Brussels, 20 March 2015

Joint open Letter to the members of the JURI Committee

European Directive on trade secrets: the JURI Committee must profoundly improve this text

Dear Members of the JURI Committee,

In late November 2013, the European Commission released its proposed directive on the "protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" (1).

There may well be a need to protect EU economic interests against theft or spying for commercial purposes. But recent revelations show that protection against such threats depends first and foremost on European businesses' ability to protect their IT systems rather than on a legislation on stricter "trade secrets" protection (2). In addition, the proposed directive is too vague and the **repressive approach** proposed **threatens civil liberties**. The text therefore requires careful assessment by the European Parliament (3-5).

On 23-24 of March 2015, you will consider Constance Le Grip's draft report for the JURI Committee (6). Several of Ms Le Grip's amendments timidly improve the text. They are however unfortunately often contradicted by other amendments.

We call on you to ensure, through additional and more ambitious amendments, that both freedom of speech for journalists and their sources, including whistle-blowers, and access to regulatory and scientific data of public interest, are preserved.

Proposed directive on trade secrets: a threat to information rights and access to public health data

The proposed directive is strongly **supported by multinationals** and corporate lawyers, both in the US and in the EU (**a**). Its **added value for society is unclear** however: according to the EU Commission, 60% of European Union companies already share their trade secrets through collaborations, protecting them if necessary through nondisclosure agreements and contracts (7). Legislation on "trade secrets" protection risks creating a **blanket right to corporate secrecy** with no other benefit for society than vague promises of increased "competitiveness", despite the fact that the circulation of knowledge is essential to the innovation process (4,5).

****An excessively broad definition of "trade secrets", including scientific data that is in the public interest.** The definition of trade secrets proposed by the European Commission includes all non-public information with "economic value" – as assessed by the trade secret "holder"- and therefore any information that could harm the reputation of the company concerned if published by a journalist or whistle-blower (e.g. information on the adverse effects of a medicine or on the toxicity of a chemical product) (4).

It is particularly troubling that t**his definition does not allow for the exclusion of scientific data whose disclosure is in the public interest**, such as health-related regulatory data. On the contrary, the MEP in charge of drafting the opinion of the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) suggested adding to this definition: "*concerns trials, tests or other secret data*

a- The directive will in fact help multinationals maintain their monopolistic positions for longer, and expand the range of services law firms can sell to their corporate clients (refs. 4,5).

which, in order to be developed, require a significant commitment and upon the submission of which marketing authorisation for chemical, pharmaceutical or agricultural products involving the use of new chemicals depends" (8). This particular amendment was a **cautionary tale**, revealing a willingness to oppose recent transparency advances (e.g. on public access to clinical or environmental data).

The welcome point that *"The acquisition, use and disclosure of trade secrets shall be considered lawful if such acquisition, use or disclosure is required or authorised by Union or national law"* (JURI amendment 24 to Article 4(1)) is unfortunately **contradicted** by the statement that "*[The directive] does not, however, release the public authorities from the confidentiality obligations to which they are subject in respect of information passed on by holders of trade secrets, whether those obligations are laid down in national or in Union law."* (JURI amendment 5 creating a new recital 10a) (**b**).

In 2013 and 2014, pharmaceutical and food processing companies had already complained against the European Medicines Agency (EMA) and the European Food Safety Authority (EFSA) in order to prevent the disclosure of useful scientific data they considered "commercially confidential" (4,5). Is it wise to offer companies one more means of opposing transparency concerning scientific data that is in the public interest?

****Shifting documents that are currently in the public domain to the trade secrets domain.** According to the European Commission, "*the prospect of losing the confidentiality of a trade secret during litigation procedures often deters legitimate trade secret holders from instituting proceedings to defend their trade secrets*". The Commission therefore proposes "*to restrict access to evidence or hearings, or to publish only the non-confidential elements of judicial decisions. Such protection should remain in force after the legal proceedings have ended for as long as the information covered by the trade secret is not in the public domain*" (see also JURI amendments 29 and 34 to article 8) (1).

However, it was only through court proceedings in which public access was given to detailed internal memos or confidential business plans that pharmaceutical companies' doubtful corporate or marketing practices ever came to light. By shifting documents now in the public domain to the trade secrets domain, this directive is a major retrograde step for the right of citizens to access information that is in the public interest and affects them.

****Restrictions on the freedom of expression of journalists and whistle-blowers.** The fact that "*legitimate use of the right to freedom of expression and information*" is among the few exceptions in which the "*measures, procedures and remedies*" provided for in the directive could not be applied is insufficient. For example, the directive states that whistle-blowers can only use undisclosed information for the purpose of revealing "*misconduct, wrongdoing or illegal activity*" and only "*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*" (1). The text also applies to third persons who "*should, under the circumstances, have known that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully"* whether it was obtained "***directly or indirectly*"** [JURI draft report amendment 19 to article 3(4)].

JURI amendment 7 (amendment to recital 12) further **restricts the exceptions provided by Article 4**: "*Exercise of these freedoms should not be deemed lawful, however, if it relates to illegal conduct on the part of the person relying on them or if it is not in the public interest"* (6).

The JURI Committee must profoundly improve the proposed directive

We oppose the hasty attempt to **push** through this proposed directive. A sensitive subject such as this requires real democratic debate, in which opposing views are represented and discussed, particularly those of **journalists** and **non-governmental organisations**.

Major amendments are needed:

b- Moreover, the clarification that the acquisition, disclosure or use of trade secrets is only considered unlawful if done so "*in a manner that is contrary to honest business practices*" (JURI amendment 10 to Article 1 – paragraph 1[scope]) is welcome, but should also be added to the definition of an "infringer" (Article 2 – paragraph 3). And the notion of intentionality as proposed by the EU Commission should be preserved in order to avoid abuses (reject JURI amendments 16, 18 and 20 to Article 3 (paragraphs 2, 3 and 5)).

- **regulatory data of public interest** should be explicitly **excluded** from the definition of "trade secret" (article 2), so that companies cannot unilaterally decide what does or does not constitute a trade secret or "commercially confidential information" and impose this view on regulatory authorities. Access to scientific and regulatory data of public interest is also needed to allow for public scrutiny of the activities of regulatory authorities;
- information whose disclosure is in the public interest or could be considered a matter of fundamental rights, and information whose publication is required by European or national regulations or that is a responsibility of public authorities should be explicitly **defined as exceptions** to which the "measures, procedures and remedies" provided for by the directive would not apply (article 4(2)); and additional restrictions should be deleted (e.g. reject JURI amendment 5 (**c**)). Moreover, the restriction on the protection afforded to whistle-blowers' revelations (which are only considered not unlawful "*provided that the alleged acquisition, use or disclosure of the trade secret was necessary*" to expose "*misconduct, wrongdoing or illegal activity"*) is superfluous and should be deleted (**d**);
- implementation of the directive must **not enable new exclusive intellectual property rights** to be granted for trade secrets, since, unlike patent protection, where protection is offered in return for public disclosure of an invention, there is no return for society for stricter "trade secrets" protection (replace certain terms that are too close to those used in intellectual property law by other terms, in order to avoid misinterpretation (article 2));
- **the precautions** provided by the European Commission to prevent abusive litigation (**intentionality**) must be **maintained**; and a clear statement should be added that the **onus is on the applicant** (i.e. the trade secret "holder" who instigated legal proceedings) to prove that the "trade secret" was acquired or used unlawfully, as well as to demonstrate that the publication of the "trade secret" does not qualify as one of the exceptions to which the measures provided for by the directive should not apply (article 6).

Thank you for giving your attention to this important issue.

Best regards,
Corporate Europe Observatory (CEO)
The Medicines in Europe Forum (MiEF)
The International Society of Drug Bulletins (ISDB)

For more information
Our detailed joint analysis of the directive proposal, with concrete examples is available at:
http://english.prescrire.org/Docu/DOCSEUROPE/20150210_TradeSecretsJointBriefingPaper.pdf

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c- JURI amendment 5 states: "*[The directive] does not, however, release the public authorities from the confidentiality obligations to which they are subject in respect of information passed on by holders of trade secrets, whether those obligations are laid down in national or in Union law."* It thereby gives power to multinationals to sue regulatory authorities if regulatory authorities wish to make public scientific or regulatory information that multinationals consider to be "commercially confidential information" or to constitute a "trade secret".

d- It is often only possible to determine whether disclosure was necessary after the event. In addition, the limitation on the right to disclose and use trade secrets to reveal "wrongdoing", "misconduct" or to protect a "legitimate interest" would allow for sanctions to be applied even when the information ought to be in the public domain, such as the harmful effects of a particular drug or chemical on health or the environment. And in the event of a wrongful accusation, it is always possible to bring libel proceedings.

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References:

1- European Commission "Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure COM(2013) 813 final - 2013/0402 (COD)" Brussels, 28 November 2013: 28 pages.

2- "La NSA pratique aussi l'espionnage industriel, selon Snowden" 26 January 2014. fr.reuters.com: 1 page.

3- McKee M and Labonté R "European Commission's proposals on trade secrets risk undermining public health and must be modified" *BMJ* 2015;350:h1369.

4- Corporate Europe Observatory, Medicines in Europe Forum, ISDB "European Directive on trade secrets: A threat to access to public health" Joint briefing paper; 10 February 2015: 6 pages.
http://english.prescrire.org/Docu/DOCSEUROPE/20150210_TradeSecretsJointBriefingPaper.pdf

5- HAI Europe, Medicines in Europe Forum, ISDB et al. "EU trade secrets directive threat to health, environment, free speech and worker mobility: Multi-sectoral NGO coalition calls for greater protections for consumers, journalists, whistleblowers, researchers and workers" 17 December 2014: 5 pages.

6- Constance Le Grip, Rapporteur for the Committee on Legal Affairs "Draft report on the proposal for a directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (2-2013/0402(COD))" 10 February 2015: 39 pages.

7- European Commission "Commission staff working document impact assessment - Accompanying the document proposal for a Directive on the protection of trade secrets - SWD(2013) 471 final" Brussels; 28 November 2013: 291 pages.

8- Comi L, rapporteur for the Internal Market and Consumer Protection (IMCO) Committee "Draft opinion on the proposal for a directive on the protection of "trade secrets" - 2013/0402(COD)" 8 December 2014: 10 pages.

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Corporate Europe Observatory (CEO) is a research and advocacy organisation that conducts campaigns about the threats posed by the economic and political power of major companies and their lobbies to democracy, equity, social justice and the environment. For more information: http://corporateeurope.org; Contact: martin@corporateeurope.org

The International Society of Drug Bulletins (ISDB), founded in 1986, is a worldwide Network of bulletins and journals on drugs and therapeutics that are financially and intellectually independent of pharmaceutical industry. Currently ISDB has around 80 members in 41 countries around the world. More info: www.isdbweb.org; Contact: press@isdbweb.org

The Medicines in Europe Forum (MiEF), launched in March 2002, represents the four key players on the health field, i.e. patients groups, family and consumer bodies, social security systems, and health professionals. It is a testament of the importance of European medicines policy. Admittedly, medicines are no mere consumer goods, and the Union represents an opportunity for European citizens to seek further guarantees of efficacy, safety and pricing. Contact: pierrechirac@aol.com