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LA RESTITUCIÓN DE LOS ESTÁNDARES EUROPEOS DE SECRETO COMERCIAL MEDIANTE MECANISMOS CORRECTORES EN LITIGIOS TRANSFRONTERIZOS *Reinstating European Trade Secrecy Standards through Corrective Mechanisms in Cross-Border Disputes*

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RESUMEN

El presente trabajo explora en qué medida el Derecho internacional privado europeo puede preservar los estándares de protección consagrados en la Directiva 2016/943 en litigios transfronterizos sobre secreto comercial. La aplicación del Derecho de un tercer Estado en este tipo de supuestos puede dar lugar a soluciones que se aparten del equilibrio sustantivo de intereses establecido por la Directiva. Sobre esta base, el trabajo analiza si ciertos mecanismos correctores del Derecho internacional privado, en particular las leyes de policía, la excepción de orden público y las disposiciones no derogables, pueden operar para salvaguardar estándares europeos esenciales en materia de secreto empresarial cuando resulte aplicable un Derecho no europeo. El artículo sostiene que la Directiva no puede considerarse internacionalmente imperativa en su conjunto. No obstante, algunas de sus disposiciones expresan intereses de suficiente relevancia normativa como para justificar su eventual proyección a través de dichos mecanismos. Concluye que, aunque tales instrumentos no pueden superar por completo las limitaciones estructurales del actual sistema conflictual, sí pueden ofrecer una vía limitada pero significativa para proteger valores europeos fundamentales en la litigación transfronteriza sobre secretos empresariales.

PALABRAS CLAVE: Secreto empresarial, Derecho internacional privado, ley aplicable, leyes de policía, orden público.

ABSTRACT

This contribution examines the extent to which European private international law may preserve the standards of protection embodied in Directive 2016/943 in cross-border trade secret disputes. The application of third-country law in such cases may lead to outcomes that diverge from the substantive balance of interests established by the Directive. Against this background, the paper explores whether certain corrective mechanisms of private international law, particularly overriding mandatory provisions, the *ordre public* exception, and non-derogable rules, may operate to safeguard core European trade secret standards where a non-European law is otherwise applicable. It argues that the Directive cannot be regarded as internationally mandatory in its entirety. Nevertheless, some of its provisions give expression to interests of sufficient normative importance to justify their possible projection through those corrective devices. The paper concludes that, although such mechanisms cannot fully overcome the structural constraints of the existing conflict-of-laws framework, they may still provide a limited yet meaningful means of protecting fundamental European values in cross-border trade secret litigation.

KEYWORDS: Trade Secrets, Private International Law, Applicable Law, Overriding Mandatory Provisions, *Ordre Public*.

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1. INTRODUCTION

Trade secrets have become an increasingly important means of protecting intangible value in the modern economy¹. Flexible in scope, in that they may cover technical know-how, production processes, and commercial strategies alike, and free from registration formalities or fixed terms of protection, they offer a form of protection that complements, and in some respects may even surpass, classical intellectual property (“IP”) rights. They are especially well suited to preserving valuable information at early stages of innovation and to protecting assets that do not fit easily within traditional categories such as patents or copyright, including certain forms of data and digital resources of growing significance in today’s technology-driven economy². It is therefore unsurprising that major economic powers have strengthened their legal frameworks in this field in recent years. Within the European Union, Directive 2016/943 on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure (“Trade Secrets Directive” or “TSD”) forms part of that broader regulatory trend. Its purpose is to approximate the protection available across Member States and, in doing so, to contribute to the proper functioning of the internal market.

The TSD, however, is not merely a commercially oriented harmonisation instrument. A closer examination of its provisions shows that its objectives extend beyond the immediate business expectations of European undertakings. The Directive pursues a plurality of aims, including the promotion of open collaboration as a driver of economic growth and innovation and the protection of European market actors against external threats capable of undermining their long-term viability. At the same time, it safeguards fundamental rights and broader public interests. Trade secret protection is expressly balanced against values such as freedom of expression, the public interest in the disclosure of wrongdoing, workers’ rights, and the legitimate mobility of employees, among others. These considerations underscore both the significance of the TSD and the importance of ensuring its effectiveness in all situations in which those interests may be engaged.

That importance is heightened by the increasingly cross-border character of trade secret disputes³. Economic activity based on intangible assets now unfolds within an

¹ Nathan Wajzman and Francisco García-Valero, ‘Protecting Innovation Through Trade Secrets and Patents: Determinants for European Union Firms’ (EUIPO 2017), [https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/Trade Secrets Report_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/Trade%20Secrets%20Report_en.pdf), pp. 28-30; WIPO, ‘WIPO Guide to Trade Secrets and Innovation’ (2024) <https://doi.org/10.34667/TIND.49735>, pp. 12-17.

² Aurelio López-Tarruella Martínez, *Propiedad Intelectual e Innovación Basada En Los Datos* (1st edn, Dykinson 2021), pp. 67-68; Áurea Suñol Lucea, ‘La Protección de Los Datos Como Secreto Empresarial En La Era de La Inteligencia Artificial’ (2020) 41 *Actas de derecho industrial y derechos de autor* 193 <https://doi.org/10.2307/j.ctv2zp4xvk.10>, pp. 196-198.

³ Significantly, an EUIPO study published in 2023 found that around 9% of the legal actions examined in relation to trade secrets infringements involved parties established in different EU Member States. The report also noted a

internationalised environment in which cross-border collaboration, the transnational circulation of information, and the global reach of digital infrastructures have become structural features of innovation and commercial expansion⁴. At the same time, fragmented supply chains and cyberattacks routinely transcend national borders, so that even ostensibly domestic operators cannot assume themselves to be insulated from transnational risks⁵.

Against that background, trade secret disputes will often extend beyond a single legal order. The unlawful acquisition, use, or disclosure of confidential information may present links with more than one State by reason of the parties' location, the place of the relevant conduct, or the territorial spread of its effects. In such circumstances, a central private international law ("PIL") question arises, namely the determination of the applicable law, which becomes a foundational precondition for effective protection. The present analysis addresses that question exclusively from a European PIL perspective, taking Regulation 593/2008 ("Rome I") and Regulation 864/2007 ("Rome II") as its principal framework. Both instruments are of universal application and govern the identification of the relevant law within the two legal settings in which secret misappropriation most commonly arises, namely contractual relationships and non-contractual conduct.

Crucially, however, the law designated by those instruments will not always be that of a Member State. Where the relevant connecting factor points to the legal order of a third country that does not secure protection equivalent to that afforded by the TSD (for example, where a product incorporating the confidential information of a Spanish undertaking is marketed in the United States), the interests that the European legislator sought to safeguard risk being undermined. In such cases, the mechanical application of the ordinary conflict-of-laws rule will not suffice. The Rome Regulations nevertheless anticipate this difficulty by providing a series of corrective mechanisms capable of recalibrating the conflict-of-laws outcome where the interest pursued by a given rule is of sufficient weight to justify it, most notably overriding mandatory provisions ("OMPs"), the *ordre public* exception, and non-derogable rules.

This paper contends that, although the TSD cannot as a whole be regarded as an internationally mandatory instrument, certain of its provisions pursue public and fundamental interests of sufficient weight to justify their operation through the corrective mechanisms previously outlined. That conclusion carries potentially significant

small number of cases, although considerably fewer, in which one of the parties was based outside the European Union [Maurizio Borghi and others, 'Trade Secrets Litigation Trends in the EU' (EUIPO 2023) <<https://data.europa.eu/doi/10.2814/565721>>, p. 29].

⁴ Ma del Mar Bustillo Saiz, *Protección Del Secreto Empresarial En La Directiva (UE) 2016/943 y En La Ley 1/2019* (1st edn, Marcial Pons 2020), pp. 15-21.

⁵ WIPO (n 1), p. 142; David S Almeling, 'Seven Reasons Why Trade Secrets Are Increasingly Important' (2012) 27 Berkeley Technology Law Journal 1091, pp. 1098-1112.

consequences for the preservation of European secrecy standards in situations where the otherwise applicable law is that of a third State. Before developing that argument, however, several preliminary observations are necessary.

First, the focus on the possible reintroduction of Union secrecy standards is justified by the structure of the European PIL framework itself. Most of the corrective mechanisms examined here operate by reference to the law of the forum and, since the Rome Regulations bind only Member States, the scenarios in which those mechanisms become relevant will in the vast majority of cases point towards the application of European standards. While it may theoretically be possible, in certain limited circumstances, to invoke the norms of a third State through some of these mechanisms (e.g., in the context of non-derogable rules applicable to purely domestic situations) a systematic examination of the secrecy legislation of all potentially implicated third countries would constitute an undertaking well beyond the scope of this contribution.

Secondly, even within the bounds of European substantive law, the analysis could in principle extend to other elements of the *acquis communautaire* bearing on trade secrecy, including sector-specific data-sharing regimes with confidentiality implications⁶. The scope and complexity of those instruments, however, places a thorough treatment of them beyond the reach of the present contribution, which accordingly focuses on the TSD⁷.

With those clarifications in place, the analysis proceeds in two steps. Section II identifies the legal thresholds governing each corrective mechanism under Rome I and Rome II, focusing only on those features relevant to the present enquiry. Section III then applies those thresholds, provision by provision, to the TSD, distinguishing between rules that fall within the Directive's minimum-harmonisation structure and those that do not, with a view to

⁶ This is the case, first of all, when discussing potential *lex specialis* secrecy standards present in both horizontal (like Art. 5 of the Regulation (EU) 2022/868) and sector-specific legislation (e.g., Art. 81.4 of Regulation 536/2014 on Clinical Trials). Moreover, there exist additional European mandatory rules on data and information sharing that may also have implications from a confidentiality standpoint even if they do not explicitly address secrecy concerns. Notable examples include sectorial data-sharing obligations outlined in Directive 2015/2366 on Payment services (Arts. 66-67), in Regulation 2018/858 on Motor Vehicle Repair and Maintenance Services (Art. 61 et seq.) or in Directive 2014/65 on Markets in Financial Instruments (Art. 65), among others.

⁷ However, for a substantive material analysis of the relevant provisions within these horizontal and vertical instruments, see: López-Tarruella Martínez, *Propiedad Intelectual e Innovación Basada En Los Datos* (n 2), pp. 167-192; European Commission, Directorate-General for Communications Networks, Content and Technology, 'B2 – Analytical Report on EU Law Applicable to Sharing of Non-Personal Data v2.0' (2020) SMART 2018/1009 <<https://data.europa.eu/sites/default/files/course/EU%20law%20applicable%20to%20sharing%20of%20non-personal%20data.pdf>>; Julie Baloup and others, 'White Paper on the Data Governance Act' [2021] SSRN Electronic Journal <<https://doi.org/10.2139/ssrn.3872703>>, pp. 15-26; Charlotte Ducuing and others, 'White Paper on the Data Act Proposal' [2022] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4259428>>, pp. 79-85; Alberto J Tapia Hermida, 'Digitalización Mercantil Europea: Las Leyes Europeas de Mercados y Servicios Digitales' (2023) 100 La Ley - Mercantil (acceso online); Pedro Alberto de Miguel Asensio, 'Obligaciones de Diligencia y Responsabilidad de Los Intermediarios: El Reglamento (UE) de Servicios Digitales' (2022) 109 La Ley - Unión Europea (acceso online).

determining which of them may operate through the corrective mechanisms examined where the otherwise applicable law is that of a third State⁸.

2. THE CATALOGUE OF AVAILABLE CORRECTIVE MECHANISMS

The three mechanisms examined here are best understood as forming a spectrum rather than a set of independent tools. OMPs intervene proactively, imposing the forum's essential rules regardless of the applicable law; the *ordre public* exception operates reactively, excluding a foreign rule whose application would produce a manifestly unacceptable outcome; and non-derogable norms preserve certain rules that cannot be displaced by the parties' choice of law, whether to protect public interests or purely private ones. Each of them functions under distinct conditions, which the following analysis sets out in turn.

To begin with, OMPs are defined by Art. 9.1 Rome I as “*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable*”⁹. This interpretation also extends to Art. 16 of the Rome II Regulation, even if the latter does not provide an explicit definition of the term¹⁰.

While it is typically the legislator's responsibility to designate a norm as an OMP and to define its precise scope through the so-called extension rule¹¹, there is a growing recognition in legal

⁸ This analysis accordingly focuses on scenarios in which the applicable law is that of a third state. In purely intra-European scenarios, the substantial degree of harmonisation achieved through the TSD means that the law of whichever Member State governs the dispute will incorporate largely equivalent secrecy standards, making it difficult to satisfy the threshold required by corrective mechanisms to justify a departure from the conflict-of-laws result. This is without prejudice to the possibility that divergent national implementing measures could in principle be invoked through such mechanisms in intra-EU scenarios, provided the corresponding conditions are met, as acknowledged by the CJEU in the context of OMP [*Case C-184/12 Unamar* [2013] CJEU ECLI:EU:C:2013:663., para. 51-53].

⁹ This notion has its origin in the *Arblade* judgement [*Joined Cases C-369/96 and C-376/96 Arblade* [1999] CJEC ECLI:EU:C:1999:575., para. 30.]

¹⁰ Javier Maseda Rodríguez, ‘El Juego de Las Normas Imperativas En El Reglamento Roma II Sobre Ley Aplicable a Las Obligaciones No Contractuales: Límites a La Aplicación de La Lex Causae’ (2013) 25 *Revista Electrónica de Estudios Internacionales* 25., pp. 6-7; Michael Wilderspin, ‘Overriding Mandatory Provisions’ in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (1st edn, Edward Elgar Publishing 2017) 1330., pp. 1334-1335.

¹¹ Martin Schmidt-Kessel, ‘Article 9’ in Franco Ferrari (ed), *Rome I Regulation: pocket commentary* (1st edn, Sellier European Law Publishers 2015), pp. 324-325.

doctrine¹² and case law¹³ that judges should have interpretative flexibility to implicitly identify international mandatory rules and rectify any potential legislative oversights. In this regard, OMPs may encompass not only national domestic provisions but also EU secondary law rules included in Regulations or Directives¹⁴, given their binding nature on Member States either through direct application or transposition¹⁵.

As per the operational aspect of this mechanism, both Rome Regulations permit the application of OMPs contained within the law of the forum, the principal difficulty lying not in their enforcement as such but in their identification and conceptualisation. Article 9.3 Rome I also provides the judge with the discretion (not obligation) to enforce OMPs from third states, but it seems rather unlikely that such provision will become relevant within the context of secrecy breaches, especially when considering the requirements imposed for its activation¹⁶.

Next, the so-called *ordre public* exception is also governed by both Art. 21 Rome I and Art. 26 Rome II Regulation under similar conditions¹⁷. It allows the court to exclude a legal provision identified by the corresponding conflict criterion when its application would result in an outcome manifestly incompatible with the public order of the corresponding Member State.

¹² Aurelio López-Tarruella Martínez, *Manual de Derecho Internacional Privado* (4ª, ECU 2022), p. 143; Maseda Rodríguez (n 10), p. 7, 10; José Carlos Fernández Rozas, Rafael Arenas García and Pedro Alberto de Miguel Asensio, *Derecho de Los Negocios Internacionales* (6th edn, Iustel 2020), p. 379; Carmen Vaquero López, 'Autonomía de La Voluntad y Normas Imperativas' in Sixto A Sánchez Lorenzo (ed), *Derecho contractual comparado: una perspectiva europea y transnacional*, II (3rd edn, Thomson Reuters - Aranzadi 2013), pp. 107-108; Clara Isabel Cordero Álvarez, 'Incidencia de Las Normas Imperativas En Los Contratos Internacionales: Especial Referencia a Las Normas de Terceros Estados Desde Una Aproximación Europea' (2017) 9 Cuadernos de Derecho Transnacional 174, pp. 182-183

¹³ See the *Unamar* case [*Case C-184/12 Unamar* (n 8)], para. 50., in which the CJEU stated that, when assessing whether the domestic rule it intends to apply may constitute as an OMP, the national court should "take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted", thus reinforcing this idea of the existence of a certain interpretative leeway for national judges to identify implicit OMPs [Wilderspin (n 10), p. 1333].

¹⁴ Schmidt-Kessel (n 11), pp. 320-330; Vaquero López (n 12), p. 93; Maseda Rodríguez (n 10), pp. 8-11.

¹⁵ Indeed, the CJEU has had the chance to deliberate precisely on the possibility of treating a given provision within a European Directive as an OMP, a question which answered in the affirmative [*Case C-381/98 Ingmar GB* [2000] CJEC ECLI:EU:C:2000:605, para. 23-24].

¹⁶ Under this provision, a judge may only give effect to an OMP of a third State if the relevant rule forms part of the law of the country where the contractual obligations are to be performed and renders their performance unlawful. Trade secrecy rules will rarely satisfy this threshold, as they do not typically render contractual performance unlawful as such. The only plausible candidates would be rules on exceptions to trade secret protection, such as those relating to mobility-restricting clauses or reverse engineering. For the interpretative debates surrounding this provision, see: Alfonso-Luis Calvo Caravaca and Javier Carrascosa González, 'Contratos Internacionales I' in Alfonso-Luis Calvo Caravaca and Javier Carrascosa González (eds), *Tratado de Derecho Internacional Privado*, II (2nd edn, Tirant lo Blanch 2022), pp. 3102-3103; Stefan Leible, 'La Importancia de La Autonomía Conflictual Para El Futuro Del Derecho de Los Contratos Internacionales' (2011) 3 Cuadernos de Derecho Transnacional 214, p. 231; Moritz Renner, 'Article 9 Rome I' in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations - Commentary* (3rd edn, Wolters Kluwer 2020), p. 273.

¹⁷ Sebastian Omlor, 'Article 21' in Franco Ferrari (ed), *Rome I Regulation: pocket commentary* (1st edn, Sellier European Law Publishers 2015), p. 488; Moritz Renner, 'Article 21 Rome I' in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations - Commentary* (3rd edn, Wolters Kluwer 2020), p. 435; Pietro Franzina, 'Article 21' in Ulrich Magnus and Peter Mankowski (eds), *Commentary - Rome I Regulation*, II (1st edn, Otto Schmidt KG, Verlag 2017), p. 823.

Consequently, this exception serves as the counterpart to the OMP mechanism, albeit functioning more as a corrective measure rather than a proactive one¹⁸. The case law of the CJEU has thoroughly examined the concept of ‘public order’¹⁹, stressing the need for a significant affection²⁰ that goes beyond mere incongruity with the legal system of the forum²¹. Here, it should equally be noted that the fundamental interest affected may emanate from both national rules and EU secondary law instruments²².

The enforcement of this clause demands a case-by-case analysis to assess whether the application of such foreign rule could pose genuine concerns in the specific circumstances according to the proximity and relativity tests²³. Yet, in instances concerning universally acknowledged fundamental principles, like basic human rights, the criteria for this evaluation may be lowered²⁴. Thus, the *ordre public* exception affords greater flexibility than the OMP mechanism, by permitting its utilization to uphold fundamental human rights safeguarded within a given jurisdiction, even in scenarios with minimal or no connection to that particular state²⁵.

The final corrective mechanism refers to non-derogable rules, and it only becomes relevant insofar as the parties have agreed on the law governing the dispute, whether within the contractual or tort realm. Indeed, both Rome Regulations²⁶ emphasize that parties' choice should not preclude the application of those provisions that cannot be excluded by agreement²⁷.

¹⁸ Jan von Hein, ‘Article 26 Rome II’ in Galf-Peter Calliess and Moritz Renner (eds), *Rome Regulations - Commentary* (3rd edn, Wolters Kluwer 2020), p. 860; Renner (n 17), pp. 434-435; Omlor (n 17), pp. 488-489; Alfonso-Luis Calvo Caravaca and Javier Carrascosa González, ‘Derecho Aplicable (II)’ in Alfonso-Luis Calvo Caravaca and Javier Carrascosa González (eds), *Tratado de Derecho Internacional Privado*, I (2nd edn, Tirant lo Blanch 2022), pp. 793-794.

¹⁹ Among others: *Case C-7/98 Krombach* [2000] CJECL:EU:C:2000:164, para. 67; *Case C-394/07 Gambazzi* [2009] CJECL:EU:C:2009:219, para. 27; *Case C-420/07 Apostolides* [2009] CJECL:EU:C:2009:271, para. 59; *Case C-302/13 flyLAL-Lithuanian Airlines* [2014] CJECL:EU:C:2014:2319, para. 49; *Case C-559/14 Meroni* [2016] CJECL:EU:C:2016:349, para. 45.

²⁰ Angelika Fuchs, ‘Art. 26’ in Peter Huber (ed), *Rome II regulation pocket commentary* (1st edn, Sellier European Law Publishers 2011), p. 428; Luís de Lima Pinheiro, ‘Article 26’ in Ulrich Magnus and Peter Mankowski (eds), *Commentary - Rome II Regulation*, III (1st edn, Otto Schmidt KG, Verlag 2019), p. 665; Renner (n 17), p. 447.

²¹ See also Recital 37 Rome I and Recital 32 Rome II in this regard.

²² von Hein (n 18), p. 865; Franzina (n 17), pp. 826-831; de Lima Pinheiro (n 20), pp. 665-666; Omlor (n 17), pp. 490-493; Fuchs (n 20), pp. 429-430.

²³ These assessments concentrate on: (i) determining if the situation has a minimal link to the pertinent state, permitting a significant influence on the public order of the forum; and (ii) evaluating the level of specificity of the affected public value (the greater the specificity to the relevant jurisdiction, the more challenging it becomes to justify a distinct impact on its public order) [Omlor (n 17), p. 494; von Hein (n 18), pp. 867-869]

²⁴ Renner (n 17), pp. 446-447.

²⁵ de Lima Pinheiro (n 20), pp. 666-668; Lydia Lundstedt, *Cross-Border Trade Secret Disputes in the European Union - Jurisdiction and Applicable Law* (1st edn, Edward Elgar Publishing 2023), pp. 256-258; Fuchs (n 20), p. 429; Calvo Caravaca and Carrascosa González, ‘Derecho Aplicable (II)’ (n 18), pp. 817-824.

²⁶ See, in this regard, Recital 15 Rome I, emphasizing the need for a coherent understanding of both provisions.

²⁷ Peter Mankowski, ‘Article 14’ in Ulrich Magnus and Peter Mankowski (eds), *Commentary - Rome II Regulation*, III (1st edn, Otto Schmidt KG, Verlag 2019), pp. 520-521.

There are two precise scenarios of a distinct scale in which this mechanism may become relevant. The first one pertains to purely domestic situations, i.e., when all the elements of the situation are located in a country other than the one whose law has been chosen (Art. 3.3 Rome I / Art. 14.2 Rome II). Here, parties' choice may not prejudice the application of the non-derogable rules of the country actually connected to the dispute, be that an EU Member State or a foreign one. The second one refers to intra-EU situations, i.e., when all the elements of the situation are located in one or more Member States, but the parties opt for the law of a third state applicable (Art. 3.4 Rome I / Art. 14.3 Rome II)²⁸. Here, parties' choice may not exclude the enforcement of non-derogable provisions within EU law (or within national rules implementing it in the case of EU Directives²⁹). In any scenario, non-excludable norms are not required to safeguard essential public interests³⁰, thus introducing a wider margin of appreciation for the judge³¹ to consider rules concerned solely with the protection of the private interests of the parties involved³².

3. THE INTERSECTION OF THE TRADE SECRETS DIRECTIVE PROVISIONS WITH CORRECTIVE MECHANISMS

With the thresholds governing each corrective mechanism established, the analysis can now turn to the question of whether, and to what extent, the provisions of the TSD are capable of meeting them.

The primary emphasis of the proposed examination will be on the OMP scheme. This choice is motivated by its proactive nature and the fact that, among all the scrutinized mechanisms, it imposes the most stringent standards to justify its potential activation, thereby introducing more interpretative and operational challenges compared to the others. Given this level of stringency, if a particular rule within the Directive qualifies for enforcement as an OMP, the underlying essential interest may similarly warrant the exclusion of foreign legislation conflicting with the forum's *ordre public*, or even the classification of the norm as non-excludable³³. However, the possibility of applying the Directive's rules through the

²⁸ In both cases, when determining whether the situation is purely domestic or European, the national judge shall pay attention to 'all relevant elements' associated with it. For a more detailed analysis, see: Francesca Ragno, 'Article 3' in Franco Ferrari (ed), *Rome I Regulation: pocket commentary* (1st edn, Sellier European Law Publishers 2015), pp. 111-113; Graf-Peter Calliess, 'Article 3 Rome I' in Graf-Peter Calliess and Moritz Renner (eds), *Rome Regulations - Commentary* (3rd edn, Wolters Kluwer 2020), pp. 110-112; Jan von Hein, 'Article 14 Rome II' in Graf-Peter Calliess and Moritz Renner (eds), *Rome Regulations - Commentary* (3rd edn, Wolters Kluwer 2020), pp. 768-769.

²⁹ Mankowski (n 27), p. 525.

³⁰ It is noted, however, that OMPs will usually be simultaneously deemed non-excludable rules [Calliess (n 28), p. 113].

³¹ Ragno (n 28), p. 114; Calliess (n 28), p. 112.

³² Lundstedt (n 25), pp. 258-259; Ivo Bach, 'Art. 14' in Peter Huber (ed), *Rome II regulation pocket commentary* (1st edn, Sellier European Law Publishers 2011), p. 339; Mankowski (n 27), p. 525.

³³ Calliess (n 28), p. 113

remaining corrective systems within the Rome Regulations will be concurrently assessed to provide a comprehensive analysis, especially for those scenarios where a given rule may not meet the requirements stipulated by the OMP scheme.

As a starting point, it must be firmly rejected that the TSD as a whole carries an internationally imperative character warranting its automatic application through the OMP mechanism whenever third-state law is identified as applicable. That conclusion does not follow from the Directive's form as opposed to a Regulation, for rules of EU secondary law, whether directly applicable or transposed into national legal orders, are perfectly capable of operating through this mechanism. The obstacle lies elsewhere: it is simply not possible to maintain that every provision of the Directive meets the threshold set by the OMP definition in Rome I.

That threshold demands the pursuit of an essential public interest, and not every rule within the TSD can credibly be said to do so. Even though the Directive plays a significant role in the current economic and commercial landscape and ultimately aims at the proper functioning of the internal market, this does not automatically imply that it pursues relevant essential public interests. In reality, the provisions embedded within the Directive seem more geared towards the safeguarding of private interests, specifically those of European entrepreneurs holding confidential information. This interpretation becomes apparent when delving into various of its Recitals and provisions, which emphasize the protection of the holder's legitimate concerns as the foundational principle underlying the envisaged measures. Hence, although the Directive acknowledges the smooth operation of the single market as an overarching objective, it appears more as a tangential consequence stemming from its primary emphasis on private business interests.

Moreover, even though secrecy breaches exert some influence on the innovative and competitive conditions of the internal market (which was the primary motivation for adopting the Directive³⁴), such influence does not seem profound enough to impact the fundamental structure of this economic area. Consequently, it may not be considered a threat to a fundamental EU public interest that would justify the automatic and direct application of the entire Directive through the OMP mechanism. Instead, a secrecy infringement is merely one of the several censurable conducts that could take place within this economic territory without causing substantial impacts on its overall structure and operation.

³⁴ Björn Kalbfus, 'Einleitung A III' in Björn Kalbfus, Henning Harte-Bavendamm and Ansgar Ohly (eds), *GeschGehG: Gesetz zum Schutz von Geschäftsgeheimnissen - Kommentar* (1st edn, CH Beck 2020), pp. 34-35, 38-42; Jens Schovsbo, 'The Directive on Trade Secrets and Its Background' in Jens Schovsbo, Timo Minssen and Thomas Riis (eds), *The Harmonization and Protection of Trade Secrets in the EU - An appraisal of the EU Directive* (1st edn, Edward Elgar Publishing 2020), pp. 9-10.

Additionally, it is essential to underscore that the European legislator has refrained from incorporating within the Directive any of the typical formulations usually employed to signify the internationally imperative nature of an instrument. For instance, there is no explicit statement indicating that the Directive or any of its rules should be applied "*regardless of the law otherwise applicable*" to the dispute. While this does not necessarily preclude the consideration of the Directive under the OMP framework, it does add an extra layer of complexity when advocating for it.

This is not to say, however, that a provision-by-provision assessment of the Directive could not yield a different result in respect of specific rules. As will be argued below, certain provisions have been formulated to safeguard interests that extend beyond the immediate concerns of trade secret holders, and it is precisely those provisions that may qualify for enforcement through Art. 9 Rome I or Art. 16 Rome II. Identifying them requires closer attention to the internal structure of the Directive and, in particular, to the distinction it draws between rules subject to its minimum harmonisation mandate and those that are not.

In this regard, it is worth recalling that, rather than pursuing full harmonisation through a directly applicable Regulation, the European legislator opted for a minimum harmonisation approach, considered sufficient to establish a baseline of consistency in the protection of commercial confidentiality across the internal market without unduly encroaching on the legal traditions of Member States. This choice reflects a deliberate preference for flexibility, leaving Member States room to adapt the protective framework to their own regulatory models while ensuring a common floor of protection.

There is nevertheless an exception to this statement, arising from Art. 1.1 TSD. According to this provision, Member States shall always respect the rules provided for in Arts. 3, 5, 6, 7 (para. 1), 8, 9 (second subparagraph of para. 1, paras. 3 and 4), 10 (para. 2), 11, 13 and 15 (para. 3). This way, the Directive appears to adopt an intermediary stance between minimum and full harmonization, which ensures that, despite the flexibility granted to Member States, national legislators will not alter the safeguards expressly stipulated in this instrument for the protection of the interests of other parties, as emphasized in Recital 10³⁵. This precept, therefore, could serve as some sort of benchmark when evaluating which provisions under the Directive may be considered internationally mandatory standards.

³⁵ Bustillo Saiz (n 4), pp. 59-62; Kalbfus (n 34), pp. 34-35.

1. Rules following the minimum harmonisation principle

With this premise in mind, the proposed analysis will start by examining those provisions that fall within the minimum harmonisation mandate, i.e., those that the TSD considers mandatory and with which Member States must ensure compliance.

One of these provisions is Art. 3, which initially appears to have the potential to be categorized as an internationally mandatory rule warranting application through the OMP mechanism when the law of a third state is determined to be applicable³⁶. This provision pertains to valid instances of acquisition, exploitation, and disclosure, where the presence of other interests more significant than those of the European undertakings in protecting their confidential information leads to the exclusion of the unlawfulness of such actions.

The first of these scenarios concerns independent discovery or creation (Art. 3.1.a TSD). As emphasized in Recital 16, the legitimacy of this conduct is grounded in the necessity to foster innovation and encourage competition within the internal market³⁷. The imperative to consider such public nature objectives has led some authors, like Lundstedt³⁸, to assert that Art. 3.1.a TSD may even extend protection to fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (“CFREU”), such as the freedom to pursue a profession and the right to work (Art. 15) or the freedom to conduct a business (Art. 16). In conjunction with the imperative nature acknowledged by Art. 1.1 TSD, this might substantiate the internationally mandatory vocation of this precept. Yet, adhering to the prerequisites stipulated by the Rome Regulations for the activation of the OMP mechanism, it is crucial to ascertain not only the pursuit of an essential public interest but also the specific scenarios falling within the purview of the relevant rule.

In this regard, it should be noted that the Directive does not include any clarification on its spatial reach. However, a comprehensive reading of its recitals and the provisions within this instrument leads to the inference, akin to the approach adopted by the CJEU in the *Ingmar* case³⁹, that it might be invoked through the OMP mechanism whenever the dispute has a close connection with the Union. This is because the primary objective of the Directive is none other than to facilitate the effective operation of the internal market for technical

³⁶ Kathrin Vollmöller, ‘Die Kollisionsrechtliche Behandlung von Geheimnisverletzungen in Vertragsverhältnissen’ (2021) 41 IPRax: Praxis des Internationalen Privat- und Verfahrensrechts 417., p. 424 (fn. 84); Ansgar Ohly, ‘Einleitung A VII’ in Björn Kalbfus, Henning Harte-Bavendamm and Ansgar Ohly (eds), *GeschGehG: Gesetz zum Schutz von Geschäftsgeheimnissen - Kommentar* (1st edn, CH Beck 2020), p. 101.

³⁷ Tanya Aplin, ‘The Limits of EU Trade Secret Protection’ in Sharon K. Sandeen, Christoph Rademacher y Ansgar Ohly (eds), *Research Handbook on Information Law and Governance* (1st edn, Edward Elgar Publishing 2021), pp. 179-180.

³⁸ Lundstedt (n 25), p. 265.

³⁹ *Case C-381/98 Ingmar GB* (n 15), para. 23-25.

knowledge, research, and innovation⁴⁰, while safeguarding the commercial interests of businesses within that economic area⁴¹. Accordingly, such close connection may arise either because the typical conduct occurs within the territorial confines of the single market or because one of the involved parties has its establishment or carries out its activities in such context, among other possibilities. This determination regarding the geographical scope of the Directive can tentatively be extended to all its provisions, regardless of the specific nuances presented by certain rules, which will be discussed subsequently.

Nonetheless, even if feasible, the application of Art. 3.1.a TSD under the *lois de police* framework appears rather improbable, given the prevailing consensus in most legal systems regarding the legitimacy of independent creation as a means of acquiring information⁴².

Very similar arguments can be put forward regarding the acquisition of secret information through the reverse engineering of a publicly available product, or of a product lawfully in possession of an acquirer without any legal obligations impeding such acquisition (Art. 3.1.b). As rules designed to promote innovation and competition within the single market, they may be viewed as protecting a crucial public interest that justifies their enforcement through the OMP mechanism (e.g., when a foreign company has made a product available on the EU but resists to allow its disassembly), or alternatively, barring the application of foreign laws when the outcome would clash with the *ordre public* of the forum⁴³.

However, regarding instances of lawful possession, it should be noted that the Directive does recognize Member States the possibility of vetting contractual limitations on reverse engineering when transposing this instrument into their legal frameworks⁴⁴. As a result, the rule on reverse engineering seems to lose its forceful nature, potentially denying its mandatory international vocation. Such norm is also unlikely to be acknowledged through the *ordre public* exception or as a non-derogable norm, given that parties can potentially override it by exercising the material autonomy granted upon them. In any case, all these elucidations are without prejudice that national transposing norms barring agreements that prohibit reverse engineering could still be considered as an OMP, as suggested by legal literature⁴⁵.

Art. 3.1 TSD also recognizes as lawful the acquisition of trade secrets in the exercise of the right of workers and workers' representatives to information and consultation, in accordance

⁴⁰ Recitals 3-4 TSD.

⁴¹ Bustillo Saiz (n 4), pp. 53-56; Kalbfus (n 34), pp. 34-35.

⁴² Elizabeth A Rowe and Sharon K Sandeen, *Trade Secrecy and International Transactions: Law and Practice* (1st edn, Edward Elgar Publishing 2015), p. 31.

⁴³ Lundstedt (n 25), pp. 266-267.

⁴⁴ Aplin (n 38), p. 183.

⁴⁵ Lundstedt (n 25), p. 266.

with both Union and national legislation. The enshrinement of such right in Art. 27 CFREU makes it possible to presume the essentially public nature of this rule. However, since its exercise depends on the specific provisions outlined in European and national law on the matter, it will be necessary to scrutinize the underlying rationale of relevant instruments to ensure that their measures are in line with this crucial public interest.

As an overview, these prerogatives find expression through various European instruments⁴⁶, such as the Directive 2002/14/EC (“Consultation Directive”) and their corresponding national implementations. A brief examination of the motivating factors behind these norms indicates that they may indeed share such significant public nature⁴⁷, especially considering that they were generally designed to procure the advancement of the fundamental right of EU workers and their representatives envisaged in Art. 27 CFREU⁴⁸ (and previously included in point 17 of the Community Charter of Fundamental Social Rights for Workers⁴⁹).

Thus, it seems perfectly plausible to resort to the OMP mechanism to guarantee the legitimate rights of EU workers, although such approach may not even be ultimately necessary. This is because the Directives and the guarantees therein envisaged are only triggered when the worker or representative carries out his activities within a Union establishment or undertaking⁵⁰. Following this logic, any potential dispute will probably already be governed to Union law, either through the special conflict rules for employment contracts outlined in the Rome I Regulation or through the non-contractual criterion for cases of unlawful acquisition, leading to the application of the law of the holder’s establishment⁵¹ (which in this case, would already be European).

The acquisition of a trade secret according to other honest commercial practices is also deemed lawful based on Art. 3.1.d TSD. Again, the Directive lacks a definition of what

⁴⁶ Including Directive 98/59/EC on Collective Redundancies, Directive 2001/23/EC on the Safeguarding of Employees’ Rights in Transfers of Undertakings, Directive 2001/86/EC on Employee Involvement in the European Company and Directive 2009/38/EC on the Establishment of a European Works Council (“Works Council Directive”).

⁴⁷ Tebelia Huertas Bartolomé, ‘Nuevas Normas Sobre Diálogo Social Europeo: La Información y Consulta de Los Trabajadores En La Comunidad Europea’ (2002) 20 Cuadernos de Relaciones Laborales 119., pp. 123-132; Sergio González Begega and Holm-Detlev Köhler, ‘Génesis Política y Nuevas Coberturas de La Directiva Revisada Sobre Comités de Empresa Europeos’ (2011) 29 Cuadernos de Relaciones Laborales 445., pp. 447-453.

⁴⁸ See, for example, Recital 2 *et seq.* of the Consultation Directive or Recital 46 of the Works Council Directive, among others.

⁴⁹ Community Charter of Fundamental Social Rights for Workers 1990 (6/90).

⁵⁰ See, for example, Art. 1 of both the Consultation Directive and the Works Council Directive.

⁵¹ Josef Drexler, ‘Art. 6 Rom II-VO Unlauterer Wettbewerb Und Den Freien Wettbewerb Einschränkungendes Verhalten’ in Franz-Jürgen Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8. Auflage (8th edn, CH Beck 2021), para. 180; Alfonso-Luis Calvo Caravaca and Javier Carrascosa González, ‘Obligaciones Extracontractuales’ in Alfonso-Luis Calvo Caravaca and Javier Carrascosa González (eds), *Tratado de Derecho Internacional Privado*, III (2nd edn, Tirant lo Blanch 2022), p. 3925; Pedro Alberto de Miguel Asensio, *Conflict of Laws and the Internet* (1st edn, Edward Elgar Publishing 2020), p. 369.

qualifies as an honest commercial practice nor does it offer any guidance in its Recitals, which may be a source of legal uncertainty. Hence, it will be essential to closely follow future judicial interpretations and the transposition of this provision into national legislation to shed some light on this matter⁵². Regardless, like the provisions on independent creation and reverse engineering, the primary objective of this article is none other than to foster innovation and bolster competition within the internal market, while simultaneously safeguarding fundamental rights such as the right to engage in business activities. As a result, this rule also has the potential for application through the OMP mechanism when the law of a third state is rendered applicable⁵³ (e.g., when a Union undertaking acquires the secret of a foreign company through certain commercial practices deemed unlawful in the country of establishment of the latter).

Lastly, Art. 3.2 TSD indicates that acquisition, use and disclosure shall be deemed lawful either when required or allowed by Union and national law. The abstract nature of this provision complicates making *a priori* assertions about its potential application through corrective mechanisms. Similar to the provision on the rights of workers and representatives, it links the lawfulness of these behaviours to what is stipulated in subsequent national or EU law. It will be necessary to scrutinize the relevant instrument to ascertain whether it upholds a fundamental public interest justifying its application through this mechanism. One example may be inferred from the reading of Recitals 11 and 18 TSD, which suggests that this provision was implemented to force companies to disclose pertinent confidential information to official governmental bodies when deemed necessary for the execution of their duties, including tasks such as audits, public contract allocations, and so forth⁵⁴. Since these are activities conducted by government agencies, it is reasonable to assume the presence of a relevant public interest, especially when speaking about audits and fiscal oversight. Another example which could fittingly align with this framework is the Directive 2019/1937 (“Whistleblowing Directive”)⁵⁵. Adopted to ensure the fundamental right to freedom of information and expression as outlined in Art. 11 CFREU⁵⁶, it

⁵² However, specific behaviours such as inducing breach of contract, deception, or fraud are widely acknowledged examples within both national and international standards (including the TRIPS Agreement) [Rembert Niebel, Lorenzo de Martinis and Birgit Clark, ‘The EU Trade Secrets Directive: All Change for Trade Secret Protection in Europe?’ (2018) 13 Journal of Intellectual Property Law & Practice 445 <<https://doi.org/10.1093/jiplp/jpx227>>., pp. 449-450; Bustillo Saiz (n 4)., pp. 126-127, 151-163].

⁵³ Lundstedt (n 25)., p. 268.

⁵⁴ Aplin (n 38)., p. 186.

⁵⁵ Lundstedt (n 25)., pp. 268-269.

⁵⁶ Recital 31 Whistleblowing Directive.

undoubtedly safeguards essential European public interests by enabling the disclosure of information (including trade secrets⁵⁷) related to activities contrary to Union law⁵⁸.

Next, consideration of Art. 5 TSD is also pertinent to the suggested analysis, as it may hold potential for mandatory application via the OMP mechanism⁵⁹. In particular, this provision stipulates that given conducts, even if deemed illicit from the outset, will be exempted from the prescribed measures, procedures, and remedies, due to the presence of other rights or interests that hold greater significance.

This is precisely the case with the right to freedom of expression and information under Art. 11 CFREU, which occupies the first of the exceptions provided in Art. 5 TSD. The legislator introduced this section with the aim of protecting investigative journalism, media pluralism, and journalistic sources⁶⁰. Hence, instances where a journalist's behaviour might be deemed illicit (such as gaining access to secret data through an individual violating a confidentiality duty⁶¹) will be exempted from penalties under the TSD due to the relevance of such interest⁶². Based on this rationale, where the foreign law governing the case imposes a stricter regime on freedom of expression and information, potentially labelling such conduct as unlawful, invoking Art. 5 TSD as a *lois de police* could be justified to ensure journalistic freedom. However, given the Directive's referral to the CFREU, it will be necessary to scrutinize the scope of application of this latter instrument to ascertain the situations that may fall within its purview.

In this context, it is important to highlight that despite safeguarding rights deemed fundamental, the scope of application of the CFREU is neither universal nor unlimited. Art. 51 of this instrument constrains its reach, specifying that it shall apply to Union institutions and bodies and to Member States solely when implementing Union law⁶³. Based on this premise, the question arises as per whether in the described scenario (i.e., a national court of a Member State addressing an international dispute involving trade secrets), the concerned Member State is effectively applying Union law. In principle, given that the

⁵⁷ Art. 21.7 Whistleblowing Directive.

⁵⁸ Art. 2 lists the different kinds of information that may be disclosed within the framework of the Whistleblowing Directive, including that on public health, consumer protection or the safeguarding of the environment, all of which seem of paramount importance for the public interest.

⁵⁹ Kalbfus (n 34), p. 37; Ohly, 'Einleitung A VII' (n 37), p. 101; Vollmöller (n 37), p. 424 (fn. 84).

⁶⁰ Recital 19 TSD.

⁶¹ Bustillo Saiz (n 4), pp. 128-129.

⁶² To ascertain the ultimate reach of such fundamental right, it might be necessary to examine the case law established by the European Court of Human Rights [Aplin (n 38), p. 190]

⁶³ For a detailed analysis, see: Miguel Azpitarte Sánchez, 'Artículo 51. Ámbito de Aplicación' in Antonio López Castillo (ed), *La Carta de Derechos Fundamentales de la Unión Europea. Diez años de jurisprudencia* (1st edn, Tirant lo Blanch 2019); Tobias Lock, 'Article 51' in Manuel Kellerbauer, Marcus Klampert and Jonathan Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (1st edn, Oxford University Press 2019).

national judge will rely on European PIL rules to establish jurisdiction and identify the law governing the dispute⁶⁴, the answer would have to be in the affirmative⁶⁵. This interpretation aligns with the expansive stance on Art. 51 advocated by the CJEU in several of its judgements⁶⁶, including the *Åkerberg Fransson* case⁶⁷, where it asserted that the CFREU should be applicable to all situations governed by Union law (which in this case included Swedish tax laws based on Directive 2006/112 and Art. 325 TFEU⁶⁸).

Hence, as suggested by some authors, the debate on the scope of the CFREU can be reframed as a question of jurisdiction⁶⁹. That is, it seems enough for a European authority to have jurisdiction on a given matter to be bound by such instrument, thus enabling them to advocate for the mandatory application of the fundamental rights contained therein, regardless of the geographical area in which these powers may be exercised⁷⁰. These conclusions can be extrapolated not only to Art. 11 CFREU but also to other rights safeguarded by it.

Yet, it is worth considering a potential exception to this general rule, which might apply in situations where the dispute lacks any connection whatsoever with the Union's territory. Instead, the court of a Member State may get to hear about a given claim solely due to the parties' explicit or implicit prorogation of jurisdiction, with the relevant conduct occurring outside that territory, and none of the parties maintaining their habitual residence there. Under such conditions, the lack of a substantial connection to the Union's territory could justify a departure from the general rule, resulting in the CFREU inapplicability through the *lois de police* framework⁷¹. Such exception seems in line with the 'self-limiting approach'

⁶⁴ The situation clearly involves the Brussels I bis, Rome I, and Rome II Regulations, which were adopted by the European legislator subsequent to the transfer of powers outlined in the Amsterdam Treaty of 1999 [López-Tarruella Martínez, *Manual de Derecho Internacional Privado* (n 12), p. 45]. Regardless, if a national court of a Member State has asserted jurisdiction based on its domestic fora due to the defendant being domiciled in a third State, the inherent universality of the Rome Regulations entails that they will still be employed nonetheless to determine the law governing the dispute. Consequently, the national court will continue to apply EU law up to some degree, providing justification for the application of the CFREU under its fifty-first article.

⁶⁵ Lundstedt (n 25), p. 270; Mark Hirschboeck, 'Conceptualizing the Relationship between International Human Rights Law and Private International Law' (2019) 60 *Harvard International Law Journal* 181, pp. 187-188.

⁶⁶ Violeta Moreno-Lax and Cathryn Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary*. (1st edn, Hart Publishing 2014), pp. 1680-1681.

⁶⁷ *Case C-617/10 Åkerberg Fransson* [2013] CJEU ECLI:EU:C:2013:105, para. 19-27.

⁶⁸ Court of Justice of the European Union. Research and Documentation Directorate, 'Field of Application of the Charter of Fundamental Rights of the European Union' (2021), https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/fiche_thematique_-_charte_-_en.pdf, pp. 3-4

⁶⁹ José Carlos Fernández Rozas and Sixto A Sánchez Lorenzo, *Derecho Internacional Privado* (12th edn, Thomson Reuters - Aranzadi 2022), p. 157.

⁷⁰ Moreno-Lax and Costello (n 67), p. 1679.

⁷¹ Lundstedt (n 25), p. 270.

proposed by AG Szpunar⁷² in the *Glawischnig-Piesczek* case⁷³, regarding the adoption of extraterritorial measures that could interfere with other states' legislations and the regulation of fundamental rights embedded therein, and the importance of international comity towards such norms⁷⁴. This caveat remains pertinent, even when considering the prospect that, in scenarios lacking a significant connection with the EU, the CFREU might still be incorporated into the forum's *ordre public*, considering the requirement for a minimum degree of connection may be more adaptable when it comes to safeguarding fundamental rights, as previously emphasized.

The subsequent exception outlined in Art. 5 pertains to offenders disclosing secret information to expose faults, irregularities, or illegal activities in defence of a general interest. The explicit mention in Recital 20 to whistleblowers and their contribution to public service by reporting illicit conduct leads to the inference that this norm is indeed aimed at safeguarding crucial public interests. The pertinent question at this point is which specific interests are those intended for protection, given that the text remains silent on this particular aspect. A teleological interpretation⁷⁵ suggests that when essential European or national interests of Member States are in jeopardy (e.g., those enumerated in Art. 2 Whistleblowing Directive⁷⁶), the application of this provision through the OMP mechanism is adequate⁷⁷. The defence of essential interests of a third state poses more questions, although such a possibility should not be summarily dismissed, for there may be situations where the application of this rule through the proposed scheme could be justified (e.g., revealing a European company's plan to participate in a cartel in the Asian market) or, at the very least, the activation of the *ordre public* exception.

⁷² *Opinion on Case C-18/18 Glawischnig-Piesczek* [2019] Advocate General Szpunar ECLI:EU:C:2019:458., para. 88-103.

⁷³ *Case C-18/18 Glawischnig-Piesczek* [2019] CJEU ECLI:EU:C:2019:821., para. 51-52.

⁷⁴ Aurelio López-Tarruella Martínez, 'Crónica de Derecho Internacional Privado - El Ámbito Territorial de Protección de Los Derechos de La Personalidad En El Entorno de Internet (a Propósito de Las Sentencias Del TJUE de 24 de Septiembre de 2019, C-507/17, Google, y de 3 de Octubre de 2019, C-18/18, Glawischnig-Piesczek)' (2019) 38 *Revista Electrónica de Estudios Internacionales* 27 <<https://doi.org/10.17103/reei.38.15>>., pp. 32-34; Lidia Moreno Blesa, 'La Retirada de Contenidos Ilícitos Por Los Prestadores de Servicios En Línea' (2021) 79 *THEMIS Revista de Derecho* 73 <<https://doi.org/10.18800/themis.202101.004>>., p. 83.

⁷⁵ As mentioned, the Directive refrains from offering a specific definition of public interest, but it does mention certain instances (such as consumer or environmental protection) in Recital 21 while discussing the necessity of considering case specifics before implementing provisional or final measures. These examples could also be extrapolated to the exception outlined in Art. 5.b TSD concerning whistleblowing activities. This inference seems to be reinforced by the incorporation of these very instances into the list of public interests ultimately codified in the Whistleblowing Directive, to which a direct link may be traced when interpreting this provision, especially considering the employment of the term 'whistleblowing activities' in Recital 20 TSD [Aplin (n 38)., pp. 191-192].

⁷⁶ Yet, Recital 98 Whistleblowing Directive underscores that the exception outlined in Art. 5.b TSD has a broader reach may also cover some cases excluded from its scope, such as the disclosure of a trade secret in order to expose a company's systematic breach of purely national labour law, for instance through the concealment of unlawful workplace practices.

⁷⁷ Lundstedt (n 25)., p. 271.

Art. 5 TSD concludes by introducing two additional exceptions related to workers' representatives and the lawful exercise of their functions, as well as the protection of any other legitimate interest according to Union or national law. The resemblance of these exceptions to the statements of lawfulness outlined in Art. 3.1.c (for workers and representatives) and Art. 3.2 (when determined by other European or national regulations) allows one to extend the reasoning applied earlier to these exceptions.

Arts. 6 and 7 (para. 1) are also among those deemed forceful by the Directive. They underscore the importance for the measures and remedies provided against the secrecy breach to be fair, equitable, effective, deterrent, proportionate, and non-abusive. The objectives of these provisions appear manifold, encompassing not only the assurance of the right to effective judicial protection (enshrined in Art. 47 CFREU) but also the commitment to preventing substantial interference by such measures with additional potential public interests (e.g., worker mobility, consumer protection, public health)⁷⁸. In any event, as Lundstedt observes, the abstract character of these provisions may create difficulties for their enforcement via the OMP mechanism⁷⁹, for instance, when it comes to determining how such standards should be applied to ensure that the measures set out in foreign legislation are fair or proportionate. Instead, they could be better interpreted as a manifestation of the Union's public order, which may eventually lead to the exclusion of a foreign rule based on the exception outlined in current private international instruments⁸⁰.

As per Art. 8 on the time limit for filing claims related to secrecy breaches, the application of such provision through the OMP mechanism appears intricate despite the mandate imposed by Art. 1.1 TSD. Firstly, Art. 8 itself allows Member States to adjust downward the maximum 6-year period articulated by the provision, demonstrating a certain flexibility for altering this standard and thereby diminishing its forceful nature. Similarly, in the *Da Silva Martins* case, the CJEU already downplayed the significance of prescription rules and dismissed the idea of considering them as OMPs, except when a detailed analysis of their wording, general regime, objectives, and legislative context were to demonstrate that they hold such importance in the relevant national legal system so as to justify departing from the law identified as applicable (for example, due to a manifest violation of the right to effective judicial protection or an effective remedy)⁸¹. Consequently, asserting that Art. 8 TSD defends an interest so fundamental to provide a rationale for promoting this timeframe through the OMP mechanism seems rather challenging, at least *a priori*. Perhaps, this possibility could be considered in scenarios where the prescription period imposed by

⁷⁸ Recital 21 TSD.

⁷⁹ Lundstedt (n 25), p. 275.

⁸⁰ Since these standards are aimed at national legislators and judges rather than private parties, it seems difficult to assess them within the framework of non-derogable norms.

⁸¹ *Case C-149/18 Da Silva Martins* [2019] CJEU ECLI:EU:C:2019:84., para. 33-34.

foreign law is exceedingly brief or extended, thus affecting the right to judicial protection of the holder or the interests of third parties in the use of such information, respectively. Nonetheless, even in such cases, it might be more straightforward to resort to the public order mechanism to justify the non-application of the foreign rule⁸². Lastly, such provision could also potentially be regarded as a non-excludable norm in the case of purely domestic or intra-EU scenarios, depending on whether parties are allowed to modify the time limit for filing of a lawsuit within the corresponding legal system⁸³.

Regarding Art. 9 TSD on the preservation of confidentiality for contested information during legal proceedings, this rule will most likely be excluded from the scope of application of the *lex contractus* or the *lex causae* due to its primarily procedural nature. Far from creating a gap in protection, however, this exclusion is in practice advantageous. Procedural matters are governed by the *lex fori*, meaning that once Art. 9 is transposed into the domestic rules of procedure of a Member State, it will apply automatically as part of the law of the forum whenever proceedings are brought before a court of that state, irrespective of the law governing the substance of the dispute. The question of whether it qualifies as an OMP therefore does not arise. The *lex fori regit processum* principle achieves the same protective outcome through a more direct route.

The latest set of principles endowed with a forceful character by Art. 1.1 TSD encompasses, broadly speaking: (i) Art. 10.2, on the substitution of provisional measures for a guarantee compensating the holder while allowing continued exploitation (without disclosure) of the secret until the resolution of the dispute; (ii) Art. 11.1, mandating the holder to provide certain evidence justifying the adoption of such measures; (iii) paragraphs 2-5 of Art. 11, outlining safeguards to consider when implementing these measures, including the need for proportionality, the evaluation of concurrent circumstances, the conditions for their revocation, and the establishment of securities in favour of individuals potentially prejudiced by them, who may even be entitled to compensation afterwards; (iv) Art. 13, imposing similar conditions for the adoption of injunctions and corrective remedies; and finally, (v) Art. 15.3, which addresses the need for proportionality and for consideration of

⁸² Lundstedt (n 25), p. 276.

⁸³ Indeed, the response to this inquiry will be contingent on the specific legal framework being examined. In Spain, for instance, according to the existing prescription regime, it seems possible for the parties to moderately shorten or extend the deadline, excluding in any case the possibility of an advance waiver [Santiago Cavanillas Múgica, 'Art. 1935' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil*, IX (1st edn, Tirant lo Blanch 2013); Xavier O'Callaghan Muñoz, *Código Civil Comentado y Con Jurisprudencia* (8th edn, Wolters Kluwer 2016), pp. 2149-2150; Pilar Domínguez Martínez, 'Artículo 1935' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (1st edn, Thomson Reuters - Aranzadi 2021)]. In some other countries like Australia, there is legal precedent supporting the viability of this latter option within the context of a mortgage agreement between private parties, while recognizing the nuances that may arise in other potential contractual relationships, including those involving consumers [Jerry To, 'Price v Spoor: Contracting out of Limitation Periods in the High Court' (2021) 35 Commercial Law Quarterly 15].

the infringer's privacy and reputation interests when publicizing the judicial resolution related to the secrecy breach.

In principle, and without discounting potential future shifts in doctrine or legal precedent that may refine this assertion, justifying the application of these principles through the OMP framework seems plausible⁸⁴. This is because, to varying degrees, all these rules appear to encompass specific public or legitimate interests of certain relevance in their underlying reasoning⁸⁵.

Take, for instance, guarantees allowing the continued exploitation of the secret. In this context, a correlation may be established between these guarantees and the protection of the alleged infringer's legitimate interests, both in relation to effective judicial protection and the presumption of innocence and to the right to partake in commercial activities and to use such information. At the same time, these aspects may have some sequential implications on the overall public interest in enhancing innovation and competition. Hence, when a foreign law does not contemplate the possibility of establishing such a guarantee, it might be possible to apply this precept through the OMP mechanism. A similar reasoning could justify the mandatory enforcement of alternative safeguards, such as the imposition on the holder of the burden of proof when requesting precautionary measures or the payment of a compensation for any possible damages resulting from their adoption.

As for the requirements to consider when modulating provisional or definitive measures, the articles themselves underscore the importance of balancing the legitimate interests of the parties and third persons, along with public interests and fundamental rights. This indicates a clear intent to ensure protection and respect for these interests when adopting any type of measure within the context of a secrecy dispute. Following this logic, if foreign law permits a measure that disregards their consideration, the mandatory application of Art. 11 or 13 may find justification depending on the specific circumstances of the case, if not as internationally mandatory rules, certainly through the *ordre public* exception. Finally, Art. 15.3 may as well be subject to assessment within these corrective frameworks, insofar it upholds the legitimate interests of the infringer regarding their privacy and reputation.

Overall, these measures seem to align with the principles articulated in Art. 6 and 7 TSD, which were recognized as endorsing public and third-party legitimate interests to advance justice, fairness, efficiency, and proportionality in trade secret proceedings⁸⁶. However, this latter group of rules provides more detailed guidance on how to accommodate such

⁸⁴ Lundstedt (n 25), pp. 274-275.

⁸⁵ Kalbfus (n 34), pp. 34-35.

⁸⁶ Recital 21-22 TSD.

interests within a particular context⁸⁷, thus making it easier to envision concrete scenarios for their implementation through the *lois de police* scheme when such European public interests might be at stake (e.g., when a provisional measure in foreign law affects the alleged infringer's ability to continue exploiting information within the EU before conviction, when third-state legislation places the burden of proof on a European defendant or does not foresee the payment of a compensation for Union individuals potentially prejudiced by the precautionary remedies adopted, or when foreign standards do not balance the offender's right to privacy and reputation in the publication of the judgment by a Member State's court).

2. Rules not following the minimum harmonisation principle

The examination proposed in this section now takes in a negative perspective. In other words, it shifts to assessing the potential evaluation under the OMP scheme of those norms not recognized by Art. 1.1 TSD as deserving forceful status. Their exclusion from that list, combined with the Directive's predominantly private orientation, creates a strong presumption against their qualification as OMPs. Nevertheless, their content will be individually scrutinized below to offer a more accurate analysis and to ascertain the possible enforcement of such provisions under alternative corrective mechanisms.

An illustrative example is found in Art. 4 TSD on unlawful practices related to trade secrets. Specifically, this provision outlines which instances of acquisition, disclosure, and use should be prosecuted, also in connection with third parties who knew or should have known that they were acquiring the secret from someone disclosing it without authorization. Upon examination, it seems challenging to justify that this rule seeks to protect an essential public interest, beyond private business concerns in safeguarding confidential information. This holds true even when considering the potential indirect influence of these private interests on innovation and competition, which does not appear substantial enough to assert that the Directive inherently pursues a public interest *per se*.

Moreover, the exclusion of this provision from the list in Art. 1.1 TSD, combined with the opportunity for Member States to enhance protection (for example, by expanding the range of behaviours considered unlawful) diminishes the imperative character of this article⁸⁸ and introduces additional uncertainties regarding its potential compatibility with the OMP mechanism. In a similar vein, the discretion afforded to private parties to condition the illegality of specific conduct on the presence of a prior confidentiality clause or NDA

⁸⁷ Borghi and others (n 3), pp. 84-85.

⁸⁸ Kalbfus (n 34), p. 37.

introduces an element of flexibility into the rule, which underscores the difficulty in classifying it as an internationally mandatory standard or even as a non-excludable norm.

What is more, certain scholars emphasize that, even in cases where legal disparities exist among the laws of countries involved in a potential dispute, these divergences are unlikely to result in outcomes drastic enough to compromise public interests and warrant the invocation of Art. 4 through the *lois de police* scheme⁸⁹. This consideration would only arise in situations where the identified foreign law lacked any provisions for safeguarding confidential information, a prospect that seems highly improbable given that most states have at least minimal safeguards under the TRIPS Agreement.

A very similar reasoning might as well be extended to other provisions within the Directive regarding potential measures and remedies for the prosecution of trade secrecy infringements. That would be the case of Art. 10.1 and 12 (on the precise list of provisional and corrective measures that may be instituted), Art. 14 on the payment of damages or Art. 15 (para. 1-2) on the publicity of the court decision declaring the secrecy infringement. Firstly, the precise deployment of such measures appears to fall within the realm of aspects that a state can legitimately define according to its own legal tradition, which should be honoured unless it leads to markedly inappropriate consequences. Additionally, their implementation serves the sole purpose of safeguarding private business interests, either through the proactive protection of confidential information or by addressing potential damages resulting from its violation. Hence, it appears rather difficult to provide a convincing justification for the claim that the immediate rationale underlying these norms is the protection of fundamental public interests.

Alongside this, the exclusion from the list of forceful rules under Art. 1.1 TSD and the option for Member States to modify such safeguards likewise supports the exclusion of the internationally imperative nature for these provisions⁹⁰. Based on this premise, even if the measures outlined in the law of a third state do not correspond to those in the European norm, the reintroduction of the latter through the OMP mechanism (as well as the activation of the *ordre public* exception) should most likely be opposed.

Legal scholarship⁹¹ goes so far as to reject the potential classification of these regulations as non-derogable, since parties may waive any liability by explicitly renouncing recourse to such remedies. These considerations remain relevant irrespective of whether some of the provisions mentioned earlier concerning such measures (e.g., Art 11.2-5 or 13 TSD), could

⁸⁹ Lundstedt (n 25), p. 273.

⁹⁰ *ibid.*, p. 279.

⁹¹ Vollmöller (n 37), pp. 423-424.

be deemed as *lois de police*, given their intention to balance alternative legitimate public interests and fundamental rights.

The exclusion from the list in Art. 1.1 TSD of the trade secrets definition contained in the second provision of the Directive is more controversial. Some authors⁹² have criticized this omission, arguing that it represents a crucial aspect requiring harmonization to enhance legal certainty for economic operators. Indeed, the assessment of whether disputed information qualifies as a trade secret or not remains one of the most contentious issues in trade secret litigation⁹³. While the Directive lays the foundation for a common definition, existing variations among the legislations of Member States could still yield differing outcomes depending on the law identified as applicable⁹⁴. These differences are particularly pronounced at the international level, where significant divergences persist in determining which information deserves protection under the trade secret regime, despite efforts at harmonization through the TRIPS Agreement⁹⁵.

Regardless, for the purposes of this analysis, it is crucial to consider whether the European norm containing this definition could be viewed as an internationally imperative rule warranting application through the OMP mechanism when the law of a third state becomes applicable. At first glance, it seems challenging to argue that this is the case. Once again, the norm seeks no other objective than to enhance the level of legal certainty for European companies regarding the confidential classification of their information⁹⁶. The presence of an underlying essential public interest is not apparent, except for the tangential impact that protecting this information may have on promoting innovation and free competition. Additionally, the exclusion of the definition of the secret from the list of rules that must be fully transposed under Art. 1.1 TSD diminishes the significance of this rule and further reduces the probability of its eventual application through the *lois de police* scheme.

It is also worth highlighting that, despite endorsing minimal harmonization, the TRIPS Agreement has effectively created some sense of consistency in the interpretation of trade

⁹² Sabrina Steinmann, 'Die Geschäftsgeheimnis-Richtlinie: Vorwirkung Und Unmittelbare Anwendbarkeit' (2019) 6 WRP - Wettbewerb in Recht und Praxis 703., p. 708; Kalbfus (n 34)., pp. 34-35.

⁹³ Borghi and others (n 3)., pp. 34-35.

⁹⁴ Some examples include Germany or Slovakia, which seem to have introduced additional or distinct criteria for classifying information as confidential [Ansgar Ohly, 'Jurisdiction and Choice of Law in Trade Secrets Cases' in Sharon K. Sandeen, Christoph Rademacher y Ansgar Ohly (eds), *Research Handbook on Information Law and Governance* (1st edn, Edward Elgar Publishing 2021)., p. 243.; The Licensing Executives Society International, 'Special Issue - The EU Trade Secrets Directive' (2019) LIV les Nouvelles - Journal of the Licensing Executives Society International 162., p. 218].

⁹⁵ Rochelle Cooper Dreyfuss and Linda Silberman, 'Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases' (2017) 8 Cybaris 265., pp. 275-286.

⁹⁶ Recital 6-8 and 14 TSD.

secrets across the legal frameworks of participating states⁹⁷. In fact, the uniform definition of confidential information emerges as the key strength of the protective framework outlined in this instrument. This is especially noticeable when juxtaposed with the abstract mandate imposed on signatory parties to establish adequate mechanisms for safeguarding trade secrets, insofar the flexibility granted to states under this mandate has led to the adoption of a divergent array of protective regimes⁹⁸.

Considering this and the impact of the TRIPS Agreement on most legal systems, one may infer the existence of common guidelines offering a baseline level of certainty to the involved parties when defining the fundamental requirements for confidential information, irrespective of the governing law. This statement does not dismiss the potential existence of significant divergences among legislations, whether stemming from legal precedents or the lawmaker's decisions. Certainly, there could be substantial advantages resulting from a common understanding of the trade secret definition. Nonetheless, it appears improbable that such variations could lead to outcomes capable of disrupting the essential public order of the respective state in a way that would justify the imposition of the trade secret definition in Art. 2 TSD through the *lois de police* scheme. Scholars point out that only in specific cases, such as when the definition of a secret in foreign law allows for the inclusion of skills acquired by an employee during their activities or information about criminal activities, could this alternative be considered⁹⁹, or rather, the non-application of such foreign law through the public order mechanism¹⁰⁰.

That said, there seems to be more room for acknowledging the definition of trade secrets as a non-excludable norm, based on the argument that parties may not agree to classify as secret specific information not aligning with the criteria outlined by the Directive (for instance, because it is available in the public domain)¹⁰¹. Therefore, even if two European entities were to opt for the law of a foreign state (an improbable scenario in tortious disputes but slightly more plausible in contractual matters), they would still be bound by the Directive's requirements when ascertaining the confidential nature of certain data.

⁹⁷ Again, it is crucial to emphasize that, in accordance with its opening article, the TRIPS agreement is mandatory for all WTO member states, which currently total 164 [WTO, 'WTO Members and Observers' (*World Trade Organization*). https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [accessed 30 April 2026].

⁹⁸ Rowe and Sandeen (n 43), pp. 31-33.

⁹⁹ Ansgar Ohly, 'Das Auf Die Verletzung von Geschäftsgeheimnissen Anwendbare Recht' in Hans-Jürgen Ahrens and others (eds), *Praxis des Geistigen Eigentums – Festschrift für Henning Harte-Bavendamm zum 70. Geburtstag*, (1st edn, CH Beck 2020), p. 400.

¹⁰⁰ Lundstedt (n 25), pp. 262-263.

¹⁰¹ *ibid.*, p. 263.

4. CONCLUSIONS

This paper has shown that the corrective mechanisms provided by the Rome I and Rome II Regulations may, in limited but meaningful circumstances, preserve core European trade secret standards where the law otherwise applicable to a cross-border dispute is that of a third State. Although Directive 2016/943 cannot be regarded as internationally mandatory in its entirety, some of its provisions may still operate beyond the ordinary outcome of the choice-of-law process where they protect interests of sufficient public or fundamental importance.

This is particularly true of provisions concerning lawful acquisition and disclosure, freedom of expression and information, whistleblowing in the public interest, the position of workers and workers' representatives, and the fair and proportionate administration of provisional and final remedies. In such cases, OMPs, the *ordre public* exception, and, where relevant, non-derogable rules may provide a basis for reintroducing European standards that would otherwise be displaced by foreign law. By contrast, provisions primarily concerned with defining the material scope of protection or strengthening the holder's remedial position will generally remain outside the reach of those corrective mechanisms.

The broader implication is that European PIL rules are not indifferent to substantive outcomes in every case. Even within a system based on the multilateral allocation of the applicable law, there remains room for the protection of norms that reflect fundamental choices of the Union legal order. That room is, however, limited. The mechanisms examined here do not allow for a general reassertion of the Trade Secrets Directive whenever third-country law applies. Their significance lies, rather, in preventing foreign law from undermining those elements of the European trade secrecy regime that are most closely connected to public interests, fundamental rights, and the integrity of judicial protection.

The conclusion, therefore, is a qualified one. These mechanisms cannot fully overcome the limitations of the current framework, and their operation will remain dependent on judicial interpretation and the circumstances of the individual case. Even so, they retain real significance. Properly understood, they provide national courts with a principled basis for ensuring that the application of foreign law in cross-border trade secret disputes does not displace those elements of Directive 2016/943 that reflect not merely commercial interests, but fundamental European values.

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