“Trade Secrets Protection”

A Dangerous EU Legislation Which Must Be Rejected

What is the problem?

Trade secrets are everything companies keep secret to stay ahead of competitors. A secret recipe or manufacturing process, plans of a new product, prototypes... The theft of trade secrets can be a real problem for companies, and is already punished in all EU Member States. But there was no EU legislation on the matter.

A small group of lobbyists working for large multinational companies (Dupont, General Electric, Intel, Nestlé, Michelin, Safran, Alstom…) convinced the European Commission to draft such a legislation, and helped it all along the way. The problem is that they were too successful in their lobbying: they transformed a legislation which should have regulated fair competition between companies into a blanket right to corporate secrecy, which now threatens everyone else in society.

The European Parliament is expected to vote on the “Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure” on 12 April 2016. The text can no longer be changed. It is essential that MEPs reject it and ask the Commission to come up with a better one, but are under heavy pressure from business groups to adopt it.

Why is it a threat?

With the very broad and vague definitions used in this directive, almost all internal information within a company can be considered a trade secret. With this text, companies do not need to pro-actively identify which information they consider a trade secret, as states do when they put “top secret” or “confidential” labels on documents.

But employees, journalists, consumers... sometimes also need to have access to, use and publish such information, and would now face legal threats and heavy fines for doing so. The exceptions foreseen in the text do not correctly protect them, and the legal uncertainties created by this text will have a chilling effect that will prevent people in possession of information revealing corporate misconduct or wrongdoing from reporting it.

An additional problem is that the Directive foresees precautionary measures to prohibit the disclosure of documents and proofs during legal procedures, hiding them from public opinion. While it is true that certain companies sue others for the sole purpose of accessing their trade secrets, why should such measures, which risk undermining the rights of defence, apply to individuals?

Last but not least, this Directive only sets a minimum standard in the EU: Member States will be able to go further when they transpose the text in national law, and will be lobbied by industry all over Europe. This will create a situation of uneven legislations in the EU that companies will be able to use, launching lawsuits from the country with the most aggressive measures for trade secrets protection.

In January 2015, when France tried to adopt in anticipation the key elements of the directive, it

added criminal measures of three years in jail and a 375,000€ fine for trade secrets violation (and twice as much when vague “national interests” would be at stake). French journalists mobilised to protect their freedom to report on companies' misbehaviour, and managed to convince the government to withdraw the project; but comparable measures might be considered again in all EU Member States if the Directive is adopted.

Who is concerned?

Employees
Employees are the first category of persons at stake. If they want to change jobs and use in their new job the knowledge and information they've learned, their former employer might sue them during six years after they've left if he considers they're using his trade secrets! This is very bad for workers' mobility and, as a consequence, innovation, which thrives on mixing ideas and experiences. The vast majority of existing trade secrets lawsuits are already companies suing former or existing employees.

Journalists
A second category of professionals directly impacted by the Directive is journalists. Companies would be given the right sue anyone publishing information they consider a trade secret, and the judge will have to balance this economic right with journalists' political right to inform. There is no guarantee that the right of information will be given preference, and journalists will have to weigh up the risk, taking into account potential very high financial damages. Legal harassment of media by companies is already widespread, now they will be able to use trade secrets protection as an additional argument. Which media editor will take the risk of financial ruin?

Whistleblowers
These are employees willing to reveal actions or plans of their employers that they think harm the public interest. They are often the main source of information of the media or public authorities on corporate misbehaviour, and this is where the text has improved most since the original proposal of the Commission. But even now, whistleblowers are only protected when they reveal a “misconduct, wrongdoing or illegal activity” and this leaves large gaps.

For instance, the documents which caused the Luxleaks scandal were contracts between Luxembourg and multinational companies, and, from the point of view of Luxembourg, legitimate since most EU countries are also engaged in such dealings to attract multinationals. As a consequence, the whistleblower and the journalist, who are being prosecuted in Luxembourg for their actions, would not be protected by the Directive even though they revealed a major tax evasion scandal from an European perspective.

An additional constraint is that whistle-blowers (and journalists using their information) will need to demonstrate to the judge that they acted with “the purpose of protecting the public general interest”: the burden of the proof is on them, and while large companies can afford long and expensive legal procedures, individuals usually cannot.

Consumers
Are products used every day by European consumers safe? Only independent scientific scrutiny can tell. The scientific studies evaluating the risks of most products in Europe are done by their producers, and public regulators examine these studies to take the decision to grant or not a market authorisation.

The problem is that producers systematically oppose the publication of these studies as they

consider that they contain trade secrets and, because they are costly, should not be seen and used by competitors. A recent example took place in Rennes, France, where a man died during a clinical trial. Scientists are now asking to access the data of this clinical trial to find out what happened, but the company, Biotrial, refuses, claiming that it needs to protect its trade secrets.

Scientists and civil society groups have been fighting for a very long time to obtain the publication of these studies so that the assessment of products put today on the EU market can be properly... scientific, and significant gains have been obtained for medicines, with the publication of clinical trials data foreseen in the coming years in the EU. But this is still a difficult battle, and with the high financial penalties foreseen in the text for trade secrets disclosure without their owners' consent, companies will be given an additional argument to threaten public authorities would they be willing to publish these studies.

Aren't all of them protected by specific exceptions in the text?

Yes, but, in our analysis, these exceptions are insufficient. The original proposal by the Commission was very bad and, after we and many others managed to create some public debate about it, MEPs and some Member States improved these exceptions, notably for whistleblowers, journalists and employees. But now the text cannot be changed any more and, as we explain above, we think it is still very far from a correct compromise between the need to protect companies' trade secrets and citizens' political rights.

One must absolutely keep in mind, while discussing this text, that the price of any legal uncertainty for these exceptions will be paid by citizens, not companies. Again, while trade secrets protection is a legitimate objective, this Directive goes way too far and should be rewritten, and this time with a public debate at the beginning of the process, not at the end.

Isn't trade secrets protection good for innovation?

We don't think so. Trade secrets protection is good for individual companies who want to defend a competitive advantage, but innovation in society thrives on sharing ideas and processes, not keeping them secret. A journalist who wrote about this Directive commented that “the directive is overall a victory for multinationals panicking about competition”.

Is there a link between trade secrets protection and the TTIP negotiations?

Yes and no. Formally this Directive is a completely different process than the TTIP negotiations. However, it is striking to see that almost exactly the same text is going through Congress these days and that this will lead to a de facto harmonisation of the legislation on trade secrets protection in the EU and in the US. The regulatory cooperation mechanism foreseen in the TTIP will make changing this legislation very difficult if the TTIP agreement is adopted by the EU and the US.