During the last few months, the EU intellectual property (IP) agenda has been taking its final shape, with the main actors getting together to discuss the details of the legislation. The recent hearing in parliament's legal affairs committee was a rather good opportunity for all engaged stakeholders to have a direct discussion of their intentions on the commission proposal for a new trade secrets directive, which will address the industry's calls for more effective protection.

While preparing the directive, the commission cited data according to which "one in five respondents had suffered at least one attempt at misappropriation within the EU, whereas nearly two in five respondents stated that the risk of trade secret misappropriation had increased during the same period." At the same time, "40 per cent of EU companies would refrain from sharing trade secrets with other parties because of fear of losing the confidentiality of the information through misuse or release without their authorisation".

Despite the apparent effort to establish a common framework of protection, one of the fundamental parts of the negotiations so far has been the extent of the regulation itself, with the commission opting for a minimum harmonisation approach, instead of full harmonisation. The directive lays out some minimum requirements of protection for the industry, allowing member states to adopt more detailed and stricter provisions when compared to the commissions.
"The greatest challenge that European industry is facing at the moment is the fragmentation of the law, the different procedures and the remedies provided across Europe, with the companies - in most cases SMEs with limited financial resources - having to deal with 28 different legal systems"

Of course, industry representatives are very disappointed. The managing director of the Italian steel company present at the hearing and whose company suffered a great loss due to the wrongful misappropriation of its production method and client list from a third country competitor, appeared dissatisfied with the position taken by the representative of the legal industry against full harmonisation.

Nevertheless, the directive mentions that judicial cooperation and enforcements are not within its scope. Indeed, the greatest challenge that European industry is facing at the moment is the fragmentation of the law, the different procedures and the remedies provided across Europe, with the companies - in most cases SMEs with limited financial resources - having to deal with 28 different legal systems.

What they need is a legal framework that will provide certainty and the sense of protection whenever a competitor's wrongful act threatens the normal course of business and the development of a competitive innovative market in Europe. An enforcement mechanism across Europe is the essential tool that will provide this certainty and will carry out the targets of the digital agenda, by being a driving force for investments in Europe.

At the same time, enforcement of trade secret related court decisions in third countries is also a very important issue. A great deal of the products and innovation coming from the EU companies is being exported to third countries, while many of the companies that unlawfully obtain trade secrets owned by European companies are based in such third countries. This makes the enforcement of the EU court decisions overseas even more challenging, taking into consideration that there is no cooperation agreement that would facilitate the process of enforcement.

The proposal for a trade secrets directive is definitely a very important step toward reinforcing the common market within the EU, providing for the first time a standardised definition of trade secrets across Europe and a framework of protection for the safe disclosure of information during litigation. What would be decisive here though - and which is lacking at the moment - is an enforcement mechanism across the continent.

About the author

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