Multi-sectoral NGO Coalition Calls on Parliament to Defend Safeguards for Consumers, Journalists, Whistleblowers, Public Authorities and Workers

OPEN LETTER

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Dear Ms Le Grip,

Trilogue negotiations on the Commission's proposal for a Trade Secrets Directive: Multi-sectoral NGO coalition calls on the Parliament to defend safeguards for consumers, journalists, whistleblowers, public authorities and workers

The conduct of businesses and corporations has an important impact on the quality of life of EU citizens, notably their health, environment and working conditions. The Commission's and the Council's positions on the draft Trade Secrets Directive threaten citizens' right to know the full extent of these impacts, and places unjustified restrictions on worker mobility. Ultimately, the Trade Secret Directive should serve its purpose as a tool to promote EU competitiveness. This will not be the case if it impedes transparency leading to more health and environment scandals and restricts worker mobility. Under your guidance as rapporteur, the JURI Committee carried out a detailed scrutiny of the Commission's proposal and adopted amendments that afford greater protection for these interests. We call on you now to strongly defend the JURI Committee's position during the trilogue negotiations with the Council and the Commission.

Public Access to Information – protection for public authorities, whistleblowers, and journalists

Dieselgate is a stark example of the lengths business will go to protect information that affects profits. While the Volkswagen case involves alleged fraud and illegal conduct, other impacts are more subtle and often do not involve unlawful activities. Waste disposal techniques, the chemical make-up of plastics in toys, production processes that favour

efficiency over environmental protection — these could all qualify as a “trade secrets” under the directive. Yet, as citizens and consumers, we need access to precisely this sort of information to make informed choices about what we buy, where we live, what we let our children play with and who we vote for. And in the long run, informed choices provide an important incentive for businesses to find innovative and sustainable solutions, and for governments to support them in doing so. The safeguards provided in the JURI Committee’s report must remain to ensure a fair balance is struck between the rights of citizens to choose what they consume and the economic interests of industry.

Businesses are under few obligations to make information available to the public. We rely on three crucial means to access business information: public authorities, the media and whistleblowers. The Commission’s proposal allows businesses to sue all of these actors for compensatory damages when disclosing information in the public interest. We therefore urge you to maintain the following JURI amendments:

- **Protection for Public Authorities (Article 1(2)(c) and Recital 9a)**

The JURI Report confirms that the disclosure of information by public authorities in compliance with access to information laws is not affected by the Directive (Article 1(2)(c)). Public authorities are already under extreme pressure from industry not to disclose their information in response to access to information requests, even where they have a clear legal obligation to do so. The risk of being sued by companies with the financial means to pursue court action forces many public authorities to err on the side of caution and refuse disclosure of all business-related information. The further risk of being sued for compensatory damages under the Trade Secrets Directive would force them into a new level of reticence. This amendment goes some way to reducing this risk.

- **Consistency with the Aarhus Convention on access to environmental information**

Recital 9a specifically mentions the UN Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters which has been ratified by the EU and its Member States. This serves to remind public authorities that specific obligations apply to the disclosure of environmental information, even in the context of trade secret protection. Specifically, there must be consistency between the directive and the Aarhus Convention, as implemented by Directive 2003/4 and Regulation 1367/2006, to ensure that information related to emissions into the environment is disclosed upon request and does not benefit from trade secret protection (Article 4(4)(d) of the Aarhus Convention). According to the Convention, Directive 2003/4 and Regulation 1367/2006, information on emissions into the environment cannot be kept confidential even if its disclosure would affect the protection of a trade secret. The public needs to have access to more environmental information, not less.

- **Protection for journalists (Article 1(2)(a), Article 4(a) and recital 12b)**

According to the Commission’s proposal, journalists can be sued for compensatory damages

when they unlawfully acquire information, when they print such information and when they print information obtained from a source that they know, or ought to know under the circumstances, is passing it on unlawfully. This would include the situation where a journalist is sent information by an anonymous source. The JURI Committee's amendment to Article 4(a) makes explicit reference to the EU Charter of Fundamental Rights and media freedom, and recital 12(b) clarifies that the "directive does not restrict journalistic works, in particular with regard to investigation, protection of sources, and the right of the public to be informed". While we believe that a clear exemption for journalists' work is crucial, these amendments must be maintained as a minimum.

- **Protection for whistleblowers (Article 4(b) and recital 12a)**

The three pronged test contained in the Commission and Council texts is almost impossible to satisfy in practice and is effectively a gag on potential whistleblowers. The JURI Committee's amendment to Article 4(b) makes the test a little easier to satisfy. Crucially, the amendment to recital 12a clarifies that judicial authorities should take into account that whistleblowers acted in good faith when revealing information in the public interest. After all, the directive is intended to increase protection against industrial espionage and should not be used against employees, scientists and researchers speaking out in good faith to protect fellow citizens.

- **Protection for information disclosed in the general public interest (Article 4(e) and recital 11)**

The JURI Committee's amendments to Articles 4(a) and 4(b) highlighted above are insufficient. Therefore, it is crucial that the amendment to Article 4(e) providing an exception for information disclosed for the purpose of protecting a general public interest is maintained. The corresponding amendment to recital 11 is equally important, as it clarifies the legislator's intention that public safety, consumer protection, public health and environmental protection are to be considered public interests.

- **Damages appropriate to the actual prejudice suffered (Article 13(1))**

Both the JURI Committee Report and the Council's Common approach refer to damages "appropriate" to the actual prejudice suffered, rather than the Commission's text which refers to damages "commensurate" to the actual prejudice suffered. This gives the judiciary the discretion to take into account the particular circumstances of the respondent when setting damages.

Worker Mobility and Representation

The Commission and Council texts fail to give adequate protection to workers from the threat of being sued for compensatory damages when they use their skills and competences for a new employer. This will severely restrict the willingness of workers to take up new employment, which is harmful to employees, employers and EU competitiveness.

We call on the Parliament to maintain the following amendments adopted by the JURI

Committee:

- **Definition of “trade secret” (Article 2(1))**

The JURI Committee’s amendment to Article 2(1) adds an important clarification that “experience and skills honestly acquired by employees in the normal course of their employment shall not be considered a trade secret”.

- **Limit to the liability for damages of employees towards their employers (Article 13(1a))**

Both the JURI Committee Report and the Council’s Common Approach amend Article 13 to ensure that Member States may limit liability for damages of employees towards their employers. This is an important recognition of the imbalanced economic relationship between employer and employee and must remain in the final text.

- **Limitation period (Article 7)**

The Council’s Common Approach which refers to a 6 year limitation period is excessive, particularly in the context of worker mobility. While we find the Commission’s initial text to be appropriate, as a minimum, the JURI Committee’s maximum period of 3 years should be maintained.

- **Workers’ Representatives (Article 1(3) (c) and 4 (c))**

It is essential that the acquisition of trade secrets be considered lawful when obtained by workers’ representatives exercising their right to information and consultation, in accordance with Union and national law and/or practices. Therefore, it is important that the text dealing with this remains in an article (as in Article 1(3)(c) in the JURI committee’s report) and not only in a recital as in the Council´s General Approach.

Article 4(2)(c) in the Commission’s proposal states that trade secrets can be disclosed by workers to their representatives as part of the legitimate exercise of their representative functions. However, the JURI committee amendments to this article (Article 4(c) in the JURI Committee’s Report) and the Council’s General Approach add a requirement that the disclosure must be necessary for the exercise of the representative’s trade union duties. The strict requirement that it be demonstrably ”necessary” will, in practice, make it very difficult for workers’ representatives to fully exercise their duties in all relevant cases and will therefore prevent them from effectively defending the rights of union members. We kindly ask you to drop your amendments to Article 4(c) in favour of the Commission’s proposal.

We remain entirely at your disposition to answer any questions you may have.

Yours sincerely,

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