

EFFA Position on Intellectual Property (IP) and Trade Secrets

Flavour businesses invest significantly in acquiring, developing, and applying know-how and information in order to enhance consumer choice and to provide a competitive advantage.

Increasingly customers, and third-party organisations working on behalf of customers, are requesting more and more detailed information from flavour suppliers.

The information requested includes valuable business know-how such as formulations, processes, customers, suppliers and supply chains.

Such valuable business information, that is undisclosed and intended to remain confidential, is referred to as a trade secret and is protected under international agreements and EU law.

The legal protections allow for the owner of the trade secret to obtain redress in case of unlawful access, use, and disclosure of proprietary information.

The voluntary disclosure of a trade secret, by definition, removes this legal protection except if an appropriate confidentiality agreement is put in place.

1. The Protection of Intellectual Property

The protection of Intellectual Property (IP) rights in business is essential in order to maintain innovation and competition, particularly in a global trading environment. The use of IP rights, such as patents, design rights or copyright, is one means of protecting proprietary information. Another means is to protect access to valuable know-how and business information which is intended to remain confidential. This information is referred to as a "trade secret".

2. Trade Secrets

Trade secrets are protected internationally under Section 7: Protection of Undisclosed Information, of the *World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS)¹. All EU Member States, as well as the Union itself, are bound by this Agreement which was approved by *Council Decision 94/800/EC*². This Decision has recently been incorporated into EU law by *Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure* (EU Trade Secrets Directive). EU Member States are required to transpose this Directive into their national law by 9th June 2018³.

¹ https://www.wto.org/english/docs_e/legal_e/31bis_trips_04d_e.htm#7

² Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure Recital (5)

³ Directive (EU) 2016/943 Art. 19

3. EU Trade Secrets Directive

The EU Trade Secrets Directive defines trade secrets as follows⁴:

- (1) 'trade secret' means information which meets all of the following requirements:
 - (a) It is a secret in the sense that it is not, as a body or in the precise configuration and assembly of its components known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
 - (b) It has commercial value because it is secret;
 - (c) It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

Recital (2) to the Directive further acknowledges that confidential business information "*extends beyond technological knowledge to commercial data such as information on customers and suppliers*" and further recognises that "*Small and medium-sized enterprises (SMEs) value and rely on trade secrets even more.*"

The Directive further requires Member States to provide for "*the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets*" when transposing the requirements into national law. Remedies can include injunctions, withdrawal of infringing goods and the payment of damages.

However as it is a Directive it can be implemented differently in different MS.

Some European countries (e.g. Austria, Germany, Poland, Portugal) already have national legislation on the misappropriation of trade secrets, while others (e.g. the Netherlands, UK) have no specific provision in their civil law. Therefore there is a need to harmonise at the EU level using a Directive as a legislative tool. The Directive is addressed to all Member States, is binding with respect to the intended results, and implementation at a national level will take into consideration existing national requirements.

4. Business Implications

In order for business know-how and proprietary information to be protected it must be subject to *reasonable steps to keep it secret*.

Beware: The voluntary disclosure of a trade secret, by definition, removes this legal protection (*in the absence of an appropriate confidentiality agreement*)

If information which is considered commercially confidential is freely provided to another party (*in the absence of an appropriate confidentiality agreement*) then the owner of the information would be unlikely to be able to obtain redress if it was later used for commercial advantage.

Members should take this into account when deciding whether to disclose commercially confidential information to other parties.

Note:

For additional information to support responses related to flavourings intellectual property and requests for flavouring formulae disclosure please refer to the *IOFI Code of Practice* by clicking on the link: [IOFI Code of Practice](#)

⁴ Directive (EU) 2016/943 Art. 2