

ADOPTED TEXT No. 572
'Small Act'

NATIONAL ASSEMBLY

CONSTITUTION OF 4 OCTOBER 1958
FOURTEENTH LEGISLATURE

2014-2015 ORDINARY SESSION

17 July 2015

EUROPEAN RESOLUTION

*on the proposal for a directive on **trade secrets**.*

Is considered as final, pursuant to Rule 151-7 of the Rules of Procedure, the resolution with the following content:

See numbers: 2857 and 2917.

.....

Single article

The National Assembly,

In the light of Article 88-4 of the Constitution,

In the light of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994,

In the light of Article 114 of the Treaty on the Functioning of the European Union,

In the light of the 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 (COM[2013]813 final),

1. Observes that national divergences exist as regards trade secrets in the European Union and takes note of the determination to harmonise legislation, with in particular the introduction of a common definition, in order to better deter and penalise the misappropriation of a trade secret and facilitate the development of innovation in the internal market;

2. Recalls that, unlike intellectual property rights, a trade secret does not entitle its holder to any exclusive rights, that its competitors or other third parties may discover independently a same secret, that any practice in keeping with honest commercial practice is accepted and that the above-mentioned proposal for a directive therefore concerns solely the misappropriation of a secret;

3. Recommends to the European Union to pursue its efforts to preserve the economic interests of its companies internationally and strengthen the initiatives as regards economic intelligence;

4. Insists on the essential linkage between the various rights defined by the Charter of Fundamental Rights of the European Union listed in recital 23 of the above-mentioned proposal for a directive, be they of an economic nature such as the freedom to conduct a business or the right to property, or of a societal or social nature such as the freedom of expression and information or the freedom to choose an occupation and the right to engage in work;

5. Insists also on the linkage between, on the one hand, private economic interests related to business or technological information or know-how and, on the other hand, public interest possibly related to the same information;

6. Informs of the persistent concerns of European civil society regarding the harm that the above-mentioned proposal for a directive could cause to the balance between the various fundamental rights mentioned in 4;

7. Regrets, from this point of view, that cooperation on this directive has focussed on a mere open public consultation led by the European Commission, the result of which is moreover controversial, given the low participation (386 answers received), the over-representation of large

industrial companies and the prior contacts of the latter with the European Commission;

8. Regrets in particular, the absence of formal European social dialogue during the elaboration process of the above-mentioned proposal for a directive by the European Commission, whereas the text has a direct impact on employee representative organisations and on workers themselves;

9. Regrets also the lack of consultation and the absence of formal dialogue with the other members of civil society, such as non-governmental organisations or journalists' associations;

10. Observes that Article 2 of the above-mentioned proposal for a directive, on the definition of trade secret, keeps without adding anything the definition of undisclosed information resulting from 2 of Article 39 of the above-mentioned Agreement on Trade-Related Aspects of Intellectual Property Rights;

11. Welcomes, however, that France has obtained the introduction of a recital in the text emerging from the Council of 26 May 2014 which states that this information or know-how must have 'effective or potential commercial value [...] in particular insofar as their unlawful acquisition, use or disclosure may be detrimental to the interests of the person lawfully controlling them in that it is prejudicial to its scientific and technical potential, its economic and financial interests, its strategic positions or its capacity to meet competition';

12. Calls more explicitly for a change to the condition set forth in *b* of 1 of Article 2 of the above-mentioned proposal for a directive, by specifying that the protected information has, more than merely 'commercial value', a 'potential or effective economic value, because it is secret', so that the definition of trade secret is more operative;

13. Calls, by a change to 2 of Article 4 of the above-mentioned proposal for a directive, for the exclusion of journalists' activities from the scope of this proposal, in order to meet the concerns expressed in particular as regards the protection of sources;

14. Suggests that a new recital specify that this exclusion of journalists from the scope of the proposal for a directive can ensure freedom of expression and information;

15. Suggests that the same new recital recall that the proposal for a directive does not affect the constitutional traditions, legislations and practices of the Member States as regards freedom of expression, protection of the sources of journalists and ethical alert, in compliance with the Charter of Fundamental Rights of the European Union;

16. Welcomes the clarification which the Council guidance text brings, on a proposal from France, to 1 of Article 4 of the above-mentioned proposal for a directive. The clarification provides that 'the acquisition, use or disclosure of trade secrets is considered lawful insofar as required by national or EU law', which helps clarify the possibility for national administrations (tax, health, customs services, regulatory authorities...) not to have trade secrets invoked against them in the course of their activities;

17. Deems that, given the impact of the proposal for a directive on the rights of employees, its Articles 3 and 4 must be amended to protect even more employee representatives;

18. Proposes therefore to integrate in the proposal for a directive the criteria that have

emerged from European case-law as regards the information of personnel representatives and that are related to their work, profession or duties;

19. Emphasises that the aim of protecting trade secrets must not restrict the mobility of workers and that the present balance between the use of non-compete clauses and confidentiality clauses, on the one hand, and the protection of trade secrets, on the other hand, must be preserved;

20. Hails the exclusion, in recital 8 of the above-mentioned proposal for a directive and with respect to the definition of trade secret, of knowledge and skills gained by employees in the normal course of their employment and which are known among or accessible to persons within the circles that normally deal with the kind of information in question;

21. Insists also on the fact that the limitation periods must be kept as two years maximum;

22. Deems that the protection of whistleblowers, acting on their own behalf and conscious of their civic responsibilities, must be specified in Article 4 of the above-mentioned proposal for a directive, which will allow them to also benefit from a form of exemption;

23. Takes note of the minimum harmonisation clause desired by the Council, allowing for example France not to create an *ad hoc* liability regime and keep the possibility of imposing civil penalties on those making abusive appeals;

24. Welcomes that a maximum harmonisation principle has been ratified for the cases of liability exclusion or exemption (journalists, employees, whistleblowers), to ensure maximum protection of fundamental rights in all the countries of the European Union, guaranteeing that any possible criminal penalties regime laid down by the Member States cannot go against exoneration clauses;

25. Supports the provisions under which the negotiations conducted by France at the Council have succeeded in allowing a better balance, during legal proceedings, between confidentiality and compliance with the adversarial principle, by restricting access to information only for third parties and not for the stakeholders and by imposing that States ensure that stakeholders, their lawyers, court agents, witnesses and experts are not authorised to use or divulge a trade secret they have learnt during proceedings;

26. Mentions its concern regarding the possible impact of this proposal for a directive on the application of any other relevant legislation, such as that on intellectual property rights, and regrets that only recital 28 refers briefly to the risk of overlapping between the scope of Directive 2004/48/EC of the European Parliament and of the Council, of 29 April 2004, on the enforcement of intellectual property rights, and the scope of the above-mentioned proposal for a directive, the latter prevailing as the *lex specialis*;

27. Deems necessary a clarification in the proposal for a directive regarding the linkage between trade secrets and intellectual property rights, when the former precede the latter, when they combine and when they are mutually exclusive;

28. Welcomes any amendment proposals by the European Parliament leading to a better balance in fundamental rights with respect, in particular, to divergences of application by the Member States;

29. Deems necessary that the French Parliament be able to affirm a clear position, combining support for innovation and respect for fundamental rights, through the means of this resolution, and thus make its voice heard in the ongoing negotiations at the European Parliament and those to be held at the Council of the European Union