

Access to information rights in the Trade Secrets Directive

1. Throughout 2015 ClientEarth's EU Aarhus Centre worked intensively on the EU's adoption of the Trade Secrets Directive, due to its potential negative impact on the public access to environmental information and the associated rights enshrined in the UN Aarhus Convention. This briefing takes a detailed look at the directive's inception and drafting, its main provisions and passage through the legislative process. It deals with these issues only to the extent that they affect public access to information, although the directive has far-reaching impacts for other policy areas, such as worker mobility. It argues that both the content of the directive and the decision-making process leading to its adoption are indicative of an increasing trend within the EU to pursue an agenda of economic growth and competitiveness at the expense of the democratic principles of public access to information, transparency and accountability.

1 Commission's proposal

1.1 Background

2. The European Commission published its proposal for a "Directive of the European Council and of the Parliament on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" (the draft Trade Secrets Directive) in November 2013¹. The proposal was accompanied by an impact assessment arguing that businesses attach much economic importance to trade secrets, especially SMEs, in protecting both technological and non-technological innovation. Despite their economic importance, there is no EU legal framework in place to protect trade secrets from misappropriation, and regulatory regimes differ from country to country. This leads to a lack of incentives to invest in cross-border R&D and a competitive disadvantage for businesses in Member States where protection is weak. The Commission concluded that EU action was necessary in order to "[e]nsure that the competitiveness of European businesses and research bodies which is based on undisclosed know-how and business information (trade secrets) is adequately protected and improve the conditions/framework for the development and exploitation of innovation and for knowledge transfer within the Internal Market."²
3. The policy option preferred by the Commission for achieving this objective was a directive to harmonise the national civil law remedies against misappropriation of trade secrets.
4. According to the Commission's website, the impact assessment was prepared and the preferred policy option chosen on the basis of a study on trade secrets carried out by the Commission in 2012, a public consultation conducted between December 2012 and March 2013 and a conference that took place in June 2012.
5. However, documents disclosed in response to a request submitted by NGO Corporate Europe Observatory revealed a different picture, one in which the draft was prepared as a joint effort between the Commission, industry lobbies and their lawyers³. This may explain the extremely wide and unbalanced nature of the main provisions of the directive, which will

¹ COM (2013) 813final, 28 November 2013.

² COM (2013) 813final, 28 November 2013, p. 5.

³ Towards legalised corporate secrecy in the EU? - Corporate Europe Observatory – 28 April 2015

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be discussed in more detail below, and why the directive was framed from the start in a way that allows industry to pursue non-economic actors who reveal business secrets in the public interest. It shows the extent to which early, non-transparent lobbying affects the quality and balance of EU legislation.

1.2 The main provisions

6. The Commission's proposal provides trade secret holders with a comprehensive set of civil procedures and remedies with which to protect their secrets from misappropriation. In order to benefit from the protection regime, trade secret holders must show a) that the information meets the definition of a trade secret (Article 2); and b) that the person being pursued has unlawfully acquired, used or disclosed the trade secret (Article 3).

What is a trade secret?

7. First, Article 2 defines a trade secret as information that is:
 - secret;
 - has commercial value because it is secret;
 - has been subject to reasonable steps under the circumstances to keep it secret.
8. This definition is extremely wide. Some legal commentators have noted that trade secret holders must now take care to take "reasonable steps" to keep information secret, but in an age where email accounts are password protected and employment contracts contain standard wording on confidentiality, even in the services industry, we believe that this requirement is easily met.
9. The definition has been transposed, almost word for word, from [Article 39](#) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) because it represents an international consensus that cannot be deviated from. However, it should be noted that the TRIPS agreement is an international treaty that places broad obligations on its signatory states to ensure trade secret protection, and leaves a wide margin of discretion as to how this should be done. It does not attempt to create a catalogue of harmonized rights for trade secret holders that can be enforced in domestic courts. Therefore, the simple transposition of the TRIPS definition to this context is inappropriate, and fails to take account of the impact of the legal remedies envisaged on the individual and collective economic and political rights of third parties, such as freedom of speech, access to information and the right to take up new employment opportunities.

Unlawful acquisition, use and disclosure

10. The central concept in the definition of the unlawful acquisition, use and disclosure of a trade secret in Article 3 is the lack of the trade secret holder's consent. Although the Commission's text requires there to be intent or gross negligence to fall under the scope of the definition, there is no requirement for an economic or anti-competitive motive or intent. This allows for public authorities, journalists and whistleblowers to be caught within its scope when they acquire and/or disclose information to protect the general public. In addition, the

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definition of the unlawful action also includes the use of a trade secret by a third party not directly involved in the original unlawful acquisition, use or disclosure if he was aware or should have been aware of the original unlawful act. This would include the situation where a journalist publishes information provided by a source that he had reasonable grounds to believe stole the information or passed it on in breach of contract, thus seriously jeopardizing the use of sources.

11. If both of these conditions are met, that is intent or gross negligence, the trade secret holder can avail himself of the procedures and remedies provided in Chapter III of the proposal. For the purposes of upholding the public's right to access information, the most significant threat from the Directive arises out of the legal remedy provided by the directive that gives the trade secret holder the right to seek compensatory damages.

Exceptions to the rule?

12. The Commission's proposal does envisage some exceptions to the protection regime. First, Article 4(1) clarifies the situations in which the acquisition of trade secrets is lawful, even without the consent of the holder. As explained further below, these include reverse engineering and the exercise of the function of worker representatives. It also includes "any other practice which, under the circumstances, is in conformity with honest commercial practices."
13. Article 4(2) then describes five situations in which trade secret holders are not entitled to enforce their rights. Most relevant to the public's right to access information are the following:
 1. making legitimate use of the right to freedom of expression and information;
 2. revealing an applicant's misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest;
 3. protecting a legitimate interest.

1.3 What is the concrete impact on public access to information?

14. The chemicals used in food production, packaging and toys; waste disposal techniques; the side-effects of medicines: these are just a few examples of the way in which private businesses affect public health and the environment we live in. Yet few obligations are imposed on companies to disclose information about their practices to the public, and they are rarely willing to make reliable, non-biased information on the negative impacts of their operations accessible to the public on a voluntary basis. In general, we rely on three sources for this information: public authorities, the media and whistleblowers. As explained above, the directive is drafted in such broad terms that it includes all of these actors within its scope when they disclose information unlawfully. According to the Commission's website, we should not worry because "[t]he proposal includes express safeguards in order to ensure the respect for freedom of expression, right to information and whistle-blowers. These activities are not criminalised, and they are safeguarded in a clear and express manner, in accordance with Article 11 of the EU Charter of Fundamental Rights." This sounds straightforward but the reality is more complicated.

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- **Public authorities:** The Commission officials responsible for drafting the proposal were adamant that the disclosure of business information by public authorities would not be affected by the directive because public authorities disclose information in accordance with access to information laws. Unfortunately, the lawfulness of public authority disclosures is not always so clear-cut. When public authorities are asked to disclose business information, they must carry out a delicate balancing act to decide whether the disclosure of potentially sensitive commercial information is justified by the benefit it serves to the public. Such a balancing act creates legal uncertainty, and allows industry to threaten legal action. ClientEarth has direct experience of being refused access to business information because a company has taken the public authority in question to court for showing its intent to disclose it.⁴ Such pressure already causes public authorities to be very cautious when it comes to disclosing business information, despite the fact that until now it has been very difficult for companies to receive damages for unlawful disclosures. However, the directive changes this situation, allowing companies to ask for compensatory damages should the public authority be found by a court to have got the balancing act wrong.
- **Journalists:** Information on the negative impact of business activities is often published by journalists without the trade secret holders' consent. And information is often acquired from sources who stole or passed on the information in breach of confidence. This puts journalists squarely in the line of fire. However, the Commission was confident that the exception in Article 4 of the Directive prevented journalists from being sued when the disclosure was for the purpose of "making legitimate use of the right to freedom of expression". But what does this mean? And how much comfort would this give a journalist in possession of information that could potentially be deemed a trade secret? In fact, this boils down once again to the delicate act of balancing one party's rights against another party's rights, in this case, journalists' right to freedom of expression against the rights afforded by the directive to trade secret holders. In reality, it is very difficult to know in advance which right a court will favour in the specific circumstances of each case. Journalists will have to weigh up this risk, taking into account the financial damages that they could potentially have to pay.
- **Whistleblowers:** Whistleblowers are often employees who disclose confidential information about their employers to public authorities or the general public to reveal wrong or immoral acts. Such disclosures are usually in breach of their contract of employment or other confidentiality obligations, which puts them in the directive's line of fire. Again, Article 4 of the Commission's proposal provides protection against legal action but only if whistleblowers can show that the disclosure is for the purpose of revealing the trade secret holder's misconduct, illegal activity or wrongdoing; that the acquisition, use or disclosure of the trade secret was necessary for revelation; and that he or she acted to protect the public interest. This three-pronged test is extremely difficult to satisfy in practice. It does not cover the situation where the activity being exposed cannot easily be classified as misconduct, wrongful or illegal, and does not oblige the court to take into account the whistleblower's own belief that this is the case. It is also very difficult to know in advance whether secret information held by a company will in fact reveal industry malpractice until it has been acquired. Again, the drafting of the exception is not strong and clear enough to offer assurance to whistleblowers that they will not have to pay financial damages for speaking out.

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15. To summarise, the proposal creates clear and far-reaching rights for trade secret holders, which are not matched by safeguards for public authorities, journalists and whistleblowers. Therefore, the latter run the risk of financial ruin if they disclose information that could qualify as a trade secret. Such a risk represents an effective gagging order and has a real impact on the public's ability to access information that affects their quality of life.

2 The Council of the EU – broad support for the Commission's proposal

16. Within the Council, the Member States' intellectual property working group held speedy talks on the Commission's proposal. The positions supported by the Member States in these talks have so far been withheld from public disclosure, making it impossible to know which States defended which positions, and preventing citizens from making their views known to their government representatives.
17. In May 2014 the Council published its Common Approach, which set out a small number of amendments. The document showed that there was broad support for the Commission's proposal, with the majority of amendments aimed at strengthening trade secret holders' rights rather than the opposite. For example, the Council removed the requirement for there to be intent or gross negligence when unlawfully acquiring, using or disclosing a trade secret. The limitation period (the period of time within which a legal challenge can be brought) was extended to a maximum of six years, from the Commission's initial proposal of two years. One concession was made to whistleblowers in that the misconduct disclosed need not relate to the trade secret holder.

3 The European Parliament – damage control

18. Following the proposal's smooth ride through the Council, the European Parliament (EP) proved to be somewhat more obstructive. The Legal Affairs Committee (commonly referred to as the JURI committee) took the lead, with centre-right French MEP (European People's Party), Constance Le Grip, appointed as rapporteur in September 2014. Her own report followed much of the Council's position. However, other members of the JURI Committee, representing a broad spectrum of interests, tabled over 300 amendments. For example, a number of amendments were put forward which attempted to narrow the definition of a trade secret and to require that unlawful disclosure should entail an economic motive. At the other end of the spectrum, amendments were introduced to remove any protection whatsoever for whistleblowers.
19. Representatives of the main political groups got together in what are known as "shadow meetings" to negotiate a compromise text to be put to vote in the JURI committee. These negotiations take place behind closed doors. Despite the presence of members of the Parliament's secretariat and officials of the main political groups, no minutes are taken and it is impossible to gain knowledge of the main lines being supported by our elected representatives.

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20. The negotiations were rather protracted. Attention focused on the wide scope of the rights afforded to trade secret holders and the lack of certainty surrounding the situations in which business secrets could be divulged without the risk of having to pay damages. Finally, in July 2015 the JURI Committee voted to adopt a compromise report that succeeded in making some drafting improvements. The report was made available to the public only on the evening preceding the vote, which prevented public debate of the different options and so obstructed citizens from making their voices heard.
21. Crucially, the JURI Committee voted to maintain the Commission's wide definition of trade secret (with the addition of one modification to protect worker mobility) and the Council's definition of unlawful acquisition, use and disclosure. The main amendments related to the safeguards for journalists and whistleblowers and disclosures in the general public interest. Specifically:
- A specific reference to Regulation 1367/2006 applying the Aarhus Convention on Access to Environmental Information to EU institutions, as well as to Directive 2003/4/EC applying it throughout Member States was included in the recitals, reminding public authorities of their obligation to provide wide public access to business information that affects the environment and, in particular, to disclose business secrets concerning emissions into the environment. This is of utmost importance as Article 6(1) of the Regulation and Article 4(2) of the Directive both provide that an overriding public interest shall be deemed to exist where the information requested relates to emissions into the environment and that as a result access to information cannot be refused under the exception on the protection of commercial interest.
 - The test for whistleblower protection was made easier to satisfy by removing the requirement to show that the acquisition, use or disclosure of the trade secret was necessary to reveal the wrongdoing, illegal activity or misconduct.
 - The exception for journalists was modified to include a reference to the EU Charter for Fundamental Rights.
 - A general exception was introduced in Article 4 for the disclosure of trade secrets in the general public interest. Text was included in the recitals to show that the general public interest included protection of health, the environment and consumers.
22. However, having accepted the Commission's framing of trade secret holders' rights in the broadest of terms in Articles 2 and 3, the Parliament's approach to amending Article 4 represented little more than damage control.

4 Trilogue Negotiations – secret discussions about trade secrets

23. Following the adoption of the JURI Committee's Report, Luxembourg's government, as the Council Presidency, invited the Commission and the Parliament to enter into a series of so-called "trilogue" meetings, with the aim of negotiating a compromise text to be put to the Parliament's first reading vote. The first trilogue took place on 15 September and an agreement was reached at the fourth meeting on 15 December 2015.
24. Trilogues have become an institutionalised step in the EU's legislative process, despite there being no mention of them in the EU Treaties. The aim is to negotiate draft EU legislation in order to reach agreement on a compromise text to be formally adopted by the European

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Parliament and the Council as quickly as possible. The meetings take place behind closed doors among a handful of high-level officials. No information on the discussions is publicly disclosed until the process has come to an end. Once a text is agreed, the Parliament votes at first reading in a plenary session to either accept or reject it. There is no possibility for further discussion or amendment. This means many MEPs never have the opportunity to discuss or propose amendments to legislation, and a free and genuine exchange of views among MEPs sitting in plenary never takes place.

25. This is a far cry from how the legislative process is supposed to work. The Treaty on the Functioning of the EU, through Article 294(3),(4 and)(5), is very specific on the order of stages in the legislative process. The Parliament is supposed to adopt its first reading position in plenary. The Council must then either adopt the position of the Parliament, or adopt its own position and communicate it to the Parliament, leading to another round of negotiations. This allows the public to get information on the position of each political group and institution and to react.
26. Ignoring this requirement, trilogues often take place before the Parliament has held a first reading plenary vote. The political process is concluded through trilogue meetings and formally validated by first-reading votes in the EP and the Council. In effect, trilogues fuse the two stages of the legislative process into one, high-jacking the discussion that's supposed to take place between MEPs in the EP plenary, and replacing it with opaque negotiations between the Commission, the Parliament and the Council.
27. This is detrimental to democracy in the EU. Citizens are unable to acquire the information they need to form an opinion on legislative texts and have no way of knowing the interests that are being defended by their elected representatives in the Parliament and the Council. It makes a mockery of Article 10(3) of the Treaty on European Union, which states that every citizen has the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen.

5 The Compromise Agreement

28. Following three months of trilogue negotiations a compromise text was agreed and published in December 2015. The negotiations were primarily about defining the situations in which trade secret holders cannot enforce their rights, with the following results:
 - An additional article, Article 1(2), was adopted, which specifies what the directive "shall not affect". That is the option the institutions favoured over the one supported by NGOs and certain MEPs, which consisted in limiting the scope of the directive to the illegal use, acquisition and disclosure of trade secrets for an economic motive. This latter option would have ensured the protection of EU businesses against industrial espionage and unfair competition while excluding whistleblowers and journalists from the remit of the directive and ensuring a better protection of freedom of expression and the general public interest, including the protection of the environmental and public health. Instead, the additional provision only specifies what the directive "shall not affect". This comprises:
 - ✓ (a) the exercise of the right to freedom of expression and information including the respect for freedom and pluralism of the media;

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- ✓ (b) the application of Union and national rules requiring trade secret holders to disclose for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of their duties;
- ✓ (c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by business which they hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;
- ✓ (d) the autonomy of social partners and their rights to enter into collective agreements.

This is welcome as it clarifies that industry cannot use the directive to challenge decisions of public authorities to disclose trade secrets against the will of businesses as long as they are in compliance with the law. It also stresses the importance of freedom of expression, which is a statement of political importance. However, the real legal value of this provision is doubtful. Whistleblowers and journalists still face a greater threat than before of being taken to court by the industry, even when the information revealed is in the public interest.

In addition, Article 1(3) provides that the directive shall not be understood to offer any ground for restricting the mobility of employees.

- The reference to public authority's obligations to disclose business information pursuant to the Aarhus Convention on Access to Environmental Information was accepted (recital 9). As stated above, this is an important reminder to both public authorities and industry that specific rules apply to the disclosure of environmental information, even when they qualify as trade secrets. It will help public authorities stand up to industry pressure to withhold all business information from public scrutiny and will contribute to making the Aarhus Convention an integral part of the thinking and decision-making process of industry and public authorities alike. Nevertheless, ClientEarth continues to believe that the disclosure of business information by public authorities in response to requests for access to information should have been excluded completely from the scope of the directive.
- The reference to Article 11 of the Charter of Fundamental Rights was accepted. However, given that the Charter applies whether or not there is an explicit reference in legislation, this does not change the precarious situation of journalists when they disclose trade secrets.
- The Parliament's wording for the exception relating to whistleblowers was accepted. It now states that trade secret holders cannot enforce their rights when the disclosure was to reveal "a misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest" (Article 5(b)) Again, this is a welcome improvement on the Commission's original proposal. However, it should be noted that this test is a distinct departure from the one in the [Council of Europe's recommendation on whistleblower protection](#), as well as from the test laid down in UK and Irish legislation, which is widely recognised as being current European best practice. For many EU Member States, this will be the first piece of legislation containing provisions on whistleblowers to be enacted. It is unfortunate that the EU did not seize this opportunity to create an effective and fair whistleblower protection regime across Europe. This also means that the more protective regimes of freedom of expression and

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of the media will have to align themselves with the provisions of the Directive, weakening the right of civil society to voice their concerns about industry malpractice. On the contrary, the final compromise text states that "Member States may provide, in compliance with the provisions of the Treaty, more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required in this Directive", provided that compliance with all the relevant provisions is ensured⁵. The intent is clearly to grant more protection to industry in accepting the risk that it can be at the detriment of environmental and public health protection.

- The Parliament's proposal to include a general exception for the disclosure of information in the general public interest was rejected. This means that all public interest disclosures must meet the test for whistleblower protection in order to avoid legal action.
- Member States have discretion to set the limitation period up to a maximum of six years (Article 7). This is a significant period of time and helps keep urgent information on malpractice under wraps.

29. The first reading vote of the European Parliament is scheduled to take place on 12 April 2016. The main political parties have either indicated their support for the text or their intention not to obstruct its adoption. Therefore, it is expected to be adopted at first reading in its current form.

6 Conclusion

30. The legislative process, notably the input from the European Parliament, resulted in some improvements to the Commission's proposal. However, lack of transparency at every stage of the procedure prevented the full impact of the directive being publicly debated and taken account of by EU decision-makers. The initial input of industry lobbies at the drafting stage resulted in a Commission proposal that was unbalanced in favour of trade secret holders from the start. This was followed by secret negotiations within both the European Parliament and Council leading to the adoption of their respective positions, and ultimately the trilogue meetings, where the final text was agreed. Such opacity in the legislative process prevents civil society and the public at large from informing themselves of the issues at stake, and of making their views known to the very people elected to represent their interests. This places EU voter disaffection and euroscepticism firmly in context.

31. Regarding the substance of the directive, the cumulative effect of entrenching such far-reaching rights for trade secret holders in EU and national law and the effective gagging of the actors we rely on to divulge the secrets of industry malpractice will inevitably lead to more information being covered up. Yet, this is precisely the information to which citizens need access so that we can make informed consumer and political choices on what we buy, where we live and who we vote to govern us. Ironically, it is informed consumer choice that drives innovation, as businesses strive to come up with more efficient, safe and environmentally sustainable solutions. Unfortunately, this seems to be seen by our European public servants as a secondary consideration to short-term economic growth.

⁵ Article 1(1) of the final compromise text of the Directive.

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