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Balancing Interests in Trade Secrets Protection under EU Law: A Human Rights and Freedoms Perspective[1]

Abstract: This article examines the challenges in balancing employers' and employees' conflicting interests regarding trade secrets protection under EU Directive 2016/943. It analyses provisions of the Directive that may be relevant for such a balancing exercise and highlights the challenges associated with their application, particularly the problem of subjectivity. The study identifies key human rights and freedoms relevant in this context, including the right to privacy, freedom to conduct a business and freedom to choose an occupation. It explores EU Member States' obligations to consider these rights when protecting trade secrets. The article proposes using a perspective on human rights and freedoms to facilitate the balancing exercise. To minimize subjectivity, it suggests the application of a structured balancing test for human rights conflicts as proposed by Smet. The article argues that this approach could support a judicious balance between employees' and employers' competing interests in cases of trade secrets protection.

Keywords: Directive 2016/943, employer–employee interests, employment relationships, human rights balancing, trade secrets

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Introduction

The idea that certain valuable information deserves safeguarding against misappropriation has long been recognized as a significant legal principle.[2] Informal practices of secrecy and the preservation of valuable know-how can be tracked back to various ancient civilizations.[3] It was not, however, until the advent of industrialization that broader protection of trade secrets and, over time, of the know-how underlying industrial processes gained recognition and enforcement by English common law courts (e.g. *Newbery v. James*; Judgment of the High Court of Chancery, 1817). Legal protection against the misappropriation of trade secrets aimed at addressing the risks associated with new production modes in large factories, where substantial numbers of employees were often strangers both to their employer and to one another. At the same time, the innovative technologies used there required significant skills training, and forced employers to share critical technical knowledge with employees (Hrdy, 2019, pp. 2423–2424; see also the literature indicated therein).

However, the protection of trade secrets was not unlimited. From the very beginning, in cases with a background of an employment relationship, courts recognized that there is a need to balance employers' rights with the legitimate interests of employees. For example, in 1869 in *Leather Cloth Co. v. Lorsont* (Judgment of the High Court of Chancery, 1869), it was emphasized that '[p]ublic policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into'. This approach led to the development of the 'general knowledge, skill, and experience' doctrine, which initially emerged in the context of non-competition agreements (Hrdy, 2019, p. 2424).

Trade secrets protection in the context of an employment relationship is complex for several reasons. First, successful business operations are often impossible without sharing certain secrets with employees. Moreover, there are strong justifications for granting protection to trade secrets obtained by employees, arising from the rights of employers, including the right to protect business interests, confidential information and, in general, the right to privacy. At the same time, a strict approach to this protection could lead to a situation where employees are restricted from working elsewhere, simply because they have been exposed to their employer's secrets. This could ultimately infringe on the employees' individual rights, including the right to engage in work. Therefore the tension between employer interests in protecting trade secrets

2 On the historical background of trade secrets protection, see for example Menell et al., 2023; Schiller, 1930; Watson, 1996, p. 19.

3 On forms of protection in the past for the products of inventors' and artists' creativity, see Suchman, 1989.

and employee interests in being able to freely choose an occupation and workplace is of fundamental importance.

Within the EU, prior to the harmonization of rules about trade secrets protection, the approaches of its Member States to this issue varied. Sweden was the first country to have legislation on trade secrets. Other EU members provided protection through unfair competition law (Austria, Germany, Poland and Spain), provisions in industrial properties codes (Italy, France and Portugal), tort law (the Netherlands and Luxemburg) or the common law of confidence and contract law (UK, Ireland and Malta). Interestingly, the vast majority of Member States (excluding Cyprus, the Czech Republic, the Republic of Ireland, Luxemburg, Malta and the UK) had specific provisions on trade secrets in national labour laws or civil codes (European Commission, 2013, p. 4).

In order to strengthen the protection of trade secrets in the EU, Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure has been adopted.[4] It is binding for EU Member States, as well as for Iceland, Lichtenstein and Norway.[5] Directive 2016/943 harmonizes many aspects of trade secrets protection,[6] while adopting a minimal harmonization approach. This allows EU members to implement more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets, provided that the safeguards explicitly outlined in this Directive, designed to protect the interests of other parties, are respected (Article 1(1) and Recital 10).

The aim of this article is to identify key challenges in balancing the conflicting interests of employers and employees regarding trade secrets protection under Directive 2016/943, and to propose actionable recommendations for improving the reconciliation of these competing interests. To achieve this objective, the paper first examines the provisions of the Directive that explicitly refer to trade secrets protection in the context of employment. It also considers general provisions that may be relevant for balancing the competing interests of the parties to a dispute, highlighting the challenges associated with their application, in particular the problem of subjectivity. Subsequently, the article identifies the specific human rights and freedoms of employers and employees that are relevant to trade secrets protection in an employment relationship context, namely the right to privacy, freedom to conduct a business and freedom to choose an occupation and the right to engage in work. It also analyses

4 This had to be transposed by EU Member States by 9 June 2018 (Article 19(1) of Directive 2016/943).

5 These countries were included in the European Economic Area (EEA) Agreement by Decision 91/2019 of 29 March 2019.

6 Such as the definition of trade secrets; the acquisition, use and disclosure of trade secrets; measures, procedures and remedies, or sanctions.

to what extent EU Member States are obliged to take into account these human rights and freedoms when protecting trade secrets. Finally, the paper argues that turning to the principles of the protection of human rights and freedoms can facilitate the process of balancing the competing interests of employers and employees regarding trade secrets protection. As a tool to minimize the subjectivity of decisions taken in individual cases, the paper proposes applying a structured balancing test for the resolution of human rights conflicts, as proposed by Smet. It is argued that applying the criteria from this test could support the judicious balancing of the competing interests of employers and employees. This research is based on the dogmatic method of legal research.

1. The balancing of employer's and employees' legitimate interests under Directive 2016/943

The problem of the misappropriation of trade secrets within the context of employment is significant, as employees and former employees are the most common perpetrators of such acts.[7] Directive 2016/943 repeatedly refers to freedom of establishment (Recital 13) and the free movement and mobility of workers (Recitals 3, 13, 21, Article 1(3)) that employers and employees stand behind. Despite the fact that the tension between the legitimate interests of employers and employees with regard to employers' trade secrets is obvious, Directive 2016/943 does not establish completely separate rules for the protection of trade secrets against misappropriation by employees. Instead, it introduces only minor modifications to account for the employment context, in comparison to its general rules about the protection of trade secrets. The aim of this section is to verify how, if at all, this Directive addresses the challenge of balancing the competing interests of employers and employees in trade secrets protection.

First and foremost, Directive 2016/943 introduces a modification of the general rules of trade secrets protection in the employment context, which affects the outcome of an assessment of whether an employee's use of their employer's trade secrets was unlawful. This modification is connected to the experience and skills acquired by employees in the course of their employment. These have been addressed in Article 1(3)(b), which states that the Directive shall not offer any ground for limiting employees' use of the experience and skills honestly acquired in the normal course of their employment. The question arises of whether experience and skills can be considered trade secrets at all. Pursuant to Article 2(1) of Directive 2016/943, a 'trade secret' means information which meets all of the following requirements:

7 In the public consultation conducted by the European Commission (2012, p. 13) prior to the adoption of Directive 2016/943, over half of the respondents identified former employees as the most typical perpetrators of trade secrets misappropriation.

a) it 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) 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.[8]

The concept of trade secrets is very broad, and the Directive's threshold for information to qualify as a trade secret is low (see e.g. Irgens-Jensen, 2023, pp. 501–509; Korycińska-Rządca, 2024, p. 167). Directive 2016/943 does not address the experience and skills gained by an employee during their employment in the definition of 'trade secret' contained in its Article 2(1)(a). In particular, this provision does not explicitly exclude employees' experience and skills from the concept of trade secrets, nor does any other provision in the main body of the Directive. In contrast, the Preamble to the Directive states, in Recital 14, that the definition of a trade secret excludes, among other things, the experience and skills gained by employees in the normal course of their employment. It seems that there is inconsistency between the provisions contained in the main body of the Directive and its Preamble, because the latter explicitly excludes experience and skills from the concept of trade secrets, whereas the main body remains inconclusive on this point. This has led to differences in the approaches of national courts. Polish courts, despite existing practical difficulties, follow the approach supported by the wording of Recital 14 of the Preamble and acknowledge that employees' experience and skills are excluded from the concept of trade secrets and therefore are not protected as such (Korycińska-Rządca, 2024, pp. 166–167). On the other hand, courts in Denmark, Germany, France, Norway and Sweden, instead of attempting to make such a distinction, focus on the weighting of interests (Irgens-Jensen, 2023, pp. 510–511).[9] The latter approach appears to more accurately reflect the provisions of the Directive. This is primarily due to the fact that the preamble to any directive has no binding legal force and plays a limited role in interpreting the provisions contained in the main body (see for example Judgment of the CJEU,[10] 1998, para. 54; Judgment of the CJEU (Sixth Chamber), 1998, para. 30; Judgment of the CJEU (Fifth Chamber), 2005, para. 32). Moreover, Recital 14 lists,

8 These requirements recall the criteria of 'undisclosed information' contained in Art 39(2) of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); the wording is identical (at least in the English version of these acts).

9 Interestingly, the French Code de Commerce does not explicitly exclude an employee's experience and skills from the definition of a trade secret. However, Article L-151–158(3) reiterates Article 5(d) of Directive 2016/943, stating that a trade secret cannot be enforced when it has been acquired, used or disclosed in order to protect a legitimate interest.

10 For the sake of consistency, the acronym CJEU is used throughout the main text to refer to the Court of Justice, including for judgments delivered prior to the entry into force of the Treaty of

along with employees' experience and skills, information that is generally known among, or is readily accessible to, persons within the circles that normally deal with such information as a category excluded from the definition of a trade secret. Such information is explicitly excluded from the concept of trade secrets under Article 2(1)(a) of the Directive. Therefore it can be assumed that if the EU legislature had intended to exclude employees' experience and skills from the concept of trade secrets, it would have done so in the same manner.

An important implication is that these rules regarding the experience and skills gained by an employee during their employment constitute the basis for balancing the legitimate interests of both the employer and the employee when determining whether, in an individual case, an employee's use of their employer's information was unlawful. Still, it has been argued in literature that when determining whether an employee's conduct was unlawful, a broad weighting of interests is in compliance with Directive 2016/943 (see Kolasa, 2018, pp. 155–156; Irgens-Jensen, 2023, p. 512, as well as the literature indicated therein).

Second, Directive 2016/943 introduces mechanisms that allow for the modification or dismissal of certain measures and remedies against an unlawful use of employers' trade secrets by their employees. These mechanisms are provided both at the stage of drafting national legislation and when the law is applied. At the legislative stage, Article 14(1) of the Directive permits Member States to limit employees' liability for damages when misappropriation occurs without intent. This provision grants flexibility to national legislatures, allowing them to consider the potential imbalance of power in employment relationships when shaping liability rules. By doing so, they can prevent disproportionate consequences for employees who inadvertently misuse trade secrets. This flexibility is rooted in the need to balance competing interests.

At the stage of applying rules to individual cases, Article 7(1)(a) requires that the measures, procedures and remedies provided for in the Directive be applied in a proportionate manner. This means that any measure or remedy imposed to protect trade secrets must be carefully balanced to ensure that it does not jeopardize fundamental rights and freedoms, the public interest or the mobility of workers, as indicated in Recital 21, which specifies various factors that should be taken into account in this balancing process, including the value of the trade secret, the seriousness of the conduct resulting in its misappropriation and the impact of such conduct. It also underscores that judicial authorities should have the discretion to weigh the interests of the parties involved in legal proceedings, as well as those of third parties. It can be concluded that the requirement of proportionality in ordering measures and remedies against the misappropriation of trade secrets aims to ensure a balance between the interests of employers and employees. However, this balancing exercise – unlike the

Lisbon. In the reference list, all such judgments are uniformly attributed to the Court of Justice of the European Union.

one related to experience and skills – does not take place at the stage of determining whether an employee's conduct was unlawful, but rather at the stage of imposing specific measures and remedies once misappropriation has been confirmed.

An important implication is that Directive 2016/943 provides mechanisms that require balancing the competing interests of employers and employees in a given case. At the same time, it does not provide clear guidance on how this process should be carried out properly. The Preamble only mentions certain factors that should be considered within the balancing process, including the need to take fundamental rights and freedoms into account, in relation to the requirement of the proportionality of measures, procedures and remedies.

2. Trade secrets and human rights

2.1. General remarks

Directive 2016/943 provides mechanisms requiring a balancing exercise between the competing interests of employers and employees when determining whether trade secrets protection should be granted in a given case. However, it fails to offer clear and comprehensive guidance on how this process should be conducted. As a result, the question arises as to whether referring to the human rights and freedoms of employers and employees could help facilitate the evaluation of whose legitimate interests deserve protection in a given case.

Trade secrets law is often framed in the context of promoting business innovation and facilitating the efficient exchange of valuable information.[11] Sunder (2013, p. 335) accurately indicates that this perspective highlights only the economic benefits of trade secrets protection but tends to overlook its broader social implications, where trade secrets law – beyond its economic role – profoundly shapes the social relationship between employers and employees, influencing fundamental human rights and freedoms. In regard to the question of whether human rights and freedoms may facilitate the process of balancing the competing interests of employers and employees in a given case, it should be emphasized that Recital 34 of Directive 2016/943 lists several fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union (the Charter) signed on 7 December 2000 in Nice.[12] Recital 34 states that the fundamental rights and principles listed therein are

11 The issues of competitiveness, innovation-related goals and the protection of knowledge exchange between businesses are repeatedly emphasized in the Preamble of Directive 2016/943 (Recitals 1–4, 8–9, 16–17).

12 The Charter was subsequently amended and re-signed by the presidents of the European Parliament, the EU Council and the European Commission during the Lisbon Summit on 12 December 2007. It became a legally binding instrument following the adoption of the Lisbon Treaty, which entered into force on 1 December 2009.

respected and observed by the Directive. These include the right to respect for private and family life, the right to protection of personal data, freedom of expression and information, the freedom to choose an occupation and the right to engage in work, the freedom to conduct a business, the right to property, the right to good administration and in particular access to files, while respecting business secrecy, the right to an effective remedy and to a fair trial, and the right of defence. It should be noted, however, that not all of these rights and principles seem relevant when considering the balancing of employers' and employees' interests.

This section identifies the human rights and freedoms of employers and employees that may be relevant when determining whether trade secrets protection should be granted. On the one hand, it focuses on human rights and freedoms safeguarded by the Charter, which Directive 2016/943 directly refers to. On the other, it reviews the provisions of the European Convention on Human Rights (ECHR or the Convention), signed in Rome on 4 November 1950, that all EU members are bound by. Although the Convention primarily safeguards civil and political rights, the European Court of Human Rights (ECtHR) does not entirely exclude economic interests from the scope of its protection.[13] On the contrary, in *Airey v. Ireland*, it acknowledged that '[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature' and concluded 'that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention' (Judgment of the ECtHR, October 1979, para. 26). Notably, the Charter distinguishes itself from the Convention by explicitly recognizing certain economic rights (such as the freedom to conduct a business, guaranteed under Article 16 of the Charter) and thus may be considered to be a more modern document (Wiśniewski, 2023, p. 12). Although neither the Convention nor the Charter explicitly safeguard the right to protect trade secrets, several of their provisions are relevant for establishing a human rights perspective for such protection. These provisions are discussed below.

2.2. The right to privacy

Both the Convention and the Charter recognize the right to privacy as a fundamental human right. Given this, one may question whether the protection of trade secrets can be linked to it. Pursuant to Article 8(1) ECHR, everyone has the right for their private and family life, their home and their correspondence to be respected. This right undoubtedly applies to employees (Judgments of the ECtHR, 1997, 2007, September 2017, November 2017), but this statement contributes very little to the issue of protect-

13 In fact, the ECtHR has identified violations of one or more Convention rights in numerous cases involving socio-economic issues (see Leijten, 2018, pp. 25–58).

ing the trade secrets of employers. A much more significant issue here is likely to be whether the right to privacy can also be recognized as a right of employers, which could serve as a justification for granting protection over trade secrets. Based on the English version of the Convention, it might seem that the term 'private life' and 'home' cannot apply to businesses, as the notion of a company having any form of life (or home) appears inconceivable (Oliver, 2009, p. 1449). However, there are notable differences between the English and French versions (both are authentic) of this provision, as the latter, instead of using terms 'private life' and 'home', refers to a '*vie privée*' (a standard term for 'privacy' in French) and '*domicile*' (a term with broader implications than 'home', which can include, for example, also a professional office).

The case law of the ECtHR has expanded the scope of Article 8(1) ECHR to encompass professional matters. In the judgment on *Niemietz v. Germany*, which was the first case where the ECtHR ruled that the right to privacy applies to businesses, the Court observed that '[t]here appears […] to be no reason of principle why […] the notion of "private life" should be taken to exclude activities of a professional or business nature' (Judgment of the ECtHR, 1992, para. 29). It further stated that interpreting 'private life' and 'home' to include certain professional or business activities or premises aligns with the fundamental aim of Article 8, which is to protect individuals from arbitrary interference by public authorities (para. 31). It can be observed that over time, the ECtHR extended the scope of the application of Article 8(1) ECHR even further, indicating in *Société Colas Est and Others v. France* that the concept of 'home' also covers 'a company's registered office, branches or other business premises' (Judgment of the ECtHR, 2002, para. 41). The ECtHR has yet to address whether Article 8(1) extends to the protection of trade secrets. However, as Oliver (2009, p. 1451) has accurately pointed out, the recognition of trade secrets as falling within the scope of this provision would only represent a minor conceptual shift.[14]

The right to respect for private life enshrined in Article 8 ECHR is substantially reproduced in Article 7 of the Charter (see Judgment of the CJEU (Grand Chamber), 2008, para. 64), which states that everyone has the right to respect for his or her private and family life, home and communications.[15] In *AKZO Chemie BV v. Commission*, the CJEU held that business secrets are afforded very special protection, and that the protection of business secrets constitutes a general principle of Community

14 In this context, Oliver has also recalled *Goodwin v. the United Kingdom* (Judgment of ECtHR, 1996), stating that the protection of business secrets was recognized there as a legitimate reason for restricting freedom of speech. It should be noted, however, that this case did not concern the protection of trade secrets but focused on freedom of expression and the possibility of its limitation in order to protect the confidentiality of a journalistic source, which provided a journalist with the confidential information of an undertaking (albeit there was no sufficient ground to claim that this information constituted a business secret).

15 With the same notable differences in the wording between the English and French versions, as in the case of Article 8(1) ECHR.

law (Judgment of the CJEU (Fifth Chamber), 1986, para. 28). This view was confirmed in *SEP v. Commission* (Judgment of the CJEU (Fifth Chamber), 1994, paras. 36 and 37). In his Opinion in the case of *Ismeri v. Court of Auditors*, Advocate General Ruiz-Jarabo Colomer indicated that the principle of confidentiality, which is present in EU law and case law, replicates the fundamental right established in Article 8 ECHR (CJEU, 2001, para. 73). Interestingly, in *Varec v. Belgian State*, the CJEU raised the protection of confidential information and business secrets to the status of fundamental rights, as it referred directly to Article 8 ECHR and Article 7 of the Charter (Judgment of the CJEU (Third Chamber), 2008, para. 48). In that sense, the CJEU has gone further than the ECtHR, as the latter has not yet ruled on whether Article 8 ECHR covers the protection of trade secrets.

Based on the analysis presented above, there is solid ground to consider an employer's right to privacy as a relevant human right, which should be taken into account when evaluating whose legitimate interests – those of the employer or the employee – deserve protection in a given case.

2.3. The freedom to conduct a business

The use of information, including trade secrets, obtained by employees in the course of their employment for purposes other than fulfilling their duties under the employment relationship (such as using them at a subsequent employer or in the employee's own business activity) may significantly affect the employer's business activity and cause them serious damage. This raises a question of whether such actions by an employee may be considered an infringement of their employer's freedom to conduct a business.

As mentioned above, the Convention safeguards civil and political rights, without explicitly recognizing any right directly related to conducting economic activities. In contrast, the Charter takes a broader approach to fundamental rights; Article 16 recognizes the freedom to conduct a business in accordance with EU law, national laws and practices. The concept of this freedom is not extensively elaborated in this provision, however. Explanations relating to the Charter indicate three components of this freedom: (1) the freedom to exercise an economic or commercial activity – the Explanations suggest that it has been recognized in *Nold* (Judgment of the ECtHR, 1974, para. 12) and *SpA Eridania and Others* (Judgment of the ECtHR, September 1979); (2) freedom of contract – the Explainations cite *Sukkerfabriken* (Judgment of the ECtHR, January 1979) and *Commission v. Spain* (Judgment of the CJEU (Sixth Chamber), 1999); and (3) free competition, which has been recognized in Article 119(1) and (3) TFEU (European Union, 2007, p. 23[16]). Incidentally, a close examination of the judgments in

16 It should be noted that the Explanations were originally prepared under the authority of the Praesidium of the Convention, which drafted the Charter, and do not have the status of law.

the above-mentioned cases raises serious doubts about whether the wording of Article 16 of the Charter represents a straightforward codification of case law.[17]

The concept of the freedom to conduct a business has been clarified through case law. It follows that this freedom ensures that economic actors have a certain degree of autonomy in relation to other actors and the state, which enables them to engage in commercial activities and exercise their entrepreneurial rights without undue interference (see Judgment of the CJEU (First Chamber), 2004, paras. 51–52; Judgment of the CJEU (Third Chamber), 2011, paras. 46–53). Advocate General Cruz Villalón explained in *Mark Alemo-Herron* that 'the freedom to conduct a business protects economic initiative and the ability to participate in a market, rather than the actual profit, seen in financial terms, that is earned in that market' (CJEU, 2013, para. 51). In the literature there is a discussion as to the precise status of the freedom to conduct a business, namely whether Article 16 of the Charter lays down a directly enforceable 'right' or merely a 'principle' (see e.g. O'Connor, 2024, pp. 120–122, 133–134; Oliver, 2013, p. 295). The reference in Article 16 of the Charter to 'Union law and national laws and practices' may be indicative of a principle, rather than a right. However, in *Sky Österreich*, the CJEU considered the freedom to conduct a business a specific 'right', rather than merely a 'principle' (Judgment of the CJEU (Grand Chamber), 2013, para. 46; see also O'Connor, 2024, pp. 121–122; Oliver, 2013, pp. 295–296). Notably, in the foreword to a report entitled 'Freedom to conduct a business: Exploring the dimensions of a fundamental right', the EU Agency for Fundamental Rights referred to the freedom to conduct a business as a 'right'.[18]

17 In *Nold*, there is a reference to the right to the free pursuit of business activity, but it is only due to the fact that the applicant claimed that this right was protected by the *Grundegesetz* in Germany and other national constitutions as well as the European Convention on Human Rights, and claimed that this right was violated (Judgment of the ECtHR, 1974, para. 12). The judgment makes no reference to the freedom to conduct a business, and the Court did not examine this case on the basis of this freedom. Similarly to *Nold*, the *SpA Eridania and Others* judgment is a reference to an economic activity in the context of fundamental rights, but purely due to the fact that this judgment was a result of a reference for a preliminary ruling, and one of the submitted questions was 'based on the view that the carrying on of economic activity must be guaranteed because it forms part of the fundamental rights which Community law is also concerned to uphold' (Judgment of the ECtHR, September 1979, para. 20). Contrary to what has been stated in the Explanations, this judgment does not explicitly indicate that the freedom to conduct a business constitutes (or should constitute) a fundamental right. Notably, paragraph 19 of the *Sukkerfabriken* judgment, cited in the Explanations, makes no mention of the freedom to contract. Having said that, the subsequent paragraph of this judgment merely refers to that concept without, however, establishing it as a fundamental right. In *Kingdom of Spain v. Commission* (Judgment of the CJEU (Sixth Chamber), 1999), it was acknowledged that the right of parties to amend contracts concluded by them is based on the principle of contractual freedom, and any restrictions on it must be clearly articulated. See also Hogan, 2023, pp. 762–765, and the literature indicated therein.

18 It has been explained in the report that the main aim of the freedom to conduct a business 'is to safeguard the right of each person in the EU to pursue a business without being subject to ei-

Nevertheless, the freedom to conduct a business has been considered a rather 'weak' right. Oliver describes the language used in Article 16 of the Charter as 'diffident', in contrast with several other provisions of the Charter. Moreover, he notes (2013, p. 285) that the phrase 'in accordance with Union law and national laws and practices' lessens the intensity of this provision even further. On the other hand, Groussot, Petursson and Pierce (2014, p. 336) have asked whether the seemingly weak wording of Article 16 has the potential to be significantly strengthened through judicial interpretation. Analysis of CJEU case law regarding the freedom to conduct a business provides some evidence to confirm such a thesis. Most of the attempts to invoke the freedom to conduct a business have ended unsuccessfully, as the CJEU has repeatedly emphasized that the freedom to conduct a business is not absolute and must be viewed in relation to its social function (see e.g. Judgment of the CJEU (First Chamber), 2004, paras. 51–52; Judgment of the CJEU (Third Chamber), 2012, para. 54, and the case law cited therein; Judgment of the CJEU (Grand Chamber), 2013, para. 45). In fact, the freedom to conduct a business has been used as a counterweight to other fundamental rights, such as the rights to privacy (Judgments of the CJEU, February 2012, para. 48; March 2012, para. 50), health (Judgment of the CJEU (Third Chamber), 2012, para. 55) and intellectual property rights (Judgment of the CJEU, February 2012, para. 48; Judgment of the CJEU (Third Chamber), 2011, para. 50). However, some cases demonstrate that Article 16 of the Charter has a broader potential. For instance, it appears that it is relatively often relied on in horizontal situations when the interpretation of secondary EU law involves the balancing of rights at the national level (as in *Scarlet Extended*[19] or as in highly controversial and widely criticized Judgment of the CJEU (Third Chamber), 2013[20]), or in cases of the validity of EU secondary law arising at a national level in a proceeding involving private parties (as in Judgment of the CJEU (Grand Chamber), 2013) (see Groussot et al., 2014, p. 331). Hogan (2023, p. 783) has emphasized that the concept of this provision appears to be extremely broad, despite attempts to frame the freedom to conduct a business as a freedom supplemented by the limitations outlined in Article 16.[21] As follows from the above, the freedom to conduct a business is used as a counterweight to other

ther discrimination or disproportionate restrictions' (European Union Agency for Fundamental Rights, 2015, p. 21).

19 In this case, the Court held that the imposition of an injunction on an internet service provider to filter all electronic communications passing through its services constituted a violation of Article 16 (Judgment of the CJEU (Third Chamber), 2011, para. 48).

20 In *Mark Alemo-Herron*, the Court held that a national measure which went beyond the scope of harmonization required or allowed by the Directive violated Article 16 of the Charter; as a result, the judgment negatively impacted employees' rights, which the Directive was supposed to protect. On the critics of this, see Hogan, 2023, pp. 769–772, and the literature indicated therein.

21 She also expresses concern about the idea 'that any action taken in the running of a business constitutes the exercise of a fundamental right, and that any regulation or measure that affects a business's operations constitutes a prima facie interference with that right' (Hogan, 2023, p. 783),

fundamental rights, and may be considered relevant in the evaluation of whose legitimate interest should be protected in an individual case with an employment relationship context.

2.4. The freedom to choose an occupation and the right to engage in work

When searching for human rights or the freedoms of employees that could be relevant in the process of balancing interests, the freedom to choose an occupation and the right to engage in work should be considered. These have a well-recognized status within the broader framework of human rights. At the international level, their protection has been guaranteed, among others, under Article 23(1) of the Universal Declaration of Human Rights,[22] Article 6(1) of the International Covenant on Economic, Social and Cultural Rights,[23] and the International Labour Organization Convention no. 143 on migrant workers. These instruments are legally binding on EU Member States under their international commitments. Also, within the legal framework of the Council of Europe, Article 15(1) of the Charter has been recognized as being inspired by Article 1(2) of the European Social Charter,[24] which has been ratified by all EU members. At the EU level, the freedom to pursue one's trade or profession has been acknowledged as a general principle of EU law by the CJEU in *Keller* (Judgment of the CJEU (Third Chamber), 1986, para. 8) and subsequently safeguarded in the Charter.

Pursuant to Article 15(1), everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Furthermore, Article 15(2) guarantees every EU citizen the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Advocate General M. Bobek, in the Opinion delivered on 21 March 2017 in the case of *Werner Fries v. Lufthansa CityLine GmbH*, stated that the right to engage in work and to pursue a freely chosen or accepted occupation 'enhances personal autonomy and self-realisation, with human dignity serving as its foundation' (CJEU, 2017, para. 66).

Article 15 of the Charter can be interpreted broadly as covering the freedom to choose an occupation and the legal form of its performance (i.e. whether it is performed within the framework of an employment relationship or in another form, in-

questioning whether the freedom to conduct a business should have been included in the Charter at all.

22 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.'

23 '[T]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to make his living by work, which he freely chooses or accepts, and will take appropriate steps to safeguard this right.'

24 Article 1(2) states that, '[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake (…) to protect effectively the right of the worker to earn his living in an occupation freely entered upon'.

cluding independently), to seek employment and to work (including the freedom to make a declaration of intention both to enter into an employment relationship and to terminate it), as well as to exercise freedom of establishment and to provide services.[25] In the light of such an understanding, the obligation of employees to preserve the confidentiality of their employer's trade secrets acquired during their employment can conflict with this. This is because the obligation to keep information belonging to employers confidential, and the inability to legally use that information for purposes other than the performance of duties under the employment relationship, may restrict an employee's ability to seek new employment opportunities or to start their own business. In some cases, particularly for highly specialized employees, it can even eliminate those opportunities entirely if the employee intends to remain in the same profession. The foregoing considerations suggest that the freedom to choose an occupation and the right to engage in work may be a relevant factor in balancing employer and employee interests in an individual case.

3. Trade secrets and human rights: EU Member States' obligations

In addition to the obligations arising from EU legislation, EU Member States, as parties to the ECHR, are under an obligation to secure the rights and freedoms defined there for all individuals within their jurisdiction (Article 1 ECHR). In the context of the right to privacy enshrined in Article 8 ECHR, their responsibility may be engaged not only when the infringement of this right is a result of direct intervention by national authorities, but also when they fail to act to secure the observance of this right (Judgment of the ECtHR, September 2017, para. 110; see also Judgment of the ECtHR, 23 September 2010, *Obst*, paras. 40 and 43; 23 September 2010, *Schüth*, paras. 54 and 57). The Charter's provisions are addressed primarily to EU institutions, bodies, offices and agencies, with due regard for the principle of subsidiarity (Article 51(1)). This means that they should adopt legislation and apply it in a manner that respects the rights protected by the Charter, observes their principles and promotes their application within their respective powers. The Charter does not establish any new power or task for the EU, nor does it modify any power or task prescribed by the treaties (Article 51(2)). This basically means that despite the fact that the rights and freedoms safeguarded in the Charter are of a fundamental nature, the Charter does not solely empower or oblige any EU authority to adopt legislation in order to protect them, but if they do adopt legislation on the basis of their respective powers, they are obliged to take into account and properly protect the fundamental rights protected by the Charter. Additionally, it follows from the case law of the CJEU that the provisions of EU law should be interpreted in such a way that fundamental rights are not

25 On the material scope of Article 15 of the Charter, see García Coso, 2024, pp. 172–175.

violated (see Judgment of the CJEU (Third Chamber), 1991, para. 12). The provisions of the Charter also apply to EU Member States, but only when they are implementing EU law (Article 51(1)), including in cases of failure to act.

Considering the above, EU members are under an obligation to incorporate appropriate safeguards for employers' right to privacy, guaranteed under Article 8 ECHR among other things, in the context of protection against the misappropriation of trade secrets by employees. In particular, they are required to ensure that existing legal provisions are applied in a manner that effectively safeguards this right. As regards the freedom to conduct a business, as well as the freedom to choose an occupation and the right to engage in work, enshrined in the Charter, the latter has a limited binding extent for EU Member States. This implies that when implementing EU secondary legislation on trade secrets protection into national laws and applying it in individual cases, Member States have to adequately safeguard these freedoms. These considerations suggest that when applying trade secrets protection rules to a case within the context of an employment relationship, the right to privacy, the freedom to conduct a business and the freedom to choose an occupation and the right to work must be taken into account.

4. How human rights can facilitate the process of balancing the competing interests of employers and employees

In cases concerning the permissible scope for employees' and former employees' use of information obtained during their employment period for purposes unrelated to their duties, a conflict of interest between employers and employees may easily arise. When such a conflict occurs, it is essential to strike a fair balance between these competing interests, taking into account the specific circumstances of each individual case (Judgment of the CJEU, 2002, para. 43; Judgment of the ECtHR, September 2017, para. 112).

As demonstrated above, on the one hand Directive 2016/943 provides mechanisms that require balancing competing interests in a given case. However, it does not offer comprehensive guidance on how this balancing exercise should be conducted, and nor does it address various practical challenges, such as the issue of subjectivity (Smet, 2017a). On the other hand, the right to privacy, the freedom to conduct a business, and the freedom to choose an occupation and the right to work are relevant in trade secrets cases with an employment relationship background.[26] Thus reference to (or consideration of) these human rights and freedoms in an individual case is inevitable. The question should therefore not be whether reference to human rights and freedoms can support the proper balancing of competing interests, but rather how it

26 See the discussion in section 2 of this article.

should be implemented to facilitate this balancing process and to enhance the objectivity of the outcome. In order to reflect the competing human rights and freedoms of employers and employees within the balancing exercise in a case of trade secrets protection, the application of a balancing test can be valuable. Among the various methods proposed in the literature, in cases concerning the permissible scope for employees' and former employees' use of information obtained during their employment period for purposes unrelated to their duties, the structured balancing test proposed by Smet (2017b, pp. 38–57) offers particular advantages. This test allows for a nuanced and context-sensitive assessment of the dynamic interactions between the competing rights of both parties to a dispute, ensuring that the balancing exercise sufficiently reflects the interests of both.[27]

The structured balancing test proposed by Smet is a methodological approach used to resolve conflicts between competing human rights by comparing their relative strength in a given context. It involves a structured comparison of the justifications for and against each right, determining which should prevail in an individual case (Smet, 2017b, p. 45). Smet's test is composed of seven balancing criteria, four of which (the impact criterion, the additional rights criterion, the general interest criterion, and the responsibility criterion) may be relevant in a balancing exercise in trade secrets protection cases with an employment context. The remaining three criteria (the value criterion, the core–periphery criterion and the purpose criterion) have no practical significance and thus will not be discussed further.[28] The criteria of the structured balancing test are designed to work together in constructing 'nets of reasons' that support each of the conflicting human rights. Comparing the strength of both 'nets' makes it possible to determine which human right should prevail in a given case (Smet, 2017b, p. 49).

The impact criterion is the first issue that may be relevant; on its basis, it is possible to examine the damage suffered by (or the impact on) conflicting human rights or

27 By contrast, Alexy's (2003, 2014) proportionality test, for example – widely regarded as the standard framework in European constitutionalism – relies heavily on the abstract balancing of competing interests, which may make it somewhat less well suited to capturing the nuanced and multi-dimensional interactions that can arise in trade secrets protection disputes between employers and employees, and could thus make it more challenging to ensure the objectivity and comparability of the outcome.

28 The value criterion is useful only when the right to life competes with other human rights (Smet, 2017b, p. 47). The core–periphery criterion is intended to assess whether damage is done to a central or a peripheral aspect of the human right in conflict (Smet, 2017b, p. 48); it seems to have no added value to the resolution of the conflicting rights of employers and employees in the process of balancing competing interests in an individual case, because such disputes usually concern core rights and freedoms on both sides. The purpose criterion makes it possible to verify whether one human right stands in the function of another, conflicting, human right (Smet, 2017b, p. 49). This criterion is irrelevant for balancing employers' and employees' rights, as neither of the conflicting human rights in question stands in the function of the other.

the likelihood that such damage might actually occur (Smet, 2017b, p. 47). Smet proposes a five-stage scale, which enables the categorization of damage suffered by each conflicting human right as 'very serious', 'serious', 'moderate', 'light' or 'very light'. Another five-stage scale enables the categorization of the likelihood of damage as 'certain', 'a real and immediate risk', 'reliable', 'maintainable' and 'unlikely' (Smet, 2017b, p. 47). In order to assess both – the damage suffered by each conflicting human right or freedom and the risk of such damage occurring – it is crucial to consider the circumstances of a given case.

On the one hand, the nature and value of an employer's information that is acquired by the employee during their employment should be examined. At this point, it may be key to verify whether the relevant information is (or may be) used by the employee in direct competition with their employer (e.g. information enabling the creation of an item equivalent to the one sold by the employer). If so, this may be grounds for assuming that the use of such information by the employee would infringe their employer's human rights and freedoms more significantly than the rights and freedoms of the employee. By contrast, if it is information concerning other areas of the business activity of the employer, which do not directly touch upon the core of the business (e.g. general information memorized by the employee about the ideas, concepts or plans, names and prices of the products or customers lists), the damage to the employer's human rights and freedoms and the likelihood that such damage will occur will usually be assumed to be significantly lower. On the other hand, it is important to consider the individual situation of the employee, including the specific nature of their profession and the type of information necessary to perform their duties (e.g. if the employee performs a specialized job in a highly specialized market). The damage suffered to the employee's freedom to choose an occupation and the right to work may be increased if the employee is deprived of the possibility to legally use certain information elsewhere.

The second aspect to consider is the additional rights criterion, which allows the consideration of other human rights beyond the two main rights in conflict, whether held by one of the parties or by third persons (Smet, 2017b, pp. 48–49). At this stage, it may be relevant to look at the motives of the employee for using the information acquired during the employment relationship elsewhere. This criterion allows for considering, within the balancing exercise, whether the employer treated the employee unfairly, as well as whether the employee acted to the detriment of the employer.

The third relevant criterion is that of general interest, which is intended to take into account the broader context behind a conflict between human rights and to examine whether any of the conflicting rights are supported by an important general interest (Smet, 2017b, p. 49). At this stage, it is useful to take into consideration society's interest in the mobility of workers (Irgens-Jensen, 2023, p. 511).

Last is the responsibility criterion, which enables the assessment of the relevance of duties that correlate with human rights (Smet, 2017b, p. 49). This criterion may permit the consideration of employees' duty of loyalty towards their employers, provided that such a duty derives from national laws (Domeij, 2020, p. 163; Irgens-Jensen, 2023, p. 498; Kolasa, 2018, p. 156). It also allows for consideration of whether the parties signed a confidentiality agreement, and whether the employee received remuneration from the employer for maintaining confidentiality.

A comparison of the strength of the 'nets of reasons' supporting each of the conflicting human rights and freedoms, as assessed through these four criteria, may facilitate the process of balancing the competing interests of employers and employees in cases of trade secrets protection. Due to the structured nature of the test, referencing conflicting human rights in a given case and balancing them using the test could enhance the objectivity of the process, increasing transparency and the comparability of judgments.

Conclusions

Keeping confidential company information secret is often challenging, especially when these secrets are critical to maintaining the company's competitive edge. Operating a successful business without sharing any confidential information would only be possible for undertakings that do not employ anyone. However, for an undertaking with employees, at least at some stage of its development, it becomes inevitable that some business secrets will be disclosed to them. At the same time, the fact that employees have access to their employer's confidential information creates a delicate and potentially conflict-prone situation between employers and employees.

The analysis presented in this article highlights key challenges in balancing the conflicting interests of employers and employees concerning the protection of trade secrets within the EU. Directive 2016/943, as a key instrument of EU law aimed at the harmonization of trade secrets protection across EU Member States, provides mechanisms requiring the balancing of employers' and employees' interests in trade secrets disputes. This balancing exercise occurs both when determining whether an employee's conduct was unlawful (the experience and skills exclusion) and when deciding on measures and remedies against the unlawful use of an employer's trade secrets by their employee (the possibility for EU members to limit employees' liability for damages in cases of unintentional misappropriation and the general requirement of proportionality in measures, procedures and remedies). However, Directive 2016/943 does not provide explicit guidance on how to reconcile these competing interests in a given case. This lack of clear direction may result in subjective decision-making and inconsistencies in the application of trade secrets protection laws across EU Member States.

To address these challenges, this article proposes a structured approach to balancing the competing interests of employers and employees by considering relevant human rights and freedoms. Specifically, the right to privacy, the freedom to conduct a business, and the freedom to choose an occupation and the right to engage in work have been identified as crucial factors in the context of trade secrets protection in employment relationships.

The article proposes the application of Smet's structured balancing test for resolving human rights conflicts as a recommended tool to enhance objectivity and transparency in decision-making. This test, which involves assessing the strength of reasons supporting each conflicting right through specific criteria, can provide a more systematic and comparable approach to balancing competing interests. The application of such a structured methodology could not only facilitate the process of balancing the competing interests of the employer and employee, but can also work towards a more consistent and fair application of trade secrets protection rules to cases with an employment context while respecting the human rights and freedoms of both parties.

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