



EUILAP
Jean Monnet Chair
EU Innovation Law & Policy



PROTECTION OF TRADE SECRETS.

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Digital Age

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What is a trade secret?

Trade secret vis-à-vis patent protection:

- **Technical know-how;**

But trade secret can also be:

- Sub-patentable technical know-how;

Trade secret can regard any sensible **commercial data** of the entrepreneur (data regarding profits, business strategies, clients and customers, etc.);

Clinical data can be protected as trade secrets.



What is a trade secret?

According to Article 2, Dir. 2016/ 943, ‘trade secret’ means **information** which meets all of the following requirements:

- (a) it is **secret** in the sense that it is **not** [...] generally known among or **readily accessible** to persons within the circles that normally deal with the kind of information in question;
- (b) it has **commercial value** because it is **secret**;
- (c) it has been subject to **reasonable steps** under the circumstances, by the person lawfully in control of the information, to keep it secret;



What protection is granted to a trade secret?

The Directive disciplines:

- Lawful **acquisition, use** and **disclosure** of trade secret (art. 3);
- Unlawful **acquisition, use** and **disclosure** of trade secrets (art. 4);



Prohibited conduct (art. 4, 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 **copying** 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;
- (b) **any other conduct** which, under the circumstances, is considered *contrary to honest commercial practices*.



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Prohibited conduct (art. 4, 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) having acquired the trade secret **unlawfully**;
- (b) being in **breach of a confidentiality agreement** or any other duty not to disclose the trade secret;
- (c) being in **breach** of a contractual or **any other duty to limit the use of the trade secret**.



Further prohibited conduct (art. 4, 4°)

Trade secret obtained by another person who was using it unlawfully.

The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, **knew or ought**, under the circumstances, **to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully** within the meaning of paragraph 3.



Lawful acquisition, use and disclosure of trade secrets

The acquisition of a trade secret is lawful when the trade secret is obtained by:

(a) **independent discovery or creation;**

(b) So called **REVERSE ENGINEERING:**

observation, study, disassembly or testing of a product or object that has been made available to the public;

(c) any other practice which, under the circumstances, is in conformity with **honest commercial practices.**