions are vaguely defined and not included in statutory law, which may result in legal uncertainty.

L. Whereas trade secret protection should not be extended to experience and skills honestly acquired by employees.

M. Whereas articles 50 (1) and (2) of the TRIPs agreement place an obligation on the Member States to implement (civil procedure) *ex parte* search and seizure orders in case of misuse of trade secrets.

N. Whereas it is difficult for a trade secret proprietor to prove that trade secrets have been misused unless the trade secret proprietor can conduct a civil search to establish the misuse.

O. Whereas it is difficult for a trade secret proprietor to prove the full extent of damage that the misappropriation of trade secrets has caused the proprietor.

P. Whereas trade secrets must not become publicly available as a result of trade secret litigation.

Q. Whereas defendants in trade secret cases must be granted the right to fair trial and to conduct a full defense.

R. Whereas trade secret protection may be abused by the trade secret proprietor to limit or harass competitors.

S. Whereas the balance between trade secret proprietors and its competitors must be upheld and trade secret proprietor's measures in case of trade secret misappropriation must be proportionate.

The Ligue considers that it is important to participate in this debate and therefore recommends the following :

1. The international harmonisation of legislation on the protection of confidential know-how and business information (trade secrets) against their wrongful acquisition, use and disclosure should be pursued within due time.
2. A good starting point is the European Parliament's proposal for an EU directive of June 2015 on the protection of trade secrets. However, the existing text still has some lacunas, especially where it supports trade secret proprietors' claims against public authorities, journalists and whistleblowers in respect of the acquisition and revelation of business information.
3. In general, the protection of trade secrets should not prejudice the public's access to information regarding industry malpractice.
4. When protecting trade secrets it is important to have regard to fundamental rights, such as freedom of speech, and other legitimate public interests, including fair competition.
5. It is necessary to work towards the adoption of a uniform statutory definition of trade secrets to increase legal and business certainty.
6. It is necessary to work towards the allowance of *ex parte* search orders in national legislation in cases of trade secret misuse.
7. It is necessary to work towards establishing a common standard for defining the protection against proprietors' abuse of trade secrets and the remedies in case of such abuse.
8. It is necessary to work towards establishing procedural principles under which trade secret information is kept under seal and at the same time is accessible to the defendant to conduct a full defence.
9. It is necessary to work towards the establishment of a principle of a lower burden of proof when it comes to proving damage as a result of the misuse of trade secrets.