

“TRADE SECRETS TROLLS”

A dangerous new legal doctrine is lurking:

The unrestricted Trade Secret protection

Xnet launches a campaign at European level, in collaboration with numerous civil society organizations such as Corporate Europe Observatory, EDRi, la Quadrature du Net, Health Action International, P2P Foundation, Initiative für Netzfreiheit, to expose the threats of the new legal doctrine on Trade Secrets for whistleblowers, freedom of press and information, workers and consumers, health and the public interest.

The approval of the current Trade Secrets directive text

[http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2016/01-28/sn01019_EN.pdf] and development of this new legal doctrine would lead to very serious threats for citizens who undercover corporate abuses:

- A situation of unfair asymmetry between citizens and institutions with regard to the protections they have when reporting corporate misconducts and illegal behaviours. It leaves individual citizens and whistleblowers unprotected even though most denunciations against corporate abuses are driven by them.
- It takes for granted the legal persecution of any person who reveals trade secrets, despite in the end the courts rule in their favor.
- Whistleblower protection is framed as an exception to trade secret protection, rather than being treated as a legal norm.
- The uncertainty about the legal actions that they may suffer and its outcome has a chilling effect that would prevent people in possession of information revealing corporate misconduct or wrongdoing from reporting it.
- The burden of proving that the disclosure was in the public interest lies on the whistleblower who have to convince the legal and administrative authorities.
- The long and expensive procedures will lead to costs that corporations can easily face but whistleblowers can not afford.
- Precautionary measures would allow private companies to prohibit the disclosure of documents and proofs during the legal procedure, hiding them from public opinion.
- Private companies can overuse legal measures to their advantage for the legal harassment of whistleblowers, former employees or competitors unless proven bad faith.
- This Directive only sets minimum standards, allowing Member States to *even further* protect Trade Secrets, with opportunities for companies to use the most favorable national regime for legal action in the EU.

Only the Greens voted against the directive in the recent vote of the legal affairs committee. Neither GUE nor ALDE, S&D or the EPP opposed it. <http://zmk.blogactiv.eu/2016/01/31/did-we-temporarily-loose-the-trade-secrets-directive/> Shame on them.

What is this legal doctrine?

Corporate lobbyists are using the context of **the “economic crisis” as a justification to ensure that their commercial interests are given priority over the public interest.**

The crisis as a perfect excuse for establishing corporate impunity and privileges that would otherwise be deemed unacceptable in democratic states under the rule of law.

A new doctrine that provides private companies with *superpowers* such as tools and legal guarantees to protect companies investments far beyond what is reasonable and that corporations can use to hide abusive practices, arguing the need to protect their trade secrets.

In fact, European corporations already possess protections, that are already excessive in many cases, through patent laws, other intellectual property laws and unfair competition laws.

This legal approach, in which the benefits of "trade" transcend all other social and political criteria, is what lobbyists have attempting to ensure through free trade agreements such as TTIP, CETA and TiSA. With the justification of promoting "trade", these agreements are negotiated behind closed doors and outside the sphere of democratically elected parliaments.

We cannot allow this vision to become further entrenched as the predominant logic in a world where corporate and financial interests already dominate all others. It is important to stay vigilant and prevent legislation from developing in this direction.

The Trade Secrets Directive

When on November 28, 2013 the European Commission's proposal for a "Trade Secrets" directive was published all the alarms went off. The directive contains disproportionate protection for "trade secrets" that creates a categorical security shield from access to all information, communications and data held by a company, covering data as preposterous as the type of skills that company employees have acquired.

This new offensive use of trade secrets would allow multinational companies to legally hinder the access to data relating to criminal activities and malpractices, extending it even to the realm of justice.

A clear recent example to show how dangerous this disproportionate protection of *trade secrets* concept is, can be found in France. A man died during clinical trials. Scientists are asking for transparency and access to all clinical trial data to find out what happened. The company is opposing it, claiming trade secret protection.

<https://www.mediapart.fr/journal/international/250116/essai-clinique-de-rennes-des-scientifiques-reclament-la-transparence>

By arguing that investment protections require a level of protection of trade secrets that is absolute, these interests would become invulnerable to public scrutiny.

After more than two years of pressing, organizations defending freedom of expression and journalism (with the sizeable participation of journalist associations from France and Sweden) managed to reduce some of the most dangerous points for freedom of press that were present in the initial text of the European Commission.

However, **whistleblowers remain very unprotected in the current version of the proposed Directive**. Individual citizens who publicly denounce corporate abuses would be legally persecuted and harassed even if the safeguards and exceptions currently provided by the directive are fulfilled.

For this reason we are launching a campaign to expose the dangers and corporate interests behind the narrative according to which trade is considered a be-all and end-all to social and economic challenges. It is essential to **prevent that the argument of *trade secret* become a *superpower* used by corporations to crush public interest**, transparency and the disclosure of relevant information. Help us to spread the word by reaching out to as many people as possible.

More protection for whistleblowers is needed

Whistleblower vulnerability is rooted in the fact that explicit legal protections are absent in the legal framework of the European Union. We must urge legislators to introduce legislation to protect the activity of anonymous citizens who, having experienced abusive practices or witnessed corruption, decide to act by publicly disclosing information to denounce it.

Xnet and the Anticorruption Group of the Spanish State drafted a Decalogue on the Protection of Whistleblowers: <http://xnet-x.net/en/decalogue-protection-whistleblowers/>

TTIP - Inclusion of Trade Secrets in Trade Agreements

The new legal regime of the trade Secrets directive would be closer to the USA's, where new federal legislation is also being passed. The rush for approving these new laws on both sides of the Atlantic is due to their intentions to include Trade Secrets in the TTIP where, if the treaty is approved, not only would it become irrevocable but also its combination with the ISDS mechanism would be devastating.

Excerpts from articles to which we refer:

Article 4: Exceptions

Member States shall ensure that the application for the measures, procedures and remedies provided for in this Directive is dismissed when the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

(...)

b. for revealing a misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;

(...)

- The scope of what is considered to be wrongdoing / misconduct / illegal activity should be clarified with a non-exhaustive list of examples to prevent the **chilling effect on whistleblowing** activity.

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Adoption by the Member States

Article 1: Subject matter and scope

This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

*Member States may provide, in compliance with the provisions of the Treaty, **for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required in this Directive**, provided that compliance with Articles 2a, 4, 5, Article 6(1), Article 7, the second sub-paragraph of Article 8(1), Articles 8(3), 8(4), 9(2), Articles 10, 12 and Article 14(3) is ensured.*

- This Directive only sets minimum standards, allowing Member States to *even further* protect Trade Secrets.

The scandalous criminal measures foreseen by the French government in January 2015, when it tried to introduce key elements of this Directive into French law, could be re-introduced at Member State level with this text, with opportunities for companies to use the most favorable national regime for legal action in the EU.

Precautionary measures

Article 9: Provisional and Precautionary Measures

1. Member States shall ensure that the competent judicial authorities may, at the request of the trade secret holder, order any of the following provisional and precautionary measures against the alleged infringer:

(a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret on an provisional basis;

- Precautionary measures would allow private companies to prohibit the disclosure of documents and proofs during the legal procedure, hiding them from public opinion.

Trade Secrets Directive's current text:

http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2016/01-28/sn01019_EN.pdf