



To: Ms. Constance Le Grip
MEP Rapporteur

Mr Georges Friden
Deputy Permanent Representative for Luxembourg to the EU

Mr Slawomir Tokarski
European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

3 December 2015

Dear Ms Le Grip, Mr Friden and Mr Tokarsky and all representatives of Member States,

Trilogue negotiations on the Commission's proposal for a Trade Secrets Directive: legal uncertainty endangers access to information and worker mobility

With the third trilogue meeting taking place today, there is wide agreement among the Commission, the Parliament and the Council that trade secrets should not always be protected from disclosure. However, the texts of all three EU institutions have failed to ensure that the directive's scope is limited to commercial practices, as foreseen in Article 39 of the TRIPS Agreement. In addition, the Commission's proposal and the Council's General Approach contain too much uncertainty surrounding the situations

in which business secrets can be acquired and disclosed without the risk of being sued for compensatory damages. Such uncertainty will prevent the disclosure of information unduly qualified as trade secrets, such as information on the impact of products and production processes on public health and the environment that should be in the public domain, by journalists, whistleblowers, worker representatives and public authorities. This goes against the best interests of EU citizens, does nothing to promote the competitiveness of EU businesses and defies the logic of EU harmonisation.

We therefore urge the Council and the Parliament to take this opportunity to implement the following considerations in order to limit the damage that this directive will have on crucial democratic safeguards:

1. Protection for journalists (Article 4(2)(a) and recital 12b)

The directive proposal undermines some of the laws in force in certain Member States which provide a more protective regime for journalists and their source.

The reference to “legitimate use” in Article 4(2)(a) is unnecessary and should be removed.

It is important to give national courts an indication of the legislator’s intention as to how the rights to privacy and property on the one hand, and the right to freedom of expression on the other, should be reconciled in the context of the directive. In this respect, **recital 12b of the JURI Committee’s Report** is a necessary clarification of the important role that investigative journalists and their sources play in a democratic society and should be maintained in the final text.

2. Protection for whistleblowers (Article 4(2)(b) and recital 12a)

Given the recent health and environment scandals which endanger EU competitiveness, now is the time for strengthening protection for whistleblowers. However, the directive proposal sets a weak precedent for those Member States that do not currently have a protection regime, and threatens the regimes already in existence, such as the UK and Ireland. The test contained in the Commission’s and Council’s texts is too restrictive and creates legal uncertainty which will have a chilling effect on the willingness of whistleblowers to disclose trade secrets.

The Parliament and the Council should follow the 2014 Council of Europe recommendations for best practice and guiding principles for whistleblowing legislation (<http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282014%297E.pdf>). The test should be based on the whistleblower’s reasonable belief that the information disclosed is accurate. The question of the whistleblower’s motivation for revealing the information should be irrelevant.

We suggest the following wording, which ensures that the directive follows international best practice and adds clarity to how the test should be implemented at national level:

“Article 4(2)(b) for revealing information which, in the reasonable belief of the person making the disclosure, tends to show that a misconduct, wrongdoing, fraud or illegal activity has occurred, is occurring or is likely to occur, provided that the disclosure serves the public interest.”

“Recital 12a. Measures and remedies provided for under this Directive should not restrict whistleblowing activity. Therefore the protection of trade secrets should not extend to information which reveals misconduct, wrongdoing, fraud or illegal activity, and that serves the public interest, including, but not limited to, information that the health and safety of any individual has been, is being or is likely to be endangered; information that the environment has been, is being or is likely to be damaged; information that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur; or information tending to show that any of these matters is being or is likely to be deliberately concealed.”

In the alternative, we favour Article 4(b) and recital 12a of the Parliament’s JURI Committee Report over the Commission’s proposal and the Council’s Common Approach.

3. Ensuring free mobility and representation of workers (Article Article 1(3)(c), Article 2(1), Article 7 and Article 4 (2)(c))

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.

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*".

The longer the limitation period, the harder it is for workers to change jobs freely. We find the Commission's initial proposal in Article 7 of 1-2 years to be appropriate.

It is essential that the acquisition and disclosure of trade secrets by workers’ representatives exercising their right to information and consultation be considered lawful, in accordance with EU and national law and/or practices. Therefore, the text dealing with this should remain in an article (as in Article 1(3)(c) of the JURI committee’s report) and not only in a recital as in the Council’s General Approach. The Parliament and Council amendments to Article 4(2)(c) of the Commission’s proposal add the requirement that the disclosure must be necessary for the exercise of the representative’s trade union duties. Again, this adds a level of legal uncertainty that will prevent workers’ representatives from fully exercising their duties. We favour the Commission’s original text in this respect.

4. Protection of disclosures in the general public interest (Article 4(2)(e) and recital 11)

Legitimate interest and general public interest does not mean the same thing. EU citizens have a right to access the information they need to be able to make informed consumer and political choices. This also drives EU innovation. Such information may not always qualify as a “wrongdoing” and receive protection

under Article 4(2)(b). Examples include preferable tax agreements for certain companies, the structure and quantity of the chemicals used in certain products, the specific make-up of genetically modified organisms. Public access to data on the safety and efficacy of medicines is also crucial to making informed decisions on treatment, and prevents scarce public resources from being spent on therapies that are no better than existing treatments, do not work, or do more harm than good. The directive should not obstruct recent EU developments on clinical trial data transparency.

We urge the Council and the Commission to accept the wording in Article 4(e) and recital 11 of the Parliament’s JURI Committee Report.

5. Ensuring compliance with the UN Aarhus Convention on Access to Environmental Information (Recital 9a)

Access to environmental information is subject to a specific legal regime which prohibits the qualification of information on emissions into the environment as trade secrets. We therefore welcome the clarification in Recital 9 of the Commission’s proposal that disclosures in accordance with Regulation 1049/2001 on Access to Documents should not be considered unlawful disclosure of a trade secret. However, this reference is incomplete without also referring to the whole body of EU law on access to documents which includes Regulation 1367/2006/EC and Directive 2003/4/EC implementing the UN Aarhus Convention on Access to Environmental Information at the level of EU institutions and national public authorities. It is essential to remind all public authorities that specific rules apply to the disclosure of trade secrets which qualify as “environmental information” under the Aarhus Convention and to reinforce their confidence in disclosing such information. Therefore, **recital 9a of the JURI Committee Report must be maintained in the final text.**

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

Yours sincerely,

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