# 1AC

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### Framework

#### the standard is maximizing expected wellbeing

#### 1 – Extinction o/ws under any framework, even under moral uncertainty – infinite future generations

Pummer 15 — (Theron Pummer, Junior Research Fellow in Philosophy at St. Anne's College, University of Oxford, “Moral Agreement on Saving the World“, Practical Ethics University of Oxford, 5-18-2015, Available Online at http://blog.practicalethics.ox.ac.uk/2015/05/moral-agreement-on-saving-the-world/, accessed 7-2-2018, HKR-AM) \*\*we do not endorse ableist language=

There appears to be lot of disagreement in moral philosophy. Whether these many apparent disagreements are deep and irresolvable, I believe there is at least one thing it is reasonable to agree on right now, whatever general moral view we adopt: that it is very important to reduce the risk that all intelligent beings on this planet are eliminated by an enormous catastrophe, such as a nuclear war. How we might in fact try to reduce such existential risks is discussed elsewhere. My claim here is only that we – whether we’re consequentialists, deontologists, or virtue ethicists – should all agree that we should try to save the world. According to consequentialism, we should maximize the good, where this is taken to be the goodness, from an impartial perspective, of outcomes. Clearly one thing that makes an outcome good is that the people in it are doing well. There is little disagreement here. If the happiness or well-being of possible future people is just as important as that of people who already exist, and if they would have good lives, it is not hard to see how reducing existential risk is easily the most important thing in the whole world. This is for the familiar reason that there are so many people who could exist in the future – there are trillions upon trillions… upon trillions. There are so many possible future people that reducing existential risk is arguably the most important thing in the world, even if the well-being of these possible people were given only 0.001% as much weight as that of existing people. Even on a wholly person-affecting view – according to which there’s nothing (apart from effects on existing people) to be said in favor of creating happy people – the case for reducing existential risk is very strong. As noted in this seminal paper, this case is strengthened by the fact that there’s a good chance that many existing people will, with the aid of life-extension technology, live very long and very high quality lives. You might think what I have just argued applies to consequentialists only. There is a tendency to assume that, if an argument appeals to consequentialist considerations (the goodness of outcomes), it is irrelevant to non-consequentialists. But that is a huge mistake. Non-consequentialism is the view that there’s more that determines rightness than the goodness of consequences or outcomes; it is not the view that the latter don’t matter. Even John Rawls wrote, “All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.” Minimally plausible versions of deontology and virtue ethics must be concerned in part with promoting the good, from an impartial point of view. They’d thus imply very strong reasons to reduce existential risk, at least when this doesn’t significantly involve doing harm to others or damaging one’s character. What’s even more surprising, perhaps, is that even if our own good (or that of those near and dear to us) has much greater weight than goodness from the impartial “point of view of the universe,” indeed even if the latter is entirely morally irrelevant, we may nonetheless have very strong reasons to reduce existential risk. Even egoism, the view that each agent should maximize her own good, might imply strong reasons to reduce existential risk. It will depend, among other things, on what one’s own good consists in. If well-being consisted in pleasure only, it is somewhat harder to argue that egoism would imply strong reasons to reduce existential risk – perhaps we could argue that one would maximize her expected hedonic well-being by funding life extension technology or by having herself cryogenically frozen at the time of her bodily death as well as giving money to reduce existential risk (so that there is a world for her to live in!). I am not sure, however, how strong the reasons to do this would be. But views which imply that, if I don’t care about other people, I have no or very little reason to help them are not even minimally plausible views (in addition to hedonistic egoism, I here have in mind views that imply that one has no reason to perform an act unless one actually desires to do that act). To be minimally plausible, egoism will need to be paired with a more sophisticated account of well-being. To see this, it is enough to consider, as Plato did, the possibility of a ring of invisibility – suppose that, while wearing it, Ayn could derive some pleasure by helping the poor, but instead could derive just a bit more by severely harming them. Hedonistic egoism would absurdly imply she should do the latter. To avoid this implication, egoists would need to build something like the meaningfulness of a life into well-being, in some robust way, where this would to a significant extent be a function of other-regarding concerns (see chapter 12 of this classic intro to ethics). But once these elements are included, we can (roughly, as above) argue that this sort of egoism will imply strong reasons to reduce existential risk. Add to all of this Samuel Scheffler’s recent intriguing arguments (quick podcast version available here) that most of what makes our lives go well would be undermined if there were no future generations of intelligent persons. On his view, my life would contain vastly less well-being if (say) a year after my death the world came to an end. So obviously if Scheffler were right I’d have very strong reason to reduce existential risk. We should also take into account moral uncertainty. What is it reasonable for one to do, when one is uncertain not (only) about the empirical facts, but also about the moral facts? I’ve just argued that there’s agreement among minimally plausible ethical views that we have strong reason to reduce existential risk – not only consequentialists, but also deontologists, virtue ethicists, and sophisticated egoists should agree. But even those (hedonistic egoists) who disagree should have a significant level of confidence that they are mistaken, and that one of the above views is correct. Even if they were 90% sure that their view is the correct one (and 10% sure that one of these other ones is correct), they would have pretty strong reason, from the standpoint of moral uncertainty, to reduce existential risk. Perhaps most disturbingly still, even if we are only 1% sure that the well-being of possible future people matters, it is at least arguable that, from the standpoint of moral uncertainty, reducing existential risk is the most important thing in the world. Again, this is largely for the reason that there are so many people who could exist in the future – there are trillions upon trillions… upon trillions. (For more on this and other related issues, see this excellent dissertation). Of course, it is uncertain whether these untold trillions would, in general, have good lives. It’s possible they’ll be miserable. It is enough for my claim that there is moral agreement in the relevant sense if, at least given certain empirical claims about what future lives would most likely be like, all minimally plausible moral views would converge on the conclusion that we should try to save the world. While there are some non-crazy views that place significantly greater moral weight on avoiding suffering than on promoting happiness, for reasons others have offered (and for independent reasons I won’t get into here unless requested to), they nonetheless seem to be fairly implausible views. And even if things did not go well for our ancestors, I am optimistic that they will overall go fantastically well for our descendants, if we allow them to. I suspect that most of us alive today – at least those of us not suffering from extreme illness or poverty – have lives that are well worth living, and that things will continue to improve. Derek Parfit, whose work has emphasized future generations as well as agreement in ethics, described our situation clearly and accurately: “We live during the hinge of history. Given the scientific and technological discoveries of the last two centuries, the world has never changed as fast. We shall soon have even greater powers to transform, not only our surroundings, but ourselves and our successors. If we act wisely in the next few centuries, humanity will survive its most dangerous and decisive period. Our descendants could, if necessary, go elsewhere, spreading through this galaxy…. Our descendants might, I believe, make the further future very good. But that good future may also depend in part on us. If our selfish recklessness ends human history, we would be acting very wrongly.” (From chapter 36 of On What Matters)

#### 2 – Actor specificity:

#### [A] Governments must aggregate since every policy benefits some and harms others, which also means side constraints freeze action. [B] States lack wills or intentions since policies are collective actions. [C] No act- omission distinction— governments must vote on bills, so inaction is an explicit act taken, and governments are responsible for the public sphere so they must aggregate. Actor-specificity comes first since different agents have different ethical standings.

#### 3 - only it can explain degrees of wrongness- it is worse to kill thousands than to lie to a friend- either ethical theories cannot explain comparative badness, or it collapses

#### 4 - Decades of game theory research proves we should evaluate the framework debate through epistemic modesty – means the veil of ignorance justifies util

MacAskill 18 – (Will MacAskill, Associate Professor in Philosophy at Oxford University, author of Doing Good Better, and one of the co-founders of the effective altruism community., interviewed by Robert Wilbin, “Our descendants will probably see us as moral monsters. What should we do about that?”, 80000 Hours, 1-19-18, Available Online at <https://80000hours.org/podcast/episodes/will-macaskill-moral-philosophy/#top>, accessed 8-21-18, HKR-AM)

Will MacAskill: Terrific. Introducing the core idea is that we make decisions about under empirical uncertainty all the time. There’s been decades of research on how you ought to make those decisions. The standard view is to use expected utility reasoning or expected value reasoning, which is where you look at the probability of different outcomes and the value it would obtain. Given those outcomes, all dependent on which action you choose, then you take the sum product and you choose the action with the highest expected value. That sounds all kind of abstract and mathematical, but the core idea is very simple where if I give you a beer you think 99% likely that beer is going to be delicious, give you a little bit happiness. There’s a 1 in 100 chance that it will kill you because I’ve poisoned it. Then it would seem like it’s irrational for you to drink the beer. Even though there’s a 99% chance of a slightly good outcome, there’s a 1 in 100 chance of an extremely bad outcome. In fact, that outcome’s 100 times worse than the pleasure of the beer is good.

Robert Wiblin: Probably more than 100 times. At least.

Will MacAskill: At least, yeah. That’s all you need. In which case the action with greater expected value is to not drink the beer. We think about this under empirical uncertainty all the time. We look at both the probability of different outcomes and how good or bad those outcomes would be. Then, when you look at people’s moral reasoning, it seems like very often people reason in a very different way. I call this the football fan model of decision making given model uncertainty. People say, “I’m a libertarian, or I’m a utilitarian, or I’m a contractualist.” At least, moral philosophers speak this way. Then they just say, “Well, given that, this is what I think I ought to do.” They’re no longer thinking about uncertainty about what matters morally. Instead they’re just picking their favorite view and then acting on that assumption. That seems irrational given all we’ve learned about how to make decisions under empirical uncertainty. The question I address is: supposing we really do want to take moral uncertainty under account, how should we do that?

In particular, it seems like given the obvious analogy with decision making under empirical uncertainty, we should do something like expected value reasoning where we look at a probability that we assign to all sorts of different moral views, and then we look at how good or bad would this action be under all of those different moral views. Then, we take the best compromise among them, which seem to be given by the expected value under those different moral views.

#### He continues:

Will MacAskill: The other best 2 I think are, one is Harsayni’s Veil of Ignorance argument. The second is the argument that moves from rejecting the notion of personhood. We can go into the first one, Harsayni’s Veil of Ignorance. John Harsayni was an economist but also a philosopher. He suggested the following thought experiment: Morality’s about being impartial. It’s about taking a perspective that’s beyond just your own personal perspective, somehow from the point of view of everyone, or society, or point of view of the universe.

The way he made that more precise is by saying, “Assume you didn’t know who you were going to be in society. Assume you had an equal chance of being anyone. Assume, now, that you’re trying to act in a rational self-interested way. You’re just trying to do whatever’s best for yourself. How would you structure society? What’s the principle that you would use in order to decide how people do things as this perspective of the social planner.” He proved that if you’re using expected utility theory, which we said in the past earlier is really well justified as a view of how to make decisions under empirical uncertainty, and you’re making this decision, the rule you’ll come to is utilitarianism. You’ll try and maximize the welfare of everyone, of the sum total of welfare in society.

### 1

#### Advantage 1 is Whistleblowing

#### European trade secrets protections for medicine chill whistleblowing – that undermines public health and drug efficacy

HAI et al 14 — (Health Action International and a coalition of other NGOs, HAI works to expand health access in Europe, “EU trade secrets directive threat to health, environment, free speech and worker mobility”, 12-17-14, Available Online at <https://corporateeurope.org/sites/default/files/attachments/statement_-_eu_trade_secrets_directive_needs_amendments.pdf>, accessed 9-8-21, HKR-AM)

AMSTERDAM—We strongly oppose the hasty push by the European Commission and Council for a new European Union (EU) directive on trade secrets because it contains: ¬ An unreasonably broad definition of “trade secrets” that enables almost anything within a company to be deemed as such; ¬ Overly-broad protection for companies, which could sue anyone who “unlawfully acquires, uses or discloses” their so-called “trade secrets”; and ¬ Inadequate safeguards that will not ensure that EU consumers, journalists, whistleblowers, researchers and workers have reliable access to important data that is in the public interest. Contrary to the Commission’s goals, this unbalanced piece of legislation would result in legal uncertainty. Unless radically amended by the Council and European Parliament, the proposed directive could endanger freedom of expression and information, corporate accountability, information sharing—possibly even innovation—in the EU. Specifically, we share great concern that under the draft directive: ¬ Companies in the health, environment and food safety fields could refuse compliance with transparency policies even when the public interest is at stake. Health: Pharmaceutical companies argue that all aspects of clinical development should be considered a trade secret. ii Access to biomedical research data by regulatory authorities, researchers, doctors and patients—particularly data on drug efficacy and adverse drug reactions—is critical, however, for protecting patient safety and conducting further research and independent analyses. This information also prevents scarce public resources from being spent on therapies that are no better than existing treatments, do not work, or do more harm than good.iii Moreover, disclosure of pharmaceutical research is needed to avoid unethical repetition of clinical trials on people. iv The proposed directive should not obstruct recent EU developments to increase sharing and transparency of this data.v 2/5 Environment: Trade secret protection can be used to refuse the release of information on hazardous products within the chemical industry. Trade secret protection may, for example, be invoked by companies to hide information on chemicals in plastics, clothing, cleaning products and other items that can cause severe damage to the environment and human health. They could also use the directive to refuse disclosing information on the dumping of chemicals, including fracking fluids, or releasing toxins into the air. Food safety: Under EU law, all food products, genetically modified organisms and pesticides are regulated by the European Food Safety Authority (EFSA). Toxicological studies that the EFSA relies on to assess the risks associated with these products are, however, performed by manufacturers themselves.vi Scientific scrutiny of the EFSA's assessments is only possible with complete access to these studies. Companies argue, though, that this information contains confidential business information and strongly oppose its disclosure.vii It is essential that the risk assessment work of public bodies is properly monitored by the scientific community. All data that these public bodies use must therefore be exempt from the scope of the directive. ¬ The right to freedom of expression and information could be seriously harmed. Under the proposed directive, whistleblowers can use undisclosed information to reveal misconduct or wrongdoing, but only if “…the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest”. Unfortunately, though, determining whether disclosure was necessary can often only be evaluated afterwards. In addition, it remains unclear whether many types of information (e.g., plans to terminate numerous employees) qualify as “misconduct” or “wrongdoing”. This creates legal uncertainty for journalists, particularly those who specialise in economic investigationsviii , and whistleblowers.ix ¬ The mobility of EU workers could be undermined. The proposed directive poses a danger of lock-in effects for workers. It could create situations where an employee will avoid jobs in the same field as his/her former employer, rather than risking not being able to use his/her own skills and competences, and being liable for damages. This inhibits one’s career development, as well as professional and geographical mobility in the labour market.x In addition, despite the Commission’s desire for a “magic bullet” that will keep Europe in the innovation game, closed-door trade secret protection may make it more difficult for the EU to engage in promising open and collaborative forms of research. In fact, there is a risk that the measures and remedies provided in this directive will undermine legitimate competition—even facilitate anti-competitive behaviour. Unsurprisingly, the text is strongly supported by multinational companies. In fact, industry coalitions in the EU and the United States (US) are lobbying, through a unified Trade Secrets Coalition, for the adoption of trade secret protection.xi In the US, two new bills are pending before Congress. xii If passed, these texts would allow trade secret protection to be included in the Trans-Atlantic Trade and Investment Partnership (TTIP)—something that will be incredibly difficult to repeal in the future through democratic processes.xiii Given that TTIP is expected to set a new global standard, its potential inclusion of trade secret protection is particularly worrisome. We urge the Council and the European Parliament to radically amend the directive. This includes limiting the definition of what constitutes a trade secret and strengthening safeguards and exceptions to ensure that data in the public interest cannot be protected as trade secrets. The right to freely use and disseminate information should be the rule, and trade secret protection the exception.

#### Current law places the burden of proof on whistleblowers, which reinforces legal uncertainty – empirics prove a lack of accountability for corporations.

Moody 16 — (Glyn Moody, Contributing Policy Editor at Ars Technica. He has been writing about the Internet, free software, copyright, patents and digital rights for over 20 years., “New EU trade secrets law could jail whistleblowers, block drug trial data access”, Ars Technica, 4-14-16, Available Online at <https://arstechnica.com/tech-policy/2016/04/new-eu-trade-secrets-law-whistleblowers-journalists-drug-trials/>, accessed 8-27-21, HKR-AM)

However, the Pirate Party MEP, Julia Reda, believes the new rules will harm journalism, writing that they have "created major uncertainties about the role of whistleblowers and investigative journalists. All information, including information about malpractice, can be protected as a trade secret. As a result, the burden of proof that the public interest outweighs the business interest will now always lie with the whistleblower."

One area where whistleblowing is crucially important concerns drug safety. Health Action International (HAI), a non-governmental organisation dedicated to strengthening medicines policy to improve public health, said it was was "deeply disappointed with today’s adoption of the European Union Trade Secrets Directive."

"Under the Directive, researchers, journalists and whistle-blowers that expose illicit practices by the pharmaceutical industry, or reveal important medicine safety and efficacy information, will not be adequately protected under law," HAI wrote.

"Trade secret protection has long been a recurring argument by the pharmaceutical industry to justify data secrecy." Indeed, as HAI points out, "the trade secrets argument was used recently by the company sponsoring the clinical trial in France where one person died and others were injured." The journal Nature reported that the company involved refused to hand over information about the disastrous drug trial, "citing French laws that protect the release of trade secrets."

#### This burden structure makes intimidation lawsuits inevitable, further deterring whistleblowing.

CEO 17 — (Corporate Europe Observatory, non-profit research and campaign group whose declared aim is to "expose any effects of corporate lobbying on EU policy making"., “Adapting the EU Directive on Trade Secrets ‘Protection’ into National Law”, February 2017, Available Online at <https://corporateeurope.org/sites/default/files/attachments/trade_secrets_protection_directive_-_a_transposition_briefing.pdf>, accessed 9-9-21, HKR-AM)

Indeed, whistleblowers denounce wrongdoing, either by using internal reporting mechanisms set up by the institution they work for, or, when these are neither sufficient nor safe, by taking the risks to reveal confidential information to the public, sometimes via the press, sometimes not. Over the past decade many of them have been prosecuted (Chelsea Manning, Antoine Deltour, Raphaël Halet) by companies or governments. Given the veil of secrecy many corporate activities operate under, whistleblowers are sometimes the only available sources on corporate wrongdoing.

Journalists’ work will be made much more difficult if their sources are criminalised for forwarding them confidential business information that is of public interest. Scandals can break out without material proofs (for example Watergate, Rainbow Warrior) but never without sources.

It must be said that the Directive is the first EU legislation which actually acknowledges the role of whistleblowers, in its Recital 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.”

But while they reflect the intention of the legislator for the judges to take public interest into account when they interpret the law, recitals are not binding and such positive language is not present in the Articles.

Also, as with the exception on freedom of information, the final text is an improvement compared to the original Commission proposal, which stated: “for revealing an applicant’s misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest”. This formulation put a higher burden of proof on the whistleblower as they would have had to convince the judge of both the necessity of the ‘violation’ of the trade secret and the fact that they had acted in the public interest.

Now what we have is an improved wording where the whistleblower is only judged on his intention to protect the public interest, making a “honesty” / “good faith” defence possible. However, the fundamental problem remains that the burden of the proof is on the whistleblower to demonstrate their good intentions, which, at the end of the day, can only be evaluated by a judge. This means that intimidation lawsuits by large companies against individuals can be pursued. This reversal of the burden of the proof goes against most recent international standards, such as the 2014 definition by the Council of Europe.a

“ The scope as delimited by the EU Directive is large but not necessarily problematic for whistleblowers. However, the burden of proof is now placed on the whistle-blower who has to act “for the purpose of protecting the general public interest”. It is a serious concern because it goes against all international standards where the burden is placed on the claimant.16 — Nicole Marie Meyer, Transparency International France

“ The status attributed to the whistleblower is better than nothing, but it remains a complex situation because he/ she will have to fulfil the different criteria on whistleblowing in the directive [which] will protect those who can prove they live up to the criteria, but the protection is only against the directive itself. It stays a risky situation anyway because the protection isn’t 100% guaranteed. If the case is not clear enough, the content of the directive becomes very important.17 — Martin Jefflén, President of the Council of European Professional and Managerial Staff (Eurocadres)

What if this Directive in reality gets used to put potential whistleblowers in the kind of financial risk originally designed for whole companies committing commercial espionage? The prospect of being sued for such amounts would deter most from speaking out. The rights given to whistleblowers and the exercise of the freedom of information are closely related issues, and the Directive fails to give whistleblowers rights that are in proportion to the potential powers it grants to trade secrets holders to punish them. This problem is particularly serious in countries where legal protection for media sources is weak or even absent.

#### Effective protections for European medical whistleblowers are crucial to strengthening public health and prevent pandemics – COVID was the test run

Dreyfus and Galizzi 20 — (Suelette Dreyfus, PhD, Researcher at the University of Melbourne, and Bruno Galizzi, part of the Blueprint for Free Speech Spain, “Protect whistleblowers, protect everyone's health”, 5-19-20, Blueprint for Free Speech, Available Online at <https://www.blueprintforfreespeech.net/en/news/protect-whistleblowers-protect-everyones-health>, accessed 9-8-21, HKR-AM)

The worldwide spread of coronavirus has highlighted the importance of whistleblowers like never before. The medical community caught a glimpse of the dark emergence of the virus when Dr. Li Wenliang from China tried to warn colleagues about the disease. Like many, he suffered retaliation from local officials for telling his community unpleasant truths. The highest levels of government intervened to rehabilitate his reputation only when he had died from the virus.

Whistleblowers from around the world are revealing irregularities that are hidden by governments, companies and institutions. They reveal when health workers are put at risk for lacking the proper protective equipment; they tell us when the supply chains that bring us food - or medical supplies - are being tampered with or corrupted, etc. For this reason, more than 100 civil society organizations, journalists, unions, and experts from around the world released a statement asking to protect the whistleblowers in times of Covid-19. The letter emphasizes the centrality of citizens and workers in "guaranteeing that proper accountability is maintained in our governments, corporate institutions and markets, and in the defense of their human rights and the freedoms of all people."

Neither heroes nor martyrs

In Spain, the State Confederation of Medical Unions (CESM) has filed a complaint with the Supreme Court about the distribution of defective medical material, based on situations that have been experienced at the local level. Not surprisingly, unions are valuable institutions to which an whistleblower could turn to report a fact, particularly on public health and safety.

Although this is not always the case in Spain, many unions and organizations have exposed the lack or non-compliance of protection measures, or the lack of means to fight the virus, unleashing the #NiHéroesNiMartires trend. Protecting those who blow the whistle, in this case, also saves lives. The European Center for Disease Prevention and Control (ECDC) places Spain among the countries with the highest percentage of infected among its health personnel. Even when we applaud them from our balconies every day, healthcare workers continue to face a double vulnerability at the same time: contagion and retaliation. In fact, in recent weeks, many have been exposed to prevent or combat crimes or irregularities. The lack of protection they have contrasts, without a doubt, with the value that the public interest complaints they share provide us.

This is something that does not happen only in the field of health care, as we have seen in the globally known case of Tim Bay, Amazon's vice president, who decided to leave one of the most powerful companies after having witnessed the dismissal of employees who had denounced the vulnerabilities of workers in the warehouses of the technological giant.

Just a fight against corruption?

Some organizations are recognizing the vital value of protecting whistleblowers for the duration of the pandemic, not afterward. The Group of States against Corruption (GRECO) has recently released a series of legal references to prevent and fight corruption during this period. They recognize that fraudulent practices have an effect on medical services, making them more expensive and of lower quality, leading to unequal access to them, to the detriment of the most vulnerable populations.

The report again points out that the protection of whistleblowers is essential to prevent the effect of corruption on public institutions and the management of funds. Once again, protecting those who warn against corruption also saves lives, since it allows strengthening the health system by protecting those who report corruption from within. Let's not forget that the economic costs of corruption for Spain have been estimated by different sources, reaching 90 billion euros, according to a report published by the Los Verdes / ALE alliance in the European Parliament, defining it as 90% of public health spending by 2018.

But the protection of whistleblowers goes further, and has an effect on the protection of the environment, nuclear safety, transport, the quality of products, distribution chains and, as we have already seen, public health. This is recognized by the rapporteur of the Committee on Legal Affairs of the European Parliament Sylvain Waserman, in his latest report last October.

In Poland, Andrzej Hawranek, Director of the State Health Inspectorate, reported the lack of sufficient evidence to determine the spread of the virus in the city of Krakow. Thanks to his publications on the local situation, he forced the health and epidemiological units to report daily on the situation. The knowledge and democratization of public, updated and reliable information on the state of the pandemic is essential to be able to carry out successful and tailored management. Protecting whistleblowers and our right to know also saves lives.

Towards the new normality, protecting those who protect us

In a bitter irony, Spain is one of the countries hardest hit by the coronavirus and, at the same time, one of the few countries in the European Union that does not have a national law to protect whistleblowers.

Now is the time to change that. The transposition of the European Directive 2019/1937 is an opportunity to incorporate legal provisions at the national level, and promote a cultural change to provide citizens with mechanisms for active participation in the protection of the public interest.

Last February, when the world was yet another, Blueprint for Free Speech, together with the National Commission of Markets and Competition, organized a public event bringing together spokespersons and representatives of political parties precisely to discuss this matter. That event was the first time that a wide and diverse party table (Ciudadanos, Esquerra Republicana, Partido Popular, Unidas Podemos, Vox) sat publicly in Madrid to discuss protection of whistleblowers.

Different positions were heard, some of them distant from what was established by the aforementioned European Directive, but all recognized the complete need to protect alerters in an integral way. Civil society was once again ahead of the interests of legislators proposing various alternatives that were waiting to be debated, one of them currently on the Table of Congress.

In this period of de-escalation and transition to the "new normal" one cannot look the other way. The iron and urgent commitment must be doubled to protect the whistleblowers, who have demonstrated to promote a more just and democratic operation of the institutions, in defense of our fundamental and human rights.

#### New diseases cause extinction – uniquely probable due to environmental changes.

Mooney 21 — (Tom Mooney, Senior Communications & Advocacy Manager for the Coalition for Epidemic Preparedness Innovations, “Preparing for the next “Disease X””, CEPI, 2-1-21, Available Online at <https://cepi.net/news_cepi/preparing-for-the-next-disease-x/>, accessed 9-10-21, HKR-AM)

Disease X represents the knowledge that a serious international pandemic could be caused by a pathogen currently unknown to cause human disease. It was first included in the WHO’s list of priority pathogens in 2018. COVID-19 represents the first occurrence of Disease X since its designation was established, emerging much sooner than anticipated.

While the world battles to control COVID-19, we know that future outbreaks of Disease X are **inevitable**. Our interconnected world has made us more vulnerable than ever to the rapid spread of new emerging infectious diseases. Rapid urbanisation, deforestation, intensive agriculture, livestock rearing practices, climate change and globalisation are increasing opportunities for animal-to-human contacts and for human-to-human transmission of disease on a global scale. **The threat of Disease X infecting the human population, and spreading quickly around the world, is greater than ever before.**

COVID-19: CEPI’s first Disease X

When CEPI was established in 2017 we classed Disease X as a serious risk to global health security, for which the world needed to prepare. Prior to the COVID-19 pandemic, CEPI had initiated a rapid response programme—including mRNA vaccines—against novel pathogens. Our goal was to be able to start safety testing of vaccines within months of a new pathogen being genetically sequenced.

In January 2020—within 2 weeks of the publication of the genome sequence of the COVID-19 virus, and with just 141 confirmed cases of COVID-19 globally—CEPI began work on developing vaccine candidates against the virus. CEPI was able to move with such agility because it had already identified coronaviruses as serious threats and invested over $140 million in the development of vaccines against MERS. Within a few weeks of the COVID-19 outbreak, most of CEPI’s MERS vaccine development partners had pivoted to work on the new virus.

Just one year later, two CEPI-supported vaccine candidates are amongst the first in the world to be approved by regulatory authorities and deployed to protect people from the virus; and potentially over one billion doses of vaccine enabled by CEPI investment will be available to the COVAX Facility in 2021.

The speed of the scientific progress has been astounding, compressing vaccine development—which typically takes a decade into the space of 12 months—yet over 2 million lives have been lost to COVID-19 already and economies the world over have been devastated.

So, could we move even faster next time?

What next for Disease X?

We don’t know where or when the next Disease X will emerge, only that it will. As COVID-19 has demonstrated, diseases do not respect borders so we need to be prepared on a global scale to respond to future outbreaks of Disease X, and we need to do it fast.

In many ways COVID-19 is a proof of concept for rapidly developing a vaccine against a new viral threat. Scientists were already working on vaccines against MERS and SARS—pathogens from the same virus family as COVID-19—which gave us a crucial head start this time around.

25 viral families are known to infect humans, and over 1.6 million yet-to-be-discovered viral species from these viral families are estimated to exist in mammal and bird hosts—the most important reservoirs for viral zoonoses.

We cannot develop vaccines against all potential viral threats, but we could produce a library of prototype vaccines and other biological interventions against representative pathogens from each of these 25 viral families. Having such a library of prototype vaccines, which could be ‘pulled off the shelf’, and advanced into clinical testing as soon as a related threat emerges would dramatically accelerate the development of vaccines.

We also know that beta coronaviruses that cause SARS and MERS are associated with case fatality rates of 10-35% (25-88 times worse than COVID-19) and that coronaviruses circulate widely in animal reservoirs. The emergence of a coronavirus variant combining the transmissibility of COVID-19 with the lethality of SARS or MERS would be utterly devastating. We must minimise this threat as a matter of urgency. One way to do this in the long-term would be to develop a vaccine that provides broad protection against coronaviruses in general.

If we can produce vaccines against Disease X in a matter of months instead of a year or more, we could revolutionise the world’s ability to respond to epidemic and pandemic diseases. **Disease X and other emerging infectious diseases pose an existential threat to humanity**. But for the first time in history, with the right level of financial commitment and political will, we could credibly aim to eliminate the risk of epidemics and pandemics.

### 2

#### Advantage 2 is Uniformity

#### EU trade secret regulations are fragmented – lack of clear standards on protection across countries undermine businesses. Uniform trade secret legislation is key – single state exceptions doom growth.

Junge 16 — (Fabian Junge, Law @ Maastricht University, “THE NECESSITY OF EUROPEAN HARMONIZATION IN THE AREA OF TRADE SECRETS”, MAASTRICHT EUROPEAN PRIVATE LAW INSTITUTE WORKING PAPER No. 2016/04, Available Online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839693>, accessed 9-8-21, HKR-AM)

The EU and its Member States with their far-reaching economic, political and social integration are even more under pressure to facilitate sufficient common standards of trade secret protection. As has been shown above, the vast majority of EU Member States, taken individually, guarantees the protection of trade secrets to a sufficient extent. The existing fragmentation, however, caused by the differences in the domestic legal systems has serious impacts on the functioning and development of the internal market as well as on actual or potential cross-border activities both affecting the economic growth in the EU.

By relying on different definitions of trade secrets, prohibited acts or possible defendants, by applying different methods of incorporating the TRIPS-mandated trade secret protection, by unequally classifying trade secrets and by basing enforcement mechanisms predominantly in national law, the EU and its Member States created a situation of legal uncertainty for European businesses and subverted the incentives for relying on trade secret protection. Especially trade secrets holders are hampered with their ability to fully engage on the internal market and to take advantage of the benefits of trade secret protection.

Besides decreasing the incentives for cross-border investments, collaborations, outsourcing, R&D activities or technology transfer, the diverse protection standards undermine the demand of trade secret holders to enforce their right to judicial protection in alleged cross-border misappropriations for three main reasons.

First of all, depending on the jurisdiction a non-disclosure during proceedings is not inherently guaranteed. Combined with potential difficulties, inter alia, seeking remedies, gathering evidence or proving that the respective information falls under the definition of trade secret in that respective Member State, taking recourse to legal protection might be pointless or even harmful.

Secondly, connected with the proceedings are increased transaction and litigation costs to ensure that, when deciding to press charges in another Member State, the claim fulfills the respective requirements. Furthermore, the legitimate trade secret holder must produce comprehensive and complete documentation to prove a misappropriation and to allow the courts to accurately calculate damages or the order of proportionate measures.

Thirdly, the basic rule to assess the applicable law for non-contractual cross-border disputes is enshrined in Art. 4 (1) Rome II Regulation93 stating that the respective dispute should be governed by the “law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur”. The alternatives in Art. 4 (2) and (3) Rome II Regulation are unlikely to be available for trade secrets holders seeking redress, if the misappropriator is an unconnected third party residing in a different Member State or third country. Even more troublesome, depending on whether trade secrets are classified under the scope of unfair competition law or as intellectual property right Art. 6 or Art. 8 Rome II Regulation might be applicable as well.

Overall, in a situation where trade secret misappropriation caused damages in multiple Member States a trade secret holder needs to, based on the mosaic theory, analyze all potential jurisdictions without necessarily being familiar with said jurisdictions. Moreover, it is possible that the applicable law provides less protection to him than the law of his home Member State. Also, comparable outcomes in multiple Member States are highly unlikely. Even worse, if trade secrets were disclosed during litigation in a less protective and comprehensive Member State, they might not be eligible for protection in other Member States anymore, and hence, lose their value without the trade secret holder’s fault or will.94

If the misappropriator is solely residing in a third country, the issue of the applicable law will be dealt with on the basis of national law, because it falls outside the scope of the Brussels I Regulation95. Therefore, trade secret holders only have access to judicial protection or can enforce foreign judgments, if domestic law allows it. The conditions for access as well as for recognition and enforcement of third country judgments differ greatly between the Member States.96 In principle, goods produced by the misappropriator in a Member State or third country not providing trade secret protection for the legitimate trade secret holder could be freely sold on the internal market.

Difficulties with both cross-border litigation and domestic litigation on trade secrets are supported by the fact that, while only a limited number of domestic cases have been reported, cross-border case law appears to be completely absent. Reminiscing the number of companies being the target of misappropriation, or attempts to misappropriate, their reluctance to bring an action is certainly worrisome with respect to the EU’s and its Member States’ capacity for an effective enforcement mechanism.97

#### European consistency in trade secret whistleblowing laws is key – current legal vagueness create uncertainty for whistleblowers and businesses

Junge 16 — (Fabian Junge, Law @ Maastricht University, “THE NECESSITY OF EUROPEAN HARMONIZATION IN THE AREA OF TRADE SECRETS”, MAASTRICHT EUROPEAN PRIVATE LAW INSTITUTE WORKING PAPER No. 2016/04, Available Online at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839693>, accessed 8-27-21, HKR-AM)

Art. 5 (b) in conjunction with Recital 20 Trade Secrets Directive embodies the so called whistleblower protection. Alongside the issue of eventual restriction of the fundamental rights of expression and information, the potential impact of the Trade Secrets Directive on whistleblower protection engendered criticism during the negotiations. It appears that the final text could calm the debates by clearly determining that, if the acquisition, use or disclosure of a trade secret was carried out for revealing misconduct, wrongdoing or illegal activity, it shall be deemed justified, if its purpose was to protect the general public interest.

While Recital 20 points out that the misconduct, wrongdoing or illegal activity must be directly relevant to the trade secret, it also allows judicial authorities to extent the protection of whistleblowing activities to cases, in which Art. 5 (b) Trade Secrets Directive is actually not satisfied, but the respondent had acted in good faith believing that his actions would have fallen under the exception. What exactly constitutes “public interest” and whether this issue shall be solved in either EU or national law remains unclear.

Moreover, the Trade Secrets Directive does not provide definitions for “misconduct” and “wrongdoing” resulting in legal uncertainty for potential whistleblowers having a critical impact on their decision to go public. Compared to the protection from prosecution awarded to journalists whistleblower have a lesser standing, because their protection does not arise automatically **and they need to prove that the criteria for protection are fulfilled.**

Overall, it remains to be seen whether the now adopted provision is sufficient enough to encourage future whistleblower and whether subsequent legislation on European level is necessary to address the issue.

Art. 5 (c) Trade Secrets Directive enhances the protection of workers and workers’ representatives. The provision stipulates that disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions will be considered as an exception, if two prerequisites are satisfied. First of all, the disclosure must be in accordance with Union or national law. Secondly, the disclosure must have been necessary for performing the function. What exactly amounts to being necessary will inevitably be resolved on national level, until the CJEU will clarify the matter. Lastly, Art 5 (d) Trade Secrets Directive incorporates a broad catch-all provision allowing an exception to trade secret protection for the purpose of protecting a legitimate interest recognized by Union or national law. There is no guidance in the Trade Secrets Directive on what constitutes a legitimate interest rendering it unclear as to what should be covered.

It is evident that the exceptions are drafted in a very open and broad manner to encompass as many theoretical scenarios as possible. By not only referring to EU Law but also to national law, the Member States and its courts are granted a wide margin of appreciation to determine the scope of the exception potentially leading to discrepancies in the Member States’ application. Setting out the exceptions in such a general manner allows the Member States to adopt flexible definitions and concepts to either limit the scope of trade secret protection or to limit the exceptions. As long as these questions have not been resolved on European level the degree of trade secret protection and of legitimate exceptions will certainly vary in the EU, which is consequently detrimental to the approximation of national laws and to the aims targeted by the Trade Secrets Directive.

### Solvency

#### Plan Text: The member states of the European Union ought to reduce trade secret protections for medicines by requiring that plaintiffs prove that the acquisition, use, and disclosure of the trade secret did not pertain to revealing misconduct, wrongdoing, or illegal activity, or to protecting the general public interest.

#### The plan shifts the burden of proof from whistleblowers to companies.

Abazi 16 — (Vigjilenca Abazi, Assistant Professor @ Maastricht University, “Trade Secrets and Whistleblower Protection in the European Union”, European Papers, Vol. 1, 2016, No 3, European Forum, Insight of 3 September 2016, pp. 1061-1072, Available Online at https://www.europeanpapers.eu/en/europeanforum/trade-secrets-and-whistleblower-protection-in-the-eu, accessed 9-9-21, HKR-AM)

The most disconcerting aspect of Art. 5, let. b), is that the whistleblower has the burden of proof about, first, whether the information pertains to “misconduct, wrongdoing or illegal activity” and, secondly, that the disclosure is made in the public interest. **In line with best practice and international standards,[16] it is generally** **the plaintiff who is required to demonstrate** by “clear and convincing **evidence** any claims or statements **that the disclosure** is purposefully dishonest, or **is absent of public interest** and that any measures taken against a whistle-blower are not in any way related to the disclosure”.[17] The current text of the Art. 5, let. b), differs from the initial proposal of the Commission as it does not require the whistleblower to show that the disclosure as such is necessary in addition to being in the public interest, which would have made the burden of proof even more challenging than the current requirements.[18] In practical terms, we are yet to see how the dynamics unfold between resourceful companies invoking protection to trade secrets and individuals who need to provide convincing evidence that their disclosure is done in the public interest.

Art. 5, let. b), refers to “general public interest”, which is a change of text in light of the compromise between the European Parliament and the Commission’s initial proposal that referred merely to “public interest”. Many questions arise in this regard. What is precisely the scope of general public interest? Will such definitions give rise to variations in interpretation in different cases and different courts throughout the EU Member States leading to an increased fragmentation of what is already a weak and fragmented system of whistleblower protection?[19] In addition to these concerns, it has been rightly pointed out that there are a number of cases, which show the difficulty in determining whether there is a public interest involved. For example, as argued by Aplin, the case of Browne v. Associated Newspapers Ltd[20] involved a revelation that a chief executive of a significant company misused the resources of that company for private purposes and shared confidential information with his partner.[21] It remains to be seen in practice whether such revelations could be considered as exposing trade secrets and doing so in the general public interest.

Overall, Art. 5, let. b), of Trade Secrets Directive shows weaknesses in the legal protection of whistleblowers in light of the scope of what may be regarded a trade secret, issues that are exempt from protection, questions of general public interest as well as the burden of proof. Importantly, the exception provided in Art. 5, let. b), should be read and understood in the broader legal context of (the missing) whistleblower protection in EU Member States.

#### That expands the whistleblowing exception to trade secret protections by restricting employer discretion, which reduces the extent of trade secret protections.

Vandekerckhove 21 — (Wim Vandekerckhove, Professor of Business Ethics @ University of Greenwich and co-Director of the Centre for Research in Employment and Work, Phd in Applied Ethics from Ghent University, “Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection”, Journal of Business Ethics (2021), Available Online at <https://link.springer.com/article/10.1007/s10551-021-04771-x>, accessed 9-10-21, HKR-AM)

It is clear—albeit not explicit—that Art 5 (b) relates to whistleblowing, whereas Art 5 (a) relates to freedom of the media, and (c) relates trade unions and other forms of worker representation. Abazi (2016) writes that Art 5 provides for situations where information that meets the definition of a trade secret, is nevertheless not considered to be one. Abazi (2016) specifically focuses on Art 5 (b), which provides such exception in the context of whistleblowing, and asserts that the EU Trade Secrets Directive increases the ‘susceptibility of whistleblowers despite the exception provide in Art 5, let. (b)’ (p. 1071). She gives two reasons for that. The first is that the scope of trade secrets leaves too much discretion to the company that holds the information, to determine ‘what should be disclosed, to whom and when’ (Abazi 2016, p. 1067). The second reason for the increased ‘susceptibility’ of the whistleblower is that the Trade Secrets Directive puts the **burden of proof** on the person claiming the exception (i.e. on the whistleblower). The whistleblower needs to prove (a) that information pertains to misconduct, wrongdoing or illegal activity, and (b) that the disclosure is in the ‘general public interest’. Abazi (2016, p. 1069) asks ‘What is precisely the scope of general public interest’?

Abazi (2016) is of the opinion that the EU Trade Secrets Directive does not provide the necessary legal safeguards for whistleblower protection. Her assertion that the Directive increases ‘susceptibility’ of the whistleblower implies that it leaves **too much discretion** with the employer, and **not enough freedom with the whistleblower**. In other words, the pertinence of which will become clear in the latter part of the paper, the Trade Secrets Directive fails to delineate the ‘zone of non-interference’ for the whistleblower and thus, makes the ‘zone of non-interference’ for the employer far too large. Writing in 2016, just after the Trade Secrets Directive was voted in and transposition began, Abazi (2016, p. 1069) saw the Trade Secrets Directive as merely one side of the coin, with a Whistleblowing Directive as the other side of that coin: ‘the exception provided in Art 5, let. (b), should be read and understood in the broader legal context of (the missing) whistleblower protection in EU Member States.’