



INSIGHT

TRADE SECRETS AND WHISTLEBLOWER PROTECTION IN THE EUROPEAN UNION

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ABSTRACT: The recently adopted Trade Secrets Directive aims to increase incentives for cross-border innovation activities and business competitiveness in the European Union. Yet, the Directive has been controversial and criticized for failing to provide adequate safeguards for whistleblowers, i.e. individuals who expose information in the public interest. This *Insight* offers a legal analysis of interlinks between protection of trade secrets and whistleblower protection and questions whether the Directive increases the susceptibility of whistleblowers. Furthermore, despite the *prima facie* antagonism between trade secrets and whistleblowing, this *Insight* shows that their rationale for improving the EU internal market is shared, and points to the necessity of across-the-board EU protection of whistleblowers alongside trade secrets protection.

KEYWORDS: trade secrets – whistleblower protection – EU – Directive – internal market – freedom of expression.

I. INTRODUCTION

The EU Trade Secrets Directive,¹ adopted with 503 votes in favour by Members of European Parliament in April 2016,² and later on unanimously approved by the Council, provides a common protection for trade secrets across EU Member States with the purpose to increase cross-border innovation activities and business competitiveness in the

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¹ Directive 2016/943 of the European Parliament and the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. For a comment on such act see also D. ARCIDIACONO, *The Trade Secrets Directive in the International Legal Framework*, in *European Papers – European Forum, Insight* (forthcoming), www.europeanpapers.eu.

² See European Parliament Legislative Observatory Statistics 2013/0402(COD) on Protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, www.europarl.europa.eu.

European Union. The Commission, based on studies and consultations,³ identified the need for offering protection to trade secrets due to *inter alia* increased risk of trade secrets misappropriation in the past 10 years,⁴ and the salience of this protection for improving EU internal market.

The initial proposal of the Commission did not show significant regard to the interconnectedness and implications of trade secrets protection for freedom of expression and information as well as individuals who would disclose information in the public interest, i.e. whistleblowers. This in turn led to a concerted push from the European Parliament to improve exceptions to trade secrets protection resulting in a new agreed draft text of the Directive in December 2015.⁵ Art. 5, let. b), of the now adopted Trade Secrets Directive stipulates the exception to the protection of trade secrets when disclosure is made “for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest”.

The revelations of whistleblowers, for example the recent “Panama mega leak”⁶ and “LuxLeaks”⁷ exposing tax heavens, are crucial for triggering accountability mechanisms and public debate on issues that otherwise could remain undetected or not reported,⁸ but they also contribute to better financial and organisational management.⁹ In an overall competitive market hence, it is not only the confidential know-how that should be protected, but also the individuals who disclose information when the revelation is in the public interest.

This *Insight* offers a legal analysis of interlinks between protection of trade secrets and whistleblower protection in light of the EU Trade Secret Directive and questions whether the Directive increases the susceptibility of whistleblowers. Despite the *prima*

³ See Hogan Lovells International, *Study on Trade Secrets and Parasitic Copying (Look-alikes)*, Report on Trade Secrets for the European Commission, MARKT/2010/20/D, 2012; Baker & Mackenzie, *Study on Trade Secrets and Confidential Business Information in the Internal Market*, MARKT/2011/128/D, 2013; European Commission, *Trade Secrets: Supporting Innovation, Protecting Know-how*, 29 June 2012.

⁴ See Commission Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM(2013) 813 final, p. 4; but see T. APLIN, *A critical evaluation of the proposed EU Trade Secrets Directive*, in *King's College London Dickson Poon School of Law Legal Studies Research Paper Series*, paper no. 2014-25, who actually argues that in light of these studies only 38 per cent of respondents thought this risk had increased, p. 5. Note also that 3 in 4 citizens found trade secrets to be of minor significance for research and development and perceived existing legal protection extensive, see further initial Commission proposal.

⁵ European Council Press Release 935/15 of 22 December 2015, *Trade secrets protection: Luxembourg presidency seals deal with Parliament*, www.consilium.europa.eu.

⁶ See *Süddeutsche Zeitung*, *Panama Papers*, panamapapers.sueddeutsche.de.

⁷ See International Consortium of Investigative Journalists, *Luxembourg Leaks: Global Companies' Secrets Exposed*, www.icij.org.

⁸ V. ABAZI, *Leaked Transparency and Whistleblowers*, in *Verfassungsblog*, 2 May 2016, verfassungsblog.de.

⁹ See generally OECD, *Committing to Effective Whistleblower Protection*, Paris: OECD Publishing, 2016, www.oecd-ilibrary.org.

facie antagonism between trade secrets and whistleblowing, the paper argues that in the context of the EU their rationale for improving the internal market is shared, and points to the necessity of across-the-board EU whistleblower protection alongside trade secrets protection.

II. EU TRADE SECRETS DIRECTIVE: INCREASING THE SUSCEPTIBILITY OF WHISTLEBLOWERS?

The main element that makes trade secrets commercially salient is their confidential nature. Disclosure of that information hence takes away its commercial value resulting in damage or loss for the holder of that trade secret. However, the prerogative to conceal information gives the holder of the trade secrets a strong power that also leads to a certain asymmetry because it is the holder of the information – a company in the case of trade secrets – that determines what should be disclosed or not, to whom and when.¹⁰ Moreover, not all kept secrets are necessarily trade secrets of commercial value but may be information concealing wrongdoing, fraud, and corruption among other concerns. Therefore, individuals who have access to such information and disclose it in the public interest, i.e. whistleblowers,¹¹ merit legal protection from prosecution as well as any retaliation measures. This section questions whether the EU Trade Secrets Directive provides the necessary legal safeguards for whistleblower protection or whether it increases the susceptibility of whistleblowers if they disclose information in the public interest.

The definition of trade secrets is the first aspect in determining to what extent the protection of trade secrets, which is directed at protecting companies from theft by other companies for commercial advantages, increases the risks for whistleblowers to disclose information. Art. 2 of the Trade Secrets Directive defines as a trade secret information that is kept confidential by its holder and derives its commercial value precisely due to its confidential nature. Whereas the definition of what constitutes a trade secret has some procedural aspects by which it could be determined whether the information is a trade secret,¹² it nevertheless leaves a margin of discretion to the secret

¹⁰ See more generally about secrecy and its characteristics, S. Bok, *Secrets: On the Ethics of Concealment and Revelation*, New York: Pantheon Books, 1982.

¹¹ There is no overall agreed definition of a whistleblower in legal standards whether at national, regional or international level. For a comparative view regarding the EU Member States see Transparency International, *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, 5 November 2013, www.transparency.org.

¹² In 2003 the Commission issued a Communication regarding professional secrecy in State aid decisions that provides more information than its proposal regarding trade secrets in how the Commission would evaluate externally what could be considered under business secrecy and some elements match with the definition as provided in Art. 2 of Directive 2016/943; see Commission Communication C (2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, point 13.

holder.¹³ Such an approach is perhaps inevitable considering that it would be the company that holds the information and is, therefore, in a position to make an assessment of its commercial value, yet it does make it possible that the web of trade secrets is cast too wide.¹⁴ This in turn would mean a large amount of information, potentially, some that are not trade secrets at all, to which legal protection applies resulting in an increased disclosure risk for the whistleblower.

An additional significant and interrelated aspect is the scope of disclosure that is exempt from the regime of trade secrets. Art. 5, let. b), of Trade Secrets Directive stipulates the following acts: “misconduct, wrongdoing or illegal activity”. This scope seems to exclude situations where the whistleblower suspects that a wrongdoing is likely to occur, or situations which are not necessarily an illegal activity as such but that are problematic nevertheless and merit public attention, as most evidently exemplified with the Panama papers disclosure considering that the establishment of offshore companies is not illegal. Moreover, it is not clear whether misconduct, wrongdoing or illegal activity refer to issues beyond commercial activities in the sense that trade secrets could pertain to environment, public health, public finance, etc. For example, would a case be included that involves a revelation of “practices inconsistent with proper food hygiene in a factory producing and distributing frozen meals to the healthcare and public sector”?¹⁵ Whereas a practice as such would not be qualified as a trade secret, such revelations could nevertheless expose also information that is considered a trade secret by the concerned company.

The most disconcerting aspect of Art. 5, let. b), is that the whistleblower has the burden of proof about, first, whether the information pertains to “misconduct, wrongdoing or illegal activity” and, secondly, that the disclosure is made in the public interest. In line with best practice and international standards,¹⁶ it is generally the plaintiff who is required to demonstrate by “clear and convincing evidence any claims or statements that the disclosure is purposefully dishonest, or is absent of public interest and that any

¹³ See Art. 2, para. 1, let. a), of Directive 2016/943, cit.

¹⁴ For an additional critique of the current definition but from the angle of determining the “readily accessible” and relevant “circles”, see T. APLIN, *A critical evaluation of the proposed EU Trade Secrets Directive*, cit., p. 11 *et seq.*

¹⁵ In her critical analysis of the agreement Aplin notes a few salient examples derived from exciting cases that are noteworthy in questioning the scope of disclosure protected, see T. APLIN, *A critical evaluation of the proposed EU Trade Secrets Directive*, cit., pp. 33-34.

¹⁶ See, *inter alia*, *The Global Principles on National Security and the Right to Information* (Tshwane Principles); D. BANISAR, *Whistleblowing International Standards and Developments*, in *Social Science Research Network*, 11 February 2011, papers.ssrn.com; European Commission, Directorate-General Justice, Freedom and Security, *Prevention of and Fight Against Fraud 2009*, (May 2006 – Revised) February 2009; K. CLARK, *White Paper on Whistleblowing*, in *Social Science Research Network*, 1 November 2012, papers.ssrn.com.

measures taken against a whistle-blower are not in any way related to the disclosure".¹⁷ The current text of the Art. 5, let. b), differs from the initial proposal of the Commission as it does not require the whistleblower to show that the disclosure as such is necessary in addition to being in the public interest, which would have made the burden of proof even more challenging than the current requirements.¹⁸ In practical terms, we are yet to see how the dynamics unfold between resourceful companies invoking protection to trade secrets and individuals who need to provide convincing evidence that their disclosure is done in the public interest.

Art. 5, let. b), refers to "general public interest", which is a change of text in light of the compromise between the European Parliament and the Commission's initial proposal that referred merely to "public interest". Many questions arise in this regard. What is precisely the scope of general public interest? Will such definitions give rise to variations in interpretation in different cases and different courts throughout the EU Member States leading to an increased fragmentation of what is already a weak and fragmented system of whistleblower protection?¹⁹ In addition to these concerns, it has been rightly pointed out that there are a number of cases, which show the difficulty in determining whether there is a public interest involved. For example, as argued by Aplin, the case of *Browne v. Associated Newspapers Ltd*²⁰ involved a revelation that a chief executive of a significant company misused the resources of that company for private purposes and shared confidential information with his partner.²¹ It remains to be seen in practice whether such revelations could be considered as exposing trade secrets and doing so in the general public interest.

Overall, Art. 5, let. b), of Trade Secrets Directive shows weaknesses in the legal protection of whistleblowers in light of the scope of what may be regarded a trade secret, issues that are exempt from protection, questions of general public interest as well as the burden of proof. Importantly, the exception provided in Art. 5, let. b), should be read and understood in the broader legal context of (the missing) whistleblower protection in EU Member States.

¹⁷ See Draft Directive for whistleblower protection in the public and private sector in the European Union, draft Art. 11, launched by the group of Greens of the European Parliament, www.greens-efa.eu.

¹⁸ See the wording in the proposed Art. 4, para. 2, let. b): "for the purpose of 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", COM (2013) 813 (emphasis added).

¹⁹ Merely five EU Member States have dedicated and somewhat advanced whistle-blower protection. Sixteen Member States provide only partial legal protection to workers who report wrongdoing. See further Transparency International, *Whistleblowing in Europe*, cit.

²⁰ Court Queen's Bench Division, judgment of 9 February 2007, *Browne v. Associated Newspapers Ltd*.

²¹ T. APLIN, *A critical evaluation of the proposed EU Trade Secrets Directive*, cit., p. 33.

III. WHISTLEBLOWER PROTECTION: NECESSARY FOR ACCOUNTABILITY AND INTERNAL MARKET

The Trade Secrets Directive exists in an EU legal context for whistleblower protection that is mostly fragmented and not advanced.²² The EU Member States have significant variations on whether there are rules at all about whistleblower protection, whether these rules refer to the public and private sector as well as whether they apply to all policy fields. Furthermore, whereas whistleblower protection is recognized to have an essential accountability role, its significance for the better functioning and competitiveness of the internal market is not emphasized. The debate about the Trade Secrets Directive and critical discussions before its adoption focused mostly on juxtaposing trade secrets protection and whistleblower protection. In light of arguments in Section 2 of this *Insight*, indeed it is clear that there are tensions between these two regimes. However, it is argued here that their rationales are not necessarily as opposed and their functionality could be ensured if both legal frameworks are well established in the EU. Since trade secrets protection implies concealing information and whistleblowing means disclosing it, it seems self-evident that they are opposed to each other and it would be difficult to imagine how both regimes can be ensured concurrently. However, another important aspect to examine about these protections is not only how they function, but also why they are utilised and in this latter aspect, they do not necessarily have conflicting rationales. Namely, trade secrets were described by the Commission to be valuable for providing incentives to growth and innovation in the internal market. Similarly, although whistleblower protection is focused at protecting an individual, its contribution is to also establish a working environment that encourages exposure of acts that would be damaging for a company.

Whistleblowing is a compound and complex instrument bringing together elements of accountability, freedom of expression and labour law protections of the whistleblower. It is this compound nature of whistleblowing and especially its aspects related to the improvement of the internal market that the debate regarding the Trade Secrets Directive has not paid attention. Reducing fragmentation and diversity of the legal framework on the protection of trade secrets was a repeated argument by the Commission in showing why EU level protection of trade secrets is necessary. For example, the Commission argued that such fragmentation impairs cross-border research and development as well as circulation of innovative knowledge.²³ Moreover, the Commission pointed to the lack of rules in some Member States regarding calculation of damages or protection of trade secrets during litigation.²⁴

²² See generally Transparency International, *Whistleblowing in Europe*, cit.

²³ Communication COM(2013) 813, p. 3.

²⁴ *Ibid.*

All these aspects to the lack of sufficient safeguards for trade secrets protection are comparable to the lack of rules about whistleblower protection that also have negative implications for the competitiveness of the internal market. Market abuse could be avoided in light of the fact that whistleblowers may bring new information to the attention of the competent authorities for possible insider dealing and market manipulation.²⁵ In addition, whistleblower protection is crucial for anti-corruption and ensuring a market as equal playing field. Significant variation between the ways in which different Member States provide protection for whistleblowers creates barriers for exposing information by whistleblowers which in turn may lead to obstacles to the functioning of the internal market while putting at stake the principle of equality. Such relevant aspects about whistleblower protection for the internal market are most recently also pointed by the Commission regarding measures against tax evasion and tax avoidance. More specifically, the Commission notes that whistleblower protection would “help disciplining companies and protect societal interests, which have the potential to enhance trust in the market and therefore attract potential investors and business partners”.²⁶

Overall, protection for whistleblowers is necessary both from the perspectives of accountability and of internal market. The exception for whistleblower protection provided in Art. 5, let. b), of EU Trade Secrets Directive is the first step towards what should be a dedicated and advanced EU legal protection for whistleblowers. A separate legal act on whistleblower protection could ensure a working environment that does not discourage individuals from exposing (suspected) wrongdoing, corruption, misconduct, fraud and other similar acts, which in turn could make companies more profitable and competitive. Indeed, the Commission in a recent Communication on further measures to enhance transparency and the fight against tax evasion and avoidance has recognized the salience of a separate EU legal act on whistleblower protection,²⁷ but it remains to be seen whether the Commission would propose a legislative act on whistleblower protection in the EU.

IV. CONCLUSION

This *Insight* focused on the legal implications of the recently adopted EU Trade Secrets Directive for whistleblower protection. The paper showed that this Directive increases the susceptibility of whistleblowers despite the exception provided in Art. 5, let. b). This susceptibility is related to the manner in which the exception to trade secrets protection

²⁵ See Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, which recognises, in Art. 32, that effective whistle-blower protection is essential to ensure the proper functioning of the internal market.

²⁶ Communication COM(2016) 451 final of 5 July 2016 from the Commission on further measures to enhance transparency and the fight against tax evasion and avoidance, pp. 9-10.

²⁷ *Ibid.*

is provided in Art. 5, let. b), in light of the scope of trade secrets, the burden of proof, and questions of what may be considered a general public interest. The paper however also emphasised that the concerns regarding whistleblower protection arise not only due to the provision in Trade Secrets Directive but also due to the overall lack of legal protection in the EU for whistleblowers. Furthermore, the paper argued that the protection of whistleblowers should be understood as essential not only from the perspective of accountability but also for its relevance for improving the competitiveness of the internal market. Indeed, competitiveness of the EU internal market should not only rely on protecting the “knowledge” of the companies but also about the “employees” of those companies especially since they would be exposing information in the public interest.