newsmedia association

15 March 2018

Dear Sir/ Madam

Consultation on draft regulations concerning trade secrets

As you will be aware, the News Media Association is the voice of national, regional and local news media organisations in the UK – a £5 billion sector read by 48 million adults every month in print and online. I am writing in response to Q12 of the questions posed in the Consultation on the implementation of Directive (EU) 2016/943.

The NMA met with the IPO in the run-up to the Directive and voiced concerns over the way in which the proposal struck the balance between the interests of businesses and matters of wider public concern. The Rapporteur Constance Le Grip was confident that the finalised Directive *"will make it possible to protect companies' professional knowhow and confidential commercial information, whilst safeguarding the fundamental freedoms of expression and information and of the press"*. Throughout the negotiations MEPs acknowledged the need to ensure that the legislation does not curb media freedom and pluralism or restrict the work of journalists, in particular with regard to their investigations and the protection of their sources.

It is helpful to enumerate the various recitals and articles now contained in the Directive which underline the fact that Investigative reporting must not be hindered by corporate threats to litigate or to block the publication of stories that are in the public interest:

Recitals

(19) While this Directive provides for measures and remedies which can consist of preventing the disclosure of information in order to protect the confidentiality of trade secrets, it is essential that the exercise of the right to freedom of expression and information which encompasses media freedom and pluralism, as reflected in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'), not be restricted, in particular with regard to investigative journalism and the protection of journalistic sources.

(20) The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies in a case where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this Directive.

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Article 1.2.
This Directive shall not affect: (a) the exercise of the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media.

Article 5 Exceptions

Member States shall ensure that an application for the measures, procedures and remedies provided for in this Directive is dismissed where the alleged acquisition, use or discosure of the trade secret was carried out in any of the following cases:

(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;

(c) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;

(d) for the purpose of protecting a legitimate interest recognised by Union or national law.

Exceptions

In a letter to the NMA dated 22 November 2015 Baroness Neville-Rolfe assured us that the Directive *"would not have a negative impact on investigative journalism, because of the exceptions that have been provided in the text in Articles 4(2)(a) [as then numbered] on the right to freedom of expression and information and 4(2)(e) on protection of legitimate interests. The public interest defence that applies in UK law would not therefore be affected"*.

The government now states that it believes that the exceptions in Article 5 are already covered by existing UK law and in consequence they have not been transposed into the draft Trade Secrets (Enforcement, etc) Regulations 2018. In Annex B of the Consultation paper it is said that the exceptions *"are covered by UK common law and current UK legislation including the Human Rights Act 1988 and Trade Union and Labour Relations (Consolidation) Act 1992, the European Convention on Human Rights and the public interest exception in common law"*.

Recital 10 stipulates that the safeguards explicitly provided for in the Directive to protect the interests of other parties must be respected. We do not consider that it is sufficient simply to make reference to the common law and the enumerated Acts of Parliament without examining these provisions and their import and explaining in detail how they satisfy the requirements of the Directive.

It is vital that investigative journalism is safeguarded, and we would ask for an assurance that there will be no incursion into the public interest defence.

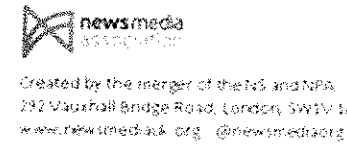
Restrictions on open justice

Clause 10 of the Regulations will create new restrictions on open justice in consequence of the powers for courts to identify alleged trade secrets as confidential. Furthermore, courts may also restrict access to documents and hearings on application by a party, or on their own initiative. We recognise that in doing so they must take account (inter alia) of the legitimate interests of third parties (although not specifically of the public interest). However, we are concerned that there is no express provision for prior notification of the media to enable representations to be made nor, importantly, for variation and lifting of such orders during the course of legal proceedings. It is important that the courts have express powers to expedite media challenges to the making of such orders, and to vary them where appropriate. The absence of such provisions is a significant lacuna in the Regulations.

The NMA would welcome a meeting with IPO officials to discuss the transposition of the Directive in more detail.

Yours faithfully

[redacted]



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