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Consultation: Trade Secrets Regulations 2018
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Public Concern at Work's response to the consultation "*Trade Secrets Regulations 2018*"

1. We welcome the opportunity to make this short response to the above consultation. Our submission will focus on how the transposition of the Trades Secrets Directive will impact on whistleblower protection in the UK and the missed opportunity to strengthen whsitleblower protection rights when incorporating the new regulations relating to trade secrets. We touch upon aspects of the proposed transposition that appear at odds with existing whistleblower rights and call for more specific reference to those rights in the transposition process.

Introduction

2. Public Concern at Work ("PCaW") is the UK's leading authority on whistleblowing. Set up 25 years ago, at the heart of the charity's work is the free, confidential adviceline, which helps over 2,000 whistleblowers each year. The charity also supports hundreds of organisations to help ensure their whistleblowing arrangements are trusted and effective. We currently work with many regulators, professional bodies, commercial, public sector and voluntary organisations including: CIPD, AAT, General Medical Council (GMC), The Law Society, John Lewis Partnership, Barclays, the Bank of England, ITV and the British Red Cross.

3. These two complementary streams of work give us a unique perspective on whistleblowing – including the challenges faced by individuals in speaking up, and those experienced by organisations in listening to and addressing concerns. PCaW has employed this experience in a wide array of policy work which has shaped the frameworks in which individuals raise concerns, and how organisations handle them. This includes: helping to draft the primary piece of legal protection for whistleblowers, the Public Interest Disclosure Act; drafting the British Standard Institution's Guidance on Whistleblowing Arrangements; establishing the Whistleblowing Commission which developed a Code of Practice for whistleblowing arrangements, a guide used by many organisations in creating their whistleblowing processes; ongoing involvement in sectoral developments within the NHS and Financial Services; and long-standing collaboration with government on numerous initiatives which have touched on the wider world of whistleblowing.

4. We limit this response to specific comments around questions 2 and 3 and more general points and comments relating to the non-transposition decisions, specifically questioning why the Public

Interest Disclosure Act 1998 and the rights provided to individuals therein, are not specifically referred to in the proposed new legislation.

5. We are concerned that the current proposed transposition regulations risk creating legal and practical ambiguity about the protection provided for whistle-blowers in the UK and a 'chilling effect' which could stop whistle-blowers from coming forward to raise public interest concerns in the future. Similar protections are required for trade union representatives who legitimately disclose information about a company's activities to other employees or the media.

Question 2 – limitation periods

6. We query why, when whistleblower rights have a limitation period of 3 months, it is deemed appropriate to give such a long limitation period for the protection of corporate trade secret rights. Even personal injury claims have a shorter limitation period than the statutory longstop of 6 years suggested by the consultation. We would suggest that a shorter limitation period of one year is more appropriate here. In addition, if an infringement action is brought against an individual infringer (where that individual claims whistleblower protection) then similar discretionary extensions of the limitation period should be afforded to the individual akin to the rights provided by the Public Interest Disclosure Act 1998 (PIDA). These rights should be specifically incorporated into the proposed new regulations (similar to the provisions to be found in regulation 6).

Question 3 – preservation of confidentiality

7. It seems odd that later provisions in the proposed directive dealing with the exercise of the court's discretion (eg regulations 11 and 12 on delivery up) specifically require the court to consider the public interest and the safeguard of fundamental rights before granting an order. These two matters should also be considered by the court if decisions are being made which go against the principles of open justice where all or parts of court proceedings/ documents/ judgements are to be restricted in the ways suggested in regulation 10(4). In order to protect the public interest in the overarching principles of transparency and open justice, it is vital that the safeguarding of fundamental rights and the public interest are specifically referred to in these provisions.

8. We would also suggest that an additional criteria should be added here and in later parts of the regulations (regulations 12 and 15 for example), if the infringer or any third party are asserting their rights or claiming that there has been a disclosure of information which falls to be protected under the Public Interest Disclosure Act, the court should take those rights into account as part of its deliberations when removing any part of its proceedings from the public realm and generally when granting an order under the new regulations.

Exclusions and transposition table

9. We are concerned to note that in the transposition table, where in particular Articles 3, 5 and 7 of the EU Directive are referred to, there is no reference to the Public Interest Disclosure Act. This is a missed opportunity to re-iterate the importance of the whsitleblower protection legislation that exists in the UK and potentially to strengthen this vital protection. While we acknowledge that the transposition of the Trade Secrets provisions were not intended to gold plate the protection afforded to organisations with trade secrets, it is necessary to ensure that any countervailing right of an individual who has disclosed information about wrongdoing in the public interest, is specifically protected from the threat of litigation provided by the enhanced protection mechanisms envisaged

by this new piece of legislation.

10. Where wrongdoing has been identified and disclosed by an individual, without adequate legal safeguards in place for individuals, the perception will be that disclosing information of any kind (public interest or trade secret) is likely to result in litigation. So there must be specific reference to the defence mechanisms available and the specific protection of the court in these circumstances. Without this, there will be an uneven playing field in that the whsitleblower will face the threat of litigation from powerful corporate interests with deep pockets. This must be recognised by the UK government when transposing this new and enhanced approach to the protection of trade secrets into UK law. We would suggest this could be achieved by specifically referring to the rights conferred by PIDA and requiring UK courts to consider those rights in order to protect the public interest in appropriate cases.

11. Equally PIDA protection should be available to individuals as a defence to infringement proceedings and the provisions required by Article 7 of the Directive (safeguards against bad faith litigation) should also be expressly included in the transposition provisions, given the power in-balance that could be created where trade secrets litigation is in reality a defensive and protective measure used by organisations to prevent and threaten those who have raised a protected public interest disclosure internally. The use of the trade secrets legislation or the threat of litigation should not be an opportunity for organisations to threaten whistleblowers and hide information about wrongdoing, risk or malpractice. This could be strengthened by including strong language which penalises abusive litigation on trade secrets which is aimed at preventing legitimate scrutiny of commercial activities.

Public interest defence

12. As an alternative to the defence mechanisms set out above and based on adopting existing protection in the Public Interest Disclosure Act, a more progressive approach would be to include a fully drafted public interest defence in the proposed regulations. A helpful analogy to this approach lies in national security debates. When Chelsea Manning was sentenced, non-governmental organisations called for the introduction of a public interest defence to protect individuals charged under the Espionage Act in the USA. Edward Snowden, for whom the European Parliament voted in favour of granting asylum, would face similar charges if he returned to the United States. While the disclosure of national security information is clearly more sensitive than trade secrets, the Tshwane Principles[1] provide instructive examples of how to frame a public interest defence. According to these principles where an individual is the subject to criminal or civil proceedings, or administrative sanctions, as a result of making a protected disclosure of information, the law should provide a public interest defence if the public interest in disclosure of the information in question outweighs the public interest in non-disclosure[2].

13. The Tshwane Principles provide guidance on how to determine whether the public interest in disclosure outweighs the public interest in non-disclosure. This can be determined in light of:

    a. whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;

[1] The Global Principles on National Security and the Right to Information (Tshwane Principles) (12 June 2013)
[2] Ibid Principle 40

b. the extent and risk of harm to the public interest caused by the disclosure;

c. whether the person had reasonable grounds to believe that the disclosure would be in the public interest;

d. whether the person attempted to make a protected disclosure through internal procedures and/or to an independent oversight body, and/or to the public, in compliance with the specific procedures; and

e. the existence of exigent circumstances justifying the disclosure.

14. This principle reflects jurisprudence from European Court of Human Rights[3] and has been endorsed by the Council of Europe[4] in its recommendations surrounding whistleblower protection.

Further matters

15. We also adopt and confirm the points made by the joint letter endorsed by many groups from across UK civil society, which has also been submitted to this consultation. In particular the points made around Journalistic freedom and Freedom of Information. When transposing the directive, the UK should ensure that the exception for journalists on the grounds of freedom of expression (Article 5) is unambiguously included. This is to ensure that there is a clear direction for both journalists and judges when applying the directive. This protection was a clear commitment arising out of the debates around the 'Snoopers Charter' and yet no progress has been made by the UK government to date.

16. As to Freedom of Information and Public authorities, the transposition provisions should ensure that there is no 'chilling effect' on public authorities who fear being sued for damages when releasing commercial data under freedom of information laws. The directive must not undermine freedom of information laws by creating legal ambiguity about the situations in which commercial information can be legitimately released.

17. Finally we attach our policy paper responding to the initial debates around the Trade Secrets Directive and refer particularly to our points made around the non-exhaustive illustrative list of the types of wrongdoing that would be covered by the protected disclosure provisions in order to strengthen that protection.

18. We would be happy to discuss the points made in this short response with the IPO in order to ensure there is clarity around the protected disclosure provisions and how these could be specifically included and strengthened in the Trade Secrets (Enforcement) Regulations 2018.

Public Concern at Work
12 March 2018

[3] *Bucur and Toma v. Romania* (2013) Application No. 40238/02 and *Guja v. Moldova* (2008) Application no. 14277/04
[4] Parliamentary Assembly of the Council of Europe, Resolution 1729 Protection of 'whistleblowers' (2010)