



## **IFRA Comments on the Proposal for a Directive on the Protection of Undisclosed Know-How and Business Information (Trade Secrets)**

*Over the last few decades, undisclosed know-how and confidential business information have become much more vulnerable. IFRA welcomed the Directive adopted by the European Commission on 28 November 2013 establishing a common definition of trade secrets and a comparable level of protection in the 28 countries of the European Union. This proposal will also help increase awareness amongst companies and citizens regarding the importance of trade secrets, frame business relationships and promote the development of best practices. A few important points could be further expanded to improve the effectiveness of this Directive.*

Considering the Proposal of the Commission, IFRA expresses the following comments:

- As European competitiveness is directly linked to an optimised internal market, a Regulation would have seemed more appropriate than a Directive. At this stage IFRA understands that a few delicate points touched on by this Proposal justified the choice of a Directive and congratulates the Commission for this bold initiative. IFRA thereby supports maximum harmonisation, absolutely indispensable for an internal market favouring innovation.
- It is positive that the definition of trade secrets has been based on the TRIPS definition. In contrast, the key concepts of acquisition, use and disclosure as well as their limits and interactions (i.e. in case of redivulgation) remain unclear.
- Commercial information has become extremely vulnerable through new technologies, instant communication, regulatory pressure and reverse engineering. The concepts of “readily accessible” information and “reasonable steps” should be interpreted in a restrictive way; otherwise trade secrets holders would have to fight an impossible preventive battle.
- While IFRA does not challenge that confidential information may be lawfully acquired through reverse engineering or regulatory disclosure, it is concerned that the systematic approach of the Directive seems to legitimise any subsequent use or (re)disclosure made of this lawfully acquired information. This would be likely to affect the functioning of the internal market and the commercial interests of the trade secret holder if it occurs without his permission and/or in a way contrary to fair commercial practices.
- Too broad limitations could endanger the aims of this Directive and the text should specify that the exceptions foreseen in Article 4 should not occur in a manner contrary to fair commercial practices or confer an unfair competitive advantage on the one claiming them.
- IFRA supports the fact that this Directive does not envisage punitive sanctions that would penalize individuals and are of little comfort compared to the economic potential of a secret that remains secret. Yet, this Directive does not foresee sufficient measures to collect and preserve evidence, demonstrate and quantify a prejudice, and be ultimately more dissuasive.



Considering the Opinion of the Council of the European Union, IFRA adds the following remarks:

- IFRA congratulates the Greek Presidency for reaching a Compromise as early as May 26, 2104. As expected, this Compromise was concluded through certain concessions, in particular the recommendation of flexible minimum implementation throughout Member States with very disparate trade secrets regimes. IFRA insists on the fact that, in the absence of a regulation, only solid maximum harmonisation will ensure the effectiveness of this Proposal. The monitoring of 28 different trade secret regimes is at best complicated and costly and at worst confusing and unmanageable, especially for SMEs with limited resources.
- IFRA is alarmed by the interpretation given to the new article 4(1a) by Recital (10a) which could extend beyond the scope of the provisions required by TRIPS and by 10(2) European Convention on Human Rights (ECHR) regarding trade secret protection limitations. Trade secret protection should prevail over the freedom of information obligations, otherwise companies will hesitate to entrust their confidential information to governmental institutions.
- While the limitation period (Art. 7) is supposed to be subject to maximum harmonisation, the Council's Opinion gives the practical potential of minimum harmonisation consisting of divergences, which are too broad from one member state to another.
- On the one hand, the Council's recommendations on the preservation of confidentiality of trade secrets in the course of legal proceedings (Art. 8) try to balance the Commission's Proposal and especially the protection of trade secrets with the right to a fair trial. On the other hand, trade secrets are more likely to (re)escape if the parties are given "full" access to confidential documents of the opposing parties during trial.
- Minimum harmonisation would allow Member States to put in place criminal provisions to prevent the acquisition, use or disclosure of trade secrets. Yet, it seems mandatory that the effectiveness of the Directive should be ensured through a well-oriented maximum harmonisation rather than through a freedom, source of legal complexity, uncertainty or even abuse.

IFRA (International Fragrance Association) represents the interests of the fragrance industry, one of the most creative and innovative sectors in Europe. Ironically, in a perfume, everything is protected – packaging, bottle, name – except... the perfume itself! Yet, the industry spends 17% of its turnover in R&D. The creation of a new fragrance, whether for a luxury perfume, a shampoo or a detergent, may require months if not years and hundreds of trials. Thousands of SMES can only rely on secret to protect the harvest of raw material, their selection and transformation into fragrant products. Unfortunately, this know-how is particularly vulnerable to unlawful acquisition, use and disclosure. Pierre Sivad, IFRA President claims that: *"This bold proposal from the Commission, if successful, will go a long way to ensuring that innovative European industries, such as the fragrance industry, remain competitive."*