# Whistleblowing protection and the European trade secrets' directive : proposal of interpretation

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"A secret is a secret, and we can't tell you why it is a secret, nor who decides it is a secret, precisely because it is a secret". Lewis Carrol's main character Alice perfectly expresses the frustrating tautological and sometimes even absurd character that absolute secrets often wear. When not counterbalanced by comprehensive limitations, secrets have the potential to greatly weaken public debates and deprive the public from its access to critical information. In parallel, corporations' activities are no longer considered as a pure economic or financial vector in societies: their operations have a direct or indirect impact on public health, the environment, global market harmonization, or more generally, human rights.[1] It is therefore critical that regulations putting in place a framework for the protection of "trade secrets" are examined under the protection of other interests, and particularly the freedom of speech and access to information.

In November 2013, the European Commission proposed a Directive[2] protecting trade secrets against their unlawful acquisition, use or disclosure. Following months of debate in Trilogue upon a first draft[3], the Directive was finally adopted in April, 2016 and entered in force in July 2016. This text provides a framework for victims of the misappropriation or use of business secret to claim compensation. In a European market context in which the theft of business secrets is an increasingly widespread threat[4], SMEs and start-ups tend to depend more heavily on confidentiality than large businesses, as do companies dealing in knowledge capital such as the Research and Development sector. The political and legal debates preceding the directive stressed out the absence of a European definition of business secrets, leading to considerable variations between the level of protection from one member-state to another.[5] Moreover, the lack of legal mechanisms protecting trade secrets and their potential illegal use

[1] The scope of this article does not include the analysis of corporations' legal responsibility towards human rights. However, a lecture of the Directive on trade secrets necessarily takes into account that a broad or unclear legal regime of such trade secrets entails the risk of weakening the ongoing construction of corporations' responsibilities to "protect, respect and remedy" according to the three pillars-framework developed by the UN Guiding Principles on Business and Human Rights and adopted in 2011.

[2] 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.

[3] See https://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_fr

[4] See the In-Depth analysis on trade secrets requested by the JURI Committee and submitted in 2014, available online: http://www.europarl.europa.eu/studies

[5] All EU Member States, as well as Switzerland, Japan and the US, have signed the TRIPS agreement. Pursuant to Council Decision 94/800/EC, all Member States, as well as the Union itself, are bound by it. As a result, all concerned jurisdictions offer some form of protection for trade secrets, although the relevant national legislation varies considerably.

was a major concern, as this legal precarity affects the economic growth of countries by restraining innovation's initiatives and fostering unfair competition.

Trade secrets are not part of any existing category of intellectual property rights, nor can they be defined as patents.[6] Their existence and value for the enterprise are directly linked with their secrecy and commerciality, as stated in the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organisation (TRIPS): "*in the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information*".[7] In contrast to other traditional intellectual property fields such as copyrights and patents, trade secrets can protect technical and non-technical information, expression or ideas, and even facts. Initially aiming at protecting ideas, and functionally related to the impact of innovation in the evolution of the economy,[8] their scope has been extended to cover any potentially value-generating information in a company: financial information, methods of doing business, customer lists and numbers, supplier lists, future marketing strategies, etc. Stretching its coverage beyond the famous secret recipes of Coca-Cola or crusty Kentucky Fried Chicken, the notion of trade secret in fact relates to a broad range of intangible assets. Their double nature – secret and commercial – entails a strong risk of violating freedom of expression when it comes to harmonizing trade secrets and whistleblowing activity. Indeed, as it has been illustrated by many recent whistleblowing cases exposing wrongdoings in corporations, the deterring of corporate malpractices implies the breaking of the secret apparatus protecting them. *De facto,* accessing and disclosing information exposes whistleblowers to a risk of criminalization: without objective criteria of what constitutes a legitimate trade secret, any internal information in an environment dedicated to profit and competitivity -such as private enterprises- could be protected by a legalized secret cloak of invisibility, thereby remaining out of the reach of accountability.

Beyond their function and the *a priori* conflicting values they seem to support – secrecy versus transparency –, an important aspect in trade secrets is the rationale of their existence, namely the value they intend to protect. The aim of the Directive has been made clear in its Recital: "*Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right. They use confidentiality as a business competitiveness and research innovation management tool, and in relation to a diverse range of information that extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans, and market research and strategies (…) By protecting such a wide range of know-how and business information, (…) [trade secrets] are particularly important for business competitiveness as well as for research and development, and innovation-related performance."*[9]. Trade secrets seek to protect, in the frame of business and competitive environments, undisclosed secrets against unlawful disclosures harming their competitivity. In the course of its drafting and the negotiations, several NGOs, academics, MEPs or associations of journalists have expressed their concerns[10] about the consequences of such a Directive for the fundamental right to expression. At the heart of this right, lays the right

[6] Schultz, M. F. and D. Lippoldt (2014), "Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper", OECD Trade Policy Papers, No. 162, OECD Publishing, http://dx.doi.org/10.1787/5jz9z43w0jnw-en

[7] Art. 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights

[8] Study on Trade Secrets and Confidential Business Information in the Internal Market, p. 5, April 2013, accessible online : http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf

[9] European directive for the Protection of trade secrets against their unlawful acquisition, use and disclosure, Recital par. 2

[10] See for instance, "Trade secrets: freedom of expression must be protected, say legal affairs MEPs", 16/06/2015, available online: http://www.europarl.europa.eu/news/en/news-room/20150615IPR66493/trade-secrets-freedom-of-expression-must-be-protected-say-legal-affairs-meps

of public to receive information through the disclosure of whistleblowers and journalists, whose respect calls for the setting of a fair balance between fundamental rights and trade secrets.

Whistleblowing protection is on the other hand, focused at protecting an individual whose disclosure not only aims at shedding light on practices harming the public interest that would be otherwise remain hidden, but also purging companies themselves from internal deviant practices. That being stated, the protection of trade secrets does not necessarily represent an opposite rationale to whistleblowers' protection, as both protections strengthen companies' well-being. May it be through the protection of confidential information or the protection of whistleblowers, financial and competitive interests are at stake. Indeed, while protecting a trade secret from its illegal use or acquisition directly preserves an economic asset for a company, whistleblowers disclosing malpractices such as misuse of corporate assets, gross mismanagement or corruption can lead to accountability for these crimes and allow the subsequent recovering of funds. As it has been concluded from the Lux Leaks[11] revelations, the amount of taxes due but unperceived by tax administrations harms globally the EU interests, by inducing economic and competitive distortions among State-Members. The revelations led to several investigations ordering to companies in different EU Members to reimburse the amount lacking: Apple was condemned to a payback of 13 billion euros,[12] while other companies such as Amazon, Mac Donald's or Engie are under investigation.[13] Following a first draft and a concertation initiated by the European Parliament, the adopted text of Directive now stipulates the exception to the protection of trade secrets in its art. 5:

> *(a) for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;*
>
> *(b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest* (…)

Although efforts to include exceptions to this directive concerning whistleblowing activity and journalism freedom should be recognized, definitions adopted still remain very large, therefore leaving room for interpretation. In order to avoid the risk of legal uncertainty engendered by this vagueness, it is critical to clarify the interpretation of this Directive under the light of guaranteed fundamental rights in Europe, especially those aiming at protecting freedom of expression and right to information. Providing such an interpretation framework is necessary to ensure that journalists, workers or generally, citizens, can rely on clear and expectable guidelines on their rights in the case of disclosures involving potential trade secrets. Yet, trade secrets rely on three fundamental requirements: the object at issue must be "information"; that information must confer a competitive value because it is secret; and that information must be

[11]Antoine Deltour and Raphael Halet, charged in the Lux Leaks trial, have been condemned by Luxembourg Criminal Court on the grounds of – among others infractions – the violation of trade secrets. Their trial in appeal lowered sentences but confirmed the condemnation on March 16th 2017. Documents they revealed consisted Administrative Tax Agreements (ATA) elaborated by the auditing company for its clients, mainly multinational corporations. General Prosecutor in Luxembourg argued that the tax optimisation advising activity and the particular schemes used in these ATA were part of the tax optimisation "art" and specific strategy of the company, therefore constituting trade secrets. The disclosures of these ATA led to a wide political and social condemnation of these agreements as the European Commission and Parliament started investigations on the disclosed beneficiaries of such deals and declared the use of this optimisation scheme clearly abusive. Edouard Perrin, who had used the documents to document a documentary "Cash Investigation" on the Lux Leaks, was relaxed in first instance as well as in appeal. For more information on the case see for instance : http://www.europarl.europa.eu/news/, https://www.icij.org/project/luxembourg-leaks/, and the first judgment : http://www.justice.public.lu/fr

[12] http://europa.eu/rapid/

[13] http://europa.eu/rapid/

maintained under reasonable safeguards in order to assure secrecy.[14] Taken as such, these conditions draw porous frontiers between the legal and illegal use of trade secrets, hence developing the risk of refraining future disclosures of information necessary for the public debate.

In the wording of the Directive, trade secrets do not enter in the category of intellectual property, therefore precluding them from being protected under the fundamental right of property.[15] They represent an indigenous[16] kind of commercial knowledge for companies, distinct from the notion of patents and trade-marks both envisaged by the ECJ and ECtHR case law. Yet, the provisions of the Directive aim at protecting a right that must be complied with the fundamental right of freedom of expression. This article seeks to provide a guidance on the transposition to be given to the Directive, based on the European and international binding framework on freedom of expression.

[14] Report on the 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, Commission of Legal Affairs, A8-9999/2015 June 2015

[15]Article 1 of the First Protocol (A1P1) of the European Convention on Human Rights and Article 17 of the EU Charter of Fundamental Rights

[16] The term is used by several authors in the frame of the debate on the legal basis of trade secrets and their protection. Indeed, the debate on determining the basis of legal protection of trade secret is still ongoing in research: unfair competition, property rights, patent law, contractual obligations are several grounds envisaged by different authors. Chapter 3 of the OECD impact report on approaches to trade secrets quotes a decision of the US Supreme Court to illustrate this ambiguity regard to one of these grounds: “perception of trade secrets as property is consonant with a notion of ‘property’ that extends beyond land and tangible goods and includes the products of an individual's ‘labour and invention.” For more articles see, for instance: Doris E Long. Trade Secrets and Traditional Knowledge: Strengthening International Protection of Indigenous Innovation, in Law and Theory of Trade Secrecy: a Handbook of Contemporary Research (2011); Deepa Varajarana, A Trade Secret Approach to Protecting Traditional Knowledge, in 36 Yale J. Int'l L. 371 (2011)

# I – Sources of protection for freedom of expression

The right to receive and give information represents a fundamental right protected by several regional and international instruments who describe its content and closely supervise limitations to it.

## 1. The European Court of Human Rights

The Treaty on European Union (TEU) presents in its article 2 the principles of "*respect for human rights, democracy, rule of law"* are common to the values to the European Union and prescribed by both the Council of Europe statute and the European Convention on Human Rights (hereafter ECHR). Art. 49 of the same treaty makes the adhesion to the EChR a condition for EU membership: being more than a declaration of rights devoid of biding effects for the Member States, the rights declared by the ECHR go beyond the mere political recognition of their existence. Despite its conventional aspect, the ECHR does not apply the principle of reciprocity as its rights are subjective and designed to protect individuals. Through the ratification of the Convention, State-members adhere to the article 1 of the Convention which states as follows: "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*." This article creates a direct applicability of the Convention's provisions. Its normativity is strengthened by the institutionalization of a judicial control receiving complaints of individuals whose rights have not been respected by the Member States. Central to this jurisdictional system is the European Court of Human Rights, whose case law considerably contributes to providing Member States with a "lively"[17] interpretative guidance of the rights protected by its dispositions.

The interpretation resulting from the Court's case-law is compulsory for State members. In the frame of freedom of expression specifically, the Sunday Times case has been the starting-point of a number of judgements in which state members have been found in violation with Article 10: journalists, publishers, individual citizens, civil servants, academics, politicians, artists, activists or non-governmental organisations applied to the European Court as a victim of an illegitimate, unjustifiable or disproportionate interference in their freedom of expression. The Court has the opportunity to confirm that this same approach also continues to apply under the Charter. As a consequence of this case law by the Strasbourg Court and due to the binding character of the Convention, the member states are under a duty to modify and improve their standards of protection of freedom of expression in order to comply with their obligations under the European Convention (art. 1 of the Convention).

Under the Convention, three articles are relevant for the interpretation of the Directive on trade Secrets:

- Art. 10 of the Convention guarantees the freedom of expression, which entails the right to give and receive information. In its judgement, Sunday Times,[18] the Court emphasized that freedom of expression "*constitutes one of the essential foundations of a democratic*

[17] In its judgment Marckx v. Belgium, the Court has judged that the ECHR is a "lively" convention, that has to be "interpreted under the prism of todays' context". ECtHR, Case No 6833/74, Marckx v. Belgium, 13 June 1979

[18] ECtHR Case No. 6538/74, Sunday Times (n° 1) v. UK, 26 April 1979,

*society. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*." Moreover, the Court stresses that the need for any restrictions must be established convincingly, precisely because freedom of expression is considered essential for the functioning of a democratic society;[19]

- Art. 6 on the right to a fair trial is of major importance when analysing whether a whistleblower effectively benefit from a fair judicial process during which all procedural guarantees will be applied;[20]
- Art. 13 on the right to effective remedies under which both the ECtHR and the CJUE [C1]have found to protection of whistleblowers against retaliation they may suffer from, in the course of disclosures.

## 2. The European Charter on Human Rights

Freedom of expression under the Charter is protected under art. 11 whose content mirrors art. 10 of the ECHR. Under the Lisbon Treaty, the EU Charter of Fundamental Rights, originally solemnly proclaimed in Nice in 2000, has the same legal value as the Treaties (art. 6 TUE). The Charter draws on the European Convention on Human Rights, the European Social Charter and other human-rights conventions, as well as the constitutional traditions common to the EU Member States. Article 52(3) of the CFR states that for rights corresponding to rights protected by the European Convention: "*the meaning and scope of those rights shall be the same as those laid down in the Convention*". Consequently, the ECtHR case law is not only a general source of inspiration for the creation of general principles, but it is a guiding authority for the interpretation of the Charter's provisions.

The Charter is binding upon the European institutions when enacting new measures, as well as for Member States whenever they act within the scope of EU law. In the European Court of Justice's (hereafter *ECJ*) view, EU law - including all acts of secondary law - enjoys unconditional supremacy over national law[21], including constitutions. In particular, the Court has underlined that in national legislations, the level of protection of fundamental should not be lowered and maintain itself to the standards derived from its provisions. Article 51(1) of the Charter defines the scope of its competency, mentioning that the provisions of the Charter are primarily "*addressed to the institutions and bodies of the Union"* and to the Member States *"only when they are implementing Union law*". This scope has been specified and extended in

[19] See E. Dommering, "Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): Freedom of Expression", in O. Castendyk, E. Dommering and A. Scheuer, and for an example of case-law see ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard* v. *Denmark*

[20] In this regard, the case of Edward Snowden is an illustration of a fair trial denial to a whistleblower. Being charged by the United States Government for crimes Under the Espionage Act of 1917, his trial in the US would follow the rules established for the subjects initially targeted by this Act: spies. Prohibitive costs of defence, restricted access to the file and the evidence by the defence team, non-access to the public to the discussions in Court, strict presumption of the accused felonious intent with irrelevance of the motives or the material's public interest. A more detailed analyse of the respect of a fair trial and equality or arms can be found in the op-ed written by GAP National Security & Human Rights Director Jesselyn Radack appeared in the Wall Street Journal on January 22, 2014, available online : https://www.whistleblower.org/wsj-op-ed-why-edward-snowden-wouldnt-get-fair-trial

[21] The constitutional theory was first mentioned by the Court in its Costa v. Enel, Case 6/64 (1964) ECR 585; (1964) CMLR 425, "(…) It follows from all these observations that the law stemming from the Treaty, an independent source of law could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question (…)".

several cases by the Court: in the case Pringle v Ireland,[22] the Court ruled that the provisions of the Charter are addressed to the Member States in their implementation of EU law in those areas within the competence of the EU. A functional interpretation to the requirement of art. 51(1) has been brought in the Hans Åkerberg Fransson case[23], in which the Court stressed that the fundamental rights guaranteed under the EU Charter order apply "*in all situations governed by European Union law*", even in the event of a European Directive transposition by a member state, as long as "*a national provision enters in the scope of EU law"*. The Court furthers its reasoning by specifying that *"applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*."[24] Thereby, the Court simplifies and unifies the criteria of the Chart's applicability by superposing European law to the fundamental rights of the Chart. In the case of collisions between national legislation and European law, art. 53 of the Charter's provisions constitute the minimum "*floor of protection*" to be respected, provided that this minimum scope of protection can be extended. Following this provision, where a European Union legal act calls for national implementing measures, national authorities and courts may apply national standards of fundamental rights' protection. In doing so, national transposition of European directive can be achieved without compromising the level of protection granted by the Charter of Fundamental Rights.

Moreover, as set out by the Fransson case[25], "*implementing EU law"* covers Member-States' legislative, judicial and administrative practices when fulfilling their obligations under EU law. This is the case, for instance, when they ensure effective judicial protection for safeguarding rights deriving from EU law, as they are obliged to do under Article 19 (1) TEU. In the case of the transposition of the EU Directive on trade secrets and the protection of the freedom of expression, several administrative, judicial and legislative practices have been pointed out by the EChtR as positive obligations binding on States to not only refrain from depriving citizens from freedom of expression, but the effective access to freedom of expression. These obligations will be further specifically developed in point III. 2) of this article.

The ECJ, together with the guidance drawing from the ECtHR[26], ensure that fundamental freedoms protected in Europe do not suffer from broad exceptions in the course of national law making and its implementation. Recently, the ECJ gave an illustrative example of its attentive regulation of interferences to fundamental freedoms, by declaring void the entire Data Retention Directive on the account of a violation of the principle of proportionality when limiting fundamental rights to privacy and data protection (Articles 7 and 8 of the Charter). The judgment,[27] although based on a different provision of the Charter than freedom of expression, shows an application of the criteria under which legislation creating an interference with fundamental freedoms should follow, as well as illustrate an application the "*proportionality*" principle used to balance legal collisions such as the one posed by the above-mentioned Digital Rights Ireland case. The case also illustrates the difficulties arising from the vagueness of the authorized data detention in national interpretations : prior to the ECJ decision, several national

[22] ECJ, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, 31 July 2012
[23] ECJ, Case 617/10, *Åklagaren v Hans Åkerberg Fransson,* 26 February 2013
[24] *Ibid.*
[25] *Ibid.*
[26] As a principle, the ECHR and ECJ follow inspire from the guidance provided by the ECHR and its ECtHR, but they can of course also hold different opinions and show variables in their interpretation of rights.
[27] ECJ, joined cases C-293/12 et C-594/12, *Digital Rights Ireland Ltd § Michael Seitlinger*, 8 April 2014

decisions had declared provisions transposing the Directive, arguing that the unprecise interference to privacy was in breach of constitutionally protected rights. [28]

## 3. International instruments

Article 19 of the Universal Declaration of Human Rights guarantees the right to seek, receive and impart information and ideas through any media and regardless of frontiers. Additionally, the International Covenant on Civil and Political Rights enshrines the same rights in its article 19, which emphasizes that the freedom applies to information and ideas of all kinds. The content of this right is enriched by the analysis of the Human Rights Committee Report on freedom of expression, which states that the right to information is grounded in the public's right to know "*information of public interest".*[29] The last reports[30] of the Special Rapporteur have included the protection of whistleblowers as a priority in the frame of the freedom of expression, and recognized their role in the development of accountability regarding malpractices and the fight against corruption.

The responsibility of States with regards to the ICCPR may be examined by the Human Rights Committee (HRC) which can release comments on the report submitted by States parties on their implementation of the Covenant.[11] The Committee can also play the role of a mediator between States parties which disagree on the way they fulfil their obligations.[12] Last but not least, the Committee may examine communications submitted by individuals about possible violations of the covenant by States parties and express "*its views*".[13] Within these mechanisms, the sanction incurred by States is based on the publicity of the views of the Committee and is merely reputational. It should be stressed nevertheless that the ICCPR may be invoked in national courts in States whose constitutional regime allows to do so.[14]

## 4. The frame of protection for whistleblowers

Besides laws protecting freedom of expression, several instruments have engaged in the specific protection of whistleblowers, as holders and emblematic servants of freedom of expression for the public interest. As it has been stressed out by several actors before and after his adoption,[31] the scope and conditions of the protection envisaged by the Directive remain vague and do not guarantee potential whistleblowers or journalists a protection against unfair retaliation. Combined to the broad scope of circumstances under which they could be held liable for the unlawful use of a secret, the global legal effect of the Directive could constitute a serious threat to their rights. Therefore, beyond ensuring that freedom of expression will be respected as drawing from the above-mentioned instrument, member States implementing the Directive

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[28] For an exhaustive and detailed history of the Data Directive in national and CJUE jurisdiction as well as an analysis of the rationale used by the Court, see "*Data Retention after the Judgement of the Court of Justice of the European Union*", report submitted to the European Parliament and authored by Prof. Dr. Franziska Boehm and Prof. Dr. Mark D. Cole, 30 June 2014

[29] General comment No. 34 of the Human Rights Committee, para. 13

[30] See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11.05.2016, available online : https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/095/12/PDF/G1609512.pdf?OpenElement and "*Freedom of expression* under worldwide attack", 20th October 2016, available online : http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373

[31] See, among others, http://www.taxjustice.net/2016/04/01/the-european-trade-secrets-directive-how-to-silence-tax-whistleblowers/, http://www.pcaw.co.uk/latest/blog/trade-secrets-directive-corporate-secrecy-amid-calls-for-transparency, http://www.greens-efa.eu/trade-secrets-15388.html

should do so in accordance with the principles governing the protection of whistleblowers and journalists at the international and European level.

The frame of legal protection for whistleblowers has known crucial developments over the last decade, along with the growing awareness of their critical role in several sectors. The development of their protection finds a breeding ground on the pursuit of different objectives that could be summarized in four approaches: the fight against corruption mainly represented by the procedures raising from both the U.N Convention on the fight against corruption (UNCAC) in its article 33, the Council of Europe Civil Law convention on Corruption, and the OECD anti bribery convention. International enforcement authorities who play a significant role in implementing these conventions have established a considerable number of principles and templates concerning the protection of whistleblowers, among which the "G20 Guiding Principles for Legislation on the Protection of Whistleblowers"[32] have a particular impact on political initiatives, despite their non-binding character.

The second approach to the protection of whistleblowers is the Human Rights approach which consists in the protection of freedom of expression and freedom of journalistic sources. This approach is dominated by the works of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression who emphasizes the scope of this right and specifies the restricted frame in which it can be attempted to. At the European level, the work of the European Court of Human Rights as well as the European Charta for Fundamental Rights are major pillars under which Member states have binding obligations.

Recently, the European agenda has taken steps forward the uniformization and development of whistleblowers' protection and have adopted several guidelines, reports and non-binding recommendation. In 2011, a study[33] of the feasibility of a legal instrument on the protection of employees who make disclosure in the public interest was presented by the Parliamentary Assembly of the Council. On the basis of this study, the Committee of Ministers adopted Recommendation CM/Rec(2014)7 on the protection of whistleblowers prepared by the European Committee on Legal Co-operating (CDCJ) of the Council of Europe, and took note of its Explanatory Memorandum. This legal instrument sets out a series of principles to guide member States when reviewing their national laws or introducing legislation and regulations on whistleblowing. In its judgment Bucur v. Romania[34] recognizing the violation of art. 10, the ECtHR relied in its motives on the Resolution 1729(2010)[35] of the Parliamentary Assembly of the Council of Europe on protecting whistleblowers.

Based on these European initiatives and numerous civil society initiatives, and regarding the high risks suffered by the use of freedom of expression in the frame of a whistleblowing activity, several EU members have stressed the need of a European Directive[36] for the protection of whistleblowers. In May 2016, the group Greens EFA have proposed a draft directive for the protection of whistleblowers[37], and the Commission of Judicial Affairs has appointed two

[32] Study on Whistleblowers' Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation, accessible online: https://www.oecd.org/g20/topics
[33] "A study of the feasibility of a legal instrument on the protection of employees who make disclosure in the public interest", 2013, accessible online: http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/CDCJ(2012)9E_Final.pdf
[34] Bucur and Toma c. Roumanie - 40238/02, 08.01.2013 [Section III]
[35] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en
[36] https://www.theparliamentmagazine.eu/articles/news/meps-call-better-protection-whistle-blowers
[37] A summary of the Draft Directive is accessible online: http://www.greens-efa.eu/fileadmin/

rapporteurs to conduct a study on the feasibility of a Directive for the protection of whistleblowers. This research represents a more tangible involvement of the Commission for whistleblowing protection as it goes beyond the usual declarations of intention and focuses on the competence of the European Commission to regulate the matter.

Combined to the protection of whistleblowers, several rights and obligations arise from the legal binding and non-binding frame as presented in the first part. These obligations should be complied with in the course of the future transpositions of the Directive, in order to ensure that the protection of trade secrets does not override freedom expression and considerably limit whistleblowing activity.

## II/ Legitimating the interference

Taken together, these international and regional provisions place the right of free expression as a principle against which interferences are restrictively permitted. Generally, once an individual has shown the existence of a restriction on freedom of expression, the burden falls on the State to demonstrate that it complies with the requirements of human rights law.[38] Essential to meeting that burden of proof is the demonstration that the restriction does "*not put in jeopardy the right itself*".[39]

Moreover, specific limitations envisaged can be summarized as following: to be acceptable, an interference with a fundamental right should be prescribed by the law, pursue a legitimate objective, be necessary and proportional to the right protected. Each of these exceptions are subject to a precise scrutiny of both the European Court of Human Rights and The European Court of Justice, who have developed specific interpretations in the frame of freedom of expression.

### A. An interference prescribed by law

By setting the conditions under which the disclosure of a trade secret can lead to condemnation, member states will have to be consistent with the requirements carried out by the general exception allowed by a precise norm. The European Court of Human Rights, in its application of article 10, considers that the interference must be prescribed by law,[40] and delimits the frame of exceptions to freedom of expression by the following: "[interferences with freedom of expression] *may only be applied if the interference by the authorities is prescribed by law in a sufficiently precise way, is non -arbitrarily applied, is justified by a legitimate aim and most importantly is to be considered "necessary in a democratic society*". This condition is equivalent to the legality requirement found in the International Covenant on Civil and Political Rights.[41]

Similarly, the Human Rights Committee in its Comment n°33 par. 23 states that "*to be characterized as a "law",* [a norm] *must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and it must be made accessible to the*

[38] Human Rights Committee, general comment No. 34, para. 27)
[39] *Op. cit.*, par. 21
[40] Art. 10 par. 2 of the Convention
[41] Art. 19, par. 3 of the Covenant

*public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution*."

In the frame of assessing whether an interference with art. 10 of the Convention was prescribed by the law, the Court[42] concluded to the violation of the freedom of expression by considering that the "legality test" included precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness.

Applied to the provisions of the Directive here studied, three elements will be analysed under this legality condition: the definition of acts consisting in the unlawful use, acquisition or disclosure, the definition of trade secrets, and the scope of exceptions.

### 1. *Defining the material scope*

As of today, the variability of approaches taken by countries to regulate trade secrets forms a fragmented global protection at the European scale. Illegal use, disclosure or acquisition of a trade secrets are envisaged by law through contractual breaches of duty in the course of an employment, unfair competition provisions, or criminal law in certain countries. A number of countries, such as France[43], have adopted a sectorial approach and protect trade secrets by multiple provisions. Among these provisions can be often found the protection under intellectual property rights, situation in which the owner simply has exclusive rights to use them, without being required to show breach of duty or misappropriation, but other countries like the United Kingdom only rely on general principles of common law protecting equity.

In its objective of harmonizing the protection of trade secrets, the Directive leaves to member states the choice of determining whether civil, criminal or administrative provisions or procedures will be used to transpose its text. While it remains beyond the scope of this paper to provide with recommendations on the use of civil or criminal legal ways to protect trade secrets, it is nonetheless important to replace these provisions in the context of the protection of fundamental rights' context.

Art. 1 and 4 of the Directive are certainly the most important provision as they state a general definition of the actions against which trade secrets are protected, provided that EU members are free to go beyond the minimal scope. Art. 1 of the Directive condemns the "*unlawful acquisition, use and disclosure of trade secrets*". This general scope is followed by Art 4., which further details the content of these incriminations by describing under which circumstances the unlawful character is characterized. At first, the text starts by considering what could be seen as the material element of an unlawful disclosure.

> *Art. 4. "The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:*

[42] See, for example, ECtHR 24 September 1992, Case No. 10533/83, Herczegfalvy v. Austria; ECtHR 23 September 1998, Case No. 24838/94, Steel and Others v. UK; ECtHR 25 November 1999, Case No. 25594/94, Hashman and Harrup v. UK; ECtHR 14 March 2002, Case No. 26229/95, Gaweda v. Poland; ECtHR 25 January 2005, Case Nos. 37096/97; 37101/97, Karademirci and Others v. Turkey; ECtHR 17 January 2006, Case No. 35083/97, Goussev and Marenk v. Finland; ECtHR 17 January 2006, Case No. 36404/97, Soini and Others v. Finland; ECtHR 18 July 2006, Case No. 75615/01, Štefanec v. Czech Republic;

[43] The French criminal Code protects in its Article L. 1227-1 of the Labor Code and Article L. 621-11 of the Intellectual Property Code the breach of manufacturing secret by an employee or a manager.

*(a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;*

*(b) any other conduct which, under the circumstances, is considered contrary to honest commercial practices."*

*3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:*

*(a) having acquired the trade secret unlawfully;*

*(b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;*

*(c) being in breach of a contractual or any other duty to limit the use of the trade secret.*

Art. 3 of the Directive furthers with a description of the general intent carried by the person who acquires, uses of discloses a trade secret:

*"Art. 3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:*

*(a) having acquired the trade secret unlawfully;*

*(b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;*

*c) being in breach of a contractual or any other duty to limit the use of the trade secret."*

Two remarks draw from these articles:

**a) The intent** hereabove defined by the Directive corresponds to the general intent notion used in criminal law. This general content as defined by the Directive constitutes in the knowledge, or the possibility of having known by the individual, that his actions were in violation of a legal or contractual duty, or simple known that he had "*acquired the trade secret unlawfully*". The definition of this intent element (*Mens rea*) is required for any criminal incrimination, under the so-called "personal liability" under which one can only be held liable if he knew – provided that he had the mental and physical capacity to know – he was committing the crime. Moreover, the need to define the intent in legal incrimination draws from the "principle of legality". The principle of legality in its criminal aspect,[44] is a principle of international human rights law whose role is to prevent arbitrary interpretation and lack of legal consistency in judiciary decisions. Under this principle, the law is requested to be precise and clear as to the conditions under which a crime is committed. Beyond the respect of the legality principle and its mere significance for criminal law practice, the intent element in an incrimination plays a major role

[44]The principle of legality encompasses a wide range of reflexions going far beyond of this article.

in defining the social value protected. In general, criminal law, incriminations of theft are generally composed of a material element (object of the theft), and the intent, composed of the knowledge of appropriating an object that does not belong to us. The theft rationale criminalizes the general behaviour of individuals stealing others' belongings, no matter what they intend to pursue with the stolen object. Legislators had no more intention in this case than protecting generally citizens from thefts: a famous example of this general intent is Robin Hood, whose honourable objective would at no condition have allowed him to be excused from the crime of theft.

Other incriminations are, at the contrary, directed towards specific sectors in which certain types of values or interests require protection. These special needs correspond for instance, to the development of sectorial criminal laws, including environmental criminal law, labour criminal, and white-collar crimes. Focusing on white collar crimes as a relevant example for the purpose of this analysis, incriminations in this field protect the violation of rights that occur in a financial or corporate environment, which therefore requires additional intent: the crime of misusing corporate assets contains general material and intent elements, to which is added a specific intent', namely the use of the knowingly misappropriated assets for the private interest of the abuser.

As mentioned in the introduction of this article, the Directive's rationale is clear as it aims at protecting companies from illegal commercial practices, foster innovation and attract investors. In the conference launching the Directive, the Internal Market and Services Commissioner, Vice-President Antonio Tajani stated: "*Protecting trade secrets is particularly important for the EU's smaller, less established firms. They employ trade secrecy more intensively than larger companies - in part because of the cost of patenting and protection against infringement. The loss of a trade secret and disclosure of a key invention to competitors means a catastrophic drop in value and future performance for an SME. With this legislation, the Commission will protect EU businesses' livelihood and the trade secrets that form a vital part of it*".[45] This statement clearly shows the behaviour and consequences that are to be protected: the disclosure, use or acquisition of a trade secrets in the goal of taking a financial advantage of it or causing financial or strategic harm to the company. Having regard to the objective pursued by the harmonization of trade secrets' protection and the necessary respect of freedom of expression, the transposition of the Directive should specify the acts consisting in an unlawful use, disclosure or acquisition. Whether they choose to place the protection of trade secrets under civil or criminal liability, laws should integrate the specific element of consequences supported by the company at the commercial level. As an example, German Act Against Unfair Competition defines the unlawful disclosure, use or acquisition as "*procuring or saving a trade secret without authorization for personal gain, competitive purposes, or the benefit of a third party*".[46]

Specifying the characteristic of the intent appears as a key condition for the achievement of a fair balance between freedom of expression and trade secrets' protection, when one comes back to the first of the three *alternative* conditions defined by article 3:

[45] See European Commission press release, available at : http://europa.eu/rapid/press-release_IP-13-1176_en.htm?locale=FR
[46] UWG Section 17, paragraph 2(1), see also Schultz, M. F. and D. Lippoldt (2014), "Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper", OECD Trade Policy Papers, No. 162, OECD Publishing. http://dx.doi.org/10.1787/5jz9z43w0jnw-en

*"3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:*

*(a) having acquired the trade secret unlawfully;"*

To be qualifying as a person unlawfully acquiring a trade secret, one shall be considered as knowing that he was indeed acquiring the trade secret unlawfully, which is in practice linked to the fact that she had knowledge of the fact that her information was a trade secret. Taking a look again at the incrimination of threat, it is objectively assessable by a person that an object is not hers, therefore matching easily the intent element. In other infractions concerning the violation of secret such as for doctors or lawyers, laws also define precisely what is in the scope of the secret. Stating this condition without further detailing what information qualifies as a trade secret in precise terms, and which actions to protect the secret should be taken by the companies opens the door to the quasi presumption of intent that would severely endanger the legitimacy of the protection against trade secret in regard to European law. Without these precisions, almost any whistleblower could be recognized as having met the conditions of the intent condition on the basis of the criteria a). These conditions are envisaged by the Directive and will be analysed further in this article.

**b)** Moreover, art. 2b refers to the notion of "***honest commercial practices*":** the vagueness and moral reference characterizing this term participate to the unpredictable nature of trade secrets' protection as it is presented in the Directive. At the European level, no uniform definition or regulation of unfair commercial practices in businesses to businesses relations (B2B) exists. The Directive on Unfair Commercial Practices was adopted in 2005, but only regulates relations between businesses and consumers (B2C). Its recital 6 mentions "*This Directive [...] neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of full subsidiarity, Member States will continue to be able to regulate such practices in conformity with Community law, if they choose to do so [...]*."[47] Ironically, unfair competition was initially a notion created to protect relations between competitors, and specifically in two fields : the misrepresentation misleading the consumer (and therefore creating a distortion in competition between businesses), and the protection of elements that could not find protection under classical intellectual property… including trade secrets[48]. The content of such practices does not find yet an interpretation in European Courts, as it interpretation of "honest commercial practices" is largely overlapped by the reference to the protection of consumers[49]. Therefore, the only reference to this notion without further examples leaves a high risk or arbitrariness in judicial fora of members States.

The TRIPS Agreement[50] describes honest commercial practices as "*at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition*." This definition goes

[47] Updated Guidance on the Unfair Commercial Practices Directive, adopted by the European Commission, 25 May 2016, accessible online: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf
[48] Prof. Dr. Jules Stuyck, Briefing paper, "*Addressing unfair commercial practices in business-to-business relations in the internal market*", May 2011, p. 19
[49] Op. cit., p. 24
[50] Agreement on trade related aspects of intellectual property, art. 39

beyond the mere commercial interest of the company and could therefore extremely broaden the scope of the freedom of expression's limitation. Therefore, in regard to the specific objective of the Directive, the acts falling under "contrary to honest practices" should be completely redefined in order to specifically frame the exception to freedom of expression and enable employees who wish to disclose an information for the public interest to expect an effective protection. A negative definition of it could be introduced to strengthen the initial objective of the Directive – protecting against unfair competition actions and supporting innovation – by mentioning that honest practices are those who do not aim at earning a professional, competitive, financial or personal interest from the information: whistleblowers and journalists, when obviously acting for the disclosure of public interest matters, would not fall under this scope.

2. *The definition of trade secrets*

The definition given by the Directive also falls short in framing precisely the definition of a trade secret, therefore leaving a broad margin of appreciation as to the broadness of trade secrets' scope. Art. 1 of the Directive states as follows: *"(…) knowledge that is valuable to the entity and not widely known. Such valuable know-how and business information, that is undisclosed and intended to remain confidential, is referred to as a trade secret*". The definition chosen by the Commission is similar to the one used in the TRIPS agreement, but it does not allow for a clear expectation of the scope of trade secrets. The safety of pharmaceuticals in clinical trials,[4] the composition of baby formula[5] or secret tax deals[6] could all qualify as a 'trade secrets' under the Directive, as could the Panama papers disclosures and the recent Lux Leaks' secret tax agreements.[51] Another far reaching example of the trade secret's notion abuse is the case concerning scientific evidence on the possible cancerogenic impact of pesticide glyphosate. While a previous study from the OMS had declared glyphosate as "probably cancerogenic", the European Food Safety Authority published a report giving an opposite conclusion. The AFSA refuses to disclose the three key scientific studies used to assess the component, claiming that they have been conducted by industrial companies and thus represent trade secrets having a commercial value.[52]

This uncertainty is aggravated by the mention in the art. 2b: "*it has commercial value because is it secret*". This rather tautological provision leaves to the secret holder's the margin of appreciation to define, under its financial structures and activities, what has commercial value and what is only functional. Extended margin of appreciation is considered as an illegal character of any interferences with fundamental rights by the ECtRH as well as the Commissioner for Human Rights, as seen at the introduction of this section. In its Comment 33 par. 36, the Committee recalls: *"(…) in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary.*[53] *In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a "margin of appreciation"*[54] *and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the*

[52] See, for instance, https://corporateeurope.org/efsa/2016/02/key-evidence-withheld-trade-secret-eus-controversial-risk-assessment-glyphosate
[53] See communication No. 518/1992, *Sohn v. Republic of Korea*
[54] See communication No. 511/1992, *Ilmari Länsman, et al. v. Finland*, Views adopted on 14 October 1993.

*enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression*."[55]

In order to comply with the requirements framing interferences with freedom of expression, national transpositions should include objective criteria defining the information that is considered as trade secret. The faith of whistleblowers who disclose an information linked to the corporation cannot be driven by such a high degree of interpretation and arbitrariness. Moreover, not specifying the scope of trade secrets will have the unavoidable effect of refraining whistleblowers to give information to the public because of the uncertainty of their retaliation. This would, subsequently reduce our right as the public to receive information important for a public debate. Such an objectivization of the trade secret definition could be for instance achieved by imposing to enterprises the internal drafting of trade secrets inside the company or clearly defining the commercial interest they bring.

Similarly, legal uncertainty also rises from the mention of the relative secrecy: art. 2(1)(a) states: "*it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question*". Again here, what the term of circles encompasses is rather uncertain and does leave to a subjective appreciation as to the qualification of the information as trade secret, therefore the perimeter and nature of such circle should be clearly specified.[56] Art. 2 continues:

> *"(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret".*

As mentioned above in this paper, the reasonable steps taken to keep the information secret is closely linked to the intent element of the infraction. Defining these "reasonable steps" to keep an information secret would allow assessing how likely the author of a use or acquisition of a trade secret could have known about its secrecy. Therefore, concretely defining this condition secures a fair assessment of the knowledge of the alleged author of an illegal use/acquisition of a trade secret. This criterion supporting the intent element exists in incriminations such as the illegal maintaining or introduction in an informatic system[57] in which the intent requires the knowledge, based on the appearances of the system, of having entered in a system that was otherwise restricted to the use of a restricted circles of users. In this frame, case law[58] in France concerning this infraction has based its evaluation of the intent on the appearances of the restricted character of the system and the security steps taken to restrict it (codes of identification, banners warning of the restricted access…). This condition, as stated in the Directive, isn't clearly defined – if not defined at all – and must be elaborated to conform with freedom of expression.

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[55] See communications Nos. 518/92, *Sohn v. Republic of Korea*; No. 926/2000, *Shin v. Republic of Korea*

[56] See, for more reflexions on this theme, Aplin, Tanya, A Critical Evaluation of the Proposed EU Trade Secrets Directive (July 18, 2014). King's College London Law School Research Paper No. 2014-25. Available at SSRN: https://ssrn.com/abstract=2467946 or http://dx.doi.org/10.2139/ssrn.2467946

[57] See in French law, article 323-1 Criminal Code

[58] See Cour de cassation, criminelle, Chambre criminelle, 20 mai 2015, 14-81.336, Publié au bulletin, and Cour de cassation, criminelle, Chambre criminelle, 3 octobre 2007, 07-81.045, Publié au bulletin

## 1. The scope of the exceptions

Art. 5, let. b), of Trade Secrets Directive stipulates the following acts that an individual would have to report to be excluded from the Directive's scope: "*misconduct, wrongdoing or illegal activity*". This enumeration poses issues as two levels:

- Firstly, the scope seems to be excluding situations in which whistleblowers suspect an act that, while not being considered as illegal as such, reveals a practice that deserves public attention. This hypothetical case clearly shows its risks for freedom of expression when it becomes real: both Luxleaks[59] and Panama Papers[60] concerned the exposure of practices – respectively the establishment of off-shores companies and the operation of tax rulings – that are not considered illegal. The challenge in the Lux Leaks case therefore lays in the fact that an abusive use of such legal practice can hardly be proved as they remain on casuistic interpretation of the tax agreements allowed, therefore locking the information disclosed in the frame of trade secrets' protection.

- Misconduct and wrongdoing: while the broadness of these terms corresponds to the standards for effective whistleblowing protection, but there are notions that leave much space for subjective interpretation: what could a misconduct or wrongdoing look like in the financial sector? Would it be the same in an industrial pharmaceutical firm? To what extent is it different from a simple "negligence" that does not fall into the scope of the exceptions? The text is left again to a subjective interpretation that does not allow one to reasonably anticipate whether a disclosure of an information could lead to a condemnation for illegal use, acquisition or disclosure of trade secrets.

In order to counter the issues brought with an unprecise and restrictive enumeration of protected disclosures, the G20 Principles recommend covering disclosures of "*a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or types of wrongdoing that fall under the term corruption, as defined under domestic law(s)*". As the Study for a feasibility of an instrument protecting whistleblowers rightfully mentions it, whistleblowers's objective is, above all, to prevent such acts from occurring. Therefore, the integration of terms "gross mismanagement or gross waste of funds" finds its legitimacy as they are likely to represent precursors signs of more serious malpractices. The Council of Europe Committee of Ministers recommends in its Explanatory Report to the Directive[61] protecting whistleblowers that States adopt protections for those who report threats or harms to the public interest, which "*should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment*".

An example of the most precise and comprehensive delimitation of acts is the Irish Public Disclosures Act 2014. In its Article 5(3), wrongdoings are defined as follows:

[59] http://www.transparency.org/news/feature/luxleaks_whistleblowers_like_antoine_deltour_should_be_celebrated
[60] http://panamapapers.sueddeutsche.de/en/
[61] Explanatory Report to the Recommendation CM/Rec(2014)7 on the Protection of Whistleblowers, accessible online, https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf

*(a) that an offence has been, is being or is likely to be committed,*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,*

*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged,*

*(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,*

*(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or (h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.*

In its Report on the Promotion and protection of the right to freedom of opinion and expression[62], the Special Rapporteur states that a protected disclosure "*constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety*"[63]. In the light of the exigencies unanimously stated by the European Court, the Court of Justice, the Rapporteur, the Human Rights Committee, any interference should be precise. As a consequence, in the frame of the trade secret provisions, the scope of these violations should be specified by, *inter alia*, specifying the public interest in cause.

## 4. Public interest and trade secrets

Art. 5 relating to exceptions continues in its b) "*for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted* ***for*** *the* ***purpose of protecting the general*** *public interest".*

The public interest has been subject to an extended case-law of the ECtHR and the ECJ, and serves yet as a key component of the proportionality test used to balance the freedom of expression and a colliding right. The Court's case law reflects particular attention to the public interest involved in the disclosure of information: "*In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence*."[64]

In its Grand Chamber judgment in Guja v. Moldova, the Court recognised the need of protection of whistleblowers by Article 10 of the Convention. The Court noted "*that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest*". Moreover, the Court

[63] See A/70/361, par. 28
[64] ECtHR 26 April 1979, Case No. 6538/74, *Sunday Times (n° 1)* v. UK

finds has in several cases found that « *the public interest can be sometimes so strong that it overrides a clause of confidentiality imposed by the law*[65].

Moreover, in the Markt Intern Verlag GmbH case and Klaus Beermann[66], the Court concluded that there had been no violation of art. 10, noting that "*information of a commercial nature cannot be excluded from the scope of Article 10, §1, which does not apply solely to certain types of information or ideas or forms of expression*".

In the light of the public interest's broad interpretation by the Court, European members should ensure that provisions transposing the exceptions cover a broad number of hypothesis, therefore precluding genuine disclosures from being subject to unnecessary judicial procedures. Such a specification will contribute to maintain a legal environment in which disclosures for the public interest are encouraged, rather than being oppressed by the burden of legal uncertainty.

## III – A necessary and proportional interference

The Digital Rights Ireland ruling mentioned above marks a new trend for the Court of Justice, not only in so far as data protection is concerned (as was confirmed a month later with the Google Spain case[67]), but also of the new obligations incumbent upon the EU legislature, in cases of possible impact on fundamental rights. According to the Council Legal Service, the Digital Rights Ireland ruling is as follows:

*"…confirms that the Court of Justice will not satisfy itself with anything less than a strict assessment of the proportionality and necessity of measures that constitute serious restrictions to fundamental rights, however legitimate the objectives pursued by the EU legislature*."

But the ECtHR had already, in a famous Guja v. Moldova case, developed a set of criteria specifically guiding the proportionality test in the frame of whistleblowing. In this case, while assessing if the interference with the freedom of expression is proportionate, the Court examined six elements to determine the role of freedom of expression in this balance. Based in the application of two of these criteria at stake in the Directive's provisions, the following remarks can be suggested for the future transposition in national legislations.

### 1. The burden of proof

Art. 5b) of the Directive considering exceptions to the unlawful use or disclosure of trade secrets states the following exception: *"(…) provided that the respondent acted for the purpose of protecting the general public interest*." By conditioning the protection to its protection of the general interest, the Directive embarrasses whistleblowers' protection with a rather heavy and burden of the proof.

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[65] ECtHR, Fressoz et Roire c. France [GC], 21 janvier 1999, n° 29183/95 ; CEDH, Radio Twist c. Slovaquie, 19 décember 2006, n° 62202/00)
[66] ECtHR, Markt Intern Verlag GmbH and Beermann v Germany, 10572/83, A/165, 20th November 1989
[67] ECJ, Grand Chamber, (C-131/12), Google Spain SL, Google Inc. / Agencia de Protección de Datos (AEPD), 13 May 2014

Considering both specific regulations on whistleblowing and international protections on interferences with the freedom of expression, such a general public interest should be presumed, leaving space for the company's right to prove that the disclosure was motivated by unlawful or unethical objectives and was strictly private. The Special Rapporteur mentions in its 2015 rapport "*the whistle-blower's motivations at the time of the disclosure should also be immaterial to an assessment of his or her protected status*."[68] Moreover, the Parliamentary Assembly[69] principles include that "*any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true (...)"* The PACE[70] study goes further by turning good faith into a defence mean in cases in which the disclosure would eventually turn to be false: "*even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives*". The notion has also been stated by Council of Europe Recommendation[71] as an element that "*should be believed as existing for any whistleblower*", and most recently, the Council of Europe has shifted its focus from good faith to reasonable belief by recommending in its Recommendation for whistleblowers that protection "*should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialised, provided he or she had reasonable grounds to believe in its accuracy*."[72]

This limitation of good faith as an obstacle to whistleblowers' protection finds its justification in the objective pursued by whistleblowing, as mentioned previously in this article: what matters in a disclosure is its veracity and the way its reception has chances to effectively stop the incriminated behaviour.

The European Court of Human Rights has developed in its abundant case law on whistleblowing since the Guja v. Moldova case[73]. In this case, the European Court used, to conduct its "necessity in a democratic society test", six criteria among which good faith. In par. 77 of the Guja v. Moldova case, the Court states that an act justified by personal grievance, personal antagonism or the expectation of a personal advantage would not justify the protection offered by art. 10 (par. 77). The Court therefore, although not yet reaching the high standard achieved by the Council of Europe Draft Recommendation, takes this criterion of good faith very largely and presumes it together with the public interest criteria and the previous attempts to disclose internally.

Several legislations in Europe have already taken steps to eliminate the good faith from their mechanisms. In the UK, the NGO Public Concern At Work campaigned for the removal of the good faith test in its legislation[74], as it was clear that this test was being used by employers as a means to question the motives of a whistleblower, before the public interest disclosure or the treatment of the whistleblower was examined. The requirement that the whistleblower act in good faith has now been removed from liability to remedy with claimants standing to lose up

[68] *Op. cit., p. 7*
[69] Law No. 571, 14 December 2004
[70] Ibid.
[71] See Recommendation CM/Rec(2014)7 and explanatory memorandum, accessible online https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf
[72] *Op. cit.*., par. 22
[73] ECtHR *Guja* v. *Moldova*, Case No. 14277/04, 12 February 2008
[74] The Public Interest Disclosure Act (PIDA), 1998

to 25% of their damages if they are found to have acted in bad faith. Similarly, Irish[75] and Romanian[76] provisions serve as an example by considering that "*the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure*".

Therefore, it appears that the Directives' provision should, in its national transposition by member States, precise in the procedural rules guiding the qualification as a protected disclosure that the public interest is presumed. Moreover, the "good faith" of a the disclosant should not precondition its protection.

### 2. Positive obligations: ensuring a safe legal context for public interest disclosures

In addition to the primary negative understanding of a State to abstain from interferences in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligations". This principle has been first stated in the Fuentes Bobo v. Spain case[77] which concerned a programme director's dismissal for making offensive remarks about the managers of a Spanish public television channel during an interview. The Court pointed out that Article 10 applied to all employer-employee relationships, even those falling within the realm of private law, and that in certain cases there was a positive obligation on the state to protect the right to freedom of expression.

The existence of these positive obligations has two consequences:

- Individuals can, when they consider a violation of one of their right protected under the ECHR, submit a case under the ECtRH, after they will have realized the condition of "exhausting remedies" by exhausting all their national judicial recourse;
- Procedural obligations ensuring that individuals are provided with all necessary mechanisms to effectively access their rights and limiting the scope of an interference with these right.

Art. 11 of the Directive states as follows:

> "*Member States shall ensure that the competent judicial authorities have, in respect of the measures referred to in Article 10, the authority to require the applicant to provide evidence that may reasonably be considered available in order to satisfy themselves with a sufficient degree of certainty that:*
>
> *(a) a trade secret exists;*
>
> *(b) the applicant is the trade secret holder; and*
>
> *(c) the trade secret has been acquired unlawfully, is being unlawfully used or disclosed, or unlawful acquisition, use or disclosure of the trade secret is imminent*."

[75] Ireland Protected Disclosures Act, 2014
[76] Law no. 571/2004 on the protection of personnel within public authorities and institutions disclosing violations of the law
[77] ECtHR *Fuentes Bobo* v. *Spain*; Case No. 39293/98, 29 February 2000

As regard to the above-mentioned uncertainties and subjective assessment by the companies on the existence of a trade secret, this article creates a serious arbitrariness in the judicial mechanisms. Since criterion a) and b) and left in practice at the entire appreciation of the company, potential whistleblowers aren't likely to assess the judicial risks brought by their disclosure.

Art. 11 follows in these terms:

> "*Member States shall ensure that in deciding on the granting or rejection of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account the specific circumstances of the case, including, where appropriate:*
>
> *(a) the value and other specific features of the trade secret;*
>
> *(b) the measures taken to protect the trade secret;*
>
> *(c) the conduct of the respondent in acquiring, using or disclosing the trade secret;*
>
> *(d) the impact of the unlawful use or disclosure of the trade secret;*
>
> *(e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;*
>
> *(f) the legitimate interests of third parties;*
>
> *(g) the public interest; and*
>
> *(h) the safeguard of fundamental rights*".

In order to comply with their positive obligation to enable individuals to use their right of freedom and refrain from turning principle of freedom of expression into a restricted exception, transpositions of these provisions should include procedural safeguards for whistleblowers. These positive obligations are specified by further cases in which the Court has elaborated on the content of such obligations and defined their main objectives:

a) States are required to put in place procedures under which employees can safely disclose an information. Such mechanisms are important for the development of a reporting work culture and the effective eradication of malpractices. They create a safe legal environment for employees, who can rely on a channel of disclosure instead of taking unnecessary often major risks by going public with the information. To be considered as such, channels of disclosure need to fulfil certain requirements directly linked with the vulnerable condition of whistleblowers. In defining these channels of disclosure, the European Court of Human Rights judged that they represent any "competent authority" to which he or she could make disclosure, or "any other effective means of remedying the wrongdoing" (…) requiring a person to "carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable[78].

[78] ECtHR, Guja v. Moldova, 14277/04, 12 February 2008, paras. 73-78. See also *Heinisch v. Germany*, application No. 28274/08, judgement of 21 July 2011 and *Bucur and Toma v. Romania*, application No. 40238/02, judgement of 1 August 2013.

The importance of these channels has been repeatedly stressed by the ECtHR in its judgements, and appreciated as element contributing to the "public interest" and "proportionality" tests. As mentioned above, the Guja v. Moldova case considers, in its six criteria, that the "*in the light of the duty of discretion referred to above, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public. In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover*".[79] In the Henrisch and Guja case, the ECHR kept applying the requirement of pursuing alternative channels for making the disclosure the ECtHR, and noted the applicant had raised her concerns on numerous occasions with her employer to no avail.

Similarly, the PACE resolution calls for "*internal whistle-blowing procedures that will ensure that disclosures pertaining to possible problems are properly investigated and relevant information reaches senior management in good time, bypassing the normal hierarchy, where necessary*", and the G20 principles state: "*The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels".*

While States must provide employees with external and internal independent channels, they still support the responsibility of ensuring that these procedures are effective. Indeed, the responsibility lies on States to tailor systems of disclosure that are as effective as possible, provided that "*when a Government seeks to prosecute or otherwise penalize a publicly disclosing whistle-blower, the burden should be on the State to show that the whistle-blower's perceptions of non-protection or non-redress were unreasonable*.".

Therefore, when transposing provision*" (c) the conduct of the respondent in acquiring, using or disclosing the trade secret*;", Member States should integrate the consideration of steps taken by the employee to disclose the alleged trade secret to an internal or external independent authority. Moreover, legislation providing employees with such systems of disclosure should be required by the law, in order to proportionately balance the infringement to the freedom of expression with potential sanctions and risks of legal pursuit suffered from whistleblowers.

b) Besides the creation of specialized channels allowing employees to safely disclose, States are under the duty to ensure the that proper investigation on the facts alleged by a disclosant can be offered. This obligation would allow employees detaining secret information and suspecting a wrongdoing to beneficiate from an independent and confidential investigation before falling under the scope of an accepted application in Court that would put his identity at risk and expose him to sanctions. In the case Ozgiir Gundem v. Turkey, the ECtHR Court held that "i*n failing to adequately protect a pro-Kurdish newspaper or investigate criminal activity directed against the paper, the Turkish government failed to meet its positive obligation under the art. 10 and freedom of expressio*n".

[79] *Op. cit.* par. 73

The Explanatory Memorandum to the European Council recommendation on the protection of whistleblowers also emphasises that "*Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees (…) Public interest reports and disclosures by whistleblowers should be investigated promptly and, where necessary, the results acted on by the employer and the appropriate public regulatory body, law enforcement agency or supervisory body in an efficient and effective manner*."

Ensuring proper investigative duties and powers in their national legislation will allow members states to comply with their positive obligation by enabling whistleblowers to safely disclose a perceived wrongdoing to a dedicated authority before falling under the scope of a judicial process for the unlawful use, disclosure and acquisition of a trade secret.

## Conclusion

The Directive on the Protection of trade secrets raises several challenges in terms of concordance with fundamental rights, specifically the ability of whistleblowers and journalists to disclose information of malpractices occurring in their work environment. Drawing on an already blurry notion of "trade secrets", the Directive sets a broad scope limiting freedom of expression by relying on extensive definitions. In addition, the large understanding of trade secrets and unlawful use, disclosure or acquisition seems to extend beyond the initial rationale of the Directive, whose primary objective is to avoid unfair competition practices and weaknesses of the EU internal market on innovation. It remains the responsibility of EU members States to adequately specify the notions in order to transpose this Directive into a predictable, legitimate and proportionate exception to freedom of expression. To do so, European acquis on interferences with fundamental rights must be taken into account, in combination with the specific needs of whistleblowers that are gaining an important role in the European policy agenda on human rights and fight against corruption.

Without a clear delimitation of trade secrets' perimeter, difficulties of interpretation are likely to arise and lead individuals to question the validity of the transposed provisions as to national constitutional norms or the norms protected by the ECthR and the European Charter.