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EDITORIALS



European Commission's proposals on trade secrets

Risk undermining public health and must be modified

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In late 2013 the European Commission published proposals to harmonise elements of existing national legislation on trade secrets.¹ These will shortly be debated in the European parliament but, in their present form, they have created serious concerns among non-governmental organisations concerned with health policy.²

Strengthening protection against disclosure of trade secrets is the most recent step in a process whereby multinational corporations have increasingly sought to commodify knowledge. Thus, the drug industry has lobbied to strengthen the protection given to it by the patent system—for example, by persuading governments to increase the duration of protection for so called orphan drugs³ and using international trade negotiations to enable it to claim rights in previously unprotected markets such as India. A diverse range of industries has exploited the opportunities provided by transfer pricing, whereby operations selling a trademarked commodity in one country pay large sums to another part of the same corporation based in a low tax jurisdiction for the right to use the brand name and associated imagery.⁴

The arguments in favour of such arrangements are well rehearsed. Patent law gives corporations rights over intellectual property and enables them to innovate without the risk that others might profit from their ideas. This reflects a social contract whereby those innovating will obtain a time limited degree of protection, based on the idea of a fair return on their investment, in return for the contribution that their products, such as new medicines, make to society or to economic growth. The same principles underpin the use of copyright. Trademarks are also considered to offer a societal benefit, placing owners under an implied responsibility to ensure the quality of their product. However, many trade secrets are not protected by patent, copyright, or trademark legislation and, within Europe, their protection varies greatly from country to country. At present, there is not even a common definition of trade secrets. The proposed directive would remedy this, adopting the definition used in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which draws on the US Uniform Trade Secrets Act.⁵ A trade secret is defined as

something that is “not generally known among or readily accessible to persons . . . that normally deal with the kind of information in question.” It must also have some commercial value, and reasonable steps must have been taken to preserve secrecy. Interestingly, the directive treats trade secrets differently from other forms of intellectual property in that there is no owner as such. Instead it uses the term “holder,” which confers no exclusive right to possess the information concerned.

Although the benefits of the proposals to large corporations are apparent, there are also important criticisms. Some have questioned whether there is even any need for them. Member state governments argue that the existing lack of legal harmonisation is a barrier to innovation, reducing competitiveness as companies fearing their secrets will be misappropriated apply costly measures to protect them.⁶ Yet the survey of businesses used in the case for legislation provides little support for these arguments,⁷ and the commission's impact assessment finds that most companies already share trade secrets using their own disclosure agreements.⁸ Nor is it clear that the proposals will provide legal certainty because many elements remain vague.^{7,9} They may not even be directed at the right targets, given the growing evidence of industrial espionage by certain governments.¹⁰

Health implications

It is, however, in health policy where many unanswered questions are now emerging. Do the harms to patients associated with non-disclosure of trial results and adverse drug reactions by the pharmaceutical industry argue for less rather than more trade secrecy?¹¹ The European Food Safety Agency depends on manufacturers' assessments of safety, but those manufacturers regard the results as trade secrets, so could these become even more difficult to access? Could whistleblowers and undercover reporters highlighting threats to public health—for example, by exposing grossly unhygienic practices and adulteration of foodstuffs—lose what few safeguards they have? Could researchers studying tactics used by the tobacco, alcohol, and junk food industry to market their products to children find themselves in breach of the law? Will proposed limits to

disclosure of trade secrets in civil litigation constrain the ability of protestors to cite evidence that might justify their actions?

It may be argued that the proposals contain sufficient protection for the public interest. There is a provision for whistleblowers to “reveal misconduct or wrongdoing.” Yet this would be permitted only when such action was strictly “necessary” to reveal wrongdoing. This test may not be met if it was already known that the corporation had done wrong but the secrets were acquired to illustrate the scale and scope of its actions.⁷ Nor might it protect an investigative reporter who went undercover following reasonable suspicion that wrongdoing was occurring but who discovered that it was not, or when additional material, not strictly relevant to the alleged misconduct, was inadvertently obtained.

In recent years the European Commission has given a much greater priority to economic growth and competitiveness than to social policy. This is exemplified by the recent proposal, abandoned in the face of widespread protests, to move pharmaceutical policy from the health directorate general to the internal market, industry, and entrepreneurship directorate.¹² The European parliament will return to the proposals on trade secrets in April. Maybe it will be able to redress the balance in favour of the citizens of Europe whose interests it is meant to represent.

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investment in health, and has received research funding from the EC, although he is writing in a personal capacity.

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