

## Response to the consultation "*Trade Secrets Regulations 2018*"

1. We welcome the opportunity to make this short response to the above consultation. Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making: <https://corporateeurope.org/>
2. We followed the development of the Trade Secrets Directive at the European level and were **very concerned to see the extent to which corporate lobbies had influenced the Commission's draft and subsequent debate.**<sup>1</sup> Since then we have produced a 'transposition guide' for national legislators which sets out what the safeguards which should be included in national regulations, and pitfalls to be avoided.<sup>2</sup> We have previously submitted this guide to the Intellectual Property Office.
3. We were pleased to be part of the letter to the minister Sam Gyimah, which was signed by 20 other civil society organisations, and submitted to this consultation on 14 March 2018.
4. This submission will focus on how the transposition of the Trades Secrets Directive will impact on **whistle-blowers, journalists, trade unionists, and other working people.** 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 them 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. A public interest defence must additionally be included for journalists.

### Question 2 – limitation periods

5. We query why, when whistle-blower 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. **We would strongly suggest that a shorter limitation period of one year is more appropriate here.**

### Question 3 – preservation of confidentiality

6. Public interest and the safeguard of fundamental rights should 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

<sup>1</sup> <https://corporateeurope.org/power-lobbies/2015/04/towards-legalised-corporate-secrecy-eu>

<sup>2</sup> <https://corporateeurope.org/power-lobbies/2017/02/adapting-eu-directive-trade-secrets-protection-national-law>

in the ways suggested in regulation 10(4). **It is vital that the safeguarding of fundamental rights and the public interest are specifically referred to in these provisions.**

### **Exclusions and transposition table**

7. We are concerned to note that in the transposition table, there is no reference to the Public Interest Disclosure Act (PIDA). This is a missed opportunity to re-iterate the importance of the whistle-blower protection legislation that exists in the UK and potentially to strengthen this vital protection. **It is necessary to ensure that an individual who has disclosed information about wrongdoing in the public interest, or via their trade union representation activities, is explicitly protected from the threat of litigation.**
8. 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. **To avoid this, these regulations should specifically refer to the rights conferred by PIDA and should require UK courts to consider those rights in order to protect the public interest in appropriate cases.**
9. 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. **Strong language which penalises abusive litigation on trade secrets which is aimed at preventing legitimate scrutiny of commercial activities should be included.**
10. Additionally regulation 17 should ensure there are **strict restrictions on the damages which can be sought**, especially from individuals such as employees.

### **Public interest defence**

11. **A fully drafted public interest defence should be included in the proposed regulations.** The Tshwane Principles<sup>3</sup> provide instructive examples of how to frame a public interest defence.
12. 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.
13. 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.

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